No. 129081
IN THE ILLINOIS SUPREME COURT

LUCILLE MOSBY, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, *Defendants-Appellants*.	Appeal from the Appellate Court of Illinois, First Judicial District, Nos. 1-20-0822 and 1-21-0895, cons. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 05031 The Honorable Pamela McLean Meyerson, Judge Presiding
YANA MAZYA, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE, *Defendants-Appellants.*	Appeal from the Appellate Court of Illinois, First Judicial District, Nos. 1-20-0822 and 1-21-0892, cons. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Alison C. Conlon, Judge Presiding

BRIEF OF *AMICUS CURIAE* ADVANCED MEDICAL TECHNOLOGY ASSOCIATION

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POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

In enacting the Biometric Information Privacy Act (BIPA or the Act), the General Assembly made a policy decision to create necessary exemptions in section 10, including for "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" (HIPAA), and crafted clear language to effectuate its intent. As written, this exemption furthers the goals of protecting the public health, ensuring the safety of medication use and delivery, and fostering innovation in the health care industry, among others. In holding that this statutory provision refers only to patient information, however, the appellate court cast aside these goals, along with well-settled principles of statutory interpretation and the provision's plain meaning, to insert a limitation that the legislature did not write or intend.

Section 10 provides important guidelines for Illinois businesses to determine whether certain information falls within the Act's reach. In particular, medical technology companies that manufacture medical devices for use in Illinois hospitals have relied on BIPA's plain language to evaluate whether its requirements apply. As an example, the medical devices at issue in this case collect, use and store information that falls squarely within BIPA's health care exception. Indeed, hospitals use these devices to ensure the safety and security of medication delivery to patients (i.e., "health care treatment, payment or operations under [HIPAA]"). The appellate court's decision, however, upends the health care industry's understanding of the law and introduces uncertainty into a vital sector of the Illinois economy. If the appellate court's ruling stands, the looming specter of rising litigation costs and potential damages could discourage the development and use of biometric identification technologies in Illinois, which would be a major setback given the

importance of this technology in health care settings. Accordingly, *amicus curiae* Advanced Medical Technology Association (AdvaMed) asks this court to interpret the Act according to its plain meaning, effectuate the legislature's intent, and hold that BIPA's health care exception applies to the medical devices in this case.

II. INTEREST OF AMICUS CURIAE

AdvaMed is the world's largest medical-technology association representing device, diagnostics, and digital technology manufacturers that are transforming health care through earlier disease detection, less invasive medical procedures, and more effective treatments. Its more than 400 member companies span every field of medical science and range from cutting-edge startups to multinational manufacturers. AdvaMed's member companies are dedicated to advancing clinician and patient access to safe, effective medical technologies in accordance with the highest ethical standards. As the outcome of this litigation may significantly affect the ability of the association's member companies to support Illinois hospitals and conduct business in this state, AdvaMed has a substantial interest in this matter.

III. OVERVIEW OF MEDICAL TECHNOLOGY INDUSTRY

The medical technology industry, also referred to as medtech, plays a vital role in ensuring that patients have access to safe, effective, and innovative medical technologies that save and improve lives. Between 1980 and 2017, advancements in both the diagnosis and treatment of disease contributed to a five year increase in average life expectancy in the United States. *Medical Device Industry Facts*, https://www.advamed.org/medical-device-industry-facts/ (last visited Apr. 13, 2023) [hereinafter *Industry Facts*]. Notably, the country has seen significant reductions in deaths due to heart disease, cancer, and other chronic diseases, thanks in part to the development of new medical technologies. *Id.*

Likewise, from 1980 to 2019, these advancements contributed to a thirty-eight percent decrease in the average length of hospital stays. *Id*. All of this incredible progress occurred in our lifetimes, and medical technology companies continue to innovate, helping people live longer, healthier, and more productive lives.

Moreover, the medical technology industry is a significant part of both the U.S. and Illinois economies. For every $1 billion the industry generates in revenue, the U.S. generates an additional $1.69 billion in national economic output and $778 million in personal income. *The Value of Medtech*, AdvaMed, https://www.advamed.org/wp-content/uploads/2014/07/Fact-Sheet_Medical-Technology-Creates-Jobs-final.pdf, (July 1, 2014). Additionally, medtech companies directly account for more than 500,000 jobs nationally and indirectly create far more. *Job Creation*, AdvaMed, https://www.advamed.org/medical-device-industry-facts/job-creation/ (last visited April 13, 2023). On average, medtech jobs are much higher paying than jobs in other industries, including other manufacturing jobs. *Id.* Furthermore, all of this economic activity contributes to state resources—every $4 in medtech revenues generates an additional $3 in total state revenues. *Id.*

In Illinois, medtech is a $3.3 billion industry, and medical technology companies collectively provided nearly 13,000 jobs in the state in 2021. AdvaMed, The Power of Medtech: Illinois, (2021), https://www.advamed.org/wp-content/uploads/2023/02/illinois-state-fact-sheet.pdf. Also, the average medtech job in Illinois pays $112,081 per year, which is more than fifty percent higher than the state median household income. *Id.*; *Quick Facts*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/IL/BZA210220, (last visited Apr. 13, 2022).

IV. BACKGROUND ON BIOMETRIC SCANNERS AND MEDICATION DELIVERY

Medication dispensing devices, like Defendant Becton, Dickinson and Company's (BD) innovative Pyxis solutions, have become vital tools for ensuring the safe delivery of medications to patients and preventing the diversion of controlled substances. As the American Society of Health-System Pharmacists (ASHP) explains, the use of these devices "has become the standard of care" in health care systems because they "are essential to provide quality patient care, secure storage of medications, and ensure viability of the medication-use process in healthcare organizations." Ryan Cello, et al., *ASHP Guidelines on the Safe Use of Automated Dispensing Cabinets*, 79 Am. J. of Health-Sys. Pharmacy 71 (2022). The medication-use process involves: "(1) prescribing, (2) transcribing and documenting, (3) dispensing, (4) administering, and (5) monitoring." F. Randy Vogenberg & David Benjamin, *The Medication-Use Process and the Importance of Mastering Fundamentals*, NCBI (Oct. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3278147/#:~:text=The%20multistep%20process%20in%20which,%2C%20and%20(5)%20monitoring. Medication dispensing devices help make the medication-use process safer and more efficient by helping to reduce errors, providing hospitals invaluable visibility into their inventories, and identifying sources of waste, risk, and diversion.

ASHP endorses the incorporation of biometric identification technologies into the medication-use process as an essential security measure. John Clark, et al., *ASHP Guidelines on Preventing Diversion of Controlled Substances*, 79 Am. J. of Health-Sys. Pharmacy 2279, 2288 (2022). Unfortunately, estimates suggest that "10% to 15% of [health care workers ("HCWs")] misuse alcohol or drugs at some point in their careers, which is

similar to the general population. HCWs may also divert [medications] for sale or for use by someone else." *Id.* at 2279. Biometric identification technology helps address these problems by "provid[ing] physical access control, limit[ing] access to appropriate personnel, and creat[ing] a perpetual log of HCWs who have accessed the storage area or cabinet." *Id.* at 2292. Notably, the U.S. Department of Health and Human Services (HHS)—the agency tasked with implementing HIPAA—also recognizes the importance of biometric access technology to reducing medication diversion. Dep't of Health & Human Servs., Two Indian Health Service Hospitals Had System Security for Prescription Drug and Opioid Dispensing but Could Still Improve Controls 8 (2017), https://oig.hhs.gov/oas/reports/region18/181630540.pdf, (observing that BD's "Pyxis is designed to ensure safe, accurate, and efficient medication dispensing").[1]

Importantly, medtech companies work closely with hospitals and other health care providers to ensure the medication dispensing processes they design comply with the law. Likewise, many medtech companies actively support the integration of their devices with health care providers' medication-use processes to help assure high-quality patient care. HHS contemplates this kind of collaboration because "most health care providers and health plans do not carry out all of their health care activities and functions by themselves." *Business Associates*, HHS (last updated May 24, 2019), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html [hereinafter *Business Associates*]. Companies providing such services are often considered business associates under HIPAA, and, as a result, they must

[1] AdvaMed does not concede that Pyxis uses a "biometric identifier" or "biometric information" as BIPA defines those terms.

comply with the statute and related regulations. See, e.g., 45 C.F.R. § 160.310 (enumerating responsibilities for covered entities and business associates); § 164.502 (setting forth obligations of business associates); § 164.504(e) (listing requirements for business associate agreements); *Business Associates*.

V. MEDTECH AND THE BIOMETRIC INFORMATION PRIVACY ACT

As the U.S. Chamber of Commerce and others have observed, since 2016 there has been an explosion of BIPA litigation. See Megan L. Brown, et al., Institute for Legal Reform, A Bad Match: Illinois and the Biometric Information Privacy Act (2021), https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf. Between 2008 and 2016, only fifteen BIPA class actions were filed in Illinois. *Id.* at 4. In the first half of 2019 alone, 151 BIPA class actions were filed in this state. *Id.* By 2021, plaintiffs had filed over 750 BIPA class actions in state and federal courts. Molly DiRago, *The Litigation Landscape of Illinois' Biometric Information Privacy Act*, ABA (Aug. 20, 2021), https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/cyber-data-privacy/the-litigation-landscape/. Moreover, since 2017, nearly 2000 BIPA lawsuits of all types have been filed. Daniel Wiessner, *White Castle Could Face Multibillion-Dollar Judgment in Illinois Privacy Suit*, Reuters (Feb. 17, 2023), https://www.reuters.com/legal/white-castle-could-face-multibillion-dollar-judgment-illinois-privacy-lawsuit-2023-02-17/.

While BIPA litigation has led to a number of high profile, multi-million dollar settlements with large companies, small businesses have mostly borne the brunt of this deluge of lawsuits. Grace Barbic, *Lawmakers Revisit Data Collection Privacy Laws*, Capitol News Ill., (Mar. 10, 2021),

https://capitolnewsillinois.com/RSSFullText/lawmakers-revisit-data-collection-privacy-laws. As Representative Jim Durkin observed, a "cottage industry for a select group of lawyers to file class action lawsuits against big and small employers and nonprofit agencies" has developed around the Act, and small businesses have been hit the hardest. *Id.* Most medtech companies are small- or medium-sized enterprises with fewer than 100 employees, *Industry Facts*, and for many of them, inordinate damages and litigation expenses could be ruinous. So too, for large healthcare companies, outsized BIPA damages and related litigation expenses could outpace annual revenue and deplete resources that could otherwise be devoted to developing new life-saving technologies.

Notably, technology companies like Sony and Google have elected not to make particular products and features available in Illinois because of concerns about potential BIPA lawsuits. See Megan Wollerton, *Aibo's Dark Side: Why Illinois Bans Sony's Robot Dog*, CNET (Apr. 1, 2019), https://www.cnet.com/home/security/what-sonys-robot-dog-teaches-us-about-biometric-data-privacy/; Ally Marotti, *Google's Art Selfies Aren't Available in Illinois, Here's Why.*, Chicago Tribune (Jan. 17, 2018), https://www.chicagotribune.com/business/ct-biz-google-art-selfies-20180116-story.html. Depending on this court's ruling, some medtech companies may wish to, or be compelled to, follow suit.

VI. ARGUMENT

The General Assembly chose to include exemptions in BIPA for various sectors and industries, including the financial sector, certain government services, and health care, which it deemed "necessary." 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg). Thus, the legislature excluded from the definition of biometric identifiers "information captured from a patient in a health care setting *or*

information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." (Emphasis added.) 740 ILCS 14/10 (West 2016). Contrary to well-settled statutory construction principles, the appellate court concluded this health care exclusion only concerned *patient* biometric identifiers, apparently reasoning the General Assembly had intended to distinguish patient information that is captured in a health care setting from patient information that is collected, used, or stored for health care treatment, payment, or operations. *Mosby v. Ingalls Mem. Hosp.*, 2022 IL App (1st) 20082 ¶¶ 58-59 ("So far in our reading of the statute, there is no redundancy in coverage: the first category covers when the information is captured from a patient in a health care setting; and the second category applies when information is subsequently gathered and accumulated."). As described more fully below, the appellate court's strained interpretation of section 10 added a limitation to the statute that the plain meaning of the text does not support. See *People v. Burge*, 2021 IL 125642 ¶ 20 (instructing that "courts may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express"). This court should give effect to the General Assembly's intent for section 10 and find simply that "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" is excluded from BIPA's purview.

A. The plain language of the health care exclusion establishes that both patient information *and* information obtained for health care treatment, payment, or operations purposes are excepted from the Act.

As this court has often observed, the "primary objective in construing a statute is to ascertain and give effect to the intention of the legislature." *Roberts v. Alexandria Transp.*, 2021 IL 126249 ¶ 29. Moreover, "the best indication of that intent is the statutory language itself, giving it its plain and ordinary meaning." *Burge*, 2021 IL 125642 ¶ 20. Here, the

appellate court correctly recognized the plain language of section 10's health care exclusion delineates two categories of information. *Mosby*, 2022 IL App (1st) 200822 ¶ 59. As this court has explained "'or' means 'or'" and arguing otherwise would be disingenuous. *Elementary School Dist. 159 v. Shiller*, 221 Ill.2d 130, 145 (2006). Thus, this statutory construction disagreement is only about what information the legislature intended those categories to encompass.

AdvaMed agrees with defendants' and Justice Mikva's view that the first category excludes information obtained from a specific source—patients—while the second excludes information obtained for particular purposes—health care treatment, payment, or operations. See *Mosby*, 2022 IL App (1st) 200822 ¶ 75 (Mikva, J., dissenting). It is difficult to sensibly read the provision otherwise. The first category plainly states it concerns "information captured *from* a patient," while the second plainly refers to "information collected, used, or stored *for* health care treatment" and other specified purposes. (Emphasis added.) 740 ILCS 14/10 (West 2016). "From" and "for" are the operative words in these clauses. Moreover, the second category does not identify from whom the information is collected. Contrary to the appellate court's interpretation, the word "patient" does not modify or limit the phrase "information collected, used or stored for healthcare treatment, payment or operations." *Id.*

Nonetheless, the appellate court elected to ignore the words "from" and "for" and instead juxtaposed the word "captured" against the phrase "collected, used or stored" to justify its reading of the provision. *Mosby*, 2022 IL App (1st) 200822 ¶¶ 58-59. The appellate court reasoned that information is first "captured" in an individual file but could eventually make its way into a collection of other files, thus necessitating two exclusion

categories. *Id.* Furthermore, the appellate court insisted its interpretation resolved any redundancy issues caused by having both categories concern only patient information. *Id.* at 59. That reasoning is unconvincing because the appellate court did not (and could not) explain why the legislature needed two distinct categories to exclude *exactly* the same information. Is it reasonable to think that, without the second category (which the appellate court interpreted to exempt gathering information from several patients), a hospital could have been liable for BIPA violations if a doctor moved a patient's file from her desk into a filing cabinet alongside other patients' files? That interpretation simply does not make sense. *Cf. Dawkins v. Fitness Int'l, LLC*, 2022 IL 127561 ¶ 27 ("It is also true that statutes must be construed to avoid absurd results."). Moreover, nothing in the Act's text or legislative history suggests the legislature intended to draw such an arbitrary distinction.

Furthermore, while the appellate court relied on a secondary definition to distinguish the words "captured" and "collected," *Mosby*, 2022 IL App (1st) 200822 ¶¶ 58-59, using that same approach, one can read the two words synonymously, see *Capture*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/capture, (defining "capture" as "to gain control of especially by force"); *Collect*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/collect, (defining "collect" as "to gain or regain control of"). This further underscores that the simpler, more natural reading of the provision is correct—the difference between the two categories of information lies not in what happens to patient information over time but in the person or persons from whom the information is captured or collected.

B. Applying the last antecedent rule leads to the most sensible interpretation.

Likewise, the appellate court's analysis of the last antecedent rule is mistaken. The last antecedent rule "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote." *In re E.B.*, 231 Ill.2d 459, 467 (2008). Courts do not mechanically apply the rule but instead consider how the doctrine should apply within the context of the statute. *Id.* Here, the appellate court concluded it would be contradictory, under the last antecedent rule, to read the phrase "under [HIPAA]" as extending only to the phrase "health care treatment, payment, or operations," as opposed to the entire exclusion. *Mosby*, 2022 IL App (1st) 20082 ¶ 10. The appellate court pointed to multiple uses of a disjunctive "or" in the provision and erroneously reasoned that a faithful application of the rule would mean the phrase "under [HIPAA]" only applied to the word "operations." *Id.*

The appellate court's analysis is misguided for several reasons. First, the court ignored important context—the General Assembly obviously adopted the phrase "health care treatment, payment, or operations" directly from the HIPAA regulations. See*, e.g.*, 45 C.F.R. § 164.506 (discussing uses and disclosures for "protected health information for treatment, payment, or health care operations"); § 164.508 (referencing "treatment, payment, or health care operations"); see also *Mosby*, 2022 IL App (1st) 20082 ¶ 80 (Mikva, J., dissenting). Therefore, it makes perfect sense that the legislature intended courts to look to the HIPAA regulations to define the health-care-related activities listed in section 10, and determine what information was excepted from the Act. Moreover, the legislature did not insert a comma before the phrase "under [HIPAA]," which further indicates the phrase was intended to modify "treatment, payment or operations" and not the entire exclusion.

See *In re E.B.*, 231 Ill.2d at 468 ("Significantly, there is no punctuation setting this qualifying phrase apart from the sentence which precedes it, which might connote that the phrase was intended to modify more remote terms." (quoting *Advincula v. United Blood Servs.*, 176 Ill.2d 1, 27 (1996))). Thus, contrary to the appellate court's view, applying the last antecedent rule leads to a clear interpretation of the provision—"under [HIPAA]" refers only to "health care treatment, payment or operations."

C. The legislative history further supports defendants' and Justice Mikva's reading of the statute.

Moreover, BIPA's legislative history demonstrates that the General Assembly incorporated exemptions into the statute because it was wary of the Act being construed to disrupt services essential to the public good. As Representative Kathy Ryg explained: "[The Act] provides exemptions as necessary for hospitals, organ donation efforts, licensed fingerprint vendors working with State Police doing background checks and private subcontractors working for a state or a local unit of government and banks that are covered under Federal Law." 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg). Since the General Assembly did not intend for BIPA to interfere with patient care, including the dispensing of medications, interpreting the statute according to its plain meaning is consistent with legislative intent.

If the appellate court's ruling stands, the prospect of enormous potential damages for BIPA violations could have a chilling effect on the health care industry in Illinois. Medical technology companies would be forced to weigh the risks of potential litigation, including the tremendous costs required to defend a class action lawsuit, against the potential benefit of offering medication dispensing devices with biometric identification technology to in-state hospitals. Likewise, Illinois hospitals might opt not to use medication

dispensers with biometric access capabilities, making the medication-use process less safe. Again, some technology companies are already limiting their offerings in Illinois as a precautionary measure, *supra* Point IV, and the health care industry may elect to follow a similar path if it loses the protection of the health care exclusion. The Legislature expressly included that exclusion, and, accordingly, AdvaMed urges this court to issue its ruling consistent with this legislative intent.

VII. CONCLUSION

BIPA's plain language and legislative history establish that biometric identifiers obtained for purposes of health care treatment, payment, or operations—as defined under HIPAA—are excepted from the Act. The General Assembly wisely included this limited exclusion because hospitals and medical technology companies play a vital role in ensuring public health and helping sustain the economy. The appellate court's ruling represented an unnecessary departure from customary principles of statutory construction and should be reversed. Moreover, this court should answer defendants' certified question in the affirmative.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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 13 pages or words.

/s/ *Cynthia S. Betz*

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Cynthia S. Betz, an attorney, hereby certify that on **April 26, 2023**, I caused a true and complete copy of the foregoing Brief of *Amicus Curiae* Advanced Medical Technology Association to be electronically with the Clerk of the Illinois Supreme Court, using the Odyssey eFileIL system, and served upon the following counsel of record via electronic mail:

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Under penalties as provided by law pursuant to Section 109 of the Illinois Code of Civil Procedure, the undersigned attorney certifies that the statements set forth above are true and correct.

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