No. 127801

IN THE
SUPREME COURT OF ILLINOIS

Jorome Tims and Isaac Watson, individually and on behalf of a class of similarly situated persons, *Plaintiffs-Appellees,* v. Black Horse Carriers, Inc., *Defendant-Appellant.*	Rule 315(a) Appeal from the First District Appellate Court, No. 1-20-0563; There Heard on Appeal from the Circuit Court of Cook County, Illinois, No. 19 CH 3522 The Honorable David B. Atkins, Judge Presiding

APPELLANT'S REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF

HINSHAW & CULBERTSON LLP
151 North Franklin Street
Suite 2500
Chicago, IL 60606
312-704-3000
Attorneys for Defendant-Appellant Black Horse Carriers, Inc.

David M. Schultz
dschultz@hinshawlaw.com
John P. Ryan
jryan@hinshawlaw.com
Joshua G. Vincent
jvincent@hinshawlaw.com
Louis J. Manetti, Jr.
lmanetti@hinshawlaw.com

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ARGUMENT

I. The parties agree that an objective standard based on the nature of the injury determines the applicable statute of limitations.

Plaintiffs agree that the nature of the injury dictates the applicable statute of limitations and, citing *Travelers Casualty & Surety Co. v. Bowman,* 229 Ill. 2d 461 (2008), acknowledge that the analysis "focuses not on the facts from which the particular injury arises and the relief sought, but the legal injury itself and the liability imposed." (Pltf. Br. 7.) Plaintiffs also agree that the statute of limitations analysis is an objective standard and that "the fact that the Act protects an individual's privacy is not in dispute." (Pltf. Br. 8, 18.)

Despite these concessions about the applicable standards and that the protection of an individual's privacy is the crux of the Act's purpose and intent, plaintiffs ultimately misapply the law. They focus on *how* the Privacy Act was allegedly violated instead of the nature of the injury that resulted from the violation. In other words, plaintiffs mistakenly focus on the elements of their alleged claims. A century of this Court's precedent which plaintiffs gloss over in their response exposes the faulty premise of plaintiffs' position.

The limitations period is determined "by the type of injury at issue, irrespective of the pleader's designation of the nature of the action," or "the nature of the facts from which the claim arises." *Travelers Cas. & Sur. Co.*, 229 Ill. 2d at 466, citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 286-87 (1996); *see also Mitchell v. White Motor Co.*, 58 Ill. 2d 159, 162 (1974) ("We think that it is the

nature of the plaintiff's injury rather than the nature of the facts from which the claim arises which should determine what limitations period should apply."). The limitations period is "not based upon the form of the particular action named but on the particular injury sued for or upon the obligation out of which the action grows." *Handtoffski v. Chi. Consolidated Traction Co.*, 274 Ill. 282, 285 (1916).

Here, the particular injury that results from a violation of each of the Privacy Act's requirements is an invasion of the privacy rights that the Legislature enacted the statute to protect. According to this Court's precedent and the statutory preamble, each of the Privacy Act's distinct requirements serves to guard against the unwitting or nonconsensual publication of an individual's immutable biometric data. The General Assembly required private entities to adopt a policy for the destruction and retention of biometric data, to make disclosures and obtain consent in advance of collection, and to adhere to a reasonable standard of care solely for the purpose of protecting individuals from the loss of privacy if their biometric information is disclosed or is at risk of being disclosed to a third party. And when a person, wittingly or unwittingly, allegedly provides their biometric information to an employer, as here, that is plainly an act of publication and disclosure. It is clear that the harms each section of the statute seeks to combat involve the actual or threatened publication of a person's biometrics, and therefore, under *Handtoffski*, the

privacy statute of limitations, 5/13-201, must govern all actions under the Privacy Act.

Plaintiffs' argument incorrectly dwells on the particular subsection of the Privacy Act under which they brought their action and characterizes the injury as a lack of informed consent. (Pltf. Br. 8, 10.) But this focus on the particular "form" of the Privacy Act violation is inconsistent with the objective standard that this Court first articulated in *Handtoffski*.

Plaintiffs' argument is also internally inconsistent. They acknowledge that "preventing the third-party disclosure of biometric data is but one type of conduct the legislature sought to regulate in enacting the Act," and that "the *unauthorized* disclosure of biometric data, privately or otherwise, is one type of conduct the General Assembly sought to regulate in enacting the Act." (Pltf. Br. 9, 13-14) (emphasis in original). But then plaintiffs argue that the applicable limitations period should be determined by whether they pleaded any improper disclosure of their data. (Pltf. Br. 9.) That is exactly the type of artful pleading *Handtoffski* and its progeny say a plaintiff cannot employ to avoid a shorter limitations period. Plaintiffs' argument should be rejected because it would permit a party to plead around the applicable limitations period simply by omitting (or adding) discreet factual allegations about the defendant's conduct.

Although plaintiffs protest that their particular alleged facts do not amount to "manipulating" their pleading (Pltf. Br. 9, n.2), the significance

plaintiffs attach to the facts they did and did not allege concerning defendant's conduct reveals the disingenuous nature of their argument. As this Court's precedent demonstrates, looking to the elements or components of the cause of action, or which section of a statute the plaintiff claims the defendant did or did not violate, would defeat the predictability provided by the use of an objective standard that uses the nature of the injury to determine the applicable limitations period.

This is particularly crucial here. Section 20 of the Privacy Act focuses not on "actual injury" but "aggrievement," which requires only the invasion of a legally protected right or interest. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 30. That interest is plaintiffs' right to keep their unique biometric identifiers private, as plaintiffs concede throughout their brief. This Court's settled law eschews the type of element-focused limitations analysis plaintiffs propose.

Plaintiffs' insistence that a particular statute of limitations applies depending on the particular Privacy Act subsection that was allegedly violated improperly focuses on the form of the action and disregards the true nature of the injury.

II. The true nature of the injury at issue is an invasion of privacy which involves publication.

The true nature of a Privacy Act injury—and the entire purpose served by the statute—is to prevent an invasion of privacy that results from the

disclosure ("publication") of a person's unique biometrics. *See Santa's Best Craft, LLC v. Zurich Am. Ins. Co.*, 408 Ill. App. 3d 173, 185 (1st Dist. 2010) (publish means to disclose). A publication can take multiple forms, whether it is the compelled, unknowing disclosure by the plaintiff to her employer because the employer has imposed a biometric-based timekeeping policy, or the entity's lack of secure storage, or the absence of a retention/destruction policy, or the outright sale of a person's biometric data, or all of the foregoing.

Without citation to any authority, and in total disregard of the Privacy Act's statement of legislative intent, plaintiffs broadly assert that the true nature of the injury is merely a lack of informed consent—the specific section 15(b) statutory violation that requires "informed consent before collecting, storing, using and disseminating their fingerprints." (Pltf. Br. 8.) This cramped and isolated reading of the Privacy Act is insupportable. *See Eighner v. Tiernan*, 2021 IL 126101, ¶ 19 ("[w]hen construing statutory language, we view the statute in its entirety, construing words and phrases in light of other statutory provisions and not in isolation.").

This Court's interpretations of the Privacy Act, the plain language of the Privacy Act, its statement of legislative intent and its legislative history fully support defendant's position that the purpose of the Privacy Act is to prevent an unauthorized disclosure.

Rosenbach stressed that the liability imposed by the Privacy Act "insure[s] that . . . biometric identifiers and biometric information are properly

honored and protected to begin with, before they are or can be compromised ** That is the point of the law." 2019 IL 123186, ¶¶ 36, 37; *see also Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 70 (the Act operates "to prevent an unauthorized disclosure[.]"). The entire purpose of obtaining consent under section 15(b) is to prohibit an unauthorized disclosure, whether it is the plaintiff's non-consensual disclosure of her biometric data to the entity collecting it, or to prevent the entity that collected the data from thereafter publishing it to a third party through conduct that violates sections 15(a), 15(c), 15(d) or 15(e). Whether the disclosure is intentional or not is of no consequence because they *all* involve unauthorized disclosures.

Plaintiffs admit that the Privacy Act was created "as a means to deter careless handling" of private matter. They also concede that "[t]he statute is prophylactic in nature and, on its face, expresses a *general intent* to regulate and protect biometrics *for the purpose of preventing an irreversible security breach* that would permanently *expose* an individual to identity theft, *privacy invasion* and other evils." (Pltf. Br. 4) (emphasis added). Yet, at the same time, plaintiffs contend the opposite – that "[t]he nature of any claim for violations of the Act stems from an entity's failure to comply with the Act's notice and consent regime before collection, not the wrongful 'publication' of biometric data." (Pltf. Br. 8.)

Plaintiffs' schizophrenic argument about the nature of their injury suffers from the same infirmity as their argument about the test to determine

which statute of limitations applies. The various ways in which the Privacy Act may be violated, just like the various elements of a cause of action, are not determinative. The various subsections of the Privacy Act all serve one overriding purpose – to prevent an unauthorized disclosure.

McDonald described the duties expressed in the Privacy Act as "prophylactic measures *to prevent compromise of an individual's biometrics*." *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 43, citing *Rosenbach*, 2019 IL 123186, ¶ 36 (emphasis added). The injuries caused by violating the Privacy Act are "personal and societal," and particularly the "loss of the ability to maintain her privacy rights," *id.* ¶ 44, meaning to keep it out of the public domain or from the defendant who collected it.

Preventing the unauthorized disclosure of biometric data is why the Privacy Act was enacted: "Pursuant to the Privacy Act, the General Assembly has adopted a strategy to limit the risks posed by the growing use of biometrics by businesses and the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised." *Id.* ¶ 48. The "General Assembly has tried to head off such problems before they occur by imposing safeguards to ensure that the individuals' privacy rights in their biometric identifiers and biometric information are properly protected before they can be compromised". *Id.*; *see also Rosenbach*, 2019 IL 123186 ¶ 36.

The purpose of these up-front safeguards is to minimize the risk of biometric data being improperly disclosed. The statutory protections expressed in the Privacy Act are not injuries in and of themselves; they are safeguards designed to prevent a specific harm—the unauthorized disclosure of an individual's biometric information. The injury associated with the entire Act is a privacy violation that involves publication. A plaintiff is just as "aggrieved" within the meaning of section 20 by the risk of publication as she is by actual publication.

Plaintiffs baldly assert that "a party cannot bring an action premised on 'potential' conduct." (Pltf. Br. 15.) But Section 20 expressly provides for injunctive relief. A suit to compel security protocols or a retention/destruction policy based on a risk of publication due to the lack of adequate safeguards is something the Act plainly contemplates. *McDonald* and *Rosenbach* emphasized that the injury the Privacy Act guards against is the risk that biometric information will be improperly disclosed. *Rosenbach* held that a person is "aggrieved" once the statute is violated: "No additional consequences need be pleaded or proved." *Rosenbach*, 2019 IL 123186 ¶ 33.

West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc., 2021 IL 125978, reinforces this conclusion, and plaintiffs' attempt to distinguish it fails. Plaintiffs claim that *West Bend* dealt merely with an insurer's duty to defend and therefore the decision does not inform the analysis in this case. (Pltf. Br. 16-17.) But consistency and predictability of judicial precedent is crucial to the rights of

plaintiffs and defendants alike. These jurisprudential concerns militate strongly in favor of interpreting words and phrases alike, according to their plain meaning, whether in contracts or statutes, unless the parties or the legislature have specifically adopted a different definition. *People ex. rel. Daley v. Datacom System Corp.*, 146 Ill. 2d 1, 15 (1991) ("[i]n the absence of statutory definitions indicating a different legislative intent, words in a statute are to be given their 'ordinary and popularly understood meaning.'"). The Court has in the past used the dictionary as a resource.

West Bend observed that the term "publication" was not defined in the parties' contract (although it could have been), and that its dictionary definition and common law meaning as expressed by the Second Restatement of Torts "means both communication to a single party and communication to the public at large." *Id.* ¶¶ 40, 42. "Publication," therefore, is not restricted to communication with the public at large unless the legislature defines it as such. Under *West Bend*, even plaintiffs' nonconsensual disclosure of their biometric data to Black Horse qualifies as an unwanted "publication" within the meaning of section 15(b). It is as much a publication as a disclosure to the public at large, with all the same attendant impact on the individual privacy interest.

Every section of the Privacy Act is concerned with an invasion of privacy that involves publication. Section 15(a) requires an entity in possession of biometric information to develop a retention and destruction schedule. 740 ILCS 14/15(a). The purpose of having a retention and destruction deadline is to

ensure that sensitive information will not languish in perpetuity and increase the risk of an unauthorized disclosure.

Section 15(b) requires an entity to inform the subject in writing that biometric information is being collected or stored; to specify the length for which the biometric information will be used or stored; and to obtain a written release. *Id.* § 15(b). But again, the purpose of informing a person that biometric information will be taken and stored, the duration of this storage, and obtaining a written release is so that a person can better gauge if they should entrust their private information to the entity. Information about the duration of the use and storage of biometric information permits an informed judgment about whether relinquishing control of a biometric identifier is worth the risk of a potential unauthorized disclosure. Section 15(b) is also reasonably interpreted to involve a "publication" that violates a privacy interest when the plaintiff is unwittingly compelled to reveal her biometrics to another, such as her employer, due to the lack of notice required by section 15(b).

Section 15(c) explicitly restricts a certain type of communication of biometric information: the entity may not disseminate biometric information to any third party for profit. *Id.* § 15(c). Section 15(d) prohibits an entity from disclosing or disseminating biometric information to complete a transaction requested by or authorized by the subject, or as required by law, without the subject's consent. *Id.* § 15(d). These sections are explicitly concerned with the publication of biometric information.

Finally, section 15(e) requires an entity to "store, transmit, and protect from disclosure" biometric information using a reasonable standard of care, and in a manner that meets or exceeds how the entity treats confidential or other sensitive information. Again, the overriding purpose is to prevent and redress the publication of matter affecting a privacy right.

To the extent that the Court finds any ambiguity in the plain language of the Privacy Act, its legislative history provides further proof that the privacy statute of limitations should apply. Senator Ryg identified the primary impetus behind the Privacy Act. *Sekura*, 2018 IL App (1st) 180175 ¶ 63. A company known as Pay By Touch had assets that contained biometric information, it went into bankruptcy and the court approved the sale of it, which sale included this information. *Id*. Thereafter, the Illinois legislature sought to address the valid concerns of what would happen to the biometric data of thousands of Illinois citizens. *Id*. The concern was that biometric data would be disclosed to the wrong person and end up in the wrong hands. Thus, the legislature sought "to protect against unauthorized disclosure." *Id*. ¶ 70.

Plaintiffs' attempt to recharacterize their injury as one that does not implicate publication is a contrivance that ignores the very heart of the interest the Privacy Act protects – the actual or threatened disclosure to another of a person's unique biometric data.

III. Section 13-201 applies to any privacy claim that asserts a right to exercise control over the disclosure of private matter.

Plaintiffs recognize that the function word "for" in the phrase "for publication of matter" modifies the term "publication" in a way that broadens it. They state that "for" means "with the object or purpose of," and agree that section 13-201 encompasses "privacy torts involving publication." (Pltf. Br. 11, 12.) This is consistent with defendant's arguments that "for" means "concerning" or "involving" (Deft. Br. 20-21), and that the Privacy Act's purpose is to guard against the unauthorized disclosure of biometric data and to provide a remedy when it occurs. Nevertheless, plaintiffs attempt to artificially create limitations on the scope of section 13-201 to only apply to: a) privacy claims wherein there is a publication to the public at large; and b) privacy claims in which publication is a required element. Neither limitation can or should be read into section 13-201. *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009) ("[i]t is a cardinal rule of statutory construction that we cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature.").

Plaintiffs' argument that section 13-201 should be limited to only privacy claims wherein a publication is made to the public at large lacks merit. (Pltf. Br. 11, 16.) As this Court noted in *West Bend*, the term "publication" includes "both communication to a single party and communication to the public at large." *West Bend*, 2021 IL 125978, ¶ 40, 42. Plainly, the term

"publication" is not limited in the fashion plaintiffs insist. *See Ciolino v. Simon*, 2021 IL 126024, ¶ 19 (2021) ("[a]ny act by which defamatory matter is communicated to someone other than the person defamed is a publication.").

Plaintiffs' attempt to restrict the application of section 13-201 to only privacy claims where publication is a required element of the cause of action is equally meritless. Plaintiffs assert that an examination of "the common-law publication-based privacy claims governed by section 13-201 supports the conclusion that its language is intentionally narrow in scope." (Pltf. Br. 13.) They claim that appropriation of likeness (codified by the Illinois Right of Publicity Act), public disclosure of private facts, and false light each require publication to the public at large.

But this Court has never held that section 13-201 is limited to actions where publication is a required element. Merely because section 13-201 has been applied to cases involving an affirmative publication of private matter does not mean, *ipso facto,* that section 13-201 does not apply to actions brought to control or prevent the publication of private matter, as here. The law is not static; it evolves as technology and societal needs change especially in regard to privacy. The language of section 13-201 is not so inelastic that it cannot reach privacy claims relating to newly developed technology where the objective is to prevent the unauthorized publication of matter affecting a privacy right.

Plaintiffs assert that there is a distinction between privacy claims that are subject to section 13-201 and "those that are not because they do not involve

'publication.'" (Pltf. Br. 12.) To support this claim, they point to two appellate court decisions from several decades ago: *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 735 (2d Dist. 1982), which considered the Illinois Eavesdropping Act, and *Benitez v. KFC Mgmt. Co.*, 305 Ill. App. 3d 1027, 1033 (2d Dist. 1999), which analyzed the intrusion upon seclusion tort. Neither of those cases, however, attempted to reconcile their rationale with *Bryson v. News Am. Publications, Inc.*, which stated that "[t]he limitations period for invasion of privacy claims and for defamation claims is one year after the cause of action accrues." 174 Ill. 2d 77, 105 (1996), citing 735 ILCS 5/13-201. This Court has never held that section 13-201 applies strictly to privacy claims that involve an affirmative publication of private matter, and not to claims to control or prevent the publication of private matter. Such an artificial distinction is illogical.

If there is any distinction to be drawn between the limitations period for intrusion upon seclusion and all other invasion of privacy claims (and there should not be, as the injury to a privacy interest is the touchstone), then logically the dividing line is the right to be left alone (seclusion) versus the right to control the dissemination of private information. For instance, in *McDonald's*, the plaintiffs alleged that franchisees surreptitiously recorded 21 conversations. *McDonald's*, 108 Ill. App. 3d 732, 735 (2d Dist. 1982). The defendant in *McDonald's* argued that section 13-201 applies because an alleged violation of the Eavesdropping Act is akin to a claim for intrusion upon seclusion. *Id.* at 737.

The Second District held that section 13-201 did not apply because the Eavesdropping Act did not involve any publication of conversations. *Id.*

But unlike the Privacy Act, the nature of an injury stemming from a violation of the Eavesdropping Act is not the risk that the party hearing or recording the conversation may intentionally or negligently disclose it to others. It is in the nature of a *trespass* – a violation of the plaintiff's right to be left alone and not overheard. Indeed, at least one court has held that the Eavesdropping Act does not touch on privacy concerns at all. The defendant in *Plock v. Board of Education*, 396 Ill. App. 3d 960, 968 (2d Dist. 2009), argued that its plan to record special-education classrooms did not violate the Eavesdropping Act because there was no right of privacy in a classroom. *Id.* The court rejected that argument and held that eavesdropping applies to any conversation between two or more people, "regardless of whether any party has an objective or subjective expectation of privacy." *Id.* As a result, the Eavesdropping Act and its statute of limitations do not inform the analysis here.

Similarly, *Benitez* considered whether claims for intrusion upon seclusion based on the defendants secretly viewing plaintiffs in the bathroom were governed by section 13-201. The court noted the core of the tort of intrusion upon seclusion "is the offensive prying into the private domain of another." *Benitez*, 305 Ill. App. 3d 1027, 1033 (2d Dist. 1999). The examples the court cited all involved the same concept as a trespass: "invading someone's home, illegally searching someone's shopping bag in a store, eavesdropping by

wiretapping, peering into the windows of a private home, or making persistent and unwanted telephone calls." *Id*. *See also Schiller v. Mitchell*, 357 Ill. App. 3d 435, 440 (2d Dist. 2005) (holding that "it was the voyeuristic aspect of the intrusion that constituted the tort of intrusion upon the seclusion of another").

In determining the proper statute of limitations to apply, the court found "the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication." *Id*. *Benitez* acknowledged a conflict in its holding with *Juarez v. Ameritech Mobile Comm., Inc.*, 746 F. Supp. 798, 806 (N.D. Ill. 1990) (holding that alleged claims for invasion of privacy must be brought within one year), *aff'd*, 957 F.2d 317 (7th Cir. 1992); *see also Hrubec v. Nat'l R.R. Passenger Corp.*, 778 F. Supp. 1431, 1435 (N.D. Ill. 1991), *reversed on other grounds*, 981 F.2d 962 (7th Cir. 1992). *Juarez* and *Hrubec* both held that section 13-201 should not be read so narrowly as to exclude privacy claims for intrusion upon seclusion. *Id*. *Juarez* and *Hrubec* instead relied on the historical application of Section 13-201 to all privacy claims, as defendant does here.

Nevertheless, the intrusion upon seclusion category of cases is not concerned with an injury tied to the risk of the information being improperly disclosed—the torts do not depend in any way on the disclosure of the information at all or the prevention of its disclosure to others. The injury from eavesdropping is complete when a person surreptitiously records a conversation without consent, and the injury from intrusion upon seclusion is

complete when a person commits an offensive prying into the private domain of another. Both are in the nature of a trespass. Indeed, *Benitez* held that "the crux of the privacy-related claim" was that "employee-defendants poked holes in the ceiling of the women's bathroom and viewed" the plaintiffs, not that they took pictures of the plaintiffs in the restroom and told others intimate details about what they had seen. 305 Ill. App. 3d at 1033.

In short, even if plaintiffs are correct that privacy claims for intrusion upon seclusion are exempt from the privacy statute of limitations (and that is not correct), the distinction makes no difference in *this* case. Violations of the Privacy Act still fall into the category of privacy claims which involve publication. In both eavesdropping and intrusion upon seclusion, it is irrelevant if the recipient of the ill-gotten information communicates that information to a third party. It is the trespass upon the plaintiff's right to be left alone that is the essence of the injury. With the Privacy Act, this Court has repeatedly stressed that the statute exists to prevent the improper disclosure of biometric information to a third party—that is the point of the law. It is fundamentally different than a trespass.

Finally, plaintiffs' contention that the five-year statute of limitations expressed in section 13-205 applies because the Privacy Act does not contain a specific statute of limitations is untethered to the test this Court has applied for over a century to the issue presented here. Plaintiffs observe that the courts have applied the five-year statute of limitations period to "countless other statutes

that lack a specific limitations period." (Pltf. Br. 18-19.) Plaintiffs' amicus parrots this argument: "That statute of limitations [section 13-205] governs all civil actions that do not have an explicit statute of limitations provided by the statute." (Pltf. Amicus Br. 5.)

But section 13-205 is not a default statute of limitations which applies whenever a given statute lacks an express limitations period. Instead, where two or more statutes of limitation may apply, as here, the Court considers only "the type of injury at issue, irrespective of the pleader's designation of the nature of the action." *Travelers*, 229 Ill. 2d at 466, citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996). The Court does not tally up the number of instances where the catch-all limitations period was applied in other unrelated cases to make its decision. Instead, the law requires an individual analysis of the type of injury at issue to determine if there is an applicable statute of limitations. The type of injury at issue with alleged violations of the Privacy Act is undoubtedly privacy. Thus, the statute of limitations entitled "Defamation – Privacy" must apply.

IV. Application of a five-year limitations period would only exacerbate the injury the Privacy Act seeks to ameliorate.

A five-year statute of limitations thwarts the up-front protections that are the Act's entire purpose. The Privacy Act provides remedies in the form of monetary and injunctive relief to prevent the improper disclosure of biometric information. *See* 740 ILCS 14/5(g) ("The public welfare, security, and safety will

be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information."). A shorter, one-year statute of limitations comports with the Privacy Act's purpose and structure of prohibiting unauthorized disclosure—the risk of identity theft is greatly reduced if a person acts promptly once they have been "aggrieved," before any actual damage can occur.

Another statute that speaks to the same subject matter militates in favor of assigning a shorter statute of limitations to Privacy Act claims. The Personal Information Protection Act, for example, regulates what happens in the event of a data breach, and applies to biometric information. 815 ILCS 530/5(1)(F). A violation of the PIPA constitutes an unlawful practice under the Illinois Consumer Fraud and Deceptive Business Practices Act. *Id.* § 20. This means that violations of the PIPA have a three-year statute of limitations. *See* 815 ILCS 505/10a(e).

"A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative." *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 458-59 (2002), citing *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 391-92 (1998). The Privacy Act and the PIPA complement each other and are related.

The Privacy Act provides protections and enforcement mechanisms on the front end to prevent and deter unauthorized disclosure. *Rosenbach*, 2019 IL 123186, ¶¶ 36, 37 (stating that the liability imposed by the Privacy Act "insure[s]

that . . . biometric identifiers and biometric information are properly honored and protected to begin with, before they are or can be compromised . . . That is the point of the law."). A person is "aggrieved" and has an actionable claim under the Act once the statute is violated—"[n]o additional consequences need be pleaded or proved." *Id.* ¶ 33. This preemptive purpose of the Privacy Act was made explicit in the legislators' amicus brief in *Rosenbach*, which explained that the Privacy Act is a "direct descendant" of the General Assembly's efforts to adapt privacy laws to changing technologies lest an individual whose "biometric data were compromised" would have "little recourse." (SR 133.)

The PIPA, on the other hand, comes into play when a breach has actually occurred. It would be illogical for the legislature to make the backstop protection the PIPA provides in the event of an actual injury subject to a shorter limitations period than the preemptive protections the Privacy Act provides before any actual injury has resulted. The two statutes work hand-in-glove, however, if the Privacy Act has a shorter limitations period that promotes the quick, preemptive assertion of the rights to the protections it affords, while the PIPA affords plaintiffs a longer time to assert claims after an actual injury has occurred.

Plaintiffs argue that a longer limitations period is necessary because "biometrics can be misused decades from now without an individual's knowledge." (Pltf. Br. 22) But this actually supports the argument for applying a *shorter* period. That is because plaintiffs overlook the role of the discovery rule

in Illinois jurisprudence, which would toll the statute of limitations until the plaintiff knows or should have known of her injury and that it was wrongfully caused.

Applying the discovery rule to plaintiffs' argument highlights the absurdity of plaintiffs' position. Under plaintiffs' theory, an individual could discover the injury decades after an entity collected their biometric data and then the individual could wait *another five years* to sue. A shorter limitations period merely affects how much time a person has to bring suit *after discovering their injury*. *See A&R Janitorial v. Pepper Construction Co.*, 2018 IL 123220, ¶24 ("[t]he dismissal was fully consistent with the purpose of a statute of limitations, which are 'to require the prosecution of a right within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in bringing claims.'").

V. A one-year limitations period applies to the Privacy Act, regardless of which section a defendant has violated.

It makes little sense to apply two different limitations period to the same statutory violation. As between the one-year and five-year periods at issue in this case, a one-year limitations period is more consistent with the nature of the injury that results from a Privacy Act violation (the risk of identity theft), the Privacy Act's overall purpose (prevent the potential and actual disclosure of biometric identifiers), the language of section 13-201 (the disclosure of private

information) and the public policy served by a shorter limitations period (prompt, preemptive redress).

But even under plaintiffs' unjustifiably cramped interpretation of section 13-201, at a minimum, violations of sections 15(c) and 15(d) would still fall comfortably with the ambit of section 13-201. Both explicitly involve the affirmative publication of biometric information: selling, leasing, or trading the information (section 15(c)); disclosing, redisclosing, or otherwise disseminating biometric information (section 15(d)). And here, plaintiffs explicitly raise a claim under section 15(d) for "failing to secure informed consent before disclosing Plaintiffs' biometric data". (Pltf. Br. 10) (emphasis in original).

Courts must "construe statutes consistently and in their proper context." *People v. Jenkins*, 383 Ill. App. 3d 978, 985 (1st Dist. 2008), citing *People v. Trainor*, 196 Ill. 2d 318, 332 (2001). There is no indication in the language of the Privacy Act that the legislature intended different statutes of limitation based on what type of violation the plaintiff alleges, or that a delay of five years to bring an action was contemplated or desirable. Sections 15(a), 15(b), and 15(e) exist to prevent unauthorized disclosure of biometric data, and should be interpreted consistently with section 15(c) and 15(d) violations.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, Black Horse Carriers, Inc., respectfully requests that this Court reverse the judgment of the appellate court and answer the certified question by finding that the one-year

limitations period in 735 ILCS 5/13-201 governs all actions under the Biometric Information Privacy Act.

Respectfully submitted,

/s/Joshua G. Vincent

David M. Schultz
dschultz@hinshawlaw.com
John P. Ryan
jryan@hinshawlaw.com
Joshua G. Vincent
jvincent@hinshawlaw.com
Louis J. Manetti, Jr.
lmanetti@hinshawlaw.com

HINSHAW & CULBERTSON, LLP
151 North Franklin Street
Suite 2500
Chicago, IL 60606
312-704-3000
Attorneys for defendant-appellant Black Horse Carriers, Inc.

Dated June 29, 2022

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents with points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5569 words.

/s/ Joshua G. Vincent

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he electronically filed via Odyssey eFileIL defendant-appellant's Reply Brief And Response To Request For Cross-Relief with the Clerk of the Supreme Court of Illinois, on the 29th day of June, 2022.

The undersigned further certifies that on the 29th day of June, 2022, an electronic copy of the foregoing Reply Brief is being served via Odyssey eFile IL.

In addition, the undersigned certifies that the foregoing Reply Brief was served via email on the 29th day of June, 2022, before 5:00 p.m., to counsel of record listed on the attached Service List.

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Joshua G. Vincent

Tims v. Black Horse
Matter No. 1018882

SERVICE LIST

Ryan F. Stephan
James B. Zouras
Catherine T. Mitchell
STEPHAN ZOURAS, LLP
100 North Riverside Plaza - Suite 2150
Chicago, IL 60606
rstephan@stephanzouras.com
jzouras@stephanzouras.com
cmitchell@stephanzouras.com
Counsel for Plaintiff

Matthew C. Wolfe
Melissa A. Siebert
Ian M. Hansen
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
masiebert@shb.com
mwolfe@shb.com
ihansen@shb.com
Counsel for Amicus Curiae
Illinois Chamber of Commerce

Randall D. Schmidt
Edwin F. Mandel Legal Aid Clinic of
The University of Chicago Law School
6020 South University Ave
Chicago, Illinois 60637
r-schmidt@uchicago.edu
Counsel for the Employment Law
Clinic and Amici Curiae

Kurt Niermann
Porro Niermann Law Group LLC
821 West Galena Blvd
Aurora, Illinois 60506

kurt@pnlawoffice.com
Counsel for the Illinois
Trial Lawyers Association

J. Bryan Wood,
Treasurer and Secretary, NELA/Illinois
The Wood Law Office, LLC
303 West Madison St., Ste. 2650
Chicago, IL 60606
bryan@jbryanwoodlaw.com
Counsel for NELA/Illinois