No. 129081

In the

Supreme Court of Illinois

LUCILLE MOSBY, Individually, and on Behalf of All 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 Illinois Appellate Court, First Judicial District, Case No. 1-20-0822.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 18 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 Illinois Appellate Court, First Judicial District, Case No. 1-21-0895.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 18 CH 07161.
The Honorable **Alison C. Conlon**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES

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NATURE OF THE CASE

The Illinois Biometric Information Privacy Act ("BIPA" or "the Act"), 740 ILCS 14/1, *et seq*. does not interfere with, much less prohibit, the use of biometric technology. Compliance with this prophylactic statute is simple, especially for sophisticated organizations that should already know how to safeguard sensitive, confidential information. Biometric data collectors must establish a consent mechanism, a publicly available retention schedule, and provide certain disclosures to individuals whose biometrics are being collected and stored. *Id*. The Act's plain text, buttressed by context, overall structure, and basic principles of statutory construction, reveals the General Assembly's intent that BIPA establish a comprehensive baseline for biometric data protection. The Act provides exemptions "as necessary" for hospitals, but it does not create a categorical exemption for healthcare providers, let alone HIPAA-exempt technology suppliers. To avoid preemption, the legislature excluded *patient* biometric data (which is protected under HIPAA), but not *healthcare worker* biometric data (which is not).

Nevertheless, Defendants contend that BIPA's straightforward, easy-to-follow privacy protections may be wholly disregarded when noncompliance occurs in a healthcare setting, stripping essential workers of the right to biometric data privacy. Accepting this position would require the Court, which has repeatedly reaffirmed the basic rights afforded by the nation's first and most comprehensive biometric data privacy law, to hold that "or" always separates two mutually-exclusive categories of information, "under" means "*as defined by* but not protected, governed or even addressed under," and that by hiding an elephant in a mousehole, the legislature arbitrarily excluded at least 10% of the state's

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workforce from BIPA's protections, in addition to virtually every person who interacts with Illinois healthcare facilities.

Simply put, Defendants' contentions, which are at war with the plain text, are legally and logically untenable. The Appellate Court—like almost every other state and federal court to address the issue—got it right. Under the plain and ordinary meaning of its definition of "biometric identifier", BIPA excludes only "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" (the "HIPAA exclusion"); not the biometric data of health care workers. 740 ILCS 14/10.

ISSUE PRESENTED FOR REVIEW

In this consolidated appeal, this Court agreed to answer the following certified questions, both of which involve essentially the same issue:

> Whether the exclusion in Section 10 of [the Act] for 'information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996' [HIPAA] applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?

See Mosby C1873.[1]

> Does finger-scan information collected by a health care provider from its employees fall within the [Act's] exclusion for 'information collected, used, or stored for health care treatment, payment or operations under the federal [HIPAA],' 740 ILCS 14/10, when the employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations?

[1] Citations to the *Mosby* Common Law Record are in the form "*Mosby* C__." Citations to the *Mazya* Common Law Record are in the form of "*Mazya* R__." Citations to Defendants' Appendix are in the form of "A__."

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See Mazya R1103.

STATUTES INVOLVED

The Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*

STATEMENT OF FACTS

I. By Unanimously Enacting BIPA, the General Assembly Imposed a Duty on Private Entities to Safeguard Biometric Data and Secure Written Informed Consent Before Collecting It.

Much like DNA, distinctive anatomical features like fingerprints, iris scans, voiceprints and scans of hand, and facial geometry (collectively defined as "biometric identifiers" under the Act, 740 ILCS 14/10) are unique, universal, and immutable. For these reasons, beginning in the mid-to-late 2000s, private entities increasingly began deploying biometric systems to streamline identity verification. Although the use of these systems in the corporate sector helps maximize profits by increasing productivity, efficiency, and security, the ease with which biometric data is electronically extracted, stored, and disseminated makes these systems vulnerable to abuse from entities seeking to profit off of selling the data, hackers bent on identity theft, and foreign governments building databases of U.S. citizens. With the rise of biometric technology and commensurate threats posed from its use, the Illinois legislature responded to the "very serious need" to protect the biometrics of Illinois citizens by unanimously passing BIPA in 2008. 740 ILCS 14/5(a)-(g); 95th Ill. Gen. Assembly, House Proceedings, May 30, 2008, at 249.

The General Assembly's legislative findings make clear that its goal was to comprehensively protect Illinois citizens from the dangers posed by uninformed collection and inadequate protection of biometric data, without neglecting its potential benefits:

> Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security

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> numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.

740 ILCS 14/5(c). With BIPA's enactment, the Illinois legislature recognized these unique threats and sought to deter the careless handling of biometric data and ensure that all individuals who are asked to provide their biometric data are fully informed. *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶¶ 36-37 (2019) ("*Rosenbach*"). The Act is prophylactic in nature and, on its face, expresses a general intent to regulate and protect biometric data for the purpose of preventing an irreversible security breach that would permanently expose an individual to identity theft, privacy invasion, and other evils. *Id*. The Act does not restrict the use of biometric technology in any way, but rather imposes basic safeguards on its use.

II. Plaintiffs Seek to Vindicate Defendants' Collection, Storage, Use, and Dissemination of Their Biometric Data in Violation of BIPA.

Under BIPA's plain and unambiguous text, a private entity that wants to collect, obtain, and/or possess biometric data must first provide written disclosures of specific information and then "receive" a written release, defined as "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." 740 ILCS 14/10, 15(b). Yet Ingalls and Northwestern,[2] throughout Plaintiffs' employment, repeatedly collected, stored, used, and disseminated their fingerprints without giving them notice of such or obtaining consent to do so. (*See*

[2] "Ingalls" refers to The Ingalls Memorial Hospital, UCM Community Health & Hospital Division, Inc.; "Northwestern" refers to Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare.

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operative *Mosby* complaint, A6-28; operative *Mazya* complaint, A35-61). Compounding the malfeasance, Becton, Dickinson and Company ("BD")—the third-party vendor that knowingly received Plaintiffs' biometric data from Ingalls and Northwestern—separately failed to secure informed written consent from Plaintiffs for its own receipt, storage and use of their fingerprints. (A16-18, ¶¶ 46, 59; A43, ¶ 41). In other words, Defendants failed to give Plaintiffs any meaningful and informed opportunity to say "no" as required by the Act. *Rosenbach*, 2019 IL 123186, ¶ 34.

A. Becton Dickinson Collected, Stored, Used, and Disseminated Mosby's Fingerprints in Violation of the Act.

Plaintiff Lucille Mosby ("Mosby"), a Registered Pediatrics Nurse at Ingalls, filed a Class Action Complaint against BD and Ingalls[3] on April 18, 2018, seeking redress for their respective BIPA violations. (A6-28). As a condition of employment with Ingalls, Mosby was required to scan her fingerprint at a BD Pyxis Medstation to authenticate her identity and access controlled and restricted material. (A15-17, ¶¶ 39-40, 55). Her unique fingerprint data was then stored and maintained on both Ingalls' and BD's servers in the form of a unique, user-specific template. (A15-18, ¶¶ 41, 56). BD specifically designs and constructs its Pyxis devices so that the fingerprint data it collects at each use is managed, maintained, and stored on its servers. (A7, ¶¶ 5, 7). BD actively manages, maintains, and stores biometric data collected from its Pyxis devices in a single, centralized location so that it may use that data to facilitate support services for its clients. (A8, ¶ 9). It further shares this data with third parties that host the data. (A15, ¶¶ 43-45). Mosby alleged that

[3] During the pendency of the Appellate Court proceedings, the trial court entered final approval of a class settlement agreement reached between Mosby and Ingalls. Therefore, Ingalls withdrew and is no longer a party to this appeal.

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BD and Ingalls violated BIPA by: (1) failing to properly inform her in writing of the specific purpose(s) and length of time for which her fingerprints were being collected, stored, and used; (2) failing to provide a publicly available retention schedule and guidelines for permanently destroying her fingerprints; (3) failing to obtain a written release from Plaintiff to collect, store, or otherwise use her fingerprints; and (4) failing to obtain consent prior to disclosing or redisclosing her fingerprints to third-party vendors that host the data. (A10, ¶ 17). Mosby predicated her action on each Defendant's failure to comply with Sections 15(a), (b), and (d) of BIPA. (*Id.*).

B. The Trial Court Correctly Rejected Becton Dickinson's Claim That it Had No Duty to Comply With the Act.

After Mosby filed an Amended Class Action Complaint, Ingalls and BD each moved to dismiss, arguing that BIPA does not protect biometric data collected, used, and stored from workers in a healthcare setting. (*See Mosby* C485-88; 599-601; 619-622). The trial court denied the motions, finding, in relevant part, that the HIPAA exclusion is limited to patient data, specifically "information protected under HIPAA." (A5; *Mosby* C1453-92). The court rejected BD's contention that the HIPAA exclusion contained in the definition of "biometric identifier" in Section 10 somehow encompasses biometric data collected from healthcare workers. (*Mosby* C1471). As explained by the trial court, "HIPAA, by its terms, does not protect the privacy of health care employees' biometric information. It protects patients. And if the legislature intended to exempt them entirely from the Act, I'd expect the legislature to do so in a more explicit and straightforward way." (*Id.*). As aptly stated by the trial court, "the alternative is to impose a broad exception for all employees involved in operations that impact HIPAA protected patients and I don't think that that's warranted." (*Id.*).

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After Mosby filed a Second Amended Complaint, BD and Ingalls filed a joint motion to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308. (*Mosby* C1523-31). While recognizing that the "majority of circuit courts have ruled consistently with this Court—finding that the [HIPAA] exclusion does not bar the suit…", the trial court certified the proposed question for interlocutory appeal under Rule 308. (A29-31). The Appellate Court denied the Application, finding that "the question of law involved does not present a question of law as to which there is a substantial ground for difference of opinion." (A32).

BD and Ingalls then filed a Petition for Leave to Appeal to the Supreme Court, which was denied. (A33). This Court did, however enter a supervisory order directing the Appellate Court to allow the appeal and answer the certified question. (*Id.*).

C. Northwestern Collected, Stored, Used and Disseminated Mazya's Fingerprints to Third Parties in Violation of the Act.

Plaintiff Yana Mazya ("Mazya") worked as a Registered Nurse at Northwestern from November 12, 2012, to December 4, 2017. (A45, ¶ 49). Like Ingalls, Northwestern utilized BD Pyxis Medstations and other similar controlled substance dispensers throughout its various facilities. (A36, ¶¶ 4-6; A43, ¶ 38; A45, ¶¶ 51-52). Each time Mazya required access to these devices, she had to scan her fingerprint, which Northwestern collected and stored in its user software systems and databases. (A36, ¶¶ 4-6; A45, ¶¶ 52-53). Northwestern purchased its biometric substance dispensers and related software from third-party vendors, including BD, and disseminated Mazya's biometric data to these entities. (A36, ¶¶ 4-6; A43, ¶ 40; A46, ¶ 56; A47, ¶ 63). Northwestern engaged in this conduct without securing Mazya's written consent or release, without providing her with any of the required information under BIPA, and without providing a publicly available

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biometric retention and destruction schedule. (A38, ¶ 13; A43, ¶¶ 37, 40-42; A44, ¶¶ 44-46; A45, ¶ 54; A46, ¶¶ 55-57; A53, ¶¶ 89-90; A55, ¶¶ 102-103; A57, ¶ 116). Like Mosby, Mazya filed her class action complaint, predicating her action on Northwestern's failure to comply with Sections 15(a), (b), and (d) of BIPA. (A38, ¶ 13).

D. The Trial Court Correctly Rejected Northwestern's Claim That it Had No Duty to Comply With the Act.

Northwestern moved to dismiss Mazya's Complaint, arguing that Section 10 categorically excludes medical providers from the Act's protections. (*Mazya* R28; R38-41). The trial court disagreed. Like *Mosby* and virtually every other court to have heard the argument, the *Mazya* trial court held that the definition of "biometric identifier" in Section 10 explicitly excludes *patient* biometric from regulation under BIPA. (A63-64). Healthcare workers' biometric data—which is not regulated or protected by HIPAA—is not excluded from BIPA's coverage. (*Id.*). Rejecting Northwestern's arguments, the trial court held that "BIPA's explicit reference to biometric data taken from a *patient* memorializes the intent of the Illinois General Assembly to exclude *patient* biometrics from BIPA's protections – because those biometrics are already protected by HIPAA—and not *employee* biometric data." (A64 (emphasis added)). The trial court correctly observed that, "[t]o accept Northwestern's notion would leave medical professionals with no protection under BIPA, or HIPAA, from the improper collection and use of their biometric identifiers and information." (*Id.*).

Northwestern moved to certify a question under Rule 308. (*Mazya* R470). The trial court denied Northwestern's motion, finding that its proposed question was not meaningfully distinguishable from the one already before the Appellate Court in *Mosby*. (*Mazya* R854). Shortly thereafter, Mosby informed the trial court of the settlement she

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reached with Ingalls and in light of this notice, Northwestern moved to reconsider the court's previous denial of Rule 308 certification. (*Mazya* R856). The trial court granted Northwestern's motion to reconsider and certified a question to be answered on appeal. (A68). Thereafter, Northwestern appealed, and sought consolidation of its appeal with that of *Mosby*, which the Appellate Court granted. (A70).

III. The Appellate Court *Twice* Correctly Answered the Certified Questions by Holding Health Care Workers' Biometric Information Is Not Excluded From Protection Under the Act.

The Appellate Court affirmed the judgments of both trial courts, finding that the HIPAA exclusion did not apply to biometric data collected by a health care provider from its workers. *Mosby, et al. v. Ingalls Memorial Hospital, et al*., 2022 IL App (1st) 200822, ¶ 47 (Feb. 25, 2022) (A71) ("Consistent with the plain language of the Act, we find that the legislature did not exclude health-care employee biometric information from its protections"). Specifically, the Appellate Court held that "the biometric information of employees is simply not defined or protected 'under HIPAA,'" finding that the plain language of the Act blazes a straight path to the result that it does not exclude employee information from its protections, given that employees "are neither (1) patients nor (2) protected under HIPAA." *Id*. ¶ 44.

Dissatisfied, Defendants filed a joint petition for rehearing. The Appellate Court granted the petition, ordered additional briefing, and issued its modified order on September 22, 2022. After carefully considering Defendants' arguments, the Appellate Court rejected "Defendants' attempt to include employee biometric information under this exclusion" as going "beyond the plain language of the Act." *Mosby, et al. v. Ingalls Memorial Hospital, et al*., 2022 IL App (1st) 200822, ¶ 65 (Sept. 30, 2022) (A113).

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First, the Appellate Court rejected Defendants' contention that a reading of the exclusion to apply only to patient information would render "information captured from a patient in a health care setting" and "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" redundant. The Court concluded that, "Defendants' arguments about redundancy overlook the verbs used in the two sub-exclusions or categories, correctly observing that while the two sub-exclusions or categories apply to patient information, each are modified by different verbs, which gives them different meanings. *Id.* at ¶ 58. The first category refers to information captured from a patient in a healthcare setting, while the second category applies when such information is subsequently gathered, accumulated, used and/or stored. *Id*. at ¶ 59.

Second, the Appellate Court declined to rewrite the statute by construing "under HIPAA" to mean "*as defined by* HIPAA." *Id*. at ¶ 64. The Court observed that the primary meaning of "under" when used as a preposition in the clause is "covered" or "protected." *Id*. at ¶ 63 (citing the Merriam-Webster Online Dictionary). It further confirmed that HIPAA protects patient medical records and data from unauthorized disclosure by creating a procedure for obtaining permission to use them but does not extend to information about healthcare workers. *Id*. at ¶ 63. The court also noted that under the series-qualifier cannon argued by Defendants, "under HIPAA" would apply to both categories of information, "not just to the second type as they argue." *Id*. at ¶ 62.

Next, the Appellate Court found that the legislature could have easily excluded all healthcare workers from the Act's protections if that was its intent, but it did not do so. *Id*. at ¶ 64. The Court astutely noted that the Act already contains express blanket exclusions for certain sectors of the workforce, such as financial institutions subject to Title V of the

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federal Gramm-Leach-Bliley Act of 1999 or employees, contractors, or subcontractors of local government or the State, but no such exclusion exists for healthcare workers. Therefore, the Court declined to rewrite the Act to provide such an exclusion. *Id*.

Finally, the Appellate Court found that because the "language is plain, [it] need not consider other sources to discern statutory meaning." *Id*. at ¶ 68 (citations omitted). But even if the court were to consider Defendants' legislative-history argument, it would not be persuaded. *Id*. BIPA's sponsor asserted that BIPA provided "exemptions as necessary for hospitals." *Id*. But the Appellate Court recognized that this statement supports and is fully consistent with its finding that the exclusion is limited to *patient* data. Indeed, the Court noted that "Representative Ryg ended her remarks, immediately prior to passage, by stating: 'we are in very serious need of protections for the citizens of Illinois when it comes to biometric information.' Those citizens include the nurses at issue here." *Id*. (internal citations omitted).

Breaking from the majority, a dissenter believed that the phrase "under HIPAA" should be interpreted to mean "as defined by HIPAA." *Id*. at ¶ 86.

STANDARD OF REVIEW

The standard of review is *de novo* for three reasons. First, "an interlocutory appeal under Rule 308(a) necessarily involves a question of law[.]" *Rogers v. Imeri*, 2013 IL 115860, ¶ 11 (citing *In re Marriage of Mathis,* 2012 IL 113496, ¶ 19; *Barbara's Sales, Inc. v. Intel Corp.,* 227 Ill. 2d 45, 58 (2007)). Second, the *de novo* standard applies because this appeal arises from an order denying a Section 2-619 motion to dismiss. *Feltmeier v. Feltmeier*, 2017 Ill. 2d 263, 266 (2003). Finally, the interpretation of a statute is a question of law that is reviewed *de novo*. *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30.

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ARGUMENT

I. The Appellate Court Got It Right: The Legislature Did Not Exclude Healthcare Workers From the Act's Protections.

The Appellate Court, consistent with practically every other state and federal court to consider the issue, correctly held—*twice*—that biometric information of health care workers is not excluded from protection under the Act. (A86, ¶ 47; A138, ¶ 71). Not only is this the only result dictated by the express language of the statute, it also comports with dictionary definitions of the statutory terms, gives best effect to every word in the statute, and directly reflects the legislative intent motivating the Act's passage (*i.e.*, to ensure that individuals are provided informed consent regarding the collection of their biometric data). It also provides the greatest possible incentive for biometric data collectors to take action to correct their prior violations. The legislature included the words "under HIPAA" to specify, qualify and limit the information contemplated for "health care treatment, payment, or operation"—that is, *patient* information, which is the only kind of information protected "under HIPAA."

When interpreting a statute, the court's primary objective is to "ascertain and give effect" to the intent of the legislature. *Rosenbach*, 2019 IL 123186, ¶ 24; *VC&M, Ltd.*, 2013 IL 114445, ¶ 30. As this Court has held, and the Appellate Court astutely noted, "[t]he most reliable indicator of the drafters' intent is the language they chose to use in the statute itself." (A126, ¶ 42) (citing *VC&M, Ltd.*, 2013 IL 114445, ¶ 30). As such, legislative intent is best understood by the plain language of the statute. *Rosenbach*, 2019 IL 123186, ¶ 24; *Gillespie Comm. Unit Sch. Dist. No. 7 v. Wright & Co.*, 2014 IL 115330, ¶ 31. "Legislative intent can be ascertained from a consideration of the entire Act, its nature, its object and

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the consequences that would result from construing it one way or the other." *Fumarolo v. Chicago Bd. of Educ.,* 142 Ill.2d 54, 96 (1990).

Furthermore, courts should not "construe words and phrases of a statute in isolation; instead, all provisions of a statute are viewed as a whole." *In re Donald A.G.,* 221 Ill.2d 234, 246 (2006). And finally, "[t]he courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience or injustice, and a statute will be interpreted so as to avoid a construction which would raise doubt to its validity." *Harris v. Manor Healthcare Corp.,* 111 Ill. 2d 350, 363 (1986) (internal citation omitted); *accord State Farm Mut. Auto. Ins. Co. v. Grater*, 351 Ill.App.3d 1038, 1041 (2nd Dist. 2004). Thus, "when a statute's language is clear and unambiguous, a reviewing court should not read in exceptions, limitations, or conditions." *Petition of K.M.,* 274 Ill. App. 3d 189, 194 (1st Dist. 1995).

A. The Court Need Not Engage in Linguistic Gymnastics to Ascertain the Legislature's Intent.

Leaning heavily on the dissent, Defendants insist the text is unclear and condemn the Appellate Court for "misapply[ing] bedrock rules of statutory construction." Defendants' Brief ("Defs.' Br.") at 13. Zeroing in on the first of three uses of the word "or" in the sentence at issue, Defendants claim the Illinois legislature used this term in the disjunctive to identify two totally separate and mutually-exclusive categories of information: (1) "information captured from a patient in a health care setting" (what Defendants unilaterally label the "Patient Data Exclusion"); and (2) "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." *Id*. at 14 (citing 740 ILCS 14/10). In addition to fixating on the first "or," Defendants attribute great

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significance to the fact that the term "information" is used twice, which they claim further signals an intent to place two distinct kinds of information into separate buckets. *Id*.

But this is just making something simple complicated. Using plain text, the legislature deliberately 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* [HIPAA]." 740 ILCS 14/10 (emphasis added). Immediately following this language is a sentence which explicitly references data that originates only from a patient. *See* 740 ILCS 14/10 ("Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening."). Clearly, the legislature sought to avoid any conflicts with HIPAA while ensuring BIPA compliance would not interfere with or impede medical care or treatment, and its specific use of the words "*from a patient*" unequivocally reflects an intent to exclude *patient* biometric data from the Act's provisions because it is already protected by HIPAA.

1. "Or," Like Every Other Word, Must Be Read In Context.

Doubling down, Defendants maintain that the two categories of information they say are divided by the first "or" must "be taken separately.'" Defs.' Br. at 14-15 (citation omitted). They then conclude that, "information is exempt from the Privacy Act if it satisfies *either* statutory criteria." *Id*. (emphasis in original). But Defendants place far too much significance on the word "or," a term used 79 times in the Act and not always in the disjunctive. For example, in one of its most substantive sections, the Act provides, "[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a

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person's ***or*** a customer's biometric identifier or biometric information, unless … ." 740 ILCS 14/15(b) (and compare to similar language in Section 15(c)). Under Defendants' interpretation, the terms "person" and "customer" must refer to different things. This is impossible because "customers" are also "persons."

Ultimately, the grammatical categorization of this particular "or" should have no impact on the Court's analysis. The word "or" does not mechanically mean that language appearing before and after it refers to two entirely different, unrelated categories of information. As the Appellate Court correctly pointed out, "the two categories can be seen as protecting: (1) information captured from the patient in a healthcare setting; and (2) information that is already protected 'under [HIPAA].'" (A132, fn8) (quoting 740 ILCS 14/10). And as the Appellate Court observed, Defendants do not apply their "'or' is always disjunctive" rule to the other two uses of this word *in the same sentence*. Inconsistently, Defendants "read the first 'or' as disjunctive but the second 'or' as conjunctive, thereby giving two different meanings to the very same word in the very same sentence" while attempting to "manipulate the last antecedent doctrine." (A132, fn9).

2. There is No "Redundancy" Problem.

Defendants have never proffered any serious explanation for why the legislature would arbitrarily exclude health care workers from BIPA's protections. Rather than engage with the plain text, as required by basic principles of statutory construction, Defendants complain that the Appellate Court rationale "does not remedy the problem of redundancy." Defs.' Br. at 18. But there is no problem to solve. There is no unassailable canon of statutory construction to avoid redundancy, much less by sacrificing the ordinary meaning of the plain text, contradicting the surrounding text, or making a mockery of the clear intent of the legislature. *See White v. United Airlines*, 987 F.3d 616, 622 (7th Cir. 2021) ("[T]he

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presence of some redundance is rarely fatal on its own to a statutory reading"); *see also Bridges v. United States*, 991 F.3d 793, 802 (7th Cir. 2021) ("[A] textual argument based on avoiding redundancy is not necessarily a show-stopper").

Nevertheless, after applying basic principles of statutory construction and rules of grammar, no redundancy results from an interpretation of the sentence at issue where the information preceding and following the "or" are limited only to *patient* information. One must look at the verbs used in the two sub-exclusions or categories: the information preceding the "or" refers to information "captured" in a "health care setting", which means "to record in a permanent file (as in a computer)." *See* 740 ILCS 14/10; Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/capture (last visited May 11, 2023). Thus, the first category refers to information that is captured, or recorded in a permanent file, from an individual patient in a healthcare setting. The information following the "or" refers to information "collected, used or stored." The term "collect" means to "to bring together into one body and place", "to gather or extract from a number of persons or sources," and "to gather an accumulation of." *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/collect (last visited May 11, 2023). Thus, as the Appellate Court aptly noted, "after the capture of information from an individual patient in a healthcare setting (described in the first category), that information may be gathered or accumulated from a number of persons into one place." (A131, ¶ 59). In sum, the language preceding the "or" covers information captured from a patient in a healthcare setting while the language following it covers information used or stored after it is captured and accumulated. Accordingly, "there is simply no redundancy in this statute." (*Id.*) (internal citations omitted).

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Even if there were a "redundancy" problem, Defendants cannot solve it. Defendants urge this Court to apply its convoluted interpretation to find that the "Appellate Court overlooked the legislature's use of terms of art that appear over and over again in HIPAA regulations … ." Defs.' Br. at 17. But to accept Defendants' interpretation, one must accept that "information captured from a patient" is something entirely different from information "collected … for health care treatment" *as defined by* HIPAA. But biometric data collected from a patient for "treatment", as that term is defined by HIPAA, ***is*** unquestionably also captured from a patient.

The reality is that like many statutes, BIPA unremarkably does have some superfluous and overlapping language. For example, the Act states that a "private entity" does not include a "state or local government agency", while also stating it does not include "any court of Illinois", which of course is a "state or local government agency." *See* 740 ILCS 14/10). The Act also employs other terms, such as "X-ray" and "roentgen process" which are essentially the same thing. *See* 740 ILCS 14/10. That the plain language may reveal some redundancy bears little significance; the Court should not abandon the "fundamental rule of statutory construction" and read the statute in a way that fails to give effect to the legislature's stated intent to protect Illinois citizens in the broadest possible sense. *See City of Chicago v. Janssen Pharm., Inc.*, 2017 IL App (1st) 150870, ¶ 20.

3. The Last Antecedent Rule Does Nothing to Help Defendants.

Defendants next posit that the Appellate Court "misapplied the last antecedent rule because it determined 'under HIPAA' would apply to the word 'operations,' rather than to 'treatment' and 'payment' as well." Defs.' Br. at 20. Defendants suggest "the context of the statute shows 'under [HIPAA]' applies to all three terms—particularly because variations of the phrase 'health care treatment, payment, or operations' is commonly used

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throughout HIPAA regulation." *Id*. in addition, Defendants claim the Appellate Court "erroneously applied the wrong definition of 'under[,]'" which should have been defined to mean "guides, controls, and instructs the meaning of 'treatment, payment, or operations'". *Id*. at 21. In essence, Defendants, mirroring the dissent, argue that the phrase "under HIPAA" is a directive to healthcare employers and their workers to consult HIPAA and discern how terms like "operations" are defined in that statute. Defs.' Br. at 19-21 (citing A140-141, ¶¶ 80, 82). But Defendants' suggestion contradicts the plain and unambiguous text and the Court's duty to apply the statute as written.

As the Appellate Court correctly noted, this argument ignores the primary meaning of the word "under" when used as a proposition, which means "below or beneath so as to be *** covered [or] protected *** by." (A133-134, ¶ 63) (citing Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/under (last visited May 9, 2022)). Rather, to reach their predetermined outcome, Defendants conveniently select the secondary meaning, which defines "under" as "subject to the authority, control, guidance, or instruction of." Defs.' Br. at 19 (internal citation omitted). The Appellate Court also noted that Defendants urged the Court to rewrite the statute, disregard the words "under HIPAA" and substitute them with the words "as defined by HIPAA." (A134, ¶ 6). But unlike the exclusion for "donated organs, tissues or parts" two sentences before the one at issue,[4] the General Assembly deliberately chose not to use the phrase "as defined" when referencing another statute in the HIPAA exclusion. Courts are not authorized to "rewrite

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[4] *See* 740 ILCS 14/10 ("Biometric identifiers do not include donated organs, tissues, or parts ***as defined*** in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency.") (emphasis added).

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a statute to add provisions or limitations the legislature did not include." *See Zahn v. North American Power & Gas, LLC,* 2016 IL 120526, ¶ 15. Defendants' approach would undermine the General Assembly's intention to provide the broadest and most comprehensive biometric privacy protections to Illinois citizens and would instead isolate all data utilized for "health care treatment, payment, or operations" from the "under HIPAA" qualifier.

This Court must apply the tool of statutory construction which "provides that 'a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (citations omitted). In doing so, the Court must also be reminded that "structural or contextual evidence may 'rebut the last antecedent inference.'" *Id.* at 355 (citation omitted). This only make sense here because collecting biometric data from a nurse is never for treatment "*under* HIPAA," payment "*under* HIPAA," or operations "*under* HIPAA." The Appellate Court ultimately found that "the biometric information of employees is simply not defined or protected 'under HIPAA.'" (A85, ¶ 44; A134, ¶ 64). And consistent with its duty to apply the words as written in the Act, it concluded "the plain language of the statute does not exclude employee information from the Act's protections because they are neither (1) patients nor (2) protected under HIPAA." (A85, ¶ 44; A134, ¶ 6).

B. If the Legislature Intended to Exempt Health Care Providers and Their Vendors Whenever They Collect Biometric Data For "Operations," It Would Have Expressly Done So.

The General Assembly knew how to provide categorical exemptions for certain entities. *See* 740 ILCS 14/25. In Section 25, the Act provides a broad, categorical exclusion for financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act of 1999.

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740 ILCS 14/25(c); *see also* (A134, ¶ 64) ("Where the legislators wanted to create blanket exclusions for certain sectors of the workforce, they expressly provided [for] that…"). Additionally, the Act provides a broad, categorical exclusion to a "contractor, subcontractor, or agent of a State agency or local unit of government … ." 740 ILCS 14/25(e); *see also* (A134, ¶ 64) (the Appellate Court, observing other broad sectors excluded from BIPA, which included "employees, contractors, or subcontractors of local government or the State as provided in section 25"). Thus, if the legislature intended to exempt HIPAA-covered entities (and their suppliers) from compliance or exclude their workers from BIPA's protections when biometrics are collected for "operations", it would have expressly done so in Section 25, as opposed to burying it in the middle of a definition.

But there is no such broad, categorical exclusion for HIPAA-covered entities or health care workers, and the Appellate Court rightfully refused Defendants' invitation to rewrite the statute to satisfy its self-serving, *post hoc* rationale. (A136, ¶ 65) ("[t]here is simply no provision or reference to the exclusion of employee biometric data in the Act or its protections in HIPAA. Thus, we will not add employee biometric data as information to be excluded by the Act because it would be contrary to its plain language.")

There is no reason to believe the General Assembly intended to exempt healthcare providers whenever they collect biometrics for "operations" or otherwise. On the contrary, the Act's exclusion for "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" is purposefully limited in scope. And for good reason. Patient biometric information is already strictly protected under HIPAA, with severe penalties for entities that fail to comply, and fines ranging from $50,000—$250,000 as well as sentences of one to ten years imprisonment. 42 U.S.C. 1320d–6(b)). But HIPAA

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does not govern and provides no protection whatsoever to employees or their data. Defendants' proposal that their wrongful disclosure of a *patient's* biometric data on one occasion could mean a six-figure fine, but their disclosure, sale, lease or otherwise profiteering off a *worker's* biometric data even thousands of times should carry *no consequences whatsoever* is wholly unreasonable. Unquestionably, the General Assembly did not intend to leave healthcare employees exposed to a heightened risk of biometric data compromise, with no statutory protection, and no avenue for redress when their biometric data is abused.

C. The Act's Plain Text Confirms that the HIPAA Exclusion Applies Only to Patient Data.

Defendants emphasize that Plaintiffs' allegations "make clear that the technology at issue was used only for health care treatment, payment, and operations, as those terms are *defined by* HIPAA." Defs.' Br. at 2-3. That much is true, but it is irrelevant. The Act does not exclude information "defined by" HIPAA; rather, it excludes information protected "under HIPAA."

The only kind of information protected, governed or defined *under HIPAA* is patient information. Notably, the phrase "information collected, used, or stored for *health care treatment, payment, or operations under [HIPAA]*" was not created by the General Assembly. 740 ILCS 14/10. It borrowed this language from *The Standards for Privacy of Individually Identifiable Health Information* (*i.e.,* the "Privacy Rule"), 65 FR 82462-01 of HIPAA which provides: "a covered entity may use or disclose protected health information [("PHI")] [5] for its own *treatment, payment, or health care operations*." *Compare* 740 ILCS

[5] PHI, or "individually identifiable information", 45 C.F.R. § 164.501, is defined by Congress and the Department of Health and Human Services to mean, information:

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14/10 (emphasis added) to 45 C.F.R. § 164.506 (emphasis added). HIPAA is not an employment statute, does not regulate employee data, and does not govern the duties of employers or the rights of employees, let alone associated technology vendors. The Privacy Rule component of HIPAA "sets a floor of ground rules for health care providers, health plans, and health care clearinghouses to follow, in order to *protect patients* and encourage them to seek needed medical care." 65 FR 82464 (emphasis added). It further provides that "[t]he provision of high-quality health care requires the exchange of personal, often-sensitive information between an individual and a skilled practitioner. *Vital to that interaction is the* ***patient's*** *ability to trust that the information shared will be protected and kept confidential*." 65 FR 82462 (emphasis added). Entities subject to the Privacy Rule are also prohibited from using a patient's PHI without first securing the patient's consent. 45 C.F.R. § 164.506.

The Privacy Rule was enacted for one reason: to protect patient health information and restrict a covered entity's ability to use this information without authorization or consent to situations related to the covered entity's own treatment, payment, and operations. HIPAA has no applicability and no relevance to a health care employee's information, as the statute explicitly states. "'[E]mployment records held by a covered entity in its role as employer' are specifically excluded from HIPAA protection." *Cooney*

> [C]reated or received by a health care provider, health plan, employer, or health care clearinghouse; and related to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Northwestern Mem. Hosp. v. Ashcroft, 362 F. 3d 923, 934 (7th Cir. 2004) (citing 42 U.S.C. 1320d(6); 45 C.F.R. § 160.103).

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v. Chicago Pub. Sch., 407 Ill. App. 3d 358, 361-62 (1st Dist. 2010) (citing 45 C.F.R. § 160.103 (2006) ("[PHI] excludes individually identifiable information in ... [e]mployment records held by a covered entity in its role as employer."); *see, e.g., In re Johnson*, 2008 WL 5025015, at *3 (N.J. Super. Ct. App. Div. No. 28, 2008). Thus, mirroring language from the patient-focused HIPAA Privacy Rule, the General Assembly clearly intended to exclude only *patient* information already covered by HIPAA from BIPA's protections. Contrary to what Defendants say, the source of the data *does* matter, because unless it is patient information, there is nothing for HIPAA to define.

D. Reading the HIPAA Exclusion Narrowly to Apply Only to Patient Information Fully Aligns with the Legislative Purpose of the Act.

The privacy concerns driving the Act's enactment, as set forth in its legislative findings, wholly discredit Defendants' theory that the Illinois General Assembly intended to excuse healthcare providers from compliance any time they collect biometric data for any purpose. Defendants' denial that they seek a wholesale exemption is belied by how their preferred application of the HIPAA exclusion actually plays out. Because any biometric data collection by a healthcare provider is always for "operations", whether it is from a physician entering a secured parking lot, an administrative assistant accessing a computer, or a landscaper who is mowing the lawn, Defendants know their theory would result in a *de facto* categorical exemption for healthcare workers. Defs.' Br. at 24.

This is not the result the General Assembly intended, which was to address an urgent need to provide Illinois citizens with the broadest and most comprehensive biometric privacy protections. *See* 740 ILCS 14/5(f)-(g) ("[t]he full ramifications of biometric technology are not fully known," and the "public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention,

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and destruction of biometric identifiers and information"); 95th Ill. Gen. Assembly, House Proceedings, May 30, 2008, at 249 (Illinois is in "very serious need of protections for the citizens of Illinois when it comes to biometric information"). Consistent with the General Assembly's stated purpose, the Appellate Court correctly held, "[f]inding that the nurses at issue here are covered by the Act vis-à-vis their employers and the Medstation marketing company furthers the stated goals of the Act." (A136, ¶ 67).

II. Virtually Every Court to Address the Issue Has Determined that the HIPAA Exemption Applies Only to Patient Biometric Data.

The Appellate Court's decision is hardly an outlier. Virtually every trial court to have considered the issue, and each one to have engaged in any serious legal analysis, has held that Section 10's exclusion is limited to *patient* data, categorically rejecting any application to health care workers. At least two courts found Defendants' proposed interpretation to be "absurd" and "nonsensical." *See Bruhn v. New Albertson's, Inc. et al.*, No. 2018-CH-01737 (Cir Ct. Cook Cty. July 2, 2019); *Winters v. Aperion Care, Inc.*, No. 2019-CH-6579 (Cir. Ct. Cook Cty. Feb. 11, 2020); *Loving v. Belhaven Nursing & Rehabilitation Center, LLC*, No. 2020-CH-04176 (Cir. Ct. Cook Cty. June 23, 2021); *Heard v. Becton, Dickinson & Co.,* 524 F. Supp. 3d 831 (N.D. Ill. 2021). In fact, eight of the nine trial courts to have considered the issue, all of which are in Cook County or the United States District Court for the Northern District of Illinois, unanimously concluded that health care worker biometric data is not excluded from BIPA's scope.[6]

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[6] *See Mosby* C1471; A63-64; *Heard*, 2021 WL 872963, at *8; *Thurman v. Northshore Univ. Health Sys.*, 2019 WL 7249205, at *11 (Cir. Ct. Cook Cty. Dec. 12, 2019); *Loving*, No. 2020-CH-04176 (Cir. Ct. Cook Cty. June 23, 2021); *Webster v. Windsor Est. Nursing and Rehab Centre, LLC*, No. 2019-CH-11441, Transcript of Proceedings (Cir. Ct. Cook Cty. Nov. 16, 2020); *Winters v. Aperion Care, Inc., et al.*, No. 2019-CH-6579 (Cir. Ct. Cook Cty. Feb. 11, 2020); *Peaks-Smith v. St. Anthony's Hosp.*,

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All of these courts, after considering the same arguments advanced by Defendants, concluded that Defendants' interpretation is contrary to the unambiguous language of the statute which plainly exempts "information collected *from a patient* and not information collected from healthcare workers or providers." *See e.g., Winters*, No. 2019-CH-6579 (Cir. Ct. Cook Cty. Feb. 11, 2020) (emphasis original). Even if the language of the statute were ambiguous, courts have held that the "absurd result" of excluding "all members of the healthcare industry" directly conflicts with the intent of the legislature. *See id.*; *see also Loving*, No. 2020-CH-04176 (Cir. Ct. Cook Cty. June 23, 2021); *Heard*, 2021 WL 872693, at *8; *Bruhn*, No. (Cir. Ct. Cook Cty. July 2, 2019); *Peaks-Smith*, No. 2018-CH-07077 (Cir Ct. Cook Cty. Jan. 7, 2020); *Winters*, No. 2019-CH-6579 (Cir. Ct. Cook Cty. Feb. 11, 2020). As such, both the trial courts and the Appellate Court correctly concluded that BIPA's HIPAA exclusion does not immunize Defendants from BIPA claims asserted by Northwestern's and Ingalls' workers. (*Id.*).

Facing a dearth of any contrary authority, Defendants attempt to shoehorn *dicta* from inapposite rulings adjudicating a completely different issue—the scope of exclusion for patient biometric data—into the analysis. *See* Defs.' Br. at 15 (*citing Vo v. VSP Retail Dev. Holding, Inc.*, No. 19 C 7187, 2020 WL 1445605 (N.D. Ill. Mar. 25, 2020); *Delma Warmack-Stillwell v. Christian Dior, Inc*., No. 22-C-4633, 2023 WL 1928109, at *3 (N.D. Ill. Mar. 25, 2023); *Svoboda v. Frames for Am., Inc.*, No. 21-C-5509, 22 WL 410719, at *1, 3 (N.D. Ill. Sept. 8, 2022); and *Crumpton v. Octapharma Plasma, Inc.*, 513 F. Supp. 3d 1006 (N.D. Ill. 2021)). But none of these cases address the issue before this Court:

No. 2018-CH-07077 (Cir. Ct. Cook. Cty. Jan. 7, 2020); *Bruhn*, No. 2018-CH-01737 (Cir. Ct. Cook Cty. July 2, 2019).

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namely, whether health care worker biometric data falls under BIPA's HIPAA exclusion. Rather, *Vo*, *Delma*, and *Svoboda* all addressed whether a consumer using virtual try-on software provided by an eyeglasses retailer was "a patient" providing her facial geometry in a "health care setting." *Vo*, 2020 WL 1445605, at *1; *Delma*, 2023 WL 1928109, at *3; *Svoboda*, 22 WL 410719, at *1, 3. Each court correctly held that they were, and therefore the collection of their facial geometry fell outside of BIPA's protections. *Id*. Similarly, in *Crumpton*, the court considered whether consumers who provided their fingerprints while donating plasma were "patients" in a "health care setting." 513 F. Supp. 3d at 1016. The court held they were not. *Id*. But regardless, none of these cases analyzed the HIPAA exemption and thus, offer no meaningful guidance to the issue on appeal.

Every trial court to apply well-established rules of statutory construction has easily reached the same conclusion: health care workers' biometric data is not excluded from BIPA's coverage. Sanctifying Defendants' reading of BIPA means an entire group of individuals—that is, employees and workers of HIPAA-covered entities—would have no protection whatsoever for their biometric data, under HIPAA or BIPA. Nothing in BIPA's plain text or its stated intent, let alone common sense, supports such a deleterious result.

III. The Question of Whether Healthcare Workers Are Categorically Exempt is An Inquiry of Law, Not Public Policy, and Policy Considerations Strongly Weigh In Favor of Rejecting Any Such Exemption.

Defendants and their amici ask the Court to decide this case on policy grounds. First, Defendants and their amici implore the Court to find a carveout for healthcare workers because they claim complying with BIPA (essentially, getting employees to sign a form) is all but impossible. In addition, Defendants' amici say this Court should reverse in the interests of scientific and economic considerations based on overblown concerns that

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affording biometric protection to healthcare workers will bring an end to biometric technology research, development, and availability in Illinois. Finally, the Court is warned that affirmance of the Appellate Court's decision will trigger one of the greatest wealth transfers in human history, shifting hundreds of billions of dollars from healthcare conglomerates into the pockets of their workers. As a result, we are told, hospitals will close, millions will have no access to healthcare, and patients (along with entire communities) will suffer.

Even if these doomsday assertions were grounded in fact (they are not), the question of whether healthcare providers and their biometric device and technology vendors are exempt from BIPA when collecting biometric data from workers does not rest on policy considerations. In other words, a court may not rewrite a statute to free a party from a duty because it performs a laudable public service, suffered during the COVID crisis, or is a sympathetic litigant. If that was how statutory interpretation worked, then *Plaintiffs*, along with the thousands of nurses, physicians, and other hospital workers they seek to represent (the people who *make* the daily sacrifices that Defendants credit themselves for), could rightly ask the Court to rule in their favor based on those considerations. But of course, this is not how legal disputes are resolved and, in any event, Defendants' arguments are quickly revealed as a masquerade.

A. Healthcare Providers Are Not Required to Use Biometric Devices, and Regardless, BIPA Does Not Hamper Their Use.

Defendants and their amici suggest they harvested the biometric data from health care workers without informed consent to comply with HIPAA and guidance from various institutes and agencies which favor the use of biometric technology. *See*, *e.g.*, Defs.' Br. at 25-28; Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 9-12; Br. of Advocate Health

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& Hosp. Corp., *et al*. as Amicus Curiae at 3-9. But in enacting BIPA, the legislature did not disfavor or interfere with the use of biometric devices or technology in any way. To the contrary, it ensured that compliance with BIPA's requirements would not interfere with or impede patient medical care or treatment. Aside from the fact that HIPAA already protects this data, the legislature recognized it would be potentially life-threatening for a health care provider to withhold emergency treatment requiring the collection of biometric data from an incapacitated patient because they were unable to sign a BIPA-compliant written release.

Careful to use words such as "recommends," "could," "encouraged," "may," "contemplate," and "preferred" when describing the force of the statements issued by the various entities, Defendants rightly stop short of suggesting they were compelled to break Illinois law. Defs.' Br. at 25-28. That is because neither HIPAA nor any other industry guidance ***requires*** the implementation of biometric authentication protocols. Indeed, Northwestern concedes that to verify a worker's identity for accessing the medical dispensing systems, they can *either* use their biometrics or a passcode that is manually entered. Defs.' Br. at 8.

Far from "directly conflict[ing]" with industry guidance, healthcare providers, like other private entities in Illinois, are free to use biometric devices and technology after complying with BIPA's easy-to-follow informed consent and biometric data security protocols. As this Court made clear, complying with BIPA "should not be difficult," and "whatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded; and the public welfare, security,

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and safety will be advanced." *Rosenbach*, 2019 IL 123186, ¶ 37. Defendants were not confronted with an "either or" proposition as they claim. Quite easily, they can follow industry recommendations *and* comply with BIPA.

B. Feasibility of Compliance Is Irrelevant to Statutory Construction, but Healthcare Employers Routinely Use Biometric Technology Without Violating BIPA.[7]

Defendants and their amici turn to deriding the Act itself, complaining that compliance is both virtually impossible and prohibitively expensive. At least two defense amici do not even recognize complying with the Act as an option; the only choices they see are to either discontinue using biometric devices and technology or face destruction. *See* Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 6, 12-13; Br. of Ill. Chamber of Commerce, et al. as Amicus Curiae at 4, 14-17. Especially for employers, who have direct access to and control over their workers, they can quickly, easily and efficiently provide notice and secure informed consent at virtually no cost.

Healthcare employers already have robust systems in place to ensure patients and workers sign-off on a myriad of questionnaires, policies, agreements, insurance, and other forms to ensure compliance with federal and state regulations. Including an additional one-page BIPA notice and consent form in the physical or electronic onboarding documents already presented to employees for signature is not challenging or costly. In fact, Northwestern has belatedly instituted a biometric consent protocol along with a retention

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[7] So do biometric technology vendors. Take, for example, Georgia-based Operative IQ, which "was built out of a need for a local Georgia-based EMS agency to track their medical supply inventory." Georgia does not even have a biometric privacy statute, but it still found compliance with other states' biometric statues to be a sound, prudent, and affordable business decision. *See*, *e.g.*, https://operativeiq.com/biometric-privacy-policy (last visited June 2, 2023).

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and destruction policy.[8] Similarly, Ingalls Memorial Hospital, which previously withdrew from this appeal after settling with its workers, had no difficulty coming into full compliance with BIPA. *See Mosby v. The Ingalls Memorial Hospital, et al.*, Case No. 18 CH 05031 (Cir. Ct. Cook County, Oct. 7, 2021), Settlement Agreement and Release at ¶ 80 ("The Ingalls Defendants hereby acknowledge and declare that they have implemented policies and procedures regarding the use of the Medstation Scanning Device at Ingalls Memorial Hospital facilities within the State of Illinois in accordance with BIPA."). In other words, Northwestern—whose $8.1 billion market capitalization is 34 times that of Ingalls—can afford to secure written informed BIPA consent from its workers.[9] Only *one* out of the *twelve* defense amici provide an example of why hospitals supposedly cannot comply, suggesting the time it might take to secure consent from emergency medical services (EMS) and workers from staffing agencies could mean the difference between life and death. Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 14-15. Remarkably, this amicus is suggesting that its members allow persons unrestricted access to vast storehouses of potentially addictive and lethal narcotics without: (1) requiring them to execute any hospital paperwork; or (2) enrolling them in the biometric medication dispensing system (which would make access to the system impossible).

Tellingly, Defendants and their amici are careful never to claim they have ceased using biometric technology or have any plans to, consistently couching the "impact" of this

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[8] *See* Northwestern University Biometric Information Privacy Policy and Biometric Identifier Collection Authorization Form, available at https://policies.northwestern.edu/docs/biometric-information-privacy-policy-final.pdf; https://policies.northwestern.edu/docs/biometric-identifier-collection-authorization-form.pdf (last visited May 17, 2023).

[9] https://nonprofitlight.com/il/harvey/ingalls-memorial-hospital (estimating Ingalls' net worth at approximately $238,000,000.00).

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Court's decision on their prospective ability to use biometric technology in the vaguest terms. *See, e.g.,* Defs.' Br. at 2 (the Court's ruling "will have a significant impact on healthcare providers and their vendors … ."); *see also* Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 2 (finding for the Plaintiff means hospital groups "often would elect not to use [biometric technology]."). Perhaps this is because these hospital conglomerates, like Ingalls and Northwestern, continue to implement and use biometric devices and technology; only now, they are making efforts to comply with the law.[10] The efficiencies promoted by biometric technology, coupled with the simplicity of compliance, is precisely why any threats to stop using it, even if relevant here, are unfounded.

C. Although The Impact on Commerce Is Irrelevant to Statutory Construction, BIPA Has Not Affected the Research, Development or Sale of Biometric Devices or Technology in Illinois.

Equally fanciful is the notion that unless this Court grants an exemption for the healthcare field, research and deployment of biometric technology will come to a screeching halt, as healthcare entities will find that any cost saving and patient safety considerations are outweighed by the requirement to secure written informed consent for biometric data collection of workers. *See* Br. of Advanced Med. Tech. Ass'n as Amicus Curiae at 1-2. This is nonsensical. BIPA was enacted 15 years ago by unanimous vote. There is no evidence that the Act, or this Court's sound decisions interpreting it, have slowed or ceased the innovation, sale or deployment of biometric devices and technology

[10] Incredibly, one of Defendants' amici, representing 240 Illinois hospital and health care systems, says there is little point to its members complying with BIPA because: (1) they will probably be sued anyway, notwithstanding their full compliance with the Act; and, (2) their attorneys (some of the largest and most powerful law firms in the world) do not know how to defeat frivolous lawsuits. Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 14-15.

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in Illinois except in apparently two instances: a "robot dog" and an "art selfie" app. *Id*. at 7.

Defendant BD—one of the world's largest suppliers of biometric devices—itself makes no such claims. BD, along with dozens of other technology companies, continues to research, develop, and sell countless biometric devices in Illinois exactly as it did before this litigation. Perhaps this is because BD knows that selling its technology to BIPA-compliant Illinois employers is good business. Requiring private entities to receive informed consent and properly safeguard biometric data only furthers the Act's goal of encouraging the responsible use of biometric technology and preventing irreversible harms before they occur while imposing no additional burden, hardship or expense whatsoever.

D. Potential Damages Are Irrelevant to Statutory Construction, But Defendants Grossly Exaggerate Their Potential Exposure.

Most insulting are Defendants' and their amici's maniacal assessment of their liability exposure. To put it charitably, this red herring is getting old. Ever since briefing in *Rosenbach* commenced approximately five years ago, irresponsible biometric data collectors have sought an escape hatch, not to avoid "annihilative liability," but to eliminate the possibility of having to pay any damages whatsoever. In furtherance of this true agenda, culpable defendants have represented to this Court, *ad nauseum*, that applying the plain text as written will mean exorbitant damages and the shuttering of virtually every business

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in Illinois. In the Supreme Court briefing in *Rosenbach*,[11] *McDonald*,[12] and *Cothron*[13] alone, Defendants and their allies dedicated hundreds of pages and untold attorneys' fees trying to convince the Court of this so-called "fact." The briefs in this case hardly disappoint, once again forecasting that unless the Appellate Court's decision is overturned, trial court judges will enter constitutionally indefensible judgments and turn Illinois into a barren healthcare wasteland. *See* Br. of Ill. Health & Hosp. Ass'n. as Amicus Curiae at 13-14 (claiming a class of 150 nurses is subject to an "extremely conservative" award of $1.5 billion, or $10 million per nurse); Br. of Advocate Health & Hosp. Corp., et al. as Amicus Curiae at 2, 16 (forecasting damages "easily" reaching "*hundreds of billions of dollars* in cumulative liability") (emphasis in original); Br. of Ill. Chamber of Commerce, et al. as Amicus Curiae at 22 (claiming exposure in the "billions of dollars for one business alone.") One amicus advises the Court that insurance does not cover BIPA claims, notwithstanding all the decisions in which courts have found the existence of insurance coverage for BIPA actions. Br. of Advocate Health & Hosp. Corp., et al. as Amicus Curiae at 17, fn. 6).[14]

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[11] *See* Br. of Illinois Chamber of Commerce as Amicus Curiae at 10, *Rosenbach v. Six Flags Ent. Corp.*, No. 123186 (Ill. Sept. 10, 2018) (charting potential damages of $5 billion for an employer with 1,000 employees that scan their fingerprints four times per workday), *available at* https://epic.org/wp-content/uploads/amicus/bipa/rosenbach/Rosenbach-v-Six-Flags-Illinois-Chamber-of-Commerce-Amicus.pdf (last visited May 18, 2023).

[12] *See McDonald v. Symphony Bronzeville Park, LLC,* 2022 IL 126511 at ¶ 47 (noting that *amici* supporting Bronzeville's position suggest that the Court's decision "stands to expose employers to potentially devastating class actions that can result in financial ruin").

[13] *See Cothron v. White Castle*, 2023 IL 128004, at ¶ 40 ("White Castle estimates that if plaintiff is successful and allowed to bring her claims on behalf of as many as 9500 current and former White Castle employees, class-wide damages in her action may exceed $17 billion.")

[14] *See, e.g., Thermoflex Waukegan, LLC v. Mitsui Sumitomo USA, Inc.,* No. 21 C 788, 2023 WL 319235 (N.D. Ill. Jan. 19, 2023); *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978 (Ill. May 20, 2021); *Citizens Insurance Co. of*

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Yet, in the 54 months since *Rosenbach*, none of this Court's rulings have triggered a single bankruptcy, annihilated a single business, or resulted in a single settlement or judgment premised upon a "per scan" theory of damage, which is the only way to arrive at such outrageous damages figures. What has happened are fair and reasonable settlements by responsible defendants.[15] Take former Defendant Ingalls, which managed to solve its the problem without paying billions. *See Mosby v. The Ingalls Memorial Hospital, et al.*, Case No. 18 CH 05031 (Cir. Ct. Cook County, Mar. 14, 2022), Final Approval Order. As a rational litigant, Ingalls honestly assessed its exposure, negotiated a court-approved resolution of just over $800.00 per class member and moved on. *Id*. In contrast, the

America v. Wynndalco Enterprises, LLC, No. 20 C 3873, 2022 WL 952534 (N.D. Ill. Mar. 30, 2022); *American Family Mutual Insurance Co., et. al. v. Carnagio Enterprises, Inc., et. al.*, No. 20 C 3665, 2022 WL 952533 (N.D. Ill. Mar. 30, 2022); *Citizens Insurance Co. of America v. Highland Baking Co., Inc.,* 20 CV 4997, 2022 WL 1210709 (N.D. Ill. Mar. 29, 2022); *State Automobile Mutual Insurance Co. v. Toney's Finer Foods Enterprises, Inc., et al.,* 589 F.Supp.3d 919 (N.D. Ill. 2022); *Citizens Insurance Co. of America v. Thermoflex Waukegan, LLC*, No. 20 CV 5980, 2022 WL 602534 (N.D. Ill. Mar. 1, 2022); *American Family Mutual Insurance Co. v. Caremel, Inc.*, No. 20 C 637, 2022 WL 79868 (N.D. Ill. Jan. 7, 2022); *Twin City Fire Insurance Co. v. Vonachen Services, Inc.*, No. 20 CV 1150, 2021 WL 4876943 (C.D. Ill. Oct. 19, 2021).

[15] *See, e.g.,* preliminarily court-approved post-*Cothron* settlement in *Fulton v. SCR Medical Transport, Inc.*, Case No. 20 CH 927 (Cir. Ct. Cook County, Mar. 23, 2023), Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement at 2 ($1,443,000.00 gross settlement or $1,500 per class member); *Simmons, et al. v. Nascote, Inc., et al.,* Case No. 20 L 39 (Cir. Ct. Boone County, April 12, 2023), Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement at 2 ($2,350,000.00 gross settlement or $1,499.68 per class member). While one amicus refers to a recent settlement against a biometric device provider as a portend of "annihilative liability," it deliberately fails to mention the post-*Cothron* court-approved settlement amount. Br. of Illinois Health & Hosp. Ass'n., et al. as Amicus Curiae at 13-14, fn. 10. It was $4,300,000.00 gross or $170 per class member – not exactly "ruinous liability" for a company with a market capitalization of $3.28 billion. *See Heard v. Omnicell, Inc.,* Case No. 19 CH 6817 (Cir. Ct. Cook County, Mar. 23, 2023) (Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement at 5-6); https://stockanalysis.com/stocks/omcl/market-cap (last visited May 18, 2023).

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remaining Defendants apparently hope to solve their self-inflicted problem by peddling the myth that this lawsuit is an extinction-level event, which will soon leave Illinois citizens to suffer the same fate as the dinosaurs.

Defendants' analysis is grounded in fiction, similar to every other apocalyptic prophecy spouted to this Court in BIPA appeals over the last few years. As this Court and the Appellate Court recently recognized, trial court judges know and can be trusted to award fair and constitutionally-sound damages. "A trial court presiding over a class action—a creature of equity—would certainly possess the discretion to fashion a damage award that (1) fairly compensated claiming class members and (2) included an amount designed to deter future violations, without destroying defendant's business." *Cothron*, 2023 IL 128004, at ¶ 42 (citations omitted). That is the right balance and exactly the one to which trial courts overseeing BIPA actions have strictly adhered throughout the evolution of this Court's BIPA jurisprudence. As shown by the facts, the *end-of-the-world mantra* chanted by BIPA violators and their fearmongering interest groups is nothing but a fairy tale.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellees Lucille Mosby and Yana Mazya respectfully request that the Court answer the *Mosby* and *Mazya* certified questions in the negative and affirm the *Mosby* trial court's denial of BD's motion to dismiss and the *Mazya* trial court's denial of Northwestern's motion to dismiss.

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Dated: June 14, 2023

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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 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, and the certificate of service, contains 36 pages.

/s/ *James B. Zouras*
James B. Zouras

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, *Plaintiff-Appellee,* v. THE INGALLS MEMORIAL HOSPITAL, et al., *Defendants-Appellants.*	)	
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL, et al., *Defendants-Appellants.*	)	No. 129081

The undersigned, being first duly sworn, deposes and states that on June 14, 2023, there was electronically filed and served upon the Clerk of the above court the Brief of Appellees. On June 14, 2023, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ James B. Zouras
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ James B. Zouras
James B. Zouras

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