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.

YANA MAZYA, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

NORTHWESTERN LAKE FOREST HOSPITAL AND NORTHWESTERN MEMORIAL HEALTHCARE,
Defendants-Appellants.

On Appeal from the Appellate Court of Illinois, First Judicial District,
Case Nos. 1-20-0822 & 1-21-0895 (Cons.),
There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Case Nos. 18 CH 05031 & 18 CH 07161,
Hon. Pamela McLean Meyerson & Hon. Alison C. Conlon, Judges Presiding.

BRIEF FOR THE AMERICAN NURSES ASSOCIATION – ILLINOIS AND THE EMPLOYMENT LAW CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL'S EDWIN F. MANDEL LEGAL AID CLINIC AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST OF *AMICI*

American Nurses Association – Illinois is a non-profit, I.R.C. § 501(c)(6), professional organization that represents and unifies our members in the practice of nursing. ANA-Illinois represents the interests of over 200,000 licensed registered professional nurses and advanced practice registered nurses from all areas of practice and academia in Illinois, as well as the interests of these nurses' patients. ANA-Illinois also promotes the empowerment and advancement of the profession and access to equitable, affordable quality healthcare in the state.

The Employment Law Clinic has represented indigent clients, served as advocates for people typically denied access to justice, and worked to reform the legal system to be more responsive to the interests of the poor for over forty years. In that time, the Employment Law Clinic's dedicated attorneys and law students have represented hundreds of plaintiffs in individual cases and thousands in class action lawsuits.

The Employment Law Clinic has a special interest in seeing that rights of workers are respected and protected. This case involves an issue of significant importance to the rights of healthcare workers to protect their biometric data from capture and dissemination without their consent. The Employment Law Clinic has a strong interest in ensuring that workers who are injured by violations of the Illinois Biometric Information Privacy Act

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(BIPA), 740 ILCS 14/1 *et seq.*, can pursue their claims in court and that no class of workers is excluded from the Act's protection.

STATEMENT OF THE CASE

The Biometric Information and Privacy Act (BIPA), 740 ILCS 14/1 *et seq.*, was enacted in 2008 by the Illinois legislature to regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 19, 129 N.E.3d 1197, 1203 (2019) (quoting 740 ILCS 14/5(g)). BIPA places several obligations on private entities, including employers, in the "collection, retention, disclosure, and destruction" of biometric information. *Id.* at ¶ 20. Section 10, which defines biometric identifiers, excludes information "captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10.

Lucille Mosby worked at Ingalls Memorial Hospital as a registered pediatrics nurse from October 1987 to December 2017. *Mosby v. Ingalls Mem'l Hosp.*, 2022 IL App (1st) 200822, ¶ 8, 207 N.E.3d 1157, 1159 (2022). Yana Mazya worked at Northwestern Memorial Lake Forest Hospital as a registered nurse from November 2012 to December 2017. *Id.* at ¶ 20. Both Ms. Mosby and Ms. Mazya were required to scan their fingerprints to authenticate their identity and gain access to medication dispensing systems.

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Id. at ¶ 8, 20. At no point during their employment did the Defendants obtain their consent or provide them with a destruction policy and schedule. *Id.*

In their class action complaints,[1] Ms. Mosby and Ms. Mazya both alleged violations of BIPA under sections 15(a)–(d). They alleged that their employers had violated BIPA by failing to inform them in writing about the collection, storage, and use of their fingerprints; failing to provide a public retention schedule and guidelines for destroying fingerprints; failing to obtain written consent for the collection, storage, dissemination and use of their fingerprints; and failing to obtain consent before disclosure to third-party vendors. *Id.* at ¶ 9, 21. Defendants moved to dismiss on the grounds that employee information is specifically excluded from the statute because "(1) the biometric data that was collected, used, and/or stored restricted access to protected health information and medication and (2) the data was used for healthcare treatment and operations pursuant to HIPAA." *Id.* at ¶ 10.

Both circuit courts in *Mosby* and *Mazya* ruled that the exception for HIPAA was limited to patient information. *See id.* at ¶ 11, 25. Northwestern filed an application for leave to appeal pursuant to Rule 308 and requested to

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[1] Ms. Mosby filed a class-action suit on April 18, 2018, against Ingalls, UCM Community Health & Hospital Division, Inc., and the third-party vendor Becton, Dickinson and Company for violations of BIPA under sections 15(a)–(d). *Mosby*, 2022 IL App (1st) 200822, ¶ 8, 207 N.E.3d at 1159. Ms. Mazya filed a class-action suit on April 10, 2019, against Northwestern, Omnicell, Inc., and Becton, Dickinson and Company. Like Ms. Mosby, Ms. Mazya alleged violations of BIPA under sections 15(a)–(d). *Id.* at ¶ 19.

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consolidate the case with *Mosby*. The First District Appellate Court granted the motion on August 13, 2021. *Id.* at ¶ 31.

On February 25, 2022, the First District Appellate Court held that the exclusion "did not apply to biometric information collected by a health care provider from its employees." *Id.* at ¶ 34. Northwestern and BD, the two remaining Defendants, subsequently filed a joint petition for rehearing, which was granted. On appeal, Defendants argued that "(1) that the exclusion sets forth two categories, with the first category relating to patient information and the second category relating to the information of others, such as its employees; (2) that the phrase 'under [HIPAA]' in the second category applies to 'treatment, payment or operations" rather than to "collected, used or stored'; and (3) that [the court] should use the secondary meaning of "under" in the Merriam-Webster Dictionary, which is 'subject to the authority of.'" *Id.*

The First District Appellate Court held that biometric information of healthcare workers is not excluded under BIPA. The appellate court found that the statute's language is clear and that there was no redundancy in coverage because "the first category covers when the information is captured from a patient in a health care setting; and the second category applies when information is subsequently gathered and accumulated." *Id.* at ¶ 57–59. Thus, both categories apply to patient information. The court also rejected the Defendants' argument that the "under [HIPAA]" clause applies only to

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what immediately precedes it—"treatment, payment or operations." The court explained that this argument internally contradicted itself as it argued for both a disjunctive and conjunctive use of "or." *Id.* at ¶ 61. The court also found that the legislature would have excluded all healthcare workers from BIPA's protections if it had intended to do so, pointing to other blanket exclusions elsewhere in the statute for financial institutions subject to Title V of the Gramm-Leach-Bliley Act of 1999 and to employees of the local or state government in section 25. *Id.* at ¶ 64. Finally, the court considered legislative history and the BIPA's purpose and found that it was consistent with the interpretation of the statute's plain meaning. *Id.* at ¶ 67–69.

The appellate court's interpretation of BIPA is consistent with both the statute's plain language and its purpose. For the reasons discussed below, this Court should hold that healthcare workers' biometric information are protected under BIPA.

ARGUMENT

Since *Rosenbach*, this Court has consistently recognized strong protections for employees under BIPA. *See Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (finding that the catchall five-year limitations period applied to BIPA claims because it would "comport with the public welfare and safety aims of the General Assembly by allowing an aggrieved party sufficient time to discover the violation and take action"); *see also Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 41 (holding that claims under BIPA accrue with

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each scan of an individual's biometric identifier and affirming the legislature's intent to "subject private entities who fail to follow the statute's requirements to substantial potential liability"). This Court's recent decisions in *Tims* and *Cothron* demonstrate that BIPA must be construed in light of its purpose.

To exempt hundreds of thousands of healthcare workers from coverage without explicit language from the legislature to that effect would be contrary to BIPA's purpose. Statutory construction likewise supports interpreting the HIPAA exception to apply only to patient biometric information. The appellate court's construction is fully consistent with how courts, federal agencies, and Illinois legislators have understood HIPAA's purpose—to protect patient medical information. Finally, Defendants exaggerate the consequences of interpreting BIPA to include healthcare workers. Compliance with BIPA is straightforward and comes at little cost to employers.

I. If the Illinois Legislature Intended to Exempt an Entire Class of Workers, It Could Have Done So with Explicit Language.

When statutes contain explicit exceptions, courts have interpreted the absence of similarly explicit language to suggest a lack of legislative intent to create other exceptions. *See, e.g., F.C.C. v. NextWave Pers. Commc'ns Inc.,* 537 U.S. 293, 302 (2003) (noting that where Congress had intended to create exceptions to provisions of bankruptcy laws, "it has done so clearly and expressly"). Section 25 of BIPA states that "Nothing in this Act shall be

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construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." 740 ILCS 14/25(e). This carveout for state government employees demonstrates that when the legislature intended to exempt a specific class of employees, it did so in clear and explicit terms. *See Heard v. Becton, Dickinson & Co.*, 524 F. Supp. 3d 831, 844 (N.D. Ill. 2021) ("[T]he legislature did not include a provision explicitly stating that BIPA shall not be construed to apply to a health care provider, much less a biometric-device vendor. Alternatively, the legislature could have excluded health care institutions from the definition of private entity, but it did not.").

Interpreting BIPA to exempt healthcare workers would leave hundreds of thousands of workers without protection. Approximately 362,000 workers in Illinois are employed as "healthcare practitioners and technical occupations" and another 218,390 workers are employed in "healthcare support occupations." *State Occupational Employment and Wage Estimates Illinois*, U.S. Bureau of Lab. Stat. (2022).[2] These workers include 129,390 registered nurses and 7,990 nurse practitioners. Accepting Defendant's interpretation of BIPA would result in these—and thousands more—workers losing critical protection over their biometric information. Absent an explicit showing of intent from the legislature to do so, this Court should not accept

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[2] https://www.bls.gov/oes/current/oes_il.htm#31-0000.

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an interpretation that strips BIPA's ability to protect hundreds of thousands of workers.

II. Broadly Defining "[H]ealth [C]are [T]reatment, [P]ayment, or [O]perations" Contravenes the Illinois Legislature's Intent and BIPA's Purpose.

The wholesale importation of the broad language of the HIPAA Privacy Rule into BIPA, as urged by the Defendants, would not only confound the intent of the Illinois legislature but would also undermine BIPA's purpose. Such an importation of these terms would result in the exemption of hundreds of thousands of workers in not only hospitals but other entities within the healthcare industry from BIPA. Section 10 cannot bear such an interpretation in light of the intent of the Illinois legislature as expressed in the text of BIPA and BIPA's purpose.

The HIPAA Privacy Rule and BIPA have distinct aims. The object of the HIPAA Privacy Rule is the creation of a national framework to protect the privacy of patients' health information. *See, e.g.*, *Haage v. Zavala*, 2021 IL 125918, ¶ 52, 183 N.E.3d 830, 844–45 (2021) (citing 65 Fed. Reg. at 82,463–64). BIPA, on the other hand, is directed toward preventing the harm that could result from a person's biometric data being compromised. *See Rosenbach*, 2019 IL 123186, ¶ 35–37, 129 N.E.3d at 1206–07; *see also Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 58–59, 115 N.E.3d 1080, 1092–93 (2018). Rather than focus solely on the biometric information of patients, BIPA aims to protect the biometric information of all

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persons, with carefully delineated exceptions. *See* 740 ILCS 14/10 (defining biometric information broadly); 740 ILCS 14/25 (carving out specific exceptions for certain industries).

A. Defendant's construction of section 10 disregards the Illinois Legislature's intent.

Despite their discrete purposes, Defendants and their *amici* contend that the mere use of the phrase "under [HIPAA]" in section 10 invokes the commodious definitions of the terms "health care treatment," "payment," and "operations" in the HIPAA Privacy Rule. The Illinois legislature, however, knows how to express its intent to invoke those definitions. Nevertheless, pointing to the dissent, Defendants and their *amici* assert that defining these terms as they are in 45 C.F.R. § 160.103 is the only sensible construction. *Mosby*, 2022 IL App (1st) 200822, ¶¶ 78–81 (Mikva, J., dissenting).

Their contention ignores the fact that the Illinois legislature has used more exacting language than merely "under [HIPAA]" when it desired to use HIPAA's definitions of "health care treatment," "payment" and "operations" in other legislation. Specifically, other provisions have expressly stated that a term has the "meaning ascribed to it under HIPAA, as specified in 45 CFR 164.501." *See, e.g.*, 210 ILCS 25/2-134, 2-136, 2-137. The lack of similar language here should merit some caution in defining these terms merely in reference to that definitional provision rather than defining them according to their use in the regulations.

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B. Defining these terms in section 10 as they are defined in the HIPAA Privacy Rule would exempt hundreds of thousands of Illinois workers and undermine BIPA's aims.

These terms, as defined in the HIPAA Privacy Rule, are capacious and cover an extensive range of activities performed not only by hospitals, but by numerous other entities in the healthcare industry. Exempting all workers engaged in such activities is directly contrary to BIPA's goal of protecting the biometric information of all persons not explicitly excepted. Should the Illinois legislature have intended such a broad exception, as noted, it would have said so clearly.

To demonstrate their breadth, we examine the definitions of each term in turn. "Treatment" is defined to include "the provision, coordination, or management of health care and related services by one or more health care providers." 45 C.F.R. § 164.501.

"Payment," which has a more particularized definition, is defined as, *inter alia*, the activities of a health care provider or health plan related "to obtain[ing] or provid[ing] reimbursement for the provision of health care," determining a patient's insurance coverage, billing, claims management, and "related health care data processing." *Id.*

Finally, the definition of "health care operations" is particularly capacious in both the conduct it encompasses and the entities it includes. It includes a variety of activities of HIPAA-covered entities "to the extent that the activities are related to covered functions." *Id.* Such activities include

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"[r]eviewing the competence or qualifications of health care professionals," "[c]onducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs," and "[b]usiness planning and development." *Id*. Notably, it also includes a catchall—"[b]usiness management and general administrative activities of the entity"—that encompasses, but is not limited to, customer service and internal grievance resolution. *Id*.

As mentioned above, HIPAA covers a substantial number of entities in the healthcare industry, which employs hundreds of thousands of Illinois workers. *See, e.g.*, *Where Workers Work*, Ill. Dep't of Emp. Sec. 12 (Dec. 2022)[3] (identifying that 515,853 Chicagoans work in health care and social assistance occupations). Specifically, HIPAA covers healthcare providers like the Defendants, health plans (which includes, among other entities, health insurance issuers), and health care clearinghouses. *See* 45 C.F.R. § 160.103. Relatedly, the definitions of treatment, payment, and health care operations do not apply only to hospitals. They apply generally, with some exceptions, to all HIPAA-covered entities.

Consequently, importing the broad definitions of these terms wholesale would exempt the biometric information of virtually all employees at HIPAA-covered entities from the ambit of BIPA—turning a brief clause into a gaping

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[3] https://ides.illinois.gov/content/dam/soi/en/web/ides/labor_market_information/where_workers_work/2022.pdf.

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loophole for a broad range of employers in the healthcare industry. Not only would the Plaintiffs-Appellees' biometric information be excluded from BIPA but also that of employees at, for example, health insurers and doctors' offices when used for any of the broadly defined activities of health care treatment, payment, and operations.

BIPA cannot bear, absent some clear indication, such a gaping loophole. The mere use of these terms, rather than the more specific references to HIPAA definitions the Illinois legislature has made before, *see, e.g.*, 210 ILCS. 25/2-134, provides a thin reed to rest this exception on. *See People ex rel. Ryan v. Agpro, Inc.*, 214 Ill. 2d 222, 228, 824 N.E.2d 270, 273–74 (2005) (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in . . . ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Moreover, given the rise in the use of biometric identifiers in the workplace—a problem BIPA is intended to address—this raises a number of troubling hypotheticals. What about, for example, the fingerprints of the custodial staff at a hospital who clock in using that information? *See, e.g.*, *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, ¶ 9, 196 N.E.3d 571, 574 (2021). What about an insurance company using facial recognition to evaluate worker productivity? *See* Henry Kronk, *Facial*

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Recognition Technology in the Workplace, Corporate Compliance Insights (Mar. 3, 2021);[4] *cf. generally Barnett v. Apple Inc.*, 2022 IL App (1st) 220187.

These examples demonstrate how the Defendants' construction of section 10 contradicts the purpose of BIPA by allowing an ambiguous clause to eliminate protections for a substantial, broad, and diverse group of workers in Illinois. As discussed above, had the legislature intended to exempt such a vast class of workers from BIPA it would have said so explicitly as it did with respect to other classes of workers.

III. The Exclusion in Section 10 of BIPA Should Be Interpreted in Accordance with the Common Understanding that HIPAA Protects Patient Confidentiality.

This Court has stated that the "singular concern" in statutory interpretation is "to ascertain and give effect to the legislature's intent." *Uldrych v. VHS of Ill., Inc.*, 239 Ill. 2d 532, 540, 942 N.E.2d 1274, 1279 (2011) (quoting *Moore v. Green*, 219 Ill. 2d 470, 488, 848 N.E.2d 1015, 1026 (2006)). Because the text of BIPA "is plain" in establishing that BIPA was intended to protect biometric information of individuals, *see* 740 ILCS 14/5, "inferences based on language found in scattered ancillary provisions of the Act are insufficient to change the outcome of this case." *People ex rel. Ryan*, 214 Ill. 2d 222 at 228, 824 N.E.2d at 273–74 (citing *Whitman*, 531 U.S. at 468) ("Congress, we have held, does not alter the fundamental details of a

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[4] https://www.corporatecomplianceinsights.com/facial-recognition-technology-in-workplace/.

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regulatory scheme in . . . ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

A broad reading of the exclusion aligns with BIPA's aim to protect biometric information of individuals; that the majority's reasoning incentivizes employers' responsible data management is an indication that its interpretation is correct. Rather than recognizing that potential employer liability allows BIPA to function, the Defendants raise a "parade of horribles" about the possibility of "catastrophic liability." Def.-Appellant's Br. at 4. The possibility of catastrophic liability is discussed, *infra*, in Part IV of this brief. But that Defendants can conjure up scenarios where BIPA imparts significant liability cannot be reason to ignore the most natural reading of the exclusion, and the reading that gives effect to legislative aims.

This is precisely why the last antecedent doctrine cannot drive an interpretation of the exemption—despite the dissent's significant reliance on it.[5] As the majority rightly observes, application of the last antecedent clause here is implausible because it is a contextual canon. *Mosby v. Ingalls Mem'l Hops.*, 2022 IL App (1st) 200822, ¶ 61, n.10. That is, when a "broad reading of

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[5] The last antecedent doctrine "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote." *In re E.B.*, 231 Ill. 2d 459, 467, 899 N.E.2d 218, 223 (2008). The last antecedent doctrine is implicated in this case insofar as it may instruct that "operations under [HIPPA]" should apply exclusively to "health care treatment, payment, or operations," the phrase that immediately precedes it. *See Mosby*, 2022 IL App (1st) 200822, ¶ 50.

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the statute best effectuates the legislative purpose," as here, the "'last antecedent' rule" cannot apply. *See People v. Bartlett*, 294 Ill. App. 3d 435, 440, 690 N.E.2d 154, 157 (1998). Indeed, mechanical application of the last antecedent doctrine has been disfavored by courts when other indicia of meaning indicate that a phrase should be read as applicable to all of the words that proceed it. *See, e.g.*, *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); *see also* 2 Lewis' Sutherland on Statutory Construction (2d Ed.) §§ 408, 409 ("A relative word will not be read as representing the last antecedent exclusively, where the context and clear intention of the lawmakers require it to represent several or one more remote."); *Mosby,* 2022 IL App (1st) 200822, ¶ 82 (2022) (Mikva, J., dissenting) (citing *In re E.B.*, 231 Ill. 2d 459, 467, 899 N.E.2d 218, 223 (2008) ("[A]pplication of the last antecedent rule is always limited by 'the intent of the legislature, as disclosed by the context and reading of the entire statute.'").

A more natural reading of the exclusion at issue utilizes the series-qualifier canon, which "instructs that a modifier at the end of a series of nouns or verbs applies to the entire series." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1164 (2021); *see Mosby*, 2022 IL App (1st) 200822, ¶ 62. The series-qualifier canon would have "operations under [HIPPA]" apply to the entire

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preceding phrase. *Id.* Yet, even if we were to set aside the series-qualifier canon, the last antecedent doctrine need not apply because it can "assuredly be overcome by other indicia of meaning." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). And here, as noted above, the legislature clearly intended "operations under [HIPPA]" to apply to the entire preceding phrase, *see Mosby,* 2022 IL App (1st) 200822, ¶¶ 60–63.

When the Illinois legislature passed BIPA, it was surely aware of the widely accepted understanding that HIPAA was enacted to protect patient medical records and other personally identifiable health information. As both the Seventh Circuit and the court below have noted, "[t]he information covered and protected by HIPAA is that of the patients, not the employees," *Mosby*, 2022 IL App (1st) 200822 ¶ 64 (citing *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007)). Furthermore, the stated purpose of HIPAA is "to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and to simplify the administration of health insurance." Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191. To achieve these goals, HIPAA allows agencies to establish national standards to keep individuals' medical records and personal health information confidential. *See* Deborah F. Buckman, Annotation, *Validity, Construction, and*

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Application of Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Regulations Promulgated Thereunder, 194 A.L.R. Fed. 133 (2004). The HIPAA Privacy Rule, in particular, "restricts and defines the ability of health plans, health care clearinghouses, and most health care providers to divulge *patient* medical records" *Id.* (citing 45 C.F.R. §§ 160, 164) (emphasis added).

Indeed, at or near the time BIPA was passed, Illinois legislators shared a common understanding that HIPAA aims to protect patient confidentiality, as demonstrated by their statements in the transcripts of the Illinois House and Senate. For example, when debating a bill to amend the Firearm Owners Identification Card Act, Senator Jacobs expressed concern that a law requiring doctors to report potentially dangerous patients might violate HIPAA's patient-doctor confidentiality rules. *See* Illinois Senate Transcript, 2007 Reg. Sess. No. 53 ("I am greatly concerned that this law violates the HIPAA laws. HIPAA laws are *patient*/doctor confidentiality. You're asking doctors to report on their patients that they may feel are dangerous.")[6] (emphasis added). Similarly, Representative Gordon, when debating whether to amend the Rights of Crime Victims and Witnesses Act, questioned whether reporting when mental health services are discontinued would violate HIPAA's privacy rights of the patient who would be receiving

[6] https://ilga.gov/Senate/transcripts/Strans95/09500053.pdf.

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mental health services. *See* Illinois House Transcript, 2008 Reg. Sess. No. 274 ("[I]s there a problem with . . . with HIPAA laws and any type of privacy rights of the person who would be receiving mental health services . . . ?")[7]

Given this context, it is evident that the HIPAA exemption mentioned in Section 10 of BIPA was specifically meant to exclude only biometric information of patients from being covered by BIPA. This exclusion was based on the accurate understanding of Illinois legislators that HIPAA protects patient information, and it intended to avoid redundancy in the regulatory framework. However, the same cannot be said for the biometric information of healthcare workers. To the best of *amici*'s knowledge, no Illinois lawmaker has explicitly stated that they believed HIPAA safeguards the biometric information of healthcare workers. Therefore, when they excluded from BIPA's coverage "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), they could not have intended for this exclusion to apply to the biometric information of healthcare workers because they did not think such information was protected *under* HIPAA in the first place.

[7] https://ilga.gov/House/transcripts/Htrans95/09500274.pdf.

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IV. Concerns about "Catastrophic Liability" for Healthcare Employers are Misplaced as Compliance with BIPA is Straightforward.

Defendants repeatedly invoke the possibility of "catastrophic liability" for healthcare providers if the appellate court's interpretation is upheld. Def.-Appellant's Br. at 4 ("If the First District's majority interpretation is allowed to stand, both health care providers and their technology providers could face catastrophic liability for conducting their critical, life-saving operations in a safe and secure manner—a result the legislature did not intend.") This is an unpersuasive line of argument for two reasons.

First, an employer in violation of BIPA need not abandon the use of technologies and practices that collect biometric information from its employees. In fact, ANA-Illinois is not aware of any hospitals or healthcare organizations systems that have stopped using biometric information because of BIPA. The purpose of BIPA is not to discourage the use of these technologies, but to ensure that employers are doing so responsibly. The costs of compliance are low. Employers must provide notice and receive written consent from employees when biometric information is collected and when it disseminates biometric information with third parties. 740 ILCS 14/15(b), (d). For example, a typical employee contract already includes various waivers and consent forms. Many employers comply with BIPA's requirements through one to two-page forms. *See, e.g.*, *Biometric Information Privacy*

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Policy,[8] Northwestern Univ. (Jun. 6, 2019); *Biometric Identifier Collection Authorization Form*,[9] Northwestern Univ.; *Sample Biometric Information Privacy Policy*,[10] Automatic Data Processing, Inc. (ADP).[11]

Second, the potential for significant damages for violations under BIPA should not be invoked to absolve employers from statutory obligations to their employees. As this Court recognized in *Cothron*, "the legislature intended to subject private entities who fail to follow the statute's requirements to substantial potential liability. The purpose in doing so was to give private entities the strongest possible incentive to conform to the law and prevent problems before they occur.'" *Cothron*, 2023 IL 128004, ¶ 41. The *Cothron* Court affirmed the proposition that "where statutory language is clear, it must be given effect, '"even though the consequences may be harsh, unjust, absurd or unwise."'[12] *Id.* at ¶ 40.

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[8] https://policies.northwestern.edu/docs/biometric-information-privacy-policy-final.pdf.

[9] https://policies.northwestern.edu/docs/biometric-identifier-collection-authorization-form.pdf.

[10] https://cdn2.hubspot.net/hubfs/342754/TLM%20Guides/ADP_Sample_Client_Biometrics_Policy.pdf?t=1515709094275.

[11] Automatic Data Processing, Inc. (ADP) is the largest U.S. provider of payroll services with one million customers and over 70,000 employees. *See Who Is the Largest Payroll Company?*, Milestone (Jan. 5, 2023), https://www.milestone.inc/blog/who-is-the-largest-payroll-company.

[12] The Court recognized that trial courts could exercise discretion in fashioning a damage award. But concerns about excessive damages (*cont.*)

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In sum, the Illinois legislature enacted BIPA to safeguard the biometric information of Illinoisans—a purpose that has been consistently acknowledged by the statutory text, legislative history, and this Court's precedents. Given this clear purpose of BIPA, employers should not be able to evade liability for mishandling the sensitive biometric information of hundreds of thousands of healthcare workers like Ms. Mosby, absent clear indication to the contrary. Healthcare providers can continue to use technologies like medication dispensing systems, but healthcare workers are only asking that they do so responsibly and in a manner that is consistent with the law.

CONCLUSION

For the reasons set forth above, *amici curiae* the American Nurses Association – Illinois and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic respectfully urge this Court to affirm the decision below and hold that the Illinois General

(*from prior page*) were a policy issue best addressed by the legislature. *See Cothron*, 2023 IL 128004, ¶ 43.

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Assembly did not exclude healthcare employee biometric information from BIPA's protections.

Respectfully Submitted,

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(11 table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages or 4,857 words using the Microsoft Word word count tool.

Respectfully submitted,

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Dated: June 14, 2023

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Randall D. Schmidt, an attorney, hereby certify that on June 14, 2023, I caused true and complete copies of the foregoing Brief of the American Nurses Association – Illinois and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic as *Amici Curiae* in Support of Plaintiffs-Appellees to be filed electronically with the Clerk's Office of the Illinois Supreme Court, using e-filing provider Odyssey eFileIL, which sends notification and a copy of this filing by electronic mail to the following counsel of record:

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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

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