No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA MCDONALD,
Plaintiff-Appellee,

v.

SYMPHONY BRONZEVILLE PARK, LLC,
Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
First District, Appellate Court Case No. 1-19-2398
There on Appeal from the Circuit Court of Cook County
County Department, Chancery Division, Case No. 2017 CH 11311
Honorable Raymond W. Mitchell, Presiding

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Marquita McDonald filed suit to recover damages for Defendant Symphony Bronzeville Park LLC's invasion of her biometric privacy rights, damages that, under the Biometric Information Privacy Act (or "BIPA"), she is entitled to recover in an "action in a state circuit court." 740 ILCS 14/20. The circuit and appellate courts correctly held that she is entitled to pursue these damages in an action in the circuit court, rather than through a claim before the Workers' Compensation Commission, because McDonald's alleged privacy injury is not one that "categorically fits within the purview of the [Worker's Compensation] Act." *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 23.

Symphony proceeds, as it did in the circuit and appellate courts, as if this Court did not mean what it said in *Folta*. But *Folta* is clear: whether an injury is "compensable" in a workers' compensation proceeding, and therefore must be brought before the Workers' Compensation Commission, depends on "whether the type of injury categorically fits within the purview of the [Workers' Compensation] Act." *Id.* Rather than argue that privacy injuries generally, or BIPA injuries specifically, "categorically fit within the purview of the Act," Symphony argues that the exclusive-remedy provision of the Workers' Compensation Act (or "WCA") eliminates *all* of an employer's civil liability to its employees under state law. This is untrue: Symphony's position is inconsistent with this Court's jurisprudence and is unfaithful to the Workers' Compensation Act as a whole. Symphony's argument takes the exclusive-remedy provision out of context, improperly divorcing it from the Act as a whole. But this provision is best understood only with reference to the type of injuries otherwise compensated under the Act. Because McDonald's alleged privacy injury is not,

categorically, the type of injury compensable in a workers' compensation proceeding, her lawsuit is not preempted by the exclusive-remedy provision.

Equally unavailing is Symphony's attempt to analogize emotional injuries as a type of injury to invasions of privacy. Invasions of privacy can cause all sorts of harms, many of which, like financial or reputational harms, are plainly outside the ambit of the Workers' Compensation Act. Symphony attempts to focus narrowly on whether mental anguish can be compensated under the Workers' Compensation Act. But this focus is unhelpful for two reasons: First, as *Folta* holds, the inquiry into compensability focuses on the *type* of injury suffered by the plaintiff, not the idiosyncrasies of the particular case (such as whether the plaintiff's injury manifested before or after a particular date). And, second, McDonald has never sought to recover for mental anguish under the Biometric Information Privacy Act (the basis for her only claim for relief in the operative complaint), and no such consequences from a violation need to be pleaded or proved to recover.

Moreover, Symphony's failure to explain why emotional harms are analogous to privacy injuries means that it cannot articulate a limiting principle to its position. Indeed, Symphony *declines* to articulate any limiting principle, urging instead that "all types of workplace injuries" must proceed through the workers' compensation process. This position apparently would cover not only privacy injuries, but also, for instance, certain workplace discrimination claims. This is doubly troubling given Symphony's concession that these non-physical injuries would receive no compensation through the Workers' Compensation Commission, as the brief of *amicus curiae* Illinois Trial Lawyers Association discusses. Symphony's argument proves far too much.

Finally, if the BIPA and the WCA do need to be harmonized, the more-specific, and later-enacted, BIPA controls here. This Court has held that, as a matter of legislative intent, later-enacted statutes control over earlier statutes, and more-specific statutes control over general acts. That describes the BIPA here, as it postdates the WCA by nearly a century and deals only with a single type of privacy injury. The text of the BIPA itself, which mentions its application in the employment context, is further evidence that the legislature did not intend for BIPA claims to be presented to the Workers' Compensation Commission. Thus, if there is a need to harmonize the two statutes (there is not), the BIPA controls here.

The certified question should be answered in the negative, and the judgments of the appellate and circuit courts should be affirmed.

BACKGROUND

I. The Biometric Information Privacy Act

Enacted in 2008, the Biometric Information Privacy Act, 740 ILCS 14, "impos[es] safeguards to insure that individuals' … privacy rights in their biometric identifiers and biometric information and properly honored." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 36. Among other things, the statute establishes a notice-and-consent regime aimed at preserving Illinoisans' biometric privacy "that applies inside and outside the workplace." *Liu v. Four Seasons Hotels, Ltd.*, 2019 IL App (1st) 182645, ¶ 30. Compliance is not onerous: As relevant here, entities, including employers, that wish to collect a person's biometric identifiers or information, including a fingerprint, see 740 ILCS 14/10, must first provide notice of the collection, provide the "specific purpose and length of term" of the collection, and receive a written release

authorizing the collection from the subject, 740 ILCS 14/15(b). In the context of employment, this written release can take the form of "a release executed by an employee as a condition of employment." 740 ILCS 14/10. Entities in possession of biometric identifiers or information must also make available a policy governing the retention and destruction of that data, and delete any retained biometric identifiers or information in a timely fashion. 740 ILCS 14/15(a).

This Court has held that when an entity fails to honor these statutory procedures and violates an individual's biometric privacy rights, the resulting privacy injury is "real and significant." *Rosenbach*, 2019 IL 123186, ¶ 34. Once an individual has suffered this privacy injury, that individual "*shall* have a right of action in a state circuit court … against an offending party," and may recover liquidated damages in that action of either $1,000 (in the case of a negligent violation of BIPA) or $5,000 (in the case of an intentional violation). 740 ILCS 14/20 (emphasis added).

II. Factual and Procedural Background

Plaintiff-Appellee Marquita McDonald worked for the Defendant-Appellant at its Symphony of Bronzeville Park facility on Chicago's South Side. (A84) In order to clock in and out of work at the Bronzeville Park facility, McDonald was required to scan her fingerprint. (A84-A85) Symphony stored McDonald's fingerprint in its databases so that it could track when McDonald clocked in and out of work. (A84) McDonald, however, was never asked to consent, in a release executed as a condition of employment or otherwise, to Symphony's collection and retention of her biometric identifier. (A85) Neither did the defendants make available to McDonald any policy concerning the retention and destruction of her biometric identifiers. (*Id.*)

As McDonald's complaint explains, there are "serious and irreversible privacy risks" associated with biometrics. (A79) The BIPA is intended to address these risks, and head off problems before they occur, by requiring entities that collect and store biometrics to take "reasonable safeguards." (A81-A83) Because these safeguards were not in place at Symphony of Bronzeville Park, McDonald brought this lawsuit. The operative complaint seeks relief on just a single cause of action, under BIPA, for liquidated damages. (A88-A90) McDonald had sought the same relief under BIPA in her original complaint, as well. (A17) McDonald also seeks to represent a class of similarly situated individuals. (A85)[1]

Symphony moved to dismiss, invoking, as relevant here, the so-called "exclusivity" or "exclusive-remedy" provision of the Workers' Compensation Act. That provision provides that, with an exception not relevant here, "no common law or statutory right to recover damages from the employer … is available to any employee who is covered by the provisions of" the Workers' Compensation Act. 820 ILCS 305/5(a). The circuit court, Judge Raymond Mitchell presiding, recognized that this Court has held that the exclusive-remedy provision does not preempt a suit in the circuit court if any one of four criteria are met: "an employee can escape the exclusivity provisions of

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[1] McDonald amended her complaint to account for updated information about corporate ownership: The Symphony of Bronzeville Park facility is operated by Symphony Bronzeville Park LLC, which was McDonald's employer, and which operates one of the facilities within the "Symphony Post-Acute Care Network." The amended complaint dismissed one Symphony-related LLC and added as defendants two other Symphony-related LLCs. (A73) The amended complaint also dismissed McDonald's original negligence claim and any allegations relating to mental anguish. (*Id.*) Those allegations, although heavily discussed in Symphony's brief, are therefore not before the Court. See *Bonhomme v. St. James*, 2012 IL 112393, ¶ 19. And as the Appellate Court recognized, and as explained below, the presence or absence of allegations of mental anguish is irrelevant to the answer to the certified question. (A192)

the Act if the employee establishes that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the Act." *Folta*, 2015 IL 118070, ¶ 14. (A111)

The circuit court concluded that the fourth limit on the scope of the exclusive-remedy provision—compensability—was met in this case. Because the only claim in this case is one under BIPA for liquidated damages, the court assessed that claim. The court denied the motion to dismiss, explaining that "the injury that McDonald suffered was the loss of the ability to maintain her privacy rights. This is neither a psychological nor physical injury and is not compensable under the Act." (A111)

The preemption question presented by Symphony's motion has been litigated in several cases in both Illinois and federal court. To date, every court to consider the issue has concluded that BIPA claims are not preempted by the Workers' Compensation Act. (A201-A202 (collecting cases, noting that the circuit courts "appear to be unanimous" in concluding that BIPA claims are not preempted)). See *Cothron v. White Castle System, Inc.*, 467 F. Supp. 3d 604, 615-16 (N.D. Ill. 2020) (observing that "courts have unanimously rejected" WCA preemption arguments).

Nevertheless, the circuit court certified the following question for interlocutory appeal under Ill. S. Ct. R. 308: Do the exclusivity provisions of the Workers' Compensation Act bar a claim for statutory damages under BIPA where an employer is alleged to have violated an employee's statutory privacy rights under BIPA? (A4)

The Appellate Court answered the certified question in the negative. The Appellate Court first recognized that this Court's decision in *Folta* provided this Court's most recent and comprehensive treatment of the issue of compensability under the

Workers' Compensation Act. (A196) The Appellate Court correctly ascertained that this Court held in *Folta* that whether an injury is "compensable" under the Workers' Compensation Act turns on "whether the type of injury categorically fits within the purview of the [Workers' Compensation] Act." (A198 (quoting *Folta*, 2015 IL 118070, ¶¶ 20-23)) This, in turn, the court reasoned, requires a court to examine "the character of the injury." (A198-199 (citing *Treadwell v. Power Solutions, Inc.*, 427 F. Supp. 3d 984, 992 (N.D. Ill. 2019))) In examining the character of a BIPA injury, the Appellate Court noted that the BIPA is a privacy-protective statute that requires entities to take certain prophylactic measures with respect to biometric data in order to prevent irreversible harms. (A199-201) The court reasoned that these safeguards, meant to *prevent* harms, did not fit within the purview of the Workers' Compensation Act, which is meant to provide prompt compensation *after* a worker suffers a job-related physical or psychological injury. (A201) Thus, an individual's loss of their BIPA privacy rights at the hands of their employer is not the type of injury that categorically fits within the purview of the Workers' Compensation Act. (A202)

This Court then granted leave to appeal.

ARGUMENT

The answer to the certified question here begins and ends with *Folta*. In *Folta*, this Court affirmed that the WCA's exclusive-remedy provision does not bar a lawsuit in the circuit court against the plaintiff's employer if the plaintiff's injury is not the type that is "categorically within the purview of the [Workers' Compensation] Act." 2015 IL 118070, ¶ 23. That holding reflects this Court's long-held understanding of the Workers' Compensation Act as a tradeoff between employer and employee in which the employee

receives prompt and equitable compensation for certain workplace injuries, and the employer is relieved of the possibility of large damages verdicts for those same injuries.

The circuit and appellate courts correctly applied that rule in this case, holding that McDonald's alleged privacy injuries are not within the WCA's *quid pro quo*, and therefore her claim is not preempted by the Workers' Compensation Act. And even if that were not the case, because the Biometric Information Privacy Act is the more-specific and later-enacted statute, under established rules of statutory construction, it's direction that it covers employees and that all aggrieved persons shall have an action in the circuit court applies here.

Symphony attempts to rewrite *Folta*, but its proposed rule—that the Workers' Compensation Act preempts *any* attempt to hold employers liable under state law—would throw the workers' compensation scheme out of balance and have devastating practical consequences. The Court should apply *Folta* and the Workers' Compensation Act as written and answer the certified question in the negative.

I. Standard of Review

An interlocutory appeal under Rule 308(a) "necessarily involves a question of law," so this Court's review is *de novo*. See *Rogers v. Imeri*, 2013 IL 115860, ¶ 11.

II. *Folta* holds that a workplace-based claim is not preempted by the Workers' Compensation Act if the alleged injury is not the type of injury that is categorically within the purview of the Workers' Compensation Act.

The Workers' Compensation Act is intended to provide financial protection for workers injured in workplace accidents. See *Folta*, 2015 IL 118070, ¶ 11; *Laffoon v. Bell Zoller Coal Co.*, 65 Ill. 2d 437, 446 (1976) ("The purpose of the Workmen's Compensation Act is to afford employees financial protection when their earning power

is temporarily diminished or terminated due to employment injuries"). Rather than require injured workers to resort to their remedies in tort law, with its attendant inefficiencies and uncertainty, the Act provides "efficient remedies" through the Workers' Compensation Commission, ensuring "prompt … compensation" for workers. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-81 (1974). In exchange for access to this specialized remedy, the Act provides that "no common law or statutory right to recover damages from the employer … for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5(a). Section 5(a), the exclusive-remedy provision, ensures that the benefits and burdens of the law are to some extent equitably distributed between employers and employees. See *Folta*, 2015 IL 118070, ¶ 12. As this Court has described this system, "the exclusive remedy provision is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990).

This Court also has recognized that the Workers' Compensation Act does not cover the whole ground of potential claims by an employee against their employer. A plaintiff whose claim derives from their employment can escape the preemptive effect of § 5(a) by showing any one of four things: (1) the injury was not accidental, (2) the injury did not arise from his or her employment, (3) the injury was not received in the course of employment, or (4) the injury is not compensable under the Workers' Compensation Act. *Folta*, 2015 IL 118070, ¶ 14. *Folta* was this Court's first attempt to synthesize its

jurisprudence regarding the fourth limit on the scope of the exclusive-remedy provision: compensability. *Folta* holds that an injury is "compensable" under the Workers' Compensation Act, and thus within the preemptive ambit of § 5(a), if the injury is of a type that "categorically fits within the purview of the Act." 2015 IL 118070, ¶ 23. So the critical question in this case is whether McDonald's alleged privacy injury is "the type of injury [that] categorically fits within the purview of the Act." *Id.* We explain in section 3 that the answer is no. But we begin with a brief review of *Folta* because Symphony proceeds as if this critical language never appeared in that opinion. We then explain that the rule actually set forth in *Folta* correctly interprets the Workers' Compensation Act, and is sensible from a practical perspective, as well.

A. *Folta* correctly construes the exclusive-remedy provision to reflect the "compensation bargain" embodied by the Workers' Compensation Act.

This Court's holding in *Folta*, that the compensability inquiry focuses on whether the WCA "categorically" covers the "type" of injury the plaintiff seeks compensation for, correctly applies the Act as a whole.

In *Folta*, the plaintiff sought damages from his employer after contracting mesothelioma, allegedly due to asbestos exposure on the job. *Id.* ¶ 3. He argued, and the Appellate Court agreed, that his injury was not "compensable" because it did not manifest until after the statute of repose in the Workers' Compensation Act expired. *Id.* ¶ 7. The question for this Court was whether the literal inability to obtain benefits for an injury that would have been compensable but for operation of the statute of repose rendered the claim non-compensable, and thus unaffected by the exclusive-remedy provision.

Canvassing past cases, *Folta* acknowledged that "[a]lthough [in older cases] this Court equated 'compensable' with 'line of duty,' the sole question raised in those cases was whether the plaintiff's injuries arose out of or in the course of his employment." *Id.* ¶¶ 18-19 (discussing *Sjostrum v. Sproule*, 33 Ill. 2d 40 (1965), and *Unger v. Continental Assurance Co.*, 107 Ill. 2d 79 (1985)). But in more recent cases, the Court explained, this Court had given independent, substantive content to the "compensability" limit on the exclusive-remedy provision's application. *Id.* ¶¶ 19-22. In fact, the Court described its opinion in *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229 (1980), as "carv[ing] out a category of injuries for which the exclusive remedy provision would not be applicable." *Id.* ¶ 17. The rule that this Court distilled from *Collier*, and similar cases, specifically *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 556 (1976), and *Meerbrey*, is "that whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." *Id.* ¶ 23.

Though first articulated in *Folta*, this rule is consistent with this Court's long-held understanding of the Act as a whole. In *Moushon v. National Garages, Inc.*, for instance, the plaintiff received disability compensation through the workers' compensation process but contended that the law did not afford any compensation for the particular personal injury he suffered in an industrial accident, so a personal-injury lawsuit in the circuit court must be allowed to go forward. 9 Ill. 2d 407, 409 (1956). This Court held that the lawsuit was preempted by the exclusive-remedy provision, noting that "'the compensation remedy is exclusive of all other remedies for the same injury, *if the injury falls within the coverage formula of the act*.'" *Id.* at 411 (quoting Larson, Workmen's Compensation Law, § 65.00) (emphasis added). In other words, if compensation for the

injury is contemplated by the Act, the exclusive-remedy provision preempts a lawsuit regarding the same injury, even if, the Court held, a "particular element of damage is not compensated for." *Id.*

Folta applies this same understanding of the Workers' Compensation Act: if a worker's injury is of the type for which the Act might provide compensation, i.e., that fits within the Act's compensation formula, it must be litigated through the workers' compensation process, even if that process would be fruitless from the employee's perspective. Thus, the plaintiff in *Folta* could not litigate his claim against his employer in the circuit court. In this regard, *Folta* is not an outlier. See, *e.g.*, *Hendrix v. Alcoa, Inc.*, 506 S.W. 3d 230, 237 & n.3 (Ark. 2016) (following *Folta*); *Shamrock Coal Co., Inc. v. Maricle*, 5 S.W.3d 130, 134 (Ky. 1999) (suit by coal miners against employer alleging that plaintiffs suffered from Black Lung Disease preempted by workers' compensation law, even though plaintiffs' injuries were not serious enough to warrant recovery under the workers' compensation law); *Tomlinson v. Owens-Corning Fiberglass Corp.*, 770 P.2d 833, 837-38 (Kan. 1989) (lawsuit against employer by plaintiff suffering from asbestosis preempted by workers' compensation law even though workers' compensation claim would be time-barred). This rule makes sense: The Workers' Compensation Act replaces traditional tort law for accidental workplace injuries in part to protect employers from outsize damages verdicts. See *Meerbrey*, 139 Ill. 2d at 462. If an employee suffers an accidental injury at work, but in a way or to a degree that the Workers' Compensation Act did not provide any compensation, he or she should not be able to run to the courthouse and seek the type of damages verdict precluded by the Act.

At the same time, however, *Folta* builds on this Court's earlier cases to confirm the other half of this equation: If the employee's injury is of the type that does *not* categorically fit within the Workers' Compensation Act, then an employee is not required to seek recompense through a workers' compensation claim. "'Balanced against the imposition of no-fault liability upon the employer are statutory limitations upon the amount of the employee's recovery … . As part of this balancing, the Act further provides that the statutory remedies under it shall serve as the employee's exclusive remedy *if he sustains a compensable injur*y.'" *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983) (quoting *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 356 (1981)) (emphasis added). One modern treatise puts the point this way: "The scope of employer immunity under exclusivity provisions is as broad as the scope of compensability under the workers' compensation statute." 1 Jon L. Gelman, Modern Workers' Compensation § 102:1 (2021). Only those injuries that "are within the compensation bargain … are subject to the exclusivity provisions of a state's Workers' Compensation Act." *Id.* Thus, as *Folta* says, when the type of injury is not "categorically … within the purview of the Act," i.e., it is outside the compensation bargain, the exclusive-remedy provision does not preempt a lawsuit seeking redress for that type of injury in the circuit court. See 9 Lex K. Larson, Larson's Workers' Compensation Law § 104.05[4] (noting that "an exclusivity challenge will hinge upon the *type of injury* sustained") (emphasis added); *Hendrix*, 506 S.W.3d at 235 (relying on the work of Professor Larson to distinguish between "an injury which does not come within the fundamental coverage provisions of the act, and an injury which is in itself covered but for which, under the facts of the particular case, no compensation is payable" and noting that a civil suit regarding the former will not be

barred by the exclusive-remedy provision). To shunt those claims into the workers' compensation process simply because the injury happened at work would result in a windfall to the employer: The employer would gain further rights (broader immunity from civil suit) without assuming any new liability (because employees will not be compensated for these injuries through an administrative workers' compensation claim). That is a quid without a quo.

Folta's approach is faithful to the statutory text. It is a cardinal rule of statutory interpretation that "all provisions of a statutory enactment are viewed as a whole." *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002); see also *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) ("After all, statutes must be read as a whole.") (quotations omitted). The Workers' Compensation Act is triggered by the suffering of an "accidental injury" by a worker. See, *e.g.*, 805 ILCS 305/1(a)(2) (defining "employer" in part as "[e]very person, firm, public or private corporation … who at or prior to the *time of the accident* to the employee for which compensation under this Act may be claimed" has elected to participate in workers' compensation) (emphasis added); 820 ILCS 305/2 ("An employer in this State, who does not come within the classes enumerated by Section 3 of this Act, may elect to provide and pay compensation for *accidental injuries* sustained by himself or any employee, arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided.") (emphasis added); 805 ILCS 305/7 ("The amount of compensation which shall be paid for an *accidental injury* to the employee resulting in death is …") (emphasis added); 805 ILCS 305/8 ("The amount of compensation which shall be paid to the employee for an *accidental injury* not resulting

in death is …") (emphasis added). Only once an employee suffers a qualifying injury does the compensation bargain reflected by the exclusivity provision become relevant. See *Corbett v. County of Lake*, 2017 IL 121536, ¶ 27 ("The words and phrases in a statute must be construed in light of the statute as a whole, with each provision construed in connection with every other section.") (quotations omitted). Thus, for instance, injuries that are intentionally inflicted by an employer are not preempted by the exclusivity provision, even though the literal text of § 5(a) precludes such a suit. See *Toothman v. Hardee's Food Systems, Inc.*, 304 Ill. App. 3d 521, 529-31 (1999). That is to say, § 5(a) is limited by the proviso that claims regarding non-accidental injuries are not preempted because a non-accidental injury does not even engage the workers' compensation system in the first place. See *Copass v. Illinois Power Co.*, 211 Ill. App. 3d 205, 213-14 (1991) (holding that to escape application of exclusive-remedy provision, employee must show that employer had "specific intent to injure" the employee because a lower standard for deeming an injury nonaccidental would "disturb th[e] careful balance" struck by the WCA); see also *Guam*, 141 S. Ct. at 1614 (holding that facially broad statutory provision "is best understood only with reference to" the specific statutory regime).

Indeed, that is how the Act itself describes the tradeoff in two separate places. Section 2 of the Act allows non-covered employers to buy into the workers' compensation system "to provide and pay compensation for accidental injuries" suffered by employees at work "and thereby relieve himself from any liability for the recovery of damages, except as provided herein." 820 ILCS 305/2. Read in its entirety, this section describes a scheme in which compensation *for qualifying, accidental injuries* replaces "the [potential] recovery of damages" for those same injuries. The tradeoff is described

the same way in section 11: "the compensation herein provided … shall be the measure of the responsibility" of covered employers or employers who opt in "to provide and pay compensation for accidental injuries." 820 ILCS 305/11. No case understands this language to mean that an employer who buys in to the workers' compensation system has thereby insulated itself from *all* other liability under state law. *Cf. Bunger v. Lawson Co.*, 696 N.E.2d 1029, 1032 (Ohio 1998) ("The workers' compensation system was not designed to resolve every dispute that arises between employers and employees."). Instead, this language is understood to reflect the compensation bargain: if an employer opts in to the workers' compensation system, then that system establishes the limits of that employer's liability for those types of injuries that are compensable in a workers' compensation proceeding. See *Sharp*, 95 Ill. 2d at 326.

Folta's understanding of the compensation bargain makes practical sense, as well. The promptness and efficiency that characterize the workers' compensation system come from the specialized expertise developed by workers' compensation arbitrators and commissioners regarding the types of workplace accidents compensated by the Workers' Compensation Act. The benefits of this expertise are lost if, as Symphony urges, an even broader swath of workplace claims are directed to the Commission, as the brief *amicus curiae* of the Workers' Compensation Lawyers Association explains.

In sum, *Folta* correctly focused on whether an employee's alleged injury is of the type for which compensation is contemplated by the Workers' Compensation Act. If so, the injury is within the compensation bargain, and the exclusive-remedy provision preempts a lawsuit in the circuit court, even if, in a particular case, the bargain yields nothing for the worker. On the other hand, if the injury of a type that is *not* categorically

within the purview of the Workers' Compensation Act, then the Act's provisions outlining the compensation bargain, including the exclusive-remedy provision, are not triggered, and a lawsuit may proceed in the circuit court. This sensible holding accurately reflects the *quid pro quo* embodied by the Workers' Compensation Act, and faithfully construes the statute as a whole.

B. Symphony misrepresents *Folta*.

Despite the opinion's clarity, Symphony insists that *Folta* holds that an injury is "compensable" in a workers' compensation proceeding if it occurs on the job and in the line of duty, a refrain it repeats at several points in its brief. (*E.g.*, Symphony Br. 3, 15, 20, 23-25) This would effectively eliminate compensability as a separate limit on the exclusive-remedy provision, as it would equate compensability with the second and third limits on the application of that provision. Symphony misrepresents *Folta*, which, as discussed above, explicitly deems Symphony's approach to compensability to be outdated, and provides a standalone rule for determining when that limit on the exclusive-remedy provision applies: an injury is compensable only if it is a type of injury that is categorically within the purview of the Act. *Folta*, 2015 IL 118070, ¶ 23.

Symphony barely acknowledges this clear holding. In fact, Symphony goes so far as to say that *Folta* holds that the question is whether a "class of injury is 'categorically excluded' from coverage." (Symphony Br. 27) The quoted phrase—"categorically excluded"—appears five times in quotation marks in Symphony's brief. (See Symphony Br. 12, 27, 30) On three occasions it is unattributed; the other two instances are supported by a citation to paragraph 23 of the *Folta* opinion. But the phrase does not itself appear in *Folta*. Symphony never explicitly explains what its invented phrase means, but it appears

that Symphony is arguing that *Folta* requires an explicit textual exclusion of types of injuries from the exclusive-remedy provision for an injury to be noncompensable.

None of this Court's cases require that approach to the exclusive-remedy provision. Indeed, Symphony's approach would vitiate *Folta*, because it would eliminate any need to examine whether an injury is categorically within the scope of the Workers' Compensation Act. The principal flaw in Symphony's approach is that it uses the exclusivity provision to determine the scope of the Workers' Compensation Act, rather than the other way around. *Folta*'s approach, in which the exclusive-remedy provision applies only when the compensation bargain is relevant in the first place, is the far sounder approach.

III. Privacy injuries are not categorically within the purview of the Workers' Compensation Act.

Applying *Folta*, the circuit and appellate courts correctly held McDonald's alleged privacy injuries do not "categorically fit[] within the purview" of the Workers' Compensation Act. In other words, privacy injuries fall outside the compensation bargain, and are therefore not covered by the exclusive-remedy provision. The certified question must therefore be answered in the negative, and McDonald's lawsuit allowed to proceed.

A. Privacy injuries are different in type from the physical or psychological injuries compensable under the Workers' Compensation Act.

The circuit court concluded that McDonald's privacy injury is not compensable under the Workers' Compensation Act "because it is neither a psychological nor physical injury." (A111) That was correct. This Court's seminal decision in *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 556 (1976), shows why. In *Pathfinder*, a claimant

alleged temporary total disability stemming from emotional shock, with no accompanying physical injury, after assisting another worker who had her hand severed by an industrial press, and after pulling the severed hand out of the machine. *Id.* at 559. The resulting question for this Court was "whether an employee who suffers a sudden, severe emotional shock, traceable to a definite time and place and to a readily perceivable cause, which produces psychological disability, can recover under the Workmen's Compensation Act, though the employee suffered no physical injury." *Id.* at 562. Canvassing past precedents, the Court recounted that recovery for psychological injuries was always available when the claimant had suffered some physical injury, no matter how slight. *Id.* at 564. The Court then reasoned that any distinction between a slight physical injury and no physical injury was untenable, and that recovery therefore should be allowed regardless of whether the claimant had suffered a physical injury. *Id.* at 564-65. Quoting the writing of Professor Larson, the Court noted that by abandoning the requirement of a minimal physical injury, "'[t]he test of existence of injury [for purposes of the Workers' Compensation Act] can then be greatly simplified. The single question will be whether there was a harmful change in the human organism-not just its bones and muscles, but its brain and nerves as well.'" *Id.* at 565 (quoting Larson, *Mental & Nervous Injury in Workmen's Compensation*, 23 Vand. L. Rev. 1243, 1260 (1970)).

A privacy injury does not inherently involve any change in the human organism, harmful or otherwise. Instead, it is occasioned simply by the invasion of a legally recognized right. In the case of the BIPA, the legislature adopted prophylactic measures in light of "the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised." *Rosenbach*, 2019 IL

123186, ¶ 35. The measures specifically adopted in § 15(b) of the BIPA preserve an individual's "power to say no by withholding consent." *Id.* ¶ 34. "When a private entity fails to adhere to the statutory procedures … the right of the individual to maintain his or her biometric privacy vanishes into thin air." *Id.* (quotations omitted). That "real and significant" injury, *id.*, can occur without any "change in the human organism," *Pathfinder*, 62 Ill. 2d at 565.[2]

Moreover, the types of harms that can result from invasions of privacy frequently are not physical or psychological harms. Individuals who suffer privacy injuries can suffer reputational or financial harms. *E.g.*, *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77 (1996). Or an invasion of privacy might result in identity theft, whether full-blown impersonation or something comparatively less serious like unauthorized charges on a credit card or a new account being opened in someone's name, for which damages might be cost to repair credit or rescind unauthorized transactions. See Restatement (Second) of Torts § 652H (one who proves an invasion of privacy is entitled to recover damages for "the harm to his interest in privacy" as well as "special damage of which the invasion is a legal cause"). In other words, neither privacy injuries by themselves, nor the harms they typically engender, are categorically the type of injury that fits within the Workers' Compensation Act. See *Marino v Arandell Corp.*, 1 F. Supp.

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[2] This Court has acknowledged in another context that BIPA injuries, even if accompanied by mental anguish, are different in kind from a "bodily injury, a sickness, or disease." *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶¶ 36, 49. Likewise, "many federal district courts have read *Pathfinder* to stand for the proposition that only physical or psychological injuries are compensable under the IWCA and that injuries to privacy interests, like those claimed in BIPA suits, are neither physical nor psychological and therefore not compensable." *Snider v. Heartland Beef, Inc.*, No. 420CV04026SLDJEH, 2020 WL 4880163, at *5 (C.D. Ill. Aug. 14, 2020).

2d 947, 954-55 (E.D. Wis. 1998) (holding that a statutory privacy claim was not preempted by a workers' compensation law because an invasion of privacy is an "intangible injury" unlike the physical and mental harms covered by the workers' compensation law).

Nor does the text of the Workers' Compensation Act provide any evidence that the Act is intended to cover privacy injuries, or injuries that do not result in a harmful change in the human organism. In fact, the text suggests just the opposite. The Act sets forth an explicit compensation schedule corresponding to death, to injuries to specific body parts, and to inability to work. 820 ILCS 305/7, 8. The Act also requires companies to report "all accidental deaths, injuries and illnesses" to the Commission. 820 ILCS 305/6(b). These are all injuries that affect an employee's capacity to perform employment-related duties, which is precisely the kind of injury for which the workers' compensation scheme was created. And these provisions are consistent with *Pathfinder*'s observation that the Act is triggered by an accident resulting in a harmful change to the human organism. See also *Laffoon*, 65 Ill. 2d at 446 ("[T]he purpose of the Workmen's Compensation Act is to afford employees financial protection when their earning power is temporarily diminished or terminated due to employment injuries").

Privacy injuries are different in kind from these injuries. For instance, an invasion of privacy does not, by itself, affect whether an employee can perform their job duties. And unsurprisingly, Symphony cannot point to any decision from this Court holding that the exclusive-remedy provision bars lawsuits against employers alleging privacy injuries. Symphony does briefly attempt to argue that privacy injuries are compensable by contending that "just because actual damages need not be shown to obtain statutory

damages does not mean they do not exist." (Symphony Br. 28) But this argument does not help Symphony: it focuses on one type of consequential harm ("actual damages" here means psychological harm), rather than the invasion of privacy itself (which is the object of McDonald's prayer for relief), and to the exclusion of many other potential consequential harms, like financial harms resulting from identity theft or reputational harms from defamation or false light claims, which cannot be compensated through a workers' compensation claim. The circuit court correctly reasoned that McDonald's "loss of the ability to maintain her privacy rights … is not a psychological or physical injury that is compensable" under the Workers' Compensation Act. (A1)

B. The purpose of the BIPA shows that biometric privacy injuries are outside the compensation bargain.

In answering the certified question in the negative, the Appellate Court elected to address only those privacy injuries that give rise to a claim under the BIPA, in light of the language of the question certified under Rule 308. (A190-191, A194) In doing so, the court compared the purpose of the BIPA with the purpose of the WCA. Examining this Court's decision in *Rosenbach*, the Appellate Court noted that the BIPA is structured "to have a preventative and deterrent effect," that is, the statute requires entities that collect or store biometric data to take reasonable prophylactic measures designed to ensure the privacy and security of this data and signals the importance of these safeguards by giving teeth to a private enforcement structure. (A201) By contrast, the Workers' Compensation Act "is a remedial statute designed to provide financial protection for workers that have sustained an actual injury." (*Id.*) See *Wieseman v. Kienstra, Inc.*, 237 Ill. App. 3d 721, 724 (1992) ("The [Worker's Compensation] Act does not apply to anticipated future injuries, and an employee's rights under the Act accrue only at such time when a work-

related injury occurs."). Because of the mismatch in statutory purpose, the Appellate Court "fail[ed] to see how a claim by an employee against an employer for liquidated damages under the Privacy Act … represents the type of injury that categorically fits within the purview of the Compensation Act." (A201)

Symphony faults the Appellate Court for supposedly focusing only on the type of damages sought by McDonald. (Symphony Br. 23-24, 27) But as the Appellate Court explained, the type of damages available for McDonald's alleged privacy injury is connected to the injury identified and sought to be remedied by the legislature. (A199). Thus, the type of damages McDonald seeks and the reasons the legislature made those damages available are directly pertinent to whether McDonald's injury is *categorically* within the purview of the Workers' Compensation Act.

Moreover, the Appellate Court's analytical approach is well-supported by decisions from other state courts. In *Daniel v. City of Minneapolis*, for instance, the Minnesota Supreme Court examined whether a claim under Minnesota's Human Rights Act was preempted by the state's workers' compensation act. 923 N.W.2d 637 (Minn. 2019). After examining the purposes of both laws, the court held that the human rights claim was not preempted because "the broad remedies provided by the human rights act, including monetary damages, equitable relief, and civil penalties, further show that the personal and societal injuries caused by discrimination are different in nature and scope from the physical and mental work injuries that are compensable under the workers' compensation act." *Id.* at 650. Similarly, the Florida Supreme Court held that a sexual harassment claim was not preempted by that state's workers' compensation law in light of the "overwhelming public policy" behind the sexual harassment law. See *Byrd v.*

Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1103 (Fla. 1989). Comparing the purposes of the two laws, that court wrote that "workers' compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by the sexual harassment laws." *Id.* at 1104. Several other courts have conducted similar analyses. See, *e.g.*, *Nakamoto v. Kawauchi*, 418 P.3d 600, 611 (Haw. 2018) ("In contrast to the type of 'personal injury' contemplated by the WCL, defamation and false light claims address altogether different types of harm."); *Byers v. Labor & Industry Review Commission*, 561 N.W.2d 678, 685 (Wis. 1997) (holding that claim for sex discrimination was not preempted by workers' compensation law, because that rule "best preserve[s] the purposes" of the two laws); *Cox v. Glazer Steel Corp.*, 606 So. 2d 518, 520 (La. 1992) ("The purposes of the worker's compensation law and the law guaranteeing civil rights to the handicapped are also different. The worker's compensation law provides compensation for accidental industrial injury or death. Guaranteeing civil job rights for the handicapped is intended to assure the handicapped equal employment opportunity.").

Taking this well-trod route, the Appellate Court correctly held that the purposes of the BIPA show that claims under that statute are not preempted by the Workers' Compensation Act. In enacting the BIPA, the General Assembly found that once an individual's biometrics are compromised, they lack meaningful recourse, and are at "heightened risk for identity theft." 740 ILCS 14/5(c). "The strategy adopted by the General Assembly through enactment of the Act is to try to head off such problems before they occur." *Rosenbach*, 2019 IL 123186, ¶ 36. The law therefore sets forth several prophylactic measures intended to prevent these problems, such as requiring

informed consent to collection, storage, or disclosure of biometric data, 740 ILCS 14/15(b), (d), timely deletion of biometric data, 740 ILCS 14/15(a), and use of industry-standard data security for handling biometric data, 740 ILCS 14/15(e), and a prohibition on profiting off of others' biometric data, 740 ILCS 14/15(c). A critical aspect of this statutory scheme is "substantial potential liability" for companies that fail to implement the safeguards required by the law. *Rosenbach*, 2019 IL 123186, ¶ 36. And this liability attaches regardless whether affected individuals have suffered "actual damages." *Id.*

By contrast, the Workers' Compensation Act ensures prompt and equitable compensation for accidental injuries suffered in the workplace. See *Folta*, 2015 IL 118070, ¶ 11. The law replaces the vicissitudes of the tort system by substituting a "new framework for recovery to replace the common-law rights and liabilities that previously governed employee injuries." *Id.* In other words, the BIPA is motivated by "vastly different concern[s]" than the Workers' Compensation Act. *Byrd*, 552 So. 2d at 1103. The injuries statutorily recognized by the BIPA are "different in nature and scope from the physical and mental work injuries that are compensable under the workers' compensation act." *Daniel*, 923 N.W.2d at 650. As such, the Appellate Court correctly held, BIPA injuries are not categorically within the purview of the Workers' Compensation Act. (A201)

And there is even more that can be said for the Appellate Court's holding. For instance, the BIPA explicitly contemplates application to workers, as it defines "written release" 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. This shows that the General Assembly understood that the Act would apply in the workplace.

Further, the right of action provides that "*any* person aggrieved by a violation of this Act *shall* have a right of action in a State circuit court." 740 ILCS 14/20 (emphasis added). The text is a clear indication that the General Assembly understood and intended that individuals would be able to litigate BIPA violations in court, regardless of where they suffered the requisite injury.

Symphony contends that the Appellate Court's analysis is inconsistent with this Court's decision in *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Railway*, 13 Ill. 2d 460 (1958). (Symphony Br. 33-34) Not so. *Gannon* held that an employee's action for damages under the Scaffold Act against his employer stemming from physical injury suffered at work (the employee "fell from a ladder") was preempted by the exclusive-remedy provision. 13 Ill. 2d at 462-64. There is nothing remarkable about the conclusion that an employee who suffered a physical injury when he fell from a ladder on the job must take his claim for compensation to the Workers' Compensation Commission. That type of injury is indisputably within the heartland of the compensation bargain, even if the employer's conduct may be governed by other statutes, as well. And Symphony does not identify any evidence that the Scaffold Act was aimed at providing redress for anything other than physical injuries; in fact, *Gannon* suggests that the Workers' Compensation Act and the Scaffold Act were motivated by complimentary concerns. See *id.* at 463 (noting that, to the extent the Scaffold Act authorizes suit by an employee against an employer, the Workers' Compensation Act addresses the same subject matter). Thus, *Gannon* has little to do with whether statutorily recognized privacy injuries must be brought before the Workers' Compensation Commission.

In sum, the Appellate Court correctly concluded that the text, purpose, and structure of the BIPA and the Workers' Compensation Act show that BIPA claims are not preempted by the exclusive-remedy provision.

C. Symphony's invocation of the canon of legislative acquiescence fails.

Unable to find support for its position in any decision of this Court, Symphony points to three opinions of the Appellate Court to argue that the legislature understands that workplace privacy claims must be presented to the Workers' Compensation Commission. (Symphony Br. 21-23) But none of these stands for the proposition that privacy injuries are categorically within the purview of the Workers' Compensation Act. And collectively these cases establish nothing about legislative understanding.

In *Richardson v. County of Cook*, 250 Ill. App. 3d 544 (1st Dist. 1993), for instance, the plaintiff contended that the exclusive-remedy provision did not bar her claims against her employer because her complaint alleged intentional torts by co-employees. *Id.* at 547. The Appellate Court rejected that contention, and further noted that "the injuries were compensable under the Act because they were sustained during the course of plaintiff's employment and arose out of a dispute regarding the performance of her duties." *Id.* at 548-49. But that isolated statement of law is no longer good after *Folta*, despite the lengths Symphony goes to recharacterize the reasoning of *Folta*. See 2015 IL 118070, ¶¶ 17-23 (recognizing that past cases had equated "compensability" with whether an injury was sustained in the course of employment and arose out of the employee's duties but giving the "compensability" limit independent content).

The relevant portion of Symphony's second case, *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027 (2d Dist. 1999), is unpublished, but nevertheless,

the decision never addresses "compensability." Instead, the only dispute presented by the parties was whether the underlying acts—allegedly intentional torts committed by co-employees—were "accidental" from the employer's perspective. See *id.* at 1038. The opinion does not address compensability at all.

Symphony's third case, *Goins v. Mercy Center for Health Care Services*, 281 Ill. App. 3d 480 (2d Dist. 1996), is similarly inapposite. The plaintiff there, a hospital employee, sued the hospital for violating the AIDS Confidentiality Act, 410 ILCS 305. Regarding the exclusive-remedy provision, the only question presented by the appeal was whether the hospital was acting as employer or healthcare provider at the time it allegedly violated the law. See *id.* at 485-89. There was no discussion in the opinion of compensability, and indeed no need to discuss compensability because the Appellate Court held that the hospital was not acting as the employer, so the Workers' Compensation Act could not have applied. *Id.* at 488-89.

Although these cases provide little to no support for its proposed rule, Symphony nevertheless attempts to invoke the canon that legislatures are presumed to be aware of judicial decisions, and, by extension, that legislatures may acquiesce to judicial constructions of a statute. From this, Symphony argues, if the General Assembly intended an employee's BIPA claim to proceed in court, it would have included in the law an express repeal of the exclusive-remedy provision. (Symphony Br. 21-22.)

Symphony's argument stretches this interpretive canon past its breaking point. This Court has cautioned that the canon of legislative acquiescence carries "little weight," *People v. Perry*, 224 Ill. 2d 312, 331 (2007), and is a "weak reed on which to base a determination of the drafters' intent," *People v. Marker*, 233 Ill. 2d 158, 175 (2009). See

also *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route."). One federal court has stated that "the failure of Congress to respond to court decisions is of interpretive significance only when the decisions are large in number and universally, or almost so, followed." *In re Tribune Co. Fraudulent Conveyance Litigation*, 946 F.3d 66, 95 (2d Cir. 2019). Even Symphony's cited case, *Palm v. Holocker*, applies the rule of legislative acquiescence only in dicta, and only in light of "consistent" judicial holdings on the precise statute at issue, and 18 subsequent amendments to that same statute, none of which disturbed these "consistent" judicial rulings. *See* 2018 IL 123152, ¶ 31.

The canon of legislative acquiescence should carry no weight here. In this case, Symphony urges the Court to presume that the legislature acquiesced to a particular understanding of the Workers' Compensation Act based on three isolated decisions dealing primarily with other issues. These isolated decisions addressing different questions, even if they supported Symphony's rule (which they do not), do not "settle" any particular proposition of law, and are no basis to presume that the legislature has acquiesced to any particular understanding of the Workers' Compensation Act. And absent that step, there is no reason to believe that the legislature would have believed there was any need to include an express, limited repeal of the Workers' Compensation Act within BIPA.[3]

[3] In fact, if anything, the General Assembly has signaled its understanding that privacy injuries are not covered by the Workers' Compensation Act. For instance, the Right to Privacy in the Workplace Act, which has been amended twice in the last decade, contains a provision allowing employees to sue their employers for violating that statute. 820 ILCS 55/15. Despite this, the legislature saw no need to include an express repeal of the Workers' Compensation Act for purposes of these claims.

In sum, no case establishes that workplace privacy injuries are categorically within the purview of the Workers' Compensation Act, nor provides any reason to believe that the legislature had that understanding of the Workers' Compensation Act when it enacted BIPA.

D. Symphony cannot identify a limiting principle for its rule and does not grapple with the consequences of its proposed rule.

Unable to find support in the actual language of this Court's *Folta* decision, or identify any cases that directly support its position, Symphony is forced to draw strained analogies from precedent. Symphony and its amici contend that privacy injuries are no different from the psychological harms held compensable in past cases such as *Meerbrey*. (Symphony Br. 19-20) But Symphony does not attempt to explain *why* injuries like "severe emotional shock," "emotional distress," or "humiliation" are analogous to privacy injuries, instead offering only its own say-so. [4]

This free-floating analogy contains no limiting principle for Symphony's rule. In fact, Symphony seems to disclaim the idea that a limiting principle is even necessary, asserting that through the exclusive-remedy provision the Workers' Compensation Act eliminates *all* of an employer's civil liability under state law. (Symphony Br. 1, 14-15. 17-20) Thus, under Symphony's rule, the exclusive-remedy provision might preempt discrimination or wage claims.[5] That would be absurd. Yet Symphony's rule provides no

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[4] What's more, the principal basis for finding that the injuries alleged in *Meerbrey* were compensable was waiver. See 139 Ill. 2d at 467-69 (noting that "plaintiff has waived this claim" that her injuries were not compensable "by failing to raise it in the trial court," but citing decisions from other states holding that injuries like those suffered by the plaintiff were not compensable). The decision is a weak foundation for Symphony's argument.

[5] For instance, until the recently enacted Workplace Transparency Act, Public Act 101-221 (eff. Jan. 1, 2020), an employer was potentially liable under 775 ILCS 5/2-102

principled basis for distinguishing between these types of injuries and the privacy injuries at issue here, or the psychological harms at issue in *Meerbrey*, *Pathfinder*, and *Collier*. Instead, Symphony urges the Court to adopt a hard-and-fast rule that any attempt by an employee to charge their employer with common-law or statutory liability must be directed to the Workers' Compensation Commission unless the legislature has specifically exempted the worker's grievance from the workers' compensation scheme.

This would mark a dramatic and unwarranted shift in workers' compensation law. The wide variety of statutes that apply to the employer-employee relationship demonstrates the wide variety of types of injuries that an employee may suffer. But no case suggests that all of these types of injuries were meant to be presented to the Workers' Compensation Commission. Instead, the Workers' Compensation Act is about ensuring prompt and equitable redress for physical injuries suffered on the job, and job-related mental disabilities precipitated by workplace accidents or extraordinary job-related stress.

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for sexual harassment by a co-employee "regardless of whether it was aware of the harassment or took measures to correct the harassment." *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, 233 Ill. 2d 125, 137 (2009). In the argot of the Workers' Compensation Act, any mental anguish suffered by the victim of harassment could have been "accidental" from the perspective of the employer, and, having occurred on the job, the victim's claim would be preempted under Symphony's construction of the exclusive-remedy provision. Even now, under Symphony's rule, such claims would be preempted unless the employer developed the specific intent to harm the employee. Likewise, many employment law claims do not require a plaintiff-employee to demonstrate that an employer had the specific intent to deprive the employee of their statutory rights, such as with the Employee Classification Act, 820 ILCS 185, or the Wage Payment and Collection Act, 820 ILCS 115. Either statute can be violated negligently. So, again, under Symphony's construction of the exclusive-remedy provision, claims under these laws may be preempted.

And even if Symphony's proposed rule is somehow limited to privacy injuries (it is not), Symphony even fails to grapple with the consequences of that holding. Privacy claims come in all shapes and sizes. Even under the BIPA, for instance, McDonald might have a claim if Symphony stored or transmitted her biometric data with insufficient security. See 740 ILCS 14/15(e). Employees might sue their employer following a data breach, as in *Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018). Or an employee might also sue their employer for misappropriation of likeness, see 765 ILCS 1065, or even for defamation.

The workers' compensation system is not meant to handle these types of privacy claims. How would a claim that an employer failed to use a reasonable standard of care to store biometric information collected from employees be adjudicated in a no-fault system? What would happen if, by virtue of an employer's actions, an employee's identity was stolen? How would that injury be valued by the Workers' Compensation Act? If an employer suffers a data breach, may the employees hold them strictly liable for whatever happened through a workers' compensation claim? Given that the limited compensation schedule set forth in the Workers' Compensation Act, would employees be left with no remedy for many of these injuries? If so, how would that comport with the Remedy Clause of the Illinois Constitution?

The bottom line is that Symphony's argument proves far too much, and it tellingly omits any discussion of the many serious questions raised by its argument. The courts and the Commission have for decades understood the workers' compensation system to apply to physical injuries sustained on the job, as well as to psychological harms that are themselves traceable to a workplace accident or to physical workplace conditions that

impose an unusual degree of stress on the claimant. *E.g.*, *Baggett v. Industrial Commission*, 201 Ill. 2d 187, 197-98 (2002). There is no need to upend this system because Symphony has violated a law about which this Court has said "[c]ompliance should not be difficult." *Rosenbach*, 2019 IL 123186, ¶ 37.[6]

In sum, the circuit and appellate courts got it right. Injuries to privacy interests are not within the purview of the Workers' Compensation Act, and, in any event, the purpose and design of BIPA itself shows that a claim for liquidated damages under that law is not categorically within the purview of the Workers' Compensation Act. McDonald's claim is therefore not preempted by the exclusive-remedy provision, and the certified question must be answered in the negative.

IV. Even assuming that a conflict between the BIPA and the WCA exists, longstanding rules of statutory construction counsel in favor of applying the BIPA here.

Finally, assuming the WCA and the BIPA conflict over where a claim can be brought, the BIPA's narrower scope governs in these specific circumstances. "It is a commonplace of statutory construction that when two conflicting statutes cover the same subject, the specific governs the general." *People ex rel. Madison v. Burge*, 2014 IL

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[6] Symphony expresses incredulity that a negligence claim and a BIPA claim premised on largely similar facts might need to be adjudicated in different fora. McDonald does not concede the point: a privacy injury giving rise to a negligence claim should also be allowed to proceed in the circuit court. Indeed, courts generally agree that when a claim is premised on a non-compensable harm, it may proceed in court even if the plaintiff also alleges ostensibly compensable injuries. See *Foley v. Polaroid Corp.*, 413 N.E.2d 711, 715 (Mass. 1980) (holding that defamation claim could proceed in court, because the "gist" of the claim is "injury to reputation," even though the plaintiff also alleged compensable mental harms). Even so, Symphony is at war with itself on this front, as it advocates for a result that requires BIPA damages claims go before the Workers' Compensation Commission, while BIPA injunctive claims proceed in court at the same time. (Symphony Br. 35) So even Symphony must admit that such dual-tracking is tolerable.

115635, ¶ 31 (citation omitted). The BIPA is clearly the narrower statute here, as it covers just a single subject matter, biometric privacy, rather than a range of workplace injuries.

While the specific governs over the general regardless of the order in which the relevant statutes are enacted, see *id.*, ¶ 32, the order of enactment provides further reason to apply the BIPA here notwithstanding the WCA. "[W]hen two statutes appear to be in conflict, the one which was enacted later should prevail, as a later expression of legislative intent." *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 431 (2005). Here, the intent of the legislature is clear: individuals, including employees, whose BIPA privacy rights are invaded *shall* have the ability to sue in circuit court. 740 ILCS 14/20. Because that intent was expressed subsequent to the WCA (indeed, decades subsequent), that statute governs McDonald's claim. See *Jahn v. Troy Fire Protection District*, 163 Ill. 2d 275, 282 (1994).

Given the clear textual command to permit BIPA claims to proceed in the circuit court, regardless of whether they accrue in the workplace or not, the circuit court was correct to deny Symphony's motion to dismiss, and the Appellate Court was right to answer the certified question in the negative.

CONCLUSION

The Court should answer the certified question in the negative and affirm the judgments of the circuit and appellate courts.

Dated: June 25, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 10,178 words.

Dated: June 25, 2021 s/ J. Aaron Lawson

No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA MCDONALD,
Plaintiff-Appellee,

v.

SYMPHONY BRONZEVILLE PARK, LLC,
Defendant-Appellant.

On appeal from the Appellate Court of Illinois,
First District, Appellate Court Case No. 1-19-2398
There on Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division. Case No. 2017 CH 11311
Honorable Raymond Mitchell, Judge Presiding

NOTICE OF FILING

PLEASE TAKE NOTICE that on June 25, 2021, Plaintiffs-Appellee Marquita McDonald filed the attached **PLAINTIFF-APPELLEE'S ANSWERING BRIEF** in the above-captioned action.

Dated: June 25, 2021

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CERTIFICATE OF SERVICE

I, Jessica R. Woodard, hereby certify that on June 25, 2021, at Chicago, Illinois, I caused the foregoing **PLAINTIFF-APPELLEE'S ANSWERING BRIEF** to be filed in the Supreme Court of Illinois using the Court's online efiling system, Odyssey eFileIL, and further state that I caused a true and correct copy of the same to be served upon the following persons via electronic mail, and a paper copy was mailed to those without email addresses:

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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 certificate of service are true and correct.

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