No. 127801

IN THE SUPREME COURT OF ILLINOIS

JOROME TIMS AND ISAAC WATSON, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS,
Plaintiffs-Appellees,

v.

BLACK HORSE CARRIERS, INC.,
Defendants-Appellant.

Petition for Leave to Appeal FILED on October 22, 2021
Petition for Leave to Appeal ACCEPTED on January 26, 2022
On appeal from the Appellate Court of Illinois, First District

BRIEF FOR THE ILLINOIS TRIAL LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/ILLINOIS, AND THE EMPLOYMENT LAW CLINIC AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST OF *AMICI*

The Illinois Trial Lawyers Association ("ITLA") is statewide organization of trial lawyers with more than 2,000 members. ITLA members specialize in representing injured consumers and workers. ITLA's objectives include upholding the Constitution of the United States and the State of Illinois, securing and protecting the rights of those injured in their persons or civil rights, and promoting fair, prompt and efficient administration of justice.

NELA/Illinois is the Illinois affiliate of the National Employment Lawyers Association ("NELA"), the largest organization of lawyers who primarily represent employees in labor, employment, and civil-rights disputes in the country. With approximately 69 state and local affiliates and a membership of over 4,000 attorneys, NELA is the nation's leading advocate for employee rights. Founded in 1986, NELA/Illinois is dedicated to advocating for employee rights and advocating justice in the workplace.

NELA/Illinois has a current membership of approximately 175 individuals—primarily attorneys from Illinois and the surrounding states who solely or primarily represent individuals in employment-related matters. NELA/Illinois provides education programs, technical support, and networking benefits to its members, which also includes mediators and law students.

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 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 (BIPA), 740 ILCS 14/1 *et seq.*, are able to pursue their claims in court.

INTRODUCTION

Enacted in 2008, the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.*, was passed 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 (quoting 740 ILCS 14/5(g)). BIPA places several obligations on private entities, including employers, who collect, store, or use biometric identifiers and information. *Id.* at ¶ 20. Under BIPA, an aggrieved person may have a cause of action against a party who violates the provisions. *Id.* at

¶ 1. In passing BIPA, the Illinois General Assembly did not provide a statute of limitations for causes of action arising under the statute.

Jorome Tims was an employee for defendant Black Horse Carriers, Inc. ("Black Horse") and filed a class action complaint in 2019 alleging violations under section 15 of BIPA. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 5. Mr. Tims had worked for Black Horse from June 2017 until January 2018 during which he alleges that defendant scanned fingerprints of "all employees" for timekeeping purposes. *Id.* The complaint stated that "[d]efendant continues to collect, store, use, and disseminate individual[s'] biometric data in violation" of BIPA. *Id*. The first count alleged a violation of section 15(a) by "failing to institute, maintain, and adhere to a retention schedule for biometric data." The second count alleged a violation of 15(b) for "failing to obtain informed written consent and release before obtaining biometric data." The third count alleged a violation of 15(d) for "disclosing or disseminating biometric data without first obtaining consent." *Id.* at ¶ 7. Even though BIPA had been existence for a decade at the time of Mr. Tims's complaint, Black Horse did not make an effort to comply with its obligations to its employees under the statute.

In June 2019, Black Horse filed a motion to dismiss alleging that Mr. Tims's complaint was filed outside the statute of limitations. Acknowledging that BIPA does not provide a statute of limitations, Black Horse argued that the one-year statute of limitations for privacy actions under 735 ILCS 5/13-

201 (section 13-201) for "[a]ctions for slander, libel or for publication of matter violating the right of privacy" governed causes of action under BIPA. *Id.* at ¶ 8. Mr. Tims responded to the motion to dismiss and argued that the five-year "catchall" statute of limitations in 735 ILCS 5/13-205 (section 13-205) for "all civil actions not otherwise provided for" should apply to BIPA in the absence of a defined statute of limitations. *Id.* at ¶ 9. Mr. Tims argued that section 13-201 only applies to privacy claims with a publication element, which is not applicable to BIPA. *Id.*

The trial court denied Black Horse's motion to dismiss in September 2019. The court held that the five-year catchall provision in section 13-205 should apply because Mr. Tims was not "claiming a general invasion of his privacy or defamation." *Id.* at ¶ 11. Therefore, the complaint fell within the five-year statute of limitations and was determined to be timely. In December 2019, Black Horse moved for reconsideration of the denial of its motion to dismiss and certification of the question of which statute of limitation applies. *Id.* at ¶ 13. The trial court denied reconsideration and certified the question to the appellate court. *Id.* at ¶ 14.

The appellate court found that both statutes of limitation apply. Looking to the duties imposed on private parties under the statute, the court determined that sections 15(a), (b), and (e)[1] of BIPA have "absolutely no

[1] Section 15(a) imposes a duty to develop a publicly available retention and destruction schedule; 15(b) requires informed consent and written (*continued*)

element of publication or dissemination" whereas section 15(c) and (d)[2] involved "publication or disclosure of biometric data." *Id.* at ¶¶ 31–32. The court held that "section 13-201 governs actions under section 15(c) and (d) of the Act while section 13-205 governs actions under sections 15(a), (b), and (e)." *Id.* at ¶ 32.

On October 22, 2021, Black Horse filed a Petition for Leave to Appeal to this Court, which this Court granted on January 26, 2022. The issue before the Court is "whether the one-year limitation period in section 13-201 or the five-year limitation period in section 13-205 governs claims under the Act." *Id.* at ¶ 16.

This Court should apply the five-year catchall statute of limitations in section 13-205 to all claims under BIPA. That statute of limitations governs all civil actions that do not have an explicit statute of limitations provided by the statute. Applying the catchall five-year statute of limitations would promote simplicity and judicial efficiency, reduce the confusion arising from applying two different statutes of limitation, and provide broad protection for employees and consumers in a manner that coheres with the purpose of BIPA. The Illinois General Assembly was aware of the five-year catchall

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(*footnote 1 continued*) release; (and 15(e) pertains to the storage, transmission, and protection of biometric data using a reasonable standard of care. *See* 740 ILCS 14/15.

[2] Section 15(c) prohibits profiting from biometric data and 15(d) prohibits the disclosure, redisclosure, or dissemination of data without consent. *See* 740 ILCS 14/15.

statute of limitations when it drafted BIPA. By not expressly providing for a statute of limitations, this Court should presume the General Assembly intended that the catchall statute of limitations apply. The one-year statute of limitations for slander, libel, and other privacy harms involving publication should not be applied to BIPA violations, which are a unique harm related to biometric data and therefore categorically different from the types of action encompassed by section 13-201. These arguments are addressed in detail below.

ARGUMENT

I. One Statute of Limitations Should Apply to all BIPA Claims.

One of the purposes of a statute of limitation is to reduce uncertainty. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L. J. 453 (1997) (arguing that statutes of limitations historically have many purposes, including the reduction of uncertainty). As this Court has stated, "[s]tatutes of limitations and repose represent society's recognition that predictability and finality are desirable, even indispensable, elements of the orderly administration of justice." *Sundance Homes v. Cnty. of Du Page*, 195 Ill. 2d 257, 266, 746 N.E.2d 254, 260 (2001). When the court below held that two different statutes of limitations applied to different provisions in BIPA, it increased uncertainty and unpredictability for potential plaintiffs.

The inconsistent statute of limitations that the lower court applied to BIPA causes confusion for potential plaintiffs about when claims are barred. An employee, for example, may have claims arising from one instance in which an employer both failed to publicize a written policy regarding its collection of biometric information (in violation of 740 ILCS 14/15(a)) and disclosed biometric information to a third party (in violation of 740 ILCS 14/15(d)). Under the lower court's holding, the same underlying facts would give rise to two different statutes of limitations.

A uniform statute of limitations for all BIPA claims also provides clarity and efficiency for lower court judges. Two statutes of limitations make things messier for lower courts to administer justice in BIPA claims. This Court has long held that statutes should be interpreted with the presumption that that when the legislature enacted a law, "it did not intend to produce absurd, inconvenient, or unjust results." *In re Marriage of Goesel*, 2017 IL 122046 ¶ 13, 102 N.E.3d 230, 235 (2017) (holding that a proffered statutory interpretation cannot be accepted because it would produce absurd, inconvenient, or unjust results). As the *Goesel* court held it "must also consider the consequences that would result from construing the statute one way or another, and in doing so, [ ] presume that the legislature did not intend absurd, inconvenient, or unjust consequences." *Id. See also Vine St. Clinic v. HealthLink, Inc.* 222 Ill. 2d 276, 282, 856 N.E.2d 422, 428 (2006); *Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co*, 215 Ill. 2d

121, 134, 828 N.E.2d 1175, 1183 (2005); *Sun Choi v. Indus. Comm'n*, 182 Ill. 2d 387, 396, 695 N.E.2d 862, 867 (1998).

Furthermore, this Court has previously rejected a statute of limitations regime in which two different time-bars applied to the same kinds of claims. In *Sundance v. County of Du Page*, this Court considered whether tax refund claims would be governed by both the equitable doctrine of *laches* and the five-year catchall statute of limitations for civil cases at law. This Court rejected the bifurcation of tax refund claims into law and equity, thereby holding that one statute of limitations—the five-year catchall provision—applied. *Sundance*, 195 Ill. 2d at 284. As this Court stated:

> we believe the legislature intended that a uniform and harmonious system of law apply to refund cases, and that the maintenance of two time-bar standards for simple refund cases is inconsistent with that intent.

Id. Citing reasons of simplicity and clarity, the Court rejected a two-part statute of limitation regime for a particular set of similar claims. As it did in *Sundance*, this Court should again reject the bifurcation of similar claims into two different time-bar standards.

Similarly, the United States Supreme Court often employs an "anti-messiness principle" when interpreting statutes. The principle "favors the avoidance of inelegant, complex, indeterminate, impractical, confusing, or unworkable factual inquires." Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 Notre Dame L. Rev. 1465, 1469 (2012). The Supreme Court has stated that it "place[s] primary weight upon

the need for judicial administration of jurisdictional statute to remain as simple as possible" *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010) (holding that a corporation's "principal place of business" should be found using the "nerve center" test, which provides the most administrative simplicity). Thus, in essence, the anti-messiness principle "reflects a judicial preference for simple, easy-to-administer interpretations." *Id.* The U.S. Supreme Court has invoked an anti-messiness/simplicity principle in many statutory construction cases. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (noting "the need for workable standards and sound judicial and legislative administration" in election law); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2007) (stating that it "strains credulity that Congress would have abandoned [a] predictable, workable framework" and thereby rejecting a messy statutory interpretation offered by the Government in a dispute over attorney's fees); *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108–9 (2010) (rejecting a statutory interpretation that created two different sets of liability and venue rules for overseas shipping and transportation carriers under the Carriage of Goods by Sea Act).

One statute of limitations for BIPA violations is the cleanest and most convenient interpretation of BIPA. Based on fundamental principles of convenience, anti-messiness, and justice in statutory interpretation, this Court should find that there is one statute of limitations that applies to all BIPA claims. To hold that there are two distinct statutes of limitations

creates an inconvenient regime for judicial administration and the potential for unjust consequences for potential plaintiffs.

II. All Actions Arising Under BIPA Should be Governed by the Five-Year "Catchall" Statute of Limitations.

A. The Illinois General Assembly was aware of the five-year "catchall" statute of limitation when it enacted BIPA without explicitly providing a statute of limitation.

This Court has stated that the "'singular concern' in determining which statute of limitation or repose applies 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)). In ascertaining the legislature's intent, "[i]t is presumed that the legislature, in enacting various statutes, acts… with full knowledge of all previous enactments." *State v. Mikusch,* 138 Ill. 2d 242, 247–48, 562 N.E.2d 168, 170 (1990).

Here, the Illinois Legislature enacted BIPA after the five-year catchall statute of limitation provision became effective in 1982. *See* Pub. Act 82-0280 (eff. Jul. 1, 1982). Thus, in ascertaining the General Assembly's intent, this Court should presume, under *Mikusch*, that the General Assembly was fully aware of the five-year catchall provision when it enacted BIPA. Moreover, to the best of *amici's* knowledge, no member of the General Assembly expressed their intent to exempt BIPA from the five-year catchall provision during the floor debate. Accordingly, this Court should presume that the General

Assembly intended the five-year catchall provision to apply to all BIPA actions.

B. The Illinois Legislature enacted BIPA with full knowledge that courts have consistently applied the five-year catchall provision to statutes without a clear statute of limitations.

This Court has stated that "the judicial construction of the statute becomes a part of the law, and the legislature is presumed to act with full knowledge of the prevailing case law and the judicial construction of the words in the prior enactment." *People v. Villa*, 2011 IL 110777, ¶ 36, 959 N.E.2d 634, 644.

Here, the Legislature is presumed to have been aware of Illinois precedents that have interpreted the catchall provision to apply in statutes that did not otherwise provide for a statute of limitations. Both this Court and the Appellate Court have used the word "catch-all" to describe the five-year statute of limitations provision, applying the catchall in situations where the General Assembly was silent as to the statute of limitations. *See Sundance Homes, Inc. v. Cnty. of Du Page*, 195 Ill. 2d 257, 280, 746 N.E.2d 254, 268 (2001) (holding that the five-year catchall provision applied when the Legislature did not provide a statute of limitations); *see also Seaman v. Thompson Elecs. Co.*, 325 Ill. App. 3d 560, 565, 758 N.E.2d 454, 458 (3d. Dist. 2001) (holding that the five-year catchall provision applied to the Prevailing Wage Act, 820 ILCS 130/0.01 *et seq.*, because it was silent regarding the statute of limitations).

Under the rationale of *Sundance Homes* and *Seaman*, this Court should presume that the Legislature knew how courts have consistently applied the five-year statute of limitation in situations where the Legislature was silent about the statute of limitations. Thus, the Court should conclude that the General Assembly intended all BIPA actions to be governed by the five-year catchall provision when it remained silent regarding the statute of limitations.

III. The Court Below Erred in Holding that the One-Year Statute of Limitations Applies to Parts of BIPA Involving the Disclosure of Biometric Data.

A. BIPA is not a publication statute.

The one-year statute of limitations established in section 13-201 applies to a narrow group of common law privacy torts, all of which involve an element of publication. *See* 735 ILCS 5/13-201. section 13-201 does not encompass the type of injury that BIPA addresses. Entitled "Defamation – Privacy," it applies to "[a]ctions for slander, libel or for publication of matter violating the right of privacy." 735 ILCS 5/13-201. The title itself is the first indication that the claims covered under this section are limited to defamation, not to all types of privacy injury. The court below held that section 13-201 applies to sections 15(c) and (d) of BIPA because they involve the disclosure of biometric data. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 33. Neither these specific provisions of BIPA involving

dissemination of data nor the statute of BIPA taken as a whole should be understood as involving "publication" in any sense.

First, BIPA violations are not defamation torts. Defamation torts are categorically different than the harms associated with the disclosure of biometric data. Defamation involves the publication of *false* information.[3] *See* Restatement (Second) of Torts, § 558. Defendant argues that "[w]hether the claim is slander, libel or the publication of matter that violates a privacy interest, the bedrock interest that unifies the category of cases… is the prevention of wrongful disclosures." Def.'s Br. at 16. Eliminating the distinction between defamation torts, which are covered by section 13-201, and all other legal injuries, which are covered by the catchall provision of section 13-205, would make the one-year statute of limitation overly broad and encompass claims that were not intended to be covered. Defamation torts recognize the reputational harm that occurs from the spread of false information whereas BIPA violations involve the spread of true but extremely sensitive biometric data.

Second, BIPA established a new statutory right to biometric privacy, not an extension of a common law right. BIPA is focused on the unique harms

[3] The four elements of a defamation tort include: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See* Restatement (Second) of Torts, § 558.

of biometric data; this is patently different than the type of common law invasion of privacy torts that the one-year statute of limitations covers. As the Circuit Court in *Robertson v. Hostmark Hospitality Group, Inc.* held, "[n]othing in the plain and unambiguous language of section 14/20 indicates that publication is a necessary element for a person to be aggrieved by a violation of the BIPA statute." No. 18-CH-5194, 2019 WL 8640568, at *3 (Cir. Ct. Cook Cnty. Jul. 31, 2019). Nowhere in BIPA is the word "publication" used nor any analogies invoked to the common law privacy harms.

This Court has long held that principles of statutory interpretation apply when interpreting statutes of limitations. As such, the primary rule of statutory interpretation is to "ascertain and give effect" to the intent of the General Assembly. *See In re Marriage of Rogers*, 213 Ill. 2d 129, 136, 820 N.E.2d 386, 390 (2004). Relatedly, this Court has also held that it must:

> consider the statute in its entirety, noting the subject it addresses and the legislature's apparent objective in enacting it. Where the letter of the statute conflicts with the spirit of it, the spirit will be controlling when construing the statute's provisions.

Gill v. Miller, 94 Ill. 2d 52, 56, 445 N.E.2d 330, 333 (1983) (citation omitted). When considering the appropriate statute of limitations for BIPA, this Court should take into account the General Assembly's intent, the statute in its entirety, and the spirit of the law as enacted by the General Assembly. In passing BIPA, the General Assembly recognized the unique harms associated with the collection of biometric data. In doing so, BIPA established a new statutory right. *See Rosenbach*, 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206.

Thus, any categorizations of BIPA violations that rely on analogizing it to the common law privacy harms covered by section 13-201's one-year statute of limitations is inconsistent with the letter and spirit of BIPA.

Third, parallels drawn to the Illinois Right of Publicity Act (IRPA), 765 ILCS 1075/1 *et seq.*, are misguided—IRPA is not a sufficiently analogous statute to BIPA. The defendant points to *Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 859 N.E.2d 1188 (2d Dist. 2006), in support of the application of the one-year statute of limitations. Def.'s Br. at 18. In *Blair*, the appellate court held that the one-year statute of limitations applied to claims arising under IRPA. 369 Ill. App. 3d at 323, 859 N.E.2d at 1192 (2d Dist. 2006). BIPA and IRPA are two separate statutes that address different harms. The appellate court in *Blair* determined that the one-year statute of limitations was appropriate because IRPA "completely supplanted the common-law tort of appropriation of likeness." *Id.* BIPA does not supplant an existing common law privacy tort as IRPA did, therefore *Blair* is not applicable to the present case.

B. The common law understanding of publication involves disclosure to the public at large.

Under the common law, "publication" is a high bar that is satisfied only when information is communicated to the *public at large*—not by disclosure to a third party. There are four privacy torts recognized at common law: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) a public disclosure of private

facts; and (4) publicity which reasonably places another in a false light before the public. *See Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 978, 560 N.E.2d 900, 901 (1990); Restatement (Second) of Torts, §§ 652B–E. Violations under BIPA do not fall under any of these common law privacy torts.

Appellate court decisions in *Benitez* and *McDonald's* demonstrate that claims merely invoking a privacy interest are insufficient to warrant the one-year statute of limitations. In *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027, 714 N.E.2d 1002 (2d. Dist. 1999), the appellate court determined that section 13-201 does not apply to intrusion upon seclusion torts because it does not include an element of publication. In *McDonald's Corp. v. Levine*, the court held that violations of the Eavesdropping Act were subject to the five-year catchall statute of limitations because plaintiffs did not allege "libel, slander, or publication of private matters." 108 Ill. App. 3d 732, 737, 439 N.E.2d 475, 479. (2d Dist. 1982). Following the logic of *Benitez* and *McDonald's*, section 13-201 is not applicable to BIPA violations because they do not involve "publication" of biometric data to a wide audience. There must be *actual* publication alleged by plaintiffs. Claims asserting BIPA violations may allege disclosure or dissemination, but they do not allege publication of biometric data.

Publication under the public disclosure of private facts tort is distinct from publication under the defamation tort. To find liability, the public disclosure of private facts tort requires that a "matter concerning the private

life of another" is given "publicity." Restatement (Second) of Torts, § 652D. It must be highly offensive to a reasonable person and not of legitimate concern to the public. *Id.* Publicity entails:

> "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge… [I]t is not an invasion of the right of privacy… to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."

Restatement (Second) of Torts, § 652D comment a. This tort is thus concerned with actions such as the publication of embarrassing or sensitive information in newspapers or magazines, not the disclosure of biometric information with third parties.

Illinois courts have adopted the Restatement's approach but have recognized that "public" may constitute a group of people if the "plaintiff has a special relationship with the 'public' to whom the information is disclosed.'" *Miller*, 202 Ill. App. 3d at 981, 560 N.E.2d at 903 (2d Dist. 1990). In *Miller v. Motorola*, the public disclosure requirement was thus satisfied by an employer sharing the plaintiff's sensitive medical condition information with other employees. *Id.* Taking into account the plaintiff's relationship with her coworkers, she was particularly exposed to distress by the defendant's disclosures. *See id.* at 979. Even with this more permissive definition of "public" accepted by Illinois courts, this high bar of disclosure is nevertheless not met by BIPA violations. Violations under section 15(c) and (d) of BIPA address the sharing of biometric data with third parties who do not have

"special relationships" with plaintiffs. The third parties implicated in BIPA violations are vendors and providers who have no such relationship with plaintiffs.

Publication is satisfied by communication to a third party only in the case of defamation. "Publication" in connection with liability for defamation "is a word of art, which includes any communication by the defendant to a third person." Restatement (Second) of Torts, § 652(d) comment a. As stated previously, BIPA violations are not defamation torts as they do not involve the communication of *false* information to third parties.

Neither public disclosure of private facts nor the defamation tort map onto the type violation at concern in BIPA. Thus, applying the one-year statute of limitation provided by section 13-201, which is intended to cover a narrow set of privacy actions, is an attempt to force a square peg in a round hole.

C. This Court's decision in *West Bend* is not applicable to the present case and should be limited to its facts.

This Court's holding in *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, 183 N.E.3d 47, which involved the interpretation of undefined terms in an insurance policy, is not applicable to the facts of the present case. The court below cited to *West Bend* in standing for the proposition that "[u]nder the common law, publication means communication to both a single party and the public at large." *Tims*, 2021 IL

App (1st) 200563, ¶ 20. The appellate court's reliance on *West Bend* is misplaced.

West Bend involved the interpretation of undefined terms in a business liability policy. The issue was whether the insurer owed a duty to defend the insured against an employee's BIPA lawsuit. *West Bend*, 2021 IL 125978, ¶ 1. The Court looked to the liability policy's coverage for an "advertising injury" which could arise from "oral or written publication of material that violates a person's right of privacy." *Id.* at ¶ 8. The Court determined that because the term "publication" was not defined by the policy and it was ambiguous, the principle of *contra proferentem* applied so that it was "strictly construed against the insurer who drafted the policies." *Id.* at ¶ 42.

Thus, this Court should decline to apply *West Bend* to the present case because *West Bend* interpreted "publication" in the context of a business's insurance policies rather within the statutory text of BIPA itself.

CONCLUSION

For the reasons set forth above, *amici curiae* the Illinois Trial Association, NELA/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 in part and reverse in part the decision below and hold that the five-year statute of limitations set forth in section 13-205 applies to all BIPA claims.

Respectfully Submitted,

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April 27, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Respectfully submitted,

/s/ Randall D. Schmidt
Counsel for *Amici Curiae*

Dated: April 27, 2022

No. 127801

IN THE SUPREME COURT OF ILLINOIS

JOROME TIMS AND ISAAC WATSON, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED	)	Petition for Leave to Appeal FILED on October 22, 2021
Plaintiffs-Appellees,	)	Petition for Leave to Appeal ACCEPTED on January 26, 2022
v.	)	
BLACK HORSE CARRIERS, INC.	)	On Appeal from the Appellate Court of Illinois, First District
Defendant-Appellant.	)	

[PROPOSED] ORDER

This matter coming to be heard on the Motion of the Illinois Trial Lawyers Association, National Employment Lawyers Association/Illinois, and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic for Leave to File a Brief of *Amicus Curiae* in Support of Plaintiffs-Appellees, due notice having been given and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion is granted / denied.

Entered:

Justice

Prepared by:
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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Randall D. Schmidt, an attorney, hereby certify that on April 27, 2022, I caused true and complete copies of the foregoing:

A. Motion, including exhibits and draft Order, of the Illinois Trial Lawyers Association, National Employment Lawyers Association/Illinois, and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic for Leave to File a Brief of *Amici Curiae* in Support of Plaintiffs-Appellees, and

B. Brief of the Illinois Trial Lawyers Association, National Employment Lawyers 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.

/s/ Randall D. Schmidt
Randall D. Schmidt