No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA McDONALD,

Plaintiff-Appellee

v.

SYMPHONY BRONZEVILLE PARK LLC et al.,

Defendant-Appellant

On Appeal from the Illinois Appellate Court, First District
Case No. 1-19-2398

On A Rule 308 Certified Question Presented
By The Circuit Court of Cook County, Case No. 2017 CH 11311
Honorable Raymond Mitchell, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF MARQUITA McDONALD

Kurt Niermann (ARDC 6207461)
Porro Niermann Law Group LLC
821 West Galena Blvd
Aurora Illinois 60506
Telephone No. (630) 264-7300
kurt@pnlawoffice.com

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Carolyn Taft Grosboll
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INTERESTS OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association presents this brief to highlight the fundamental rights which workers have at risk in the present dispute and the State's constitutional role in protecting those rights. ITLA is an organization focused on protecting the rights of all injured persons and preserving each citizen's constitutional right to seek fair civil redress for their losses.

ARGUMENT

The exclusive remedy provision of the Workers' Compensation Act ("WCA") should not be read to bar claims for statutory damages under the Biometric Information Privacy Act ("BIPA"). 820 ILCS 305/5(a); 740 ILCS 14/1 *et seq*. The legislature obviously knew that the WCA had been in place for a century when it crafted BIPA, and it expressly provided victims with a right to seek their BIPA remedy in state and federal courts, presumably with a jury trial. See 740 ILCS 14/20. That grant is not compatible with workers' compensation practice. It is also a pretty clear indication that the legislature intended no overlap of BIPA and the WCA. Marquita McDonald and her amici expand on these issues in their briefs.

ITLA will focus on the profoundly illegal endgame which Symphony and its amici demand—stranding victims without remedies. Symphony and its amici ask the Court to 1) suspend the State's constitutional obligation to provide a fair mechanism for redress to victims, and 2) deprive victims of their mechanism for protecting fundamental interests. Symphony's interpretation of the exclusive remedy clause could block every common law and statutory claim which an employee might file against an employer, at least those based in state law. The Court should reject Symphony's request for good reasons.

First, the State is constitutionally obligated to provide victims with fair mechanisms to redress injuries. Citizens enjoy a correlative right to rely

on the mechanisms when they are injured. Stranding victims without redress is not simply unjust, it is unconstitutional.

Second, bodily integrity is our most fundamental interest. If BIPA protects injuries to bodily integrity, then our most fundamental interest is at risk in this dispute. State laws which threaten the interest must be strictly scrutinized with an eye toward protecting the interest. If the WCA and BIPA cannot be harmonized to protect the worker's bodily integrity, the WCA exclusive remedy provision must be deemed unconstitutional.

Third, property interests are also fundamental interests protected by the constitution. Even if BIPA only involves property interests, we still have fundamental interests at risk in this dispute.

Finally, BIPA places no categorical limit on what victims can recover as "actual damages." See 740 ILCS 14/20.[1] Victims could face a vast range of actual damages from loss of their biometric information, and BIPA provides a framework for redressing those losses.[2] Given how individualized

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[1] The certified question asked the appellate court to address the WCA's impact on "statutory damages" under BIPA. The appellate court limited its analysis to the liquidated damages provisions and did not address the WCA's impact on actual damages. *McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) 192398 ¶15. However, all damages listed in BIPA would qualify as statutory damages, likely explaining why Symphony and its amici go to great lengths to explore why emotional injuries should be blocked by the WCA.

[2] Plausible damages might include: monetary losses to address the BIPA impact (attorney fees, credit repair expenses, replacement of assets lost, bankruptcy, etc.); bodily injuries (anxiety, distress, insomnia, physical manifestations like hypertension, stroke, depression, suicide, lifespan reduction); social damage (destroyed marriages, disruption in a

the harm and losses will be for victims, the claims should be handled in a fashion and forum that best protects each victim's ability to redress their individualized losses.

ARGUMENT I

THE STATE IS CONSITUTIONALLY OBLIGATED TO PROVIDE FAIR MECHANISMS TO REDRESS INJURIES

Each state has a duty "to provide for the redress of private wrongs." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885). The obligation "lies at the foundation of all well-ordered systems of jurisprudence" and is "founded in the first principles of natural justice." *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876). The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). One of the first duties of government is to afford that protection. *Id.*

A. The Illinois Constitution Guarantees A Right To Redress

Each version of the Illinois Constitution has included a guaranteed remedy provision for injuries to the person.[3] In its current formulation, "every person shall find a certain remedy in the law for all injuries and wrongs which he receives to his person, privacy, property or reputation." ILL.

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dependent's education, etc.); miscellaneous opportunity impacts (job losses, diminished employment options, etc.).

[3] Art. VIII, Sec. 12 of the 1818 constitution; Art. XIII, Sec.12 of the 1848 constitution; Art. II, Sec.19 of the 1870 constitution.

CONST. Art.1 §12. The intent of this clause is to protect individuals from injuries caused by others. *See In re A Minor*, 149 Ill.2d 247, 256 (1992). The clause does not guarantee that victims will win every claim. It only obligates the State to provide the fair mechanism of redress for citizens to use if they need it. *See Sullivan v. Midlothian Park Dist.*, 51 Ill.2d 274, 277 (1972); *Steffa v. Stanley*, 39 Ill.App.3d 915, 918 (2nd Dist. 1976). Denying a remedy to victims is "clearly in conflict with" the guaranteed remedy clause, and "contrary to all sense of justice." *Heck v. Shupp*, 394 Ill. 296, 300 (1946).

Similar guarantees were included in most state constitutions, reflecting the fundamental nature of one's opportunity to seek redress for an injury. *See* Judith Resnick, *Constitutional Entitlements To And In Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 St. Louis U.L.J. 917, 921-922 (2012). 80% of state constitutions contain textual references to one's right to a remedy. *Id* at 1002-1023. And the nine states without express "right to remedy" provisions still guaranteed one's right to use the courts to redress wrongs through due process or open courts provisions. *Id.* at 1024-1037. This "right to access" is intrinsic to democracy and deeply embedded in constitutional texts and doctrines. *Id.* at 921-922. Our Guaranteed Remedy clause is not simply an aspiration or policy goal for Illinois, it is a core constitutional obligation of the State.

B. The Right to Fair Redress Has Ancient Roots

We can trace the struggle for a citizen's right to redress back at least eight centuries in England. An early celebrated example of the right is found in the 1215 Magna Carta, where barons extracted rights to redress from an unpopular king. See SIR EDMUND COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON* 55-56 (1642). Both sides failed to honor their pact, leading to more struggles and renewed versions of the charter. Yet the Magna Carta remains a historically significant source of civil rights for English citizens. *See* Richard H. Helmholz, *Magna Carta and the Law of Nature*, 62 Loyola L. Rev. 869, 886 (2016). Similar charters were adopted across a variety of countries and city-states at the time. See *Id.* at 872 (discussing well known versions from Sicily, Slovania, Hungary, France, Germany, Catalonia). Political events alternatively constricted and expanded the rights in various territories over the centuries. However, the right to redress flourished as individuals increasingly recognized themselves as the source of power in the political structure, rather than pawns at the mercy of the monarch or other powerful interests.

American colonists found themselves in a state of subjugation by the English monarchy and its influential supporters. The colonists wanted to set their own course and determine their own affairs. Jefferson and his co-authors drafted the Declaration of Independence in the form of a tort

complaint, outlining the legal rights involved, the wrongs committed against them and the relief sought. See GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 57-64, 334-36 (1978); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020) p.32-33. The colonists demanded redress (freedom and their own control) to protect their rights to life, liberty and pursuit of happiness. *Id.* at 33.

These demands did not spring from a vacuum. The Founders had competing political theories to consider when structuring the government. Thomas Hobbes, for example, argued for submission to a sovereign to protect citizens from the natural state of war between individuals. John Locke promoted a commonwealth where citizens would be the ultimate source of authority rather than a monarch. Citizens would ensure that their political structures were arranged to protect each person's natural endowment to life, liberty and property rights. See 3 THE RECEPTION OF LOCKE'S POLITICS: FROM THE 1690S TO THE 1830S (Mark Goldie ed. 1999). What is remarkable about these divergent theories is that Hobbes and Locke, and most other enlightenment thinkers, agreed that individuals enjoyed a right to self-preservation in a pre-government state of nature, to prevent and respond to mistreatment or to even gain survival advantage over others. It was only when people entered into political arrangements to control threats and protect their interests that they forfeited the privilege to self-help and self-

assertion in the name of civil peace and justice.[4] Liberal-democratic states could not fairly require individuals to endure or passively receive wrongfully inflicted injuries. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020) p.14-15. Thus, the government became obligated to provide mechanisms for fair redress to its citizens. *See* John C.P. Goldberg, Benjamin C. Zipursky, *Civil Recourse Theory Defended: A Reply To Posner, Calabresi, Rustad, Chamallas and Robinette*, 88 Ind. L. J. 572-573 (2013). Even in a monarchy, Hobbes recognized it would be inequitable for a monarch to relieve wrongdoers of an obligation to make reparations to their victims. *See* THOMAS HOBBES, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND*, 76 (Joseph Cropsey ed. Univ. of Chi. Press 1971) (1681).

We can also look to William Blackstone to see what forms of redress were available to citizens at the time of our independence. Blackstone collected and curated the wide range of claims available to citizens in the common law, based on the "general and indisputable rule that where there is a legal right, there is also a legal remedy". 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *23 (1765-69). Blackstone warned that without a "method of recovering and asserting...rights," rights would exist in vain. 1 William Blackstone, COMMENTARIES *56. *See also*

[4] Not entirely, of course, given how important self-defense remains to criminal and civil disputes.

JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, ch. II, § 10 (1689) (he who hath received any damage, has...a particular right to seek reparation). Blackstone's writings greatly influenced American law practice. *See* Albert Davis, David Dagley, Christina Yau, *Blackstone and His American Legacy*, Australia & New Zealand J. of Law & Educ., 1327-7634 Vol. 5, No. 2, p.57-58 (2000).

Unsurprisingly, the U.S. Supreme Court accepted the *ubi jus ibi remedium* principle before Illinois became a state, and the Court has reaffirmed the idea through the centuries. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Hayes v. Mich. C. R. Co.*, 111 U.S. 228, 240 (1884) (each person specifically injured by breach of the obligation is entitled to his individual compensation, and to an action for its recovery); *De Lima v. Bidwell*, 182 U.S. 1, 176-77 (1901) (where there is a legal wrong, the courts will look far to supply an adequate remedy); and *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021) (violation of any legal right is a redressable injury, even if nominal damages are at stake).

Federal law similarly contains a variety of constitutional and statutory enactments which preserve a right to redress injuries, including the Fifth and Fourteenth Amendments to U.S. Constitution, the Civil Rights Acts of 1866, 1871 and 1964, etc. *See discussion at* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020) p.30-43.

Why is the ancient right to redress such a prominent and foundational feature of our legal framework? Because the right serves as a source of power and protection for individual citizens, suited to a political structure striving for equality for its citizens. *See* John C.P. Goldberg, *The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs*, 115 Yale L. J. 532-559 (2005). In that fashion, it is a tool which vulnerable citizens can turn to for redressing losses if they choose to do so—a civil form of self-defense. Art.1 §12 of the Illinois Constitution is not merely an aspiration or goal for the State, it embodies the State's constitutional obligation to empower its citizens.

C. The Judicial Branch Plays A Vital Role In The Right To Redress

The judicial branch sits at the center of the State's constitutional guarantee. Even when the legislature set up an agency to process workplace injury claims, the Judiciary still retained ultimate control over the IWCC's end-product. Legal, functional, and historical realties underscore the Judiciary's continued control over all injury claims.

From a legal standpoint, the legislature never had the authority to divest the Judiciary of judicial authority and the legislature does not perform judicial functions. *See People v. Cox*, 81 Ill.2d 268 (1980) (legislature is expressly prohibited from exercising judicial power); Ardt *v. Illinois Dep't of Professional Regulation*, 154 Ill.2d 138, 146 (1992) (legislature cannot

infringe upon inherent judicial authority); ILL. CONST. Art.VI § 9. Admittedly, *Ardt* only addressed whether equity powers were off limits to the legislature. However, inherent judicial authority also clearly extends to 1) common law evolution and administration, and 2) protecting a citizen's fundamental rights from the overreach by the other branches. *People v. Humphreys*, 353 Ill. 340, 342 (1933) (the Bill of Rights are fundamental charter reservations of liberty and rights to the people as against possible encroachments from the executive, judicial or legislative branches of government, which every court is bound to enforce).

The legislature did enact a reception statute in 1819, declaring what common law should apply to decisions in Illinois. See 50 ILCS 50/1. However, that enactment did not grant the judicial branch its power to interpret law or limit which law it could apply. The reception statute simply referenced the body of common law which judicial authorities were already using in the territory at the time of the enactment, and the judicial branch continued to use that common law. The 1787 Northwest Ordinance allowed for judicial authority over the territory, and that authority applied Virginia's 1776 reception statute, which ultimately became Illinois' reception statute. *See* Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 Vand. L. Rev. 791, 799, 801-802 (1951). This Court ultimately recognized that the 1819 statute did not bind the Court from advancing the common law beyond its sixteenth century form. See *Amann v.*

Faidy, 415 Ill. 422, 433 (1953). Rather, the common law consists of "a system of elementary rules and of general juridical declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country." *Id.* *See also* Philip Corboy, Curt Rodin & Susan Schwartz, *Illinois Courts: Vital Developers of Tort Law As Constitutional Vanguards, Statutory Interpreters, and Common Law Adjudicators*, 30 Loy. U. Chi. L.J. 183, 191-193 (1999). Thus, the 1819 reception statute did not reflect legislative supremacy over judicial authority as to what the law will be in our state. Common law evolution is squarely within the wheelhouse of the judicial branch. The legislature does not exercise judicial authority.

Maintaining a fair mechanism for redress has always been a judicial rather than legislative function. The legislature can only carve away at judicial authority if the Court permits the intrusion, and then, only to improve upon fairness of a mechanism for redress, especially when fundamental rights are at risk.

From a functional standpoint, decision-making at the Illinois Workers Compensation Commission (IWCC) is supposed to follow judicial interpretation of the WCA, courts ensure compliance with the precedent, and courts even review IWCC fact-findings to make sure they are grounded in the proofs. A special appellate panel was created to handle appeals from IWCC

decisions. *See Yellow Cab v. Jones*, 108 Ill.2d 330 (1985). If this structure creates arbitrary barriers which threaten a worker's access to benefits, the Court steps in to eliminate the arbitrary barriers. *See McAllister v North Pond*, 2020 IL 124848 (rejecting a risk doctrine built around arbitrary thresholds); *Sisbro v. Indust. Com'n*, 207 Ill.2d 193 (2003) (rejecting an earlier tiered scheme involving arbitrary doctrines).

Workers' compensation claims were even destined for the court system until an avalanche of claims overwhelmed the early court system. *FY 2018 Annual Report from the Illinois Workers Compensation Commission*, page 5.[5] Claims were then transferred to a three-member industrial board in 1913, a five-member commission within the Department of Labor in 1917 and ultimately a self-standing agency in 1957.[6] Those boards, panels, and the agency were set up to streamline the fact-finding process for compensation claims. Yet, bringing a fact-finding body into the mix did not diminish this Court's ultimate jurisdiction over injury claims.

To be clear, Art.1 §12 does not obligate the State to ensure that victims win every case. Some injuries simply occur without a wrongful cause. However, the State must empower its citizens by providing a mechanism

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[5] www.2.illinois.gov/sites/iwcc/about/Documents/FY2018AnnualReportFinal.pdf.

[6] Act of June 28, 1913, sec. I, §13. 1913 Ill. Laws 346-347; Act of May 31, 1917, sec. I, §13(a) and (b). 1917 Ill. Laws 498-499; Act of July 11, 1957, sec. I, §13(a). 1957 Ill. Laws 2633.

which they can use to try to obtain recourse for their losses. *See* John C.P. Goldberg, Benjamin C. Zipursky, *From* Riggs v. Palmer *to* Shelley v. Kraemer*: The Continuing Significance of the Law-Equity Distinction, in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk, Irit Samet & Henry Smith eds., Oxford Univ. Press 2019).

D. The Mechanism For Redress Must Also Be Fair

It is further true that the mechanism for redress must be a *fair* mechanism for victims. *See New York C.R. Co. v. White*, 243 U.S. 188, 205 (1917) (due process will not tolerate the substitution of an insignificant compensation system for common law rights); *Arizona Liability Cases*, 250 U.S. 400, 419 (1919) (arbitrary and unreasonable changes are not permissible substitutions for common law rights); *Grace v. Howlett*, 51 Ill.2d 478, 485 (1972) (legislature is not permitted to adopt an arbitrary or unrelated means of addressing a problem); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952) (legislative transfer of worker's tort rights against a third party is not a valid exercise of police power); *Best v. Taylor Machine Works,* 179 Ill.2d 367, 406 (1997) (damage caps are categorically unconstitutional when they operate without regard to the facts or circumstances of the case); and *Begich v. Indust. Com'n*, 42 Ill.2d 32, 36-37 (1969) (permanency classifications are irrational, unrealistic, and artificial when they provide different values for what is essentially the same physical loss from an injury).

Fairness also drives judicial interpretation of the WCA. The WCA is a remedial statute which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. *McAllister*, 2020 IL 124848 ¶ 32. The Act's provisions should be read in harmony to achieve that goal. *Vaught v. Indust. Com'n*, 52 Ill.2d 158, 165 (1972). Workers are entitled to "prompt, sure, and definite compensation, together with a quick and efficient remedy" with industry bearing the "costs of such injuries" rather than the injured worker. *O'Brien v. Rautenbush*, 10 Ill.2d 167, 174 (1956). A worker's access to benefits cannot be conditioned on artificial or arbitrary thresholds for compensation. *See McAllister*; *Sisbro*. All of this precedent converges on the idea that victims must have access to a fair mechanism to redress their injuries. The need for a fair mechanism is all the more important when powerful interests demand immunity for injuries they have inflicted on victims. Symphony and its amici should never be allowed to strand their victims without mechanisms for redress.

ARGUMENT II

PRESERVING BODILY INTEGRITY IS OUR PARAMOUNT INTEREST

BIPA violations are "real and significant" injuries. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 ¶ 34. An interesting question is what damages are recoverable for BIPA violations. If those damages include impairments to bodily integrity, then BIPA also protects the most

fundamental of interests any victim could have, underscoring the need for a fair mechanism. Under this scenario, an exclusive remedy shield would not conceivably block BIPA's protections.

Bodily integrity enjoyed special protection under common law, it is enshrined in federal and state constitutions, and courts appropriately protect the right against a variety of potential threats. However, common law protections for bodily integrity long predate our country's founding. *See* Robert J. Kaczorowski, *The Common Law Background Of Nineteenth-Century Tort Law*, 51 Ohio St. L. J. 1127, 1131 (1990) (referencing a 1374 claim for negligent treatment by a surgeon). The ancient torts of assault and battery provided individuals with a mechanism for redressing such injuries. See *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 518 (1997), citing to 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* * 119-120, 127-128 (1765-69). Most civilizations provided mechanisms to redress injuries to bodily integrity. The English called their protections trespasses and torts, Romans offered delicts, Babylonians redressed some personal injuries in the Law Code of Hammurabi, and hunter-gatherer bands and tribal groups all have their own mechanisms for redressing injuries.[7] Groups of vastly different structure and resources all felt compelled to

[7] "A Genealogical View of Law" outlines some of the protective mechanisms offered by human groupings through the ages. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW*, 82-117 (2017). The author observes that law, even in its most rudimentary form, established protections and restrictions relating to property, people, family unions and sacred matters. These are the essentially the same interests we deem fundamental in our system.

provide protections for bodily integrity, at least for favored groups.

The concern for bodily integrity was also prominently enshrined in our federal and state constitutions, in clauses protecting both life and liberty. States shall not deprive any person of life, liberty, or property without due process of law. *See* Ill. Const. Art.1 §2; U.S. Const. Amend. XIV, §1. Life and liberty are inherent and inalienable rights. *See* Ill. Const. Art.1 §1. These rights are fundamental charter reservations of liberty and rights to the people as against encroachments from the executive, judicial, or legislative branches of government, which every court is bound to enforce. *People v. Humphreys*, 353 Ill. 340, 342 (1933).

The "life" and "liberty" terms both protect bodily integrity, even though the liberty term has attracted all the litigation. In an 1877 case from Illinois, Justice Fields explained that *life* under the 14th Amendment meant more than mere animal existence. *Munn v. Illinois*, 94 U.S. 113, 142 (1877) J. Fields dissent. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. *Id.* The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body. *Id.* Although Fields was in the dissent in *Munn*, his views of 14th Amendment protections greatly influence our present understanding of the scope of the clause. By 1891, a majority of the Court agreed that "no right is held more sacred, or is more carefully guarded, by the common law, than

the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law". *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

The *liberty* right has more commonly been applied to disputes over bodily integrity. See *Cruzan v. Missouri Dept. of Health,* 497 U.S. 261 (1990) (liberty interest in refusing medical care/life-saving hydration and nutrition); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (liberty interest in avoiding unwanted administration of antipsychotic medication); *Winston v. Lee*, 470 U.S. 753, 764-765 (1985) (liberty interest against compelled surgery); *Rochin v. California*, 342 U.S. 165, 172 (1952) (liberty interest against forcible extraction of stomach content); *Youngberg v Romeo*, 457 U.S. 307, 315 (1982) (liberty interest in personal security). There is further a right to compel the state to provide services when the state takes custody over the person. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (liberty interest in medical treatment at government's expense while restrained).

We can also look to disciplines beyond legal and political theory for a clear understanding as to why bodily integrity is our paramount interest. Biology, genetics and evolutionary science show us that all living organisms share a drive to preserve their bodily integrity. Survival is written into our genetic code. See generally RICHARD DAWKINS, *THE SELFISH GENE* (1976).

We have sensory processing, instincts, reflexes, and internal analytic processes to help us avoid injury from the outside world. A vast immune system hunts down molecular threats inside the body. If injury happens, cellular processes surge into action to attempt to repair damaged tissues and to guard against pathogens. When these processes fail, we face existential threats to bodily integrity. Our genome and broader evolutionary forces are indifferent to any second-order concerns over religious choices, schooling preferences, parenting plans, occupational goals and speech. Moreover, each of these secondary concerns flow from neuronal activity in the cerebral cortex, itself again, entirely dependent on bodily integrity. We cannot simply move from a damaged body into a healthier body when challenges arise, like we can switch out belief systems or school choices. Bodily integrity must be uniquely protected as it is our paramount interest.

The State should never take steps which make it more difficult for victims to redress their injuries. This includes both legislative enactments or judicial barriers. There is no principled reason to apply the WCA exclusive remedy clause to wipe out the protection afforded by a separate protective law (BIPA). See *Industrial Com. Of Wisconsin v. McMartin*, 330 U.S. 622, 628 (1947) (given the protective nature of workers' compensation laws, Illinois' exclusive remedy provision should not be readily interpreted to cut off a worker's right to also seek benefits under the Wisconsin act). Using one protective law to destroy a different protective law would not seem

a judicious use of authority. Victims must have access to fair mechanisms for redressing injuries.

ARGUMENT III

A VICTIM'S PROPERTY IS ALSO A FUNDAMENTAL INTEREST AT STAKE IN BIPA

Even if BIPA only covers property-type losses, there are also clear limits as to how far the State can go when addressing property interests. *Wingert v. Hradisky* recently invalidated a statute which allowed drug victims to sue persons selling drugs into a local area, even when it was clear the dealer had no causal connection to the victim or the injury. Removal of the causation element led this Court to remark: "it is difficult to conceive of a civil liability statute more unreasonable or arbitrary than this." *Wingert*, 2019 IL 123201 ¶ 35. Due process is implicated whenever the state engages in oppressive, arbitrary, or unreasonable conduct towards its citizens. *Id.* at ¶ 29 Seventy years earlier, the Court struck down a statutorily-compelled transfer of an injured worker's tort rights to his employer. See *Grasse v Dealer's Transport Co.*, 412 Ill. 179 (1952). *Wingert* and *Grasse* show us that the State lacks authority to simply transfer one person's property interests to another, at least until a fair mechanism for redress has resolved the legal dispute between the parties.

Citizens even enjoy a protectable interest in assets which are used in the commission of a crime. The protection against excessive fines has been a

constant shield throughout Anglo-American history, justified through a concern that exorbitant tolls undermine other constitutional liberties. *Timbs v. Indiana*, 139 U.S. 682, 689 (2019). This protection is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *Id.*

Our constitutional structure jealously guards a citizen's person, liberty, and property rights against government overreach. If the State cannot freely seize or transfer assets from drug dealers (*Timbs v. Indiana*, *Wingert v. Hradisky*), gift a worker's tort rights to the employer (*Grasse v. Dealer's Transport*), artificially limit a victim's actual losses from an injury (*Best v. Taylor)*, or condition compensation upon arbitrary considerations (*McAllister v. North Pond),* what principle allows the State to deprive victims of fair mechanisms for redressing even property injuries? That principle does not exist.

ARGUMENT IV

WINDFALLS ARE NOT THREADS IN OUR CONSTITUTIONAL FABRIC

The State is responsible for protecting each citizen's right to redress, and the Judiciary is there to ensure a level playing field. Impairing a victim's rights *always* grants windfalls to those who harmed them.

Symphony should not be granted a windfall for its BIPA misconduct. It has no ownership interest in McDonald's bodily integrity, her property or

her right to access fair mechanisms for redress. Symphony and its amici also seek equitable relief from BIPA from this Court. However, Symphony has no ground for seeking equitable relief as Symphony created the mess it complains about. Equity would hardly value a wrongdoer's escape plans over a victim's efforts to preserve fundamental interests. Symphony is vulnerable to BIPA liability because of its own actions. McDonald has no blame in the equation, so equity would not warrant stranding her without a remedy.

It is also true that the State has no ownership interest in a victim's bodily integrity or their property. A citizen's fundamental interests do not become part of the asset base of the State, subject to transfer and compromise through some utilitarian calculation. *Wingert v. Hradisky* illustrates this reality. *Wingert* struck down a law which essentially permitted an asset transfer from drug dealers to victims who had not been harmed by the dealers. 2019 IL 123201. The Court sympathized with the need to address the scourge of drugs and drug dealing. However, the State could not set up a scheme where a dealer's property was vulnerable to people they had not injured. Removing the causation element was an obvious Due Process offense (and a State-enabled taking).

Denying redress to victims is as offensive to our constitution as removing the causation element from a liability scheme. We can identify the wrongdoer who caused the victim's injury and we have traditional

remedies in place to address the wrongdoing. What constitutional principle could possibly drive the State to block victims from seeking redress from those who injured them? Doesn't the State further victimize the injured party if it denies them a mechanism for redress? Where is the justice in that? Suspending a mechanism for redress simply grants windfalls to those who cause the injuries. Wrongdoers are valued above their victims. That could not be a legitimate role for the State. People are entitled to equal treatment under the law.

ARGUMENT V

SYMPHONY'S CASE LAW DOES NOT SUPPORT ITS PLAN TO STAND ITS VICTIMS WITHOUT MECHANISMS FOR REDRESS

Symphony and its amici trot out the decisions that have fueled past tort reform efforts. The worker in *Moushon* could not sue his employer in tort for impotence resulting from his workplace injury. He did recover treatment, benefits, and ultimately, was eligible for an award under the WCA for the body parts involved in the injury. *See Moushon v. Nat'l Garages, Inc.* 9 Ill.2d 407, 409 (1956). *Moushon* hardly supports the idea that victims can be stranded without redress. To the extent he could not get full relief through the agency, that is a defect of the workers compensation system which must ultimately be addressed.

Duley v. Caterpillar Tractor Co. denied a husband death benefits for his wife's workplace death, because he was not entirely dependent upon her income. The WCA at that time did allow widows to get benefits for a husband's death without regard to dependency. Of course, archaic gender classifications were thereafter recognized as Equal Protection Clause violations. *See e.g., Craig v. Boren*, 429 U.S. 190 (1976); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *Duley* has nothing to offer us.

Meerbrey involved a worker who was detained, held against his will, and then charged and prosecuted for criminal trespass when he went to the store to get his check. *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455 (1990). *Meerbrey* is a case about pleading standards and dispositive motion practice rather than a case exploring the boundaries of the exclusive remedy provision. The WCA did not block his intentional tort claims against the offending employee. Mr. Meerbrey could also have pursued such claims against the company had he simply amended the complaint to include the proper allegations against the company. But he chose to rest on a *respondeat superior* theory against the company. For some unfathomable reason, he then conceded that his injuries arose out of and in the course of his employment, a concession which gifted the company the exclusive remedy defense. The exclusive remedy clause should never have been an issue in the case as his injury did not occur until a month after the company fired him for

theft. *Id.* at 463. His injury could not possibly have arisen out of and in the course of employment. In the end, Meerbrey's litigation choices sank his case against the company and his case was a strategic mess. The *Meerbrey* decision provides no support for the idea that victims can be stranded without redress.

Finally, *Folta v. Ferro Engineering* should also not be read to support the stranding of victims without mechanisms for redress. In response to the widow's claim that she was being denied a remedy in violation of the guaranteed remedy clause, the Court observed that she had named fourteen asbestos manufacturers in her lawsuit. 2015 IL 118070 ¶ 50. "Folta was not left without any remedy. Thus, we find no merit to the constitutional claims raised by Folta." *Id.* at ¶ 50.

The "harsh" result in *Folta* was also not inevitable. The Occupational Diseases Act (ODA) is a remedial law to protect workers who incur illness from work. Consistent with the *McAllister* and *Sisbro* rulings, artificial barriers should never block workers from their ODA or WCA protections. The repose period in *Folta* is the very embodiment of an arbitrary barrier to compensation, in that the deadline apparently does not correlate with how long it takes mesothelioma to manifest itself as a disabling disease.

This Court was also not powerless to prevent the injustice, under the idea that the legislature should address the issue. *Folta* at ¶ 43. Repose periods are always crafted through some utilitarian calculation as to when

legal disputes should expire if they have not been litigated. However, utilitarianism is largely antithetical to the idea that citizens have individual rights which are protectable. See MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009) pp.31-57. Utilitarian thinking permits sacrifice of individuals and their rights if the result maximizes the utility (happiness, pleasure) for the greater group. *Id.* at 37 (throwing Christians to the lions for the amusement of the crowd). Some version of a utilitarian argument rears its head every time powerful interests demand liability reform, like the pandemic fearmongering in the current case.

That is why courts must be the vanguard of individual rights rather than the legislature. Courts are charged with a duty to protect liberty and rights against encroachments by any branch of the State. See *People v. Humphreys*, 353 Ill. 340, 342 (1933). That is also why any legislative action which impairs a victim's ability to redress bodily integrity should *always* be scrutinized using the strictest test possible, not a rational basis analysis. If the State has no right to divvy up and transfer any part of a citizen's fundamental rights to someone else, we must not simply yield to the legislature's explanation as to why it is trying to force the transfer. *Wingert v. Hradisky* illustrates the idea. This is particularly true when it comes to a victim's effort to protect their bodily integrity. Courts are here to help citizens protect their own interests, including resisting overreach by the State.

That is one of the reasons that courts possess profound equitable powers. A central role for equity is to mitigate injustices which will result from too rigorous an application of legal rules. See John Goldberg and Henry Smith, 'Wrongful Fusion: Equity and Tort', in J. Goldberg and H.E. Smith (eds), *EQUITY AND LAW: FUSION AND FISSION* (Cambridge Press 2019) ch.13 p. 310 (referencing Aristotle's recognition that equity corrects law in so far as it is deficient because of its universality); Henry Smith, "Fusion Of Law And Confusion Of Equity', in D. Klimchuk, I. Samet, H.E. Smith (eds), PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Oxford Univ. Press 2020) ch.10 (exploring equity's role as a system of second order rules to adjust the harsh impact of laws).

This Court always had the tools and the authority to prevent the harsh result in *Folta*. It could easily have suspended the repose period to allow Folta to pursue an ODA case. Her case involved a highly atypical fact pattern and did not threaten a deluge of claims in either the agency or the courts. A discovery rule could have been fashioned to equitably adjust the deadlines in the ODA case. A third solution might have involved striking the repose deadline from the ODA where it ended up arbitrarily blocking benefits. Assuming Folta's ODA case was winnable, Ferro Engineering would stand first in line to recover its payments from the fourteen other tortfeasors Folta had sued. 820 ILCS 310/5(b). Folta probably foreclosed these options by failing to attempt an ODA case. Nevertheless, *Folta* should

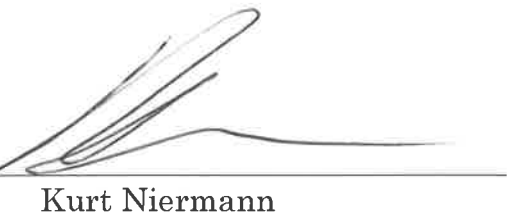
never be read to justify stranding victims without remedies. Such a conclusion would violate the victim's constitutional rights, render moot the State's correlative constitutional obligation to provide fair mechanisms for redress, and surrender the Judiciary's central role in helping victims protect their fundamental interests.

CONCLUSION

Illinois is constitutionally obligated to provide victims with fair mechanisms for redressing their injuries. Victims attempt to preserve their most fundamental interests through that mechanism, their bodily integrity. Blocking victims from fair mechanisms is not simply unconstitutional, it is contrary to all sense of justice. Suspending the mechanism would grant a windfall to those who caused the injury. ITLA encourages the Court to reject Symphony's plan for stranding its victims without meaningful redress.

Respectfully Submitted,

ILLINOIS TRIAL LAWYERS ASSOCIATION

By 

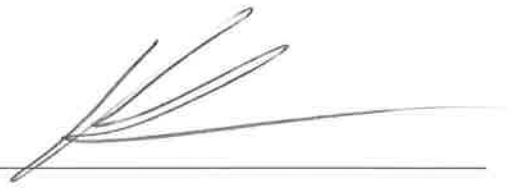
Kurt Niermann

Kurt Niermann
Atty No. 6207461
Porro Niermann Law Group LLC
821 West Galena Boulevard
Aurora, Illinois 60506
Phone: (630) 264-7300
Fax: (630) 897-8637
Email: kurt@pnlawoffice.com

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies 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 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 29 pages.

Dated: May 24, 2021

By 

Kurt Niermann

Kurt Niermann
Atty No. 6207461
Porro Niermann Law Group LLC
821 West Galena Boulevard
Aurora, Illinois 60506
Phone: (630) 264-7300
Fax: (630) 897-8637
Email: kurt@pnlawoffice.com