No. 127801

In the

Supreme Court of Illinois

JOROME TIMS and ISAAC WATSON, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

BLACK HORSE CARRIERS, INC.,

Defendant-Appellant.

Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-20-0563.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 19 CH 3522.
The Honorable **David B. Atkins**, Judge Presiding.

BRIEF OF APPELLEES. CROSS-RELIEF REQUESTED

Ryan F. Stephan
James B. Zouras
(jzouras@stephanzouras.com)
Teresa M. Becvar
Catherine T. Mitchell
Paige L. Smith
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, Illinois 60606
(312) 233-1550

Counsel for Appellees
Jorome Tims and *Isaac Watson*

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INTRODUCTION

Enacted in 2008, the Illinois Biometric Information Privacy Act ("the Act") provides critical, though easy-to-implement, safeguards and procedures governing the collection, use, disclosure and destruction of biometric data. Notwithstanding its simple, straightforward and easily-understood requirements, many private entities operating in Illinois—including some of the largest corporations in the world—persistently disregarded the law. And they did so for many years. In the employment context alone, private entities have collected, used, stored and disseminated biometric data from hundreds of thousands of Illinois citizens from all walks of life, from critical care nurses to grocery store employees to factory workers, without informed consent.

One malefactor is Defendant-Appellant Black Horse Carriers, Inc. ("Defendant" or "Black Horse"). Beginning in 2017, and likely much earlier, Black Horse, in violation of the Act, collected biometric data from its employees, including Plaintiffs-Appellees Jorome Tims and Isaac Watson ("Plaintiffs"), stored their data on its databases and disseminated their data to at least one third-party payroll vendor, all without notice or informed consent, and without establishing a biometric retention or destruction policy. To redress Defendant's multiple violations of the Act, Plaintiffs brought claims in the Circuit Court of Cook County.

The Act does not contain its own limitations period. For this reason, and as at least 34 state and federal courts universally held before the Appellate Court decision in *Tims*, including the trial court in this case, the default five-year limitations period for "all civil actions not otherwise provided for" applies. 735 ILCS 5/13-205. Casting a claim under any provision of the Act as an "[a]ction[] for slander, libel or for publication of matter

violating the right of privacy," Black Horse argues that all of the Act's provisions should be subject to the one-year limitations period under 735 ILCS 5/13-201. The Appellate Court rejected this contention for claims under Section 15(a) (creating a public retention and destruction schedule for biometric data), Section 15(b) (collecting biometric data) and Section 15(e) (storing, transmitting and protecting biometric data using a reasonable standard of care), none of which, as the Appellate Court held, even arguably contain any element of "publication." (A16, ¶ 31).

On appeal, Black Horse confusingly claims the "true character" of the injury under Sections 15(a), (b) and (e) is somehow "the publication of matter violating the right of privacy," and thus, claims brought under each of these provisions are also subject to a one-year limitations period. But as the Appellate Court held, Section 13-201 does not sweepingly apply to all actions seeking to vindicate privacy rights. (A15, ¶ 29). Rather, the Court correctly found, by its express terms, that Section 13-201 narrowly applies, for good reason, only to claims where publication "is an element or inherent part of the action." *Id.* And contrary to Black Horse's suggestion, the Court does not make its determination by considering "practical consequences," but by applying the law.

One thing Black Horse and its amicus do get right is that the same limitations period should apply to all of the Act's provisions, including those guarding against non-consensual disclosure of biometric data. However, relying on a decision involving a dispute over insurance coverage, the Appellate Court found that the one-year limitations period applied to claims under Sections 15(c) (profiting from biometric data) and 15(d) (disclosing biometric data), even though neither involve any "publication" of their biometrics as contemplated under section 13-201. (A16, ¶ 32). A uniform five-year

limitations period is dictated not only because a limitations period is not "otherwise provided for" under the Act, but also because it would facilitate the most clear and efficient administration of justice.

STATEMENT OF FACTS

A. The Illinois Legislature Enacted the Act to Empower Illinois Citizens With the Knowledge and Right to Make Informed Choices Over Collection and Use of Their Biometric Data.

Recognizing both the exponential growth and use of biometric data as a means of identification and authorization, along with the immutability of this data, the Illinois legislature enacted the Act to head off the potential for irreparable injury should an entity fail to properly safeguard an individual's biometric data. *See* 740 ILCS 14/5(a). In late 2007, Pay By Touch, a biometrics company, chose Illinois as the location to launch a pilot program for fingerprint verification systems and implemented this technology in grocery stores and gas stations throughout the state. 740 ILCS 14/5(b); *see also* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008. As a result of the program, Pay By Touch captured, collected and stored the biometric data (specifically, fingerprints) of thousands of Illinois residents. Pay By Touch filed for bankruptcy, and the bankruptcy court approved a sale of its entire database—which included Illinois residents' biometric data. This was alarming to the Illinois legislature because individuals' biometric data was at great risk, and because it demonstrated that layperson users were unaware that Pay By Touch was collecting, storing, disseminating and otherwise using their fingerprints. *See* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008. Therefore, and as widespread deployment of biometric technology was quickly on the rise, the General Assembly enacted the Act, which promoted sensible implementation of biometric technology in Illinois while

empowering Illinois residents with the right to information and control over how their biometric data was collected, stored and used. 740 ILCS 14/5.

The Illinois legislature passed the Act in 2008 with no opposition, finding it was in the public's best interest to regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(f)-(g); *see also* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008. By establishing standards for how an entity may collect and handle an individual's biometric data, the Act codified the right to privacy and the right to make informed choices over the collection and use of biometrics. 740 ILCS 14/15; *see also Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 33. And to ensure these protections are effectively enforced, the General Assembly implemented a private right of action for anyone whose biometrics are obtained without adherence to the Act's requirements. 740 ILCS 14/20; *Rosenbach*, 2019 IL 123186, ¶ 33 (any person aggrieved by a violation of the statute is entitled to recovery under Section 20).

The statute is prophylactic in nature and, on its face, expresses a general intent to regulate and protect biometrics for the purpose of preventing an irreversible security breach that would permanently expose an individual to identity theft, privacy invasion and other evils. *Rosenbach*, 2019 IL 123186, ¶ 37; 740 ILCS 14/5(f)-(g). The danger is compelling, because an individual may never learn—or may learn only long after the fact—that their data has been compromised, improperly used, and/or disseminated. The Illinois legislature recognized these dangers and enacted the Act as a means to deter careless handling of biometric data and ensure that individuals were fully informed before consenting to its collection. *Id.*

B. Plaintiffs Seek Redress for Black Horse's Multiple Violations of the Act's Notice and Informed Consent Requirements.

Black Horse employed Tims from June 2017 through January 2018 and employed Watson from December 2017 through December 2018. (SR 180, ¶¶ 41-42). As a condition of employment, Black Horse required Plaintiffs to enroll their fingerprints on its biometric timeclock to track their time worked and subsequently stored their fingerprint data in its computer database. (SR 180, ¶¶ 43-44). Black Horse required Plaintiffs to scan their fingerprints each time they clocked in and clocked out for work. (SR 180, ¶ 45).

Before collecting and storing Plaintiffs' fingerprints, Black Horse failed to provide them notice of its collection, storage and use and failed to obtain Plaintiffs' consent authorizing Black Horse to collect and store their fingerprints. (SR 173, ¶ 10; SR 178, ¶ 33; SR 180, ¶¶ 46-47; SR 181, ¶48; SR 189, ¶¶ 85-86). Black Horse likewise failed to establish a publicly available policy informing Plaintiffs how long it would retain their fingerprints and what measures, if any, it implemented to ultimately destroy them. (SR 173, ¶ 10; SR 178, ¶¶ 33-34; SR 179, ¶ 36; SR 180, ¶ 47; SR 187, ¶¶ 76-77). And Black Horse failed to inform and gain Plaintiffs' consent when it disclosed their fingerprints to its third-party payroll vendor.[1] (SR 173, ¶ 10; SR 178, ¶ 33; SR 179, ¶ 38; SR 182, ¶ 54; SR 190, ¶¶ 95-96). In light of Black Horse's multiple failures to comply with Sections 15(a), (b) and (d) of the Act, Plaintiffs filed suit to vindicate their rights. (SR 1, 171).

In response, Black Horse sought dismissal solely on basis that some or all of Plaintiffs' claims are time-barred by the one-year limitations period under 735 ILCS 5/13-201. (SR 23, 60, 100, 145, 161). The trial court denied Defendant's motion. (A2-4).

[1] Because there is no evidence that Black Horse "publicized" their data, Plaintiffs make no such allegations in their Complaint.

Applying this Court's precedent in *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461 (2008), the trial court determined that Section 13-201 was inapplicable to Plaintiff's claims under the Act, finding that "this action is premised on Plaintiff's claims that Defendant violated [the Act]; not that Defendant has generally invaded Plaintiff's privacy or defamed him," and given the absence of an express limitations period, the five-year limitations period under Section 13-205 applied. (*Id*.). Black Horse moved the trial court for reconsideration or, in the alternative, to certify a question for appeal under Rule 308. (SR 225, 241, 250). The trial court denied Defendant's motion to reconsider but granted certification of the following question: "whether the limitations periods set forth in 735 ILCS 5/13-201 ("Defamation – Privacy") or 735 ILCS 5/13-205 apply to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*." (A6).

Relying on the plain language of Section 13-201, which governs actions "for publication of matter violating the right of privacy," 735 ILCS 5/13-201, as well as its decision in *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027 (1st Dist. 1999), the Appellate Court held that Section 13-201 does not globally apply to all actions seeking to vindicate privacy rights, but is narrowly limited only to those "where publication is an element or inherent part of the action." (A15). Answering the certified question, the Appellate Court held that "section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act." (*Id*.). This appeal followed.

STANDARD OF REVIEW

The interpretation of a statute is a question of law that is reviewed *de novo*. *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30.

ARGUMENT

The Act lacks any limitations period, thereby invoking the "default" five-year catchall statutory period set forth under Section 13-205. Defendant and its amicus insist, however, that the one-year limitations period under Section 13-201 should apply, attempting to expand its reach to include any and all claims seeking to vindicate privacy rights. But as the Appellate Court and every trial court to have considered the argument correctly determined, Section 13-201 does not sweepingly apply to all actions involving privacy rights, but by its express terms, only to those requiring an element of "publication." Though the Act is, unremarkably, a privacy statute, and the unauthorized publication of biometric data *could* give rise to a cause of action under the Act, publication is absolutely not a *required* element to state a claim under any of its provisions. The nature of the injury under the Act is not publication, and publicizing biometric data is not how private entities typically run afoul of the Act. Black Horse fails to present any compelling reason why the default, five-year limitations period under Section 13-205 for "all civil actions not otherwise provided for," should not apply to actions seeking vindication of the Act's notice and consent regime.

I. The Appellate Court Correctly Held That A Five-Year Limitations Period Applies to Sections 15(a), (b) and (e) of the Act.

The applicable limitations period is governed by the nature of the injury. *Travelers,* 229 Ill. 2d at 466 (quoting *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)). The analysis focuses not on the facts from which the particular injury arises and the relief sought, but the legal injury itself and the liability imposed. *Id*. at 466-67 ("To determine the true character of a plaintiff's cause of action, … "[t]he focus of the inquiry is on the nature of the liability and not on the nature of the relief sought."). Based on this Court's precedent,

both the Appellate and trial court correctly determined that the nature of Plaintiffs' injury arises from Defendant's violations of the statutory requirements of the Act—that is, Defendant's failure to provide notice and secure informed consent before collecting, storing, using and disseminating their fingerprints.

After taking the Court on a 106-year journey through the evolution of its own jurisprudence on determining the correct limitations period, Defendant concludes that the Appellate Court wrongly failed to recognize that "collecting," "storing" and creating a retention and destruction schedule for biometric data is synonymous with "publicizing" it. Def.'s Br. at 6-11. While Black Horse correctly states the objective standard for determining a statute of limitations period, it contorts the actual nature of Plaintiffs' claims under the Act into something they are not, engaging in rhetorical gymnastics to argue that the nature of the injury stemming from Defendant's non-consensual collection, use and dissemination actually results from the publication (or potential publication) of biometrics. *Id*. Defendant's invocation of Section 13-201 and unprecedented theory that it provides an all-encompassing, catchall limitations period for all privacy claims is flawed. The nature of any claim for violations of the Act stems from an entity's failure to comply with the Act's notice and consent regime before collection, not the wrongful "publication" of biometric data. As such, Section 13-201 cannot apply to claims under the Act.

A. The Nature of Plaintiffs' Injuries Under the Act Arises From Black Horse's Conduct In Taking Their Biometric Data Without Informed Consent, Not From Publicizing It.

Black Horse claims the Appellate Court "defied" the instructions of *Travelers* and its progeny by focusing on whether the complaint alleged "publication" instead of "looking behind the allegations to determine the true character of the claim." Def.'s Br. at 11. But

that's not what happened at all. Plaintiffs, like most who have suffered violations of their rights under the Act, do not allege, and have no reason to believe, that Defendant disclosed their fingerprints to the public at large.[2] Accordingly, the Appellate Court, after reviewing the plain and unambiguous language of Section 13-201, correctly determined that it "does not encompass all privacy actions but only those where publication is an element or inherent part of the action." (A15, ¶ 29). It also aptly observed that, "[h]ad the legislature intended to include all privacy actions, it would have written something like 'actions for slander, libel, or privacy' or 'actions for slander, libel or violations of the right of privacy.'" (*Id*.). Instead, the legislature expressly and narrowly limited the scope to "actions for libel, slander or for *publication of matter* violating the right to privacy." 735 ILCS 5/13-201 (emphasis added). Needless to state, courts do not "read between the lines" of a complaint to hunt for (imaginary) conduct against which a defendant would prefer to defend.

Defendant goes on to suggest that if the Appellate Court had done its job, it would have concluded that the Act was designed for a single purpose; namely, "to prevent the unauthorized disclosure of biometric data." Def.'s Br. at 11. This is nonsense. First, preventing the third-party disclosure of biometric data is but one type of conduct the legislature sought to regulate in enacting the Act, a reality glaringly revealed by its notice and consent regime requiring private entities, before any collection, to secure written

[2] Contrary to what Black Horse and its amicus suggest, the fact that Plaintiffs accurately allege the conduct Defendant did and did not engage in is not an example of them "manipulating" their pleading. Def.'s Br. at 11; Br. of Ill. Chamber of Commerce as Amicus Curiae at 11. Defendant and its amicus fail to explain how a plaintiff could secure a judgment by falsely alleging a defendant violated one BIPA subsection instead of another.

consent and create a publicly accessible destruction policy to regulate both public ***and*** non-public dissemination of biometric data.

Second, the purpose of the Act is not to absolutely prohibit the collection, use or disclosure of biometric data, or to keep an individual's data unconditionally "secret." To the contrary, it *permits* these actions, provided a collector meets certain easy-to-follow requirements under the Act's notice and informed consent regime. Here, Plaintiffs allege that Defendant violated three distinct provisions under the Act, each of which protects different kinds of privacy interests: (1) failing to secure informed consent before collecting Plaintiffs' biometric data in violation of Section 15(b); (2) failing to secure informed consent before disclosing Plaintiffs' biometric data to Defendant's payroll vendor in violation of Section 15(d); and (3) possessing Plaintiffs' biometric data before establishing a data retention/destruction policy in violation of Section 15(a). (SR 171 ¶ 10; SR 178, ¶ 34; SR 180, ¶¶ 46-47; SR 181, ¶ 48; SR 189, ¶¶ 85-86). Accordingly, as the Appellate Court correctly observed, the fact that a statute protects a privacy interest is but one component of what is required to invoke Section 13-201. Because the other component, "publication," is not an element of a properly pled cause of an action under Sections 15(a), (b) or (e) of the Act, the default five-year limitations period applies. (A16, ¶ 31).

1. Section 13-201 is Narrowly Limited Only To Claims Which Require Pleading and Proving "Publication."

Defendant contends that "the true character of plaintiffs' injury" is "a privacy injury which involves the actual or potential publication of biometric data," thus bringing all claims under the Act within Section 13-201's confines. Def.'s Br. at 12. But the express language of Section 13-201 does not encompass "actions involving actual or potential publication." *Id*. Under the express language of Section 13-201, only actions brought to

remedy the publication of information causing a violation to the right of privacy are subject to a one-year statute of limitations.

To the extent it isn't clear on its face, dictionary definitions of terms used in the plain text support the conclusion that Section 13-201 is not intended to apply to all actions conceivably involving privacy or the transfer of sensitive information to a third party, as Defendant suggests. Def.'s Br. at 12; *see also* A15, ¶ 29. "For," as used in Section 13-201, is a preposition that is a "function word to indicate purpose," meaning "with the object or purpose of." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/for (last visited Apr. 27, 2022); Dictionary.com, https://www.dictionary.com/browse/for (last visited Apr. 27, 2022). "Publication" means "the act or process of publishing" or "the act of bringing before the public." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/publication (last visited Apr. 27, 2022); Dictionary.com, https://www.dictionary.com/browse/publication (last visited Apr. 27, 2022). Thus, Section 13-201 encompasses actions where the object or purpose of the suit arises from a defendant's act of bringing before the public a matter violating the right to privacy.

At its core, Section 13-201 does not universally apply to all claims invoking privacy rights but governs the timeframe by which a party may bring a claim for slander, libel or defamation or other publication-based privacy claim. Defendant's repeated reliance on *People v. Austin* and *Uldrych v. VHS of Illinois, Inc.* as authority for the Court to expand Section 13-201's reach to any and all privacy claims, including all claims under the Act, is puzzling because neither case involves any analysis of Section 13-201. Def.'s Br. at 17, 19, 20. In *Austin*, a criminal case involving dissemination of revenge porn, this Court was

tasked with determining the constitutionality of a state statute criminalizing nonconsensual dissemination of private sexual images. 2019 IL 123910, ¶ 1. In *Uldrych*, the court was tasked with determining the applicable statute of limitations or repose to an indemnity counterclaim brought against other parties in an underlying medical malpractice case. *Uldrych*, 239 Ill. 2d 532, 536-37 (2011). In fact, in *Uldrych*, this Court rejected the defendant's "convoluted" attempt to ignore the applicable (and well-established) test for determining a limitations period for a statute of repose in a case involving patient care and medical malpractice and instead apply *Travelers'* objective standard, which was entirely inapplicable. *Id*. at 538. This Court affirmed and rejected the defendant's arguments that *Travelers* requires the Court to look at the nature of the liability involved, because "that inquiry is merely a means to an end." *Id*. at 547-48.

It is well-established that Section 13-201's "publication of matter" category of torts encompasses only "privacy torts involving publication." Nearly four decades ago, the Appellate Court recognized the distinction between privacy claims subject to the one-year limitations period and those that are not because they do not involve "publication." *See McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 737 (2d Dist. 1982). In *McDonald's*, the plaintiffs alleged violations of the Illinois Eavesdropping Act based on surreptitious recording of conversations and divulging information in the recordings. *Id.* at 735-36. The defendants in *McDonald's* argued that the one-year limitations period—then designated in Section 14 of the Limitations Act—applied to violations of the Eavesdropping Act, because the statutory violations were similar to the privacy claim for intrusion upon seclusion. *Id.* at 737. While the Eavesdropping Act undoubtedly implicated privacy interests, the court rejected the defendants' argument because the plaintiffs' claims "did not allege libel,

slander, or *publication* of private matters." *Id.* (emphasis added). In later rejecting application of the one-year limitations period for intrusion upon seclusion claims, the Appellate Court cited *McDonald's* with approval for the proposition that when "publication" is not an element of a privacy claim, the one-year limitations period in section 13-201 does not apply. *Benitez*, 305 Ill. App. 3d at 1034 (citing *McDonald's*, 108 Ill. App. 3d at 737).

In fact, any examination of the common-law publication-based privacy claims governed by Section 13-201 supports the conclusion that its language is intentionally narrow in scope. The three invasion of privacy torts courts have held are governed by Section 13-201 in addition to libel, slander and defamation—appropriation of name or likeness of another, public disclosure of private facts, and false light—each necessarily involve an element of publication. Appropriation of name or likeness of another, codified under the Illinois Right of Publicity Act ("IRPA"), 765 ILCS 1075/1, *et seq.*, involves the *publicity* of an individual's name or likeness for commercial benefit. *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 322 (2006) (emphasis added). The Act is clearly distinguishable from publication-dependent privacy laws, like the IRPA, which Defendant suggests is analogous to the Act. Def.'s Br. at 18 (citing *Blair*, 369 Ill. App. 3d at 323). But unlike the Act, stating a cause of action under the IRPA expressly requires a plaintiff to allege the "public use or holding out" of his or her identity. 765 ILCS 1075/5, 30; *see also Blair*, 369 Ill. App. 3d at 323 ("since the [IRPA] completely supplanted the common-law tort of appropriation of likeness[], we find applicable the one-year statute of limitations that pertained to the common-law tort"). While the *unauthorized* disclosure of biometric data, privately or otherwise, is one type of conduct the General Assembly sought to regulate

in enacting the Act, the Act lacks any element of publication, and "publication" is inescapably not an element of a properly-pled cause of action.

Similarly, the crux of an invasion of privacy action for public disclosure of private facts is a defendant's *publicity* of a private fact. *See Kapotas v. Better Government Ass'n*, 2015 IL App (1st) 140534, ¶ 83 (emphasis added). Finally, the nature of an injury under an invasion of privacy claim for false light is that the plaintiff was placed in a false light *before the public* as a result of the defendant's actions. *See Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 20 (emphasis added). Under each cause of action held to be subject to Section 13-201, the nature of the injury stems from the defendant's actual publication of the matter to the public at large (whether it be false or malicious statements or private facts) violating the right of privacy. Consistent with the Appellate Court's ruling here, the one-year limitations period does not govern the fourth invasion of privacy tort, intrusion upon seclusion—the touchstone of which is "the offensive prying into the private domain of another"[3]—because publication is not an element of intrusion upon seclusion. *Benitez*, 305 Ill. App. 3d at 1034; *McDonald's*, 108 Ill. App. 3d at 737.

Accordingly, Defendant's attempts to expand the reach of Section 13-201 beyond actions for publication of a matter violating the right to privacy requires an unnatural, forced and tortured interpretation of the statute. It simply does not hold water.

[3] *See Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 416-17 (1989). ("The basis of the tort [of intrusion upon seclusion] is not publication or publicity. Rather, the core of this tort is the offensive prying into the private domain of another.").

2. The Nature of the Injury Under the Act Does Not Encompass Any Element of "Publication," A Mandatory Prerequisite for the Application of Section 13-201.

Faced with the plain text of Section 13-201, Black Horse and its amicus ask the Court to rewrite its terms so that it encompasses a so-called "bedrock interest" of other actions which are subject to it, along with what they characterize as the Act's "single spirit." Def.'s Br. at 16; Br. of Ill. Chamber of Commerce as Amicus Curiae at 16. Casting this "interest" as "the prevention of wrongful disclosures," they suggest that Section 13-201 applies because, based on violations of the Act alleged by Plaintiffs, Black Horse may *potentially* publicize their biometric data. Def.'s Br. at 16; Br. of Ill. Chamber of Commerce as Amicus Curiae at 12. But how Plaintiffs' claims for Defendant's failure to provide notice and secure informed consent without establishing a retention and destruction policy require them to allege "publication" is a mystery to Plaintiffs. And needless to state, a party cannot bring an action premised on "potential" conduct.

Plainly, as explained in Section I.A.1., *supra*, "publication" in the context of claims governed by Section 13-201 contemplates disclosure to the public at large, or to specific people close to the plaintiff in such a way that would cause him or her embarrassment (*e.g.*, friends and neighbors). *Miller v. Motorola*, 202 Ill. App. 3d 976, 980 (1st Dist. 1990) (finding a cause of action for public disclosure of private facts was sufficiently stated where plaintiff alleged that her medical condition was disclosed to several fellow employees without her consent, but not for common-law tort of unreasonable intrusion upon the seclusion of another); *Cordis v. Chi. Tribune Co.*, 369 Ill. App. 3d 601, 607 (1st Dist. 2006) (employer vendor's disclosure of plaintiff's mental health condition to ex-wife met the "special relationship" exception to the requirement that disclosure be made to the general

public for invasion of privacy and defamation claims). While communication to a single person may be sufficient to sustain a defamation claim, in the broader privacy context, publication must be to the public. Restatement (Second) of Torts, § 577, cmt. b; § 652D, cmt. a (1977). Moreover, like Merriam-Webster Online Dictionary and Dictionary.com, Black's Law Dictionary defines "publication" as "the act of declaring or announcing ***to the public***." *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

Plaintiffs allege that Black Horse violated Sections 15(a) and 15(b) by failing to inform them of Defendant's collection and obtain their consent before doing so, and by failing to establish requisite retention and destruction policies related to Defendant's collection, storage and use of their biometric data. While Plaintiffs have not asserted a claim under Section 15(e) in this action, plaintiffs asserting a claim under this provision of the Act would need to allege that a private entity failed to store their biometrics using the reasonable standard of care within the private entity's industry. Unquestionably, publication is not an element of Section 15(a), 15(b) or 15(e)'s requirements, nor is it an element to bring a claim under these provisions, and as such, section 13-201 cannot apply.

Relying on this Court's decision in *West Bend*, Defendant argues that section 13-201 applies because "[m]aintaining secrecy is the essence of the action," and Plaintiffs' injury "involves the actual or potential publication of biometric data." Def.'s Br. at 12. But "maintaining secrecy" and "prohibiting publication" of biometric data is not the overarching purpose of the Act; it is to ensure that an individual has the right to make informed choices about the collection and use of their biometric data. And while Black Horse attempts to conflate them, the standard for determining an insurer's duty to defend—an inherently fact-specific inquiry—has no relation to the standard for determining the

governing limitations period. In *West Bend*, a dispute arose between the defendant and its insurer over whether an insurance policy provided coverage for certain claims under the Act in an underlying action, where a plaintiff alleged a violation of Section 15(d). *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶¶ 1, 4. This Court, applying the well-established principle that insurance contracts must be construed strictly in favor of the insured,[4] upheld the trial court's ruling that the insurer had a duty to defend the insured under the contract because it plausibly triggered the policy's coverage for "publication." *Id*. at ¶¶ 32, 62. As this Court explained, if the definition of "publication" encompasses two possible meanings—distribution to the public or to a single third party—the court is required to construe the term against the insurer as drafter and in favor of coverage because the insurer could have foreclosed that definition in the policy. *Id*. at ¶ 43.[5] The Court should reject Black Horse's invitation to create an analogous principle whereby limitations statutes are construed against claimants seeking vindication of their statutory rights.

Additionally, both Defendant and its amicus mischaracterize this Court's decisions in *McDonald* and *Rosenbach* as standing for the premise that the Act's only intent is to

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[4] *See, e.g., United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73–74 (1991).

[5] Moreover, in the underlying case in *West Bend, i.e.*, the violative conduct for which the defendant-collector sought insurance coverage was not at issue. The only question was whether the specific insurance policy invoked a duty to defend, which "has no bearing on the statute-of-limitations issue here." *Burlinski v. Top Golf USA Inc.*, No. 19-cv-06700, 2020 WL 5253150, at *7 (N.D. Ill. Sept. 3, 2020). To read anything further into the decision would be error. *See Nix v. Smith*, 32 Ill. 2d 465, 470 (1965) ("A judicial opinion is a response to the issues before the court, and these opinions, like others, must be read in the light of the issues that were before the court for determination."); *see also Cates v. Cates*, 156 Ill. 2d 76, 81 (1993) (noting that *dicta* in previous cases is persuasive only with respect to issues actually "before this court") (emphasis omitted).

protect improper disclosure of biometric data and thus further confirms that Section 13-201 applies to claims under Sections 15(a), (b) and (e) of the Act. These assertions are meritless. *Rosenbach* and *McDonald* did not involve the applicable statute of limitations for claims under the Act, nor did the legislators' amicus touch upon it in any way. Def.'s Br. at 13-14, 26; Br. of Ill. Chamber of Commerce as Amicus Curiae at 7-10, 16. Moreover, an extra-legislative "statement of intent"—made solely for litigation purposes 10 years after the Act was enacted—is not a valid substitute for what the General Assembly stated (or did not state) at the time the statute was enacted.

Regardless, the fact that the Act protects an individual's privacy is not in dispute. As Defendant points out, the Illinois legislature was intending to protect "*a particular kind of privacy*"—that is, an individual's right to make informed choices over collection and use of his or her biometrics. Def.'s Br. at 26 (emphasis added). And the way the Act protects this right is through restrictions on collection, possession and disclosure of biometric data. None of these restrictions require a showing of "publication." As such, section 13-201 does not govern claims under the Act.

B. The Default Five-Year Limitations Period in Section 13-205 Applies.

Because the Act does not have its own limitations period, and no other limitations period applies, it is subject to the default five-year limitations period under 735 ILCS 5/13-205, which states that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." *See Johnson v. Northshore Univ. Healthsystem, Healthport, Inc.*, 405 Ill. App. 3d 1191 (1st Dist. 2011) (quoting 735 ILCS 5/13-205). Courts have routinely applied the five-year limitations period to countless other statutes that lack a specific limitations period. For example, as the Appellate Court held

when it determined the limitations period under the Illinois Prevailing Wage Act, because the law is "silent" on the limitations period, "the five-year 'catchall' period applies." *See Seaman v. Thompson Elecs. Co.*, 325 Ill. App. 3d 560, 565 (3d Dist. 2001). Likewise, in the context of the Illinois Wage Payment and Collection Act (before a ten-year limitations period was added to the statutory text), the Appellate Court held that "[b]ecause the Act does not provide for a statute of limitations, the five year 'catch-all' limitations period found in Section 13–205 is applicable." *People ex rel. Ill. Dep't of Labor v. Tri State Tours, Inc.*, 342 Ill. App. 3d 842, 848 (1st Dist. 2003). Similarly, the Seventh Circuit found that "[b]ecause the Illinois Family Medical Expense Act does not have its own statute of limitations, the catch-all five-year limitation period applies." *Killian v. Concert Health Plan*, 742 F.3d 651, 687 (7th Cir. 2013) (citations omitted).

Both the Appellate and trial courts correctly applied well-established principles in determining the applicable statute of limitations and appropriately reasoned that, because the Act lacks a specified limitations period, and Section 13-201 cannot and does not apply to Plaintiffs' claims under the Act, the default five-year limitations period set forth in Section 13-205 controls. The Appellate Court's decision finding a five-year statute of limitations period applies to claims for violations of Sections 15(a), (b) and (e) of the Act must be affirmed.

II. The Determination of the Correct Limitations Period is An Inquiry of Law, Not Public Policy, and Policy Considerations Strongly Favor the Longest Limitations Period Available.

The Court's determination on the applicable statute of limitations is not made by reference to public policy, its views on what might best serve a statute's purpose, or so-called "practical considerations." *Travelers*, 229 Ill. 2d at 466-67. In other words, a court

may not apply any statute of limitations it chooses, be it one-year, five-years, ten-years or something else based on personal notions of "fairness," or to attempt to encourage or dissuade future conduct and events.[6] Def.'s Br. at 27; Br. of Ill. Chamber of Commerce as Amicus Curiae at 11, 25, 26. For purposes of deciding the appropriate limitations period under the Act, it shouldn't matter whether the victim was a hospital worker or a customer of Amazon, whether any particular claimant can seek damages or what a trial court might ultimately decide is the proper quantum of damages, if any.

Yet, Defendant's amicus urges the Court to apply a one-year limitations period not based on established principles of statutory interpretation, but because it claims a short limitations period is "essential" to achieve the Act's goals while a five-year limitations period somehow "contravenes" the Act's "preventative purpose." Br. of Ill. Chamber of Commerce as Amicus Curiae at 2, 21-22. The stated rationale, remarkably, goes something like this: a private entity may not know it has installed biometric devices, required employees to use them, or that it is collecting, disclosing, storing or otherwise using fingerprints or other biometric data. *Id.* at 5-6, 21, 23. The entity then must rely on the subjects of biometric collection to educate the entity about its conduct, notify it of the Act's requirements and advise that it is breaking the law (with a lawsuit). *Id*. Upon receipt of the lawsuit, the private entity *may* then investigate and take action to comply with the Act. *Id*. Otherwise, compliance is delayed, which places more individuals at risk. *Id*. This

[6] Nor does the Court arbitrarily adopt the limitations period applied to other statutes, like the Illinois Personal Information Protection Act (PIPA), which expressly adopts the limitations period applied to the Illinois Consumer Fraud and Deceptive Trade Practices Act. *See* 815 ILCS 530/20.

argument may sound nonsensical, but it is exactly what the Chamber of Commerce suggests.[7]

The notion that employees and consumers, like the minor plaintiff in *Rosenbach*, are responsible for learning and apprising sophisticated corporations of the laws governing their conduct is baseless. Under this approach, the compliance incentives built into the Act would be reversed. Instead of incentivizing private entities to proactively conform to the law, the *subjects* of biometric collection, storage and dissemination would be required to both proactively investigate a private entity's conduct and ensure its compliance with the Act. This is in diametric opposition to the explicit purpose of the statute, as set forth by both the General Assembly and this Court. *See* 740 ILCS 14/15; *Rosenbach*, 2019 IL 123186, ¶ 37; *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 48.

Any consideration of policy factors overwhelmingly necessitates the longest limitations period available. Publicity-based torts like defamation are subject to a short statute of limitations because persons are reasonably be expected to quickly learn and take action when their reputation has been publicly tarnished with falsehoods, as exemplified by the Kansas decision Defendant relies upon. Def.'s Br. at 24-25 (citing *Meyer Land & Cattle Co. v. Lincoln County Conservation District*, 29 Kan. App. 2d 746, 31 P.3d 970

[7] Exactly how an entity could not know it is collecting biometric data yet it is "obvious" to the subject of the collection is oft repeated but never explained. Br. of Ill. Chamber of Commerce as Amicus Curiae at 21. It is precisely because private employers and other entities have actual and exclusive knowledge of exactly what they are doing with the biometric data they collect, store, disseminate and sell, all of which almost always takes place behind closed doors, that motivated the General Assembly to pass the Act in the first place.

(2001)).[8] Unlike common law torts like defamation, the dissemination of biometric data almost always takes place behind closed doors, in private between two business partners, and absent the Act's protections, would rarely, if ever, be revealed to the individuals whose data was transmitted. And when they are defamed, as the drafters of Section 13-201 rightly concluded, a victim experiences deleterious consequences and should act immediately because of their reputation being impugned. With biometric technology, however, "[t]he full ramifications of [which] are not fully known," biometrics can be misused decades from now without an individual's knowledge. 740 ILCS 14/5(f).

A shorter statute of limitations period would simply benefit the entity that is violating the law by encouraging noncompliance and limiting exposure, necessarily prejudicing those whom the Act is intended to protect. For example, with one-year limitations period, a private entity which has been collecting, storing and disseminating biometric data without consent since the Act's enactment in 2008 and sued today walks free for 13 years of illegal conduct, as opposed to dodging only 9 years of culpability under a five-year limitations period, effectively extinguishing 93% of its culpability. This Court should not countenance such an untenable result.

PLAINTIFFS-APPELLEES' CROSS APPEAL

As noted *supra*, the Appellate Court concluded, in three sentences of analysis, that Sections 15(c) and 15(d) of the Act are subject to a one-year statute of limitations,

[8] In *Meyer Land & Cattle Co.*, the court applied a one-year limitations period to defamation and other derivative claims brought against various parties for making falsehoods about a cattle ranch to various government agencies and private officials. 29 Kan. App. 2d 746, 31 P.3d 970 (2001). How this case implicates "very similar concerns" as those which should purportedly lead this Court to apply a one-year limitations period to claims under the Act is unknown to Plaintiffs.

reasoning only that "publication is clearly an element" of both claims. (A16, ¶ 32). But the court erred, as the plain text of Section 15(c) and 15(d) not only lacks any element of "publication," but the nature of the injury under both Section 15(c) and 15(d)—like the Act's other subsections—also arise from violations of the Act's notice and informed consent regime, and not from the publication of Plaintiffs' fingerprint data. Further, claims under Section 15(c) and 15(d) are distinguishable from other publication-based common-law and statutory privacy claims, illustrating that Section 13-201 is incongruous with claims under Section 15(c) and 15(d). Finally, a consistent statute of limitations period for each provision of the Act best aids its efficient enforcement and advances the legislative intent.

I. The Plain Language of Sections 15(c) and 15(d) Demonstrate Their Incompatibility with Section 13-201.

As explained in Section I., *supra*, analysis of the proper statute of limitations starts by examining the nature of the injury. *Travelers*, 229 Ill. 2d at 466 (quoting *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)). Given that liability under Sections 15(c) and 15(d) stems from a violation of the statutory text, the nature of the injury is best discerned by looking to the plain language of the Act. *See Rosenbach*, 2019 IL 123186, ¶ 33 (finding that a person is "aggrieved" under the Act "when a private entity fails to comply with one of section 15's requirements").

When interpreting a statute, the court's "primary objective is to ascertain and give effect to the intent of the statute's drafters." *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30. As such, "the most reliable indicator of the drafters' intent is the language used in the statute itself, which should be given its plain and ordinary meaning." *Id.*; *Michigan Ave. Nat. Bank v. Cty. of Cook*, 191 Ill. 2d 493, 504 (2000) ("The statutory language must be

given its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction."). Dictionary definitions confirm that the plain meaning leads to the unassailable conclusion that Sections 15(c) and 15(d) claims do not fall within Section 13-201's purview.[9] *See Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 56 (a reviewing court may use a dictionary to ascertain the plain and ordinary meaning of terms undefined in a statute).

Section 13-201 governs only actions brought to remedy the publication of information causing a violation to the right of privacy are subject to a one-year statute of limitations. Plainly, the injuries stemming from violations of Section 15(c) and 15(d) do not fit within the scheme established by Section 13-201.

Section 15(c) provides in full: "no private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information." 740 ILCS 14/15(c). The plain language demonstrates that the gravamen of a Section 15(c) violation is an absolute prohibition on an entity's ability *to profit or gain* from their possession of biometrics, not a prohibition on any act by that entity to reveal that information to the public at large. Not only does the plain text lack any publication element, the provision's use of the term "otherwise profit" as a catchall illustrates that the provision's true intent is to foreclose an entity's ability to prosper off of biometrics it possesses, regardless of whether that conduct "entails a publication" of those biometrics. (A16, ¶ 32).

[9] This Court has previously relied upon definitions from Merriam-Webster's Online Dictionary and Dictionary.com to interpret the Act. *Rosenbach*, 2019 IL 123186 at ¶ 32.

In fact, the statute's inclusion of "otherwise profit" necessarily means that an entity could violate Section 15(c) without *ever* transferring biometrics to another entity so long as that entity profits from its possession of biometrics. Take Facebook, for example. In 2010, Facebook implemented its "tag suggestions" feature, which amassed facial geometry data from millions of Illinois residents without their knowledge or consent. *See Patel v. Facebook, Inc.*, 932 F.3d 1264, 1268 (9th Cir. 2019). Had Facebook's stock value risen by virtue of its possession of facial geometry data extracted through its tag suggestions feature, Facebook would have violated Section 15(c) by profiting from its possession of biometrics without ever having publicized the facial geometry data at issue. In other words, the injury underlying a Section 15(c) violation is the entity in possession of biometrics' receipt of something of value by virtue of its possession of biometrics, not its publication.

Again, dictionary definitions confirm this interpretation. The triggering verbs in the statute include "sell," "lease," "trade," and "profit," none of are synonymous with "publication." *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/sell (last visited Apr. 27, 2022); Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/lease (last visited Apr. 27, 2022); Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/trade (last visited Apr. 27, 2022). Far from necessarily "entail[ing] a publication, conveyance, or dissemination," the only commonality between each of these verbs is receipt of a benefit by the entity in possession of biometrics by virtue of that possession. Thus, the "obligation out of which [an] action" under Section 15(c) arises is the entity's duty not to profit from the collection of biometrics, wholly unrelated to its actual or potential publication of those biometrics. *See* Def.'s Br. at 15 (citing *Handtoffski*,

274 Ill. at 285). Similarly, an action under Section 15(c) does not "impose liability when there is a disclosure of biometric data to a third party," and it is not an "action for publication of a matter violating the right to privacy." Def.'s Br. at 14; 735 ILCS 5/13-201.

The same is true for violations of Section 15(d), which provides:

> No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;
>
> (2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;
>
> (3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or
>
> (4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

740 ILCS 14/15(d). Thus, under its plain text, an entity violates Section 15(d) when it discloses, rediscloses or otherwise disseminates a person's biometrics without prior consent. Rather than set forth an absolute prohibition on the transfer of biometrics between private entities, Section 15(d), in harmony with the goal of the statute, introduces an informed consent regime to permit the disclosure of biometrics while empowering Illinois citizens with safeguards "to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected to begin with." *See Rosenbach*, 2019 IL 123186, ¶ 34 (citing *Patel*, 290 F. Supp. 3d at 953 ("The Act vests in individuals and customers the right to control their biometric information by

requiring notice before collection and giving them the power to say no by withholding consent.")). Again, not only does the unambiguous language of the plain text lack any publication element, but it also clearly establishes that the crux of an injury is the failure to adhere to the safeguards in place for protection of biometrics by neglecting to obtain consent.

A violation of Section 15(d) amounts to an informational injury. Section 15(d)'s provisions regulating a private entity's ability to "disclose," "redisclose" or "otherwise disseminate" hinge on its use of the term "unless," which acts as a conjunction modifying Section 15(d)'s prohibition on disclosure and providing for a limited number of circumstances under which entities in possession of biometrics may disclose, redisclose or otherwise disseminate biometrics. "Disclose" means "to make known" or "reveal or uncover." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/disclose (last visited Apr. 27, 2022); Dictionary.com, https://www.dictionary.com/browse/disclose (last visited Apr. 27, 2022); *see also* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/disseminate (last visited Apr. 27, 2022)). Meanwhile, "unless" is defined as "except on the condition that" or "except under the circumstances that." *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unless (last visited Apr. 27, 2022); Dictionary.com, https://www.dictionary.com/browse/unless (last visited Apr. 27, 2022). The plain language shows that an entity is authorized to reveal an individual's biometrics on the condition that it has secured consent to make them known.

Where, as here, a private entity discloses biometrics to a third party without first obtaining consent, a Section 15(d) action arises out of that specific conduct, not any "publication," or bringing before the public, any matter violating their right to privacy. Thus, even if "disclosure" were sufficient to meet section 13-201's "publication" requirement, which it is not, it is Defendant's failure to provide notice and secure informed consent before disclosure that gives rise to liability, not the disclosure itself. Because the Act does not require Plaintiffs to plead or prove that Black Horse disclosed or disseminated their biometric data to the public, the publication element is lacking. Indeed, Section 15(d) can be violated by a single private disclosure to a single third party (*e.g.*, payroll vendor), and the nature of this conduct in no way equates to publicizing information to the public at large or to third parties with a special relationship to the plaintiff. *Miller*, 202 Ill. App. 3d at 980. As explained *supra*, a disclosure or dissemination of biometrics in violation of Section 15(d) is <u>not</u> a publication insofar as the term is understood in other privacy related torts.

Indeed, the legislature is presumed to know the difference between the terms "disclosure" and "publication" (which connotes wider dissemination), and deliberately chose the former, undoubtedly because it correctly concluded that even the most private dissemination of biometric data is just as, if not more, pernicious as publicizing it. *See* 740 ILCS 14/5(c) ("Biometrics ... are biologically unique to the individual; therefore, once compromised, the individual has no recourse[.]"). To this end, the decision in *West Bend* provides a useful point of contrast. While the opinion has no real bearing on the issue here (given that, as noted above, *West Bend* addressed the interpretation of an insurance policy, rather than the Act, Section 13-201, or any other statute), the Court, looking to definitions

of "publication" in various contexts, including insurance law treatises, determined the term "publication" to be ambiguous in that context and construed the terms against the drafter of the policy, as is required when interpreting insurance policies. *See Burlinski*, 2020 WL 5253150, at *7; *W. Bend Mut. Ins. Co.*, 2021 IL 125978, ¶¶ 38-43. The General Assembly, however, provided no indication that the term "disclosure" should be synonymous with the term "publication" as used in Section 13-201. And despite what Black Horse suggests, it is not this Court's role to rewrite or "add words to a statute to change its meaning." *McDonald*, 2022 IL 126511 ¶¶ 48-49.

Lastly, even if it could be determined that Section 15(d)'s dissemination and disclosure elements equate to publication, when interpreting statutes, courts must "presume that the legislature did not intend absurd results." *People v. McCarty*, 223 Ill. 2d 109, 126 (2006). While publication could give rise to a violation of Section 15(d), it is not necessary to state a claim. In fact, it would be the rare circumstance, as Plaintiffs—along with the vast majority of claims currently pending under the Act—allege a limited disclosure of biometrics to discrete third parties without prior notice or consent. As such, Plaintiffs' Section 15(d) claims for Defendant's failure to obtain consent cannot fall within the narrow confines of Section 13-201's "action for publication of a matter violating the right to privacy."

II. Actions Subject to the One-Year Limitations Period Under Section 13-201 Illustrate that Section 13-201 Is Not Properly Applied to Claims Under Sections 15(c) and 15(d).

Fundamental differences between claims under Sections 15(c) and 15(d) and publication-based privacy actions subject to the one-year statute of limitations under section 13-201 further establish Sections 15(c) and 15(d)'s incompatibility with the one-

year limitations period. For example, Defendant, in an effort to analogize publication-based privacy statutes with the Act, references statutes like the Medical Patient Rights Act, 410 ILCS 50/3(d), Identity Protection Act, 5 ILCS 179/10, Right of Publicity Act, 765 ILCS 1075, and the AIDS Confidentiality Act, 410 ILCS 305. Def.'s Br. at 17. As an initial matter, Defendant merely concludes, without support, that these actions are subject to a one-year limitations period under Section 13-201 "with near unanimity." *Id.* at 18. But besides the Right of Publicity Act, which the *Blair* court held was subject to the same one-year statute of limitations as its common-law predecessor, little guidance exists on the applicable statute of limitations for statutes referenced by Defendant. 369 Ill. App. 3d at 323 ("since the Right of Publicity Act completely supplanted the common-law tort of appropriation of likeness, we find applicable the one-year statute of limitations that pertained to the common-law tort").

Even if a court were to hold that these statutes are subject to Section 13-201, none are analogous to Sections 15(c) and 15(d) of the Act. The Medical Patient Rights Act, 410 ILCS 50/3(d), the Identity Protection Act, 5 ILCS 179/10 and the AIDS Confidentiality Act, 410 ILCS 305, all absolutely prohibit disclosure of the information protected under each respective statute (*i.e.*, the nature or details of services provided to patients, individuals' social security numbers, and individuals' HIV status). None of these statutes sets forth a mechanism by which an entity could permissibly disclose protected information to a third party with the individual's consent, like Section 15(d) provides.

Attempting to equate Section 15(c) and 15(d) claims with those found to be covered under Section 13-201, Defendant similarly cites *Bryson v. News Am. Publications, Inc.* for the proposition that publication-based common-law privacy torts are also subject to a one-

year statute of limitations under Section 13-201. Def.'s Brief at 18 (citing 174 Ill. 2d 77, 105 (1996)). However, given that both actions for defamation and the three publication-based common-law invasion of privacy torts necessarily involve a publication-based injury, they explicitly fall within Section 13-201's statutory framework and thus are distinguishable from claims under Sections 15(c) and 15(d) of the Act. 735 ILCS 5/13-201.

Meanwhile, the nature of an injury under either Section 15(c) or 15(d) does not involve publication. Section 15(c) is not tethered to any disclosure of an individual's biometrics. Likewise, while a disclosure may trigger a Defendant's obligation to comply with Section 15(d), the nature of the injury is an informational one, *i.e.*, the failure to obtain informed consent. Unlike defamation and the three publication-based invasion of privacy torts, Defendant's disclosure of biometrics does not in and of itself lead to an injury under the statutory provision. While individuals asserting causes of action under the Act feasibly could allege a publication of their biometrics, the crucial difference is that they need not allege publication to successfully state a claim under the Act. This is because, under the Act's informed consent regime, the "real and significant" injury under the Act is a private entity's failure "to adhere to the statutory procedures." *Rosenbach*, 2019 IL 123186, ¶ 34.

This only makes sense. Again, logically, as claims for defamation and invasion of privacy necessarily involve publication of statements or private information, an individual with a claim will, by definition, quickly learn and suffer immediate injury by virtue of the publication. For example, Michael Jordan immediately learned that his identity was misappropriated in a Dominick's ad contained in a Sports Illustrated issue that was widely distributed in the Chicago and North Carolina markets. *See Jordan v. Dominick's Finer*

Foods, 115 F. Supp. 3d 950, 954 (N.D. Ill. 2015). In turn, Jordan was able to bring a timely action under the Right of Publicity Act. *Id.* Similarly, a psychologist was able to bring a timely action for defamation and false light following a journalist's publication of comments criticizing the psychologist's qualifications and capabilities in the Chicago Tribune, a newspaper widely read throughout the Chicagoland area. *See Moriarty v. Greene*, 315 Ill. App. 3d 225, 228 (1st Dist. 2000).

The essence of Plaintiffs' Section 15(d) claim, on the other hand, is that, without Defendant's efforts to comply with the Act and obtain consent prior to its disclosure of Plaintiffs' biometrics, Plaintiffs have no reason to know or suspect that their biometrics have been disclosed, or to whom. Similarly, under Section 15(c), an individual whose biometrics have been sold privately may never know his or her biometrics were used in such a manner. The distinctions between the nature of these injuries underscore why a five-year limitations period is most appropriate for Section 15(c) and 15(d) claims, whereas a one-year limitations period is appropriate for defamation and invasion of privacy claims.

III. Diverging Statutes of Limitations Impede the Efficient Enforcement of the Act and Are Contrary to Legislative Intent.

By holding that claims under Section 15(c) and 15(d) entail publication, the Appellate Court effectively split the Act in two: claims brought under Sections 15(c) and 15(d) are subject to the one-year statute of limitations for publication of matters violating the right to privacy, and claims brought under Section 15(a), 15(b) and 15(e) are subject to the five-year catchall statute of limitations. (A16, ¶ 32; A17, ¶ 33). But as Plaintiffs' amicus explains, a consistent limitations period of five years across each provision of the Act better aligns with legislative intent, given that the fundamental nature of the Act is to safeguard against collection without informed consent in the first instance.

The Act explains that "[a]n overwhelming majority of members of the public are weary of the use of biometrics," and "many members of the public are deterred from partaking in biometric identifier-facilitated transactions." 740 ILCS 14/5(d)-(e). To remedy this concern, the legislature recognized that the "public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and biometric information." 740 ILCS 14/5(g). In other words, the legislature passed the Act to allay fears associated with the use of biometrics by establishing a framework of protections intended to work in concert to safeguard biometrics. But a confusing scheme that provides for different limitations periods contingent on the provision at issue runs contrary to this common goal, incentivizing entities to treat their obligations under Section 15(c) and 15(d) differently than those under 15(a), 15(b) or 15(e) and discouraging individuals from enforcing their rights. Nothing in the text of the Act or legislative intent supports such a distinction, and a common, five-year limitations period applicable to each provision best accomplishes the goal of the legislature.

CONCLUSION

For all the reasons stated above, the Court should answer the certified question by holding that all claims brought under the Act are subject to a five-year statute of limitations under 735 ILCS 5/13-205.

Respectfully submitted,

/s/ James B. Zouras

Ryan F. Stephan
James B. Zouras
(jzouras@stephanzouras.com)
Teresa M. Becvar
Catherine T. Mitchell
Paige L. Smith
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, Illinois 60606
(312) 233-1550

Counsel for Appellees
Jorome Tims and *Isaac Watson*

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 34 pages.

/s/ James B. Zouras
James B. Zouras

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

JOROME TIMS and ISAAC WATSON, etc.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 127801
	)	
BLACK HORSE CARRIERS, INC.,	)	
	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on April 27, 2022, there was electronically filed and served upon the Clerk of the above court the Brief of Appellees. Cross-Relief Requested. On April 27, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

David M. Schultz (dschultz@hinshawlaw.com)
John P. Ryan (jryan@hinshawlaw.com)
Joshua G. Vincent (jvincent@hinshawlaw.com)
Louis J. Manetti, Jr. (lmanetti@hinshawlaw.com)
HINSHAW & CULBERTSON, LLP

Matthew C. Wolfe (mwolfe@shb.com)
Ian Hansen (ihansen@shb.com)
Melissa Siebert (masiebert@shb.com)
SHOOK, HARDY & BACON, L.L.P.

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

/s/ James B. Zouras
James B. Zouras

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

/s/ James B. Zouras
James B. Zouras