**No. 126511**

**IN THE SUPREME COURT OF ILLINOIS**

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| MARQUITA McDONALD,<br><br>Plaintiff-Appellee,<br>v.<br><br>SYMPHONY BRONZEVILLE PARK, LLC, et al.,<br><br>Defendant-Appellant. | ) | Illinois Appellate Court,<br>First District, No. 1-19-2398<br><br>On Appeal from the Circuit Court of Cook County, Illinois,<br>Case No. 2017-CH-11311<br><br>The Honorable<br>Raymond Mitchell,<br>Judge Presiding. |

# BRIEF *AMICI CURIAE* OF AFFECTED ILLINOIS EMPLOYERS IN SUPPORT OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC

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## STATEMENT OF INTEREST

For over 100 years, the Illinois Workers' Compensation Act (the Act) has assured employees of compensation for their work-related injuries while protecting employers against unlimited tort or statutory liability. The instant case—involving an alleged privacy injury under the Biometric Information Privacy Act (BIPA)—does violence to the purpose and intent of that important statutory scheme.

The appellate court determined that the Act's exclusive remedy provision did not apply because the type of damages sought by the plaintiff did not fall within the purview of the Act as the Act does not provide for statutory damages awards. This is precisely the same legal error the appellate court committed in *Folta v. Ferro Engineering*, 2015 IL 118070. As this Court explained when it reversed the appellate court in *Folta*, whether an injury is "compensable" is determined strictly by whether the circumstances that caused the injury fall within the purview of the Act, not whether the Act provides monetary compensation for the employee's particular injury.

Indeed, for decades this Court has consistently rejected attempts by injured employees to circumvent the Act's exclusive remedy provision on the basis that a common law or statutory cause of action should be allowed because no compensation, or a more limited amount of compensation, was available under the Act for an otherwise work-related injury. *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 16-18 (1969) (holding that the Act's exclusive remedy provisions

barred a plaintiff's civil action even though his recovery under the Act was limited to the nominal amount of funeral expenses); *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407, 410-12 (1956) (holding that the Act's exclusivity provisions barred an employee's cause of action even though no compensation for his permanent injury was provided for under the Act); *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980) (holding that the Act's exclusivity provisions barred an employee from seeking additional damages in a civil action after receiving compensation under the Act); *Folta v. Ferro Engineering*, 2015 IL 118070, ¶36 (holding that the Act's exclusivity provisions barred an employee's civil action for work-related injury even though his claim for compensation under the Act was time-barred).

The reason an employee may not receive compensation even though the injury falls within the Act's coverage formula is because the "grand bargain" – the public policy that makes an employer strictly liable for all work-related injuries while limiting the damages the employer must pay – can only be achieved by fully preempting the field of employer liability for employee injuries causally-connected to the employment.

That inevitably means that there will be instances—as in *Moushon* and *Folta*—where no monetary compensation will be available under the Act even though the injury clearly falls within the Act's coverage formula. That is the legislature's prerogative and a matter of statutory construction for this Court. When the legislature determines that an exception to the Act's exclusive remedy

provision should be made, it has not hesitated to create one. In fact, that is precisely what the legislature did in the wake of this Court's decision in *Folta*. See 820 ILCS 305/1.2 (P.A. 101-6, eff. May 17, 2019) (the Act was amended to exempt time-barred, latent injury claims from the exclusive remedy provision). It is not the judiciary's function to create such exceptions, particularly where the legislature has made clear that the Act is to apply broadly to *any* accidental injury arising out of and in the course of employment.

The appellate court's decision in this case presents the very same risk of upsetting the statutory scheme that *Folta* presented: an exception that swallows the rule. In *Folta*, it was the specter that any time-barred claim under the Act would permit the employee to seek unlimited tort damages from the employer. Here, it is the employee's inability to recover monetary damages for an injury to a privacy interest that supposedly frees the plaintiff to bring suit against the employer and impose crippling statutory liability. But as *Duley*, *Moushon*, *Collier*, and *Folta* all demonstrate, the Act's coverage in no way depends on whether or what kind of damages an employee may actually recover for his injury. All that matters is whether the circumstances of the injury place it within the purview of the Act. It is only when the circumstances that produced the injury fall outside the Act's coverage formula that it is "not compensable" under the Act.

An injury to an employee's privacy interest due to the employer's use of finger or hand scan timeclocks without first obtaining the employee's release unquestionably falls within the Act's coverage formula. It is an accidental injury

because the record shows that there was no intent to injure and it occurred at a place where the employee was expected to be during working hours. Unlike an injury incurred while driving to or from work, the required use of a finger or hand scan timeclock is not a risk to which the general public is exposed. The use of the finger or hand scan timeclock was a risk peculiar to the employee's workplace.

Quite simply, there is nothing in the Act's statutory language that remotely suggests the legislature intended to exempt from the Act's purview a work-related injury to a privacy interest any more than it intended to exempt work-related emotional injuries (*Collier*), false arrest (*Meerbrey*), or those for which there may be no compensation (*Moushon, Folta*). All fall within the Act's purview. So long as the employee's injury is an accidental one that is causally connected to the employment, as here, no common law or statutory action may be brought against the employer. 820 ILCS 305/5(a), 11.

*Amici curiae* are a diverse group of employers who have built their businesses relying on the historical assurances contained in the Act. Yet under the appellate court's interpretation of the Act, they *are* now subject to the costly and contentious litigation that the legislature intended to prevent—specifically in the form of class action lawsuits. The appellate court held as a matter of first impression that BIPA claims are exempt from the Act's exclusive jurisdiction. But this Court's precedent warrants a different and inescapable conclusion: privacy injuries based on an employee's use of finger or hand scan timeclocks as alleged

under the BIPA categorically fit "within the purview of the Act" and must be "governed exclusively by the provisions of that [A]ct." *Folta*, 2015 IL 118070, ¶36.

*Amici*, collectively referred to as the Consortium of Affected Illinois Employers, include Mercyhealth System Corporation, PDB Worldwide, Inc., A. Lava & Son Company, Kilcoy Pastoral Company Trading USA, Yaskawa America, Inc., Top Die Casting Company, United Scrap Metal, Inc., Bella Elevator, LLC, Chronister Oil Company, UCAL Systems, Inc., Cross Road Centers Illinois, LLC, Trippe Manufacturing Company, Black Horse Carriers, Inc., and Oxford Hotels & Resorts. They represent a broad spectrum of industry from across the State, diverse in size, geography, and capital valuation. They include healthcare providers, manufacturing companies, trucking companies and those in the service industry.

And what they share is a tangible interest in the outcome of this case, which asks: "Do[ ] the exclusivity provisions of the Workers' Compensation Act bar a claim for statutory damages under BIPA where an employer is alleged to have violated an employee's statutory privacy rights under BIPA?" The answer is assuredly yes.

With this brief, *amici* seek to provide this Court with a more detailed understanding of the upheaval the appellate court's mistaken interpretation of the Act will have on their ability to operate in Illinois. *Amici* reflect only a sample of the more than 500 employers subject to BIPA class action lawsuits in Illinois state and federal courts, which are also reeling from the crippling effects of the

COVID-19 pandemic. The appellate court's decision to exempt from the Act's exclusive remedy provision workplace injury claims under BIPA adds another costly and unpredictable strain on Illinois businesses. Hundreds of small, medium and large size Illinois employers are facing class action lawsuits with exposure to damages that would cripple their businesses.

These businesses are key to Illinois' economic recovery and continued vitality. *Amici* and similarly situated businesses are diverting significant resources to defend these claims in court when they should be handled under the well-established and predictable provisions of the Act. Permitting BIPA claims to be prosecuted as class action lawsuits—as the appellate court now permits—will upend a system that long ago struck a sensible balance that permits employees to bring no-fault claims and allows employers to manage their risk and limit liability. *See McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 356 (1981) (holding that as part of the Act's balancing for no-fault liability against employers, the statutory remedies under it shall serve as the employees' exclusive remedy). Accordingly, *amici* urge this Court to answer the certified question in the affirmative and apply the Act's exclusive remedy provisions as written to bar employees from bringing civil claims for damages under the BIPA.

## ARGUMENT

This appeal presents a case of first impression as to whether the Act's exclusive remedy provisions bar a civil cause of action in the circuit court for an alleged violation of BIPA when the claim arises out of and in the course of the

plaintiff's employment. The appellate court held, with little explanation, that the Act does not apply to claims for statutory or liquidated damages under BIPA, because they do not require "any further compensable actual damages." (A201).[1] The court reasoned that the Act is limited only to "remedial" claims that compensate workers who have "sustained an actual injury." (A201). In reaching this conclusion, the appellate court misapprehended the *Folta* decision. It also failed to reconcile its conclusion with this Court's watershed holding in *Rosenbach v. Six Flags Entertainment Corp.*, which established that injuries sustained as a result of alleged BIPA violations are "real and significant" in and of themselves and do not require proof of "some injury beyond violation of their statutory rights." 2019 IL 123186, ¶¶34, 36-37.

Additionally, as a policy matter, this Court's decision could profoundly affect the deeply rooted principles that have anchored the worker's compensation system over the past one hundred years. Now more than ever, it is critical that employers be able to rely on the precedents that have defined and interpreted the Act to resolve workplace injury claims and provide swift and certain resolution to both parties.

Those businesses fortunate enough to survive the COVID-19 pandemic are still struggling to stay afloat. There are well over 500 BIPA class action

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[1] The citation format "A__" refers to the Appendix to Appellant's Petition for Leave for Appeal, filed October 30, 2020.

lawsuits pending in Illinois courts, exposing those businesses to lengthy and expensive class action litigation, unpredictable liability, and exorbitant attorney fee awards, all of which will further hinder their prospects for economic recovery. As such, this Court should allow BIPA claims based on workplace injuries to proceed under the Act as the legislature intended.

## I. Workplace Injury Claims Brought Under BIPA are Compensable under the Worker's Compensation Act and Its Exclusive Remedy Provisions Preempt Any Statutory Right to Recover Damages.

The Worker's Compensation Act provides the exclusive means by which an employee may recover for any injury sustained in the course of employment. There are very narrow exceptions to this rule, including whether the type of injury is of the type considered "not compensable" under the Act. The critical question here is whether a BIPA claim falls within this "not compensable" exception. (A196).[2]

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[2] There is no dispute about whether the alleged BIPA violation here arises out of and in the course of employment. Plaintiff alleged that the employer violated BIPA by having her scan a finger to clock in and out of work without first obtaining her written release and/or without first having a BIPA policy. This injury, as alleged by Plaintiff and many other litigants bringing similar claims, has a direct causal connection to the employment. Indeed, it is hard to imagine a more direct causal connection between Plaintiff's injury and her employment—the alleged injury occurred because the employer required Plaintiff to use the employer's timeclock to begin her shift. See *Christian v. Chicago & I.M.R. Co.*, 412 Ill. 171, 175 (1952) ("employment begins and ends at the employer's premises"); *see also Unger v. Continental Assurance Co.*, 107 Ill. 2d 79, 88 (1985), *citing Sjostrom v. Sproule*, 33 Ill. 2d 40, 43-4 (1965) (employee's injury arises out of the employment when caused by "the demands of his employment rather than personal factors.").

This Court's recent decision *Folta* provides the blueprint for analyzing the "not compensable" exception, and expressly rejects the argument that "compensable" refers to whether an employee can recover compensation under the Act. 2015 IL 118070, ¶¶23, 30. Rather, compensability considers whether the alleged injury categorically fit within the purview of the Act. *Id*. ¶36. Fundamentally, this is a matter of statutory construction. Nothing in the language of the Act supports the appellate court's consideration of the nature of plaintiff's BIPA *damages* to determine whether Act applies. By focusing on the wrong question, the appellate court came to a conclusion at odds with the plain language of the Act and the history of this Court's decisions interpreting it. (A201).

### A. The Worker's Compensation Act Applies Where the Circumstances of the Injury Place it Within the Purview of the Act.

Read together, sections 5 and 11 of the Act provide "the exclusive means by which an employee can recover against an employer for a work related injury." *Folta*, 2015 IL 118070, ¶14,[3] citing *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990). Section 5(a) provides:

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[3] *Folta* involved the Workers' Occupational Disease Act, but relied on precedent interpreting the Act because the corresponding exclusivity provisions in each statute "have been viewed analogously for purposes of judicial construction." *Folta*, 2015 IL 118070, ¶13. Thus, "cases that have construed the exclusivity provisions in the context of the Workers' Compensation Act would also apply in the context of the Workers' Occupational Disease Act." *Id*.

> no common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization that is wholly owned by the employer, his insurer or his broker and that provides safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act. 820 ILCS 305/5(a).

Similarly, section 11 provides:

> the compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act [820 ILCS 305/3], or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act. 820 ILCS 305/11.

A plaintiff can only escape these exclusivity provisions if he can establish that the injury: (1) was not accidental; (2) did not arise from his employment; (3) did not occur in the course of his employment; or (4) was not "compensable" under the Act. *Folta*, 2015 IL 118070, ¶14, citing *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980). As in *Folta*, this case turns on the analysis of the "not compensable" exception to the Act's exclusive remedy provisions. (A196).

The plaintiff in *Folta* was diagnosed with mesothelioma and sued his former employer, Ferro Engineering, after allegedly being exposed to asbestos on the job. *Folta*, 2015 IL 118070, ¶3. Ferro Engineering moved to dismiss the complaint, arguing that the Act's exclusivity provisions barred plaintiff's claim. *Id.* ¶4. Folta responded that he could not recover under the Act because he filed

his claim beyond the 25-year repose period, and therefore, his claim was "not compensable" under the Act. *Id*. The circuit court agreed with Ferro and granted the defendant's motion to dismiss. *Id*., ¶¶6-7. But the appellate court reversed and remanded, finding that the plaintiff's inability recover damages under the Act placed his case within the exception for "noncompensable injuries," and therefore he was free to maintain a tort suit for unlimited wrongful death and Survival Act damages. *Id*., ¶7.

This Court reversed. It conducted an in-depth analysis of the "not compensable" exception and concluded that for nearly sixty years, "this [C]ourt has held that despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries." *Id*., ¶30.

Beginning with *Sjostrum v. Sproule,* 33 Ill. 2d 40 (1965), this Court first explained that the Act's exclusivity provisions bar a civil action for damages whenever the employee is injured in the "line of duty." The line of duty test is "identical to the general test of compensability," which is concerned with whether the injury "arose out of and in the course of employment." *Folta*, 2015 IL 118070, ¶18, citing *Sjostrum*, at 43.

The Court then examined the circumstances of the injury in light of the Act's exclusivity provisions. While the Court had previously determined that the Act applied to purely physical injuries that "arose out of and in the course of employment," as well as psychological injuries accompanied by some degree of physical harm, the Court had not yet addressed whether purely psychological

injuries fell within the Act's purview. *Folta*, 2015 IL 118070, ¶20, citing *Pathfinder v. Indus. Commission*, 62 Ill. 2d 556, 563-64 (1976).

For example, in *Pathfinder*, the Court considered whether the emotional shock experienced by an employee after assisting a colleague who suffered a gruesome workplace injury was compensable under the Act. The Court held that such an injury was "within the concept of how we defined an accidental injury," meaning that it "happened 'without design or… [was] unforeseen by the person to whom it happens.'" *Id*., citing *Pathfinder*, 62 Ill. 2d at 563. As long as the injury was "accidental" and "traceable to a definite time, place and cause," there was no principled reason to distinguish between psychological injuries accompanied by minor physical injuries and those that were not for purposes of deciding whether the exclusive remedy provision applied. *Pathfinder*, 62 Ill. 2d at 563-64. Because it was an accidental injury causally connected to the employment, it was compensable under the Act. *Folta*, 2015 IL 118070, ¶20.

Later, in *Collier*, the Court collected these holdings and formulated the now-familiar exceptions to the Act's exclusivity provisions. *Folta*, 2015 IL 118070, ¶¶14, 21, citing *Collier*, 81 Ill. 2d at 236-37. The plain language of the Act bars recovery "for any common law or statutory right to recover damages from the employer" for "any injury" sustained "in the course of the employment." 820 ILCS 310/5(a), 11. The only way a plaintiff can "escape the bar" of these exclusivity provisions is to prove that her injury: (1) was not accidental; (2) did

not arise out of her employment; (3) did not occur in the course of employment; or (4) was not compensable under the Act. *Id*. at ¶¶14, 21; *Collier*, 81 Ill. 2d at 236-37.

*Folta* concluded its historical analysis of the Act's exceptions with *Meerbrey*, in which the Court decided whether a claim for emotional distress fell within the "not compensable" exception. *Id* at ¶22, citing *Meerbrey*, 139 Ill. 2d at 467-68. In *Meerbrey*, the question was whether emotional distress suffered as a consequence of false imprisonment, false arrest, and malicious prosecution following an accusation of employee theft was compensable under the Act. *Id.*, citing *Meerbrey*, 139 Ill. 2d at 467. Although other jurisdictions rejected these types of claims as not being traditional personal injuries, this Court found that they were compensable injuries under the Act. *Meerbrey*, 139 Ill. 2d at 468. Indeed, it found that there was no articulable difference between a "deprivation of personal liberty" injury arising out of false imprisonment, false arrest, and malicious prosecution and the purely emotional injuries at issue in *Pathfinder* and *Collier*. *Id.*

*Folta* ultimately synthesized the holdings of *Pathfinder*, *Collier*, and *Meerbrey* as follows:

> whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act. These cases do not stand for the proposition that whether an injury is compensable is defined by whether there is an ability to recover benefits for a particular injury sustained by an employee.

2015 IL 118070, ¶23. *Folta* also noted that *Pathfinder, Collier, and Meerbrey* "never addressed specifically whether the exclusive remedy provisions would bar a

cause of action where there was no possibility of seeking benefits under the Act," and found the inability to recover damages did not matter so long as the injury categorically fit within the Act's coverage formula. *Id*. ¶25.

In reaching this conclusion, the Court considered the "interplay between certain provisions of the [A]ct that limit the employer's liability and the exclusive remedy provisions." *Id*. ¶26. Citing *Duley v. Caterpillar Tractor Co*. and *Moushon v. National Garages, Inc*., the Court then held that:

> [S]ince 1956, this court has held that *despite limitations on the amount and type of recovery* under the Act, the Act is the employee's exclusive remedy for workplace injuries.

*Id.* ¶¶27-30 (emphasis added), citing *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 16-18 (1969) (holding that the Act's exclusive remedy provisions barred a plaintiff's civil action even though his recovery under the Act was limited to the nominal amount of funeral expenses), and *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407, 410-12 (1956) (holding that the Act's exclusivity provisions barred an employee's cause of action even though no compensation for his permanent injury was provided for under the Act). Thus, "where the injury is the type of work-related injury within the purview of the [Act], the employer's liability is governed exclusively by the provisions of [the Act]." *Folta*, 2015 IL 118070, ¶36.

### B. Workplace Injuries Alleging BIPA Violations are of the Type that Fall Within the Purview of the Worker's Compensation Act.

Given this progression, it naturally follows that an alleged BIPA privacy injury resulting from the use of finger or hand scan timeclocks falls squarely

within the purview of the Act because it is accidental, arises out of and in the course of the employment, and is therefore the type of injury that falls within the purview of the Act. The appellate court erred in focusing its analysis on the type of *damages* being sought to determine whether the exclusivity provisions applied, holding that they did not apply where the plaintiff sought liquidated, as opposed to compensatory, damages. (A201).

This is precisely the same mistake the appellate court made in *Folta*. Whether a claim is "compensable" under the Act has nothing to do with whether, what kind, or how much compensation is available under the Act for that particular injury. It depends only on whether the circumstances under which the injury occurred place it within the purview of the Act. Purely psychological workplace injuries, with no accompanying physical injury, fall within the purview of the Act. *Pathfinder*, 62 Ill. 2d at 564-65; *Collier*, 81 Ill. 2d at 237. Purely emotional injuries arising out of a "deprivation of personal liberty" occurring in the workplace are of the type compensable under the Act. *Meerbrey*, 139 Ill. 2d at 467-68. In reconciling *Pathfinder* and *Collier* with *Meerbrey*, this Court found that there was "no principled basis" for distinguishing these purely psychological and emotional injuries from traditional physical injuries. *Meerbrey*, 139 Ill. 2d at 468. That is because neither the mechanism of the injury nor the availability of compensation determine compensability.

Similarly here, there is "no principled basis" for concluding that a privacy claim brought under BIPA is any less compensable under the Act than an

emotional or psychological injury when it arises out of and in the course of employment. In *Rosenbach*, this Court recognized that in enacting BIPA, the legislature aimed to protect against the distressing prospect of having one's biometric information compromised. 2019 IL 123186, ¶35. And as this Court made clear, a statutory breach is a "real and significant" injury in and of itself, without the need to prove any attendant consequences that may follow from it. *Id*. ¶35. The appellate court's rationale squarely conflicts with this proposition, reasoning that a BIPA violation is not covered by the Act because the claimant "has not sustained an actual injury." (A201) (further characterizing a BIPA injury as a "future injury" that has not yet accrued).

Nor is there any sound basis for the appellate court to suggest that a BIPA claim for actual damages is compensable under the Act but statutory damages are not. (A199-201). The exclusive remedy provisions draw no such distinction. In fact, they expressly state the opposite. Section 5(a) of the Act states that "no common law or *statutory* right to recover damages for *injury*" may be sustained by anyone covered by the Act, other than the exclusive remedies provided. 820 ILCS 305/5(a). Thus, the Act "'leaves no room for statutory construction' in that it bars any statutory right to recover damages for injury." *Walker v. Berkshire Foods, Inc.*, 41 Ill. App. 3d 595, 597 (1976), quoting, *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Railway, Co.*, 13 Ill. 2d 460, 463 (1958).

Indeed, the appellate court decision calls for the untenable rule that the Act may or may not bar a BIPA claim depending on the type of damages the

employee chooses to seek. The appellate court wrongly exempted plaintiff's claim from the Act's coverage because "a claim for liquidated damages under [BIPA]—available without any further compensable actual damages being alleged or sustained and designed in part to have a preventative and deterrent effect" is not the type of injury that falls within the purview of the Act, "which is a remedial statute designed to provide financial protection for workers that have sustained an actual injury." (A201).

Contrary to the appellate court's holding, the *amount or type* of recoverable damages has no bearing on whether the injury is an accidental workplace injury of the type that falls within the purview of the Act, which is the only inquiry that affects the Act's application. *Folta*, 2015 IL 118070, ¶30. Here, the plaintiff alleged she suffered a workplace privacy injury under BIPA related to the use of a finger or hand scan timeclock. The type or character of a work-related injury may change as technology changes, but the Act's coverage is static. Sixty years of precedent confirms that the Act's application continues to depend on whether the injury is accidental and unique to the employee in the workplace, and whether it arose out of and in the scope of employment. The state's employers and employees need to be able to rely on this Court's consistent construction of the Act's protections.

If the legislature wanted to exclude BIPA from the Act's exclusive remedy provision, it could have done so. In fact, the Act was recently amended in response to *Folta* to exempt certain time-barred, latent injury claims from the

Act's exclusive remedy provision. 820 ILCS 305/1.2 (P.A. 101-6, eff. May 17, 2019). Had the legislature desired to create an exception to the Act's exclusive remedy provision for BIPA claims, it could have done so then or at any other time. *In re Hernandez*, 2020 IL 124661¶¶19-24 (2020) (holding that when the General Assembly wanted to create an exception to the Act "it knew how to express that an intention in language so clear it could not be misunderstood").

In other words, the legislature did not exclude BIPA or any other privacy-based claims in enacting the amendment, so the Act's exclusive remedy provisions apply. *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004), quoting Black's Law Dictionary 581 (6th ed. 1990) ("The familiar maxim of *expressio unius est exclusio alterius* is an aid of statutory construction meaning 'the expression of one thing is the exclusion of another'"); *Ocasek v. Krass*, 153 Ill. App. 3d 215, 220 (1987) (holding that curtailment of the exclusive-remedy provision should be left to the legislature). As a result, the appellate court erred in concluding that a claimed BIPA violation is "not compensable" under the Act.

## II. Permitting Employees to Sue for Damages Undermines the Act's Carefully Balanced Policy and Exposes Employers to Unnecessary and Unpredictable Risk.

Permitting employees to seek damages for alleged violations of BIPA in a civil action defeats the legislature's intent to craft a carefully balanced procedural framework to prosecute workplace injury claims in a way that fairly respects each party's interests. *See Peng v. Nardi*, 2017 IL App (1st) 170155, ¶4. The Act is a comprehensive statute that compels employers to compensate employees for

workplace injuries without asserting various defenses it could assert in a civil action. In exchange for this no-fault liability, "the maximum amount the employer must pay is capped." *Id*. Thus, an employee is protected financially and the employer avoids the prospect of litigation and a potentially larger judgment in a civil action. *Id*. Furthermore, allowing BIPA claimants to bring their claims in circuit court upends Illinois employers' expectations as to the Act's protections and disrupts their business operations to account for the costly and unpredictable risk that will result.

The Act was "designed as a substitute for previous rights of action of employees against employers." *Moushon*, 9 Ill. 2d at 411-12. To balance the interests of employers and employees when workplace injuries occur, the General Assembly crafted the Act as a compromise that would impose no-fault liability on employers, but in exchange, would limit their damages to predetermined values and thus avoid the prospect of an unpredictably high verdict. *Id*. It also would relieve them of having to litigate these claims in civil causes of action, and instead proceed through the framework created under the Act. The Act is part of the "*quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance*." *Id*. (emphasis in original), quoting Larson, Workmen's Compensation Law, §65.10.

In this way, the Act created a procedural ecosystem in which these claims of workplace injuries could be efficiently resolved or disputed. Both employers and employees benefit from avoiding the civil litigation process. Employees

receive financial security in a no-fault liability system. Employers receive capped liability in exchange. Importantly, damages are awarded according to a predetermined fee schedule created by the Illinois Workers' Compensation Commission, eliminating the variability in the value of each judgment and essentially operating as a liquidated damages award. 820 ILCS 305/8.2.

Plaintiff and the hundreds of other employees who have filed similar class actions seek to evade the many decisions applying the Act's exclusive remedy provisions. BIPA class action claims against employers represent yet another attempt to erode the Act's capped exposure for claims brought by employees against employers for injuries that arise out of and in the course of the employment. They should be handled no differently than previous attempts to evade the Act's exclusive remedy provisions. *See e.g. Laird v. Baxter Health Care Corp.*, 272 Ill. App. 3d 280, 285 (1994) (the Act's exclusive remedy applies to statutory wrongful death claim); *Copass v. Ill. Power Co.*, 211 Ill. App. 3d 205, 214 (1991) (same as to Public Utilities Act); *Carey v. Coca-Cola Bottling Co.*, 48 Ill. App. 3d 482, 484 (1977) (same as to the Structural Work Act).

The current economic climate in which plaintiff advances this argument must be considered as well. Plaintiff's argument for an exception to the Act's exclusive remedy provisions seeks to place further strain on Illinois businesses at the same time they are already dealing with the effects of the worst pandemic in modern times. The pandemic caused many businesses to close and many thousands of people to lose their jobs. Plaintiff's argument for an exception to the

Act's exclusive remedy provisions will put more people out of work and shutter even more Illinois businesses.

The Act provides that "if an employee's injury arises out of and in the course of employment it is compensable" and questions of fault are not considered. *McCormick*, 85 Ill. 2d at 356. In exchange for no-fault liability, the Act provides employers with limitations on the amounts employees can recover and provides employees with their exclusive remedies. *Id*. Plaintiff's attempt to upend these long-standing principles should be rejected. The Act applies because there is no question that her claim arises out of and in the course of her employment and the alleged injury is of the type that falls within the purview of the Act. As a result, the Act provides plaintiff with her exclusive remedy.

## CONCLUSION

For these reasons, *amici curiae*, the Affected Illinois Employers, request that this Court answer the certified question in the affirmative and find that the exclusivity provisions of the Worker's Compensation Act bar employees from filing civil lawsuits to recover for workplace privacy injuries under the BIPA.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 22 pages.

*/s/ Gretchen Harris Sperry*

**CERTIFICATE OF SERVICE**

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I, Gretchen Harris Sperry, one of the attorneys for the proposed *amici curiae*, certify that the statements set forth in this instrument are true and correct. I further certify that the foregoing "Brief of *Amici Curiae* Affected Illinois Employers in Support of Defendant-Appellant Symphony Bronzeville Park, LLC" was electronically filed with the Clerk of the Illinois Supreme Court on May 3, 2021, by using the Odyssey electronic filing service and was served on counsel of record via Odyssey and by email directed to:

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