No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA MCDONALD, individually and on behalf of others similarly situated, *Plaintiff-Appellee,* v. SYMPHONY BRONZEVILLE PARK, LLC., *Defendant-Appellant.*	Illinois Appellate Court, First District, No. 1-19-2398 On Appeal from the Circuit Court of Cook County, Illinois, Case No. 2017-CH-11311 The Honorable Raymond Mitchell, Judge Presiding

BRIEF OF AMICUS CURIAE NELA-ILLINOIS AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE MARQUITA MCDONALD

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INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association, Illinois Chapter ("NELA-Illinois") is a bar association for attorneys who primarily represent workers in employment matters. As an organization focused on protecting and preserving employee rights, ensuring equal employment opportunity for all, and vindicating the employment rights of individuals, NELA-Illinois presents this brief to address the potentially catastrophic implications for Illinois workers if Defendant-Appellant Symphony Bronzeville Park, LLC ("Symphony" or "Appellant") obtains its requested relief.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 50 years of experience advocating for low-wage workers' employment and labor rights. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, especially those more susceptible to exclusion, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers.

INTRODUCTION

Appellant's and Amici's[1] arguments for effectively invalidating the Biometric Information Privacy Act ("BIPA") in the employment context are

[1] This Brief refers to the briefs submitted by the Restaurant Law Center ("Restaurant Brief") and the "Affected Illinois Employers" ("Employers Brief"), collectively as "Amici."

based on a fundamentally false premise: that "if a workplace injury arises out of and in the course of the plaintiff's employment . . . a suit for damages cannot be maintained." (Appellant Br. at 25.)[2] But that is not the law, and it never has been.

The century-old Workers' Compensation Act (the "Act") is a "remedial statute" whose "main purpose" is to provide "financial protection for injured workers." *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, ¶ 32. Recognizing the Act does not address every conceivable harm an employee could experience at work, this Court has long held certain kinds of employment-related injuries are not compensable under the Act, and therefore are not preempted. *See, e.g., Folta v. Ferro Eng'g,* 2015 IL 118070, ¶ 14; *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980); *Moushon v. Nat'l Garages, Inc.*, 9 Ill. 2d 407, 412 (1956).

Based on this same understanding, the Illinois General Assembly ("Legislature") passed countless laws allowing recovery for employment-related harms in court (*see* Section I.C, below). These statutes did not address Workers' Compensation Act preemption because, like BIPA, they addressed workplace injuries outside the scope of the Act.

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[2] *See also* Restaurants Br. at 4 ("if the injury occurs in the course of employment, the injury falls within the scope of the exclusivity provision"); Employers Br. at 2 (arguing that the Workers' Compensation Act fully preempts "the field of employer liability for employee injuries causally-connected to the employment").

This Court upheld BIPA and recognized that the harm it sought to address was "real and significant." *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 34. But there is no basis for this Court to usurp the clear intent of the Legislature and deny employees BIPA's protections and remedies.

None of the authority cited by Symphony or Amici supports the radical result they seek—denying employees (and only employees) the ability to address a serious harm recognized by the Legislature—which is why every court to consider the argument in a published decision has rejected it. Rather, the relevant authorities establish that aggrieved employees have the right to seek relief in court for serious workplace harms not rooted in physical injury.

Accepting Symphony's and Amici's expansive and unprecedented view of preemption would endanger foundational employment laws in Illinois. If the Court accepts the argument the Act preempts "*any* claim for civil damages, whether under common law or statute, by an employee against her employer for *any* work-related injury," (Appellant Br. at 1 (emphasis in original)), innumerable employee statutory protections are at risk, including anti-discrimination and wage and hour laws. Illinois courts will be inundated with arguments seeking dismissal of statutory employment claims of all kinds, and the Workers' Compensation Commission will be asked to address claims far beyond its purpose and expertise. This Court should reject Symphony's invitation to suddenly put at risk fundamental laws that have protected Illinois workers for decades and, consistent with its prior holdings,

reiterate that claims that are non-compensable under the Workers' Compensation Act are not barred by its exclusivity provision.

ARGUMENT

I. The Workers' Compensation Act Does Not, And Never Has, Preempted All Employment-Related Claims

A. The Workers' Compensation Act Is a Remedial Statute Designed to Assist Workers Who Are Injured on The Job

More than a century ago, the Legislature passed the Workers' Compensation Act, 1911 Ill. Laws 315-26, which provides the exclusive remedy for "injury or death sustained by any employee while engaged in the line of his duty as such employee." 820 ILCS 305/5(a). "The Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers." *McAllister*, 2020 IL 124848, at ¶ 32; *accord Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132, 146 (2010).

Symphony and Amici posit that the Workers' Compensation Act functions as a blanket liability shield for all kinds of wrongdoing by employers, whether or not the harm is one that can be addressed in the workers' compensation system. But, as described further below, there is no support for that interpretation.[3]

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[3] Symphony and Amici make much of what they describe as a "grand bargain" that they argue "makes an employer strictly liable for all work-related injuries while limiting the damages an employer must pay." (Appellant Br. at 2.) But that does not accurately describe how the workers' compensation system functions in practice. In reality, injured employees often must fight tooth and nail to recover anything from their employers via

B. For Many Decades, This Court Has Held That Employees May Pursue Claims in Court for Employment-Related Harms That Are Not Compensable Under The Act

As this Court held more than 40 years ago, a plaintiff seeking to defeat an argument that his claim is barred by the Workers' Compensation exclusivity provisions may prove "either that the injury (1) was not accidental (2) did not arise from his or her employment, (3) was not received during the course of employment **or (4) was noncompensable under the Act."** *Collier*, 81 Ill. 2d at 237 (emphasis added); *accord Folta*, 2015 IL 118070, at ¶ 14; *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 463 (1990); *see Moushon*, 9 Ill. 2d at 410, 412 (recognizing the difference between plaintiff's claim, which was "admittedly compensable" via workers' compensation and "decisions of other jurisdictions involving noncompensable occupational diseases or injuries for which no compensation was provided by statute").

Symphony and Amici are careful not to say so directly, but their argument, at its core, calls for eliminating the "not compensable" exception and overruling decades of this Court's precedent. Their arguments presume that the "not compensable" exception does not exist. They argue that "if a workplace injury arises out of and in the course of the plaintiff's employment

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workers' compensation. Of the estimated 60,000 compensable injuries (which cause three or more missed workdays) annually, approximately 40,000 result in a formal claim. Fiscal Year 2019 Annual Report, Illinois Workers' Compensation Commission (June 2020) at 5, *available at* www2.illinois.gov/sites/iwcc/Documents/FinalAnnualReportFY2019.pdf. So, in about two-thirds of cases, the employer did not accept the "grand bargain" and acknowledge strict liability, but instead chose to dispute the employee's claim.

. . . a suit for damages cannot be maintained." (Appellant Br. at 25.) They fail to identify any employment-related harms that would fit into the "not compensable" exception, and apparently in their view, nothing would.

Despite overheated rhetoric accusing the appellate court of "disregard[ing] decades of precedent" (Appellant Br. at 22), it is Symphony and Amici who are asking this Court to overturn or disregard its precedent. For generations, this Court has held that plaintiffs whose claims are "not compensable" via Workers' Compensation are permitted to pursue their claims in court. This case provides no basis for departing from this long-standing precedent.

C. The Legislature Has Passed Countless Laws Allowing Employees To Pursue Claims Against Their Employers Outside the Commission

Like this Court, the Legislature also repeatedly recognized that the Workers' Compensation Act is not the sole remedy for all workplace injuries inflicted on Illinois employees. Over decades, the Legislature has passed many laws protecting individuals and employees from harms in the workplace and authorized remedies in court for aggrieved individuals.

For example:

- The Illinois Human Rights Act protects employees from discrimination, harassment, and retaliation. 775 ILCS 5/1, *et seq*., P.A. 81-1216 (1979). Employees injured by discrimination, harassment, or retaliation may, after filing a charge of discrimination, pursue an action in court, seeking damages,

including compensatory damages for emotional distress. 775 ILCS 5/7A-102(A-1)(2), (3), (C)(4), (C-1).

- The Illinois Wage Payment and Collection Act protects employees from the injury of having their wages withheld or stolen by their employers. 820 ILCS 115/1, *et seq.*, P.A. 78-914 (1973). Employees may file suit in circuit court for violations of this Act. 820 ILCS 115/11.
- The Illinois Minimum Wage Law, 820 ILCS 105/1, *et seq.*, P.A. 77-1451 (1971), establishes the minimum wage Illinois employers must pay their employees. Again, employees injured by an employer's violation of the law may pursue remedies in court. 820 ILCS 105/12.
- The Illinois Whistleblower Act protects employees who disclose, or refuse to participate in, illegal behavior by their employers. 740 ILCS 174/1, *et seq.*, P.A. 93-544 (2003). Employees injured by retaliation may file suit in circuit court seeking, among other things, "compensation for any damages sustained." 740 ILCS 174/30. This includes damages for emotional distress. *Young v. Alden Gardens of Waterford, L.L.C.*, 2015 IL App (1st) 131887, ¶¶ 79–82 (affirming emotional distress award under Whistleblower Act).

Notably, none of these laws[4] address workers' compensation exclusivity. The Legislature understood that it can address work-related harms and provide affected employees an in-court remedy without expressly carving out the workers' compensation system.

The Right to Privacy in the Workplace Act helps illustrate this point. That law prohibits employers from seeking certain private information (*e.g.*, social media passwords) from employees and specifically bars employers from asking about whether an employee has ever applied for or received workers' compensation benefits. 820 ILCS 55/10(a). Employees who suffer that invasion of privacy "may commence an action in the circuit court to enforce the provisions of this Act." 820 ILCS 55/15(c). Even though one of the core

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[4] *See also* One Day of Rest in Seven Act, 820 ILCS 140/1 *et seq*., P.A. 78-917 (1935); Personnel Record Review Act, 820 ILCS 40/1, *et seq.*, P.A. 83-1004, 83-1339, 83-1362 (1984); Rights of Crime Victims and Witnesses Act, 725 ILCS 120/1, *et seq*., P.A. 83-1432 (1984); Time Off for Official Meetings Leave Act, 50 ILCS 115/1, P.A. 84-599 (1986); AIDS Confidentiality Act, 410 ILCS 305/1, *et seq*., P.A. 85-677, 85-679 (1987); Jury Duty Leave Law, 705 ILCS 305/4.1, P.A. 86-1395 (1990); Right to Privacy in the Workplace Act, 820 ILCS 55/1, *et seq.*, P.A. 87-807 (1991); School Visitation Rights Act, 820 ILCS 147/1, *et seq*., P.A. 87-1240 (1992); Illinois Genetic Information Privacy Act, 410 ILCS 513/1, *et seq.*, P.A. 90-25 (1997); Illinois Nursing Mothers in the Workplace Act, 820 ILCS 260/1, *et seq*., P.A. 92-68 (2001); Equal Pay Act, 820 ILCS 112/1, *et seq*., P.A. 93-6 (2003); Victims' Economic Safety and Security Act, 820 ILCS 180/1, *et seq*., P.A. 93-591 (2003); Worker Adjustment and Retraining Notification Act, 820 ILCS 65/1, *et seq.*, P.A. 93-915 (2004); Blood Donation Leave Act, 820 ILCS 149/1, *et seq.*, P.A. 94-33 (2005); Smoke Free Illinois Act, 410 ILCS 82/1, *et seq*., P.A. 95-17 (2007); Civil Air Patrol Leave Law, 820 ILCS 148/1, *et seq*., P.A. 95-763 (2008); Occupational Safety and Health Act, 820 ILCS 219/1, *et seq.*, P.A. 98-874 (2014); Illinois Child Bereavement Leave Act, 820 ILCS 154/1, P.A. 99-703 (2016); Illinois Employee Sick Leave Act, 820 ILCS 191/1, *et seq.*, P.A. 99-841 (2016); Voter Leave Act, 10 ILCS 5/17-15, *et seq.*, P.A. 101-624 (2020).

harms that prompted the law involves workers' compensation, the Legislature did not find it necessary to expressly address workers' compensation preemption when authorizing a private right of action in court. That is because the Legislature understood that the privacy-related harms addressed by the Right to Privacy in the Workplace Act were not compensable through workers' compensation.

Until BIPA, because of this Court's holdings (*see* Section I.B., above), no one seriously argued that workers' compensation bars "*any* claim for civil damages, whether under common law or statute, by an employee against her employer for *any* work-related injury." (Appellant Br. at 1 (emphasis in original).) And attempts that were made proved futile, as this one should. In *Goins v. Mercy Ctr. for Health Care Servs.,* 281 Ill. App. 3d 480, 482 (2nd Dist. 1996), an employee brought claims under the AIDS Confidentiality Act, 410 ILCS 305/1, *et seq*., which, like BIPA, protects individuals' privacy rights, regardless of whether they are employees. The appellate court rejected the employer's argument that the AIDS Confidentiality Act claim was preempted by the Workers' Compensation Act, because the employer owed the plaintiff the same duty it owed "to all other patients similarly situated, namely, confidentiality regarding his AIDS test." *Id.* at 488–89. The same is true with BIPA's protections. *See* Section II, below.

Symphony and Amici emphasize that, in their view, the penalties for violations of BIPA are too harsh, and the potential liability is too great. First,

this argument ignores the easiest option for avoiding liability under BIPA: complying with its straightforward informed consent requirements. Second, this is an argument properly addressed to the Legislature, not this Court. The fact that some employers refused or failed to comply with the law does not justify inventing a new, unprecedented doctrine invalidating modern laws based on a century-old statute designed to compensate workers for on-the-job physical injuries.

Symphony's and Amici's argument that the Workers' Compensation Act's reference to "injury" encompasses every "violation of another's legal right, for which the law provides a remedy," (Appellant Br. 15–16; Restaurant Br. 3–4), cannot be squared with the Legislature's action in repeatedly authorizing claims in court for statutory injuries. If Symphony and Amici were correct, then none of the laws described above would have any teeth, because employees' legal injuries could be addressed *only* via workers' compensation, if at all. It defies reason to assert that, in enacting laws allowing employees to recover in court for work-related harms, the Legislature intended for those same laws to have no effect. Symphony's and Amici's arguments fail to recognize that necessary implication of the holding they seek.

D. Symphony's and Amici's Key Cases Do Not Support Barring Employees From Recovery in Court

When viewed in the proper context—of the Legislature's record of passing statutes that allow employment-related harms to be remedied in

court, and this Court's consistent recognition that some employment claims are not compensable via workers' compensation—Symphony's and Amici's key cases do not support the radical conclusion they seek. None of the cases remotely support what amounts to enacting a blanket liability waiver for employers that violate statutes addressing harm other than physical injuries.

Simply describing the types of injuries involved in this Court's decisions illustrates the point. Every case involves physical injuries or emotional injuries directly resulting from physical, bodily harm.[5]

While Symphony and Amici place heavy reliance on *Folta*, that case (to the extent it remains good law) instead supports the view that the Workers' Compensation Act's exclusivity bar is not aimed at barring the courthouse doors for every harm employers inflict on their employees. In *Folta*, the plaintiff, like in the examples cited in footnote 5, suffered physical harm on

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[5] *Moushon* involved a worker who alleged that, due to a man-lift accident, "his internal organs were greatly crushed and bruised including a ruptured urethra." 9 Ill. 2d at 409. In *Gannon v. Chicago, M., S. P. & P. R. Co.*, 13 Ill. 2d 460, 461 (1958), the employee was injured when he fell from a ladder. *Sjostrom v. Sproule*, 33 Ill. 2d 40, 41 (1965), involved an employee who was injured in a car accident when traveling for work. In *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 16 (1969), the employee was struck by a fork-lift and killed. The plaintiff-employee in *Unger v. Cont'l Assurance Co.*, 107 Ill. 2d 79, 87 (1985), suffered from lung cancer. *Collier*, 81 Ill. 2d at 233–34, involved an employee who suffered a heart attack on the job, was told to go back to work, and then suffered cardiac arrest. The plaintiff in *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 355 (1981), suffered a "stress fracture of the second and third metatarsal bones of the left foot." In *Meerbrey*, the plaintiff "was arrested and forcibly taken to security offices." 139 Ill. 2d at 460. *Pathfinder Co. v. Indus. Com.*, 62 Ill. 2d 556, 559–61 (1976), involved an employee who suffered from shock and immediately fainted after pulling her colleague's severed hand from a machine.

the job—in particular, mesothelioma resulting from asbestos exposure. 2015 IL 118070, at ¶ 3. This Court synthesized its compensability precedents by explaining that "*Pathfinder*, *Collier*, and *Meerbray* stand for the proposition that whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act."[6] *Id.* ¶ 23.

Moreover, the Legislature heeded this Court's suggestion of revisiting *Folta*'s "harsh result," *see* 2015 IL 118070, at ¶ 43, and repudiated *Folta*'s holding that the Workers' Compensation Act's statute of repose forever barred recovery for a worker who, like Folta, suffered work-related harm long after his employment concluded. *See* 820 ILCS 305/1.2 (P.A. 101-6, eff. May 17, 2019). In doing so, the Legislature sent the clearest signal possible that the "main purpose" of the Workers' Compensation Act is to "provid[e] financial protection for injured workers." *McAllister*, 2020 IL 124848, at ¶ 32; *see* Senate Floor Testimony of Sen. Elgie Sims, 101st General Assembly Regular Session Senate Transcript, at 30-31 ("If the … Workers' compensation laws are 'humane' laws, we should be ensuring that individuals are given the opportunity to recover for injuries they have sustained."). The Legislature's quick and decisive repudiation of *Folta* is yet another reason to

[6] Symphony incorrectly asserts *Folta* holds that compensability turns on whether a particular type of harm is "categorically excluded" from coverage. (Appellant Br. at 2, 12, 25, 27, 30.) But the phrase "categorically excluded" appears nowhere in *Folta*. Rather, only those injuries that "categorically fit[]" in the Workers' Compensation system are subject to preemption. *See Folta*, 2015 IL 118070, at ¶ 23.

reject Symphony's and Amici's assertion that the Workers' Compensation Act functions as a broad-sweeping liability shield that leaves workers who are harmed by their employers no path to recovery.

II. BIPA Is Not Preempted By The Workers' Compensation Act And Holding Otherwise Would Jeopardize Employees' Fundamental Rights

In light of the analysis above, the correct holding in this case is clear: BIPA—which addresses a harm recognized by the Legislature unrelated to physical injury—is not preempted by the Workers' Compensation Act. In *Rosenbach*, this Court described the "nature of the harm our legislature is attempting to combat through" BIPA as protecting individuals' "right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent." 2019 IL 123186, at ¶ 34. In holding that invasion of biometric privacy was a "real and significant" injury for standing purposes, this Court did not address whether it is the kind of injury that is compensable via workers' compensation. But what constitutes an "injury" for standing is not the same as what constitutes a compensable injury for purposes of the Workers' Compensation Act.

As explained above, BIPA is just one of countless statutes that provides employees (among others) the right to recover in court for legitimate harms other than physical injuries. The harm from a BIPA violation does not come from the physical finger-scan; rather it comes from the employer failing to give notice or obtain an employee's consent before collecting or storing their biometric information. It is directly akin to the privacy invasion the

Legislature recognized and excluded from the so-called "grand bargain" by passing revisions to The Right to Privacy In the Workplace Act.

Nothing suggests that the Legislature wished to carve out employees from BIPA's protection. Symphony (at 22) is correct that "the legislature is presumed to be aware of judicial decisions interpreting legislation," but that principle undermines its argument. As explained in Section I, above, no one has ever interpreted the Workers' Compensation Act in the manner Symphony requests. Rather, for generations, this Court has held that employees may recover in court for harms that are not compensable via workers compensation. Consistent with that precedent, the Legislature has passed many laws over the decades providing employees in-court remedies for harms suffered in the workplace.

This Court should recognize the far-reaching consequences that would result from a ruling in Symphony's favor in this case. If this Court accepts Symphony's argument and holds that the Workers Compensation Act preempts "*any* claim for civil damages . . . by an employee against her employer," (Appellant Br. at 1, emphasis in original), then the well-established foundations of employment law in Illinois would be at risk.

Every well-counseled employer will file a motion to dismiss every employment case under Illinois law—discrimination claims under the Illinois Human Rights Act, minimum wage claims under the Illinois Minimum Wage Law, wage theft claims under the Illinois Wage Payment and Collection Act,

etc.—arguing that these laws are, like BIPA, subject to the workers' compensation exclusivity bar. Illinois courts, and ultimately this Court, will be called upon to resolve which laws have been *de facto* invalidated by the new interpretation of the Workers' Compensation Act. Bedrock, foundational employment rights established by the Legislature will be at risk.

Meanwhile, workers who have been harmed, harassed, discriminated against, retaliated against, forced to work overtime without compensation, whose wages have been stolen, will be left waiting for (or completely without) a remedy, in contradiction of the Legislature's clear intent to protect such workers. And the beleaguered Workers' Compensation Commission, which already must resolve tens of thousands of contested claims every year, would be forced into the untenable position of trying to resolve countless additional claims outside of its expertise and that the Legislature wanted resolved in court. There is no reason to open this Pandora's Box.

CONCLUSION

BIPA applies to employees, like all other "person[s]," and to employers, like all other "private entit[ies]." 740 ILCS 14/15, 20. Symphony's and Amici's argument that the Legislature intended to protect all individuals, *except for employees*, from having their biometric information collected and stored without consent is unsupported by any authority. And, for the reasons explained above, the Workers' Compensation Act has no role to play here. This Court should not interpret the Act in a manner that will jeopardize

employees' fundamental statutory rights. Accordingly, this Court should affirm the Appellate Court's analysis adopting this Court's long-standing line of precedent and hold that BIPA claims are not barred by the Workers' Compensation Act's exclusivity provision because it is not the type of injury compensable under the Act.

Respectfully Submitted on Behalf of NELA-Illinois and NELP,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 16 pages.

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