No. 128338

In the

Supreme Court of Illinois

WILLIAM WALTON,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ROOSEVELT UNIVERSITY,

Defendant-Appellee.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0011.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 09 CH 04176.
The Honorable **Anna H. Demacopoulos** Judge Presiding.

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INTRODUCTION

Roosevelt University ("Roosevelt") cannot advance a non-frivolous argument establishing that Plaintiff William Walton's ("Walton") claims under the Illinois Biometric Information Privacy Act (the "Privacy Act"), 740 ILCS 14/1, *et seq.*, are preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. First, Roosevelt continues to rely almost exclusively on the wrongly decided opinions in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019), *Fernandez v. Kerry*, 14 F.4th 644 (7th Cir. 2021), and the decisions issued by federal trial courts that were required to follow them. In its response, Roosevelt makes no attempt to rebut the specific ways in which Walton explains *Miller* and *Fernandez* are outside of logic and reason, nor does it offer any non-conclusory counterargument as to why the 14 federal district court decisions cannot constitute true uniform interpretation of federal law.

Second, Roosevelt misapprehends the test for LMRA preemption and continues to claim that the existence of a management rights clause in the collective bargaining agreement ("CBA") between it and Service Employees International Union, Local 1 ("the Union") means Walton's claims, along with anyone else who brings Privacy Act claims against a unionized employer, are preempted. However, Roosevelt is still unable to cobble together, in any reasoned, coherent, or intellectually honest manner, how Walton's Privacy Act claims are founded on a right conferred by the CBA or substantially dependent on an interpretation of it. Roosevelt's struggle shows that even it recognizes that Privacy Act claims, by definition, are premised solely and exclusively on state law.

Finally, Roosevelt claims that two of the points raised in Walton's opening brief have been waived or forfeited, even though Walton was the appellee before the Appellate

Court, making it impossible for him to have waived any argument supporting the trial court's correct opinion. For the reasons set forth below and in Walton's opening brief, this Court should answer the certified question in the negative.

I. Because the Decisions Were Premised Upon a Misapprehension of the Nature of Privacy Act Claims, *Miller, Fernandez,* and Their Progeny Were Outside of Logic and Reason.

A. The Seventh Circuit Mistakenly Believed the Claims in *Miller* and *Fernandez* Were Premised Upon the Employer's Use of a Timekeeping Device.

In his opening brief, Walton identified the fundamental mistake the Seventh Circuit made when holding that Privacy Act claims brought by union members are preempted by Section 301 of the LMRA. Both panels erroneously believed that the dispute in each case centered on the employers' implementation of a timekeeping device, when the actual issue raised, as in all actions brought under the Privacy Act, was whether the entities collected, stored, and disseminated employee biometric data *without informed consent* – an issue entirely separate from the use of the device itself. Accordingly, this Court should not follow these decisions because they were outside of logic and reason, and therefore, wrongly decided. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 54 ("However, we may choose not to follow Seventh Circuit or uniform lower federal court precedent if we find that precedent to be wrongly decided because we determine the decision to be without logic or reason.") (citing *Weiland v. Telectronics Pacing Sys., Inc.*, 188 Ill. 2d 415, 423 (1999)). Rather than address the flawed premise upon which *Miller* and *Fernandez* were decided head-on, Roosevelt merely parrots the briefing in each, as it has done consistently throughout this litigation, offering no real response or concrete reasons as to why the Seventh Circuit got *Miller* or *Fernandez* right. The reason for this is clear: the

Seventh Circuit, by misapprehending the true nature of Privacy Act claims, deviates so far from United States Supreme Court precedent on LMRA preemption that there are no legitimate legal parallels for Roosevelt to draw upon.

1. Roosevelt offers no persuasive response to the fundamental problem with the Seventh Circuit's reasoning in *Miller* and *Fernandez*.

The U.S. Supreme Court has made clear that "where a claim is purely a question of state law and is entirely independent of any understanding of the terms of a CBA, it may proceed as a state law claim." *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). It is evident from any plain reading of the statute and the CBA at issue that Walton's Privacy Act claims – claims regarding Roosevelt's collection of his biometric data without prior written consent – are founded exclusively on state law and not on Roosevelt's CBA with the Union. That is because Walton does not (and cannot, under the Privacy Act) assert claims against Roosevelt just for implementing any particular timekeeping system, biometric or otherwise. Rather, his claims stem solely from Roosevelt's collection of his biometric data without informed consent as required by the Privacy Act. Claims stemming from Roosevelt's collection of Walton's biometric data without informed consent are unquestionably established by the Privacy Act, a state law, and not any CBA.

In ruling on the Privacy Act claims in *Miller*, the Seventh Circuit made its first critical misstep, stating that "the stakes in both [underlying] suits include whether the [defendants] can use fingerprint identification." 926 F.3d at 902. This statement is absolutely and categorically false. Like Walton, the plaintiffs in *Miller* and *Fernandez* never challenged their employers' right or ability to use fingerprint identification. All

employers, with and without a unionized workforce, are free to use biometric technology, and the Privacy Act does not prohibit or provide any redress for its use. Indeed, the Illinois legislature enacted the Privacy Act to *encourage* the responsible use of biometric technology. *See* 740 ILCS 14/5. No plaintiff can properly state a cause of action under the Privacy Act premised upon the mere use of any particular timekeeping device, fingerprint identification system, or other biometric technology. This is because the issue in Privacy Act cases is never whether an employer *can* use fingerprint identification; it is whether a private entity secured informed consent before collecting biometric data, regardless of the device or method it happens to use to capture it.

Doubling down on its error, the *Miller* court stated that "[i]f the unions have not consented, or if the [airline] carriers have not provided unions with required information, a court or adjustment board may order a change in *how workers clock in and out*." 926 F.3d at 902 (emphasis added). Once again, this is categorically and unequivocally false. Like Walton, the plaintiffs in *Miller* and *Fernandez* never challenged or demanded any "change" to how employees "clock in or out." The Privacy Act, which is not an employment statute, does not govern employee timekeeping or "how" employees record their time worked; it governs the manner in which any private entity seeking to collect biometric data must first secure informed consent.

Yet the Seventh Circuit, without citation to any support in the record, perplexingly stated that the plaintiffs were seeking "the discontinuation of the practice, or the need for the [defendants] to agree to higher wages to induce unions to consent." *Id.* This, once again, is false. In reality, the plaintiffs in *Miller*, like Walton, sought no such thing, as no such relief is available under the Privacy Act. The plaintiffs in *Miller*, *Fernandez*, and their

progeny, like Walton and any plaintiff bringing Privacy Act claims, sought statutory damages for violating the easy-to-follow informed consent requirements of the statute, which cannot be waived and have never been a recognized subject of collective bargaining. Roosevelt has failed to provide a single fact, much less proof, showing the Union could have bargained away Walton's Privacy Act rights in the CBA. *See* Br. of NELA/Illinois and Raise the Floor Alliance as *Amici Curae,* at 10 (Walton's Privacy Act "claims are not subject to the CBA's grievance procedure or LMRA preemption because the CBA does not specifically include [the Privacy Act] – a statutory right – as a claim to be subject to the grievance procedure.").

Sending Walton's claims to an arbitrator via the Union's grievance procedure when there are no facts supporting its assertion that Privacy Act claims can be grieved would open the door to rampant abuse. Under Roosevelt's logic, employees would be unable to assert in court *any* claim that an employer contends *may* have been bargained over, regardless of the actual CBA terms. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 . . . Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.")

Undeniably, the real issue at stake – whether Roosevelt secured informed consent to the collection of employee biometrics – could not possibly have been bargained for. It did not happen here, it has never happened in the history of collective bargaining, and it was error for the Seventh Circuit to "assume" without any facts, any precedent, or any coherent reason that it "might" have happened. This fundamental misunderstanding of the

issues resulted in an opinion that defies U.S. Supreme Court precedent and is outside of logic and reason because it incorrectly holds that questions regarding whether or how an airline defendant acquires or uses biometric data from its workforce must go before a Railway Labor Act adjustment board.

Fernandez suffers from the same infirmity. Again, the Seventh Circuit misapprehended the nature of Privacy Act claims. The court repeated its error in *Miller*, stating "that provisions in the Railway Labor Act parallel to § 301 prohibit workers from bypassing their unions and engaging in direct bargaining with their employers about *how to clock in and out*." 14 F. 4th at 645 (emphasis added). From the jump, the Seventh Circuit believed the plaintiffs' claims were premised on their employer's requirement that they clock in and out using a biometric timekeeping device. The *Fernandez* court held, "[w]orkers cannot insist that management bypass the union and deal with them directly about [particular working conditions]." *Id*. at 646. Thus, the Seventh Circuit doubled down on its mistaken belief that the plaintiffs sought to circumvent their CBA to bargain over working conditions like how they clock in and out, when their claims were actually premised solely on their employer's failure to secure informed consent to the collection of their biometric data.

As Walton detailed in his opening brief, the *Miller* and *Fernandez* courts' holdings upend decades of U.S. Supreme Court precedent regarding when state law claims are and are not preempted by the LMRA. *See Lingle*, 486 U.S. at 405-06 (to trigger LMRA preemption, the defendant must affirmatively show that "resolution of a state-law claim ***depends upon the meaning of a [CBA]*** . . . .") (emphasis added); *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (claims that are "entirely independent of any understanding

embodied in the collective-bargaining agreement between the union and the employer" are not preempted by the LMRA); *see also In re Bentz Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001) (holding "that a state law claim is not preempted if it does not require interpretation of the CBA even if it may require reference to the CBA.") (citing *Livadas*, 512 U.S. 107); *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) (finding that a grievance settlement, while governing the terms of an employees' discharge, "says nothing at all about the central question" to his retaliatory discharge case and was thus "unnecessary to the resolution" of his state-law retaliation claim).

In its response, Roosevelt makes *no* effort to push back on the glaring problems with the *Miller* or *Fernandez* opinions. It does not even attempt to persuade the Court that the Seventh Circuit got it right. Instead, Roosevelt references LMRA preemption authority without analysis and states in conclusory fashion that "[a] claim that an employer violated the Privacy Act with respect to its employees requires a court to interpret and administer the CBA." Appellee Br. at 14. It then summarily concludes that unions *can* consent on behalf of its membership to the collection of their biometric data, that Walton's Union "may" have also consented, and thus *Miller* and *Fernandez* were not wrongly decided, and the Appellate Court did not err in relying upon them. *Id*. at 15.

Roosevelt does emphasize in its response that 14 federal district courts "uniformly" held that Privacy Act claims are preempted by Section 301 of the LMRA. Appellee Br. at 23-26. What it fails to appreciate (or even note) is that these rulings were all issued after *Miller*. As any law student knows, it is a fundamental precept of our judicial system that that district courts are bound to follow appellate decisions. *See, e.g., Gil v. True World Foods Chicago, LLC*, Case No. 20 C 2362, 2020 WL 7027727, at *2 (N.D. Ill. Nov. 30,

2020) ("The Seventh Circuit's decision in *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 901 (7th Cir. 2019), controls the court's decision in this case."). Thus, that each district court followed *Miller* and *Fernandez* is not evidence of genuine "uniformity." True "uniformity" was shown by well-reasoned decisions of the Illinois trial courts, almost all of which rejected the LMRA preemption defense before the Appellate Court incorrectly accepted here. *See, e.g., Watson v. Legacy Healthcare Financial Services, LLC et al.*, No. 19-CH-3425 (Cir. Ct. Cook Cty., June 30, 2020) (SR 220-226) ("the Court does not need to interpret the CBAs to decide if Defendants complied with [the Privacy Act's] requirements"); *Walton v. Roosevelt University*, No. 19 CH 4176 (Cir. Ct. Cook Cty., May 5, 2020) (Demacopoulos, J.) (SR 148-55); *Winters v. Aperion Care, Inc.*, No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2020) (Cohen, J.) (A016-26); *Thomas v. KIK Custom Productions, Inc.*, No. 19 CH 2471 (Cir. Ct. Cook Cty., Dec. 19, 2019) (Cohen, J.) (A027-39). The only so-called "uniformity" in the federal cases is that the Seventh Circuit in *Fernandez* declined to depart from its earlier decision in *Miller*. And while Roosevelt claims that a different result here will cause plaintiffs to forum shop, the only forum shopping that has or will take place is by defendants in Privacy Act cases, who routinely remove them to federal court (which they presumably can do in any future case involving a unionized employer).

The Appellate Court erred. And because this Court is not bound to follow federal decisions that are decided outside of logic and reason, it should follow the truly uniform line of authority in cases such as *Lingle*, *Livadas*, *Lueck*, and their progeny and permit unionized workers in Illinois the opportunity to vindicate their rights under the Privacy Act.

B. The Lower Court Incorrectly Held that Walton's Claims Are Preempted by the LMRA.

Roosevelt also misapprehends the test for preemption under the LMRA. While it correctly recites the multi-part test devised by the U.S. Supreme Court, Roosevelt asserts that "federal courts have consistently rejected the argument that federal labor law does not preempt a Privacy Act claim because such a claim is grounded upon rights that stem from a source other than the CBA." Appellee Br. at 30 (citing *Miller*, 926 F.3d at 904). Roosevelt claims that this point supports its preemption bid, but its argument only demonstrates a basic misunderstanding of the test. *See id.*

LMRA preemption requires an affirmative showing that "resolution of a state-law claim ***depends upon the meaning of a CBA***." *See Lingle*, 486 U.S. at 405-06 (emphasis added). Thus, courts begin by determining whether the claim is founded on a right conferred by the CBA. *Byrne v. Hayes Beer Distributing Co.*, 2018 IL App (1st) 172612, ¶ 24. If the claim is founded on a right conferred by the CBA, the claim is preempted. *Id.* But if, as here, the claim is indisputably not founded on any CBA right, the defendant must establish that evaluation of the claim is "substantially dependent" upon an interpretation of the agreement. *Id.* (citing *Lingle*, 486 U.S. at 409-10). If the court need only look to or reference the CBA, the claim is not substantially dependent upon an interpretation of the CBA and is not preempted. *Byrne*, 2018 IL App (1st) 172612, ¶ 24.

Section 301 requires a "case-by-case factual analysis." *Faehnrich v. Bentz Metal Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001). Indeed, preemption is not automatically granted in "every situation where a collective bargaining agreement comes into play." *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 499 (7th Cir. 1996). It is well established that Section 301 preemption turns on whether a party to a labor agreement can

make a "non-frivolous" argument that the challenged conduct is either authorized or prohibited by a specific clause in the agreement. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993). Notwithstanding this requirement and its burden, Roosevelt asserts that every CBA, *regardless of its terms*, universally preempts claims under the Privacy Act because they universally could address the issue of informed consent to the collection of biometric data. But the mere existence of a labor agreement is not what matters. Rather, it is the ability to engage with the language of the contract to explain why there is a non-frivolous contract interpretation that the conduct at issue is authorized by its text. As the moving party, Roosevelt must clearly articulate the purported non-frivolous interpretation of its contract that an arbitrator could make that applies to any of Walton's claims. *See Wright v. Universal. Mar. Serv. Corp.*, 525 U.S. 70, 79-81 (1998) (waiver of judicial forum cannot be inferred from "less-than-explicit union waiver in a CBA.")

Yet Roosevelt, like the Appellate Court, offers no contractual interpretation of the CBA – "non-frivolous" or otherwise – it claims preempts Walton's claims. This is because there is literally no clause, no language, no term in the CBA to "interpret" because nothing in the document even arguably governs the informed consent of employees to the collection of their biometric data. All Roosevelt can do is point to the unremarkable fact that Walton was a union member employed under a CBA with "a broad management rights provision" and argue that an issue wholly irrelevant to Walton's claims, namely "how employees clock in and out," shows the CBA is potentially invoked. Appellee Br. at 28. Despite Roosevelt's machinations to the contrary, the entirety of the Appellate Court's "interpretation" of the CBA was limited to its observation that the CBA "contains a broad management rights clause[,]" so "[t]he ***timekeeping procedures*** for workers are a topic for

negotiation that is clearly covered by the collective bargaining agreement and requires the interpretation or administration of the agreement." *Walton v. Roosevelt Univ.*, 2022 IL App (1st) 1210011, ¶ 21 (emphasis added). But even if the CBA somehow secured for Roosevelt a "management right" to implement a biometric timekeeping system (and there is no evidence it did), it is irrelevant because that is not the issue. The only relevant issue is whether Roosevelt complied with the Privacy Act before collecting Walton's biometric data by providing Walton with notice and securing his written consent and release.

Securing informed consent for the collection of an individual's biometric data is absolutely not a "timekeeping" procedure and certainly not indivisible from the use of a biometric timekeeping device. This is glaringly revealed by a point that inescapably follows from *Miller*, *Fernandez*, and the Appellate Court's decision: if Roosevelt collected biometric data from its workforce using something other than a timekeeping device, no one could seriously argue that it had negotiated for this right with the union. For example, if a candy dispenser or soda machine in the employee break room captured biometric data for payment – or if *any* device on its premises collected biometric data for *any* reason wholly divorced from timekeeping – and Roosevelt obtained employee biometric data from those machines without first securing their informed consent, the CBA's "management rights" clause indisputably would not authorize such conduct. Exactly how the happenstance of Roosevelt using a timekeeping device to collect employee biometric data transforms its failure to secure informed consent into a "collective issue" covered by this clause is a mystery to Walton.

Conspicuously, Roosevelt and the Appellate Court never point to the specific sentence, term or other language it suggests an arbitrator should "interpret" to decide any

dispositive issue related to Roosevelt's obligation to secure informed consent under the Privacy Act. Put simply, Roosevelt and the Appellate Court fail to offer any actual interpretation of the management rights clause or any textual analysis of the contract[1], leaving the parties (and the arbitrator) to guess as what the parties could argue or how the arbitrator is supposed to make any reasoned decision. Inescapably, the CBA here, like every CBA, is silent on employee informed consent to the collection of their biometrics, the storage and protection of their biometrics, the dissemination (or profiting) of their biometrics to third parties, the creation of a public biometric retention and destruction schedule or any other conduct regulated by the Privacy Act. *See* 740 ILCS 14/15(a)-(e). Plainly, the notion that any of these topics were discussed or even raised by the Union or Roosevelt at the CBA bargaining table (or any other parties to any CBA in the history of collective bargaining) has no basis in fact.

Even if Roosevelt could credibly demonstrate that the Union had actual or constructive notice of Roosevelt's plan to collect, use, store, and disseminate the biometric data of its employees, Roosevelt could not establish preemption because there is no evidence it secured a written release of any kind (compliant with the Privacy Act or otherwise) from Walton, any employee, or the Union as their purported "authorized representative." Under the statute's plain text, a private entity that fails to satisfy any of the Section 15 conditions runs afoul of the Privacy Act. *See* 740 ILCS 14/15. It is

[1] Confusingly, Roosevelt claims that Walton's argument that the Appellate Court failed to analyze the CBA is "disingenuous," as Walton "readily admitted that there was no way to distinguish" the management rights clause at issue from *Fernandez*. Appellee Br. at 25. But as explained in Walton's opening brief and again in Section I.A., *supra*, *Fernandez* was wrongly decided, in large part because the Seventh Circuit likewise failed to analyze the text of the management rights clause at issue to determine whether evaluation of the plaintiff's claims was substantially dependent on its interpretation.

extraordinarily simple: Roosevelt either has a "written release" compliant with the Privacy Act it claims in good faith to have secured or it does not. *See* 740 ILCS 14/15(b)(3). Indeed, Roosevelt would have an unassailable position just by producing a document that could plausibly be construed as a union-negotiated release, yet it never has. Any suggestion that the management rights clause itself can serve as a release under the Privacy Act is legally and factually frivolous. At bottom, Roosevelt, a private entity and Walton's former employer, cannot identify any term in the CBA that even "arguably" – a term synonymous with "non frivolous" – constitutes a "written release" for purposes of complying with the Privacy Act. Accordingly, there is no interpretation of the CBA that has been put forth, or that could in principle be interpreted to constitute a written release of Walton's or other employees' rights under the Privacy Act by the Union.

Nor could the presence of a management rights clause constitute waiver, even assuming the Union was lawfully authorized to waive Privacy Act rights on behalf of its membership, which it was not. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (holding that a CBA can restrict an employee's access to a judicial forum for purposes of resolving his statutory claim so long as it does so in clear and unmistakable terms); *Vega v. New Forest Home Cemetery LLC*, 856 F.3d 1130, 1135 (7th Cir. 2017) (finding that an employee's claim under the Fair Labor Standards Act is not preempted under the LMRA, as "nothing in the language of the collective bargaining agreement clearly and unmistakably requires an employee to resolve a statutory claim through the grievance procedure.").The National Labor Relations Board "has repeatedly held that generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights." *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 184 (N.L.R.B. June

15, 1989). As such, when Roosevelt imposed a biometric timekeeping system in the middle of the CBA, it would have had to bargain over any related issues. Roosevelt has shown no such mid-term bargaining, and mere acquiescence to the new timekeeping system by the Union is not sufficient to evidence a waiver of any rights under the Privacy Act. *Cf. NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513, 518 (7th Cir. 1998) (a Union's "failure to demand bargaining in the past, without more, does not waive that bargaining right forever."); *see also NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) ("Each time the bargainable incident occurs – each time new rules are issued – Union has the election of requesting negotiations for not."). Accordingly, neither the conduct of the parties nor the management rights clause can provide a basis to claim that Roosevelt received the required written release, and the state law claims are not based in the CBA.

Put in Section 301 terms, the CBA has nothing to say about whether Roosevelt secured a proper written release under the Privacy Act from the Union. All a management rights clause can release is the union's right to demand bargaining over wages, hours, and working conditions. *See Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 480 (6th Cir. 2002). Thus, while a Union may negotiate, for example, over how far in advance of a shift employees may clock in, whether and for how long employees may clock out for a meal and for rest breaks, or where they are required to don and doff personal protective equipment,[2] unionized employees do not waive fundamental statutory rights enjoyed by all

[2] *See, e.g., Curry v. Kraft Foods Global, Inc.*, No. 10 C 1288, 2010 WL 4338637, at *5 (N.D. Ill. Oct. 25, 2010) (employees' state law claims against employer for unpaid donning and doffing work time were preempted by the LMRA); *Anderson v. JCG Indus., Inc.*, No. 09 C 1733, 2009 WL 3713130, at *4 (N.D. Ill. Nov. 4, 2009) (employees' state law claims against employer for unpaid overtime resulting from improperly recorded meal breaks were preempted by the LMRA).

Illinois citizens, including those provided under the Privacy Act, merely by virtue of the existence of a standard management rights clause.

The Union, moreover, could not have contracted for something less than a "written release," as the Privacy Act is a law of general application. *See Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 430 (7th Cir. 2010) ("Nothing that labor and management put in a collective bargaining agreement exempts them from state laws of general application."). The plain language of the Act is clear that the Illinois legislature intended to require private entities collecting, obtaining, using, storing, or disseminating biometric data to receive written consent prior to doing so. And there is no basis to argue that the Union's purported "assent" to the implementation of a biometric-based timekeeping system, via a broad management rights clause, satisfies the "written release" requirement for collecting or obtaining biometric data that was written into law by the Illinois legislature. *Spoerle*, 614 F.3d at 430 ("Management and labor acting jointly (through a CBA) have no more power to override state substantive law than they have when acting individually."). Here, as demonstrated, the CBA does not even tangentially touch upon the conduct governed by the Privacy Act (*i.e.*, the duty to secure informed consent), and otherwise provides no textual support whatsoever for Roosevelt's position. This Court should reverse the decision of the Appellate Court.

II. Defendant's Parade of Horribles is a Distraction from Its Flawed Reading of the CBA.

Seeking to divert attention from the absence of any CBA language to interpret, much less any language that renders Plaintiff's claims "substantially dependent" on it, Roosevelt sets forth outlandish consequences it says would result from this Court's reversal of the Appellate Court's ruling. Roosevelt insinuates that by rejecting Roosevelt's

preemption bid, Walton "attempts to usurp the role of the union as the sole and exclusive bargaining agent of the bargaining unit." Appellee Br. at 26. In actuality, Walton is simply pointing out the limits to the union's authority, the contours of which have been well-established for many decades, and which the Appellate Court's ruling stretches far beyond even what unions themselves understand as their role. *See* Br. of Int'l Brotherhood of Teamster of Local 705 as *amicus curiae* at 4, 8.

As explained above, Section 301 of the LMRA applies with force where "state laws create a risk of *taking away* employee rights provided by collective bargaining or becoming entangled in the collective bargaining process, not when state laws *add* a right that is independent from the agreement." *Spoerle v. Kraft Foods Glob., Inc.*, 626 F. Supp. 2d 913, 921 (W.D. Wis. 2009) (citing *Livadas*, 512 U.S. at 118) (emphasis original). Here, the Privacy Act does not take away any rights granted by the CBA. Rather, the Privacy Act adds a statutory right (the right to say "no" to the collection of biometrics) that applies both in and outside the employment relationship and is entirely independent from the CBA. *See Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30.

As such, Plaintiff is not attempting to "usurp" the role or power of the Union or insisting that Roosevelt "negotiate with each person in the bargaining unit" individually over rights guaranteed to them under the Privacy Act. *See* Appellee Br. at 27. Like every other business with employees located in Illinois, an employer – including Roosevelt – need only comply with the Privacy Act by securing informed consent, providing their employees with notice of their collection of biometric data, and implementing and adhering to a publicly-available retention and destruction schedule. *See* 740 ILCS 14/15(a), (b), (d). The collective bargaining process would not be affected in any way by a rejection of

preemption in this instance and would proceed exactly it always has. But embracing preemption would introduce subjects into the collective bargaining table, both real and imagined, that are unprecedented.

That the management rights clause makes the union the agent for purposes of collective bargaining is not in dispute. But this unremarkable fact hardly grants the Union limitless scope and power to bargain over matters, like the right to informed consent to biometric data collection as conferred by the Privacy Act, that have nothing to do with collective bargaining. If the Union was considered Walton's *de facto* legally authorized representative vested with the exclusive power to consent on behalf of all individuals in the bargaining unit, then every state statute requiring consent (and permitting an agent to secure that consent) would fall under the Union's purview via the management rights clause. For example, the Union could bargain for its membership's consent to their submission of a family medication history questionnaire to be considered for a promotion. *See* Genetic Information Nondiscrimination Act of 2008 ("GINA"), 42 U.S.C.A. § 2000ff–1(b). The notion that unions in Illinois possess this kind of undisclosed and never-before-mentioned authority would come as a tremendous and unwelcome surprise to the unionized employees, the Unions themselves, and the employers (at least, when they are not defending actions under the Privacy Act). This simply cannot be the correct outcome.

III. Walton Did Not Forfeit Arguments Raised in His Opening Brief.

With a bare citation to a single piece of authority, Roosevelt claims that two arguments Walton made in his opening brief were forfeited or waived because they were made for the first time before this Court. Appellee Br. at 31-32. Roosevelt seems to forget that Walton's role before the Appellate Court was as the appellee, defending the trial

court's correct opinion and responding to Roosevelt's arguments made in its opening brief at the appellate level. Before this Court, Walton is, for the first time, the appellant. As such, he "may raise a ground in this court which was not presented to the appellate court in order to sustain the judgment of the trial court, as long as there is a factual basis for it." *Estate of Johnson by Johnson v. Condell Memorial Hosp.*, 119 Ill. 2d 496, 502 (1988) (citing *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 205–06 (1983); *Shaw v. Lorenz*, 42 Ill. 2d 246, 248 (1969); *People v. Franklin*, 115 Ill. 2d 328, 336 (1987)). It simply is not possible for Walton, as an appellee, to have waived arguments below. Moreover, this Court is permitted to "sustain the decision of the trial court on any grounds called for by the record, regardless of whether the trial court made its decision on the proper ground." *Id.* (citing *Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 148 (1985); *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382 (1983)). The purpose of appellate review would be undermined if this Court refused to consider a nuance or shift in approach simply because it was not urged below.

In the lone authority cited by Roosevelt, *Board of Education v. Kusper*, 92 Ill. 2d 333, 343 (1982), this Court cautioned, "[b]asic consideration supporting the rule [for waiver] is that the failure to urge a particular theory before the trial court effectively precluded the opposing party from presenting rebuttal evidence." Notably, *Kusper* resulted as the Board of Education's appeal from the trial court's ruling on cross-motions for summary judgment, and this Court "refuse[d] to pass on the merits" of the respondent's arguments raised for the first time on appeal. *Id*. Here, however, Roosevelt had ample opportunity to rebut the arguments Walton raised in his opening brief. Moreover, there is

no need to present evidence to rebut either argument it claims was first raised on appeal because each of Walton's points are legal, rather than factual, in nature.

First, the duty to the public created by Section 15(a) of the Privacy Act can be found in the text of the statute and persuasive case law. Roosevelt need only rebut Walton's contention with its own, not with specific evidence. The problem for Roosevelt, however, is that the Seventh Circuit has already determined that Section 15(a) creates a public duty rather than an individualized one. *See, e.g., Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020) ("the duty to disclose under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects."), *amended on other grounds by Bryant v. Compass Group USA, Inc.*, Case No. 20-1443, 2020 WL 6534581 (7th Cir. June 30, 2020) (en banc). Roosevelt's characterization of this argument as "def[ying] all logic" makes no sense in light of the *Bryant* court's specific holding that Section 15(a) duties are owed to the public at large.[3]

Next, Walton correctly noted that the Privacy Act sets a baseline for biometric privacy rights in Illinois. Roosevelt's only response is to again parrot *Miller*, claiming that because the Seventh Circuit rejected the idea that biometric privacy rights are person-specific, Walton's arguments must fail. Appellee Br. at 32. While Roosevelt may be correct that "[d]efamation is easily distinguishable from *timekeeping procedures*" Appellee Br. at 32 (emphasis added), Walton, as discussed above, does not challenge Roosevelt's timekeeping procedures but its failure to secure informed consent before collecting biometric data. This Court has already held that the Privacy Act protects individuals' rights

[3] It is worth noting that Roosevelt urges this Court to give dispositive weight to federal opinions favorable to it but takes a different approach with *Bryant*, ignoring the case in its entirety because it supports Walton's position.

to privacy in their biometric data. *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 33 ("Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information.") (citing *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018)). Put another way, the Privacy Act establishes the bare minimum rules, all premised upon informed consent, with which private entities like Roosevelt must comply. Roosevelt's position defies precedent and must be rejected.

CONCLUSION

The certified question must be answered in the negative. Roosevelt has failed to meet its burden of advancing a non-frivolous reading of any language in the CBA that could conceivably require interpretation and failed to show that the Union was authorized to bargain over the right of its workforce to receive informed consent to the collection of their biometric data. The decisions in *Miller*, *Fernandez*, and their federal progeny are premised upon a fundamental misapprehension of the nature of Privacy Act claims, which have nothing to do with timekeeping, and therefore, are outside logic and reason. Any honest and fair review of the CBA's terms and provisions, in accordance with the established preemption analysis set forth by the U.S. Supreme Court, reveals the absence of any basis for preemption to attach here. Should the Appellate Court's opinion stand, unionized employees will effectively surrender their rights to countless statutory protections at the workplace entrance, as the employer need only claim that a "management rights" clause shows their Union "may" have bargained them away at the negotiation table. This is an untenable, unprecedented and dangerous result this Court must correct.

Respectfully submitted,

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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 and the certificate of service, is 20 pages.

/s/ Haley R. Jenkins
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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

WILLIAM WALTON, individually and on behalf of all others similarly situated, *Plaintiff-Appellant,* v. ROOSEVELT UNIVERSITY, *Defendant-Appellee.*	)	No. 128338

The undersigned, being first duly sworn, deposes and states that on December 14, 2022, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. On December 14, 2022, service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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

/s/ Haley R. Jenkins
Haley R. Jenkins

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/ Haley R. Jenkins
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