

No. 25-2185

**United States Court of Appeals
for the Seventh Circuit**

REGINALD CLAY,

Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois
No. 1:24-cv-4194 (Hon. Georgia N. Alexakis)

**MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
AND ILLINOIS CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT UNION
PACIFIC RAILROAD COMPANY**

Jonathan D. Urick
Mariel A. Brookins
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

*Counsel for Amicus Curiae Chamber
of Commerce of the United States*

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Matthew D. Provance
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Counsel for Amici Curiae

September 2, 2025

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENTAppellate Court No: 25-2185Short Caption: Reginald Clay v. Union Pacific Railroad Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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N/A

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N/A

- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael A. ScodroDate: 09/02/2025Attorney's Printed Name: Michael A. ScodroPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐Address: Mayer Brown LLP71 S. Wacker Drive, Chicago, IL 60606Phone Number: (312) 782-8600Fax Number: (312) 701-7711E-Mail Address: mscodro@mayerbrown.com

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Attorney's Signature: /s/ Matthew D. ProvanceDate: 09/02/2025Attorney's Printed Name: Matthew D. ProvancePlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒Address: Mayer Brown LLP71 S. Wacker Drive, Chicago, IL 60606Phone Number: (312) 782-8600Fax Number: (312) 701-7711E-Mail Address: mprovance@mayerbrown.com

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Attorney's Signature: /s/ Anastasiya K. Lobacheva

Date: 09/02/2025

Attorney's Printed Name: Anastasiya K. Lobacheva

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Attorney's Signature: /s/ Jonathan D. UrickDate: 09/02/2025Attorney's Printed Name: Jonathan D. UrickPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒Address: U.S. Chamber Litigation Center1615 H Street NW, Washington, D.C. 20062Phone Number: (202) 463-5337Fax Number: N/AE-Mail Address: jurick@uschamber.com

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Attorney's Signature: /s/ Mariel A. BrookinsDate: 09/02/2025Attorney's Printed Name: Mariel A. BrookinsPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒Address: U.S. Chamber Litigation Center1615 H Street NW, Washington, D.C. 20062Phone Number: (202) 463-5337Fax Number: N/AE-Mail Address: mbrookins@uschamber.com

The Chamber of Commerce of the United States (“Chamber”) and the Illinois Chamber of Commerce (“Illinois Chamber”) (together, “movants”) hereby request leave pursuant to Federal Rule of Appellate Procedure 29(a) to file a brief as *amici curiae* in support of Defendant-Appellant Union Pacific Railroad Company in the above-captioned appeal. A copy of the brief is attached to this motion as **Exhibit A**. In support of this motion, movants state the following:

Movants’ counsel requested the parties’ consent to the filing of their *amici* brief. Appellee consents to the filing of this brief. Counsel for Appellant opposes the filing of this brief. Movants thus file this motion in accordance with Federal Rule of Appellate Procedure 29(a)(2).

Movants represent the interests of businesses located in Illinois and throughout the United States, named as defendants in lawsuits pending when the August 2, 2024 amendment to the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (“BIPA”), took immediate effect. The Illinois Supreme Court held in *Cothron v. White Castle Systems, Inc.*, 216 N.E.3d 918, 929 (Ill. 2023), that BIPA as then drafted allowed plaintiffs to recover between \$1,000 and \$5,000 for *each time* a defendant collected or disclosed a plaintiff’s biometric data without consent. After the Supreme Court’s decision in *Cothron*, the Illinois General Assembly amended Section 20 of BIPA to limit plaintiffs to a single recovery of statutory damages when an entity collects or discloses plaintiffs’ biometric data multiple times. *See* 740 ILCS 14/20(b). As *amici* explain in the proposed brief, the pre-amendment per-scan violation rule risks devastating consequences for businesses, many of them small companies,

currently facing BIPA liability. As the world's largest business federation, the Chamber directly and indirectly represent the interests of U.S. businesses that BIPA impacts. Similarly, as a non-profit organization composed of businesses and organizations in Illinois, the Illinois Chamber has an interest in the interpretation of BIPA, which has affected hundreds of Illinois businesses.

Amici's brief will also assist the Court by providing "information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). "[I]n deciding whether to accept an amicus brief, the court looks at whether the submission 'will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties.'" *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (quoting Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, XXII.B "Amicus Briefs" (2020 ed.)); *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). *Amici* submit their proposed brief to highlight the perspective of businesses who are facing BIPA lawsuits but are not currently before the Court. As the proposed brief explains, application of the per-scan accrual rule would be catastrophic to businesses currently facing BIPA lawsuits. The rule would especially affect small businesses that often lack the resources to effectively navigate BIPA compliance or defend against BIPA lawsuits. Movants are able to provide the Court with those unique perspectives as organizations that directly and indirectly represent

the interests of businesses in Illinois and nationwide.

For these reasons, movants request that the Court grant them leave to file the accompanying *amici curiae* brief in support of Defendant-Appellee Union Pacific Railroad Company. If leave is granted, movants request that the Court consider the accompanying brief as timely filed on the date of this motion's filing, September 2, 2025.

Dated: September 2, 2025

Jonathan D. Urick
Mariel A. Brookins
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

*Counsel for Amicus Curiae Chamber of
Commerce of the United States*

Respectfully Submitted,

/s/ Michael A. Scodro
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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2025, I caused the foregoing Motion of the Chamber of Commerce of the United States and the Illinois Chamber of Commerce for Leave to File Brief as *Amici Curiae* in Support of Defendant-Appellant Union Pacific Railroad Company to be served by electronic means through the Court's CM/ECF system on counsel for all parties who are registered CM/ECF users.

/s/ Michael A. Scodro
Michael A. Scodro

EXHIBIT A

No. 25-2185

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AND ILLINOIS CHAMBER OF COMMERCE AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANT-APPELLANT UNION PACIFIC RAILROAD
COMPANY AND REVERSAL**

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Attorney's Signature: /s/ Michael A. Scodro

Date: 09/02/2025

Attorney's Printed Name: Michael A. Scodro

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Chamber of Commerce of the United States

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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Attorney's Signature: /s/ Mariel A. BrookinsDate: 09/02/2025Attorney's Printed Name: Mariel A. BrookinsPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒Address: U.S. Chamber Litigation Center1615 H Street NW, Washington, D.C. 20062Phone Number: (202) 463-5337Fax Number: N/AE-Mail Address: mbrookins@uschamber.com

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INTEREST OF THE AMICI CURIAE¹

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The Illinois Chamber of Commerce (the “Illinois Chamber”) is a non-profit organization composed of businesses and organizations of all types and sizes across the State of Illinois. The Illinois Chamber is the unifying voice of the varied Illinois business community and represents businesses in all components of Illinois’ economy, including mining, manufacturing, construction, transportation, utilities, finance and banking, insurance, gambling, real estate, professional services, local chambers of commerce, and other trade groups and membership organizations. Members include many small to mid-sized businesses as well as large international companies headquartered in Illinois.

¹ No party’s counsel authored this brief in whole or in part. No party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a monetary contribution. *Amici curiae* have requested leave of this Court to file this brief.

The Illinois Chamber works collaboratively with trade organizations on specific policy issues or in specific areas of activity. It is dedicated to strengthening Illinois' business climate and economy for job creators. Accordingly, the Illinois Chamber provides businesses with a voice as it works with state lawmakers to make business-related policy decisions. The Illinois Chamber also operates an Amicus Briefs Program to bring attention to specific cases and provide additional information for the Court to consider. Over the last few years, the Illinois Chamber has appeared before federal and state courts in matters of significant importance to its members, including the appropriate role and compensation of relators in Illinois false claims actions, limitations on a municipality's authority to tax, an employee's fiduciary duty of loyalty to his or her employer, and most relevant to this case, the impact of the Illinois Biometric Privacy Act, 740 ILCS 14/1 *et seq.* ("BIPA").

Amici's members have substantial experience with BIPA. Indeed, BIPA litigation has imposed massive costs on Illinois and U.S. businesses over many years, with over 2,000 BIPA cases filed in federal and state courts since 2017. *See* Daniel Wiessner, *White Castle could face multibillion-dollar judgment in Illinois privacy lawsuit*, Reuters (Feb. 17, 2023), <https://tinyurl.com/nhcs3mvu>.

Companies understand the importance of protecting employees' and consumers' biometric data. But as the Illinois legislature recently confirmed in amending BIPA's remedial scheme, BIPA does not need to impose crushing liability, threatening many businesses' very existence, to promote these important goals. *Amici* submit this brief to explain the broader implications of this Court's ruling for

businesses in Illinois and across the country that are facing the threat of devastating damages under pending BIPA cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Illinois General Assembly passed BIPA in 2008 in response to the “growing” use of biometrics in the “business and security screening sectors.” 740 ILCS 14/5(a). The legislature recognized that the public may be “deterred” from participating in transactions involving biometric data without adequate safeguards to protect data privacy. *Id.* 14/5(e). BIPA was thus enacted to “regulat[e] the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.” *Id.* 14/5(g).

To this end, BIPA prohibits the collection or disclosure of one’s biometric information without consent. 740 ILCS 14/15(b), (d). It also bars the sale of this information and requires companies to establish policies and use reasonable care when handling biometric data. 740 ILCS 14/15(a), (c), (e). The statute creates a private cause of action for “[a]ny person aggrieved by a violation” and damages of \$1,000 for negligent violations and \$5,000 for intentional or reckless violations (or actual damages if greater than the statutory amounts). 740 ILCS 14/20.

In February 2023, the Illinois Supreme Court held in *Cothron v. White Castle System, Inc.*, that BIPA as then drafted allowed plaintiffs to recover between \$1,000 and \$5,000 for *each time* a defendant had collected or disclosed a plaintiff’s biometric data without consent. 216 N.E.3d 918, 926, 929 (Ill. 2023). *Cothron’s* per-collection/disclosure accrual rule exposed companies who, for example, use fingerprint-based timekeeping clocks to promote security and efficiency, to

astronomical damage awards based on employees' daily use of those devices. Recognizing the potentially devastating effect of its ruling, the Illinois Supreme Court "respectfully suggest[ed] that the legislature review these policy concerns." *Id.* at 929.

The General Assembly responded swiftly. Less than a year after the Supreme Court's decision in *Cothron*, the legislature amended Section 20 of BIPA to limit plaintiffs to a single recovery of statutory damages when an entity collects or discloses plaintiffs' biometric data multiple times. *See* 740 ILCS 14/20(b) ("[A] private entity that, in more than one instance, collects, captures, purchases, receives through trade, or otherwise obtains the same biometric identifier or biometric information from the same person using the same method of collection . . . has committed a single violation of subsection (b) of Section 15 for which the aggrieved person is entitled to, at most, one recovery under this Section.").

Amici file this brief to explain the devastation that BIPA's old, pre-amendment accrual rule would wreak on the more than one hundred businesses named as defendants in lawsuits pending when the August 2, 2024, amendment took immediate effect.

Many of the defendants in those pending suits are small companies facing crushing, potentially business-ending statutory penalties for technical BIPA violations. As the General Assembly recognized in immediately amending the statute, the annihilative consequences of its former, per-scan accrual rule are wildly disproportionate to any harm businesses cause consumers or employees by failing to comply strictly with BIPA's complex, often hard-to-navigate requirements. In taking

swift action to soften BIPA's inexplicably devastating liability scheme, the General Assembly clearly signaled that the statute is meant to protect consumers and employees without destroying businesses in the process.

ARGUMENT

Plaintiff Reginald Clay alleges that he visited Defendant Union Pacific Railroad Company's facilities to pick up or deliver shipping containers, and that he used finger scanners to enter or exit these facilities. Dkt. 1-1 ¶¶ 5-7. He also claims that Union Pacific violated BIPA every time it allegedly collected his finger scans without written consent, entitling him to up to \$5,000 per scan. *Id.* ¶¶ 6-7, Prayer for Relief ¶ a. After Mr. Clay filed this lawsuit, the Illinois legislature amended Section 20 of BIPA as described above.

Union Pacific is one of over one hundred businesses facing BIPA lawsuits filed before the amendment's effective date. The per-scan violation rule risks devastating consequences for those businesses, many of them small companies without the resources to properly defend against a BIPA claim, much less survive an adverse judgment under the former, per-occurrence accrual rule.

I. The General Assembly Amended Section 20 To Prevent Statutory Damage Awards From Reaching Stratospheric Levels.

The Illinois legislature passed the BIPA amendment as an immediate response to the multiplier effects of statutory damages created by *Cothron's* per-scan or per-disclosure rule. Indeed, the implications of *Cothron's* rule are staggering. Suppose an employee works 5 days a week for 48 weeks a year and uses a fingerprint scanner to clock in and out of work once each day. Over just one year, a "per-scan" accrual rule

would yield 480 violations of Section 15(b), and a “per-disclosure” accrual rule would yield another 480 violations of Section 15(d). That would result in a statutory award of \$960,000 to \$4,800,000 in liquidated damages for one plaintiff for one year. A company with 100 employees would face between \$96 and \$480 million in damages for that year. And if any employees clock in and out for lunch or other breaks, that amount could easily double or triple. By contrast, under BIPA’s amendment, that same company would face between \$200,000 to \$ 1 million in damages—a significant penalty, but not as staggeringly disproportionate to the statutory violation, and less likely to destroy a company with one adverse judgment.

Before *Cothron*, courts recognized the reality that a per-scan or per-disclosure accrual rule would expose defendants to “potentially . . . ruinous liability.” Mem. at 5, *Robertson v. Hostmark Hosp. Grp.*, No. 18-CH-5194 (Ill. Cir. Ct. May 29, 2020); see also Mem. at 3, *Smith v. Top Die Casting Co.*, No. 19-L-248 (Ill. Cir. Ct. Mar. 12, 2020) (“the interpretation plaintiff desires would likely force out of business—in droves—violators who without any nefarious intent installed new technology and began using it without complying with section (b)”). Even *Cothron* saw the “potential for significant damages awards under the Act,” while concluding that such policy determinations are best left for the legislature to resolve. 216 N.E.3d at 928. And while *Cothron* also acknowledged that courts have discretion to fashion damages awards below the statutory maximum, *id.* at 929, in reality “plaintiffs and their attorneys [have] the upper hand in pushing for higher settlements” under the pre-amendment, per-violation rule, *Commentary: Small, mid-size manufacturers urge*

Illinois lawmakers to fix BIPA, Ill. Bus. J. (Feb. 21, 2024), <https://tinyurl.com/3xvwvxv56> (“TMA Op. Ed.”).

After *Cothron*, litigants seized on the potentially enormous damages awards created by its holding. In the two months following the Supreme Court’s decision in *Cothron*, the number of BIPA lawsuits filed in Illinois state court soared by 65 percent. Stephen Joyce & Skye Whitley, *Illinois Biometric Privacy Cases Jump 65% After Seminal Ruling*, Bloomberg Law (May 2, 2023), <https://tinyurl.com/yf2n4vnp>. Small businesses in particular were acutely affected. Those businesses struggle to comply with BIPA because they lack resources, such as comprehensive human resources and compliance departments, that large companies maintain as a matter of course. Lamenting those challenges, the Technology & Manufacturing Association, an Illinois trade organization representing small and midsize manufacturers, “plead[ed] with Illinois legislators to fix BIPA as soon as possible to relieve the stress that is building in [their] members and their families over this massive liability that threatens to put them out of business” in the wake of *Cothron*. TMA Op. Ed.

The General Assembly responded promptly to avoid *Cothron*’s devastating impact, heeding the Supreme Court’s call to “review these policy concerns and make clear its intent regarding the assessment of damages” under BIPA. 216 N.E.3d at 929. In January 2024, only six months after the Illinois Supreme Court denied White Castle’s petition for rehearing in that case, Senator Bill Cunningham introduced the bill that would become the BIPA amendment. *See* Bill Status of SB2979, <https://tinyurl.com/rsymnwd4> (last visited Aug. 30, 2025); S.B. 2979, 103rd Gen.

Assemb., 2d Reg. Sess. (Ill. 2023-2024), 2023 IL S.B. 2979 (Ill. Aug. 2, 2024). The bill passed both houses and was signed by the Governor in less than seven months, taking immediate effect. *See id.* Yet, as noted above, many businesses were sued under BIPA in the spate of lawsuits filed between the decision in *Cothron* and the amendment's effective date. Many of those suits remain pending.

II. Applying *Cothron*'s Per-Scan Accrual/Disclosure Rule Would Be Catastrophic For Businesses, And Swiftly Ruinous For Small Businesses.

A. Many Small Businesses Currently Face The Threat Of Devastating BIPA Liability, Contrary To The General Assembly's Intent.

The outcome of this case will likely determine the fate of many businesses, including a number of small companies facing BIPA suits filed before the amendment's effective date. "While the technology giants have been sued for allegedly violating BIPA, so too have countless other companies . . . from locker rental companies to tanning salons." Charles N. Insler, *Understanding the Biometric Information Privacy Act Litigation Explosion*, 106 Ill. Bar J. 34, 35 (Mar. 2018). There are currently 83 BIPA cases pending in federal courts across the country, and roughly a third of those are against small businesses. And in the year preceding the BIPA amendment alone, 349 BIPA cases were filed in Illinois state courts, including approximately 75 filed against small businesses. Dozens of those state-court suits remain pending.

Behind these numbers are real employers operating in Illinois and across the country. They include nursing homes, employment staffing agencies, a door and window manufacturer, a furniture store, a transportation company, a ping-pong

social bar, and a nonprofit organization serving Chicago's North Lawndale Neighborhood.² Stalwart Illinois institutions like the Blommer Chocolate Company, Garrett Popcorn, El Milagro tortilla company, and the Windy City Limousine Company were all named in BIPA lawsuits before the legislative amendment went into effect.³ The outcome of this case will determine whether these businesses face the risk of devastating damages awards.

For example, Alden Rehabilitation Center, a recovery facility in Chicago's Uptown neighborhood offering rehabilitative care and physical therapy,⁴ is currently litigating a BIPA suit filed less than a month before the amendment's passage. Compl., *Fowler v. Alden-Lakeland Rehab. & Health Care Ctr., Inc.*, No. 24-CH-6498 (Ill. Cir. Ct. July 11, 2024). The named plaintiff in that suit is an employee who alleges that Alden violated BIPA by requiring her to scan her finger to clock in and out of work. *Id.* ¶¶ 19-37. The plaintiff seeks up to \$5,000 per statutory violation on behalf of a putative class of over 1,000 members. *Id.* ¶ 41. Even assuming each of

² See, e.g., Compl., *Fowler v. Alden-Lakeland Rehab. & Health Care Ctr., Inc.*, No. 24-CH-6498 (Ill. Cir. Ct. July 11, 2024); Compl., *Tapia-Rendon v. Employer Sols. Staffing Grp., LLC*, No. 1:21-cv-03400 (N.D. Ill. June 24, 2021); Compl., *Rosales v. Sharp Staff Inc.*, No. 24-L-2540 (Ill. Cir. Ct. Mar. 11, 2024); Compl., *Lewis v. Maverick Transp. LLC*, No. 2021-L-1379 (Ill. Cir. Ct. Nov. 17, 2021); Compl., *Vecchio v. Spin Chic. LLC*, No. 24-CH-7286 (Ill. Cir. Ct. Aug. 1, 2024); Compl., *Robinson v. Found. for Homan Square*, No. 24-L-5989 (Ill. Cir. Ct. May 31, 2024).

³ See, e.g., Compl., *Paniagua v. Blommer Chocolate Co.*, No. 24-L-4347 (Ill. Cir. Ct. Apr. 22, 2024); Compl., *McKenzie v. CaramelCrisp LLC*, No. 24-CH-6591 (Ill. Cir. Ct. July 24, 2024); Compl., *Ruiz v. El Milagro, Inc.*, No. 1:23-cv-03474 (N.D. Ill. Jun. 1, 2023); Compl., *Lakes v. Windy City Limousine Co.*, No. 24-CH-3177 (Ill. Cir. Ct. Apr. 12, 2024).

⁴ Alden Lakeland, <https://tinyurl.com/3u458uat> (last visited Aug. 30, 2025).

those employees used a fingerprint scanner to clock in and out of work for *one shift* per day, Alden would face up to \$10 million in statutory liability per workday under *Cothron*'s accrual rule. When accounting for multiple shifts over multiple years, the total potential damages exposure would be in the billions of dollars.

Yanni Design Studio is another small Illinois business subject to a BIPA suit filed before the amendment's effective date. According to the Studio's website, it is a "family-owned event production company" employing 29 staff full time.⁵ A class of independent contractors who set up and took down decorations at Studio events and worked in its warehouse filed suit against the Studio, claiming that it required them to clock in and out for work using a fingerprint scanner or a biometric facial scanner without their consent. See Compl., ¶¶ 1, 3, 21, 90-98, *Perez v. Elymir Inc.*, 1:24-cv-02419 (N.D. Ill. Mar. 25, 2024). The plaintiffs seek BIPA-related relief (and up to \$5,000 in statutory damages per violation) for a class with "at least dozens" of members. *Id.* ¶ 62. Conservatively assuming the class includes only two dozen members, post-BIPA amendment relief would subject the Studio to a maximum of \$120,000 in statutory damages. In contrast, *Cothron*'s per-scan rule would raise that number to \$240,000, assuming each employee *worked only one day*, clocking in and out once. For a boutique event planning company, a potential damages award including per-scan penalties for dozens of employees over years of work could be ruinous.

⁵ Yanni Design Studio, <https://tinyurl.com/3bx56pxz> (last visited Aug. 30, 2025); Meet the Team, Yanni Design Studio, <https://tinyurl.com/3tudxvya> (last visited Aug. 30, 2025).

There is no dispute that destroying smaller employers was never the General Assembly's intent behind BIPA. As even *Cothron* acknowledged, "there is no language in the Act suggesting legislative intent to authorize a damages award that would result in the financial destruction of a business." 216 N.E.3d at 929. To the contrary, according to Senator Cunningham, who introduced the post-*Cothron* BIPA amendment, the General Assembly's swift action in amending the statute showed legislators' intent to "protect small businesses from undue financial burden while still providing strong protections for consumers and workers." Press Release, Senator Bill Cunningham, *Cunningham advances common sense changes to BIPA* (Apr. 11, 2024), <https://tinyurl.com/mr94hkm8>.

And there is no doubt that post-amendment BIPA provides these "strong protections." Companies faced with per-person damage penalties under amended Section 20 are still powerfully incentivized to comply with BIPA and change their policies in response to a lawsuit. The costs associated with litigating these claims alone motivate businesses (some of which are not even aware of BIPA before they are sued) to comply. See Jim Logan, *Op-Ed: Protect small businesses from an onslaught of BIPA lawsuits*, Center Square (Apr. 22, 2024), <https://tinyurl.com/2wys7hkp> ("Central Square Op. Ed") (small business owner describing "overhaul[]" of its systems "to ensure compliance with BIPA" following lawsuit and arguing that "[r]eforms would not weaken biometric privacy protections"). Destroying a business for failing to comply with BIPA's complex requirements disproportionately punishes small businesses for lacking the means to hire expensive counsel.

In short, the Illinois legislature's post-*Cothron* amendment confirms that the legislature intended to regulate, not destroy, businesses that use biometric technologies. A ruling in Union Pacific's favor would save small businesses facing annihilation while still powerfully incentivizing all companies to respect consumer and employee privacy rights.

B. Under *Cothron*'s Accrual Rule, Businesses Face Liability Vastly Disproportionate To Fault And Consumer Or Employee Injury.

Many of the businesses currently named in BIPA litigation used biometric technology for safety, security, and efficiency purposes. For example, at least one transportation company currently faces per-scan liability for using technology to monitor its driver employees for signs of fatigue. *See, e.g.,* Compl. ¶ 23, *Bobro v. Ryder Transp. Sols., LLC*, No. 24-CH-06742 (Ill. Cir. Ct. July 18, 2024). A start-up company helping other businesses implement secure identity or age verification platforms to combat online fraud also faces BIPA liability. *See* Compl. ¶ 9, *Freifeld v. Sonder Holdings Inc.*, No. 1:24-cv-05459 (N.D. Ill. June 28, 2024) (listing Persona Identities Inc. as a defendant); About us, Persona, <https://tinyurl.com/ykwhpt5z> (last visited Aug. 30, 2025) (describing mission as “humanizing online identity by helping companies verify that their users are who they say they are”). Other businesses have used biometrics to keep timekeeping records more accurately than traditional time clocks allow, and to prevent “buddy punching” (the process by which an employee punches in a coworker before the coworker arrives for work or punches out a coworker after they leave). Biometric technology also can benefit employees, for instance, by

protecting the confidentiality of personal information such as paystubs or timekeeping records.

Indeed, the vast majority of BIPA defendants face liability because BIPA is a difficult law to navigate, not because they acted with indifference toward consumer or employee privacy rights. As a small business owner recently explained, smaller companies operating without specialized legal advice may not understand or even know about BIPA's strict, often confusing requirements. *See Central Square Op. Ed.* (explaining that “firms often target small businesses that are less likely to be aware of the intricate requirements of BIPA, pushing them towards settlements to avoid the higher costs of litigation”).

Moreover, even companies that have not violated BIPA may have to litigate those cases, at extraordinary cost. For example, in the first stages of a BIPA lawsuit, a court could decide that a plaintiff's complaint raises factual questions and decline to resolve those questions at the motion-to-dismiss stage. Even for companies that comply with BIPA, the threat of astronomical damages under *Cothron's* accrual rule forces them to pay extremely high settlement amounts to avoid protracted and expensive litigation. As the Supreme Court has recognized, “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Consequently, “the entire state and local economy suffers.” *See Central Square Op. Ed.*

Meanwhile, trial lawyers—not consumers or employees—will reap the vast majority of benefits from the settlement proceeds of BIPA cases. *See, e.g., Kaitlyn*

Harger, Chamber of Progress, *Who Benefits from BIPA? An Analysis of Cases Brought Under Illinois' State Biometrics Law* (Apr. 2023), <https://tinyurl.com/5c5jfkcy> (analyzing eight major BIPA settlements and finding that plaintiffs' lawyers received an average settlement of \$11.5 million per firm per case, while individuals received an average settlement of \$506 per case). Nor do trial lawyers need the promise of astronomical settlements to motivate them to vindicate consumer and employee privacy rights. As discussed, BIPA's post-amendment remedial scheme still provides for sizable remedies. And BIPA allows plaintiffs who are "aggrieved" by violations to recover "reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses," 740 ILCS 14/20(a)(3), providing sufficient incentive for lawyers to take on tough cases on behalf of their clients.

Finally, even in cases where companies technically violate BIPA, penalties in the form of potentially bankrupting damages are nearly always disproportionate to the harm plaintiffs suffer from those violations. In fact, the Illinois Supreme Court held that plaintiffs may recover damages for BIPA violations without showing *any* actual injury. *See Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d 1197, 1206 (Ill. 2019). *Cothron's* per-scan accrual rule would nevertheless entitle these uninjured plaintiffs to awards that can easily climb into the hundreds of millions or billions of dollars.

CONCLUSION

For all these reasons, the Court should carefully consider the impact of its ruling on Illinois and U.S. businesses in determining whether the amendment to BIPA Section 20 has retroactive effect.

Dated: September 2, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(4)(G) because it contains 3,660 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Seventh Circuit Rule 32(b) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using a proportionally spaced 12-point font.

Dated: September 2, 2025

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Michael A. Scodro

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2025, I caused the foregoing Brief of the Chamber of Commerce of the United States and Illinois Chamber of Commerce and as *Amici Curiae* in Support of Defendant-Appellant Union Pacific Railroad Company to be served by electronic means through the Court's CM/ECF system on counsel for all parties who are registered CM/ECF users.

/s/ Michael A. Scodro
Michael A. Scodro