No. 128004

IN THE
SUPREME COURT OF ILLINOIS

LATRINA COTHRON, Plaintiff-Appellee, v. WHITE CASTLE SYSTEM, INC. Defendant-Appellant.	)	Question of Law Certified by the United States Court of Appeals for the Seventh Circuit Case No. 20-3202 Question of Law ACCEPTED on December 23, 2021 under Supreme Court Rule 20 On Appeal from the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1292(b), Case No. 19 cv 00382 Hon. John J. Tharp

BRIEF OF THE ILLINOIS CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT WHITE CASTLE SYSTEM, INC.'S PETITION FOR REHEARING

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INTEREST OF THE *AMICI CURIAE*

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. Over the last few years, the Illinois Chamber has appeared before this Court 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, and an employee's fiduciary duty of loyalty to his or her employer.

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.

Amici's members have substantial experience with the Illinois Biometric Information Privacy Act ("BIPA" or the "Act"). BIPA litigation has exploded in recent years, with one study finding more than 900 lawsuits brought in state and federal court from 2015 through the first quarter of 2021. *See generally* U.S. Chamber of Commerce, Institute for Legal Reform, *A Bad Match: Illinois and the Biometric Information Privacy Act* (Oct. 2021). *Amici* accordingly have a strong interest in ensuring that BIPA is interpreted and applied fairly in this and other disputes.

Amici submit this brief in support of the petition for rehearing filed by Defendant-Appellant White Castle System, Inc. ("White Castle") and join White Castle in urging the Court to reconsider its holding that a new claim accrues under Section 15 of BIPA each time biometric data is collected or disclosed. In the alternative, *amici* urge the Court to clarify its discussion of how lower courts should assess statutory damages under BIPA.

As the Court's Opinion acknowledges, the General Assembly could not have intended to impose the maximum statutory damages that arise from the Court's interpretation of BIPA. Such damages awards "would result in the financial destruction of a business." *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 42 ("Opinion"). Instead, the law gives courts discretion to determine the proper amount of damages in a particular case. But the Opinion provides

no standards for lower courts to apply in exercising that discretion to fashion an appropriate award.

Amici's members are certain to face an onslaught of astronomical damages claims stemming from the Court's ruling. Without further guidance, the increased pressure to settle wholly unmeritorious claims resulting from the dramatically-increased potential damages awards will effectively preclude the fair resolution of those claims in court. If the Court does not reconsider its primary holding, it should provide guidance on standards for determining appropriate damages—that guidance is urgently needed.

INTRODUCTION AND SUMMARY OF ARGUMENT

On February 17, 2023, a majority of this Court held that a new claim accrues under Section 15(b) and (d) of BIPA each time a defendant (1) collects or captures, or (2) discloses or otherwise disseminates, a biometric identifier, even if the defendant collects or discloses the same biometric information from the same individual on each occasion. *Cothron*, *supra*. Because BIPA authorizes courts to impose damages up to the statutory maximum for "each violation" of the statute, this construction necessarily opens the door to "damages award[s] that would result in the financial destruction of a business." *Id*. ¶ 42. As the Court recognized, class-wide liability in this case alone could plausibly exceed $17 billion without any showing of actual harm to class members—*i.e.*, based solely on the alleged violation of the statute. *Id*. ¶ 40.

Amici agree with White Castle that the Court's Opinion overlooked or misapprehended several legal principles that show that its construction of

BIPA is not consistent with the statutory text or legislative intent. *Amici* are cognizant of Rule 367(b)'s requirement of concision, and the need to avoid duplication, and therefore largely incorporate by reference White Castle's arguments on this point. *See infra* Part I.

If, however, the Court does not reconsider its holding regarding BIPA's accrual principles, it should at least provide guidance on how the lower courts should determine the appropriate amount of damages to avoid awards that "may be harsh, unjust, absurd, or unwise." *Id.* ¶ 40. The Court's Opinion acknowledges that vital question, by recognizing that lower courts have discretion to set the amount of damages, but fails to specify the standards governing the exercise of that discretion.

Those standards are needed now more than ever. The Court's determination regarding the accrual of claims, combined with the statute's liquidated damages provision, permits awards that would annihilate most defendants—a result that the General Assembly never contemplated when passing the statute, as the Court itself acknowledged. The Court recognized that it "appear[ed]" that these awards would be discretionary, such that lower courts may award damages lower than the astronomical amounts permitted by its construction of the statute. Opinion ¶ 42.

But the Court did not provide lower courts with any standards to apply in making this determination which, in many cases, will decide whether the defendant company even survives. Without that guidance, lower courts are left

completely on their own to make decisions in cases involving claims of hundreds of millions to tens of billions of dollars. The Court should make clear that, under both Illinois law and federal constitutional principles, statutory damages awards must be no larger than necessary to serve BIPA's remedial purposes. And it should explain how lower courts should make that determination. *See infra* Part II.

It is essential that the Court provide this guidance now. The Court's holding regarding claim accrual will enable plaintiffs to wield the threat of astronomical damages as a cudgel to force settlement. Without any guidance regarding the standard for setting damages, defendants in class actions—and most BIPA cases are brought as class actions—will be unable to assess their realistic potential exposure.

Defendants therefore are very likely to choose settlement rather than risk annihilation via a gigantic damages award, and few, if any, BIPA cases will be litigated to judgment. This Court may not for some time have another opportunity to clarify the standards governing a trial court's discretion to award damages. In the meantime, defendants will be subjected to coerced settlements in the hundreds of BIPA cases pending in the lower state and federal courts. Those courts need clear standards for exercising the discretion to set damages recognized in this Court's opinion. *See infra* Part III.

I. The Court Should Reconsider Its Interpretation Of BIPA.

As White Castle's petition explains, the Court's determination that a new claim accrues under BIPA Section 15(b) and (d) each time a biometric

identifier from the same individual is collected or disclosed overlooks or misapprehends a number of relevant legal principles. *Amici* agree with White Castle's petition. Indeed, *amici* discussed several of these principles in their earlier *amicus* brief. *See* Chamber Amicus Br. 14-15 (explaining why the interpretation of the statute that this Court subsequently adopted is inconsistent with the use of the term "liquidated damages" in Section 20); *id.* at 17-18 (explaining the serious constitutional issues that would be posed by the interpretation subsequently adopted by the Court).

In addition, the General Assembly used express language when it wanted continuing conduct to constitute repeated violations of the law in other statutes—language that is not present in BIPA. *See id.* at 12-13. The Court did not address this distinction and did not explain why the General Assembly would have implicitly authorized such "harsh, unjust, absurd, or unwise" consequences (Opinion ¶ 40) here. Because of these legal errors, and the destructive consequences of those errors for *amici*'s members, employees, and consumers (who will see the elimination of companies they rely on for jobs, goods, and services), *amici* ask the Court to reconsider its interpretation of BIPA's accrual rules. As the dissenters noted, "[s]urely the potential imposition of crippling liability on businesses is a proper consequence to consider." Opinion ¶ 62.

II. Alternatively, The Court Should Elaborate On The Principles That Govern Courts' Exercise Of Their Discretion In Setting The Amount Of Damages Awards In BIPA Cases.

If the Court declines to reconsider its interpretation of BIPA, *amici* urge the Court to provide clear guidance on how lower courts should determine the appropriate amount of statutory damages. This issue will arise in every BIPA case—actual damages are virtually never sought—and guidance is needed now to ensure consistent decision making in accordance with principles of Illinois law and federal constitutional standards, and to avoid the unjustified compelled bankruptcy of BIPA defendants.

The Court acknowledged that, under its reading of Section 15, the maximum class-wide damages award could plausibly be as high as $17 *billion* in this action alone. Opinion ¶ 40. The Court further acknowledged that an award this high could not possibly be consistent with legislative intent. *Id.* ¶ 42. Finally, the Court acknowledged that BIPA sets forth the amounts and types of damages that a "prevailing party *may* recover" (740 ILCS 14/20 (emphasis added)) and therefore "appears" to make damages "discretionary rather than mandatory"—but the Court did not specify the criteria to be applied in exercising this discretion. Opinion ¶ 42. Thus, as White Castle notes in its petition for rehearing (at 24), "[t]here are no current standards to impose damages under the Privacy Act."

Amici agree that rehearing on this point is urgently needed. As *amici* previously stated, "BIPA provides no guardrails to structure the trial court's discretion and no guarantee that a defendant who rolls the dice [at trial] will

not face annihilative liability." Chamber Amicus Br. 18. The Court has recognized that lower courts adjudicating BIPA cases may exercise discretion to set the proper amount of damages. It is imperative that the Court specify the framework that courts should apply.

A. State and federal law require a reasonable relationship between a statutory damages award and the statute's legitimate purposes.

Under both Illinois and federal law, a statutory award violates due process if it is grossly disproportional to the legitimate interests that the statute seeks to achieve. As this Court has explained, when a statute authorizes an award that is "so severe and oppressive as to be wholly disproportioned to the offense," it "does not further a legitimate government purpose" and is unconstitutional. *In re Marriage of Miller*, 227 Ill.2d 185, 198 (2007) (quoting *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)); *see also, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (holding that due process prohibits punitive damages greater than "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"). Echoing these principles, this Court explained that trial courts retain discretion in BIPA class actions to ensure that awards "(1) fairly compensate claiming class members and (2) include an amount designed to deter future violations, without destroying defendant's business."

Opinion ¶ 42 (quoting *Central Mut. Ins. Co. v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, ¶ 72).

Although the limits on a state's power to authorize statutory damages are frequently articulated in the context of civil penalties or punitive damages, the fundamental federal due process requirement of a fit between the amount of the award and the award's purposes applies much more broadly—as we explain in detail below. The same is true of state due process requirements, because federal due process standards are typically "coextensive" with Illinois's due process clause and this Court is often "guided by federal precedent." *Miller*, 227 Ill.2d at 196.

Constitutional limits are particularly important when ostensibly non-punitive awards, like liquidated damages, are aggregated to levels far beyond what a legislature would have reasonably anticipated when enacting a remedial statute. That unanticipated aggregation arises "from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003).

Here, this Court's holding means that statutory damages are imposed on a "per-scan" or "per-disclosure" basis, not just a "per-consumer" basis. Accordingly, there are *two* levels of aggregation at play—the multiplication of

claims per plaintiff as well as the multiplication of plaintiffs—making statutory damages exponentially higher compared to an ordinary individual action.

Under BIPA, therefore, aggregation may easily "expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." *Parker*, 331 F.3d at 22. That expansion inevitably "distorts the purpose of both statutory damages and class actions" and creates "an *in terrorem* effect on defendants, which may induce unfair settlements." *Id*. Such "aggregated statutory damages" violate due process "when they are 'wholly disproportioned' and 'obviously unreasonable' in relation to the goals of the statute and the conduct the statute prohibits." *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1123 (9th Cir. 2022) (vacating aggregated statutory damages award and remanding for reassessment of constitutionality of that award) (citation omitted).

B. BIPA actions are uniquely susceptible to grossly disproportionate damages awards.

There can be no doubt that, particularly after this Court's decision, BIPA claims pose an unprecedented risk of annihilating damages awards that are wholly unrelated to the General Assembly's purposes.

To begin with, these actions very often entail enormous damages claims. This case well-illustrates that reality. The Court's opinion acknowledges that

White Castle could be liable for up to $17 *billion* in statutory damages under its reading of the statute. Opinion ¶ 42. But this case is not unique. Hundreds of pending cases involve similarly gigantic damages claims that could toll the death knell for even large, financially successful businesses.[1]

As explained above, these existential threats to numerous businesses result from three factors. First, the Court's claim-accrual decision in this case multiplies dramatically the potential damages relating to any single consumer or worker. Second, BIPA cases are almost always brought as class actions, thus implicating the aggregation concerns identified by the courts in *Parker* and *Wakefield*. Third, this Court held that BIPA actions are governed by a five-year statute of limitations. *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, ¶ 5.

Simply put, BIPA defendants will typically face multiple levels of aggregation and attendant gargantuan damages awards. Serious due process concerns are unavoidable in this context. *See Wakefield*, 51 F.4th at 1124-25 (recognizing that constitutional limitations are especially important when

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[1] *Rogers v. BNSF Railway Company,* for example, made headlines for the $228 million in damages awarded—an amount that just last week the plaintiff argued should *not* be lowered in light of this Court's decision, and, indeed, should be multiplied. *See* Response at 2, No. 19-3083 (N.D. Ill. Mar. 3, 2023), ECF No. 256 (stating that the language in this Court's Opinion regarding the "discretionary" nature of damages "is *dictum* stacked upon *dictum* and is not precedential"); Plaintiff's Rule 59 Motion to Amend Judgment at 1, No. 19-3083 (N.D. Ill. Nov. 9, 2022), ECF No. 236 ("The sole purpose of this Motion is to ask the Court to adjust the statutory damages to conform to the undisputed evidence that there were actually 136,800 violations . . . ."). For examples of other pending cases involving enormous potential exposure, *see infra* 24 n.11.

"vast cumulative damages can be easily incurred, because modern technology" can "trigger[]" vast numbers of "minimum statutory damages with the push of a button").

C. Lower courts must exercise their discretion to ensure that BIPA damages awards are reasonably related to the law's compensatory and deterrent purposes.

The Court recognized that courts have discretion to fashion appropriate awards in BIPA class actions that are lower than the statutory maximums and stated that "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." Opinion ¶ 42. But those observations leave a staggering degree of uncertainty for courts and defendants. Defendants are entitled to a basic degree of predictability about the scope of a possible sanction. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. As White Castle observes in its petition (at 22), a statute may not delegate "basic policy matters" to judges "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312 (11th Cir. 2009).

The first step in identifying the standard for determining permissible damages awards is to ascertain the General Assembly's purposes. *Cf. BMW*, 517 U.S. at 568 ("the federal excessiveness inquiry appropriately begins with

an identification of the state interests that a punitive award is designed to serve"). Multiple courts have recognized that "BIPA's provision for actual damages and the regulatory intent of its enactment show that it is intended to be a remedial statute," not a penal one. *Meegan v. NFI Indus., Inc.*, 2020 WL 3000281, at *4 (N.D. Ill. June 4, 2020).[2] The General Assembly's purposes were to compensate injured parties and deter future violations, not to impose punishment. *See infra* p. 15.

A court should therefore begin its analysis by determining the amount that would be reasonably necessary to compensate the plaintiffs for harm that they actually suffered. Next it should assess the amount that is permissible for deterrence purposes. *Amici* urge the Court to expressly state that lower courts should apply these principles in cases arising under the Act.

1. Courts should begin by assessing what is necessary to fairly compensate class members.

The first step in assessing an award under BIPA should be to ask what amount of damages is necessary to fairly compensate class members for the harm they have suffered (if any). This will often be a low number—and may even be zero.

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[2] *See also Burlinski v. Top Golf USA Inc.*, 2020 WL 5253150, at *7 (N.D. Ill. Sept. 3, 2020) ("it is safe to conclude that BIPA is not a penal statute, even if it provides for statutory damages"); *Chavez v. Temperature Equip. Corp.*, No. 2019-CH-02538, at 8 (Ill. Cir. Ct. Sept. 11, 2019) ("BIPA is a remedial statute, not a penal statute. [BIPA] does not impose damages without regard to the actual damages suffered by a plaintiff.").

Under BIPA, plaintiffs can sue without any showing of an injury. "The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action." *Rosenbach v. Six Flags Entm't Corp*, 2019 IL 123186, ¶ 33.

Moreover, although "liquidated damages" are "intended to be an estimate of actual damages" (*Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 538 (7th Cir. 2012)), in most BIPA cases—like this one—there are *no* actual damages because there is no disclosure to others or misuse of biometric information. In such instances, the "only possible estimate of actual damages . . . would be zero." *Id.*; *see also* Black's Law Dictionary 9th ed. (2009) (defining actual damages as "an amount awarded to a complainant to compensate for a proven injury or loss"); *People ex rel. Fahner v. Climatemp, Inc.*, 101 Ill. App. 3d 1077, 1080 (1st Dist. 1981) (actual damages are "intended to make the plaintiff whole"). Accordingly, when a BIPA claim is based solely on the violation of statutory rights, as is almost always the case, the compensatory rationale can justify only a nominal amount of damages. Consequently, the damages award must be justified largely, if not exclusively, on the basis of its relationship to the law's deterrent purposes.

2. Courts should next assess what is necessary to serve BIPA's deterrent purposes.

After determining what damages are necessary to compensate class members, or concluding that only nominal compensatory damages are justifiable, a court should ask what additional amount, if any, is reasonably

necessary to meet BIPA's "preventative and deterrent purposes." *Rosenbach*, 2019 IL 123186, ¶ 37. As this Court has recognized, BIPA's damages provisions seek to encourage companies to "conform to the law and prevent problems before they occur." *Id.*; *see also McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 48. That is similar to the aims of other statutes, such as the Telephone Consumer Protection Act ("TCPA"), in which statutory damages serve as "a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both." *Standard Mut. Ins. Co. v. Lay*, 2013 IL 114617, ¶¶ 31-32; *see also Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) (recognizing that liquidated damages may "serve a deterrent or punitive function").

Here, the cases elucidating the due process limits on punitive damages awards are highly relevant—with an important caveat. Punitive damages are imposed to punish as well as to deter and require proof of highly culpable conduct. But, based on this Court's conclusion in *Rosenbach*, the non-compensatory element of statutory damages under BIPA may be justified only by reference to deterrence—not punishment. Given the need for that justification, a BIPA award certainly may be no higher than (and in most cases much lower than) what would be permissible for punitive damages.

First, the U.S. Supreme Court, and many lower courts, cite the ratio between punitive and compensatory damages as a key metric in determining the constitutionally permissible amount of a punitive award. Thus, "few

awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and a punitive damages "award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425. Although no bright-line rule exists, courts have thus repeatedly invoked *Campbell* to confine punitive damages awards to a 4-to-1 ratio or lower.[3] Other courts in Illinois and elsewhere have held similarly.[4] This reflects the fact that,

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[3] *See, e.g.*, *Hardeman v. Monsanto Co.*, 997 F.3d 941, 975 (9th Cir. 2021) (concluding that "a ratio up to 4 to 1 serves as a good proxy for the limits of constitutionality" (internal quotation marks omitted)); *Williams v. First Advantage LNS Screening Sols. Inc*, 947 F.3d 735, 755, 763–67 (11th Cir. 2020) (reducing ratio from 13:1 to "the default 4:1 ratio"); *Ondrisek v. Hoffman*, 698 F.3d 1020, 1031 (8th Cir. 2012) (ordering remittitur of $30 million punitive award to $12 million where compensatory damages were $3 million); *S. Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (ordering remittitur of $4 million punitive award to $1,185,217.14 where compensatory damages were $395,072, for a ratio of approximately 3:1); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (reducing ratio from 10:1 to 4:1). Indeed, many courts have reduced a punitive damages award to a 1:1 multiple of compensatory damages. *See, e.g.*, *Saccameno v. U.S. Bank Nat'l Assn.*, 943 F.3d 1071, 1090 (7th Cir. 2019) (holding that the punitive damages in the case "should not exceed 1:1" relative to the total compensatory damages); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1075 (10th Cir. 2016) ("we reduce the award of punitive damages . . . from a ratio of 11.5:1 to a 1:1 ratio"); *Jurinko v. Med. Protective Co.*, 305 Fed. Appx. 13, 28-29 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 ratio); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 157 (6th Cir. 2007) (ordering remittitur of $2,628,600 punitive award to no more than $400,000, where compensatory damages were $400,000).

[4] *See, e.g.*, *Turner v. Firstar Bank, N.A.*, 363 Ill.App.3d 1150, 1163-65 (5th Dist. 2006) (remanding for punitive damages judgment that "would be less than the double-digit ratio between punitive and compensatory damages against which the *Campbell* Court cautioned" in case involving "only a small amount of economic damages"); *Kidis v. Reid*, 976 F.3d 708, 717 (6th Cir. 2020) (noting that "even where we might loosen *State Farm*'s tight constitutional vise on high-ratio awards" when the compensatory damages are small, "we customarily still reduce the punitive damages award so that the ratio of

typically, "a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008).

In determining the appropriate ratio, moreover, a court should consider the deterrent effect of the amount awarded as compensatory damages. *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence . . . operates through the mechanism of damages that are *compensatory*" (emphasis in original)); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). Courts have ordered significant reductions in punitive damages awards on this basis. *See, e.g.*, *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 165-66 (2d Cir. 2014) (rejecting "stack[ing]" of extensive punitive damages on top of compensatory damages where they serve similar purposes).[5]

Second, the U.S. Supreme Court also has considered the degree of reprehensibility of the conduct—which is relevant to deterrence as well as punishment. If a defendant was a repeated intentional or reckless wrongdoer,

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punitive to compensatory damages is, at the very most, in the single digits" (internal quotation marks omitted)).

[5] When compensatory damages are merely nominal, a higher ratio may be appropriate. But the inquiry remains the same: the amount must be reasonably related to the law's deterrence purpose, and less than what would be permissible as an award of punitive damages. *See* note 4, *supra*. In the BIPA context, where the size of a plaintiff class could raise even nominal per-plaintiff damages to a very substantial amount, it is likely to be the rare case in which a high ratio is warranted.

then a higher damages amount may be appropriate. *See, e.g.*, *BMW*, 517 U.S. at 576-77 ("Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law.").

That is what this Court relied on in *Miller*, holding that it did not violate due process to assess over $1 million in penalties against a defendant who habitually failed to remit child support payments for over two years. 227 Ill. 2d at 201-02. Moreover, the failure to provide child support caused continuing and potentially severe harm to third-parties (namely, custodial parents and their children), and the defendant showed willful "egregiousness" by continuing to ignore his obligations after receiving repeated notices from the state, his ex-wife's counsel, and eventually the circuit court. *Id*. at 202-03.

Third, courts look to the civil and criminal penalties imposed in government enforcement actions. *See, e.g.*, *BMW*, 517 U.S. at 583-84. As the Eleventh Circuit has explained, the relevant guidepost is not the maximum penalty but rather the penalties actually imposed for similar conduct. *Johansen v. Combustion Eng'g, Inc*., 170 F.3d 1320, 1337 (11th Cir. 1999).

Fourth, the existence of multiple "violations" for collecting or disclosing the same individual's biometric information has little or no relevance. Even if each scan or disclosure constitutes a separate "violation," as this Court has concluded, the number of violations does not make a defendant more "culpable"

or exacerbate the risks BIPA was designed to prevent. "[T]here is no reason to believe that subsequent scans of the same biometric identifier used *for authentication purposes* against a stored copy would increase the risk of misuse or mishandling of biometric data." Opinion ¶ 65 (Overstreet, J., dissenting). Therefore, the inquiry should not focus on the number of technical violations, but on broader considerations regarding the defendant's overall course of conduct. *See Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 487 (6th Cir. 2007) ("The repeated conduct factor requires that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff." (citation and internal quotation marks omitted)).

Fifth, the court also should ask whether the damages award would cause significant hardship to the defendant. If an award is financially crippling, it likely far exceeds the amount needed to deter the defendant and others from engaging in similar conduct in the future. And in any event, "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." Opinion ¶ 42. For small companies, large awards may be "manifestly unjust." *Tracy's Treasures*, 2014 IL App (1st) 123339, ¶ 72 (quoting *Freedman v. Advanced Wireless Cellular Commc'ns, Inc.*, 2005 WL 2122304, at *4 (N.J. Super. Ct. Law Div. June 24, 2005)). Yet given the amounts theoretically available under the Court's decision, even the largest companies would face significant and

perhaps devastating hardship if the statutory maximum were regularly imposed.

At the same time, the mere fact that a defendant *can* afford to pay a large award is not a basis for a high damages award. "Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); *see also BMW*, 517 U.S. at 591 (Breyer, J., concurring) (the financial position of defendants has little relevance to "deterrence, given the more distant relation between the defendant's wealth and its responses to economic incentives"); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989) ("The defendant's wealth or lack of it is . . . irrelevant to the deterrence of socially undesirable conduct."). Regardless of the defendant's ability to pay, damages should be no larger than reasonably necessary to incentivize compliance and deter the relevant conduct.[6]

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[6] The Ninth Circuit in *Wakefield* listed seven factors as relevant to the due process inquiry: "'1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case.'" *See* 51 F.4th at 1123. But the court concluded that the statutory damages provision at issue there "reflect[ed] punitive as well as compensatory and deterrence goals." *Id*. These factors therefore are not appropriate for BIPA, which this Court has held is not punitive.

Even if these factors are considered, moreover, they do not lead to a different conclusion. The factors are relevant only to the extent they bear on

3. Damages will often be far lower than the statutory maximum under these principles.

Applying these principles, it will often be the case that the appropriate award in a BIPA case is far below the statutory maximum assessed on a per-violation (or even per-person) basis. In this case, for example, a $17 billion award is more than *three million* times the $5,000 in maximum liquidated damages the General Assembly thought sufficient to incentivize individual plaintiffs to bring lawsuits for a violation of BIPA and to induce companies to comply with BIPA's obligations.

Such a gargantuan award bears no relationship to any legitimate purpose. An award of $17 billion—or $1 billion, $500 million, or $250 million—could not possibly be justified by reference to compensatory or deterrence principles, and therefore would constitute an award of punitive damages, imposed under BIPA without any showing of intentional or even reckless behavior (because BIPA imposes liability for negligent conduct). Such punitive awards would plainly be excessive and unconstitutional under the standard

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appropriate deterrence. So of course the amounts awarded (factors 1 and 2) must be considered to the extent they involve compensation for class members' actual harm—because that is a relevant metric in determining what is reasonably related to deterrence; to the extent the violations are knowing (factors 3 and 4) or involve technical, unintentional violations (factor 6), that is relevant in assessing deterrence, because more culpable actions may justify a greater amount to effect deterrence; awards in similar cases (factor 5) can be relevant, but only if those awards have been assessed under the proper due process standard; and other circumstances (factor 7) can be relevant, but only if those circumstances bear on the amount reasonably related to deterrence.

prescribed by the U.S. Supreme Court—and would be unconstitutional here for the same reasons.[7]

By contrast, an award of $9.5 million—equivalent to $1,000 per employee—would be approximately *one-fiftieth of one percent* of the $17 billion theoretically available under the statute, even though such an award provides more than sufficient incentives for businesses to comply with BIPA's requirements. Opinion ¶65 (Overstreet, J., dissenting).

Courts in other contexts have exercised their discretion to reduce damages substantially when a literal application of statutory damages would lead to "shockingly large" results. *See, e.g.*, *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 955, 962-63 (8th Cir. 2019) (reducing a $1.6 billion statutory damages award under the TCPA to $32 million); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900–01 (W.D. Tex. 2001) (finding it "inequitable and unreasonable" to award $2.34 billion for TCPA violations and instead awarding 7 cents per violation). These damages were set far below the statutory maximums because those maximums make no sense as a framework for assessing statutory

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[7] In *Williams*, the U.S. Supreme Court held that Arkansas did not violate due process when it assessed a $75 penalty against the defendant railroad in a suit brought because of a 66 cent fare overcharge. 251 U.S. at 67. But *Williams* did not involve any aggregation of claims. The determination that a $75 penalty (approximately $2,000 adjusted for inflation) was reasonable in no way suggests that it would have been permissible to assess hundreds or thousands of times that amount to achieve the same end. The Ninth Circuit in *Wakefield* distinguished *Williams* on this basis. *See* 51 F.4th at 1122.

liability when claims are aggregated and available at the "push of a button." *Wakefield*, 51 F.4th at 1124-25.

III. The Court's Guidance Is Urgently Needed.

It is essential that the Court provide guidance now regarding lower courts' discretion to award damages under BIPA, especially given the Court's construction of the statute. Without it, defendants will have no way to predict how a court will apply its discretion to determine damages—and coerced settlements will be the inevitable result.

Since 2017, thousands of BIPA cases have been filed against Illinois businesses—often against small companies.[8] "[T]echnology giants have been sued for allegedly violating BIPA, [but] 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. B.J. 34, 35 (2018). Indeed, a search of the Courthouse News database shows hundreds of BIPA cases filed against grocery stores, powder finishing companies, restaurants, and other small and medium-sized companies.[9]

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[8] *See, e.g.*, Daniel Wiessner, Reuters, *White Castle could face multibillion-dollar judgment in Illinois privacy lawsuit* (February 17, 2023) ("Nearly 2,000 lawsuits alleging violations of BIPA have been filed since 2017."); *see also* U.S. Chamber of Commerce, Institute for Legal Reform, *A Bad Match: Illinois and the Biometric Information Privacy Act* (Oct. 2021) (finding more than 900 lawsuits brought in state and federal court from 2015 through the first quarter of 2021).

[9] *See, e.g.*, *Ramsey v. Lake Ventures LLC dba Fresh Thyme Market*, No. 2022-LA-176 (Ill. Cir. Ct., DuPage Cnty. filed Feb. 18, 2022); *Navarro v. S&B Finishing Co.*, No. 2022-CH-581 (Ill. Cir. Ct., Cook Cnty. filed Jan. 24, 2022);

This Court's decision will subject these businesses to immense pressure to settle their BIPA cases. Consider a putative class of, say, 100 current and former employees who allege that they were required to use biometric timekeeping equipment without consent four times per day for the five-year limitations period. Under this Court's ruling, that business would conservatively face $500 million of exposure.[10] And that is no hypothetical. A review of a small subset of pending BIPA cases reveals many examples of lawsuits involving *several multiples* of this potential exposure.[11]

For businesses facing this draconian exposure, it is cold comfort that this livelihood-destroying liability only "may" be imposed—if the actual amount depends on the decisions of individual trial judges applying their own standards, formulated without any guidance from this Court. Because "per-

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Williams v. Wings Over Englewood LLC, et al., No. 2022-CH-326 (Ill. Cir. Ct., Cook Cnty. filed Jan. 14, 2022).

[10] This example assumes that 100 individuals used the timekeeping system four times per day, 250 days per year, for five years for which the employer faces $1,000 per alleged violation. That is, 100x4x250x5x1000. If this conduct were alleged to violate both Section 15(b) and (d), then the potential exposure would be $1 billion.

[11] *See, e.g.*, Notice of Removal at ¶ 11, *Varnado v. West Liberty Foods LLC*, No. 1:20-cv-02035 (N.D. Ill. Mar 30, 2020), ECF No. 1 (timekeeping case allegedly involving more than **1,600** putative class members); Notice of Removal at ¶ 14, *Johnson v. Kroger Co.,* No. 1:22-cv-02409 (N.D. Ill. May 06, 2022), ECF No. 1 (timekeeping case purportedly involving more than **1,000** putative class members); Notice of Removal at ¶ 28, *Norwood v. Shippers Warehouse of Illinois, Inc.*, No. 1:21-cv-00917 (N.D. Ill. Feb 18, 2021), ECF No. 1 (timekeeping case allegedly involving **882** putative class members); Notice of Removal at 5-6, *Hilliard v. Panera, LLC*, No. 1:21-cv-00233 (N.D. Ill. Jan 14, 2021), ECF No. 1 (timekeeping cases purportedly involving more than **333** putative class members).

scan" or "per-disclosure" liability will give rise to potentially annihilating statutory exposure for even small class actions, defendants will be forced to settle even non-meritorious cases. "Faced 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); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

These *in terrorem* settlements are a serious problem for the judicial system. *See, e.g.*, *In re Rhone–Poulenc Rorer Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' Judicial concern about them is legitimate . . . ." (citation omitted)).

But these settlements will have another very significant adverse consequence: few if any cases will be litigated to judgment. That means that it may be years before this Court has another opportunity to specify the standard governing trial courts' determination of the proper damages award in BIPA actions. And without a clear standard from this Court, the inexorable pressure to settle will continue.

This Court's guidance therefore is needed now. Indeed, this Court has often elaborated on legal questions when the guidance would benefit the lower courts and entities subject to the relevant laws. *See, e.g.*, *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 63 (elaborating on a question of public importance that is "likely to recur in future cases" and where "a definitive decision by this court will provide guidance to the lower courts"); *People v. Ziobro*, 242 Ill.2d 34, 45 (2011) (finding "it appropriate to offer some guidance in these cases to the circuit courts" regarding their exercise of "discretion . . . on remand"); *In re Shelby R.*, 2013 IL 114994, ¶ 22 (addressing "issue of first impression" to provide "guidance" to judges and "defense attorneys who must advise" their clients). It is hard to imagine a case in which additional guidance would be more appropriate, and could be more urgently needed, than this one.[12]

Finally, the Court should address these issues notwithstanding its statement that "policy-based concerns about potentially excessive damage awards under the Act are best addressed by the legislature." Opinion ¶ 43. Of

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[12] In *Sandholm*, for example, this Court provided guidance on the award of attorneys' fees under the Citizen Participation Act—an issue that had been mooted by a separate holding by the Court. *See* 2012 IL 111443, ¶ 63. Relying on the "public interest exception to the mootness doctrine," the Court still addressed the issue "because the question is of a public nature in that any individual or legal entity in the state may be subject to the Act; the issue is likely to recur in future cases; and a definitive decision by this court will provide guidance to the lower courts . . . ." *Id.* In this case, mootness provides no obstacle to this Court providing additional guidance on this important damages question, and all of the relevant considerations counsel strongly in favor of providing this guidance.

course, *amici* agree that legislative intervention is warranted in light of this Court's construction of Section 15.

But this is not a policy question. It is a legal one for determination by this Court: what standard should lower courts apply to set a statutory damages award that comports with the law's grant of discretion and the due process limits imposed by the federal and state constitutions.

CONCLUSION

Amici agree with White Castle that the Court should reconsider its holding that a new BIPA claim accrues with each successive scan or disclosure of biometric data. Alternatively, *amici* urge the Court to specify the standards that courts should apply in exercising their discretion to determine the appropriate amount of statutory damages.

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Respectfully submitted,

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rule 341(a) and (b) and Rule 367(a). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a) is 27 pages.

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