No. 123186

IN THE SUPREME COURT OF ILLINOIS

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach and on behalf of all others similarly situated, Plaintiff-Appellant, v. SIX FLAGS ENTERTAINMENT CORP. and GREAT AMERICA LLC, Defendants-Appellees.	)	On Appeal from the Appellate Court of Illinois, Second District, No. 2-17-317 There on appeal from the Circuit Court of Lake County, No. 16-CH-13 Honorable Luis A. Berrones, Judge Presiding

BRIEF OF *AMICI CURIAE* ILLINOIS RETAIL MERCHANTS ASSOCIATION, NATIONAL RETAIL FEDERATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INTERNATIONAL HEALTH, RACQUET & SPORTSCLUB ASSOCIATION, AND SPEEDWAY LLC IN SUPPORT OF DEFENDANTS-APPELLEES

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INTERESTS OF *AMICI CURIAE*

This Court has held "a motion for leave to file an *amicus* brief must state the interest of the applicant and explain how the *amicus* brief will assist the court." *Kinkel v. Cingular Wireless, LLC,* No. 100925 at 2 (Ill. Jan. 11, 2006) (noting that "[b]riefs which essentially restate arguments advanced by the litigants are of no benefit to the court or the adversarial process"). This *amicus* brief will benefit the Court because it discusses canons of statutory interpretation (*e.g.* the canons of constitutional avoidance and the presumption against change in the common law) beyond those canons advanced by the litigants. In addition, this brief discusses Illinois' standing doctrine, which informs the Court's statutory interpretation of "aggrieved," and is an alternative, but inextricably related, ground upon which the lower court's decision may be affirmed. *See Rosenbach v. Six Flags Entm't Corp.,* 2017 IL App (2d) 170317, ¶ 23.

The Plaintiff and her *amici's* briefs focus on other canons of statutory interpretation to analyze the words selected by the legislature in enacting the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/5 *et seq*., and briefly discuss a few standing cases. In contrast, this *amicus* brief provides a robust discussion of Illinois' state standing jurisprudence and explains how standing is a purely judicial doctrine solely within the power of the Court to decide. The legislature cannot create a private right of action that would allow lawsuits to proceed beyond the state constitutional standing principles, which this Court and the state constitution have established to protect the institutional integrity of the judiciary and guard state separation of powers principles. Although standing is an affirmative defense in Illinois law, constitutional standing also is both a constitutional and jurisdictional doctrine. Accordingly, it is relevant to the proper interpretation of the meaning of "aggrieved" in BIPA because the canon of constitutional

avoidance requires the Court to evaluate whether the Plaintiff's interpretation of "aggrieved" creates serious constitutional questions, which can be avoided by the defendants' interpretation. Viewing Plaintiff Rosenbach's claim through the lens of constitutional standing—which requires a distinct, concrete, and palpable injury—this case fails at the threshold and is not ready to proceed.

The statutory meaning of "aggrieved" and the injury-in-fact component of standing doctrine are rooted in related concepts of the sufficient quantum of alleged harm under Illinois law. The focus is not on the defendants' conduct, but instead on the harm to the plaintiff resulting from that conduct. Therefore, this Court's consideration of the arguments and authorities related to resolving the two certified questions would benefit from this comprehensive analysis of Illinois-specific standing doctrine and how the constitutional avoidance canon and the common law presumption canon of statutory interpretation not only inform the Court's construction of "aggrieved" in the BIPA statute but also provide an independent limit on BIPA claims in state court.

The Illinois Retail Merchants Association ("IRMA") serves as the voice of retailing and the business community in Illinois state government and before the City of Chicago and the Cook County Board. Founded in 1957, IRMA represents more than 20,000 member stores of all sizes and merchandise lines. From the nation's largest retailers to independent businesses in every corner of the State, merchants count on IRMA to fight for the best possible environment in which to do business in Illinois.

The National Retail Federation ("NRF") is the world's leading retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet

retailers from the United States and more than 45 foreign countries. Its mission is to advance the interests of the retail industry through communication, education, and advocacy. The Court's decision in this case will affect the interests of many retailers doing business in Illinois.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and serve as a voice for small businesses in the nation's courts. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. While there is no standard definition for "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 per year. To fulfill its role as the voice for small business, the NFIB Legal Center files *amicus* briefs in cases that will impact small businesses, such as this one.

The International Health, Racquet & Sportsclub Association ("IHRSA") is the leading global association for health and fitness facilities, gyms, spas, sports clubs, and industry suppliers. Its mission is to grow, protect, and promote the health and fitness industry. Other legal issues in which the IHRSA has provided advocacy include the Americans with Disabilities Act, employment law, injury liability, locker-room privacy, single gender clubs, and more. Health and fitness clubs are a particular target of BIPA class action lawsuits based on their use of a time-keeping system that scans the fingers of

employees as they "punch" into and out of work.[1] *See, e.g., Marshall v. Life Time Fitness, Inc.,* No. 17-CH-14262 (Cook Cty., Ill. Cir. Ct. filed Oct. 26, 2017); *Johns v. Club Fitness of Alton, LLC*, No. 2018L000080 (Madison Cty., Ill. Cir. Ct. filed Jan 24, 2018); *Knobloch v. Chicago Fit Ventures LLC*, No. 2017-CH-12266 (Cook Cty., Ill. Cir. Ct. filed Sept. 8, 2017). The Court's interpretation of BIPA will impact the growth of the health and fitness industry.

Speedway LLC – the nation's second-largest company-owned and operated convenience store chain (with over 2,700 stores in 21 states, including 127 stores in Illinois) – also is particularly well-suited to present this standing analysis. It is a defendant in a currently-pending putative class action brought under BIPA, premised on Speedway use of a time-keeping system that scans the fingers of employees as they "punch" into and out of work. *See Howe v. Speedway, LLC et al.*, No. 17-CH-11992 (Cook Cty., Ill. Cir. Ct. filed Sept. 1, 2017). Speedway removed *Howe* to federal court under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 (2005). However, Judge Wood of the Northern District remanded the case to state court after

[1] The devices, which are used in certain health clubs, measure minutiae points on the finger and then apply a proprietary algorithm to those measurements to generate a numerical representation of the finger. Biometric scanners do not collect fingerprints, no image of a finger is stored, nor can the numerical representation be reverse-engineered to "re-create" a fingerprint. On top of that, the information is encrypted, so if an unauthorized user were to acquire the numerical representation, he or she could do nothing with it. By way of analogy, all state and federal data breach notification laws exempt encrypted information from their definition of "personal information" because it has no value to a third party. This understanding is significant because plaintiffs in BIPA class action lawsuits have attempted to create a false impression that biometric technology stores and shares images of fingers and faces that can be easily compromised or stolen by a third party. That simply is not how the technology works. Thus, if an unauthorized user were to acquire the numerical representation, he or she could do nothing with it.

finding that, under federal standing law, a mere procedural violation of BIPA's written information requirement did not rise to the level of an injury-in-fact for Article III jurisdiction. *Howe v. Speedway LLC*, No. 17-CV-07303, 2018 WL 2445541, at *7 (N.D. Ill. May 31, 2018). Speedway now faces the same claim in state court, despite the fact that Illinois standing law contains the same concrete injury requirement as its federal counterpart.

This Court held in *Kinkel* that permission to file an *amicus* brief should be granted "when the would-be *amicus* has a direct interest in another case and the case in which he seeks permission to file an *amicus* curiae brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest..." *Kinkel*, No. 100925 at 3 (citing *National Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000)). The NFIB Legal Center, IHRSA, IRMA, and NRF each qualify under this standard because many of their members have a substantial interest in whether this Court affirms the Illinois Appellate Court's ruling in *Rosenbach*. Like the Plaintiff in *Rosenbach*, the plaintiffs in the BIPA cases against health and fitness facilities allege no real-world injury but seek to impose strict liability for the failure to comply with BIPA's notice and consent provisions without any actual resulting harm. (The "gotcha" nature of plaintiffs' claims are particularly evident given that the plaintiffs knowingly and voluntarily used defendants' time-keeping systems.) The outcome of the *Rosenbach* appeal will directly impact the interests of Speedway and the many member organizations of the IRMA, NRF, NFIB, and IHRSA.

Finally, this brief is directly responsive to the two *amicus* briefs this Court accepted in support of the Plaintiff, the American Civil Liberties Union ("ACLU") and

the Electronic Privacy Information Center ("EPIC") briefs. Therefore, this brief will assist the Court by providing unique arguments and authorities that relate to the certified questions and provide related, but alternative, grounds for affirming the lower court's dismissal of Plaintiff's claims.

SUMMARY OF ARGUMENT

The courts have a duty to ensure that would-be litigants—all of whom inevitably consume precious judicial resources once a case is filed—have a concrete, distinct, and palpable injury. Illinois standing law supports a determination that a BIPA claim should not be allowed to proceed when premised solely upon a violation of BIPA without any resultant harm. The term "aggrieved" in BIPA must be construed to avoid putting its constitutionality in doubt and in accordance with Illinois common law. The statutory interpretation proposed by Plaintiff and her *amici* would create issues under the Illinois Constitution by opening circuit court doors to non-justiciable matters. Accordingly, standing provides an independent, alternative ground for affirming the Second District Appellate Court's determination on the two certified questions.

ARGUMENT

I. Under The Canon Of Constitutional Avoidance, "Aggrieved" Must Be Read As Meeting The Minimum Requirements Of Constitutional Standing; Therefore, This Statutory Term Should Be Interpreted As Requiring Concrete Injury To Sue.

This Court should interpret BIPA's requirement that a plaintiff must be "aggrieved" to mean that the plaintiff must have suffered a concrete injury in order to sue. This result is driven by the canon of constitutional avoidance, and is supported by strong public policy concerns.

The canon of constitutional avoidance ensures that as between two different interpretations of a statutory term, the interpretation that avoids constitutional problems is the better interpretation. *People v. Nastasio*, 19 Ill. 2d 524, 529 (1960); *People v. Hernandez*, 2016 IL 118672, ¶ 10. Here, the canon requires reading "aggrieved" in BIPA to require an actual, concrete, and particularized injury because a holding that no such injury was required would create a private right of action for plaintiffs who lack justiciable claims. Such an interpretation would stretch the concept of standing far beyond the limits fixed by the Illinois Constitution. The Court should reject the expansive reading proposed by Plaintiff Rosenbach as it would place BIPA's private right of action in direct tension with the Illinois Constitution.

A. Although Standing Is An Affirmative Defense In Illinois, It Is Also A Constitutional And Jurisdictional Doctrine; Therefore, It Is Relevant To The Canon Of Constitutional Avoidance.

To be sure, in Illinois, standing is treated as an affirmative defense, not as a threshold bar to subject-matter jurisdiction. *Greer v. Illinois Hous. Dev. Auth.,* 122 Ill. 2d 462, 494 (1988) ("In Illinois, lack of standing is an affirmative defense."); *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 252 (2010) (noting that standing in Illinois is an affirmative defense that, unlike subject-matter jurisdiction, can be waived).

Nonetheless, standing is a constitutional and jurisdictional doctrine that can bar a plaintiff's claims if there is no injury-in-fact. As the First District has explained:

> The standing issue here is both jurisdictional and constitutional in nature. This court, in ruling that a party has waived the issue of standing, has occasionally stated that standing is not jurisdictional, but is an affirmative defense. *E.g., Contract Development Corp. v. Beck,* 255 Ill. App. 3d 660, 664 (1994) (citation omitted). However, the fact that standing is an affirmative defense under section 2-619 does not preclude it from being jurisdictional. . . . Nevertheless, the ruling in *Beck* (and similar cases) that standing can be waived is correct. Parties cannot waive an issue of subject matter jurisdiction. *Segers v. Industrial Com'n,* 191 Ill. 2d 421,

> 427 (2000). However, other jurisdictional issues can be waived. *Segers,* 191 Ill. 2d at 427 (primary jurisdiction); *Volkmar v. State Farm Mutual Auto. Ins. Co.,* 104 Ill. App. 3d 149, 151 (1982) (personal jurisdiction). Standing is one such issue. *Greer v. Illinois Housing Development Authority,* 122 Ill. 2d 462, 494 (1988). Presumably, this is because the essence of the standing inquiry is not the subject matter *per se,* but whether a litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a particular dispute or issue.

Lyons v. Ryan, 324 Ill. App. 3d 1094, 1101 n.5 (1st Dist. 2001).

Illinois's constitutional requirement that the courts may only exercise jurisdiction over "justiciable matters" is a fundamental limit on the scope of state judicial power. Ill. Const. art. VI, § 9 ("Circuit Courts shall have original jurisdiction of all *justiciable matters* ….) (emphasis added). Standing is a component of this State's constitutional justiciability requirement. *In re Estate of Burgeson*, 125 Ill. 2d 477, 484-85 (1988) (concluding that standing is a "component of justiciability" under the Illinois Constitution); *see also Messenger v. Edgar*, 157 Ill. 2d 162, 170 (1993).

Interpreting BIPA's "aggrieved" requirement consistent with state constitutional standing's injury-in-fact requirements will advance and protect the important state interests that are served by constitutional standing. The constitutional standing requirement embodies important interests of the State in preserving judicial resources for actual cases—and not injuries that are speculative or better redressed through the non-judicial processes. As this Court has recognized:

> [T]he standing doctrine is one of the devices by which courts attempt to cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision. There is universal agreement that one component of standing—injury in fact—genuinely narrows the class of potential plaintiffs to those whose grievances may be redressed by such decisions.

Greer, 122 Ill. 2d at 488; *accord Schlesinger v. Reservists Comm. to Stop the* War, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important… issues in the abstract would create the potential for abuse of the judicial process…").

Moreover, the "justiciable matters" limitation, and its derivative standing, mootness, and ripeness doctrines, ensure that the judicial branch does not infringe on the distinct roles of the executive and legislative branches. This separation of powers principle is enshrined in the Illinois Constitution. Ill. Const. art. II, § 2 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."). These important interests would be weakened by interpreting "aggrieved" in a manner that would create private rights of action based on mere procedural violations that do not cause actual and concrete injuries. The Court should protect these interests by adopting a more narrow interpretation of "aggrieved" which is consistent with constitutional standing and that requires actual concrete injury.

State *constitutional* standing is a floor that every litigant must meet. It requires a showing of injury-in-fact. *Statutory* standing ("aggrieved by a violation") may require a showing of more than injury-in-fact. Accordingly, a plaintiff asserting a BIPA statutory claim must meet two independent standing requirements: (1) a state *constitutional* requirement that she has "justiciable" standing; and (2) a *statutory* standing requirement that she be "aggrieved."

B. Standing Requires A Concrete Injury Rather Than A Mere Procedural Violation Of BIPA.

To have standing under Illinois law, a plaintiff must suffer an injury that is (1) "*distinct and palpable*"; (2) "fairly traceable to the defendant's actions"; and

(3) "substantially likely to be prevented or redressed by the grant of the requested relief." *Greer*, 122 Ill. 2d at 493 (emphasis added). Because these requirements mirror the requirements for standing under federal law, Illinois courts treat federal cases discussing standing as persuasive authority. *See People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 37 ("We find . . . federal authority [on standing] to be persuasive."); *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 25-26 (reviewing the U.S. Supreme Court's "most recent pronouncements" on standing because "[f]ederal standing principles are similar to those in Illinois, and [federal] case law is instructive.").[2]

Most importantly, standing doctrine in federal court and in Illinois share this quality: without a concrete, distinct injury, plaintiffs lack standing to sue. Like federal standing requirements, "[t]he primary criterion for standing is that a plaintiff must have suffered an injury in fact for which a judicial decision may provide a redress or remedy." *P & S Grain, LLC v. City of Williamson*, 399 Ill. App. 3d 836, 842 (5th Dist. 2010) (citing *Greer*, 122 Ill. 2d at 488). Federal standing requires an injury that is "concrete and particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016). Likewise, Illinois standing requires an injury that is "distinct and palpable." *Maglio*, 2015 IL App (2d) 140782, ¶ 22 (citing *Carr v. Koch*, 2012 IL 113414, ¶ 28).

In *Maglio*, the Illinois Appellate Court affirmed the trial court's dismissal for lack of standing in a privacy and data security claim where the plaintiffs did "not allege[] that their personal information has actually been used or that they have been the victims of

[2] One notable exception is that the Illinois Supreme Court rejected the additional "zone of interest" test for those allegedly "aggrieved" by a governmental agency action and instead only required a showing of an actual or threatened injury. *Greer*, 122 Ill. 2d at 489-493. However, this distinction is irrelevant here because a governmental agency is not involved.

identity theft or fraud[.]" *Id.* ¶ 26. The *Maglio* court held it was insufficient to allege that "computers were stolen; unencrypted information is accessible and recoverable by anyone having access to the computers; the data has significant monetary value; [and] there is a known market for the sale of the data." *Id.* ¶ 28.

Similarly, in *Chicago Teachers Union, Local 1 v. Bd. of Educ. of City of Chicago*, 189 Ill. 2d 200 (2000), teachers and taxpayers challenged a statute that allowed schools to seek a waiver from providing physical education classes. *Id.* at 202. This Court reversed an order granting summary judgment to the plaintiffs, instead dismissing the case for lack of standing because "any… adverse consequences [to physical education teachers were] purely speculative." *Id.* at 207. The plaintiffs faced no "immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute that [was] distinct and palpable and substantially likely to be prevented or redressed by the grant of requested relief." *Id*. at 208. *See also, e.g.*, *Deutsche Bank Nat'l Trust for Argent Sec. Inc. v. Peters*, 2017 IL App (1st) 161466, ¶ 15 (property owners with "purely speculative" injuries lack standing under Illinois Human Rights Act); *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 38 (taxpayers without "actual loss" lack standing under Illinois School Code); *People ex rel. Madigan v. United Constr. of Am., Inc.*, 2012 IL App (1st) 120308, ¶ 15 (plaintiffs without "actual damages" lack standing under Consumer Fraud and Deceptive Business Practices Act); *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 234 (1st Dist. 2010) (plaintiffs without "a legally cognizable injury . . . lack standing to sue…").

Several federal courts have dismissed BIPA cases for lack of Article III standing because the plaintiff failed to allege an injury. *See Santana v. Take-Two Interactive*

Software, Inc., 717 F. App'x 12 (2d Cir. 2017) (captioned *Vigil v. Take-Two* in the lower court) (where plaintiffs brought suit under BIPA alleging that the defendant videogame maker "collected and disclosed their biometric data without their authorization" via a "face scan" function, these mere "procedural violations" did not raise a "material risk of harm to a concrete interest" sufficient to confer Article III standing); *Aguilar v. Rexnord LLC*, No. 17-CV-9019, 2018 WL 3239715, at *4 (N.D. Ill. July 3, 2018) (where plaintiff's employer used fingerprint-authenticated time clocks in alleged violation of BIPA's notice and consent provisions, plaintiff's allegations did not create "appreciable risk of harm" sufficient to confer standing); *Goings v. UGN, Inc.*, No. 17-CV-9340, 2018 WL 2966970, at *4 (N.D. Ill. June 13, 2018) (no injury-in-fact where plaintiff "was aware that he was providing his biometric data to defendants and does not claim that defendants have disclosed… that information to any other entity without his consent"); *Howe*, 2018 WL 2445541 at *4-5 (plaintiff's three alleged injuries, "mental anguish, invasion of privacy, and an informational injury," did not constitute injury-in-fact); *McCollough v. Smarte Carte, Inc.*, No. 16-C-03777, 2016 WL 4077108, at *3 (N.D. Ill. Aug. 1, 2016) (lack of advance consent to retain plaintiff's fingerprint data did not give rise to injury-in-fact where there was "no allegation that the information was disclosed or at risk of disclosure"). Like the plaintiffs in those cases, Plaintiff Rosenbach relies solely upon a procedural statutory violation that has yet to manifest into a concrete, distinct injury.

The case before this Court is founded purely on procedural violations lacking the element of actual loss. *Accord Hamer by Hamer v. Board of Educ. of Tp. High School Dist. No. 113, Lake County*, 140 Ill. App. 3d 308, 315-16 (1986) ("Because we find that

plaintiff has failed to establish that she was in any way aggrieved by the grade reduction policy which she seeks to invalidate, we hold that the trial court did not err in finding that plaintiff lacked standing to maintain this action.").

The NFIB Legal Center, IRMA, IHRSA, NRF, and Speedway do not contest the importance of privacy, upon which the ACLU *amicus* brief focuses, nor do they fail to appreciate the evolving technological world in which businesses operate and the inherent potential risks posed by this evolution, upon which the EPIC *amicus* brief focuses.[3] But the better question is: how and when should Courts dedicate their limited resources to BIPA litigation? The answer is clear, and moreover, it is dictated by the Illinois Constitution: Courts can and must preserve their resources for BIPA claims where the plaintiff can establish a distinct injury. Only then are the privacy and data security issues sufficiently concrete to constitute a justiciable claim. The importance of maintaining the judiciary's separate role and restraining it based on justiciability is fundamental to the Illinois Constitution's separation-of-powers.

A plaintiff who lacks standing cannot, by definition, receive a decision on the merits, and courts have the power to dispose of claims without standing as early as the motion to dismiss stage. *In re Estate of Wellman*, 174 Ill. 2d 335, 345 (1996) ("The essence of the inquiry regarding standing is whether the litigant . . . is entitled to have the court decide the merits of a dispute or a particular issue."); *Glisson v. City of Marion*, 188 Ill. 2d 211, 220-21 (1999) (upholding involuntary dismissal of claim under a section 2-

[3] EPIC seemingly is against allowing anyone to collect biometric data *at all*. But the legislature in enacting BIPA rejected prohibition. Biometric data can serve a valuable public policy purpose by improving security through a stronger authentication process, minimizing identity theft, and ensuring someone is who they say they are, whereas social security numbers and driver's license numbers can be more easily forged.

619(a)(9) motion to dismiss because standing is "affirmative matter" that defeats the claim); *Maglio*, 2015 IL App (2d) 140782, ¶ 20 (upholding dismissal under section 2-619 because "[w]here a plaintiff lacks standing, the proceedings must be dismissed because the lack of standing negates the plaintiff's cause of action"); *cf. Lutkauskas*, 2015 IL 117090, ⁋ 31 (concluding that "harm caused by the defendant's conduct is an essential element of every cause of action" "because a plaintiff can sustain a cause of action only where he or she has suffered some injury to a legal right" and dismissal could be justified under either statutory pleading requirements or standing). Additionally, if a plaintiff seeks to represent and certify a class, she "must meet all . . . standing requirements before any class is certified." *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254 (1985).

The Plaintiff and her *amici* fail to address these serious constitutional standing concerns and instead wrongly suggest that constitutional standing is limited to "bystander standing." *See* Appellant Br. at 31-32; EPIC Br. at 15-18. They argue that constitutional standing and the meaning of "aggrieved" *only* prohibit individuals on the sidelines, who just watch *others' rights* being violated. But this grossly misstates Illinois' constitutional standing doctrine. As explained at length above, constitutional standing *also* bars individuals who are not mere bystanders but who, allegedly or in fact, experience violations of the subject provisions themselves. However, these plaintiffs *still* lack standing because they did not experience any harm as a result. The violation is not traceable to any injury-in-fact. They are no-injury plaintiffs. Therefore, they lack standing.

The legislative branch cannot eliminate or water down the standing requirement of the Illinois Constitution, which protects separation of powers and the judicial function.

Accordingly, as discussed below, the canon of constitutional avoidance requires the Court to construe a statute so that the statute is interpreted in a way that avoids placing its constitutionality in doubt.

C. The Canon Of Constitutional Avoidance Requires Construing The Term "Aggrieved" To Avoid Conflicting With Standing Requirements Under The Illinois Constitution.

The canon of constitutional avoidance is well-settled and routinely applied by Illinois courts when interpreting statutory terms that have more than one potential meaning. *Nastasio*, 19 Ill. 2d at 529 (noting the duty of the courts to "interpret [a] statute as to… avoid, if possible, a construction that would raise doubts as to its validity"); *Office of Senator Dayton v. Hanson*, 550 U.S. 511, 514 (2007) (adopting a statutory construction that "is faithful . . . to our established practice of interpreting statutes to avoid constitutional difficulties"); *Hernandez*, 2016 IL 118672, ¶ 10 (recognizing and applying canon of constitutional avoidance to statute) (internal quotation and citation omitted); *Maddux v. Blagojevich*, 233 Ill. 2d 508, 516 (2011) (concluding that "the General Assembly cannot acquiesce to a construction that is at odds with the constitution…"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012).

It requires the Court to construe a statute so that the statute is interpreted in a way that avoids placing its constitutionality in doubt. *Id*. Accordingly, when interpreting the meaning of the word "aggrieved," this Court should consider whether a reading would conflict with limits set in the Illinois Constitution. *Id*. Under the constitutional avoidance canon, the statutory standing requirement cannot be read to obviate the bedrock justiciability requirement—constitutional standing. Such an interpretation is consistent with established Illinois law. *See, e.g., Greer*, 122 Ill. 2d at 492-93 (requiring

the plaintiff to show both constitutional injury-in-fact and statutory standing when seeking declaratory relief ("actual controversy" requirement under 735 ILCS 5/2-701)); *Weihl v. Dixon*, 56 Ill. App. 3d 251, 253-54 (5th Dist.1977) (same); *Glisson*, 188 Ill. 2d at 220-31 (applying constitutional standing injury-in-fact test to determine whether the plaintiff had standing to sue under the Illinois Environmental Protection Act as well as noting the lack of statutory authorization). In this case, the reading proposed by Plaintiff Rosenbach, that the "aggrieved person" term does not require an actual, concrete injury is in direct tension with the Illinois Constitution's standing requirement.

Here, the question of standing, therefore, is interwoven with the first certified question of whether an allegedly harmless statutory violation renders a plaintiff "aggrieved" under BIPA. The Illinois Appellate Court ruled that an uninjured plaintiff "is not aggrieved and may not recover." *Rosenbach*, 2017 IL App (2d) 170317, ¶ 28. Similarly, an uninjured plaintiff also is unable to establish a "distinct and palpable injury" and lacks standing under the Illinois Constitution. *Greer*, 122 Ill. 2d at 493. Were BIPA's "aggrieved person" requirement interpreted to allow a plaintiff who had not suffered injury to bring a claim, it would run afoul of the constitutional standing requirement. Aligning the answer to the certified question with Illinois' constitutional standing requirement satisfies the constitutional avoidance canon. While the legislature can supplement constitutional standing requirements with additional specific statutory standing limits, it may not abrogate the bare constitutional minimum for standing. No statute can create standing that exceeds the limits of the Illinois Constitution. BIPA's private right of action should be interpreted consistent with those limits.

D. Public Policy Considerations Regarding Consistency Between State And Federal Law Support Affirming The Lower Court As Well.

Affirmance of the Second District Appellate Court's decision is also supported by additional public policy concerns including consistency between federal and state court interpretations of law to prevent forum shopping between state and federal courts. Under Plaintiff Rosenbach's interpretation of "aggrieved," a defendant who is entitled to and wants to elect a federal forum under the Class Action Fairness Act (CAFA) of 2005, 28 U.S.C. §§ 1332(d), 1453 (2005), finds that, once there, the federal court lacks Article III standing because federal law requires a ripe, actual injury, and a mere procedural violation will not suffice. This leads to remand of the interstate class action, despite CAFA's lack of an anti-removal presumption and its express purpose of expanding federal jurisdiction to interstate class actions. Once back in state court, the case will be allowed to proceed unless this Court recognizes that Illinois standing law similarly requires more than a procedural misstep, *i.e.*, an actual injury must exist. This jurisdictional outcome is the precise situation defendants in *Howe, McCollough*, *Santana*, *Aguilar*, and *Goings* are experiencing in their BIPA lawsuits.

Such a result makes no sense, because, as discussed above, Illinois standing requirements mirror the requirements for standing under federal law. *See Avila-Briones*, 2015 IL App (1st) 132221, ¶ 37. Just as plaintiffs with unripe, threadbare claims of injury lack standing under federal law, this Court should make clear that plaintiffs similarly lack standing under Illinois law, and that the legislature's use of "aggrieved" in BIPA should not be interpreted to change that outcome. Absent such a ruling, Illinois courts will continue to face a flood of premature BIPA litigation. Worse yet, plaintiffs with unmeritorious claims would improperly file their lawsuits in Illinois courts,

believing that their speculative allegations cannot withstand scrutiny under Article III but may be allowed in state court. Preventing forum shopping between state and federal courts protects the rule of law. A clear ruling from this Court on standing grounds would resolve the inconsistency between the cases on what constitutes injury in statutory procedural violation cases and reconcile the present appearance that the very same allegations are interpreted differently by federal and state judges.

Plaintiff Rosenbach and her *amici* wrongly insist that, absent liability for bare BIPA procedural violations, there is no incentive to protect privacy information under BIPA. They paint a picture of doom-and-gloom and attempt to make it sound as though defendants like Six Flags are unconcerned with privacy, but that simply is not the case. There is a penalty if someone is actually harmed, and the threat of liability from causing harm as a result of failing to comply with the requirements is a deterrent that disincentives a company from failing to protect biometric data. If a company fails to heed that deterrent and harm results, the penalties are triggered, and these penalties may be very great given that BIPA provides for liquidated damages and attorneys' fees, which provide ample incentive for individual BIPA lawsuits. Allowing premature, no-injury, strict-liability BIPA class actions premised solely upon alleged non-compliance without actual harm shifts judicial resources away from truly harmed individuals.

The procedural statutory violation Plaintiff Rosenbach complains of currently does not require judicial involvement. *Accord Spokeo*, 136 S. Ct. at 1549 (noting that to establish standing to bring a claim under the Fair Credit Reporting Act (FCRA), plaintiff "could not, for example, allege a bare procedural violation, divorced from any concrete harm"); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016),

cert. denied, 137 S. Ct. 2267 (2017) (plaintiff whose restaurant receipt did not truncate his credit card expiration date, in technical violation of FCRA, lacked standing because he "did not suffer any harm… nor [did] the violation create any appreciable risk of harm," and a "violation must be accompanied by an injury-in-fact. A violation of a statute that causes no harm does not trigger a federal case. That is one of the lessons of *Spokeo*."); *Auer v. Trans Union, LLC*, 17-2413, 2018 WL 4224055, at *3 (8th Cir. Sept. 6, 2018) (plaintiff lacked standing to sue for alleged "technical violations" of FCRA related to an employment background check because (1) she consented to background check and thus could "not establish[] that she suffered a concrete injury to her privacy interests"; and (2) lacking allegations of actual identity theft, her security injury was too "speculative").

Judicial involvement and the use of judicial resources should be reserved for *if* Plaintiff suffers a concrete, distinct, and palpable injury as a result of the alleged procedural violation. In other words, judicial resources are better saved for cases related to what BIPA actually seeks to accomplish, *i.e.*, the protection against the disclosure of secretly-collected biometric data to third-parties. *See Howe*, 2018 WL 2445541, at *5-6 (finding no actual harm absent allegations connected to the primary purpose of BIPA, which is to protect against *disclosure of biometric data to third parties*, and rejecting BIPA's primary purpose as protecting "privacy" generally or an 'informational interest': "BIPA's disclosure requirements serve the statute's data protection goals, but *they do not create a standalone concrete interest* in obtaining [those disclosures]." (emphasis added)). The courthouse doors should wait to open until such time, if ever, that a

defendant sells, leases, trades, or otherwise profits from biometric data it has collected, or it improperly discloses or disseminates it to third-parties.

E. Plaintiff And Her Amici's Contrary Arguments Would Swallow Standing Doctrine And Are Inapposite.

There's no logical endpoint to Plaintiff Rosenbach and her *amici's* contrary arguments. Indeed, the arguments advanced by Plaintiff and the *amici* in support of Plaintiff are clearly distinguishable and do not support interpreting BIPA in a manner contrary to the Illinois' constitution's limits on justiciability and standing. *Amicus* EPIC offers multiple no-injury analogies in support of no-injury BIPA class actions, but these all fail upon scrutiny. For example, EPIC's **speeding ticket analogy** (*i.e.*, that if a private entity can just choose to ignore its legal obligations unless there's harm "then any person caught speeding could simply argue to the officer that they shouldn't be ticketed because they did not harm any pedestrians;" *see* EPIC Br. at 15) is unhelpful in at least two respects. First, the traffic laws do not grant private rights of action for speeding, and any claim brought by an uninjured plaintiff in Illinois state court for speeding would fail for lack of standing. Second, unlike a BIPA defendant, an individual who speeds will not be confronted with a class action lawsuit brought on behalf of all would-be pedestrians who might have been run over due to that one violation of the traffic laws.

EPIC's **trespass analogy** (*i.e.*, that a defendant can be held liable for trespass even if there's no harm to the land; *see* EPIC Br. at 15) ignores that the measure of damages for trespass tort is only nominal damages if there is no injury. *See Pfeiffer v. Grossman*, 15 Ill. 53, 54 (1853) (finding "in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages"). In contrast, uninjured BIPA class action plaintiffs are not merely seeking nominal damages. They seek to aggregate

hundreds, if not thousands, of $1,000 statutory penalties for a six- or seven-figure payout. Thus, the analogy is not on all fours with the no-injury BIPA proposal.

Finally, the **wiretap and stored communications analogies** (*i.e.*, arguing that federal and state wiretap laws define "aggrieved person" as anyone whose communications were merely intercepted; at 16-17) and the **privacy tort of intrusion upon seclusion analogy** (*i.e.*, focusing on prohibition against the unauthorized collection of data; EPIC at 17) fail because, among other things, those claims include actual interception of communications and therefore, an actual "aggrieved" individual, and an element of wrongful intent on the part of the actor before liability attaches. In other words, the plaintiffs in those cases *did* in fact already have their privacy compromised, which is not the situation in this case. Even the case cited by EPIC recognizes that liability is not *per se*. *See In re Pharmatrak*, 329 F.3d 9, 13 (1st Cir. 2003) ("This does not mean that plaintiffs' case will prevail: there remain issues which should be addressed on remand, particularly as to whether defendant's conduct was intentional within the meaning of the [Electronic Communications Privacy Act]."). *See also* Restatement (Second) of Torts § 625b cmt. a (1977) (noting that the privacy tort of intrusion upon seclusion requires "an intentional interference with [a person's] interest in solitude or seclusion."). Here, Six Flags did not covertly intercept information to which it was not a party (unlike a wiretap), nor did it intentionally access information to which it was not entitled (unlike a stored act violation). Six Flags also did not set into motion an invasive, secret collection of data that invaded Plaintiff Rosenbach's son's right to seclusion. In complete contrast, Plaintiff's son voluntarily gave his fingerprint to Six Flags.

These *amici* also argue BIPA should be interpreted as creating *per se* liability because privacy has such importance that privacy violations should be construed as a form of ultra-hazardous activity warranting *per se* strict liability. But *amici* ignore that while there are laws that permit *per se*, strict liability for certain ultra-hazardous activities (*e.g.,* Restatement (Second) of Torts § 519 (strict liability for abnormally dangerous activity), such laws generally require actual harm before an action may be brought. *See, e.g., Traube v. Freund*, 333 Ill. App. 3d 198, 202-03 (2002) (affirming dismissal of ultrahazardous activity claim premised upon mere application of potentially hazardous pesticide where there was no evidence of actual harm as a result of the application). They provide no support for expanding liability and ignoring constitutional limits on standing to allow an uninjured plaintiff, such as Plaintiff Rosenbach here, to bring a claim.

This Court should affirm the holding of the Second District Court of Appeals and interpret BIPA's "aggrieved" term to require a plaintiff to assert an actual and concrete injury before bringing a private right of action under the BIPA.

II. The Lower Court's Holding May Be Affirmed On The Alternative Ground That Plaintiff Lacks Individual Standing.

Under the record presented by the parties, this Court alternatively may properly look beyond the certified questions and hold that the underlying lawsuit should be dismissed because Plaintiff Rosenbach has not alleged a concrete and particularized injury and, accordingly, lacks standing. Thus, even if this Court determines that "aggrieved" can be interpreted in a manner that eliminates any injury requirement, which it should not do, a plaintiff bringing a BIPA claim in Illinois state court must still *also*

meet the State constitutional standing requirement in order to obtain a decision on the merits.

When addressing certified questions, "[i]n the interests of judicial economy and the need to reach an equitable result, [this Court] may delve further to resolve the related issues of law that ultimately control the propriety of the order that gave rise to the appeal." *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 11. This is particularly the case in circumstances that involve standing and related doctrines. For example, in *Wildermuth*, this Court addressed "the full scope of the issues presented in th[e] case," even though they stretched "beyond the narrow question certified by the circuit court." *Id.*; *see also*, *e.g.*, *Hampton v. Metro. Water Reclamation Dist. of Greater Chicago*, 2016 IL 119861, ¶ 23; *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 153 (2007); *Schrock v. Shoemaker*, 159 Ill. 2d 533, 537 (1994).

This is because certifying a question "does not negate the doctrines of mootness, ripeness, standing, or procedural default." *In re Marriage of O'Brien*, 2011 IL 109039, ¶¶ 58, 61 (Garman, concurring); *see also Kronenmeyer v. U.S. Bank Nat'l Ass'n*, 368 Ill. App. 3d 224, 227 (5th Dist. 2006) (same; ruling that "[b]ecause the plaintiffs lack standing, there is no reason to determine" the answer to a certified question); *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 15 (addressing standing as a preliminary matter before addressing the certified question). As Illinois courts have recognized, "[A] court *must* address constitutional issues that affect its jurisdiction or the legitimacy of the judicial proceedings themselves" including standing. *Lyons*, 324 Ill. App. 3d at 1101 n.5 (citing *In re Contest of Election for Offices of Governor and Lieutenant Governor Held at General Election on November 2, 1982,* 93 Ill. 2d 463, 471 (1983) (striking down, *sua*

sponte, election contest statutes that violated the separation of powers in our state constitution)). Indeed, if this Court accepts Plaintiff's statutory interpretation, it still cannot avoid grappling with the constitutional standing requirement. For the foregoing reasons, therefore, Plaintiff Rosenbach lacks standing, and the lower court decision may be affirmed on this alternative ground.

III. Under The Presumption Against Change In The Common Law, "Aggrieved" Should Be Interpreted To Require Concrete, Meaningful Injury.

Finally, as the Court confronts the task of interpreting "aggrieved" under BIPA, the canon of construction that there is a presumption against a change in the common law is also pertinent. Under this canon, "statutes will not be interpreted as changing the common law unless they effect the change with clarity." Scalia & Garner, *supra* at 318 (discussing the "presumption against change in common law" canon); *see also Skaperdas v. Country Cas. Ins. Co*., 2015 IL 117021, ¶ 34 (in Illinois, "in general, a statute will not be construed to change the settled law of the state unless its terms clearly require such a construction."). As set forth more fully below, allowing private lawsuits where no plaintiff claims injury flies in the face of Illinois' common law which has long incorporated the doctrine of *de minimis non curat lex*, which is usually translated as "the law does not concern itself with trifles." The purpose of the doctrine is to prevent the court from becoming bogged down with matters that may indeed involve technical violations of law but that have not caused sufficient harm to warrant all the judicial time and resources such a dispute would entail. The doctrine protects against insufficiently consequential matters from undermining the court's ability to efficiently address weightier matters.

To be sure, generally speaking, privacy interests are important, not trivial. However, this case does not involve any tangible, meaningful violation of any privacy interest. Instead, Plaintiff tries to conjure a vague sense of fear from the risk of his biometric data being compromised in some indefinite way in the future by some as-yet unknown third-party, but there is, in fact, no concrete, measurable form of harm at this time. The Court should not wade into such a dispute where the facts alleged do not provide a basis for giving scope and meaning to "privacy" generally, *especially* when the legislature itself has not done so in BIPA. Thus, it is *not* privacy interests generally that are too immaterial to merit judicial attention. Rather, it is Plaintiff Rosenbach's alleged *injury* to those interests that, at this stage, falls short of the common law's standard and is devoid of any textual hook in the BIPA statute. Accordingly, theoretical *injury* to "privacy" simply is insufficient to warrant judicial attention at this time.

For the Court to properly dispense justice across its ever growing docket of cases, it must exercise some gate-keeping function. In addition to separation of powers principles, the common law tradition balances competing values and excludes matters involving insufficient injuries, like those at issue here, to best protect the rule of law and to prevent the judiciary from devolving into a debating society of philosophical queries. If the Illinois legislature had intended to depart from the common law and create a private right of action with no injury requirement, it should have done so with clarity.

A. The Term "Aggrieved" Should Be Interpreted Consistent With The Common Law Doctrine *de minimis non curat lex*.

The common law doctrine of *de minimis non curat lex* is a longstanding fixture of Illinois law. *See, e.g.*, *Hawkins v. City of Elgin*, 1 Ill. 2d 540, 542-44 (1953) (applying the equitable maxim *de minimis non curat lex* to preclude a trespass claim against

defendant who, in reliance on a faulty survey, erected a retaining wall that encroached onto plaintiff's property by one inch); *Carolene Products Co. v. McLaughlin*, 365 Ill. 62, 72 (1936) ("The conclusion is inescapable that the possibilities of fraud in the sale of these products is so infinitesimal as to nullify any presumption that fraud exists to an extent sufficient to be denominated public. *De minimis non curat lex*."); *Checkley v. Illinois Cent. R.R. Co.*, 257 Ill. 491, 499-500 (1913) (recognizing that a "technical trespass" occurred entitling appellant to nominal damages, but refusing, under the maxim *de minimis non curat lex*, to reverse the judgment or award a new trial so that claim could be heard). For over a century, Illinois courts recognized and applied the doctrine, to hold that claims by plaintiffs with albeit some injury still should not be entertained in court where the injury at issue simply was not enough to be worth judicial time and expense. In these cases, the insufficient injury at issue also derived from a procedural violation of rights. However, the common law barred them because they simply were too immaterial to merit judicial untangling. *Id*. In 1992, the United States Supreme Court gave it a broad endorsement:

> [T]he venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.

Wisconsin Dept. of Rev. v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

Thus, this common law doctrine – as a background principle – supports the view that "aggrieved" requires something more than Plaintiff has alleged. What was alleged is not enough. This is so whether the allegations are viewed through a constitutional standing prism or through this common law lens. To hold otherwise would require the courts to adjudicate claims with no concrete injury and would fly in the face of the

presumption against a change in the common law. That canon of construction specifically instructs that the legislature is presumed to legislate against the background principles of the common law. If the legislature really intended to abrogate the common law, it must do so clearly. *Skaperdas*, 2015 IL 117021, ¶ 34.

Moreover, this common law doctrine serves important public policies. It compels dismissal of cases that would otherwise (i) improperly drain judicial resources; (ii) bog down courts with claims brought by uninjured plaintiffs; (iii) inhibit access to the courts for truly injured plaintiffs and (iv) facilitate abusive or 'mischievous' litigation. *See* Jeff Nemerofsky, *What Is a Trifle Anyway*? 37 Gonz. L. Rev. 315, 324 (2001/02) ("The *de minimis* maxim exists 'to save on judicial resources and prevent the system from getting bogged down with … inconsequential matters . . . It prevents expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors."); Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 Mich. L. Rev. 537, 542 (1947) ("This early development of the maxim indicates that it is a rule of reason, a substantive rule, that may be applied in all courts and to all types of issues.").

These policy rationales apply with greater force where, as here, the alleged injury is non-pecuniary and intangible. If the common law bars suit for trivial pecuniary injuries, which at least are measurable with reasonable precision, because the possible recovery does not justify the systemic costs, then this rationale is that much stronger when applied to intangible, undefined, non-pecuniary injuries. Indeed, Plaintiff Rosenbach has not even bothered to define the precise injury that arises from violation of the BIPA provisions other than saying the violation is itself *per se* harmful. But this is

circular reasoning and amounts to little more than "it is because I say it is." This reasoning does not explain *why* such a violation is injurious. Worse yet, these assumed injuries involve uncertainty and speculation that further burden the system, driving up litigation costs even more, all the while the possible recovery is very low.

In the end, both separation-of-powers principles and this common law maxim impose limits on the types of claims that litigants can bring to protect the institutional integrity of the judiciary. And this common law tradition of dismissing immaterial disputes has not resulted in rampant lawlessness because the courthouse doors swing wide open when a credible threat of imminent harm or an actual injury occurs.

Furthermore, this doctrine's concern with "mischievous litigation" is heightened in the context of modern-day, no-injury class actions: "The class action that yields fees for class counsel and nothing for the class is no better than a racket. It must end… a class action that seeks only worthless benefits for the class should be dismissed out of hand." *In re Walgreen Shareholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016) (Posner, J.) (emphasis added); *In re Subway Footlong Sandwich Mktg. and Sales Pracs. Litig.*, 869 F.3d 551, 557 (2017) (noting putative class action seeking damages because Subway footlong sandwiches do not always measure exactly 12 inches should have been dismissed out of hand); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that "judicial concern about ['blackmail' class actions] is legitimate"); *accord Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (recognizing that "class certification creates insurmountable pressure on defendants to settle").

The better course is to allow only those plaintiffs who can assert an actual injury to pursue their claims without clogging the courts with thousands of additional uninjured plaintiffs.

B. Plaintiff's Interpretation Of "Aggrieved" Risks Causing A Serious Claim-Splitting Problem And Making Would-be Plaintiffs, Who Actually Become Injured, Worse Off.

The only beneficiary in a no-injury BIPA class action is the plaintiffs' counsel who stands to collect attorney's fees much larger than the award his uninjured clients could receive. Even worse, plaintiff's counsel's rush to recovery may be at the expense of his clients' best interest given that the doctrine of *res judicata* prohibits plaintiffs from splitting a BIPA claim across separate actions. A first BIPA action cannot be brought complaining of a breach of BIPA subsections (a)-(b) and collecting the $1,000 statutory fine, followed later by a separate BIPA action if and when an actual injury occurs, seeking liquidated damages. *See generally, e.g.*, *Hudson v. City of Chicago*, 228 Ill. 2d 462, 473-74 (2008) (explaining *res judicata* bars plaintiffs from litigating multiple lawsuits involving the same operative facts). Proposed no-injury class actions premised upon mere procedural violations of BIPA, such as the one asserted by Plaintiff Rosenbach, truly are not in the best interest of the putative classes or the judicial system.

CONCLUSION

Plaintiff alleges no injury, and thus both lacks standing to sue and fails to satisfy the correct interpretation of the meaning of "aggrieved" in BIPA for purposes of both the damages and injunctive relief sections of the statute. This Court should affirm the ruling of the lower court for the reasons stated herein.

Dated: September 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court 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) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 8,722 words.

/s/ Gary M. Miller

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, an attorney, certifies that on September 10, 2018, he caused a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE ILLINOIS RETAIL MERCHANTS ASSOCIATION, NATIONAL RETAIL FEDERATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INTERNATIONAL HEALTH, RACQUET & SPORTSCLUB ASSOCIATION, AND SPEEDWAY LLC IN SUPPORT OF DEFENDANTS-APPELLEES** to be filed with the Supreme Court of Illinois using the Court's electronic filing system and that the same was electronically mailed to the following counsel of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the above statements set forth in this instrument are true and correct.

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