The Illinois Biometric Information Privacy Act (“BIPA,” or “the Act”) is a pioneering law as it is remarkably protective of consumer’s privacy interests.\(^1\) BIPA protects a unique combination of personal assets: biometric identifiers and information as well as confidential and sensitive information (including genetic markers, account numbers, and government identifying numbers).\(^2\) More important than even its broad protections, BIPA affords consumers a private right of action against both negligent and intentional actors.\(^3\) Further, the Illinois Supreme Court has allowed plaintiffs to sue for violations of the act, even where they have not suffered any cognizable harm.\(^4\) In the absence of comprehensive federal privacy law, states are leading the charge to protect residents’ privacy interests. Illinois’ endeavor to protect biometric information leads the pack by enabling consumers to enforce the law themselves.

I. The Illinois Biometric Information Privacy Act

Introduced by Illinois Senator Terry Link in February 2008, unanimously passed by both chambers of the legislature over the summer, and signed into law by Governor Rod Blagojevich

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\(^1\) See generally 740 ILL. COMP. STAT. 14 (effective October 10, 2008).
\(^2\) 740 ILL. COMP. STAT. 14/10.
\(^3\) 740 ILL. COMP. STAT. 14/20.
in October of the same year,\(^5\) the Illinois Biometric Information Privacy Act immediately went into effect with the intent to regulate both the growing pilot testing of and also corporate normalization of biometric identifier collection.\(^6\) In the words of the Supreme Court of Illinois, “The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent.”\(^7\) The Act, containing fewer than 1,500 words, protects Illinois resident’s biometric information in three powerful ways: the Act (1) requires informed consent before any individual’s data is collected and mandates a standard of care in storing such data equal to or greater than that exercised in maintaining an entity’s own sensitive information;\(^8\) (2) defines “biometric identifier,” “biometric information,” and “confidential and sensitive information” with incredible breadth to include even hair and eye color as well as account and social security numbers, regardless of how they are captured, converted, stored, or shared;\(^9\) and (3) affords Illinois consumers a private right of action for money damages against negligent, reckless, and intentional actors, even if the only resulting harm is a technical violation of the Act\(^10\)—as opposed to the concrete harm ordinarily required for standing under Article III of the United States Constitution.\(^11\)


\(^6\) Id; see 740 ILL. COMP. STAT. 14/5 (“The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.”). Bills passed after May 31 ordinarily do not go into effect until June 1 of the next year, but Illinois legislators elected to specify the Act’s protections shall take effect immediately—requiring a three-fifths majority vote. See 5 ILL. COMP. STAT. 75/2.

\(^7\) Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 34 (citing Patel v. Facebook Inc., 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018)).

\(^8\) 740 ILL. COMP. STAT. 14/15.

\(^9\) 740 ILL. COMP. STAT. 14/10.

\(^10\) 740 ILL. COMP. STAT. 14/20; Winston & Strawn, supra note 4; see infra Part II.B.

\(^11\) See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545, 1548–50 (2016), for one of the most recent undertakings by the Supreme Court of the United States to summarize its “injury in fact” jurisprudence. Namely, the Court focused on the lack of “concrete” injury associated with infringements of privacy rights and the use of personal information. Id. It
The most important means of protecting consumers’ privacy is, indeed, the Act’s allowance for damage actions by any “person aggrieved by a violation of this Act.”\textsuperscript{12} Negligent violations of the Act could yield $1,000 of liquidated damages\textsuperscript{13} (or actual damages if greater) for aggrieved parties, and reckless or intentional violations of the Act entitle aggrieved parties to $5,000 of liquidated damages (or actual damages if greater).\textsuperscript{14} Because the right of action section of the Act \emph{suggests} claims may be brought by aggrieved persons as a result of mere violations of the Act\textsuperscript{15}—without explicitly stating such—the section lends the bite to the rest of the Act’s bark by enabling state court claims beyond that which parties would be able to bring in federal court.

\begin{itemize}
  \item was not clear to the Court that a person is “injured” in a concrete sense if a firm lists incorrect personal information such as the wrong zip code. \emph{Id.}
  \item \textsuperscript{12} 740 ILL. COMP. STAT. 14/20.
  \item \textsuperscript{13} Liquid damages are a reasonable estimation of damages expected to follow from a breach where actual damages are not readily ascertainable. \emph{Cf. Liquidated Damages, BLACK’S LAW DICTIONARY} (8th ed. 2004); \textit{see also} Resnick \textit{v.} Uccello Immobilien GMBH, Inc., 227 F.3d 1347, 1350 (11th Cir. 2000). BIPA notably allows for liquidated damages even where the harm suffered is one which is not particularly identifiable or which a federal, Article III court might not find to be a cognizable harm. \emph{Infra note 14.}
  \item \textsuperscript{14} 740 ILL. COMP. STAT. 14/20. See below for the entire “Right of action” created by the Act.
  \item Sec. 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:
    \begin{enumerate}
      \item (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
      \item (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;
      \item (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
      \item (4) other relief, including an injunction, as the State or federal court may deem appropriate.
    \end{enumerate}
  \item \textit{Id.}
  \item \textsuperscript{15} \textit{See id.}
\end{itemize}
II. Rosenbach v. Six Flags

Six Flags amusement parks, including Six Flags Great America located in Gurnee, Illinois, offer repeat-entry tickets and seasonal passes.\textsuperscript{16} In selling and administering such passes, Six Flags regularly requires prospective ticket- and pass-holders to attach biometric information in the form of a fingerprint scan and/or facial photography.\textsuperscript{17} Such fingerprint-scanning technology was rolled out at the Gurnee location for the Summer 2014 season.\textsuperscript{18} In a hope to make entry faster and more efficient, Six Flag Great America transitioned from a re-entry system utilizing photographic identifiers on tickets and passes to one necessitating a fingerprint scan upon registration and every subsequent re-entry.\textsuperscript{19} Contrary to the hopes of Six Flags, long-time pass-holders were not only upset about the additional administrative hurdle and privacy implication posed by fingerprint scanning, but some also attributed “lines longer than ever” to the newly-encumbered entry process.\textsuperscript{20} One guest, although not sharing the privacy concerns of others, found that the less efficient entry process was “not consumer friendly.”\textsuperscript{21}

A. Factual & Procedural History

Alexander Rosenbach visited Six Flags Great America on a field trip in 2014.\textsuperscript{22} His mother had purchased a season pass for him online, but Alexander submitted to a fingerprint capture required of him before he was allowed to pick up his pass card that day.\textsuperscript{23} Upon returning

\begin{footnotes}
\item[17] Terms of Use of Biometric Data, SIX FLAGS, https://www.sixflags.com/national/biometric-data-tos (last visited Nov. 3, 2019); Rosenbach, 2019 IL 123186, at ¶¶ 4–6. Notably, in addition to traditional terms of use and copyright and trademark disclosures, the footer of Six Flag’s website includes a link to “Biometric Terms of Use”. Id.
\item[19] Id.
\item[20] See id.
\item[21] Id.
\item[22] Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, at ¶ 5.
\item[23] Id. at ¶ 6.
\end{footnotes}
home, Alexander’s mother Stacy learned he had not been given any paperwork at the time of his fingerprint scan; nor were he or his mother provided with any notice of the new procedure or asked to give consent to the collection or storage of Alexander’s fingerprint data.24 And although Alexander did not return to the park over the next four years, Six Flags retained his biometric data.25

Stacey Rosenbach, as next friend of her son, brought a claim against Six Flags Entertainment alleging the above and seeking in relevant part: (I) damages for (1) collection and storage of biometric data, (2) failure to inform of collection and length of storage, and (3) failure to obtain written consent; as well as (II) an injunction compelling appropriate disclosures under the act.26 Defendants moved for dismissal on the grounds that no actual injuries occurred which could give rise to the suit and the Illinois circuit court denied the motion.27 Upon interlocutory review, the appeals court held a plaintiff is not “aggrieved” based solely upon violation of the Act and thus cannot seek damages and injunctive remedies in situations akin to the Rosenbach’s.28 Upon petition by Rosenbach, the Supreme Court of Illinois granted review and resolved the issue earlier this year.29

B. The Court’s Opinion

The Supreme Court of Illinois, in a unanimous decision, addressed the issue which was certified to the appellate court and was once again at issue in front of the state’s highest court: whether an aggrieved person may seek damages when the only alleged injury is a violation of the

24 Id. at ¶¶ 7–8.
25 Id. at ¶ 9.
26 Id. at ¶ 11.
27 Id. at ¶¶ 12–13.
28 Id. at ¶ 15.
29 See generally id.
The Court recognized that the thumbprint collected from Alexander constituted a biometric identifier and that the electronic storage of such constituted biometric information under the Act, as such was not in dispute by the parties. Further, Defendants’ motion to dismiss was not based upon whether or not the statute had been violated, but merely that no further, contemporaneous injury was alleged; Defendants had read the Act “as evincing an intention by the legislature to limit a plaintiff’s right” to bring a claim absent cognizable harm.

The Illinois Supreme Court, unbound by Article III standing requirements, noted that the General Assembly could create private rights of action as it saw fit, and, thus, the necessary undertaking was one of pure statutory interpretation to determine the intent of the legislature. However, the Court rejected outright Defendants’ reading that the legislature sought to curtail claims lacking actual harm, as the legislature had so-curtailed claims in the Consumer Fraud and Deceptive Business Practice Act where the law’s limiting intentions were explicit: “[a]ny person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person.” As there is no similar, explicit requirement to have suffered “actual damage” in BIPA, the Court likened it to the AIDS Confidentiality Act in which “the legislature authorized private rights of action … by any person aggrieved by a

30 Id. at ¶¶ 14–15, 18.
31 Id. at ¶ 19.
32 Id. at ¶ 22.
33 Id. at ¶ 25.
36 Id. at 25; Compare 815 ILL. COMP. STAT. 505/10a(a) with 740 ILL. COMP. STAT. 14/20.
37 410 ILL. COMP. STAT. 305/1 et seq.
violation of the statute” regardless of proof of actual damages.\textsuperscript{38} Moreover, within the BIPA context, the \textit{Rosenbach} Court defined “aggrieved” to mean “having legal rights that are adversely affected.”\textsuperscript{39}

In light of the similarities in the right of action included in BIPA and that of other acts allowing for technical violation claims, the Court held that the General Assembly had “codified that individuals possess a right to privacy in and control over their biometric identifiers … and information.”\textsuperscript{40} In turn, the Court determined that the Act “vests in individuals … the right to control their biometric information.”\textsuperscript{41} and when actors collect, retain, disclose, or destroy a person’s biometric data without adhering to BIPA they have violated an individual’s right to control that data.\textsuperscript{42} The Court writes, “[t]he injury is real and significant,” and “[t]he violation, in itself, is sufficient to support the individual’s … cause of action.”\textsuperscript{43}

The Court notes that its ruling comes in light of what it calls “the General Assembly’s … assessment of the risks posed by the growing use of biometrics,” and additionally notes that, “[t]he situation is particularly concerning … because the full ramifications of biometric technology are not fully known.”\textsuperscript{44} Further, the Court recognizes that the legislature’s aim for the Act, as enabled by their instant opinion, is two pronged: first, imposing standards to safeguard biometric data, and, second, deterring non-compliance through strict civil liability.\textsuperscript{45} There is no provision allowing the Attorney General to bring claims on behalf of consumers, but the

\textsuperscript{38} \textit{Rosenbach}, 2019 IL 123186, at ¶ 2 (emphasis added) (internal quotations omitted) (citing \textit{Id.} and \textit{Doe v. Chand}, 335 Ill. App. 3d 809, 822 (2002)).
\textsuperscript{39} \textit{Rosenbach}, 2019 IL 123186, at ¶ 32 (quoting \textit{Aggrieved}, \textsc{Black’s} \textsc{Law} \textsc{Dictionary} (9th ed. 2009)).
\textsuperscript{40} \textit{Rosenbach}, 2019 IL 123186, at ¶ 33.
\textsuperscript{41} \textit{Id.} at ¶ 34.
\textsuperscript{42} \textit{See id.} at ¶ 33.
\textsuperscript{43} \textit{Id.} at ¶ 34, 33.
\textsuperscript{44} \textit{Id.} at ¶ 35–36 (quoting 740 Ill. Comp. Stat. 14/5).
\textsuperscript{45} \textit{Rosenbach}, 2019 IL 123186, at ¶ 36–37.
legislature’s allowance for individual claims for technical violations imposes upon would-be violators “the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone.”46 Any requirement that individuals suffer a harm beyond violation of the Act would frustrate the protective goals of the General Assembly. Thus, the Court issued a holding which enables and endorses those objectives by, indeed, allowing for claims based solely upon technical violations.47

III. What does Rosenbach mean for Illinois consumers?

The Supreme Court of Illinois’ Rosenbach decision is, first and foremost, a preemptive victory for future litigants who might bring a claim under BIPA or under other Illinois statutes containing a similar, somewhat-vague, private right of action. For instance, Facebook is defending a number of lawsuits alleging capture and storage of facial identifiers which, if ruled against, could yield billions of dollars in damages for consumers.48 However, the vast majority of those suits are in federal courts where they are wont to be dismissed for lack of standing,49 but, in light of Rosenbach, some plaintiffs could refile their claims in Illinois Circuit Court for violation of BIPA.50 And further, any potentially aggrieved party, whether future litigants or not, would be afforded the added protection of their biometric data as likely and potential defendants take steps

46 Id. at ¶ 37.
47 See id.
50 See id.
to minimize their liability—which, in turn, would translate into more frequent informed consent and greater care for Illinoisans’ sensitive information.51

And perhaps even more importantly for Illinois consumers, the Supreme Court has given a green light to the General Assembly to craft and adopt additional laws which protect consumer and privacy rights via strict-violation rights of action.52 The legislature may, as it sees fit, identify other risks from which Illinoisans deserve heightened protection through similar private remedies. It would be straightforward for the General Assembly to amend any existing Illinois consumer protection statute to allow “[a]ny person aggrieved by a violation of [that] Act shall have a right of action…”53 and, thus, extend such heightened protections.

Beyond Illinois, the *Rosenbach* decision notifies state legislatures, as laboratories of democracy, that there is an additional tool with which to experiment in developing further consumer protection laws.54 In the absence of similarly-protective federal privacy legislation, the Massachusetts or Oregon legislature could take up the mantle of protecting their residents by adopting BIPA wholesale, or in drafting a biometric privacy act in which the state’s own

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52 See Alexis Collins & Tanner Mathison, *Illinois Supreme Court Rules Plaintiffs Are Not Required to Allege Actual Injury to Sue Under the Biometric Information Privacy Act*, CLEARY GOTTLIEB (Feb. 4, 2019), https://www.clearycyberwatch.com/2019/02/illinois-supreme-court-rules-plaintiffs-not-required-allege-actual-injury-sue-biometric-information-privacy-act/ (“By eliminating a threshold requirement of injury, the *Rosenbach* ruling will likely encourage more plaintiffs to seek redress for technical violations of BIPA. However, it also could have an impact beyond BIPA by influencing how courts interpret other biometric data privacy laws that have been adopted or are being contemplated….”).

53 740 ILL. COMP. STAT. 14/20. For the full text of BIPA’s private right of action, see *supra* note 14.

legislators utilize and expand upon BIPA’s private right of action. Additionally, the Rosenbach decision may even be more informative to state assemblies, not for its holding but for its extensive statutory interpretation. Although the Supreme Court of Illinois discerns the General Assembly’s intention to afford private rights of action to consumers whose statutory rights have been violated, other legislatures may more clearly enumerate this private right to ensure that their state courts afford relief for strict violation claims from the outset.

IV. Conclusion

At the end of the day, Illinois’ forerunning Biometric Information Privacy Act—passed in early 2008, before biometric privacy concerns had fully sprung onto the scene—leads the way among state efforts to protect consumers’ biometric data. As the Rosenbach Court describes it, the Act vests Illinois consumers with rights to their biometric data and provides a private right of action for technical violations resulting from improper collection, retention, disclosure, or destruction of biometric information—regardless of whether a traditional “cognizable” harm has been suffered. Additionally, Rosenbach incentivizes firms that collect biometric data to respect consumer interests and protect their data in order to mitigate and avoid the breadth of litigation enabled by the Act’s individual right of action. Illinois consumers’ biometric information is among the most protected data in the country thanks to BIPA, a feat which serves as a model for other states seeking to expand the privacy protections of their citizens.