No. 21-8020

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PATHFINDER SOFTWARE, LLC,
Defendant–Petitioner,

v.

MADISYN STAUFFER,
on behalf of herself and all others similarly situated,
Plaintiff–Respondent,

On Petition for Permission to Appeal from the
United States District Court for the Southern District of Illinois
(Case No. 3:20-cv-01332)

RESPONDENT'S ANSWER TO PETITION FOR PERMISSION TO APPEAL

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INTRODUCTION

Plaintiff brought a class action against Defendant Pathfinder Software, LLC ("Pathfinder") arising under § 15(a) and §15(b) of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq*. Pathfinder removed the case to the district court, which, in turn determined it lacked jurisdiction under Article III for the §15(a) claim. It thus remanded the §15(a) claim and retained the §15(b) claim. That order is not at issue in this Petition.

After this court issued its ruling in *Fox v. Dakkota Integrated Systems, LLC*, 980 F.3d 1146 (7th Cir. 2020), Pathfinder removed the §15(a) claim a second time, contending that *Fox* constituted an "order or other paper" under 28 U.S.C. § 1446(b)(3) that authorized removal. The district court disagreed and remanded the claim. Pathfinder subsequently filed its Petition for Permission to Appeal ("Petition") (Doc. #1).

The Petition should be denied. It involves no unsettled or novel legal question. The district court correctly held that *Fox* was not an "order or other paper" on which Pathfinder could base its second removal. And, although the district court therefore did not reach a decision on the

merits, its ruling need not be revisited because Plaintiff's claim is different from the plaintiff's claim in *Fox*, and the district court properly found it lacked jurisdiction under Article III.

It is well settled that a document that constitutes an "order or other paper" under 28 U.S.C. §1446(b)(3) generally must be something arising *within* the case at issue. Pathfinder seeks to expand an exception in which a decision from a court in a different case can constitute an "order or other paper" if the decision resolves a legal uncertainty concerning the existence of original jurisdiction. The district court rightly explained, however, that this exception is limited, and typically only applies to an applicable order in a different case that involves the *same defendants*, which is not the case here.

Moreover, even if the exception is broader and includes decisions from cases involving separate parties, the decision still must resolve a legal uncertainty concerning the existence of original jurisdiction. In *Fox*, however, the Court resolved no legal uncertainty concerning the existence of original jurisdiction, nor did it claim to have done so. It simply determined, based on that plaintiff's allegations (which are significantly more expansive than Plaintiff's), that standing existed on a

§ 15(a) claim alleging the unlawful retention of biometric data. Rather than broadly resolving legal uncertainty, what *Fox* shows is how much the analysis depends on a plaintiff's precise factual allegations. *See also Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021) ("[T]he plaintiff controls her own case . . . ."). Pathfinder's argument broadens the "legal uncertainty" exception to the point of swallowing the rule, such that any new decision addressing Article III would qualify as an "order or other paper."

Likewise, Pathfinder's reliance on the Ninth Circuit's exception where there has been an "intervening change of law" is also of no avail. In Pathfinder's Ninth Circuit cases, there was a *change in established law* concerning the existence of the court's jurisdiction. This exception is inapplicable here. *Fox* did not change established law. It applied well-established principles of Article III standing to the facts of the case before it.

Nor is Pathfinder correct that *Fox* supports it on the merits. Plaintiff alleges no particularized § 15(a) harm. She alleges merely that Pathfinder failed to develop a written policy made available to the public. Unlike the plaintiff in *Fox*, Plaintiff does not allege that

Pathfinder failed to comply with a data retention schedule or unlawfully retained her biometric information—the components the Court focused on in *Fox* that conferred standing. *See Fox*, 980 F.3d at 1149, 1155 (referring to the allegation that Fox violated "the full panoply of its section 15(a) duties" and stating that "an unlawful *retention* of a person's biometric data is as concrete and particularized an injury as an unlawful *collection* of a person's biometric data.") (emphasis in original).

Finally, this case will have minimal impact on the many other BIPA cases that Pathfinder asserts "have been or may be forced into litigation in state courts." Pet. 3. The 30-day deadline for any "second removals" of such cases based on *Fox* has lapsed, as has the time to appeal any such remand orders. Pathfinder chose not to appeal the first remand order, and its efforts to do so now should be rejected.

Accordingly, the district court correctly remanded this action and this Petition should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In her First Amended Class Action Complaint ("Amended Complaint"), Plaintiff alleges that her former employer, Defendant

Innovative Heights Fairview Heights, LLC ("Innovative Heights"), violated BIPA in connection with its collection of her biometric data, specifically her fingerprints. (A3-A19.) Plaintiff alleges that Pathfinder provided Innovative Heights the fingerprinting equipment and software, that it ran and controlled the systems and databases in which the fingerprints were stored or received, and that it too violated BIPA § 15(a) and § 15(b). (A7-A8, ¶¶11-15; A14, ¶¶48-49; A19-A20 ¶72.)

Section 15(a) requires that private entities in possession of biometric information "develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers . . . ." 740 ILCS 14/15(a). The schedule must outline a retention/destruction schedule that provides for the permanent destruction of the biometric data by the earlier of: [1] "when the initial purpose for the collecting or obtaining such identifiers or information has been satisfied or [2] within three years of the individual's last interaction with the private entity." *Id.* Section 15(a) also provides that, except in very limited circumstances, a private entity in possession of biometric identifiers or biometric information must

comply with its established retention schedule and destruction guidelines." *Id.*[1]

Plaintiff alleges that Pathfinder "did not make available to the public a written policy establishing a retention schedule and guidelines for permanently destroying any such fingerprints when the initial purpose for collecting such fingerprints has been satisfied." (A14, ¶50.) Thus, Pathfinder violated § 15(a) "[b]y collecting, capturing, receiving through trade, and obtaining Plaintiff's and [the class'] fingerprints without developing a written policy made available to the public that established a retention schedule and guidelines for the destruction of Plaintiff's and [the class'] biometric identifiers or biometric information." (A20, ¶72.) Because this is a putative class action, Plaintiff posits a common question of "whether [Pathfinder] developed and made available to the public a policy in compliance with 740 ILCS 14/15(a) before it obtained Plaintiff's and [the class'] biometric identifiers." (A17, ¶60.a.) To be "in compliance with 740 ILCS 14/15(a),"

[1] BIPA § 15(b) regulates the disclosures and consents required before an entity collects a person's biometric data. This section is not relevant here, as the Court has held § 15(b) claims confer Article III standing. *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020).

a publicly available policy must provide for the permanent destruction of the biometric data by the earlier of the two dates listed in § 15(a).

Pathfinder removed the Amended Complaint to the United States District Court for the Southern District of Illinois pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), after which Plaintiff moved to remand on the ground that, because she only alleged procedural violations of BIPA, there was no injury in fact to support Article III standing. The federal district court issued an Order in which it retained jurisdiction over Plaintiff's claims under §15(b) but remanded her § 15(a) claims to state court. (A034-A064.) Pathfinder did not appeal this first remand order.

Pathfinder subsequently filed a second notice of removal in which it argued that the remanded § 15(a) claims belong in federal court "in light of" *Fox*, which it contended "clarified" *Bryant* and supported the existence of Article III standing. (A67, ¶¶7, 10.) Plaintiff again moved for remand, arguing that *Fox* did not constitute an "order or other paper" that allows removal within 30 days after receipt pursuant to 28 U.S.C. § 1446(b)(3), but, even if it did, *Fox* still did not support Article III standing as to Plaintiff's § 15(a) claims. (A76.) On June 28, 2021, the

district court granted Plaintiff's motion for remand, finding that *Fox* was not an "order or other paper" under 28 U.S.C. § 1446(b)(3) that allowed removal. (A073-A084.)

QUESTION PRESENTED

Plaintiff suggests this Petition presents the following questions:

1. Whether the district court correctly held that the Seventh Circuit's decision in *Fox* was not an "order or other paper" under 28 U.S.C. §1446(b)(3) that authorized Pathfinder's second removal.

2. Assuming *Fox* constitutes an "order or other paper" under 28 U.S.C. §1446(b)(3) that authorized Pathfinder second removal, whether the district court's remand order should be affirmed based on a lack of Article III standing in plaintiff's case.

RELIEF SOUGHT

Plaintiff respectfully requests this Court deny the Petition, or, alternatively, affirm the district court.

REASONS FOR DENYING THE PETITION

I. Standard of Review

Pursuant to 28 U.S.C. § 1453(c)(1), "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to

remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order." In exercising its discretion, this Court looks to whether there is a novel legal issue or unsettled question of law. *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (granting petition "because the legal issue is novel. It has not been addressed in this or any other circuit."); *Sabrina Roppo v. Travelers Com. Ins. Co.*, 869 F.3d 568, 586 n.53 (7th Cir. 2017) ("When we previously have granted leave to appeal under 28 U.S.C. § 1453(c)(1), we have done so in cases involving novel or unsettled questions of law"); *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th Cir. 2017) (granting petition in order to resolve an "unsettled question").

As to the merits, this Court "review[s] remands based on jurisdictional defects de novo. . . . The burden of persuasion rests with the party asserting federal jurisdiction." *In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 329–30 (7th Cir. 2009) (footnote omitted).

II. The district court correctly held that the Seventh Circuit's decision in *Fox* was not an "order or other paper" under 28 U.S.C. §1446(b)(3).

A. The limited exception to the rule that a decision in a separate case does not constitute an "order or other paper" does not apply because Pathfinder was not a party in *Fox*.

When an action is not initially removable, a defendant has 30 days to remove it to federal court after receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). As the district court explained, it is "well-settled within the Seventh Circuit . . . that 'other paper' for purposes of 28 U.S.C. §1446(b)(3) refers to documents generated *within* a case and not documents from other proceedings." A76 (emphasis in original) (citing *Wisconsin v. Amgen, Inc.,* 516 F.3d 530, 533-34 (7th Cir. 2008); *Bourda v. Caliber Auto Transfer of St. Louis, Inc.,* 2009 WL 2356141, *2 (S.D. Ill. July 31, 2009); *Disher v. Citigroup Global Mkts., Inc.,* 487 F. Supp. 2d 1009, 1016 (S.D. Ill. 2007); *Disher v. Citigroup Global Mkts., Inc.,* 486 F. Supp. 2d 790, 801 n.5 (S.D. Ill. 2007); *Potter v. Janus Inv. Fund,* 483 F. Supp. 2d 692, 704 (S.D. Ill. 2007); *Dudley v. Putnam Inv. Funds,* 472 F. Supp. 2d 1102-1110-11 (S.D. Ill. 2007)).

A "very limited" exception to the rule occurs when a decision from a different case can constitute an "order or other paper." A77. This exception occurs where the decision is "sufficiently related" to a pending case as to which removal is sought—meaning the decision "came from a court superior in the same judicial hierarchy, was directed at a particular defendant, and expressly authorized that *same* defendant to remove an action against it in another case involving similar facts and legal issues." A77-A78 (quoting *Green v. R.J. Reynolds Tobacco Co.,* 274 F.3d 263, 267-68 (5th Cir. 2001); *Doe v. Am. Red Cross,* 14 F.3d 196, 202-02 (3d Cir. 1993)) (emphasis added by district court).

Pathfinder argues its second removal is proper based on language from *Amgen*, where the Seventh Circuit, citing *Green* and *Doe*, stated that a decision from another case has been found to constitute an "order or other paper" where it "resolved a legal uncertainty concerning the existence of original federal jurisdiction." *See Amgen*, 516 F.3d at 534; Pet. 14-16. As the district court, explained, however, the Seventh Circuit's reference to *Green* and *Doe* was important because both were cases "that involved *the same defendant(s)* as the case seeking removal."

A79 (citing *Amgen*, 516 F.3d at 534; *Green*, 274 F.3d at 267; *Doe*, 14 F.3d at 202-03).

Thus, contrary to Pathfinder's assertion, the Seventh Circuit has not widened the limited exception beyond separate cases involving the same defendant. The district court, therefore, correctly found this exception inapplicable here because "the defendants in *Fox* and the present matter are completely different entities." A80. Accordingly, the district court correctly held that because *Fox* was a decision from a different lawsuit involving a different defendant, it did not constitute an "other paper" that authorized Pathfinder's second removal. A82-A83.

B. Even under Pathfinder's expanded construction of the exception, *Fox* did not resolve legal uncertainty concerning the existence of original federal jurisdiction.

Pathfinder seeks to expand the exception to allow an "order or other paper" to include a decision in a separate case involving *separate* parties when the decision resolves a legal uncertainty concerning the existence of original federal jurisdiction. It relies on a line of decisions by Judge Herndon in the Southern District of Illinois involving defendant Janssen Research & Dev., LLC. Pet. 15. In these cases, the district court held that the United States Supreme Court decision in *Bristol-*

Meyers Squibb Co. v. Superior Court, 137 S.Ct. 1773 (2017) ("*BMS*"), constituted an "order or other paper" authorizing a subsequent removal.

Significantly, the court relied on *BMS*'s resolution of a legal uncertainty in that it "*conclusively established* the Due Process Clause prohibits non-Illinois plaintiffs from filing claims against defendants in Illinois state courts" *Braun v. Janssen Research & Dev., LLC*, 2017 WL 4224034, *6 (S.D. Ill. Sept. 22, 2017) (emphasis added).

To the extent the exception is broader and includes decisions from cases involving separate parties, the decision still must resolve a legal uncertainty concerning the existence of original jurisdiction. That did not occur here because *Fox* did not resolve a jurisdictional legal uncertainty; nor did it claim to do so. *Fox* simply determined that, based on *that* plaintiff's specific allegations (which were much more expansive than Plaintiff's), standing existed as to the § 15(a) claim. In fact, the analysis in *Fox* shows the extent to which the standing analysis depends on the specific factual allegations at issue.

Specifically, *Fox* distinguished its predecessor, *Bryant*, by describing the various violations wrapped into BIPA § 15(a), some of which may confer standing, and some of which may not, and comparing the

allegations of the plaintiffs in the two cases: "Fox's section 15(a) claim is much broader than Bryant's. She does not allege a mere failure to publicly disclose a data-retention policy. She accuses Dakkota of violating the full range of its section 15(a) duties by failing to develop, publicly disclose, *and comply with* a data-retention schedule and guidelines . . . ." *Fox,* 980 F.3d at 1154 (emphasis in original).

The *Fox* plaintiff also alleged that the violation "resulted in the unlawful retention of her handprint after she left the company and the unlawful sharing of her biometric data with the third-party database administrator." *Id.* In light of these allegations regarding the unlawful *retention* of the plaintiff's fingerprints, the Court found Article III standing existed as to the § 15(a) claim. *Id*. at 1155 ("[A]n unlawful *retention* of a person's biometric data is as concrete and particularized an injury as an unlawful *collection* of a person's biometric data. If the latter qualifies as an invasion of a 'private domain, much like an act of trespass would be,' *Bryant*, 958 F.3d at 624, then so does the former.") (emphasis in original). By italicizing "retention," the court clearly considered it significant that the plaintiff's alleged violation of §15(a)

included the unlawful retention of her biometric data after she left the company. *Id.*

Fox therefore involved a finding that the specific § 15(a) claim before that Court differed significantly from *Bryant* and supported the existence of standing. Thus, *Fox* did not conclusively resolve the existence of original federal jurisdiction of claims under § 15(a) of BIPA; rather, it shows that the determination depends on the specific nature of the plaintiff's allegations, just as was true in *Bryant*. *See also Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021) (remanding BIPA § 15(c) claim based on manner in which plaintiff pleaded claims: "It is no secret to anyone that [plaintiffs] took care in their allegations . . . to steer clear of federal court. But in general, plaintiffs may do this").

Ultimately, even under Pathfinder's construction of the exception, *Fox* did not resolve legal uncertainty concerning the existence of original federal jurisdiction. It simply applied well-established principles of Article III standing to the facts of the case before it. Pathfinder's suggestion that this case creates an "intra-circuit split" with the *Braun* line of cases, Pet. 13-16, is, therefore, a distraction, as

even under the *Braun* standard, *Fox* does not constitute an "order or other paper." A finding that a decision such as *Fox* qualifies as an exception to the rule would cause this exception to swallow the rule and allow any new decision addressing Article III to qualify as an "order or other paper." This result should be avoided.

Finally, Pathfinder's appeals to judicial economy also miss the mark. Pet. 3. This case will have minimal impact on the many other BIPA cases that Pathfinder asserts "have been or may be forced into litigation in state courts." Pet. 3. The 30-day deadline for any "second removals" of such cases based on *Fox* has lapsed, as has the time to appeal any such remand orders.

C. Ninth Circuit case law does not provide a basis to allow removal.

Pathfinder errs in its attempt to rely on Ninth Circuit case law as a ground for its removal, based on its claim that there has been an "intervening change in law." Pet. 17. In Pathfinder's Ninth Circuit cases (Pet. 16-19), there was a change in established law concerning the existence of the court's jurisdiction. Because here there was no change in established law, there is no reason for this Court to consider Pathfinder's argument—even if those cases were controlling. For the

same reasons discussed above, *Fox* did not change established law as to the existence of Article III standing. Thus, this exception recognized by the Ninth Circuit is also inapplicable.

Rea v. Michaels Stores Inc., 742 F.3d 1234 (9th Cir. 2014), involved a change in law that affected the court's jurisdiction. *Id.* at 1236. There, the removal clock had not started to run when the first removal petition was filed because the plaintiffs had expressly disclaimed class recovery in excess of $4,999,999.99, an amount below the jurisdictional threshold. *Id.* at 1236. Although such disclaimers were allowed at the time of the first removal, the Supreme Court's intervening decision in *Standard Fire Insurance Co. v. Knowles*, 133 S.Ct. 1345 (2013), held that they were ineffective. Following *Standard Fire* the defendant removed the action again, which the court allowed because "under the controlling law at the time Michaels received the complaint, it did not 'affirmatively reveal[ ] on its face the facts necessary for federal court jurisdiction,' so the initial 30–day removal period was never triggered." *Id.* at 1238 (internal quotation omitted). Thus, unlike *Fox*, *Standard Fire* changed the law on jurisdiction.

The Ninth Circuit's holding in *Taylor v. Cox Communications California, LLC*, 673 F. App'x 734 (9th Cir. 2016), also turned on *Standard Fire's* change in the law, *id.* at 735, so Pathfinder's reliance on it is similarly misplaced. And in *Goodman v. Wells Fargo Bank, N.A.*, 602 F. App'x 681 (9th Cir. 2015), the removal was allowed based on a Ninth Circuit decision that held for the first time that a national bank is only a citizen of the state of its main office; diversity therefore existed. *Id.* at 681-82.

In *Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir. 1991) (Pet. 16-17), during the course of the lawsuit Congress passed a statute substituting the FDIC for the Federal Savings and Loan Insurance Corporation in all pending litigation. *Id.* at 731. The statute further provided that all suits to which the FDIC is a party are deemed to arise under the laws of the United States and that the FDIC could remove any action to the appropriate district court. *Id.* The Ninth Circuit ruled that the law-of-the-case doctrine did not apply because the intervening statute had changed the law. *Id.* Regarding whether the FDIC's removal petition was timely, the court simply ruled that it was

because the FDIC *could not have removed* before it was substituted as a party. *Id.* at 733. That holding does not apply here.

Thus, even if the Court were to adopt the Ninth Circuit exception, it would not provide a basis for removal here. Unlike those cases, *Fox* did not change the law. To the contrary, it applied well-established principles of Article III standing to BIPA claims under § 15(a).

Accordingly, *Fox* does not constitute an "order or other paper," the district court's remand was proper, and there is not an unsettled question of law that this Court need resolve.

III. Assuming *Fox* constitutes an "order or other paper," the district court correctly remanded the case because it lacked jurisdiction over Plaintiff's § 15(a) claim.

Although the district court did not reach a decision on the merits as to the existence of Article III standing, such an analysis shows that there is not Article III standing with respect to Plaintiff's claim under § 15(a) of BIPA. In arguing to the contrary, Pathfinder overlooks significant differences between Plaintiff's allegations and those in *Fox* and *Marsh v. CSL Plasma Inc.*, 2020 WL 7027720 (N.D. Ill. Nov. 30, 2020), the only two cases on which it relies. In *Fox*, the court stated that there was not Article III standing in *Bryant* as to the § 15(a) claims

"because Bryant 'allege[d] no particularized harm that resulted from Compass [Group's] violation of § 15(a)." *Id.* at 1154. In contrast, in *Fox*, the plaintiff "accuses [defendant] of violating the full range of its § 15(a) duties by failing to develop, publicly disclose, *and comply with* a data-retention schedule and guidelines for the permanent destruction of biometric data when the initial purpose for collection ends." *Id.* (emphasis in original). Additionally, as noted above, in *Fox* the Court relied on the plaintiff's allegations that that violation "resulted in the unlawful retention of her handprint after she left the company and the unlawful sharing of her biometric data with the third-party database administrator." *Id.* And as also addressed above, the Court stated that "[a]n unlawful retention of biometric data inflicts a privacy injury in the same sense that an unlawful collection does" and that "[i]t follows that an unlawful *retention* of a person's biometric data is as concrete and particularized an injury as an unlawful *collection* of a person's biometric data." *Id.* at 1154-55 (emphasis in original).

Plaintiff's allegations differ from those in *Fox*; she merely alleges that Pathfinder failed to develop the retention schedule and destruction guidelines required by § 15(a). *See* A14, ¶50; A20 ¶72. Unlike *Fox*,

Plaintiff does not allege that Pathfinder failed to *comply* with its written policy or that Pathfinder's violation of § 15(a) resulted in any unlawful *retention* (to use the same emphases as *Fox*) of her biometric data. In short, Plaintiff contends that to comply with §15(a) of BIPA, a private entity in possession of biometric identifiers must do two things: (1) create and make available to the public a retention schedule and permanent destruction guidelines; and (2) follow those guidelines. As addressed above, although *Fox* involved an allegation of damage flowing from a violation of the second obligation (to follow the retention guidelines), *Bryant* involved only an alleged violation of the first. In *Bryant*, this Court found that such allegations were insufficient to confer Article III standing. Similar to the plaintiff in *Bryant*, Plaintiff alleges a violation of only the first obligation, which does not give rise to Article III standing.

Nor does the district court decision in *Marsh* support a finding that Article III standing exists here. Contrary to Defendant's argument, *Marsh* did not hold that any time a plaintiff alleges a defendant failed to develop a written policy under § 15(a) there is Article III standing because it "goes beyond a generalized harm." *See* Pet. 11-12.

Significantly, in *Marsh* (as in *Fox*), the plaintiffs also alleged particularized harm based on a § 15(a) retention violation by alleging that they were "aggrieved by Defendant's *failure to destroy their biometric data* when the initial purpose for collection or obtaining such data has been satisfied." *Id.* at *4 (emphasis added). *Marsh* noted that in *Bryant*, the Seventh Circuit "reasoned that [the plaintiff] had alleged only that a *generalized* duty of disclosure to the public had been violated, with no accompanying particularized harm to [the plaintiff]." *Marsh*, 2020 WL 7027720, at *3 (emphasis in original). Thus, in *Marsh*, the fact that "the Plaintiffs have alleged more than mere generalized harm arising from the retention-policy violation" is what made "all the difference." *Id.*

Unlike in *Marsh*, here Plaintiff does not allege such particularized harm based on the § 15(a) data retention requirements or that she was aggrieved based on the § 15(a) violation. In fact, Plaintiff alleges that the common question related to § 15(a) is "whether [Pathfinder] developed and made available to the public a policy in compliance with 740 ILCS 14/15(a) *before it obtained* Plaintiff's and [the class'] biometric identifiers." A17, ¶60.a. Pathfinder tries to rely on the statement "in

compliance with [§ 15(a)]" in this paragraph to suggest Plaintiff is alleging a failure to comply with a retention/destruction policy, as in *Fox* and *Marsh*. Pet. 8. But the allegation is clearly referring to Pathfinder's failure to develop and make available to the public a policy that complied with § 15(a)'s requirement that the policy provide for permanent destruction of the biometric data by the earlier of: [1] "when the initial purpose for the collecting or obtaining such identifiers or information has been satisfied or [2] within three years of the individual's last interaction with the private entity." 740 ILCS 14/15(a).

Moreover, Plaintiff's allegation that she was left unaware if and when her biometric identifiers would be destroyed (Pet. 12) is entirely different than alleging a specific retention violation as in *Marsh* or a specific retention and sharing violation as in *Fox*. And Pathfinder's attempt to rely on the suggestion in *Fox* regarding the potential existence of standing based on an employment relationship (Pet. 13) is irrelevant, as Pathfinder was not even Plaintiff's employer. Accordingly, the allegations at issue establish that there is no Article III standing as to Plaintiff's BIPA claim under § 15(a).

CONCLUSION

This Petition should be denied or, alternatively, the district court order affirmed.

Dated: July 23, 2021

Respectfully submitted,

GOLDENBERG HELLER & ANTOGNOLI, P.C.

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CERTIFICATE OF COMPLIANCE

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/s/ Kevin P. Green
Attorney for Plaintiff-Respondent
Madisyn Stauffer

Dated: July 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Kevin P. Green
Attorney for Plaintiff-Respondent
Madisyn Stauffer

Dated: July 23, 2021