

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-3476

JENNIFER MILLER, SCOTT POOLE, and KEVIN ENGLUND,
Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 18 C 86 — **Marvin E. Aspen**, Judge.

No. 19-1785

DAVID JOHNSON, individually and on behalf of a class,
Plaintiff-Appellee,

v.

UNITED AIRLINES, INC., and UNITED CONTINENTAL HOLDINGS,
INC.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17 C 08858 — **Virginia M. Kendall**, Judge.

ARGUED MAY 28, 2019 — DECIDED JUNE 13, 2019

Before WOOD, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. We have consolidated two appeals that pose a common question: whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151–88, which applies to air carriers as well as railroads. 45 U.S.C. §181. The answer is yes if the contentions amount to a “minor dispute”—that is, a dispute about the interpretation or application of a collective bargaining agreement. 45 U.S.C. §§ 151a, 184; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252–53 (1994). Plaintiffs insist that a judge should resolve their contentions, while defendants contend that resolution belongs to an adjustment board.

The claims in each suit arise under the Biometric Information Privacy Act (BIPA), 740 ILCS 14/5 to 14/25, which Illinois adopted in 2008. This law applies to all biometric identifiers, which the statute defines to include fingerprints. 740 ILCS 14/10. Before obtaining any fingerprint, a “private entity” must inform the subject or “the subject’s legally authorized representative” in writing about several things, such as the purpose of collecting the data and how long they will be kept, and obtain the consent of the subject or authorized representative. 740 ILCS 14/15(b). The private entity also must establish and make available to the public a protocol for re-

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taining and handling biometric data, which must be destroyed “when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual’s last interaction with the private entity, whichever occurs first.” 740 ILCS 14/15(a). Sales of biometric information are forbidden, 740 ILCS 14/15(c), and transfers are limited, 740 ILCS 14/15(d). Private entities must protect biometric information from disclosure. 740 ILCS 14/15(e).

Both Southwest Airlines and United Airlines maintain timekeeping systems that require workers to clock in and out with their fingerprints. Plaintiffs contend that the air carriers implemented these systems without their consent, failed to publish protocols, and use third-party vendors to implement the systems, which plaintiffs call a forbidden disclosure. Southwest and United contend that the plaintiffs’ unions have consented—either expressly or through the collective bargaining agreements’ management-rights clauses—and that any required notice has been provided to the unions. The air carriers insist that, to the extent these matters are disputed, an adjustment board rather than a judge must resolve the difference—and that if state law gives workers rights beyond those provided by federal law and collective bargaining agreements, it is preempted by the Railway Labor Act.

The suits were assigned to different district judges.

Judge Aspen found that the plaintiffs have standing under Article III but dismissed the suit against Southwest Airlines for improper venue. Fed. R. Civ. P. 12(b)(3). 2018 U.S. Dist. LEXIS 143369 (N.D. Ill. Aug. 23, 2018). He made clear, however, that the suit did not belong in state court or some

other federal district court; he held, rather, that it belongs to an adjustment board under the Railway Labor Act and that any attempt by Illinois to give workers rights to bypass their union (Transportation Workers Union Local 555) and deal directly with an air carrier is preempted by federal law. Thus dismissal has nothing to do with venue. See 28 U.S.C. §1391.

Dismissal should have been labeled either as a judgment on the pleadings, Fed. R. Civ. P. 12(c), or a dismissal for lack of subject-matter jurisdiction, as this circuit's decisions suggest. See, e.g., *Carlson v. CSX Transportation, Inc.*, 758 F.3d 819, 824–25 (7th Cir. 2014); *Brotherhood of Maintenance of Way Employees v. Norfolk Southern Ry.*, 745 F.3d 808 (7th Cir. 2014); *Brown v. Illinois Central R.R.*, 254 F.3d 654 (7th Cir. 2001). But see, e.g., *Oakey v. U.S. Airways Pilots Disability Plan*, 723 F.3d 227 (D.C. Cir. 2013) (need to resolve a dispute under the Railway Labor Act's procedures does not imply lack of subject-matter jurisdiction); *Emswiler v. CSX Transportation, Inc.*, 691 F.3d 782 (6th Cir. 2012) (same). None of this circuit's decisions considers the effect of the Supreme Court's modern understanding of the difference between "jurisdiction" and other kinds of rules. See *Fort Bend County v. Davis*, No. 18–525 (U.S. June 3, 2019) (discussing the difference); *Carlson*, 758 F.3d at 831 (recognizing that this court has yet to consider how the distinction applies to the Railway Labor Act). It is unnecessary to do so here, for either a substantive or a jurisdictional label ends the litigation between these parties and forecloses its continuation in any other judicial forum.

The suit against United Airlines was filed in state court and removed to federal court on two theories: federal-question jurisdiction under the Railway Labor Act plus removal jurisdiction under 28 U.S.C. §1453, part of the Class

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Action Fairness Act (CAFA). Judge Kendall concluded that the subject is in the bailiwick of plaintiffs' union (International Association of Machinists and Aerospace Workers) and an adjustment board; this aspect of her decision reaches the same conclusion as Judge Aspen. But Judge Kendall added that the complaint did not present a case or controversy, because the class asserted only a bare procedural right. This led her to dismiss for lack of jurisdiction. 2018 U.S. Dist. LEXIS 127959 (N.D. Ill. July 31, 2018).

The class, which wants to litigate in state court, protested, observing that if there is no federal jurisdiction then the suit must be remanded. 28 U.S.C. §1447(c). Judge Kendall agreed. United also complained about the initial decision. Observing that the jurisdictional question had not been raised or briefed by the parties, United maintained that plaintiffs have standing because they allege (or at least imply) that biometric data had been transmitted outside United and may have reached inappropriate hands. Judge Kendall refused to revisit that subject, however, and entered an order returning the case to state court. 2019 U.S. Dist. LEXIS 43484 (N.D. Ill. Mar. 18, 2019).

The remand of a suit removed under the Class Action Fairness Act is appealable with judicial permission, 28 U.S.C. §1453(c)(1), and United asked us to accept its appeal. The statute makes appellate authority turn on removal under the Class Action Fairness Act, not on whether the appeal presents an issue about the interpretation of that statute. This, plus the disparate outcomes of the two suits, led us to accept the appeal even on the assumption that the only issues concern the interaction between Illinois law and the Railway Labor Act. (That assumption may be incorrect. We'll return

to the question how the Class Action Fairness Act applies to the removal of the suit against United.)

Subject-matter jurisdiction is the first issue in any case, and as far as we can see the two suits are identical in this respect. Judge Aspen found that fingerprinted workers have standing, but Judge Kendall thought that a violation of the state statute does not cause concrete injury to anyone, so that the workers lack standing. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017); *Casillas v. Madison Avenue Associates, Inc.*, No. 17-3162 (7th Cir. June 4, 2019). We disagree with Judge Kendall's conclusion, for two principal reasons.

First, the stakes in both suits include whether the air carriers can use fingerprint identification. If the unions have not consented, or if the carriers have not provided unions with required information, a court or adjustment board may order a change in how workers clock in and out. The prospect of a material change in workers' terms and conditions of employment gives these suits a concrete dimension that *Spokeo*, *Groshek*, and *Casillas* lacked. Either the discontinuation of the practice, or the need for the air carriers to agree to higher wages to induce unions to consent, presents more than a bare procedural dispute. See *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 697 (7th Cir. 2018) ("Article III's strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a chance to obtain a benefit.").

Second, plaintiffs assert that the air carriers are not following the statutory data-retention limit and may have used outside parties to administer their timekeeping systems. The

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longer data are retained, and the more people have access, the greater the risk of disclosure (including by dissatisfied employees who misuse their access or by criminals who hack into a computer system). This was Judge Aspen's rationale for finding standing. 2018 U.S. Dist. LEXIS 143369 at *5–10. Some employees devote time and money to safeguards against identity theft. That's why we held in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), that a suit contending that hackers obtained personal details presents a case or controversy, even though the plaintiffs did not contend that their credit ratings had suffered. See also, e.g., *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016); *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018). Because these complaints do not allege that biometric data are in the hands of malefactors, their position is weaker than that of the plaintiffs in *Remijas* and its successors. We need not decide whether the risk of disclosure itself suffices for standing—or whether it would be necessary to take discovery into the question whether biometric data have been released—because the first ground of standing is independently sufficient.

We begin with the suit against Southwest, for in that suit the plaintiffs are content to litigate in federal court. We postpone the question whether the suit against United was properly removed.

A dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act. There is no doubt that Southwest has a collective bargaining agreement with the union that represents the three plaintiffs. Southwest asserts that the union assented to the use of fingerprints, ei-

ther expressly on being notified before the practice was instituted or through a management-rights clause. And there can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers—is, indeed, a mandatory subject of bargaining. 45 U.S.C. §152 First. (That phrase usually is associated with negotiations under the National Labor Relations Act, but the Supreme Court has held that the principle applies under the Railway Labor Act too, with provisos that do not affect this case. See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association*, 491 U.S. 490, 508 n.17 (1989); *Norfolk & Western Ry. v. American Train Dispatchers' Association*, 499 U.S. 117, 122 (1991). See also *Brotherhood of Locomotive Engineers v. Union Pacific R.R.*, 879 F.3d 754, 756 (7th Cir. 2017).)

As a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents. 45 U.S.C. §152 Second; *International Association of Machinists v. Street*, 367 U.S. 740, 760 (1961). A state cannot remove a topic from the union's purview and require direct bargaining between individual workers and management. And Illinois did not try. Its statute provides that a worker *or an authorized agent* may receive necessary notices and consent to the collection of biometric information. 740 ILCS 14/15(b). We reject plaintiffs' contention that a union is not a "legally authorized representative" for this purpose. Neither the statutory text nor any decision by a state court suggests that Illinois wants to exclude a collective-bargaining representative from the category of authorized agents.

Whether Southwest's or United's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question

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for an adjustment board. Similarly, the retention and destruction schedules for biometric data, and whether air carriers may use third parties to implement timekeeping and identification systems, are topics for bargaining between unions and management. States cannot bypass the mechanisms of the Railway Labor Act and authorize direct negotiation or litigation between workers and management. (Whether there would be a role for litigation if a union violated its duty of fair representation is a subject we need not confront; plaintiffs have not named a union as a defendant or contended that a union has violated its duty of fair representation.) That biometric information concerns workers' privacy does not distinguish it from many other subjects, such as drug testing, that are routinely covered by collective bargaining and on which unions give consent on behalf of the whole bargaining unit.

When a subject independent of collective bargaining arises, and concerns different treatment of different workers, litigation may proceed outside the scope of the Railway Labor Act. The Supreme Court held in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) (discussing the Labor Management Relations Act), that a retaliatory-discharge claim may be pursued under state law. Such a claim can be resolved without interpreting a collective bargaining agreement; it is person-specific and does not concern the terms and conditions of employment. See also *Hughes v. United Air Lines, Inc.*, 634 F.3d 391 (7th Cir. 2011) (*Lingle's* approach applies to the Railway Labor Act as well). But our plaintiffs assert a right in common with all other employees, dealing with a mandatory subject of collective bargaining. It is not possible even in principle to litigate a dispute about how an air carrier acquires and uses fingerprint information for its

whole workforce without asking whether the union has consented on the employees' collective behalf. That's why this dispute must go to an adjustment board. *Lingle*, *Hawaiian Airlines*, and *Hughes* all recognize that, if a dispute necessarily entails the interpretation or administration of a collective bargaining agreement, there's no room for individual employees to sue under state law—in other words, state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers.

Plaintiffs stress that Southwest began using workers' fingerprints in 2006, two years before Illinois enacted its law. This shows that the union *cannot* have consented to Southwest's practices, plaintiffs conclude. That's not necessarily so. Southwest and the union may have discussed and resolved this matter in 2005, or 2006, or 2008, or in the decade since. Perhaps in 2006 Southwest supplied all of the information, and the union gave all of the consents, that the state later required. Perhaps the statute led to a new round of bargaining. What Southwest told the union, whether it furnished that information in writing, when these things happened, and what the union said or did in response, are matters not in this record. They are *properly* not in this record, as they are topics for resolution by an adjustment board rather than a judge. Perhaps a board will conclude that the union did not consent or did not receive essential information before consenting, just as plaintiffs assert. But the board must make that decision and supply any appropriate remedy.

What we have said about the suit against Southwest applies equally to the suit against United—and the conclusion that it is impossible to litigate under the state statute without

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examining what the union knew and agreed to also means that United was entitled to remove the suit to federal court under the federal-question jurisdiction. 28 U.S.C. §§ 1331, 1441. Although the class attempted to frame a complaint relying entirely on state law, the complaint concerns collective bargaining regulated by federal law. That brings into play a doctrine misleadingly called “complete preemption,” but perhaps better labeled as a rule that when federal law completely occupies a field any claim within that scope rests on federal law, no matter how a plaintiff tries to frame the complaint. See *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983); *Lehmann v. Brown*, 230 F.3d 916, 919–20 (7th Cir. 2000); *Hughes*, 634 F.3d at 393.

If we are wrong about how the Railway Labor Act affects collective bargaining over fingerprinting in the workplace, then the doctrine of complete preemption would not authorize removal of the suit against United. So, just in case, we add that the Class Action Fairness Act probably authorized the removal—probably, but not certainly.

A “class action” as defined in 28 U.S.C. §1332(d)(1) may be removed from state to federal court. 28 U.S.C. §1453(b). Section 1332(d) creates federal jurisdiction if a class suit has an amount in controversy exceeding \$5 million and at least one member of the class has a citizenship different from that of the defendants. Given the size of the class (more than 4,000 workers in Illinois alone use fingerprints to clock in and out) and the penalties provided by state law, the controversy exceeds \$5 million. 740 ILCS 14/20. United is a Delaware corporation with its principal place of business in Illinois, so if even one person who works for United in Illinois, uses fingerprints to clock in and out, and is a citizen of any

state other than Delaware or Illinois, the requirement of minimal diversity is met. It seems likely to us that at least one person domiciled in southern Wisconsin or northwest Indiana works for United at O'Hare Airport, which is in commuting distance from both states. But, for reasons that United has not explained, its notice of removal does not assert this. Surely United knows where its workers live, and it may even know their domicile (which is not always the state of residence), but it did not put that information in its notice of removal, which is therefore deficient.

The class representative tells us that he wants the class limited to citizens of Illinois. It is far from clear that this is appropriate. The state law applies to private entities that collect biometric data in Illinois; the statute does not purport to exclude people who work in Illinois, provide biometric data in Illinois, but are domiciled in other states. Nor is it clear that the class was so limited on the date of removal—and post-removal amendments to a complaint or other papers do not eliminate jurisdiction proper at the time of removal. See *Rockwell International Corp. v. United States*, 549 U.S. 457, 473–74 & n.6 (2007). Still, the shortcoming in United's allegations of citizenship remains as a potential obstacle.

After these problems were pointed out at oral argument, United filed a jurisdictional supplement, invoking 28 U.S.C. §1653. In addition to wrongly supposing that the suit challenges its employment practices nationwide—which is not possible, as the state statute is limited to Illinois—the supplemental filing continues to refer to the “residence” rather than the “citizenship” of United's Illinois workforce.

Given our conclusion that the federal-question jurisdiction supports removal, we need not remand for the district

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court to explore the question whether, on the date the case was removed, one class member was a citizen of Wisconsin or Indiana, or conceivably some third state other than Illinois or Delaware—say, a citizen of California temporarily detailed to work at O'Hare.

In *Miller v. Southwest Airlines*, No. 18-3476, the judgment of the district court is affirmed. In *Johnson v. United Airlines*, No. 19-1785, the judgment is vacated, and the case is remanded with instructions to refer the parties' dispute to an adjustment board.

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID JOHNSON, individually and
on behalf of a class of similarly
situated individuals,

Plaintiff,

v.

UNITED AIRLINES, INC., a
Delaware corporation, and UNITED
CONTINENTAL HOLDINGS, INC.,
a Delaware corporation,

Defendants.

No. 17 C 08858

Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

David Johnson (“Johnson”), on behalf of himself and similarly situated individuals, filed this action alleging a violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”) against Defendants United Airlines, Inc. and United Continental Holdings, Inc. (collectively “United”). (Dkt. 1). The Court now considers dueling Motions for Relief from Judgment by Johnson and United. For the following reasons, Johnson’s motion is granted, and United’s motion is denied.

BACKGROUND

The Court assumes familiarity with the facts as set forth in its Order addressing the Motion to Dismiss filed by United. (Dkt. 37). Briefly, United utilized Johnson’s fingerprints to track when he signed in and out of work while he was employed as a baggage handler at O’Hare International Airport in Chicago, Illinois.

Johnson took issue with the collection of such information, arguing it violated his rights under BIPA.

In regard to procedural history, Johnson filed his complaint on November 7, 2017 in the Circuit Court of Cook County, Illinois. (Dkt. 1-1). United removed the action to federal court on December 8, 2017 under a theory that the Railway Labor Act (“RLA”) preempted Johnson’s claim and that the Class Action Fairness Act (“CAFA”) provided this Court with jurisdiction. (Dkt. 1). United moved to dismiss Johnson’s complaint pursuant to Rule 12(b)(1) and in the alternative moved to strike the class allegations pursuant to Rule 12(f). (Dkt. 19). The Court granted United’s Motion to Dismiss for lack of subject matter jurisdiction and entered judgment on July 31, 2018. (Dkts. 37-38). In its Order of dismissal, the Court provided alternative justifications for its holding—that Johnson’s claims were preempted by the RLA and that he lacked Article III standing. *Id.* Johnson then filed a Motion for Relief from Judgment pursuant to Rule 60(b)(4) asking the court to vacate its prior judgment and remand the case to Illinois state court. (Dkt. 39). United subsequently filed its own Motion for Correction of the Court’s Order pursuant to Rule 60(a), Rule 60(b)(1), and/or Rule 60(b)(6). (Dkt. 44). United’s Rule 60 Motion seeks relief “solely on the issue of Article III standing” in the Court’s Motion to Dismiss Order. *Id.*

LEGAL STANDARD

Rule 60(a) authorizes relief from a final judgment in order to “correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a

judgment, order, or other part of the record.” Fed. R. Civ. P. 60(a). Rule 60(b) provides relief on the basis of:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). “Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances.” *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (quoting *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005)).

DISCUSSION

I. Johnson’s Rule 60(b)(4) motion for relief from judgment

Johnson seeks relief from the Court’s Order granting United’s Motion to Dismiss on the grounds that the Order is void because the Court lacked subject-matter jurisdiction and was precluded from rendering judgment. (Dkt. 39). “Once a district court decides that the underlying judgment is void, the trial judge has no discretion and must grant the appropriate Rule 60(b) relief,” and it is ‘a *per se* abuse of discretion to deny a Rule 60(b)(4) motion when the trial court has no jurisdiction over the action.’” *Philos Technologies, Inc. v. Philos & D, Inc.*, 645 F.3d 851, 855 (7th Cir. 2011) (quoting *Blaney v. West*, 209 F.3d 1027, 1031 (7th Cir. 2000); *O’Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir. 2000) (“A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter or of

the parties...); see also *Fed. Election Comm'n v. Al Salvi for Senate Committee*, 205 F.3d 1015, 1020 (7th Cir. 2000) (“A judgment is void within the meaning of Rule 60(b)(4) where it is entered by the court without jurisdiction...”)

A court’s finding that it lacks jurisdiction over a matter serves as an immediate roadblock to proceeding with the case. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCordle*, 74 U.S. 7 Wall. 506, 514, 19 L.Ed. 264 1868). As a natural extension of this, a court cannot decide the merits of a case once it discovers that it lacks jurisdiction. See *Steel Co.*, 523 U.S. at 101-02 (“For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.”); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 821 (7th Cir. 2016) (“It is certainly true that a court may not decide the merits of a case without subject matter jurisdiction even if the parties have not themselves raised it.”). Therefore, the proper result of a scenario where a court lacks jurisdiction over a removed case would be remand to the state court. See e.g., *Smith v. Wis. Dep’t of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1139 (7th Cir. 1994).

In its July 31, 2018 Order, the Court provided the parties with alternative rulings. “Not only does preemption support dismissal in the underlying matter, but so too does the issue of Article III standing.” (Dkt. 37, pg. 7). Johnson contends that

the latter holding—that Johnson does not have Article III standing—precludes the Court from entering any judgment on preemption grounds. As discussed *infra*, United has not identified a mistake of law warranting the extraordinary relief from the Court’s ruling that Johnson did not suffer an injury-in-fact and consequently lacks standing to proceed. The question then becomes whether opining on the issue of preemption was an impermissible judgment on the merits.

United’s motion to dismiss sought to dismiss Johnson’s complaint in its entirety under Rule 12(b)(1) for lack of subject-matter jurisdiction. (Dkt. 19). The Court held that “the RLA preempts the action and mandates use of the arbitration provisions set forth under the CBA and in doing so strips this Court of subject matter jurisdiction.” (Dkt. 37, pg. 6). A dismissal based on preemption grounds is considered a dismissal pursuant to Rule 12(b)(6) and on the merits. *Healy v. Metro. Pier and Exposition Auth.*, 804 F.3d 836, 840 (7th Cir. 2015) (“However, we deem a dismissal of preempted state law claims a 12(b)(6) dismissal for failure to state a claim, a dismissal on the merits.”). Therefore, such a ruling, even when couched as an alternative ruling, treads in to the waters of “hypothetical jurisdiction.” See *Steel Co.*, 523 U.S. at 101-02. Since the Court did not have subject-matter jurisdiction over the matter due to a lack of Article III standing, the judgment is void with respect to the dismissal of the complaint on preemption grounds. *Al Salvi for Senate Committee*, 205 F.3d at 1020.

Upon a finding of lack of subject-matter jurisdiction, remand is the appropriate resolution. “If at any time before final judgment it appears that the district court

lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c); *see also Smith*, 23 F.3d at 1138-39. Having made such a determination, the Court has no discretion, but to remand to the Circuit Court of Cook County, Illinois. *Blaney*, 209 F.3d at 1031.

II. United’s Rule 60 motions

United seeks relief under Rule 60(a), Rule 60(b)(1), and/or Rule 60(b)(6). (Dkt. 44). The Court reviews each in turn.

A. Rule 60(a)

Relief Rule 60(a) is available to litigants in very limited circumstances. “Rule 60(a) applies only where, because of a clerical error, the judgment expresses something different than what the court intended.” *Moore-Bey v. Delrosario*, 165 F.3d 32 (7th Cir. 1998). United suggests that if the Court analyzed Article III standing on the erroneous assumption that Johnson’s motion to remand was still pending, then relief under Rule 60(a) would be appropriate. (Dkt. 45, pgs. 3-4). It is true that the Court indicated it was dismissing Johnson’s motion to remand as moot despite Johnson withdrawing the motion prior to the Court’s Order. (Dkt. 30). However, it is of little import and does not warrant relief under Rule 60(a) as the motion to remand did not impact the Court’s ruling and did not lead to “the judgment express[ing] something different than what the court intended.” *Moore-Bey*, 165 F.3d at 32. Furthermore, no clerical error was present in the Order and therefore Rule 60(a) is inapplicable. United’s Motion for Relief from Judgment under Rule 60(a) is denied.

B. Rule 60(b)(1)

United next seeks relief for “mistake, inadvertence, surprise, or excusable neglect” under Rule 60(b)(1). “The rule was designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law.” *Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). “Therefore, errors of law and fact generally do not warrant relief under Rule 60(b)(1) and certainly do not require such relief.” *Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 667.

United’s position is “that the Court’s Order finding that Plaintiff has not sufficiently alleged Article III standing was in error and a mistake.” (Dkt. 45, pg. 5). The Court held in its motion to dismiss that “the harm alleged by Johnson fails to rise to the level of an injury-in-fact without more.” (Dkt. 37, pg. 7). The Court further wrote, “Johnson alleges a statutory violation based entirely on United’s failure to obtain consent but provides no factual basis to show there was any subsequent disclosure that would form the injury.” *Id.* at 8. “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016); *see also Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing.”). United fails to demonstrate the Court’s Order contains a mistake or error sufficient to warrant the extraordinary relief provided by Rule 60(b). *Harrington*, 433 F.3d at 546.

United's argument hinges on a single allegation from Johnson's complaint which reads:

Additionally, Defendants did not obtain consent for any transmission to third parties of Plaintiffs and their other employees' biometrics. To the extent Defendants utilize out of state vendors to operate their biometrics program in conformance with biometric industry practice, Defendants have also violated BIPA on each occasion they transmit such information to such third parties.

(Dkt 1-1 at ¶ 34). United fails to carry its burden here to demonstrate the Court committed an error or mistake in its Article III standing analysis. There is no dispute that Johnson must allege an actual injury-in-fact beyond merely conjectural or hypothetical harms. *Lujan*, 504 U.S. at 560. The language that United hangs its hat on in Johnson's complaint only serves to highlight the attenuated and hypothetical nature of the injury alleged. In essence, United takes issue with the Court's application of the law to the facts, but, absent other circumstances, such an argument is not a proper basis for relief under Rule (60)(b)(1). *Banks*, 750 F.3d at 667. As a result, United's Motion for Relief from Judgment pursuant to Rule 60(b)(1) is denied.¹

¹ United's argument that CAFA jurisdiction exists is similarly unconvincing. It is true that Rule 23 allows the Court to address class certification "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). Though it is only appropriate for the district court to do so when it is definitive at the pleadings stage that class certification is inappropriate. *See e.g., Wright v. Family Dollar, Inc.*, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010). It would be inappropriate for the Court to consider and rule on the class allegations where there is a factual dispute as to the purported class and discovery is needed. *See e.g., Buonomo v. Optimum Outcomes, Inc.*, 301 F.R.D. 292, 295 (N.D. Ill. 2014). Johnson represents that he intends to certify a class that would be "substantially, if not completely, comprised of Illinois citizens." (Dkt. 39, pg. 9). Such representations are sufficient at the motion to dismiss stage to maintain minimal diversity exists as any dispute here is necessarily factual in nature. 28 U.S.C. § 1332(d)(4)(A).

C. Rule 60(b)(6)

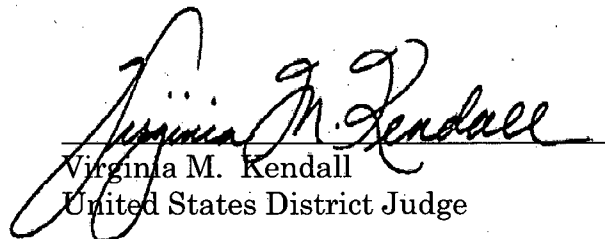
Rule 60(b)(6) operates as a catch-all provision and allows for relief from a final judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). This provision is only available in extraordinary circumstances, but courts have flexibility and discretion in determining if such circumstances are present. *Pearson v. Target Corporation*, 893 F.3d 980, 984 (7th Cir. 2018). Certain factors that could lead to relief under the Rule include “the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process.” *Buck v. Davis*, 137 S.Ct. 759, 778 (2017) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988). “Rule 60(b)(6) is fundamentally equitable in nature.” *Ramirez v. U.S.*, 799 F.3d 845, 851 (7th Cir. 2015). Though seemingly broad in its grant of discretion, Rule 60(b)(6) exacts a higher burden upon United than other provisions in Rule 60(b). “In a rule already limited in application to extraordinary circumstances, proper resort to this ‘catch all’ provision is even more highly circumscribed.” *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995).

United contends it would be unjust to the parties for the Court to have ruled on the issue of Article III standing “without the benefit of briefing on the subject.” (Dkt. 45, pg. 6). This claim is without merit as it ignores the fact that district courts routinely and independently assess standing. “This court has an independent obligation to satisfy itself that federal subject matter jurisdiction exists before proceeding to the merits in any case, even where, as here ... the parties ... [have] questioned the existence of such jurisdiction.” *Smith v. Am. Gen. Life & Acc. Ins. Co.*,

337 F.3d 888, 892 (7th Cir. 2003); *see also United States v. \$304,980.00 in U.S. Currency*, 732 F.3d 812, 817 (7th Cir. 2013). “[O]nce the district judge has reason to believe that there is a serious jurisdictional issue, he is obliged to resolve it before proceeding to the merits even if the defendant, whether as a matter of indolence or strategy, does not press the issue.” *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986). United agreed with as much in open court. (Dkt. 43, 4:2-5). The Court exercising its obligation to conduct an inquiry into subject-matter jurisdiction is undoubtedly within the realm of its authority and cannot be considered an injustice to the parties. United’s argument fails to meet the extraordinarily high bar required for relief under Rule 60(b)(6) and its motion is denied. *Popovich*, 71 F.3d at 700.

CONCLUSION

For the reasons stated above, the Court denies United’s motion for relief from judgment. (Dkt. 44). The Court grants Johnson’s motion. (Dkt. 39). Accordingly, the Court’s Memorandum Opinion and Order (Dkt. 37) and entry of judgment (Dkt. 38) are deemed void due to lack of subject-matter jurisdiction. The matter is remanded to the Circuit Court of Cook County, Illinois.


Virginia M. Kendall
United States District Judge

Date: March 18, 2019