

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES FEDERAL TRADE COMMISSION,

Defendant.

Civ. Action No. 18-942 (TJK)

**PLAINTIFF'S OPPOSITION TO MOTION BY  
FACEBOOK, INC. TO INTERVENE**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

BACKGROUND..... 1

STANDARD OF REVIEW..... 4

ARGUMENT ..... 4

I. Facebook does not have standing to intervene..... 5

II. Facebook has not shown that its legally protected interests would be impaired by disclosure of the agency records at issue..... 10

III. The court should not grant permissive intervention under Rule 24(b)..... 16

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### Cases

<i>100Reporters LLC v. DOJ</i> , 248 F. Supp. 3d 115 (D.D.C. 2017).....	11
<i>Am. Oversight, Inc. v. HHS</i> , No. 17-827, 2018 WL 4381099 (D.D.C. Aug. 3, 2018).....	8
<i>Cayuga Nation v. Zinke</i> , 324 F.R.D. 277 (D.D.C. 2018) .....	4, 5
<i>City of Cleveland, Ohio v. Nuclear Regulatory Comm’n</i> , 17 F.3d 1515 (D.C. Cir. 1994).....	5
<i>CNA Financial Corp. v. Donovan</i> , 830 F.2d 1132 (D.C. Cir. 1987).....	14
<i>Critical Mass Energy Project v. Nuclear Regulatory Comm’n</i> , 975 F.2d 871 (D.C. Cir. 1992) (en banc).....	11
<i>Ctr. for Biological Diversity v. EPA</i> , 274 F.R.D. 305 (D.D.C. 2011) .....	17
<i>Defs. Of Wildlife v. Perciasepe</i> , 714 F.3d 1317 (D.C. Cir. 2013).....	17
<i>EEOC v. Nat’l Children’s Ctr., Inc.</i> , 146 F.3d 1042 (D.C. Cir. 1998).....	17
<i>Frank v. Gaos</i> , 139 S. Ct. 1041 (2019) .....	6
<i>Fund For Animals, Inc. v. Norton</i> , 322 F.3d 728 (D.C. Cir. 2003).....	5, 10
<i>Gov’t Accountability Project v. FDA</i> , 181 F. Supp. 3d 94 (D.D.C. 2015).....	10
<i>In Defense of Animals v. USDA</i> , 587 F. Supp. 2d 178 (D.D.C. 2008).....	14
<i>In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165</i> , 704 F.3d 972 (D.C. Cir. 2013).....	4
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992) .....	4
<i>M/A-COM Info. Sys. v. HHS</i> , 656 F. Supp. 691 (D.D.C. 1986).....	11
<i>Nat’l Ass’n of Home Builders v. U.S. Army Corp of Eng’rs</i> , 519 F. Supp. 2d 89 (D.D.C. 2007).....	18
<i>Nat’l Parks &amp; Conservation Ass’n v. Kleppe</i> , 547 F.2d 673 (D.C. Cir. 1976).....	11
<i>Nat’l Parks &amp; Conservation Ass’n v. Morton</i> , 498 F.2d 765 (D.C. Cir. 1974).....	1, 3, 7
<i>NYC C.L.A.S.H., Inc. v. Carson</i> , No. 18-1711, 2019 WL 2357534 (D.D.C. June 4, 2019) .....	17
<i>Old Dominion Elec. Coop. v. FERC</i> , 892 F.3d 1223 (D.C. Cir. 2018).....	5
<i>Owner-Operator Indep. Drivers Assoc., Inc. v. DOT</i> , 879 F.3d 339 (D.C. Cir. 2018).....	5

*Pub. Citizen Health Research Grp. v. FDA*,  
704 F.2d 1280 (D.C. Cir. 1983)..... 13

*Sierra Club v. McCarthy*,  
308 F.R.D. 9 (D.D.C. 2015) ..... 10, 17

*Spokeo v. Robbins*,  
136 S. Ct. 1540 (2016) ..... 1, 5, 6, 7, 8, 9

*United Technologies Corp. v. DOD*,  
601 F.3d 557 (D.C. Cir. 2010)..... 13

*Waterkeeper Alliance, Inc. v. Wheeler*,  
330 F.R.D. 1 (D.D.C. 2018) ..... 8

*Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*,  
840 F.2d 72 (D.C. Cir. 1988)..... 4

**Statutes**

5 U.S.C. § 552(b)(4)..... 3

**Other Authorities**

Andrew Perrin, *Americans Are Changing Their Relationship with Facebook*, Pew Rsch. Ctr.  
(Sept. 5, 2018) ..... 14

Brian Barrett, *Facebook Exposed 6.8 Million Users’ Photos to Cap Off a Terrible 2018*, Wired  
(Dec. 14, 2018)..... 16

Brian Barrett, *Facebook Owes You More Than This*, Wired (Mar. 19, 2018) ..... 2

Brief of Appellant, *Patel v. Facebook, Inc.*, No. 18-15982 (9th Cir. filed Dec. 7, 2018)..... 6, 9

Brief of Appellee, *In re Facebook Internet Tracking Litigation*, No. 17-17486 (9th Cir. filed July  
30, 2018)..... 6

Chris Hughes, *It’s Time to Break Up Facebook*, N.Y. Times (May 9, 2019)..... 12

Damon Beres, *‘Delete Facebook’ Searches Hit 5-year High on Google After Cambridge  
Analytica crisis*, Mashable (Mar. 22, 2018) ..... 14

Decision and Order, *In the Matter of Facebook, Inc*, No. C-4365, at 6 (Fed. Trade Comm’n July  
27, 2012)..... 2

Defendant-Appellee Facebook, Inc.’s Supplemental Brief of Re: *Spokeo, Inc. v. Robins, Campbell  
v. Facebook, Inc.*, No. 17-16873 (9th Cir. filed May 29, 2019)..... 6, 9

Defendants’ Join Reply in Support of Their Motion to Dismiss the Complaint, *Smith v. Facebook,  
Inc.*, 262 F. Supp. 3d 943 (N.D. Cal. filed Aug. 22, 2016) (No. 5:16-cv-01282) ..... 6, 8

EPIC, *In re Facebook – Cambridge Analytica* (2019)..... 3

EPIC, *In re Facebook* (2019) ..... 2

Facebook, *An Important Update About Facebook’s Recent Security Incident* (2019) ..... 16

Facebook, *Cracking Down on Platform Abuse* (Mar. 21, 2018)..... 14

Facebook’s Notice of Mot. & Mot. To Dismiss Cons. Complaint, *Schmidt v. Facebook, Inc.*, No.  
3:18-cv-05982 (N.D. Cal. filed Mar. 14, 2019)..... 6

Fed. Trade Comm’n, Statement by the Acting Director of FTC’s Bureau of Consumer Protection  
Regarding Reported Concerns about Facebook Privacy Practices (March 26, 2018) ..... 16

Gabriel J.X. Dance, Nicholas Confessore, & Michael LaForgia, *As Facebook Raised a Privacy  
Wall, It Carved an Opening for Tech Giants*, N.Y. Times (Dec. 18, 2018)..... 16

Gabriel J.X. Dance, Nicholas Confessore, & Michael LaForgia, *Facebook Gave Device Makers  
Deep Access to Data on Users and Friends*, N.Y. Times (June 3, 2018) ..... 15

Issie Lapowsky, *Russia-Linked Facebook Ads Targeted a Sketchy Chrome Extension at Teen  
Girls*, Wired (May 12, 2018)..... 15

Letter from Facebook, Inc. to Greg Walden, Chairman, Frank Pallone, Ranking Member, and Members of the H. Energy & Commerce Comm. (June 30, 2018)..... 15

Letter from Representative David Cicilline, H. Antitrust Subcomm. Chairman, to Fed Trade Comm’n Comm’rs (March 19, 2019)..... 12

Mike Isaac & Cecilia Kang, *Facebook Expects to Be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues*, N.Y. Times (Apr. 24, 2019) ..... 2

Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. Times (Jan. 25, 2019) ..... 13, 14

Nicholas Confessore, Michael LaForgia & Gabriel J.X. Dance, *Facebook Failed to Police How Its Partners Handled User Data*, N.Y. Times (Dec. 12, 2018)..... 2

Press Release, Fed. Trade Comm’n, *Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises* (Nov. 29, 2011)..... 2

Reply in Support of Motion of Defendant Facebook, Inc. to Dismiss Plaintiffs’ First Amended Consolidated Complaint, *In Re: Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843 (N.D. Cal. filed May 5, 2019) ..... 6, 9

Simon Cross, *What to Expect on April 30 – Upgrading to Graph API and the New Login*, Facebook (Apr. 28, 2015)..... 14

Tim Wu and Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. Times (June 7, 2019) ..... 12

**Rules**

Fed. R. Civ. P. 24 ..... 1

Fed. R. Civ. P. 24(a)(2) ..... 10

Fed. R. Civ. P. 24(a)(b) ..... 5

Fed. R. Civ. P. 24(b)..... 16

LCvR 7(j)..... 1

Plaintiff Electronic Privacy Information Center (“EPIC”) respectfully opposes the Motion by Facebook, Inc. (“Facebook”) to intervene in this case. Facebook lacks Article III standing and also does not satisfy the requirements for intervention as of right or for permissive intervention. Fed. R. Civ. P. 24; LCvR 7(j). Facebook has not established, or even argued, that it would suffer substantial competitive harm as a result of the disclosure of the agency records at issue in this case.

It is not sufficient for Facebook to allege that the records provided to the Federal Trade Commission (“FTC”) contain “confidential” information. Under *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), any party seeking to establish Article III standing must satisfy the “concrete and particularized” injury-in-fact requirement. *Id.* at 1548. Facebook failed to address this requirement in its motion and did not provide any evidence or even allegations that it would suffer a cognizable concrete injury as a result of disclosure. Furthermore, under *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), a third-party only has a legally protected interest in a Freedom of Information Act (“FOIA”) suit concerning Exemption 4, 5 U.S.C. § 552(b)(4), if that entity would suffer “substantial competitive harm” as a result of disclosure. *Nat’l Parks*, 498 F.2d at 770. Facebook did not address *Spokeo* or *National Parks* in its motion to intervene. Under Article III and Rule 24, there is no permissible basis to permit Facebook’s intervention in this case.

## **BACKGROUND**

In 2011, the Federal Trade Commission (“FTC”) filed a complaint against Facebook for violating the privacy of millions of Facebook users by engaging in unfair and deceptive business practices after the company changed the privacy settings of Facebook users. *See EPIC, In re*

*Facebook* (2019);<sup>1</sup> Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises (Nov. 29, 2011).<sup>2</sup> Facebook subsequently entered into a consent decree with the FTC, which required the company to implement a comprehensive privacy program. The Order stated that Facebook “shall obtain initial and biennial assessments and reports (‘Assessments’) from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession.” Decision and Order, *In the Matter of Facebook, Inc*, No. C-4365, at 6 (Fed. Trade Comm’n July 27, 2012).<sup>3</sup> Facebook hired a third-party auditor, PricewaterhouseCoopers LLP (“PwC”), to conduct the assessments of Facebook’s privacy practices and to evaluate whether the company’s “privacy controls are operating with sufficient effectiveness.” Ex. 3 at 4.

Despite the explicit requirements of the FTC Consent Order, Facebook has repeatedly violated the privacy of its users. Mike Isaac & Cecilia Kang, *Facebook Expects to Be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues*, N.Y. Times (Apr. 24, 2019);<sup>4</sup> *see also* EPIC, *#EnforceTheOrder*, @FTC (2019).<sup>5</sup> For example, in 2018, Facebook admitted that the data analytics and political consulting firm Cambridge Analytica had unlawfully transferred private data from over 50 million Facebook user profiles. Nicholas Confessore, Michael LaForgia & Gabriel J.X. Dance, *Facebook Failed to Police How Its Partners Handled User Data*, N.Y. Times (Dec. 12, 2018);<sup>6</sup> Brian Barrett, *Facebook Owes You More Than This*, *Wired* (Mar. 19, 2018);<sup>7</sup>

---

<sup>1</sup> <https://epic.org/privacy/inrefacebook/>.

<sup>2</sup> <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

<sup>3</sup> <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

<sup>4</sup> <https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html>.

<sup>5</sup> <https://www.epic.org/enforce-the-order/EPIC-EnforceTheOrder.pdf>.

<sup>6</sup> <https://www.nytimes.com/2018/11/12/technology/facebook-data-privacy-users.html>.

<sup>7</sup> <https://www.wired.com/story/facebook-privacy-transparency-cambridge-analytica/>.

*see also* EPIC, *In re Facebook – Cambridge Analytica* (2019).<sup>8</sup> But the FTC has yet to bring an enforcement action against Facebook for violating the Consent Order.

After the agency failed to act in the wake of the Cambridge Analytica scandal, EPIC filed a FOIA request to the FTC seeking the release of all Facebook biennial privacy assessments and other documents related to Facebook’s privacy practices. Compl. ¶¶ 25–26. EPIC filed suit on April 20, 2018, after the FTC violated statutory deadlines and unlawfully withheld agency records. Compl. ¶¶ 42–43, 45–47. The agency subsequently provided to EPIC redacted versions of the three Assessments that Facebook provided to the FTC under the Consent Order (2013, 2015, and 2017). Exs 2–4. The agency also provided to EPIC redacted communications records related to the Consent Order.

The agency claims that some of the material withheld is subject to FOIA Exemption 4, which concerns trade secrets and confidential commercial information. *See* 5 U.S.C. § 552(b)(4). EPIC has responded that it intends to challenge the withholding of this material because there is no evidence that disclosure “would be likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks*, 498 F.2d at 770. Moreover, the FTC records are of significant interest to the public given the ongoing threats to the privacy of internet users posed by Facebook’s business practices. The FTC’s failure to enforce the consent order is also a matter of widespread public concern. Facebook now seeks to join this case as an intervenor-defendant.

Facebook has also wrongly encouraged the FTC to withhold records that are not exempt under the *National Parks* test. For example, records released to EPIC by the FTC in this case revealed that Facebook provided two versions of the 2013 privacy assessment—a version labeled

---

<sup>8</sup> <https://epic.org/privacy/facebook/cambridge-analytica/>.

“confidential” and a version with redactions. *See* Ex. 5 at 20–22. When the FTC processed the assessment for release under the FOIA in this case, the agency determined that most of the information Facebook claimed was “confidential,” and sought to redact, was not actually exempt from disclosure. *Compare* Ex. 5 at 23–101 *with* Ex. 2.

Furthermore, Facebook has not provided any information about its “competitive position” or alleged that the company faces competition related to the business practices that were discussed in the FTC communications records at issue in this case. Nor has Facebook made any effort to describe what type of competitive harm would result from disclosure of these records.

### **STANDARD OF REVIEW**

Courts evaluate a third-party motion to intervene on the pleadings. *See, e.g., Cayuga Nation v. Zinke*, 324 F.R.D. 277, 278 (D.D.C. 2018). An intervenor is on “equal footing with the original parties to the suit” and “must satisfy the standing requirements imposed on those parties.” *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 976 (D.C. Cir. 2013). At the pleading stage, a party must provide “factual allegations of injury” sufficient to establish Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, under Federal Rules of Civil Procedure Rule 24(a), a motion to intervene must “allege a legally sufficient claim” to establish a legally cognizable interest. *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988).

### **ARGUMENT**

Facebook has not established that it has Article III standing to intervene nor has it demonstrated that release of the records at issue would likely impair Facebook’s legally protected interests. Facebook’s proposed legal arguments would overlap entirely with the FTC’s arguments and would not provide any additional benefit. The Court should accordingly deny Facebook’s

motion to intervene because it has not established Article III standing to intervene, because Facebook cannot intervene as of right, and because Facebook’s participation would not significantly contribute to the adjudication. Fed. R. Civ. P. 24(a)(b).

**I. Facebook does not have standing to intervene.**

“[A]ll would-be intervenors must demonstrate Article III standing.” *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018); *see also Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003); *City of Cleveland, Ohio v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (“[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties.”). Where a party “seeks to intervene as a defendant in order to uphold or defend an agency action, it must establish: (a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld.” *Cayuga Nation*, 324 F.R.D. at 280 (citing *Am. Horse Prot. Ass’n, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001)).

The “touchstone for analyzing whether the violation of a statutory obligation constitutes injury in fact is the Supreme Court’s recent decision in *Spokeo*.” *Owner-Operator Indep. Drivers Ass’n, Inc. v. DOT*, 879 F.3d 339, 342 (D.C. Cir. 2018). Under *Spokeo*, a party must allege an injury-in-fact that is both particularized and concrete—that is, the party seeking to intervene “must allege some ‘concrete interest’ that is ‘de facto,’ ‘real,’ and ‘actually exist[s].’” *Id.* at 343 (quoting *Spokeo*, 136 S. Ct. at 1548–49). Further, the party must allege that it would suffer the type of injury that Congress sought to prevent. *Id.* at 345. Courts (and litigants) err when they ignore *Spokeo*, as the Supreme Court recently explained in *Frank v. Gaos*, 139 S. Ct. 1041

(2019). In *Gaos*, the Court reversed and remanded a decision granting final approval of a class action settlement in a privacy suit because the lower court failed to address whether the plaintiffs had alleged a concrete injury-in-fact under *Spokeo*. *Id.* at 1046.

Facebook is keenly aware of the standing requirements under *Spokeo*. In fact, Facebook has argued in numerous cases that courts should not recognize consumers' Article III standing to sue based on the unlawful collection and disclosure of their personal information.<sup>9</sup> Yet Facebook has failed in this case to allege any concrete injury in fact that would result from the disclosure of the FTC records at issue. Facebook does not even discuss or cite to *Spokeo* in its motion. Absent more, this Court lacks jurisdiction to join Facebook as an intervenor.

Under *Spokeo*, Facebook must show that it would suffer a concrete injury in order to establish Article III standing. *Spokeo*, 136 S. Ct. at 1548. "Both history and the judgment of Congress play important roles" in this determination. *Id.* at 1549. The Court in *Spokeo* recognized that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578). In those circumstances, a party "need not allege any *additional* harm beyond the one Congress has identified." *Id.* A party must allege the *type* of injury that Congress sought to prevent in enacting

---

<sup>9</sup> See, e.g., Defendant-Appellee Facebook, Inc.'s Supplemental Brief of Re: *Spokeo, Inc. v. Robins, Campbell v. Facebook, Inc.*, No. 17-16873 (9th Cir. filed May 29, 2019); Brief of Appellant, *Patel v. Facebook, Inc.*, No. 18-15982 (9th Cir. filed Dec. 7, 2018); Brief of Appellee, *In re Facebook Internet Tracking Litigation*, No. 17-17486 (9th Cir. filed July 30, 2018); Reply in Support of Motion of Defendant Facebook, Inc. to Dismiss Plaintiffs' First Amended Consolidated Complaint, *In Re: Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843 (N.D. Cal. filed May 5, 2019); Facebook's Notice of Mot. & Mot. To Dismiss Cons. Complaint, *Schmidt v. Facebook, Inc.*, No. 3:18-cv-05982 (N.D. Cal. filed Mar. 14, 2019); Defendants' Join Reply in Support of Their Motion to Dismiss the Complaint, *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943 (N.D. Cal. filed Aug. 22, 2016) (No. 5:16-cv-01282).

the statute. *Id.* at 1549–50 (citing *FEC v. Akins*, 542 U.S. 11 (1998); *Public Citizen v. DOJ*, 491 U.S. 440 (1989)).

For four decades, this Circuit has made clear that withholding of agency records under Exemption 4 must be “justified by the legislative purpose which underlies the exemption.” *Nat’l Parks*, 498 F.2d at 767. When a person is required to disclose information to the federal government, as Facebook was required to do, Exemption 4 protects the submitter from “the competitive disadvantages which would result from its publication.” *Id.* at 768. Thus, to withhold documents under Exemption 4, an agency must prove that disclosure would “be likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* at 770. Therefore, Facebook must show that disclosure would be likely to cause the company substantial competitive harm.

Facebook has failed to explain how disclosure of the information EPIC seeks could cause the company *any* competitive harm (let alone substantial harm). Facebook has not provided any information about its competitive position or explained how any other business could use the FTC records at issue to cause Facebook competitive harm. Without this information, Facebook cannot establish that it is likely to suffer an injury in fact absent intervention. Facebook’s allegation that “[t]his action threatens to impair Facebook’s interest in protecting the confidentiality of its documents,” Mot. 7, is not sufficient.

All but two of the cases that Facebook cites to support its standing to intervene were decided before *Spokeo*. See Mot. 9–11 (citing *Safari Club Int’l v. Salazar*, 281 F.R.D. 32 (D.D.C. 2012); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4 (D.D.C. 2010); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015);

*100Reporters LLC v. DOJ*, 307 F.R.D. 269 (D.D.C. 2014); *Gov't Accountability Project v. FDA*, 181 F. Supp. 3d 94 (D.D.C. 2015); *Appleton v. FDA*, 310 F. Supp. 2d 194 (D.D.C. 2004); *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359 (D.C. Cir. 2005)). Many of the cases that Facebook cites do not even concern third-party standing to intervene in FOIA matters.

Indeed, Facebook does not even discuss *Spokeo* or address the operative Article III standing test in its motion. The only post-*Spokeo* FOIA case that Facebook cites, *American Oversight, Inc. v. U.S. Department of Health and Human Services*, No. 17-827, 2018 WL 4381099 (D.D.C. Aug. 3, 2018), did not concern intervention of a private third party whose standing was in question. The intervenor in *American Oversight* was the Committee on Ways and Means of the House of Representatives and neither of the parties challenged Congress' standing or right to intervene. *Id.* Similarly in *Waterkeeper Alliance, Inc. v. Wheeler*, 330 F.R.D. 1 (D.D.C. 2018)—an APA suit concerning the Environmental Protection Agency's approval of "an Oklahoma program regulating the disposal of coal combustion residuals"—there was no dispute that the industry intervenors would suffer an injury in fact if they were denied "access to the challenged program." *Id.* at 1, 4 n.6.

The failure to address *Spokeo* is especially surprising given that Facebook has repeatedly cited *Spokeo* in its other cases to argue consumers that sue Facebook for privacy violations have not suffered a concrete injury. Indeed, it is a common refrain of Facebook that "Article III standing requires a concrete injury even in the context of a statutory violation." Defendants' Join Reply in Support of Their Motion to Dismiss the Complaint at 3, *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943 (N.D. Cal. filed Aug. 22, 2016) (No. 5:16-cv-01282).

In several cases, Facebook has relied on *Spokeo* to argue that consumers' allegations of injury are not concrete. Facebook's brief in *Campbell v. Facebook*, a case now before the Ninth

Circuit where consumers claim that Facebook scanned, used, and disclosed links they shared on Messenger in violation of consumer privacy statutes, is paradigmatic. In the brief, Facebook argued that, “although [the consumers] generically claimed that their privacy was ‘breached’ and their speech ‘corrupted,’ they have not alleged, or offered evidence of, *any* real-world injury.” Defendant-Appellee Facebook, Inc.’s Supplemental Brief Re: *Spokeo, Inc. v. Robins* at 10, *Campbell v. Facebook, Inc.*, No. 17-16873 (9th Cir. filed May 29, 2019) (emphasis in original). Facebook went on to argue that “[i]f plaintiffs could establish Article III standing merely by claiming their privacy rights were ‘invaded’ by the challenged conduct, the injury-in-fact requirement would be meaningless.” *Id.* at 13. (citing *Spokeo*, 136 S. Ct. at 1550).

In another case currently before the Ninth Circuit, *Patel v. Facebook*, Facebook argued that plaintiffs suffered “no real-world harm” from Facebook’s collection and use of consumers’ biometric face data without statutorily mandated disclosures. Brief of Appellant at 26, *Patel v. Facebook, Inc.*, No. 18-15982 (9th Cir. filed Dec. 7, 2018). Facebook argued that “the mere assertion that a plaintiff’s ‘privacy’ has been ‘violated,’ untethered to any allegation of injury or risk of injury, cannot substitute for the ‘factual showing of perceptible harm’ required for standing.” *Id.* at 30 (quoting *Lujan*, 504 U.S. at 566). Facebook has also cited to *Spokeo* to support arguments that disclosure of private data does not always result in a concrete injury. *See, e.g.*, Defendant-Appellee Facebook, Inc.’s Supplemental Brief Re: *Spokeo, Inc. v. Robins*, *Campbell v. Facebook, Inc.* at 10–11, No. 17-16873 (9th Cir. filed May 29, 2019); Reply in Support of Motion of Defendant Facebook, Inc. to Dismiss Plaintiffs’ First Amended Consolidated Complaint at 1, *In Re: Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843 (N.D. Cal. filed May 5, 2019).

**II. Facebook has not shown that its legally protected interests would be impaired by disclosure of the agency records at issue.**

Facebook cannot establish standing or intervene under Rule 24 if its legally protected interests would not be impaired by disclosure of the agency records at issue. Intervention as a matter of right under Federal Rule of Civil Procedure 24(a) requires the satisfaction of four factors:

(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.

*Gov't Accountability Project v. FDA*, 181 F. Supp. 3d 94, 95 (D.D.C. 2015) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). A potential intervenor may only intervene as a matter of right if it "claims an interest relating to the property or transaction that is subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). As to the third factor required under Rule 24(a), the Court considers "the 'practical consequences' of denying intervention." *Fund For Animals*, 322 F.3d at 735 (internal quotation marks omitted). The legally protected interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Sierra Club v. McCarthy*, 308 F.R.D. 9, 11 (D.D.C. 2015) (quoting *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D.D.C. 2012)) (internal quotations omitted).

Facebook claims to have a legally protected interest under FOIA Exemption 4 and Section 6(f) of the FTC Act, but these statutes do not protect the company's interest in information that *the company considers confidential*. Both laws require that a business seeking to prevent disclosure of confidential information establish that "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure." *Nat'l Parks & Conservation*

*Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). Facebook has not alleged facts sufficient to satisfy either requirement. Facebook's claim that the FTC records at issue contain "internal policies and procedures, and discussions of new business acquisitions, among other confidential business information" that would be made public if EPIC prevailed, is not sufficient to establish a legally protected interest that would be impaired by disclosure. Mot. 7–8.

The cases that Facebook cites are also clearly distinguishable. The court in *M/A-COM Info. Sys. v. HHS*, 656 F. Supp. 691 (D.D.C. 1986), was evaluating the withholding of information that a business had *voluntarily* provided to the government during a settlement negotiation. Information that businesses provide on a voluntary basis is subject to a different standard articulated in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (explaining that information voluntarily provided it is protected unless it is customarily disclosed to the public by the submitter). As the Court in *Critical Mass* explained, the substantial competitive harm test of *National Parks* remains in effect for cases "in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government." *Id.* Facebook was obliged to furnish the records at issue in this case to the FTC as a result of the investigation and Consent Order.

The primary case upon which Facebook relies, *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115 (D.D.C. 2017), is distinguishable because the business in that case (Seimens) provided evidence of their competitive position and explained how the disclosure of the specific records at issue would result in substantial competitive harm. *Id.* at 142–143. The court in *100Reporters* also specifically found that "Seimens faces actual competition." *Id.* at 142. Facebook has made no similar allegation that they face actual competition or that release of the records at issue would

cause substantial competitive harm. In fact, there is every reason to doubt that Facebook faces actual competition related to the business practices discussed in the FTC records.

The number of users on Facebook's social media platforms far exceeds that of all other platforms. Facebook's core products—Messenger, WhatsApp, and Instagram—have a combined 6.2 billion monthly active users, whereas all non-Facebook platforms combined—including YouTube, WeChat, TikTok, Reddit, LinkedIn, Twitter, and Snapchat—have an estimated 4.75 billion monthly active users. Chris Hughes, *It's Time to Break Up Facebook*, N.Y. Times (May 9, 2019).<sup>10</sup> As a result of their market dominance, many have called for investigations of Facebook, including the Chairman of the House Antitrust Subcommittee. Letter from Representative David Cicilline, H. Antitrust Subcomm. Chairman, to Fed Trade Comm'n Comm'rs (March 19, 2019).<sup>11</sup>

When nascent competitors have emerged, Facebook has simply acquired them. Facebook has acquired 92 companies since 2007. Tim Wu and Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. Times (June 7, 2019).<sup>12</sup> Of those 92 companies, 39 were shut down by Facebook following their acquisition. *Id.* This suggests that Facebook may be acquiring competitors to remove them from the marketplace. In other cases, Facebook has been able to establish greater market dominance through its acquisitions, most notably with the acquisitions of WhatsApp and Instagram, which are responsible for much of the company's growth. WhatsApp and Instagram could have been viable competitors to Facebook in the mobile messaging and social media markets. But instead, Facebook is now integrating these three services into a single

---

<sup>10</sup> <https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html>.

<sup>11</sup> [https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Facebook\\_FTC.pdf](https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Facebook_FTC.pdf).

<sup>12</sup> <https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html>.

messenger. Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. Times (Jan. 25, 2019).<sup>13</sup>

Facebook has also not shown that it would suffer a substantial competitive harm as a result of disclosure of the specific records in this case. Facebook simply asserts that it has “an interest in maintaining the confidentiality” of its business information, which it describes as “internal policies and procedures, and discussions of new business acquisitions.” Mot. 7. Notably absent from Facebook’s motion is any mention of the privacy assessments, which were the central focus of EPIC’s FOIA request.

An agency cannot withhold records under Exemption 4 based on a “conclusory and generalized allegations of substantial competitive harm” *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). Facebook in its motion does little more than refer vaguely to “internal policies and procedures, and discussions of new business acquisitions” discussed in the FTC communications records. Mot. 13. Facebook does not even attempt to explain how the release of that information could cause substantial competitive harm. And the nature and context of the records indicate that Facebook would not suffer any competitive harm as a result of disclosure.

Facebook cannot prevent disclosure of the redacted information simply to avoid more bad publicity on its privacy practices. Harms caused by “embarrassing disclosure[s],” *United Technologies Corp. v. DOD*, 601 F. 3d 557 (D.C. Cir. 2010), or disclosures which could cause “customer or employee disgruntlement,” *Public Citizen*, 704 F.2d at 1291, are not cognizable under the competitive harm prong of Exemption 4. *See, e.g., CNA Financial Corp. v. Donovan*,

---

<sup>13</sup> <https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html>.

830 F.2d 1132, 1154 (D.C. Cir. 1987); *In Defense of Animals v. USDA*, 587 F. Supp. 2d 178, 182 (D.D.C. 2008).

Disclosure of the records at issue would not likely have any impact on Facebook's competitive interests because they contain information about Facebook's *prior* business practices going back to 2011, not about Facebook's current business practices. Facebook has changed its privacy practices several times while under the consent decree. *See e.g.*, Simon Cross, *What to Expect on April 30 – Upgrading to Graph API and the New Login*, Facebook (Apr. 28, 2015);<sup>14</sup> Facebook, *Cracking Down on Platform Abuse* (Mar. 21, 2018);<sup>15</sup> Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. Times (Jan. 25, 2019). The redacted assessments and communications detail privacy policies since 2012 bear little relevance on Facebook's current practices.

It is likely that the release of the privacy assessments would be most significant to Facebook's users, not to business competitors. After the Cambridge Analytica revelations, Google searches for "delete Facebook" spiked, Damon Beres, *'Delete Facebook' Searches Hit 5-year High on Google After Cambridge Analytica crisis*, Mashable (Mar. 22, 2018),<sup>16</sup> and 54% of adult Facebook users adjusted their privacy settings. Andrew Perrin, *Americans Are Changing Their Relationship with Facebook*, Pew Rsch. Ctr. (Sept. 5, 2018).<sup>17</sup> Users leaving a platform because they disapprove of the company's practices is a sign of the market functioning correctly, not a sign of competitive harm.

---

<sup>14</sup> <https://developers.facebook.com/blog/post/2015/04/28/april-30-migration/?ref=hp>.

<sup>15</sup> <https://newsroom.fb.com/news/2018/03/cracking-down-on-platform-abuse/>.

<sup>16</sup> <https://mashable.com/2018/03/22/delete-facebook-searches-cambridge-analytica/>.

<sup>17</sup> <https://www.pewresearch.org/fact-tank/2018/09/05/americans-are-changing-their-relationship-with-facebook/>.

The effectiveness of the FTC's enforcement of the 2011 consent order is now a matter of national concerns. Since the Cambridge Analytica breach in March 2018, the problems have only increased:

- Russian-linked Facebook ads for “FaceMusic”—a Chrome extension infected with malware—targeted American girls aged 14–17. Issie Lapowsky, *Russia-Linked Facebook Ads Targeted a Sketchy Chrome Extension at Teen Girls*, *Wired* (May 12, 2018).<sup>18</sup>
- Facebook's special arrangements with device manufacturers (including Apple, Amazon, Microsoft, Blackberry, and Chinese company Huawei) to override user privacy settings allowed companies to access sensitive information that users had explicitly set to private. Gabriel J.X. Dance, Nicholas Confessore, & Michael LaForgia, *Facebook Gave Device Makers Deep Access to Data on Users and Friends*, *N.Y. Times* (June 3, 2018).<sup>19</sup>
- Facebook admitted to Congress that it gave dozens of companies, including Russian internet giant Mail.ru, extended access to the personal data of users' friends after it had claimed publicly that it cut off that access in 2015. Letter from Facebook, Inc. to Greg Walden, Chairman, Frank Pallone, Ranking Member, and Members of the H. Energy & Commerce Comm. (June 30, 2018).<sup>20</sup>
- Hackers exploited software bugs to access 30 million Facebook profiles, enabling these hackers to take over the accounts as if they were their own and to potentially gain access

---

<sup>18</sup> <https://www.wired.com/story/russia-facebook-ads-sketchy-chrome-extension/>.

<sup>19</sup> <https://www.nytimes.com/interactive/2018/06/03/technology/facebook-device-partners-users-friends-data.html>.

<sup>20</sup> <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/House%20QFRs.compressed.pdf>.

to third party apps that use Facebook Login. Facebook, *An Important Update About Facebook's Recent Security Incident* (2019).<sup>21</sup>

- Facebook waited two months to disclose to the public that a software bug allowed approximately 1,500 third-party apps to wrongly access the photos of up to 6.8 million users. Brian Barrett, *Facebook Exposed 6.8 Million Users' Photos to Cap Off a Terrible 2018*, *Wired* (Dec. 14, 2018).<sup>22</sup>
- Facebook disclosed personal user data to over 150 companies—including Amazon, Microsoft, Netflix, and Spotify—after it claimed it had ended the practice. Gabriel J.X. Dance, Nicholas Confessore, & Michael LaForgia, *As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants*, *N.Y. Times* (Dec. 18, 2018).<sup>23</sup>

These are only the privacy abuses reported in the past year; there have been many more since 2012 that could be known to the public if the FTC would release to EPIC the records obtained under the agency's consent order. Facebook is currently under FTC investigation for failure to comply with its consent decree. Fed. Trade Comm'n, *Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices* (March 26, 2018).<sup>24</sup>

### **III. The court should not grant permissive intervention under Rule 24(b).**

Facebook also seeks intervention by permission. Fed. R. Civ. P. 24(b). To litigate a claim on the merits, the “putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of

---

<sup>21</sup> <https://www.facebook.com/help/securitynotice>.

<sup>22</sup> <https://www.wired.com/story/facebook-photo-api-bug-millions-users-exposed/>.

<sup>23</sup> <https://www.nytimes.com/2018/12/18/technology/facebook-privacy.html>.

<sup>24</sup> <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

law or fact in common with the main action.” *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). District courts, however, “have the discretion . . . to deny a motion for permissive intervention” even if all three requirements of the rules are met. *Id.* at 1048. When exercising discretion under Rule 24(b), Courts may also consider whether the putative intervenor will “significantly contribute to . . . the just and equitable adjudication of the legal question presented.” *Sierra Club*, 308 F.R.D. at 12.

Though Facebook claims in a footnote that it is an “open question” in this Circuit whether permissive intervention requires Article III standing, the D.C. Circuit has “declined to review the denial of a Rule 24(b) motion once [it has] determined the potential intervenor lacked standing.” *Def. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013). According to this Court, “Article III standing is a factor that undercuts a claim for permissive intervention.” *NYC C.L.A.S.H., Inc. v. Carson*, No. 18-1711, 2019 WL 2357534, at \*3 (D.D.C. June 4, 2019). Facebook has failed to demonstrate that it has Article III standing and the Court should weigh this consideration as a factor that cuts against intervention.

The legal question in this case is whether the FTC has improperly withheld agency records in violation of the FOIA. The burden is on the FTC to prove that the withholdings are properly justified. Facebook’s proposed defenses would be the same as those asserted by the FTC under Exemption 4. Mot. 12. Allowing Facebook to intervene would do little more than duplicate arguments that the FTC is already making and will not “significantly contribute to . . . the just and equitable adjudication of the legal question presented.” *Sierra Club*, 308 F.R.D. at 12; *c.f. Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 313 (D.D.C. 2011) (denying the motion of an industry organization to intervene because the organization’s expertise was “not at issue in the

case”). Facebook has not claimed in its motion that it would make arguments that are different from those the FTC would offer.

Facebook has failed to demonstrate that it can contribute to the litigation as an intervenor in a way that it could not as a witness, declarant, or *amicus curiae*. Courts have denied intervention in similar circumstances. For example, in *National Association of Home Builders v. U.S. Army Corp of Engineers*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007), the Court denied an environmental organization’s motion to intervene because it did not have standing and did not satisfy the elements of permissive intervention. Instead, the court granted the environmental organization permission to participate as *amicus curiae* because the organization “sought to support the government’s arguments” and because “the court may benefit from [the organization’s] input.” *Id.* at 93.

\* \* \*

The Court should not permit Facebook to intervene because the company has not demonstrated Article III standing, a legally protected interest that would be impaired by disclosure, or that Facebook’s participation would contribute to the adjudication of the legal questions presented that the government will not already put forth in its defense.

### CONCLUSION

For the above reasons, this Court should grant EPIC’s Opposition and deny Facebook’s Motion to Intervene.

Respectfully Submitted,

MARC ROTENBERG, D.C. Bar #422825  
EPIC President and Executive Director

/s/ Alan Butler  
ALAN BUTLER, D.C. Bar #1012128  
EPIC Senior Counsel

ELECTRONIC PRIVACY INFORMATION  
CENTER  
1718 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20009  
(202) 483-1140 (telephone)  
(202) 483-1248 (facsimile)

*Attorneys for Plaintiff EPIC*

Dated: June 14, 2019