**No. 18-15982**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE FACEBOOK BIOMETRIC INFORMATION PRIVACY LITIGATION

CARLO LICATA, ADAM PEZEN, and NIMESH PATEL,
individually and on behalf of all others similarly situated,
*Plaintiffs-Appellees*,

*v.*

FACEBOOK, INC.,
*Defendant-Appellant.*

On Petition for Permission to Appeal from the
United States District Court for the Northern District of California
No. 3:15-cv-03747 (Donato, J.)

## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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* *Application for admission to the bar of the United States Court of Appeals for the Ninth Circuit pending*

October 16, 2018

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file the accompanying amicus curiae brief in support of appellant Facebook, Inc. As described further below, although the Chamber's unopposed amicus submission in support of Facebook's Rule 23(f) petition was accepted by the Court, Plaintiffs have not consented to this filing.

1. The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus briefs in cases raising issues of concern to the nation's business community. Members of the Chamber regularly face abusive class action litigation, including litigation brought under state law. The Chamber thus often participates as an amicus in cases raising significant questions of class action law. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

To that end, the Chamber filed an amicus brief in support of Facebook's Rule 23(f) petition in May 2018. *See* Chamber of Commerce Br., No. 18-80053 (May 7, 2018), Dkt. 6-2.; Order, No. 18-80053 (May 29, 2018), Dkt. 24 (granting motion for leave to file). Plaintiffs consented to that motion for leave to file.

2. The Chamber's participation at the merits stage of this appeal is also warranted. The Chamber has a direct interest in this case, which presents questions of exceptional significance to class action law. As the Chamber's proposed amicus brief explains, the District Court's decision is legally flawed and, if left standing, risks significant harm to U.S. businesses. The court certified a class without requiring any showing of real-world harm beyond a bare statutory violation, in violation of Article III and the Illinois Biometric Information Privacy Act. The court also improperly applied the act outside Illinois's borders.

The Chamber's proposed amicus brief will aid the Court, as it will offer the Chamber's perspective on important questions of class action law. These questions are important not only to the parties, but also to all defendants subject to class actions within this Circuit and to U.S. businesses and consumers more generally who face abusive class litigation. Furthermore, the issues addressed by the proposed amicus brief are directly relevant to the disposition of Facebook's appeal because they underscore the importance of the District Court's legal errors to class action defendants, including technology companies, such as Facebook.

3. As noted above, Plaintiffs have not consented to this filing. Plaintiffs have instead suggested that counsel for the Chamber violated Appellate Rule 29(a)(4)(E) by failing to disclose in the Rule 23(f) petition-stage amicus brief that certain lawyers listed on the signature block for the Chamber's law firm in this matter, WilmerHale, represent or have represented Facebook in other, unrelated matters. Although Plaintiffs have cited no authority in support of their interpretation of Rule 29, Plaintiffs have withheld their consent to the filing of the Chamber's amicus brief unless specific representations of Facebook by those lawyers are disclosed.

It is a matter of public record that WilmerHale represents or has represented Facebook in other matters, but there is no legal basis for Plaintiffs' novel disclosure demand. As the Chamber's counsel explained to Plaintiffs' counsel in requesting their consent, Plaintiffs' understanding of the Rule 29 disclosure requirement is incorrect. Rule 29(a)(4)(E) requires, in part, the disclosure of whether "a *party's counsel* authored the brief in whole or in part." Fed. R. App. P. 29(a)(4)(E)(i) (emphasis added). That provision obviously requires disclosure as to whether a party's counsel *in the case* in which the amicus brief is being submitted authored the amicus brief in whole or in part. WilmerHale is "counsel" in this case only to the Chamber, and the Chamber is not a "party[]" in this litigation. WilmerHale does not represent Facebook in this matter, and Facebook's

counsel in this case (Mayer Brown) did not author the petition-stage amicus or the proposed merits amicus brief in whole or in part. The Rule 29 certifications in the Chamber's prior brief and in its proposed brief here are thus accurate.

The fact that WilmerHale represents (or has represented) Facebook in other matters is not subject to the Rule 29 disclosure requirement, and we are aware of no contrary authority. The Rule 29(a)(4)(E) disclosure requirement was added to the Federal Rules of Appellate Procedure in 2010. The purpose of the disclosure requirement, as the 2010 Rules Advisory Committee Notes explain, is "to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." Fed. R. App. P. 29 Advisory Committee's Notes to 2010 amendment. In other words, the Rule serves "to prevent amicus briefs from being used by parties to skirt length limitations on their own briefs," *Federal Appellate Practice: Ninth Circuit* § 16:6 (Nov. 2017)—which could occur in situations in which a party's counsel authored part or all of an amicus brief in support of the party. The Rule 29 disclosure requirement at issue obligates the amicus to make that fact known. That purpose is not implicated where, as here, an amicus brief is authored entirely by non-party counsel and submitted on behalf of a non-party.[1]

[1] The history of the adoption of the Rule 29 disclosure requirement reinforces these points. The Advisory Committee's Notes, in explaining the purpose of the Rule 29(a)(4)(e) requirement, point to the Eleventh Circuit's decision in *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003). The Eleventh Circuit there recognized that "attorneys for parties" not only "solicit amicus briefs in support of their

Because Rule 29(a)(4)(E) does not require the disclosures that Plaintiffs demand, the Chamber does not agree to such disclosures as a condition for Plaintiffs' consent to the filing of this brief. The Chamber respectfully requests that the Court grant leave to file the proposed *amicus* brief submitted here.

Respectfully submitted,

/s/ Kelly P. Dunbar

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position," but sometimes "have a hand in writing [the] amicus brief[s]"—an outcome that could be used to "evad[e] the page limitations on a party's briefs." *Id.* at 919. Moreover, the Rule 29(a)(4)(e) disclosure was "modeled on Supreme Court Rule 37.6." Fed. R. App. P. 29 Advisory Committee's Notes to 2010 amendment. Supreme Court Rule 37.6 was adopted in 1997 in response to "known instances where a counsel for a party not only solicited or inspired the filing of an amicus brief but also wrote all or substantial portions of that brief," thus skirting length limitations. Gressman *et al.*, *Supreme Court Practice* § 13.14, at 739 (9th ed. 2007). Again, Mayer Brown did not write the Chamber's proposed amicus brief in whole or in part, so those purposes are not implicated here. And Plaintiffs' demand for disclosures about WilmerHale's representations of Facebook in other matters is unrelated to ensuring the integrity of page limits.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of October, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR

## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

1. Exclusive of the exempted portions of the motion, as provided in Rule 32(f), the motion contains 1177 words.

2. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Rule 32(g)(1), the undersigned has relied upon the word-count feature of this word processing system in preparing this certificate.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus* briefs in cases raising issues of concern to the nation's business community.[1]

Members of the Chamber regularly face abusive class action litigation, including litigation brought under state law. The Chamber thus often participates as an *amicus* in cases raising significant questions of class action law. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc). The Chamber has a strong interest in ensuring that courts faithfully apply the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013),

[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than *amicus*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to prevent abuse of the class action mechanism. To that end, the Chamber filed an *amicus* brief in support of Facebook's Rule 23(f) petition. *See* Chamber of Commerce Br., No. 18-80053 (May 7, 2018), Dkt. 6-2; Order, No. 18-80053 (May 29, 2018), Dkt. 24 (granting motion for leave to file).

The District Court certified a vast class of potentially millions of Facebook users seeking billions of dollars in damages despite the absence of any allegations of real-world harm to anyone. Because that decision presents questions of exceptional significance, the Chamber has a direct interest in this Court's reversal of class certification.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly emphasized that a "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). As a result, parties "seeking to maintain a class action 'must affirmatively demonstrate [their] compliance with'" Federal Rule of Civil Procedure 23, and district courts must "'rigorous[ly]'" assess compliance with the rule's requirements. *Id.*; *see also In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018). Facebook's brief persuasively explains the multiple legal errors underlying the District Court's

class-certification decision. The Chamber writes separately to emphasize two points of special significance to the business community more broadly.

*First*, the District Court improperly certified a "no-injury" class action, allowing the suit to proceed without any showing of concrete harm beyond a bare statutory violation. That decision resulted from two independent errors, one constitutional and the other statutory: the court both misapplied Article III standing doctrine and misinterpreted the Illinois Biometric Information Privacy Act's ("BIPA") "aggrieved" requirement. As Facebook convincingly explains, these errors conflict with Article III precedent, state law, and Rule 23. *See* Facebook Br. 20-33, 45-53.[2] What's more, their combined practical effect poses a significant threat to businesses. "No-injury" class actions such as this case—allowing potentially millions of Facebook users to sue for potentially billions of dollars in damages without demonstrating that anyone suffered any real-world harm—impose enormous burdens on U.S. businesses. That burden is especially substantial for technology companies, such as Facebook.

*Second*, the District Court gave BIPA an impermissibly expansive geographic scope. All agree that the Illinois legislature did not intend BIPA to apply beyond the State's borders. Yet the District Court held that the statute

[2] Citations to Facebook's brief here are to a redacted version of the as-filed brief produced by Facebook.

applies to all Facebook users located in Illinois—regardless, for example, of where a Facebook user subscribed to Facebook, where the user read Facebook's Data Policy, or where any alleged injury occurred. That holding directly conflicts with Illinois law, as Facebook correctly explains. *See* Facebook Br. 34-45. Furthermore, by permitting Illinois law to apply extraterritorially, overriding the policy judgments of other states regarding the regulation of biometric data, the District Court's misinterpretation of BIPA raises serious constitutional concerns under the federal dormant Commerce Clause. The extraterritorial application of BIPA also risks significant harm to business. Broad nationwide application of one state's law could chill investment and innovation in emerging technologies with great potential for social benefit, such as those in the biometrics field.

For these reasons and for the reasons fully explained by Facebook, this Court should reverse the District Court's class-certification decision.

## ARGUMENT

### I. The District Court's certification of a no-injury class action violates Article III and Illinois law.

The District Court certified a class of millions of Facebook users seeking potentially billions of dollars in damages without requiring *any* showing of harm beyond a bare statutory violation. As Facebook ably explains, that decision rests on at least two manifest legal errors. *First*, in conflict with governing precedent, the District Court held that plaintiffs had Article III standing because they "were

deprived of procedures [under BIPA] that protected privacy interests," even though they had not alleged "any attendant embarrassment, job loss, stress or other additional injury." ER22. Remarkably, the court not only failed to require any showing of real-world harm, it held that the plaintiffs had demonstrated standing despite their concessions that they were not, in fact, harmed. *Second*, the District Court held that an unadorned statutory violation satisfied BIPA's "aggrieved" requirement based on an undefined statutory privacy interest. ER9-10.

Unless corrected, these constitutional and statutory errors will encourage no-injury class actions. Such suits risk devastating consequences for U.S. businesses, particularly technology companies such as Facebook, as this case well illustrates.

### A. The plaintiffs lack Article III standing because they suffered no real-world harm.

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). This constitutional requirement is not "automatically satisfie[d] … whenever a statute grants a person a statutory right and purports to authorize that person to sue." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Rather, "even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff."

*Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).[3]

Because standing is "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). So to move past the summary judgment stage, plaintiffs must point to evidence in the record of specific facts, which, taken as true, establish standing. *Id.*; *see* Fed. R. Civ. P. 56(c)(1)(A). Moreover, this Court may properly consider injury-in-fact on interlocutory appeal because standing is an Article III requirement for federal jurisdiction. *E.g.*, *Civil Rights Educ. & Enf't Ctr. v. Hospital Props. Tr.*, 867 F.3d 1093, 1098-1099 (9th Cir. 2017).

This Court should reverse the District Court's class-certification decision because the plaintiffs have not remotely satisfied their injury-in-fact requirement. As Facebook demonstrates, the plaintiffs not only failed to introduce evidence of injury, they acknowledged that they did not suffer *any* negative consequences from Facebook's purported violations of BIPA. *See* Facebook Br. 20-33. The single

[3] Besides showing that a statutory violation has caused them concrete harm, the plaintiffs also must demonstrate that "the statutory provisions at issue were established to protect [their] concrete interests (as opposed to purely procedural rights)." *Robins*, 867 F.3d at 1113. The Chamber agrees with Facebook that the plaintiffs have not made that showing. *See* Facebook Br. 22-26.

theoretical harm that the plaintiffs did assert—a so-called "invasion of privacy"—by itself cannot support standing. *Id.* at 29-31.

The plaintiffs' failure to demonstrate—indeed, their disavowal of—any concrete, real-world harm caused by Facebook's purported conduct defeats their Article III standing. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1549; *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 783 (9th Cir. 2018) (holding that alleged violation of federal privacy statute did not support Article III standing because printing receipt displaying the plaintiff's credit card expiration date did not pose "any risk of harm" that is "real" and otherwise caused no "concrete harm"). Moreover, as explained further below, by misapplying Article III standing doctrine, the District Court also wrongly permitted a no-injury class suit to proceed in violation of Illinois law.

### B. Without real-world harm, the plaintiffs also are not "aggrieved" within the meaning of BIPA.

BIPA's private right of action extends only to those "aggrieved by a violation of this Act." 740 ILCS 14/20. As one Illinois appellate court has held, "[i]f a person alleges only a technical violation of [BIPA] without alleging any injury or adverse effect, then he or she is not aggrieved and may not recover." *Rosenbach v. Six Flags Entm't Corp.*, __ N.E.3d __, 2017 IL App (2d) 170317, ¶ 28 (Dec. 21, 2017).[4]

[4] The Illinois Supreme Court has agreed to hear *Rosenbach*. *See* 98 N.E.3d 36 (Ill. 2018) (Table). As Facebook explains, an Illinois Appellate Court decision

The District Court nonetheless held that the plaintiffs satisfied BIPA's "aggrieved" requirement because they "sufficiently alleged" an "injury to a privacy right." ER9-10. That holding is wrong as a matter of Illinois law, as Facebook explains. *See* Facebook Br. 45-48. An "injury to a privacy right" consisting of no more than a statutory violation is no injury at all. According to the District Court, every alleged violation of BIPA—even absent tangible, real-world consequences for plaintiffs—gives rise to a private suit. That counterintuitive reading defies Illinois law and effectively certified a no-injury class action.

## II. No-injury class actions harm American businesses by exacerbating abusive and burdensome litigation.

The District Court's mistaken standing analysis and its misinterpretation of BIPA's "aggrieved" requirement together enabled this suit to proceed as a no-injury class action. This Court should correct those errors because no-injury class actions foster abusive and costly litigation that harms U.S. businesses generally, and technology companies in particular. This case well illustrates those harms.

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from a different district recently disagreed with that case. *See Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175 (Sept. 28, 2018). The Chamber agrees with Facebook that the Illinois Supreme Court is likely to adopt *Rosenbach*'s interpretation of BIPA. *See* Facebook Br. 46-48. That outcome is especially likely because, as explained here, an overly permissive reading of the statute's "aggrieved" requirement would facilitate harmful no-injury class actions.

### A. Without a harm requirement, class counsel can circumvent Rule 23 and threaten companies with massive unintended liability.

No-injury class actions are uniquely harmful and prone to abuse for several reasons. For starters, without any need to show harm, class counsel can circumvent Rule 23's requirements, obtaining certification of enormous and improper classes. A threshold harm requirement makes class certification harder. The individualized harm issue undermines commonality. *See* Fed. R. Civ. P. 23(a)(2). Class counsel will not be able to show that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (quotation marks omitted). Similarly, predominance cannot be demonstrated if class members must show harm through individualized proof. *See* Fed. R. Civ. P. 23(b)(3). More plaintiff-specific questions mean the proposed class may not be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Here, for example, the District Court made it much easier for the plaintiffs to satisfy commonality and predominance by ignoring the individualized constitutional and statutory harm requirements.

With Rule 23's requirements weakened, moreover, no-injury class actions allow plaintiffs' attorneys to leverage statutory damages for technical violations into threats of massive unintended liability. When provided, statutory damages for

individual plaintiffs are often relatively modest. For example, BIPA permits plaintiffs to recover, for each statutory violation, the greater of actual damages or a set amount of liquidated damages that varies depending on the nature of the violation ($1,000 for negligent violations, $5,000 for intentional or reckless ones). *See* 740 ILCS 14/20(1)-(2); *cf.* 15 U.S.C. § 1681n(a)(1)(A)-(B) (imposing a similar tiered scheme for willful noncompliance with the Fair Credit Reporting Act). Given these amounts, an economically rational plaintiff who suffered *no actual harm* from a technical statutory violation might not choose to sue individually. The litigation costs would easily exceed the potential recovery. But the litigation incentives flip if plaintiffs can aggregate their statutory damages through a class action, because potential recoveries can quickly skyrocket to billions of dollars. *See, e.g.*, Johnston, *High Cost, Little Compensation, No Harm To Deter*, 2017 Colum. Bus. L. Rev. 1, 68-69.

These massive potential damages impose significant costs on the defendant companies and the broader economy. Judge Wilkinson has highlighted these costs in the context of a federal statute. The combination of Rule 23's class action provisions and a "modest range of statutory damages," he warned, may work together to create "a perfect storm in which the two independent provisions combine to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J.,

concurring specially). This perfect storm, Judge Wilkinson recognized, "is a real jobs killer" that Congress could not have intended to sanction in that context. *Id.* As he explained, "the relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives." *Id.*; *accord Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring) ("I do not believe that in specifying a $1,000 minimum payment for Cable Act violations, Congress intended to expose a cable television provider to liability for billions of dollars.").

When a business is threatened with (or incurs) a massive judgment in a no-injury class action, the shareholders are not the only ones who take the hit—the entire company may face ruin, putting employees at risk too. *See Stillmock*, 385 F. App'x at 279 (Wilkinson, J., concurring specially). "It staggers the imagination," Judge Wilkinson observed, "to believe that Congress intended to impose annihilating damages on an entire company and the people who work for it for lapses of a somewhat technical nature and in a case where not a single class member suffered actual harm." *Id.* at 280.

The same goes for the Illinois Legislature. BIPA created a penalty scheme with fixed damages for statutory violations. Given the individual damages amounts at issue, it is impossible to believe the legislature intended to subject

companies to the ruinous potential of no-injury class actions for bare technical violations of the statute's notice-and-disclosure requirements. As Facebook explains, the class action here conflicts with BIPA's design and the Illinois Legislature's intent. *See* Facebook Br. 54-59.

### B. The potential for massive liability distorts litigation incentives, encouraging meritless lawsuits and *in terrorem* settlements.

The potential for massive liability from no-injury class actions distorts litigation incentives for both plaintiffs and defendants at society's expense. Large damage awards encourage meritless litigation with no social benefit. No-injury class actions are highly lucrative for class counsel, who take a slice of the recovery. The large potential attorneys' fees that come with such class actions enrich class counsel without benefiting the class. The "benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). These "chief beneficiaries" are often class counsel, as "class action attorneys are the real principals, and the class representative/clients their agents." 1 Rubenstein, *Newberg on Class Actions* § 3:52, at 327 (5th ed. 2011). And since class counsel takes a proportional share of any recovery, even a small fraction of billions of dollars is a significant incentive to pursue class actions, regardless of their merits. The greater the potential damages, the greater the incentive to bring a

meritless class action with little chance of success in the hopes of extracting an *in terrorem* settlement.

Settlement pressure from no-injury class actions is especially likely to overwhelm defendants because the threat of crushing liability distorts their litigation incentives too. When a large class of uninjured plaintiffs is certified, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2424 n.7 (2014) (recognizing *in terrorem* settlement pressure); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *Parker*, 331 F.3d at 22 ("aggregation in a class action of large numbers of statutory damages claims … could create … an *in terrorem* effect on defendants, which may induce unfair settlements").

As Judge Posner put it, "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant, if only because of the *in terrorem* character of a class action." *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677-678 (7th Cir. 2009) (internal citations omitted). "When the potential liability created by the lawsuit is very great," he explained, "the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. For by aggregating a large number of

claims, a class action can impose huge contingent liability on a defendant." *Id.* at 678 (internal citations omitted). The risk of ruinous liability, and the settlement of weak no-injury class actions, is a major drain on U.S. businesses and thus the entire economy.

Technology companies such as Facebook may be especially vulnerable to abusive no-injury class actions. As this case shows, every day millions of Internet users interact with technology companies to conduct transactions, share content, and connect with people all over the world. Indeed, the Internet's unique efficiency and worldwide reach enable technology companies to deliver enormous value at little or no cost to their users. The resulting huge volume of daily users and interactions exposes technology companies to enormous class actions for minor, technical violations. As a result, technology companies are more likely to face potentially ruinous statutory damages that dramatically amplify the *in terrorem* settlement pressure. *E.g.*, *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013) ($9 million settlement in case alleging statutory damages of $150 billion).

Although all companies face that pressure, technology companies have an especially strong interest in correcting the District Court's improper certification of a no-injury class action. The economic risks that such class actions pose to technology companies is especially significant, as technology companies make

important contributions to both the public interest and the vibrancy of the American economy through investment, research, and innovation. Class actions seeking staggering damages pose a real threat to this vital sector of the economy.

## III. The District Court's extraterritorial application of BIPA is unlawful and threatens additional harm to U.S. businesses.

The District Court also committed manifest error by giving BIPA an overly expansive geographic scope. The court certified "a class consisting of Facebook users located in Illinois for whom Facebook created and stored a face template after June 7, 2011." ER1. This class definition sweeps in conduct occurring outside Illinois even though, as the court recognized, "BIPA does not have extraterritorial reach." ER12. As Facebook explains, the court's misapplication of BIPA conflicts with Illinois law. *See* Facebook Br. 34-45. That error allowed the plaintiffs to avoid yet another individualized issue that should preclude class certification under Rule 23. *Id.* at 45-52. What's more, the District Court's extraterritorial—indeed, effectively nationwide—application of BIPA raises serious constitutional concerns and risks inflicting substantial costs on U.S. businesses.

### A. BIPA does not apply outside Illinois.

Under longstanding Illinois law, a state statute does not apply outside Illinois's borders "unless an intent to do so is clearly expressed." *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 852-853 (Ill. 2005). As both the

District Court and the plaintiffs recognized, BIPA expresses no such intent. ER12. Because all agree that BIPA does not apply extraterritorially, the statute creates liability only for conduct "occurr[ing] primarily and substantially in Illinois." *Avery*, 835 N.E.2d at 854. To fall within BIPA's domestic scope, "the majority of circumstances related to the alleged violation" must have occurred within the State. *Landau v. CNA Fin. Corp.*, 886 N.E.2d 405, 407-409 (Ill. App. Ct. 2008). By contrast, a case falls outside the statute if "a necessary element of liability d[oes] not take place in Illinois." *Graham v. General U.S. Grant Post No. 2665, VFW*, 248 N.E.2d 657, 658-659 (Ill. 1969).

The District Court certified a class of all Facebook users "located in Illinois" for whom Facebook created face templates. As Facebook explains, mere residence is not dispositive under Illinois law. *See* Facebook Br. 34-45. To the contrary, Illinois courts have refused to treat every injury to a resident as domestic, no matter where it occurs. *See Graham*, 248 N.E.2d at 658-659.

### B. Applying BIPA nationwide to all Illinois residents regardless of where the violation took place allows plaintiffs to circumvent Rule 23 and raises serious constitutional concerns.

Treating Illinois residency as dispositive causes two major problems. *First*, it allows certification of improper classes by avoiding yet another highly individualized issue, making it much easier for plaintiffs to satisfy Rule 23(b)'s predominance requirement. Under the correct Illinois standard, "whether a

transaction occurs within this state … must be decided on its own facts." *Avery*, 835 N.E.2d at 854. And which facts matter necessarily varies depending upon each plaintiff's circumstances—"there is no single formula or bright-line test." *Id.* Because Illinois law requires a fact-bound, and multi-factor, analysis to determine whether an alleged BIPA violation is sufficiently domestic, and because that individualized question is a threshold issue for every plaintiff, common issues do not predominate. As Facebook demonstrates, the District Court's overbroad interpretation of BIPA led it wrongly to hold otherwise. *See* Facebook Br. 45-52.

*Second*, extending BIPA to all Illinois residents no matter where the relevant conduct occurred also raises serious constitutional concerns. As for federal statutes, "courts have a duty to construe [Illinois statutes] so as to uphold their validity if there is any reasonable way to do so." *Coram v. State*, 996 N.E.2d 1057, 1074 (Ill. 2013). Unless BIPA supports no other reading, this Court must interpret the act "so as to avoid serious doubt of [its] constitutionality." *Id.* Applying BIPA nationwide to all Facebook users "located in Illinois" puts the act in serious constitutional jeopardy under the dormant Commerce Clause.

The Commerce Clause grants Congress authority "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of power comes with a corresponding "'negative' aspect that denies [states] the power unjustifiably to … burden the interstate flow of articles of

commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of State of Oregon*, 511 U.S. 93, 98 (1994). Known as the "dormant" Commerce Clause, this implied limitation precludes States from "direct[ly] regulati[ng]" transactions that take place wholly outside their borders. *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018). "The mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Id.* at 615.

The dormant Commerce Clause's rule against extraterritoriality vindicates important structural principles of federalism. "The sovereignty of each State … implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). As a result, a state may not "extend [its] police power beyond its jurisdictional bounds." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (no state has "power to project its legislation into [another]"); *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction."). By limiting the States' power to regulate commerce outside their own borders, the Commerce Clause "reflect[s] the Constitution's special concern both with the maintenance of

a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-336 (footnote omitted).

This Court's en banc decision in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015), well illustrates the extraterritoriality rule. California's Resale Royalty Act required "residents" of California who sold fine art to pay a royalty to the artist who created the sold artwork. *Id.* at 1323. This state-law requirement, like the District Court's interpretation of BIPA here, purported to apply to sales that had "no necessary connection with the state [of California] other than the residency of the seller." *Id.* For example, the law applied even if the seller "has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York." *Id.* Because "the sculpture, the artist, and the buyer never traveled to, or had any connection with California," the en banc Court "easily conclude[d] that the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant commerce clause." *Id.*

The same constitutional problem arises here from the class certified by the District Court. Particularly given the parties' agreement that Illinois did not intend BIPA to have extraterritorial reach, this Court should reject the District Court's

broad reading of the act to avoid those serious constitutional concerns. *See Coram*, 996 N.E.2d at 1074.

### C. Extraterritorial application of BIPA would impede regulatory experimentation and stifle innovation.

Beyond its legal infirmity, the District Court's extraterritorial expansion of BIPA threatens significant harm for American businesses. Under the court's misreading of the act, any alleged violation identified by an Illinois resident creates liability, no matter how attenuated the connection between the violation and the State. That rule invites abuse. For example, Illinois courts could adjudicate a BIPA claim where a plaintiff signed up for Facebook, reviewed its notice and consent policies, and uploaded photographs in one State other than Illinois; Facebook stored the photographs on its servers and used its face-recognition software in another; and the alleged reputational damage occurred in still a third state—all because the plaintiff happens to reside in Illinois at the time of suit. This hypothetical is hardly far-fetched. Indeed, as the District Court acknowledged, the class it certified may very well contain plaintiffs with claims just as "peripherally related" as in the above hypothetical. ER14.

Moreover, applying BIPA extraterritorially would force out-of-state businesses such as Facebook to conform their nationwide operations to a confusing patchwork of overlapping state laws. To the extent those laws directly conflict, full compliance may not even be physically possible. The significant compliance

costs and liability risks of extraterritorial Internet regulation would unnecessarily drain companies' resources and stifle innovation in new technologies, such as biometrics.

The District Court's expansive view of BIPA effectively imposes Illinois's policy choices on the entire nation. If, as the court held, an Illinois resident may sue under BIPA for any out-of-state conduct implicating that resident, U.S. businesses would have to assume that BIPA, an *Illinois* statute, could apply to their actions *anywhere* in the nation. For example, if BIPA liability were possible merely because a user eventually moves to Illinois at some point in the future—even if the conduct purportedly violating BIPA was legal when and where it took place—companies would likely err on the cautionary side and comply with BIPA. In this way, the District Court's misinterpretation of BIPA would allow an Illinois statute to regulate the use of biometric data across the country, overriding the considered views of other States, and contrary to Illinois's own decision that the statute should not apply extraterritorially.

Such an expansive interpretation of BIPA will disrupt the States' freedom to experiment and innovate with respect to biometric technologies. Experimentation and innovation, of course, are hallmarks of our federal system. *See, e.g.*, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015); *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018). "Denial of the right to

experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If one State can effectively dictate a single, nationwide standard, however, for a nascent, rapidly innovating technological field such as biometrics, that State could throttle experimentation and innovation for all.

Applying Illinois law so expansively would be particularly unwise for biometrics, an area in which most States have exercised deliberate regulatory restraint. Only three states—Illinois, Washington, and Texas—have enacted laws regulating biometrics, and only Illinois's statute confers a private right of action. Allowing that decision by Illinois to trump other States' views on this emerging technology—especially without any clear intent to legislate extraterritorially—would erode the clarity and predictability that U.S. businesses generally, and technology companies in particular, need to operate nationwide.

Cautious regulation of biometrics makes good policy sense, as overbroad and unnecessary regulation and liability could squelch innovation in this dynamic technological field. Biometric technology holds vast potential. From medicine, to banking, to communications, and beyond, biometric technologies that collect and

analyze human physiological or behavioral characteristics could prove revolutionary. The biometric revolution will never have a chance to get off the ground, however, if States can apply their laws nationwide—risking ruinous liability for minor, technical violations harming no one. Such liability would stifle investment and innovation, and thus jeopardize the enormous social benefits biometric technologies could bring.[5]

## CONCLUSION

For these reasons and the reasons explained by Facebook in its brief, this Court should reverse the decision below.

Respectfully submitted,

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[5] The Chamber also agrees with Facebook that the District Court's certification decision raises serious due process concerns. *See* Facebook Br. 60. This Court has recognized that massively disproportionate statutory damages awards "could implicate due process concerns." *Fraley v. Batman*, 638 F. App'x 594, 597 (9th Cir. 2016). Imposing billions of dollars in liability on Facebook for technical violations causing no actual harm would present just such proportionality concerns. Such a massive judgment would be "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1913).

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/s/ Kelly P. Dunbar
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October 16, 2018

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Signature of Attorney or Unrepresented Litigant [/s/ Kelly P. Dunbar] Date [October 16, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of October, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR