No. 18-15982

IN THE

United States Court of Appeals for the Ninth Circuit

IN RE FACEBOOK BIOMETRIC PRIVACY LITIGATION

NIMESH PATEL, *et al.*,

Plaintiffs-Appellees,

v.

FACEBOOK, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:15-cv-03747-JC
District Judge James Donato

BRIEF FOR *AMICUS CURIAE* INTERNET ASSOCIATION IN SUPPORT OF APPELLANT FACEBOOK, INC. AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Internet Association (the "Association") is a trade association representing leading global internet companies on matters of public policy. The Association does not have any parent corporations and does not issue stock.

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STATEMENT OF COMPLIANCE WITH RULE 29

No party or party's counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to fund this brief's preparation or submission. Though Appellant Facebook, Inc. is a member of the Internet Association, it did not author any part of this brief or make any monetary contribution to fund its preparation or submission.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Internet Association represents more than 40 of the world's leading technology companies, from social networking services and search engines to travel sites and online marketplaces. The Association advances policies that protect internet freedom, promote innovation, and empower small businesses and the public, all while protecting the privacy of consumers. The Association has a compelling interest in the proper application of Article III limits on federal jurisdiction and the rules governing the certification of class actions. The Association is also keenly interested in the proper enforcement of territorial limits on state statutes. The district court's errors below on these scores will render

[1] Perkins Coie LLP and Hogan Lovells US LLP represent Facebook in unrelated matters and have received no money from Facebook to prepare or submit this brief. All parties have consented to the filing of this brief.

technology companies—including the Association's members—uniquely vulnerable to baseless and abusive litigation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In enacting BIPA, the General Assembly of Illinois struck a balance between encouraging the use of biometric technology and safeguarding certain consumer data. Allowing large, no-harm class actions, as the district court did here, without a proper inquiry into whether class members' claims fall within the territorial ambit of BIPA, would upend that balance. It would encourage the use of BIPA as a cudgel to extract lucrative settlements from innovative businesses, including those that have complied with BIPA's requirements and purposes and have not put any user data at risk. To distort BIPA in this fashion would hurt technology companies like the Association's members, and seriously chill the development of new technologies. Biometric technologies serve many useful purposes in our society—from providing new authentication features that enhance security (like the ability to unlock one's phone with a fingerprint), to facilitating the organization and sharing of photographs (like the ability to quickly retrieve photographs stored in a private account), to promoting health and wellness (like allowing for digital patient check-ins at the emergency room). These are applications that millions of people already enjoy, and that offer great potential in the future. It is in no one's

interest that the lawful development and use of biometric technologies be artificially chilled.

The district court made several legal errors to usher in such unwanted consequences. First, the district court misunderstood and misapplied basic principles of Article III standing. None of the Plaintiffs here has alleged, let alone established, that he has suffered any actual harm from the feature at issue in this suit—financial, emotional, or otherwise. The district court nonetheless found Article III standing because Plaintiffs claimed an invasion of a privacy right created by the statute. That finding runs headlong into the black-letter principle that the mere violation of a statute, divorced from concrete harm, is insufficient to show standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). And the effect of that holding is to subject technology companies like the Association's members to class actions claiming exorbitant statutory damages—here running into the billions—that are "unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting, joined by Kennedy, Breyer, and Alito). This Court should not approve that outcome.

Second, the district court misapplied the predominance requirement of Federal Rule of Civil Procedure ("Rule") 23. BIPA is not an extraterritorial statute. For a claim to be cognizable under BIPA—according to the framework

supplied by Illinois law—the circumstances and activities giving rise to the claim must occur primarily and substantially in Illinois. The district court wholly discarded that framework. It reasoned, instead, that any class member's claim will trigger BIPA as long as he or she is "located" in Illinois. ER12-14. Such a ruling not only defies BIPA and Rule 23, but also raises considerable problems under the Dormant Commerce Clause of the U.S. Constitution.

The consequences of class certification rulings like the one below are grave for technology companies and their users. That is true not only for future suits under BIPA, but also for suits brought under other state laws. Under the district court's approach, as long as a group of plaintiffs is "located" in a state and can point to a bare violation of that state's statute through the use of a "modern online service[]," they can certify a class, advance claims pertaining to activities involving that product in all 50 states, and demand extraordinary damages. ER13. In turn, the only way that technology companies will be able to protect themselves from these suits will be to avoid—on a nationwide basis—even arguable violations of the law of the state with the most protective standards. The upshot is that a single state's regulatory regime will govern nationwide. Meanwhile, innovation will be stymied, beneficial products will be eliminated or never created in the first place, and millions of users will lose access to applications they enjoy.

This Court should reverse the district court's ruling and avoid an outcome

that would run counter to the legislative intent, and give nationwide reach to an Illinois statute that was not intended to apply extraterritorially.

ARGUMENT

I. PLAINTIFFS WHO ALLEGE NOTHING MORE THAN BARE STATUTORY VIOLATIONS LACK STANDING AND CANNOT PROCEED WITH A CLASS ACTION.

Affirming the district court's holding would have broad ramifications for the Association and its members. Technology companies, like the Association's members, are frequently subject to opportunistic lawsuits claiming vast statutory damages without real-world harm, however meritless the basis for standing. Affirmance would embolden plaintiffs to pursue more unfounded lawsuits. That would be a stark departure from the basic "role of courts," which is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, *actual harm*." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis added).

Plaintiffs here readily admit that they have suffered no physical, financial, or other tangible or intangible injury. And they make no claim that their alleged biometric data was used for any purpose other than to suggest tags to people they had chosen to connect with. The same goes for the class they wish to certify—there is no common injury of any physical, financial, or tangible nature that class members are alleged to have experienced. Rather, the sole injury that Plaintiffs

and the putative class members claim is that Facebook's violation of BIPA's notice-and-consent procedures is a violation of their "legal privacy rights." *In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD, 2018 WL 1794295, at *6 (N.D. Cal. Apr. 16, 2018). That purported injury is plainly insufficient to meet Article III's standing requirements.

A. Vitiating Article III Standing Requirements Would Have a Substantial and Deleterious Impact on the Association's Members.

1. Allowing litigants to access federal courts based on nothing more than a claimed violation of a state statute risks opening a floodgate to "gotcha" class actions that offer no benefit to the public and instead stifle technology by making useful features and products more costly.

This concern is not hypothetical. The list of companies sued for BIPA violations without a showing of actual harm is long and growing. It includes: American Airlines (finger scan-based timekeeping for employees); Crème de la Crème (fingerscan-based security system at daycare center); Google (photo storage feature that allows users to search by face); Hooters restaurants (finger scan-based timekeeping for employees); Hyatt hotels (same); McDonald's restaurants (same); Roundy's supermarket (same); Shutterfly (photo storage feature that allows users to search by face); Six Flags (finger scan equipment to enter amusement park); and Symphony Healthcare (finger scan-based timekeeping for employees). These are

just a small fraction of the over 100 companies sued under BIPA based on an alleged bare statutory violation since 2015. They do not include the dozens of small and medium businesses that have less name recognition and thus fewer means to defend themselves against these costly lawsuits.

In the circumstances where these cases have been brought in or removed to federal court, those courts have overwhelmingly found that the plaintiffs lacked Article III standing. *See, e.g.*, *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 507-519 (S.D.N.Y.) (dismissing for failure to plead Article III injury in fact), *aff'd in part and judgment modified sub nom. Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017); *Aguilar v. Rexnord LLC*, No. 17 CV 9019, 2018 WL 3239715, at *3 (N.D. Ill. July 3, 2018) (dismissing for lack of Article III standing because "notice and consent violations do not without more create a risk of disclosure"); *Goings v. UGN, Inc.*, No. 17-cv-9340, 2018 WL 2966970, at *4 (N.D. Ill. June 13, 2018) (remanding case because "the privacy and emotional injuries plaintiff alleges are too speculative and abstract to support Article III standing" and because "plaintiff's alleged violation of BIPA's notice provisions is insufficient, on its own, to support federal jurisdiction); *Howe v. Speedway LLC*, No. 17-cv-07303, 2018 WL 2445541 (N.D. Ill. May 31, 2018) (remanding for lack of federal jurisdiction under Article III); *McCollough v. Smarte Carte, Inc.*, No. 16 C 03777, 2016 WL 4077108, at *4 (N.D. Ill. Aug. 1,

2016) (dismissing for lack of jurisdiction because the "plaintiff has alleged the sort of bare procedural violation that cannot satisfy Article III standing"); *see also Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834 (N.D. Ill. 2017) (remanding without deciding whether federal jurisdiction existed where no party argued in favor of federal jurisdiction).[2] The same result should apply here. This Court should vacate the district court's decision with instructions to dismiss for lack of Article III jurisdiction.

2. Allowing class actions to proceed without a showing of harm would also upend the balance struck by the legislature and turn BIPA into a vehicle for extracting outsized settlements. As noted, since 2015, over one hundred BIPA class actions have been filed against businesses nationwide. *See* Brief for Illinois Chamber of Commerce as Amicus Curiae Supporting Defendants-Appellees at 4, *Rosenbach v. Six Flags Entm't Corp.*, No. 123186 (Ill. Sept. 18, 2018) ("Ill.

[2] Cases in which BIPA plaintiffs have survived Article III challenges involve allegations not present here. *See, e.g.*, *Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17 C 8033, 2018 WL 2445292, at *10 (N.D. Ill. May 31, 2018) (exercising jurisdiction based on the plaintiff's allegation that her biometric information was disclosed after being collected). Respectfully, *Monroy v. Shutterfly, Inc*. was wrongly decided. No. 16 C 10984, 2017 WL 4099846, at *8 n.5 (N.D. Ill. Sept. 15, 2017) (finding Article III standing based on the allegation (also not present here) that the plaintiff "had no idea that Shutterfly had obtained his biometric data").

Chamber Amicus Br.")[3]. Without an injury requirement, there is no barrier to filing cookie-cutter class actions in pursuit of BIPA's statutory damages. Indeed, BIPA class actions have been filed principally by the same handful of law firms. *Id.*

The sums at stake can be staggering. BIPA provides that "[a] prevailing party may recover for *each violation*: (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater; [and] (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater." 740 Ill. Comp. Stat. 14/20 (emphasis added). Although no court has ruled on the question, plaintiffs in BIPA class actions have asserted that each individual "scan" of a photograph or fingerprint constitutes a separate violation. Under that theory, the potential damages could quickly reach billions of dollars. Notably, if the district court's order is allowed to stand, the risk of such an astronomical penalty could be brandished—and used to try to extract an *in terrorem* settlement—without the need to show that the purported class members were harmed.

[3] *Available at* http://www.illinoiscourts.gov/SupremeCourt/SpecialMatters /2016/123186 _AMB6.pdf.

Threatening to impose existential damages on technology companies through no-harm class actions would deter innovation—an outcome that the Illinois legislature sought to avoid. As the Illinois General Assembly recognized, biometric technology serves many useful purposes. Among other things, it (1) "promise[s] streamlined financial transactions and security screenings," 740 Ill. Comp. Stat. 14/5(a); (2) allows for scan-based timekeeping systems in the workplace that provide faster and more secure means of authenticating employees and ensuring that they are paid accurately, *see* Brief for The Restaurant Law Center et al. as Amicus Curiae Supporting Defendants-Appellees at 16, *Rosenbach v. Six Flags Entm't Corp*., No. 123186 (Ill. Sept. 18, 2018)[4]; (3) assists with "dispensing of medications, protecting the safety of children at day care centers, and safeguarding radioactive materials," Ex. A, Ill. Chamber Amicus Br. at 6; (4) provides mechanisms for locking homes and belongings that offer consumers and businesses both improved security and increased convenience, *see, e.g.*, Stephan Rabimov, *Evolution on Lock: From Stick to Gate*, Forbes (Dec. 27, 2017, 5:42 PM);[5] (5) protects against gun violence, *see, e.g.*, Don Reisinger, *How Technology*

[4] *Available at* http://www.illinoiscourts.gov/SupremeCourt/SpecialMatters/2016/123186_AMB3.pdf.
[5] *Available at* https://www.forbes.com/sites/stephanrabimov/2017/12/27/evolution-on-lock-from-stick-to-gate/#3a719c2c7cac.

May Make Guns Safer, Fortune (Dec. 3, 2015);[6] (6) offers promising avenues for sharing digital health records between providers, *see* Pew Charitable Trusts, Enhanced Patient Matching Is Critical to Achieving Full Promise of Digital Health Records 18 (Oct. 2018) (patients interviewed "overwhelmingly supported the use of biometrics" as a "unique identifier to improve patient matching"); and (7) and facilitates social activities like organizing and sharing photographs, as Facebook's technology did in this case. The legislature did not intend to deter the development of these beneficial technologies with the prospect of crushing damages.[7]

Consumers appreciate, enjoy, and increasingly expect features like voice and face recognition in the products and services they use. Speech recognition has become increasingly accurate, "with all major platforms reporting an error rate of under 5%." Clark Boyd, *The Past, Present, and Future of Speech Recognition Technology*, Medium: The Startup (Jan. 10, 2018).[8] "[T]he technology is now

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[6] *Available at* http://fortune.com/2015/12/03/safe-gun-tech/.

[7] Indeed, BIPA was never intended to apply to facial recognition based on photographs in the first place. The General Assembly chose expressly to exclude photographs from the definition of "biometric identifier" and to exclude "information derived from" photographs from the definition of "biometric information." 740 Ill. Comp. Stat. 14/10. These exclusions encompass products that use facial recognition technology to organize and share user-uploaded photographs. The district court's reading—that the exclusion for photographs is confined to hard-copy, paper photographs—is entirely untenable. This issue, however, is not before this Court in this appeal.

[8] *Available at* https://medium.com/swlh/the-past-present-and-future-of-speech-recognition-technology-cf13c179aaf.

genuinely useful in the accomplishment of daily tasks," and "consumers are increasingly comfortable making purchases through their voice-enabled devices." *Id.* Seventy-five percent of American homes are projected to have at least one smart speaker by the end of 2020. *Id*. Facial recognition technology is similarly "helping to improve consumers' day-to-day lives—in terms of security, health and convenience." Dan Maunder, *How brands are saving face: five ways facial recognition is improving our lives*, ITProPortal (May 10, 2018).[9] Among other things, facial recognition technology can allow consumers to unlock their smartphones with a glance, streamline airport security screenings, and assist doctors in identifying rare genetic diseases. *Id.*

Certifying a class under BIPA without the rigorous application of Article III standing rules risks imperiling not just social and entertainment uses of biometrics, but also uses that protect people, such as security cameras that can recognize strangers outside the home, fingerprint readers that prevent access to sensitive information, and facial recognition systems that can help locate missing children online. This Court should not undermine these promising technologies.

B. A Bare Statutory Violation Is Insufficient for Standing.

[9] *Available at* https://www.itproportal.com/features/how-brands-are-saving-face-five-ways-facial-recognition-is-improving-our-lives/.

1. Of course, these consequences are all avoidable through a straightforward application of settled standing doctrine. "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. The plaintiff "bears the burden of establishing these elements." *Id*. And in a putative class action, the named plaintiffs must satisfy the Article III requirements themselves. *Id.* at 1547 n.6.

To satisfy Article III, an injury in fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). And to be "concrete," an injury "must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548 (citing Black's Law Dictionary 479 (9th ed. 2009)). The violation of a statute is not, in and of itself, a concrete injury; rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*. at 1549; *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017) ("[E]ven 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.").

Plaintiffs all but concede that they and their proposed class lack standing under these principles. As noted, they do not point to any actual harm beyond the purported violation of BIPA. And pointing to a statutory violation does not relieve a plaintiff of the bedrock requirement to show some "actually exist[ing]" harm. *Spokeo*, 136 S. Ct. at 1548. Plaintiffs also claim a violation of a "legal privacy right." But a violation of BIPA's notice-and-consent provision is not an invasion of privacy. Moreover, couching the statutory violation as a violation of a "legal privacy right," makes no difference; the fact remains that the only harm Plaintiffs can point to is a violation of a statute, rather than an actual, real-world harm. *Robins*, 867 F.3d at 1113.

2. To be sure, a legislature "is well positioned to identify intangible harms that meet minimum Article III requirements," and its judgment is "instructive and important" in the standing analysis. *Spokeo*, 136 S. Ct. at 1549. Thus, a legislature "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). But any such injury must be "concrete" and "*de facto*" in the first place. *Id*. A legislature "cannot erase Article III's standing requirements by statutorily

granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).[10]

BIPA in no way suggests that the collection of biometric data, without more, is a concrete harm. BIPA states on its face that it was motivated by a concern that consumers would be "*deterred* from partaking in biometric identifier-facilitated transactions." 740 Ill. Comp. Stat. 14/5(e) (emphasis added). BIPA thus "represents the Illinois legislature's judgment that the collection and storage of biometrics to facilitate financial transactions is not in-of-itself undesirable or impermissible." *Take-Two*, 235 F. Supp. 3d at 504.

3. Finally, Plaintiffs cannot show that their supposed injuries are "fairly traceable to the challenged action[s] of the defendant." *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). Plaintiffs allege that Facebook violated BIPA by not providing BIPA-compliant notice or obtaining consent before collecting their biometric identifiers, and by failing to publish a retention schedule. Even if these allegations were true, Plaintiffs have not alleged any injury traceable to that conduct. Plaintiffs do not aver that they would have acted differently if they had received BIPA-compliant notice, such as disabling

[10] This is especially true of a state legislature, since state legislatures generally do not have the power to define the jurisdiction of federal courts. *See Finkelman v. Nat'l Football League*, 810 F.3d 187, 196 n.65 (3d Cir. 2016); *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424, 435 (S.D.N.Y. 2015).

Facebook' facial recognition feature. Nor have Plaintiffs alleged an injury due to Facebook's supposed failure to publish a retention schedule. There is thus no causal connection between Facebook's alleged noncompliance and any injuries that Plaintiffs may have suffered, and Plaintiffs lack standing for this reason too. *See Take-Two*, 235 F. Supp. 3d at 515 (BIPA plaintiffs lacked standing in part because they did not "claim that they would have foregone use of the [biometric technology] if they had received more extensive notice and consent").

II. THE DISTRICT COURT'S CLASS CERTIFICATION DECISION IGNORED TERRITORIAL LIMITS OF BIPA AND THREATENS TO IMPOSE A SINGLE STATE'S LAW NATIONWIDE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE.

Aside from its errors concerning Article III standing, the district court's class certification decision was also deeply flawed in its analysis of predominance under Rule 23 and issues connected to extraterritoriality. BIPA does not apply outside of Illinois. To determine whether a particular plaintiff's claim is subject to BIPA, courts apply a multi-factor test. Here, the district court found that individualized questions about extraterritoriality would not predominate under Rule 23 and that there was sufficient similarity among the class members on this issue to warrant class treatment. But the court was able to reach that conclusion only by discarding the extraterritoriality test supplied by Illinois law. Instead, the court invented its own test, suggesting that a claim is subject to BIPA as long as the class member asserting it is "located" in Illinois. ER12-14. That is not how

the extraterritoriality analysis works, and it is not what the legislature would have intended or expected for the enforcement of BIPA. Making matters worse, the district court's approach creates grave problems under the Dormant Commerce Clause: It permits Illinois, through BIPA, to regulate events occurring entirely outside its borders. If left to stand, the court's ruling would create a dangerous precedent for technology companies and their users, both in BIPA cases and beyond.

A. The District Court Found Predominance Only by Gutting the Extraterritoriality Test Under Illinois Law.

The district court acknowledged that BIPA is a statute with only limited application: It "does not have extraterritorial reach" outside of Illinois. ER12. The court also recognized that under Illinois law, the proper test of extraterritoriality is whether "the circumstances relating to the challenged conduct [did or] did not occur 'primarily and substantially within' Illinois." ER13 (quoting *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853 (Ill. 2005)). But in deploying that test as part of its class certification decision, the court concluded that it would be satisfied, and that individualized questions would not predominate, as long as each putative class member is "located" in Illinois. *See* ER12-13. Such a ruling does violence to the legislature's intent when passing BIPA, because it jettisons Illinois' actual extraterritoriality framework.

1. It is a "long-standing rule of construction in Illinois" that "a 'statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute.'" *Avery*, 835 N.E.2d at 852 (quoting *Dur-Ite Co. v. Indus. Comm'n*, 68 N.E.2d 717, 722 (Ill. 1946)); *see also Graham v. Gen. U.S. Grant Post No. 2665, V.F.W.*, 248 N.E.2d 657, 660 (Ill. 1969) ("when a statute . . . is silent as to extraterritorial effect, there is a presumption that it has none"). Here, no one disputes that BIPA has no "extraterritorial effect." *See* ER12. And, because the General Assembly was legislating against the background of Illinois law, there is also no dispute that the legislature would have expected that territorial limit to be enforced through the application of *Avery*. The district court erred by tossing aside Illinois' own extraterritoriality standard and inventing its own.

2. Under Illinois law, "whether a transaction occurs within th[e] state" and thus triggers the application of Illinois-confined statutes is governed by a multi-factor test. *Avery*, 835 N.E.2d at 854. Specifically, conduct will be deemed to fall within an Illinois statute's geographic reach "if the circumstances that relate to the disputed transaction occur *primarily and substantially* in Illinois." *Id.* (emphasis added). The *Avery* test will not be satisfied if a "necessary element of liability did not take place in Illinois." *Graham*, 248 N.E.2d at 659. For instance, if the unlawful act that caused the plaintiff's injury did not occur in Illinois, a "necessary

element of liability" will be lacking and a territorial Illinois statute will not apply. *Id.*

For claims involving the alleged collection of biometric identifiers and therefore implicating BIPA, a proper extraterritoriality evaluation would look nothing like the one the district court used. The disputed violation here contains multiple steps and potentially spans multiple states (or even countries). First, a person signs up for Facebook and agrees to Facebook's policies. Then, someone takes that person's photograph and subsequently uploads it to Facebook. In certain circumstances, after that happens, Facebook performs a facial recognition analysis on the photograph to suggest "tags" to other users. This last step is done according to policies developed and carried out by Facebook. Thus, to determine whether "the circumstances that relate to the disputed transaction" occurred "primarily and substantially" in Illinois, a court would need to consider at least the following:

- the state where the plaintiff signed up for Facebook and went through any notice-and-consent procedure;
- the state where the photograph was taken;
- the state where the photograph was uploaded;
- the state where alleged "scans" of "face . . . geometry" were created;
- the state where these alleged scans were stored;

- the state(s) of residency of the subjects of the photograph as well as of the photographer, both presently and when the photograph was taken;
- the state(s) where the relevant communications between the parties took place; and
- the state where Facebook developed and carried out its policies.

See, e.g., *Avery*, 835 N.E.2d at 854 (considering the residency of the plaintiff, the location of harm, the locations where communications between parties were sent and received, and where company policy was carried out); *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1102 (N.D. Ill. 2017) (in BIPA case, considering adequate for purposes of a motion to dismiss that plaintiffs alleged they were Illinois residents, that their photographs were taken in Illinois, and that their photographs were uploaded from Illinois, but directing parties to develop evidence about where the scans took place and where the lack of consent took place); *Monroy v. Shutterfly, Inc.*, 2017 WL 4099846, at *6 (considering similar factors to determine extraterritoriality under BIPA).

The *Avery* analysis creates problems for the proposed class out of the gate: at least two of the key factors that bear on where the relevant conduct "primarily and substantially" took place point to states other than Illinois. First, Facebook "scanned" and stored every class member's alleged biometric data outside of Illinois because Facebook does not have servers in Illinois and therefore does not

conduct any facial recognition processing in Illinois. Second, as a California company, Facebook developed and carried out its facial recognition policies outside of Illinois. Under these facts, BIPA arguably should not apply to any class member's claim at all. *See Graham*, 248 N.E.2d at 659 (holding that Illinois law did not apply where the "necessary element of liability did not take place in Illinois").

Moreover, the remaining *Avery* factors would differ for each class member. For instance, the states in which the photographs giving rise to each plaintiff's claim were *taken* will differ; the states wherein those photographs were *uploaded* will differ; and the states of residence for the individuals who *appear in* the photographs will differ, both presently and at the time the photograph was taken. Each class member will have signed up for Facebook at a different point in time and in a different place and will have read Facebook's notice-and-consent provisions from different locations. Each class member's connection to Illinois will also vary. If someone technically meets the class definition, he may be a long-time or even permanent resident, or he may have only moved to Illinois recently and/or may have plans to depart soon. These individualized questions about extraterritoriality will overwhelm any common ones in the final analysis.

3. The district court found otherwise, but only by gutting the *Avery* test. The court obliquely determined that the "case is deeply rooted in Illinois," and

proceeded to cite three reasons for that conclusion: the fact that the "named [P]laintiffs are located in Illinois along with all of the proposed class members," the fact that "the claims are based on the application of Illinois law," and the fact that the claims relate to the "use of Facebook mainly in Illinois." ER12. The court's second reason conflated extraterritoriality with choice of law: it is precisely *because* Illinois law applies that the district court must apply Illinois' test of extraterritoriality laid out in *Avery*.[11] And the court's other two reasons for finding that the *Avery* test would be satisfied were either legally erroneous or factually unsubstantiated.

As to the court's focus on each class member's current "locat[ion] in Illinois," ER12, that fact cannot possibly establish that the "circumstances" giving rise to the individual's claim "occur[red] *primarily and substantially* in Illinois." *Avery*, 835 N.E.2d at 854 (emphasis added). The *Avery* test does not turn mechanically on a plaintiff's location at any point in time; it looks to several factors, almost all of which depend on the location where the liability arose. *Landau v. CNA Fin. Corp.*, 886 N.E.2d 405, 407-409 (Ill. App. Ct. 2008); *Graham*, 248 N.E.2d 657. In *Avery* itself, the Illinois Supreme Court considered adopting a

[11] Further, the parties here agreed that *California* law would apply to their relationship, not Illinois law. *See In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1170 (N.D. Cal. 2016). The parties' choice of law is thus a circumstance mitigating *against* the application of BIPA, not in favor of it. *See Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840 (Ill. 1987).

framework that would have turned on the plaintiff's residency, but "went on to adopt *an entirely different test*." *Valley Air Serv. v. Southaire, Inc.*, No. 06 C 782, 2009 WL 1033556, at *12 (N.D. Ill. Apr. 16, 2009) (emphasis added).

It takes no stretch of the imagination to see that many class members located in Illinois presently will fail to satisfy the *Avery* test based on the circumstances of their claims. For example, someone currently "located" in Illinois may have uploaded all of her photos to Facebook from California, where she previously lived while an avid Facebook user, and those photos may depict her in places all over the world. That class member's case is not "deeply rooted in Illinois," and BIPA would not apply to her claim. Likewise, someone "located" in Illinois may appear in pictures uploaded to Facebook by friends who are residents of other states, who took and uploaded the photographs from other states. Again, the substantial conduct giving rise to that individual's claim—the taking of the photographs, uploading of the photographs, and running of Facebook's facial recognition software on the photographs—all would have occurred outside of Illinois. The *Avery* test would not be satisfied. *See Landau*, 886 N.E.2d at 407-409 (under *Avery*, "the *majority* of circumstances relating to the alleged violation" should occur inside Illinois (emphasis added)). Nonetheless, under the district court's "location"-centric approach, the claims of either of the above-described plaintiffs could proceed.

Finally, the court's third reason for finding that extraterritoriality will be satisfied for class members—its observation (at ER12) that this case primarily involves the "use of Facebook mainly in Illinois"—is wholly without support. There are no averments in the complaint that the collection of the alleged biometric data occurred through the "use of Facebook mainly in Illinois." The plaintiffs and proposed class members may *themselves* be Facebook account holders who are located in Illinois and "use" Facebook in Illinois today. But that boils down to the same "location-in-Illinois" factor already discussed, which is not dispositive under *Avery*.

B. The District Court's Extraterritoriality Ruling Raises Problems Under the Dormant Commerce Clause and Will Harm Technology Companies and Users.

The extraterritoriality analysis employed by the court not only defies the legislature's intent in enacting BIPA and the standard for extraterritoriality under Illinois law, it defies the Dormant Commerce Clause. The court's flimsy test for whether a claim is subject to BIPA would result in the statute applying to conduct taking place outside of Illinois. The U.S. Constitution prevents states from attempting such forms of regulation: a state may not "impose its own policy choice on neighboring States," or force foreign residents to live under its particular mandates. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). The practical effect of rulings like the one below is that defendants like Facebook must comply

with a single state's law in all 50 states to avoid liability. That outcome will harm not just technology companies, but also the millions of users of their products who would lose access to features they enjoy.

1. The Dormant Commerce Clause "protects against" the "projection of one state['s] regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst.*, 491 U.S. 324, 335-337 (1989). As the Supreme Court has explained, the "critical inquiry" under the clause "is whether the practical effect of [a state's] regulation is to control conduct beyond the boundaries of the State." *Id.* This Court recently reaffirmed this rule, concluding that a California statute violated the Dormant Commerce Clause where it attempted to regulate "sales that t[ook] place outside California" and had "no necessary connection with the state other than the residency of the seller." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc).

The court's class certification decision below—and specifically, its treatment of issues concerning extraterritoriality—flouts this basic constitutional limit. Under the court's framework, if a class member is "located" in Illinois at the time of filing suit, he or she can advance claims under BIPA irrespective of where the activity giving rise to the claim took place. Even if all the relevant conduct occurred elsewhere—from the taking of the photograph, to the uploading of the photograph, to the collection of the alleged biometric data from the photograph, to

the dissemination of the notice-and-consent disclosures—the district court would permit the claim to proceed. That holding turns BIPA into a brazen Dormant Commerce Clause violation; Illinois would be "directly control[ling]" "conduct" that occurred "wholly outside the boundaries of [the] State." *Healy*, 491 U.S. at 336. "[N]o single State" may "enact" a uniform "policy for the entire Nation" in this manner, whether through regulating biometrics or anything else. *BMW*, 517 U.S. at 571.

2. The court's approach threatens significant negative ramifications for technology companies and users. Start with the results from other BIPA suits: given that companies would now, based on the district court's analysis, face the risk of class-wide liability from uses of their product everywhere, rather than just in Illinois, companies would have no choice but to comply with BIPA nationwide. Such outcomes, of course, are exactly what the Dormant Commerce Clause is designed to stop. *See TelTech Sys., Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN, 2009 WL 10626585, at *8 (S.D. Fla. July 16, 2009). The result would be that millions of users could lose access to products or features they desire, and technology companies would be stymied in their efforts to innovate and create products that users enjoy.

These harms are not just hypothetical. Over 100 BIPA class actions have been filed to date, many against companies that operate in every state. *See supra*

Section I(A). Given that Illinois is the only state with a biometrics law that permits private enforcement, it is particularly problematic to subject the entire population of the United States to BIPA as if it were a nationally ratified policy. Moreover, if the district court's approach to class certification were to be adopted in cases involving state statutes other than BIPA, the harms would proliferate.

In sum, the district court's decision to permit class certification despite the individualized questions about extraterritoriality that will predominate was wrong as a matter of Illinois law and wrong as a matter of constitutional doctrine, not to mention wrong under Rule 23. And the consequences of such an approach—both here and in future cases—will be profoundly negative for technology companies and users of their products. The district court should not have certified the class.

CONCLUSION

For the foregoing reasons, the Court should vacate for lack of jurisdiction or reverse the decision below.

Respectfully submitted,

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October 16, 2018

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ Susan Fahringer
Susan Fahringer

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 16, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Susan Fahringer
Susan Fahringer