No. 18-15982

IN THE 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
Honorable James Donato
Case No. 3:15-cv-03747-JD

FACEBOOK'S OPPOSITION TO PLAINTIFFS' MOTION TO VACATE ORDER GRANTING INTERLOCUTORY APPEAL AND DISMISS THE APPEAL

Lauren R. Goldman
Andrew J. Pincus
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION[1]

In a transparent attempt to prevent this Court from addressing the merits of the class certification decision below, plaintiffs have asked the Court to dismiss this appeal based on an intervening state-court decision that affects only one of Facebook's four main arguments. Such a ruling would be literally unprecedented: Plaintiffs have cited no case in which this Court has dismissed a Rule 23(f) interlocutory appeal after granting a petition for review, and Facebook has not uncovered one. The motion is procedurally improper and meritless.

Plaintiffs brought this action in 2015, alleging that Facebook violated the Illinois Biometric Information Privacy Act ("BIPA") by applying facial-recognition technology to photos of them without complying with BIPA's notice-and-consent requirements. Plaintiffs seek billions of dollars in statutory damages on behalf of millions of Facebook users, while conceding that they have suffered no actual harm. The district court certified a Rule 23(b)(3) class of "Facebook users located in

---

[1] "Mot." refers to plaintiffs' motion to dismiss this appeal. "Def. Br." is Facebook's opening merits brief. "Pl. Br." is plaintiffs' answering brief. "ER" is Facebook's excerpts of record, and "SER" is plaintiffs' supplemental excerpts of record.

Illinois for whom Facebook created and stored a face template after June 7, 2011."

Facebook petitioned for leave to appeal under Rule 23(f), arguing that the district court's decision implicated "fundamental issue[s] of law relating to class actions" and rested on "manifest error." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); ER165-94. Facebook asserted three separate grounds in its petition: that class treatment is improper because (1) under BIPA's private right of action, each class member must show that he was "aggrieved"—actually injured—by the alleged BIPA violation (ER178-85); (2) if BIPA's "aggrieved" provision did *not* require an actual injury, Article III's injury-in-fact requirement would independently present individualized issues (ER185-86); and (3) each class member's ability to satisfy Illinois' extraterritoriality doctrine will be individualized (ER186-90). The Court granted Facebook's petition and its emergency motion to stay the district court proceedings. ER48. The Court did *not* identify which of Facebook's three arguments it deemed to satisfy the *Chamberlan* standard—or whether all three satisfied the test. *See id.*

Facebook filed its opening brief on October 9, 2018, making four main arguments:

- ***Article III Standing.*** Plaintiffs lack Article III standing because they have not demonstrated the "real," "concrete injury" required by *Spokeo v. Robins*, 136 S. Ct. 1540, 1549-50 (2016). Def. Br. 20-33.

- ***Extraterritoriality.*** Illinois' extraterritoriality doctrine defeats predominance because in order to invoke BIPA, each class member must make a fact-intensive, individualized showing that the "majority of circumstances related to" his claim occurred in Illinois. *Id.* 34-44.

- ***Aggrieved.*** Relying on the Illinois Appellate Court's decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, Facebook argued that BIPA's "aggrieved" provision defeats predominance because it requires (independently from Article III) that each class member demonstrate actual harm resulting from the alleged statutory violation. Def. Br. 45-52.

- ***Superiority/Due Process.*** A class action is not superior, and would violate federal due process, because it could result in a huge statutory damages award untethered to any injury and inconsistent with BIPA's legislative intent. *Id.* 54-60.

Plaintiffs filed their answering brief on December 10, 2018. Facebook's reply brief was due to be filed on March 15, 2019. On January 31, 2019, however, plaintiffs moved this Court to "vacate the Order granting permission to appeal" and "dismiss the appeal" based on the Illinois Supreme Court's intervening decision in *Rosenbach*. There, the court reversed the intermediate appellate court's decision and held that BIPA's "aggrieved" provision does not independently require a plaintiff to allege an "actual injury" beyond the "violation of his or her rights under the statute." 2019 IL 123186, ¶ 1 (Jan. 25, 2019). *Rosenbach* construes

only BIPA's "aggrieved" provision; it does *not* address Illinois' extraterritoriality rule or any question of *federal* law. Plaintiffs nonetheless argue that *Rosenbach* "resolves" Facebook's standing and superiority arguments, and that the extraterritoriality issue is too "insubstantial" to justify an appeal. Mot. 2.

Plaintiffs' motion should be denied for three independent reasons.

First, it is procedurally improper. Facebook has not found a single case in which this Court has dismissed a Rule 23(f) appeal as improvidently granted. And Circuit Rule 3-6 does not permit summary dismissal here.

Second, plaintiffs concede that *Rosenbach* has no impact on Facebook's extraterritoriality argument (Mot. 2, 10), and their arguments for why this issue is "insubstantial" are identical to those they made in their answering brief and in response to Facebook's Rule 23(f) petition. These arguments lack merit, as Facebook's reply brief will show; but for present purposes, what matters is that they *go to* the merits. They should be resolved by the merits panel.

Third, *Rosenbach* has no bearing on Facebook's Article III standing, superiority, and due process arguments. Plaintiffs' position—that these

questions of federal law were "resolved" by a single *state*-court case involving different facts—is fanciful. Their motion should be denied.

ARGUMENT

I. PLAINTIFFS' MOTION IS PROCEDURALLY IMPROPER.

Although Rule 23(f) was adopted over 20 years ago, plaintiffs have pointed to no case in which the Court has granted a Rule 23(f) petition only to then dismiss the appeal before the close of briefing. That is no surprise: Where, as here, one motions panel of this Court concludes that a district court's class-certification order implicates "fundamental issue[s] of law" and rests on "manifest error" (*Chamberlan*, 402 F.3d at 955), it would be extraordinary for a second motions panel to deem the interlocutory appeal not just lacking in merit but too "insubstantial" to proceed. Mot. 2.

Plaintiffs cite just one case from this Circuit vacating a grant of any kind of interlocutory appeal. Mot. 2. In *Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039 (9th Cir. 1973), this Court concluded that it had "improvidently entered" an order granting an interlocutory appeal under 28 U.S.C. § 1292(b) because the decision below did not even qualify as an "order." *Id* at 1041. The district court had issued a ruling that "*[i]f* [defendant] is found negligent in any manner proximately causing . . . the death of [the decedent], it will be denied any relief on its cross-claim for

indemnity." *Id.* (emphasis added). This "hypothetical, advisory opinion" on "an issue which may never arise" was "not an 'order' . . . which will support an interlocutory appeal." *Id.* There is a world of difference between dismissing an appeal of an order for lack of jurisdiction because it is not appealable, and dismissing an appeal based on a summary consideration of the merits.

Plaintiffs also cite a two-paragraph decision from the Third Circuit dismissing a Rule 23(f) appeal—the only such case that Facebook has found from *any* federal court of appeals. *Colbert v. Dymacol, Inc.*, 344 F.3d 334 (3d Cir. 2003). But in that decision the dismissal occurred *after* the merits panel issued its decision, and *after* the *en banc* court had granted a rehearing petition. And the dismissal was based on a misrepresentation by the party seeking appellate review. None of those circumstances is present here.

In *Colbert*, the merits panel issued its opinion in the case in favor of the defendants on the ground that the plaintiff's claim was moot. The plaintiff then moved for rehearing *en banc*, arguing that there was a defect in the defendants' Rule 23(f) petition. *See* 10/3/2002 Order, Case No. 01-397 (3d Cir.). The *en banc* panel subsequently dismissed the appeal on the ground "that the question presented by [the defendants] in their [Rule

23(f) petition] was inaccurate in that [the plaintiff] had not received all relief requested in his complaint," and thus his claim was *not* moot. 344 F.3d at 334. The rationale of *Colbert*—where dismissal occurred after the merits panel decision and because the defendants had *falsely represented* in the petition that the plaintiff's case was *moot*—is far afield from this situation.

Unable to cite any authority supporting the dismissal of this kind of interlocutory appeal, plaintiffs fall back on this Court's rule governing summary dispositions more generally. Mot. 2. Circuit Rule 3-6 provides:

> At any time prior to the completion of briefing in a civil appeal if the Court determines:
>
> (a) that clear error or an intervening court decision or recent legislation ***requires reversal or vacation*** of the judgment or order appealed from or a remand for additional proceedings; or
>
> (b) that it is ***manifest*** that the questions on which the decision in the appeal depends are ***so insubstantial as not to justify further proceedings*** the Court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order.

(Emphases added.)

By its plain language, subsection (a) permits the Court to summarily *reverse or vacate* a district court's order where an "intervening court decision" "requires" that result; it does not contemplate the *affirmance* of

an order based on a decision that resolves only one issue of several in the appeal.

As for subsection (b), this Court has explained that an appeal can be dismissed as "insubstantial" only where "the insubstantiality is *manifest from the face of the appellant's brief*." *United States v. Hooton*, 693 F.2d 857, 857 (9th Cir. 1982) (emphasis added). Unless the "outcome of a case is beyond dispute, a motion for summary disposition unduly burdens the parties and the court," and this Court "will not . . . ordinarily entertain" it. *Id.* Such a ruling is *per se* improper in a Rule 23(f) appeal—which is predicated on a ruling that it involves significant issues. *See Chamberlan*, 402 F.3d at 955. But in any event, plaintiffs have not contended that Facebook's arguments are manifestly "insubstantial" from the face of its brief—which is why they devote much of their motion to rehashing the points made in *their* brief.

II. PLAINTIFFS CONCEDE THAT *ROSENBACH* HAS NO IMPACT ON FACEBOOK'S PRINCIPAL ARGUMENT UNDER RULE 23(b)(3).

Even if dismissal of a Rule 23(f) appeal were *ever* appropriate in this Circuit, it is unwarranted here—most obviously because plaintiffs *concede* that Facebook's lead argument under Rule 23(b)(3), which rests on Illinois' extraterritoriality doctrine, is "not addressed" (or affected in any other

respect) "by *Rosenbach*." Mot. 10.

Because BIPA does not apply extraterritorially, each class member must show that the events giving rise to his claim took place "primarily and substantially" in Illinois. *Avery v. State Farm Auto. Ins. Co.*, 216 Ill. 2d 100, 187 (2005). In applying this test, "each case must be decided on its own facts." *Id.* Here, those facts include where a class member signed up for Facebook, where his photos were taken, where they were uploaded, where he was at the time of the upload and facial-recognition analysis, and where he was injured—all of which must be balanced against the undisputed fact that Facebook's facial-recognition analysis and storage of data *always* occur on its out-of-state servers. Def. Br. 39-45. These individualized questions defeat predominance, and *Rosenbach* has zero bearing on any of them.

Plaintiffs nonetheless contend that the extraterritoriality issue is "too 'insubstantial' to justify this Court's intervention." Mot. 10.[2] They have not come close to meeting this Court's "insubstantiality" standard. *See* p. 7, *supra*. Indeed, their motion offers *no response* to the arguments in Facebook's opening brief. They simply reiterate the district court's

[2] The word "intervention" is misleading, because the Court has *already* intervened and decided that this case was worthy of review.

conclusion that *all* of the class members can invoke BIPA simply because they were "located in Illinois" at the time their template was created. Mot. 11. But as we explained (Def. Br. 36), the Illinois Supreme Court has repeatedly held that Illinois residency—let alone some lesser period of "location" in Illinois—is not enough to satisfy the state's extraterritoriality limitation. *Graham v. General U.S. Post No. 2665, V.F.W.*, 43 Ill. 2d 1, 2-4 (1969); *Avery*, 216 Ill. 2d at 182. Plaintiffs do not address these holdings.[3]

Plaintiffs also argue that Facebook's position is "entirely suppositional" because it "has not tendered any evidence to indicate that the circumstances relating to the challenged conduct did not occur 'primarily and substantially within' Illinois." Mot. 11.

Facebook certainly did: Among other things, it presented undisputed evidence about the location of its facial-recognition analysis and the drafting of its disclosures. *See, e.g.*, Def. Br. 9, 41, 43-44 (citing ER88, 201-02, 227-28). But more fundamentally, Facebook was not required to offer *evidence* of the varying facts that may be presented by

---

[3] Because the district court misapplied *Graham* and *Avery*, plaintiffs' assertion that "the district court was well within its broad discretion" (Mot. 10) misstates the standard of review. Although this Court generally "review[s] a district court's class certification decision for abuse of discretion," "[a]n error of law is a per se abuse of discretion" that is reviewed "de novo." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018).

individual class members. What matters for purposes of Rule 23 is that the extraterritoriality doctrine presents "individualized *questions*." *Sali*, 909 F.3d at 1009 (emphasis added).

III. *ROSENBACH* DOES NOT RESOLVE FACEBOOK'S MULTIPLE SEPARATE ARGUMENTS UNDER FEDERAL LAW.

Plaintiffs argue that, in addition to resolving the meaning of BIPA's "aggrieved" requirement, *Rosenbach* also "demonstrates the baselessness" of two of Facebook's other arguments. Mot. 5. This argument is frivolous.

A. *Rosenbach* Did Not, And Could Not, Resolve The Question Whether Plaintiffs Have Article III Standing.

In *Spokeo*, the Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. Where, as here, a plaintiff claims that the defendant has violated a *procedural* requirement in a statute (*see* Pl. Br. 14, 16; Def. Br. 21), this Court's cases require a plaintiff to make two separate showings: (1) that the specific provision he invoked protects a *concrete interest*; and (2) that the particular violation of the statute caused him *real harm* or a material risk of harm. *Robins v. Spokeo*, 867 F.3d 1108, 1113 (9th Cir. 2017). "In making the *first* inquiry," this Court considers (1) whether the legislature believed that the provision "protect[s] a concrete interest" and (2) whether the interest is "akin to a historical, common law interest."

Dutta v. State Farm Auto. Mut. Ins. Co., 895 F.3d 1166, 1174 (9th Cir. 2018) (emphasis added).[4]

At most, *Rosenbach* could affect only one of these questions: whether the legislature made a judgment that BIPA's notice-and-consent provisions protect concrete interests. Facebook's reply brief will show that *Rosenbach* does not even resolve *that* question. But it certainly does not resolve (or even purport to resolve) whether the mere collection and storage of biometric data bears a "close relationship to" a recognized common law harm. *Spokeo*, 136 S. Ct. at 1549; *see* Def. Br. 25; *Rivera v. Google, Inc.*, 2018 WL 6830332, at *8-9 (N.D. Ill. Dec. 29, 2018) (in materially indistinguishable BIPA suit, finding a "wide gap between . . . the creation and retention of [ ] face templates [ ] and the privacy interests protected by [the common law]").[5] Nor does *Rosenbach* have any bearing

---

[4] Plaintiffs argue that "[t]he parties agree that the question of 'whether a statute protects a concrete interest depends on the meaning of the statute.'" Mot. 6 (quoting Def. Br. 23 n.9). This quote from Facebook's brief—plucked out of context from a footnote—is addressed only to one portion of the *Robins* test. Facebook's brief is clear that this test depends *not* just on what the statute means, but also requires two other inquiries: whether the alleged statutory interest is analogous to a harm recognized at common law (Def. Br. 25-26) and whether the plaintiffs have suffered real harm (*id.* 26-33).

[5] Plaintiffs argue that "Facebook [ ] concedes that privacy violations have long been actionable at common law." Mot. 6-7 (citing Def. Br. 25). That is a blatant mischaracterization. Facebook argued that because

on the second prong of this Court's test: whether *plaintiffs* have suffered real-world harm "causally connected" to the alleged BIPA violation. *Dutta*, 853 F.3d at 1172; *see* Def. Br. 26-33.

Far from demonstrating that their theory of Article III is correct, plaintiffs' motion lays bare its flawed premise: that standing is entirely a matter of *state statutory interpretation*. Mot. 7 ("in this case [standing] depends on the meaning of a state statute"). That is clearly wrong: Even if a plaintiff's "action [ ] is perfectly viable in state court under state law," he "may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury to establish Article III standing." *Hangarter v. Provident Life & Accident Ins. Co*, 373 F.3d 998, 1022 (9th Cir. 2014). That is because "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute," *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009), much less by a state *judicial* decision construing *one provision* of that statute.

Finally, plaintiffs offer no response (either in their motion or in their brief) to Facebook's separate predominance argument based on Article III: that even if a bare statutory violation is sufficient to satisfy BIPA,

---

plaintiffs have never alleged that their data was shared with third parties, "*it is irrelevant* here whether . . . '[v]iolations of the right to privacy have long been actionable at common law.'" Def. Br. 25 (emphasis added).

individualized inquiries will still be necessary to weed out class members who lack federal standing. Def. Br. 53. As just discussed, the Supreme Court and the Ninth Circuit have made clear that a bare statutory violation does not suffice to establish standing; each plaintiff must show a concrete injury, which is necessarily an individualized inquiry.

B. *Rosenbach* Cannot Resolve Facebook's Due Process And Superiority Arguments.

If this class action were permitted to move forward, it could result in a multi-billion-dollar statutory damages award untethered to any injury, in violation of both due process and Rule 23(b)(3)'s superiority requirement. Def. Br. 54-60.

Plaintiffs do not even address due process, which—*irrespective* of legislative intent—prohibits statutory awards that are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). That alone is sufficient to warrant the rejection of their argument.

But even as to superiority, plaintiffs' argument is meritless. They contend that "Facebook's argument regarding the superiority prong . . . , based on its assertion that the statutory damages alleged were inconsistent with the legislative intent, [was] rejected by *Rosenbach*." Mot. 9. It is true that *Rosenbach* held that the legislature intended to

"subject[] private entities who fail to follow the statute's requirements to substantial potential liability." 2019 IL 123186, ¶ 36; Mot. 9. But that was a reference to BIPA's provision of $1,000 to $5,000 in damages for *individual* violations. The question here is whether "the potential for enormous" *aggregated* damages "would be inconsistent with [the legislative] intent" and thus the superiority rule. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 715, 722 (9th Cir. 2010); *see Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233-34 (9th Cir. 1974). The *Rosenbach* court was not faced with this issue, and did not address it.

CONCLUSION

The Court should deny plaintiffs' motion or, alternatively, refer it to the merits panel for a decision after full briefing. Pursuant to Circuit Rule 27-11(a)(1), plaintiffs' motion to dismiss "stay[s] the schedule for . . . briefing pending the Court's disposition of the motion." Facebook respectfully requests that the Court set the deadline for Facebook's reply brief at a date 30 days from the Court's order resolving plaintiffs' motion to dismiss.

Respectfully submitted,

/s/ Lauren R. Goldman

Lauren R. Goldman
Andrew J. Pincus
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
lrgoldman@mayerbrown.com
apincus@mayerbrown.com
mrayfield@mayerbrown.com

Counsel for Appellant

Dated: February 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, the foregoing opposition was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: February 11, 2019 /s/ Lauren R. Goldman