No. 18-80053

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-Respondents,

v.

FACEBOOK, INC.,
Defendant-Petitioner.

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

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

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May 7, 2018

UNOPPOSED 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 Facebook's Rule 23(f) petition. All parties have consented to the filing of the brief.

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 are regularly subject to abusive class action litigation, including litigation brought under state law. The Chamber thus regularly 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).

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 decision below is "manifestly erroneous," *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005), in two ways: It certified a class without requiring any showing of real-world harm beyond a bare statutory violation, and it failed to confine properly the geographic reach of Illinois's Biometric Information Privacy Act. For the reasons stated in its proposed amicus brief, the decision below conflicts with settled principles of federal and state law.

The Chamber respectfully submits that its proposed amicus brief will aid the Court, as it will offer the Chamber's unique perspective on questions important not just to the parties, and not just to all defendants subject to class actions within this Circuit, but to U.S. businesses and consumers who are affected by abusive class litigation as well. Furthermore, the issues addressed by the proposed amicus brief are directly relevant to the disposition of Facebook's petition because they underscore the importance of the district court's legal errors to class action defendants, including U.S. technology companies, such as Facebook.

No counsel for a party authored this brief in whole or in part and 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.

For the foregoing reasons, the Chamber respectfully requests that the Court grant leave to file the brief submitted with this motion.

Respectfully submitted,

/s/ Kelly P. Dunbar

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May 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 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

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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 are regularly subject to abusive class action litigation, including litigation brought under state law. The Chamber thus regularly 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). Among other things, 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), to help prevent abuse of the class action mechanism.

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[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. All parties have consented to the filing of this brief.

Because the decision below—which 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, tangible harm to anyone—presents questions of exceptional significance to class action law, the Chamber has a direct interest in this Court's granting of Facebook's petition and reversal of the district court's certification decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class action device 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). To fall within this exception, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance'" with Federal Rule of Civil Procedure 23. *Id.* This demands "'a rigorous analysis'" by trial courts. *Id.*; *see also In re Hyundai & Kia Fuel Economy Litig.*, 881 F.3d 679, 690 (9th Cir. 2018). The district court's certification decision failed that exacting standard, as explained persuasively by Facebook. *See* Facebook Pet. 8-20.

The Chamber writes separately to expand upon two reasons why the district court's certification decision raises "fundamental issue[s] of law relating to class actions" and is "manifestly erroneous," *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005):

First, by wrongly certifying a class of potentially millions of Facebook users without requiring any showing of real-world harm beyond a bare statutory violation, the district court effectively certified a "no-injury" class action. These types of class actions invite abusive litigation, impose enormous burdens on U.S. businesses, and in particular present substantial risks for technology companies, such as Facebook. This Court's review is needed to correct that manifest error.

Second, the district court erred in failing properly to confine the reach of Illinois's Biometric Information Privacy Act ("BIPA"). All agree that the Illinois legislature did not intend BIPA to have extraterritorial effect. Yet the district court held that the statute could be applied across the purported class based on Illinois residency alone, regardless, for example, of where a Facebook user subscribed to Facebook; where the user read Facebook's Data Policy; or where any injury occurred. That holding not only conflicts with Illinois law, as Facebook explains, but it also raises serious concerns for U.S. businesses by permitting the law of one state to apply well beyond its borders and effectively override the policy judgments of other states.

For these reasons and those set forth in Facebook's petition, this Court should grant the petition and reverse the decision below.

ARGUMENT

I. NO-INJURY CLASS ACTIONS—LIKE THE CLASS CERTIFIED BY THE DISTRICT COURT—INVITE ABUSIVE LITIGATION AND IMPOSE SIGNIFICANT BURDENS ON U.S. BUSINESSES

This Court should grant Facebook's petition because the district court clearly erred in certifying an expansive class based on its view that BIPA's statutory injury requirement is a common issue resolvable on a classwide basis. BIPA's private right of action is available only to someone "aggrieved by a violation" of the statute. 740 ILCS 14/20. An Illinois appellate court, among other courts, has squarely held that to be "aggrieved," a plaintiff must prove an "injury or adverse effect" *beyond* the alleged statutory violation. *Rosenbach v. Six Flags Entm't Corp.*, __ N.E.3d __, 2017 IL App (2d) 170317, ¶¶ 15, 23 (Dec. 21, 2017). A BIPA claim thus fails where, as here, "the only injury [a plaintiff] alleges is a violation" of BIPA's notice-and-consent requirement. *Id.* ¶ 15.

The district court disregarded that decision, holding that class counsel had pled more than a statutory violation because they had "sufficiently alleged" an "injury to a privacy right." Op. 9-10. That is wrong as a matter of state law, as Facebook explains. *See* Facebook Pet. 8-15. The complaint's only injury allegations that apply classwide assert that Facebook "continues to violate millions of Illinois residents' *legal* privacy rights." Dkt. 40 ¶ 17 (emphasis added); *accord id.* ¶ 66. That is precisely the kind of tautological "injury" that *Rosenbach* deemed

insufficient. *See* 2017 IL App (2d) 170317, ¶ 20 (rejecting argument that violation of statutory "right to privacy" is an "actual injury, adverse effect, or harm" under BIPA). And for good reason: An "injury to a privacy right" consisting of no more than a statutory violation is no injury at all. Under the district court's view, *any* alleged violation of BIPA—even absent tangible, real-world consequences for plaintiffs—could give rise to suit. In adopting that counterintuitive reading, the district court defied Illinois law and effectively certified a no injury class.

This Court's review of that error is necessary because, in addition to implicating Article III concerns, Facebook Pet. 15-16, it transforms BIPA into an enabling statute for no-injury class actions—a recipe for abusive and costly litigation. Although many individuals would not see any benefit in suing to redress purported statutory violations that do them no harm, class counsel—who can aggregate large numbers of plaintiffs into a single suit and take a percentage of the recovery—view such lawsuits as highly lucrative. Statutory damages per violation may be modest, but when vast numbers of plaintiffs are aggregated into a class, total claimed damages can easily 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. Indeed, if class counsel could bring such lawsuits without a need to allege injury beyond an unadorned statutory violation, U.S. businesses would

predictably be tied up in frequent litigation over harmless alleged lapses or technical violations, diverting their resources from more productive uses.

No-injury lawsuits will also make abusive class actions more frequent. If a plaintiff must show actual injury, class certification will be more difficult, because class counsel will be unable to establish commonality under Rule 23(a)(2)—that is, that the class members "'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011). Likewise, class counsel may be unable to show predominance under Rule 23(b)(3), that is, that the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Here, for example, the district court sanctioned class counsels' efforts to evade establishing actual injury to any individual class member, instead allowing a vague assertion of injury to privacy to be treated as a common issue.

The financial stakes of no-injury classes may be extreme. By eliminating the requirement of actual injury, class counsel may define a putative class much more broadly. Permitting no-injury lawsuits thus simultaneously makes classes easier to certify and increases class size. The result is an enormous incentive for lawyers to bring claims with little underlying merit on behalf of plaintiffs who have not been damaged. As Judge Wilkinson has explained, statutory damages and class actions risk "corporate death by a thousand cuts through Rule 23" and

produce a "perfect storm" in which they "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).

These amplified financial stakes, in turn, distort normal litigation incentives. When a large class of uninjured plaintiffs is certified, damages exposure can be massive, forcing defendants "into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). That is certainly true here. The district court's certification decision permits millions of class members to seek billions of dollars in statutory damages. This dynamic creates significant incentives to settle weak claims brought by admittedly uninjured plaintiffs—an outcome that enriches lawyers while conferring no countervailing benefit.

These problems are particularly acute for technology companies like Facebook. Due to the widespread use of Internet-based services and products, many technology companies interact with millions of individuals or more each day who use their services to conduct transactions, share content, and interact with people all over the world. Indeed, it is the efficiency and worldwide reach of these operations that enable technology companies to deliver enormous value at such low (sometimes no) cost to their users. At the same time, however, the huge

volume of daily interactions with millions of different people renders such companies particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous classes. For technology companies in particular, this compounds the *in terrorem* settlement pressures such no-injury class actions create. *E.g.*, *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013) (unpublished) ($9 million settlement in case alleging statutory damages of $150 billion).

In sum, this Court's review is needed to correct the district court's erroneous decision to certify a no-injury class action, potentially subjecting Facebook to damages ranging to billions of dollars. As the Supreme Court has made clear, Rule 23(f) review is intended for these circumstances, because an "'order granting certification ... may force a defendant to settle rather than ... run the risk of potentially ruinous liability.'" *Microsoft Corp.*, 137 S. Ct. at 1715 (quoting Committee Note on Rule 23(f)) (ellipses in original).

II. THE DISTRICT COURT'S FAILURE TO CABIN THE GEOGRAPHIC REACH OF ILLINOIS LAW WAS MANIFEST ERROR AND RAISES SIGNIFICANT CONCERNS FOR U.S. BUSINESSES

The other aspect of the district court's opinion that warrants this Court's review is its decision to give BIPA extraterritorial—indeed, nationwide—effect. Although the court purported to recognize that, as all agreed, "BIPA does not have extraterritorial reach," Op. 12, it nonetheless interpreted the statute to sweep in any

conduct, whether in-state or out-, that affects an Illinois resident. That misguided interpretation of BIPA has the damaging effect of subjecting all U.S. businesses to BIPA suits arising out of conduct anywhere in the country.

Under Illinois law, when a statute does not have extraterritorial effect, a plaintiff can sue only to remedy a violation that takes place "primarily and substantially" in Illinois, such that "the majority of circumstances related to the alleged violation" occurred in-state. *Landau v. CNA Fin. Corp.*, 886 N.E.2d 405, 407-409 (Ill. App. Ct. 2008). Disregarding that fact-sensitive standard, however, the court certified a class of Illinois residents for whom Facebook created face templates on the ground the "case is deeply rooted in Illinois" because plaintiffs reside there. Op. 12. As Facebook explains, *see* Facebook Pet. 16-20, that defies state law and upends Rule 23(b)'s predominance requirement. Indeed, Illinois courts have rejected a rule that would turn every injury allegedly suffered by a resident (even those that occur out-of-state) into a domestic one. *Graham v. General U.S. Grant Post*, 248 N.E.2d 657, 658-659 (Ill. 1969). And application of the proper standard, under which "each case must be decided on its own facts," *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 854 (Ill. 2005), would have precluded class certification.

The district court's failure to confine BIPA's reach domestically would have serious consequences for out-of-state businesses. Under the district court's

misreading of the law, any alleged violation of BIPA identified by an Illinois resident is actionable under the statute, no matter how attenuated the connection between the violation and the state. Such a rule is ripe for abuse. Illinois courts could, for example, exercise jurisdiction over a BIPA claim in which the plaintiff signed up for Facebook, reviewed its notice and consent policies, and uploaded his photographs in one state; in which Facebook stored the photographs on its servers and used its face-recognition software in another; and in which the plaintiff alleges he suffered reputational damage in a third—all because the plaintiff happens to reside in Illinois at the time of suit. Indeed, as the district court acknowledged, some of the plaintiffs *in the certified class* may have claims whose relationship to Illinois is as "peripherally related" as in that hypothetical. Op. 14. Contrary to the district court's view, Illinois has no interest in providing a forum for an action with such a threadbare connection to the state.

The result of such a rule, moreover, is that out-of-state businesses like Facebook would be forced to conform their nationwide operations to a patchwork of conflicting and overlapping state laws. If, as the decision below holds, an Illinois resident may bring a BIPA action based on any out-of-state action that implicates him, U.S. businesses would be forced to operate on the assumption that BIPA, an *Illinois* statute, could apply to actions they take *anywhere* in the nation. That effectively forces Illinois's policy judgments regarding the use of biometric

data to override the considered views of other states—and it does so, as all parties agree (Op. 12), without any evidence Illinois intended that drastic result.

Applying Illinois law to the out-of-state conduct of out-of-state businesses would be particularly unwise in the context of the regulation of biometric data, an area in which most states have exercised considered regulatory restraint. Only three states—Illinois, Washington, and Texas—have imposed such regulations, and only Illinois's statute confers a private right of action. By contrast, California (where many technology companies are located) has considered and rejected a law that would have regulated facial recognition technology. *See* S.B. 169, 2001-2002 Regular Sess. (Cal. 2001). Allowing Illinois's decision about how to regulate in-state conduct to trump other states' views on this emerging area of law and technology—especially based on a misreading of the geographical scope of state law—would erode the clarity and predictability that U.S. businesses generally, and U.S. technology companies in particular, need to operate on a nationwide basis.

At bottom, the district court's failure to require a showing of a substantial connection to Illinois for all class members' claims both undermines the "stringent requirements for [class] certification," *American Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013), and creates serious challenges for U.S. businesses. These are the types of significant questions of class action law that cry out for Rule 23(f) review.

CONCLUSION

This Court should grant Facebook's petition and reverse the decision below.

Respectfully submitted,

/s/ Kelly P. Dunbar

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May 7, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,596 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 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

May 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 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
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