

IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

ZAPPOS.COM, INC.,

Applicant,

v.

THERESA STEVENS, DAHLIA HABASHY, PATTI HASNER, SHARI SIMON, STEPHANIE
PRIERA, KATHRYN VORHOFF, DENISE RELETFORD AND ROBERT REE,

Respondents.

**APPLICATION TO THE HON. ANTHONY M. KENNEDY
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Zappos.com, Inc. (“Zappos” or “Applicant”) hereby moves for an extension of time of 30 days, to and including August 20, 2018, for the filing of a petition for a writ of certiorari.

1. The Ninth Circuit rendered its decision on March 8, 2018 (Exhibit 1), and amended its decision and denied a timely petition for rehearing on April 20, 2018 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. Unless an extension is granted, the deadline for filing the petition for certiorari will be July 19, 2018.

3. This case involves an important question that has divided the federal courts of appeals—namely, whether a plaintiff has Article III standing to bring suit

in federal court as a result of a data breach even where the plaintiff does not allege that his stolen information has been misused.

4. This case arises out of a data breach that befell Zappos, an online shoe and clothing retailer based in Las Vegas, Nevada. In 2012, hackers breached Zappos' servers and allegedly stole personally identifying information belonging to millions of Zappos customers. Zappos notified customers of the breach via email. Several customers responded by filing putative class actions in district courts across the country. (The initial complaint was filed just one day after Zappos provided notice of the breach.) The Judicial Panel on Multidistrict Litigation ultimately transferred the various suits to the District of Nevada for consolidated pretrial proceedings.

5. In reviewing the pleadings, the district court distinguished between two groups of plaintiffs: (1) those who alleged that the hackers used stolen information about them to conduct subsequent financial transactions, and (2) those who sought to sue Zappos based solely on the hacking incident itself, not any subsequent illegal activity. The court ruled that the first group of plaintiffs had Article III standing because they alleged that they had already suffered financial losses stemming from the data breach. In contrast, the second group did not have Article III standing because they failed to allege any "actual identity theft or fraud." The court thus dismissed the second group's claims without leave to amend.

6. The Ninth Circuit reversed as to the second group of plaintiffs. The Ninth Circuit had previously held that allegations that a plaintiff's personally identifying information had been stolen sufficed for Article III standing, relying on

circuit precedent holding that such allegations alone suffice to establish “a credible threat of real and immediate harm.” *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010). The Ninth Circuit expressly hewed to *Krottner* notwithstanding this Court’s intervening decision in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), rejecting the argument that “an objectively reasonable likelihood” of future injury suffices for Article III. *Id.* at 410. Instead, a plaintiff must allege harms that are “certainly impending.” *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)); accord *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

7. Consistent with *Clapper*, at least three circuits have rejected the Ninth Circuit’s permissive approach and held that plaintiffs must demonstrate that their personal information was actually misused as a result of a data breach to have standing to sue the hacked company. *See, e.g., Beck v. McDonald*, 848 F.3d 262, 272-76 (4th Cir. 2017) (rejecting both claim that “fear [of] identity theft and financial fraud” resulting from the data breaches are ‘adverse effects’ sufficient to confer Article III standing” and claim “that plaintiffs can establish an injury-in-fact based on” “an enhanced risk of future identity theft” alone); *In re SuperValu, Inc.*, 870 F.3d 763, 769-72 (8th Cir. 2017) (data breach itself is insufficient to establish standing); *Whalen v. Michaels Stores, Inc.*, 689 F. App’x 89, 90 (2d Cir. 2017) (no standing where stolen credit card was promptly cancelled after breach and no other identifying information was alleged to be stolen); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 42-44 (3d Cir. 2011) (“allegations of hypothetical, future injury” arising out of data breach “insufficient to establish standing”).

8. By contrast, at least three other federal courts of appeal have embraced the Ninth Circuit's view that the mere fact that a plaintiff's private identifying information was unlawfully obtained in a data breach suffices to confer standing. See *Attias v. CareFirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017) (even though they alleged no misuse of their data, plaintiffs had standing "simply by virtue of the hack and the nature of the data that the plaintiffs allege to be taken," which included "personally identifying data"); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967 (7th Cir. 2016) (plaintiffs had standing where their credit card information was stolen by virtue of "the data breach" itself); *Galaria v. Nationwide Ins. Co.*, 663 F. App'x 384, 386, 390-91 (6th Cir. 2016) (plaintiffs had standing where their Social Security numbers were "intentionally" stolen). The circuits are thus clearly divided on this issue of recurring nationwide importance.

9. Applicant's Counsel of Record, Paul D. Clement, was recently retained and was not involved in the proceedings below, and requires additional time to research the complex issues in this case. Furthermore, before the current due date of the petition, Mr. Clement has substantial briefing obligations, including a reply in support of certiorari in *Noble Energy, Inc. v. ConocoPhillips Co.*, No. 17-1438 (U.S.) (due July 2), an *amicus* brief in *Duquesne University of the Holy Spirit v. NLRB*, No. 18-1063 (D.C. Cir.) (due July 5), a motion to dismiss in *California v. EPA*, Nos. 18-1114, 18-1118, 18-1139 (D.C. Cir.) (due July 10), a reply brief in *Ramirez v. Trans Union LLC*, No. 17-17244 (9th Cir.) (due July 16), and a petition for certiorari in

ConAgra Grocery Products Co. v. The People of California, No. __-____ (U.S.) (due July 16).

For the foregoing reasons, Applicant requests that an extension of time to and including August 20, 2018, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,



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