No. 19-____

IN THE
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NIMESH PATEL, ADAM PEZEN, AND CARLO LICATA,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court can find Article III standing based on its conclusion that a statute protects a concrete interest, without determining that the plaintiff suffered a personal, real-world injury from the alleged statutory violation.

2. Whether a court can find Article III standing based on a risk that a plaintiff's personal information could be misused in the future, without concluding that the possibility of misuse is imminent.

3. Whether a court can certify a class without deciding a question of law that is relevant to determining whether common issues predominate under Rule 23.

PARTIES TO THE PROCEEDING

Facebook, Inc., petitioner on review, was the defendant-appellant below.

Nimesh Patel, Adam Pezen, and Carlo Licata, individually and on behalf of all others similarly situated, were the plaintiffs-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

Facebook, Inc. is a publicly traded company. Facebook does not have a parent corporation, and no publicly traded company holds 10% or more of Facebook, Inc.'s stock.

RELATED PROCEEDINGS

Gullen v. *Facebook, Inc.*, No. 18-15785 (9th Cir. June 14, 2019), is a related case. The district court granted summary judgment to Facebook, Inc., the Ninth Circuit affirmed, and the time for seeking certiorari has expired.

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Facebook, Inc. (Facebook) respectfully petitions for a writ of certiorari to review the Ninth Circuit's judgment in this case.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 932 F.3d 1264. Pet. App. 1a-27a. The Ninth Circuit's order denying rehearing en banc is not reported. *Id.* at 65a-66a. The district court's denial of Facebook's motion to dismiss for lack of Article III standing is reported at 290 F. Supp. 3d 948. *Id.* at 28a-41a. The district court's class certification ruling is reported at 326 F.R.D. 535. *Id.* at 42a-64a.

JURISDICTION

The Ninth Circuit entered judgment on August 8, 2019. Petitioner's timely motion for rehearing en banc was denied on October 18, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, PROCEDURAL, AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [and] to Controversies * * * between Citizens of different States * * *.

Rule 23(b)(3) of the Federal Rules of Civil Procedure provides:

> A class action may be maintained if * * * the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Section 10 of the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/10, provides:

> "Biometric identifier" means a * * * scan of hand or face geometry. Biometric identifiers do not include * * * photographs * * *.
>
> "Biometric information" means any information, regardless of how it is captured,

> converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

Section 15 of the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15, provides:

> (a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. * * *
>
> (b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
>
> > (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
> >
> > (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and

> length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

Section 20 of the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/20, provides:

> Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. 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;
>
> (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;
>
> (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
>
> (4) other relief, including an injunction, as the State or federal court may deem appropriate.

INTRODUCTION

Plaintiffs in this case seek tens of billions of dollars in statutory damages, on behalf of a class of millions of people, based on Facebook's alleged violation of Illinois's Biometric Information Privacy Act (BIPA). Facebook uses facial-recognition software to help users "tag" friends and family in photographs, making Facebook a more user-friendly and convenient tool for sharing photos. Facebook provided Plaintiffs with notice and the opportunity to opt-out of this feature. But—according to Plaintiffs—Facebook did not seek the particular kind of consent, or provide them with the particular kind of notice, required by BIPA.

All three named Plaintiffs admit that they have suffered no harm from these alleged statutory violations. *See* Pet. App. 70a-78a. And one Plaintiff testified that he *likes* Facebook's Tag Suggestions feature and has not opted out of it, despite filing this lawsuit. *See id.* at 70a-73a. Although Plaintiffs claim that their privacy interests have been violated, they have never alleged—much less shown—that they would have done anything differently, or that their circumstances would have changed in any way, if they had received the kind of notice and consent they alleged that BIPA requires, rather than the disclosures that Facebook actually provided to them.

Despite Plaintiffs' failure to demonstrate any actual injury, the Ninth Circuit concluded that Plaintiffs have Article III standing. Applying this Court's decision in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), the Ninth Circuit found that BIPA protects a concrete interest in privacy, including an interest in preventing future misuse of facial-recognition data.

See Pet. App. 14a-20a. Because *the statute* protects a concrete interest in privacy, the Ninth Circuit reasoned, any BIPA violation "*necessarily*" gives rise to standing. *Id.* at 21a (emphasis added).

The Ninth Circuit skipped a fundamental step in the standing analysis. It interpreted *Spokeo* to hold that as long as a statute protects a concrete interest, a statutory violation necessarily injures that "interest" and a plaintiff who alleges a statutory violation has standing to sue. But the Ninth Circuit never analyzed whether each Plaintiff *in fact* suffered a personal, real-world injury as a result of the alleged statutory violation. The Ninth Circuit likewise relied on the risk of misuse of Plaintiffs' personal information as a basis for standing, but it did not evaluate whether Plaintiffs have established a risk of *imminent* injury, as this Court's precedents require.

The Ninth Circuit then issued a major decision about class actions. Under Rule 23, a class cannot be certified unless common issues predominate over individual issues. *See* Fed. R. Civ. P. 23(b)(3). Because BIPA applies only in Illinois, a significant disputed issue between the parties is where the alleged BIPA violations in this case occurred. Yet the Ninth Circuit did not determine whether that issue could be resolved through common proof. It instead affirmed the certification of a massive class—that includes millions of people—and launched the case toward an imminent trial, without determining that Rule 23's predominance requirement had been conclusively met.

This Court should grant certiorari and reverse the Ninth Circuit's decision, which created or deepened three separate circuit splits. *First*, the Ninth Circuit

found standing below based on its conclusion that BIPA protects a concrete interest in privacy, without determining that each Plaintiff suffered a personal, real-world injury. The Second, Fourth, Sixth, Seventh, and Eighth Circuits, in contrast, hold that a plaintiff must show *not only* that a statute protects a concrete interest, but also that an alleged statutory violation actually harmed the *plaintiff* "in a personal and individual way." *Strubel* v. *Comenity Bank*, 842 F.3d 181, 191 (2d Cir. 2016) (internal quotation marks omitted); *see Dreher* v. *Experian Info. Sols., Inc.*, 856 F.3d 337, 344-347 (4th Cir. 2017); *Huff* v. *TeleCheck Servs, Inc.*, 923 F.3d 458, 464-469 (6th Cir. 2019); *Groshek* v. *Time Warner Cable, Inc.*, 865 F.3d 884, 886-889 (7th Cir. 2017); *St. Louis Heart Ctr., Inc.* v. *Nomax, Inc.*, 899 F.3d 500, 503-505 (8th Cir. 2018). The Court should grant certiorari to resolve this clear split over the proper interpretation of *Spokeo*.

Second, the Ninth Circuit held that Plaintiffs have standing because of the risk of future misuse of their personal information, without requiring Plaintiffs to show that they were at imminent risk of suffering such harm. *See* Pet. App. 14a-22a; *see also Krottner* v. *Starbucks Corp.*, 628 F.3d 1139, 1141-43 (9th Cir. 2010) (finding standing based on the risk of future misuse of personal information). The Sixth Circuit has adopted a similar position. *See Galaria* v. *Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388-389 (6th Cir. 2016). In the First, Third, Fourth, and D.C. Circuits, however, the possibility that a plaintiff's personal information may be misused does *not* create standing absent an imminent risk of injury. *See Beck* v. *McDonald*, 848 F.3d 262, 273-275 (4th Cir. 2017) (acknowledging split); *see also Katz* v. *Per-*

shing, LLC, 672 F.3d 64, 78-80 (1st Cir. 2012); *Reilly* v. *Ceridian Corp.*, 664 F.3d 38, 42-44 (3d Cir. 2011); *Elec. Privacy Info. Ctr.* v. *U.S. Dep't of Commerce* ("*EPIC*"), 928 F.3d 95, 101-103 (D.C. Cir. 2019). This acknowledged split is worthy of the Court's attention as lower courts continue to grapple with standing in cases involving personal data.

Third, and separate from the two standing issues, the Ninth Circuit held below that it was not required to decide a predicate question of law relevant to class certification—the question of where a BIPA violation occurs—when evaluating whether common issues predominate. *See* Pet. App. 23a-26a. The Second, Eighth, and Eleventh Circuits, in contrast, hold that a court *must* decide a predicate question of law that bears on class certification prior to certifying a class. *See In re Petrobras Secs.*, 862 F.3d 250, 271-275 (2d Cir. 2017); *Perras* v. *H & R Block*, 789 F.3d 914, 917-918 (8th Cir. 2015); *Brown* v. *Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1237-38 (11th Cir. 2016). This Court should grant certiorari to resolve this straightforward division, which will encourage forum shopping in cases involving unsettled questions of statutory interpretation.

Each of these questions is exceptionally important. "Even in the mine-run case, a class action can result in potentially ruinous liability." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (internal quotation marks omitted). And "[w]hen representative plaintiffs seek statutory damages," "a class action poses the risk of massive liability unmoored to actual injury." *Id.* If the Ninth Circuit's decision stands, Plaintiffs' class action will proceed immedi-

ately to trial, where Plaintiffs seek *tens of billions of dollars* in damages without any showing that they were injured, and without demonstrating that the requirements for class certification have been met. Allowing class actions of this sort to proceed without rigorous adherence to the requirements of Rule 23 will put immense pressure on defendants to settle, without any adjudication of the merits of plaintiffs' claims. This Court's intervention is urgently needed to prevent that outcome.

The Court should grant certiorari and reverse.

STATEMENT

A. Statutory Background

The Illinois General Assembly enacted BIPA in 2008 in response to the "growing" use of biometric technology. 740 Ill. Comp. Stat. 14/5(a). The General Assembly recognized that "[t]he use of biometrics * * * appears to promise streamlined financial transactions and security screenings," but it acknowledged the "heightened risk for identity theft" if biometric data is compromised. *Id.* 14/5(a), (c). Because the General Assembly did not want "members of the public" to be "deterred from partaking in biometric identifier-facilitated transactions," it enacted BIPA to regulate the use of biometrics in certain circumstances. *Id.* 14/5(e); *see id.* 14/5(d), (g).

BIPA applies to "[b]iometric identifiers"—which include a "fingerprint, voiceprint, or scan of hand or face geometry"—and to "[b]iometric information"—which "means any information * * * based on an individual's biometric identifier used to identify an individual." *Id.* 14/10. BIPA does not apply to "photographs" or "information derived from" photo-

graphs. *Id.* Private entities that collect or possess biometric identifiers or biometric information must comply with several requirements. As relevant here, they must publish a written retention and destruction policy for biometric data; inform individuals "in writing," prior to the collection of biometric data, of the purpose and duration of the collection, storage, and use of that data; and obtain a "written release." *Id.* 14/15(a)-(b). BIPA provides a private right of action for actual damages or statutory damages of $1,000 for a negligent violation or $5,000 for an intentional or reckless violation. *Id.* 14/20(1)-(2).

B. Procedural History

1. Facebook users connect with one another by adding "friends" and sharing content, including photographs. Pet. App. 5a. Facebook allows users to "tag" a photo with a friend's name and a link to her account, making photo sharing more personal. Facebook notifies users who have been tagged, allowing the user to "un-tag" herself from the photo. *Id.* at 5a-6a.

In 2011, Facebook launched "Tag Suggestions," which helps facilitate this labeling and sharing process: When a user uploads a photo, Facebook sometimes uses "facial-recognition technology to analyze whether the user's Facebook friends are in" the photo. *Id.* at 6a, 43a. Facebook compares data derived from the photo with stored "templates" of a subset of the user's Facebook friends. *Id.* at 6a. Templates do not exist for all users, and Facebook does not use this technology to identify non-users or users who are not friends with the user who posted the photo. *See id.* at 6a & n.2; Appellant's Br. at 1, 9 & n.9, *Patel* v. *Facebook, Inc.*, 932 F.3d 1264 (9th Cir.

2019) (No. 18-15982), 2018 WL 6606005 (hereinafter, "C.A. Appellant's Br."). If there is a match, the user is presented with the option of tagging that friend in the photo. Pet. App. 6a; C.A. Appellant's Br. at 1, 9. Facebook's Data Policy—to which all users must agree—explains how this works, how long the data will be kept, and how to opt out of this feature. If a template does exist for a particular user, and the user does opt out, the template is deleted and the user's name no longer appears as a suggested "tag" when a friend uploads a photo of that user. Facebook does not sell this data to, or share it with, third parties or use it for advertising purposes. C.A. Appellant's Br. at 1, 9.

Facebook is headquartered in California. *Id.* at 9. None of the work to develop and implement Facebook's facial-recognition technology took place in Illinois. *Id.*; Pet. App. 68a-69a. And the facial-recognition process itself happens, and all templates are stored, on Facebook's servers, none of which is located in Illinois. C.A. Appellant's Br. at 9. Even if a Facebook user is located in Illinois, moreover, that user may be "tagged" in a photo by a user who is located outside Illinois.

2. In 2015, Plaintiffs Carlo Licata, Adam Pezen, and Nimesh Patel—respondents before this Court—filed the operative consolidated complaint against Facebook in federal district court in California. Pet. App. 7a. Plaintiffs alleged that they are Illinois residents with active Facebook accounts, and that Facebook violated BIPA by obtaining scans of their "face geometry" from photos uploaded to Facebook without a BIPA-compliant prior notice or written

release, and without a BIPA-compliant data retention policy. *Id.* (internal quotation marks omitted).

Facebook moved to dismiss the complaint, arguing that under the plain text of the statute, BIPA does not apply to "photographs" or "information derived from" photographs. *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1170 (N.D. Cal. 2016). Facebook also argued that Plaintiffs' claims were governed by California law under Facebook's terms of service, rather than by Illinois's BIPA. *Id.* at 1159. The district court denied the motion. It held that BIPA excludes only "paper prints," not "digitized images," from its scope, despite the fact that BIPA was enacted in 2008, when digital photography was the norm. *Id.* at 1171-72. And although it found that Plaintiffs had agreed to the choice-of-law provision in Facebook's terms of service, it deemed that provision unenforceable on the ground that the Illinois legislature had made a "fundamental" policy choice that trumped the parties' choice of law. *Id.* at 1167-70.

In June 2016, shortly after this Court decided *Spokeo*, Facebook moved to dismiss Plaintiffs' suit for lack of subject-matter jurisdiction. Facebook argued that Plaintiffs had not alleged any personal, real-world harm. *See* Pet. App. 28a-29a, 37a. Facebook explained that Plaintiffs did not allege that their behavior would have been different if the alleged BIPA violation had not occurred, or that Plaintiffs were otherwise injured in any concrete manner. Facebook also cited Plaintiffs' testimony that they had not lost "any money" or "property" or suffered "any other harm" as a result of the alleged BIPA violation. *See id.* at 74a-75a, 78a. One Plaintiff

subsequently testified that Facebook's facial-recognition software was "a nice feature" that he did not wish to "opt out of." *Id.* at 71a, 73a.

The district court denied Facebook's motion, concluding that "the abrogation of the procedural rights mandated by BIPA necessarily amounts to a concrete injury," and no "real-world harm[]" is required. *Id.* at 36a-37a (emphasis omitted). In April 2018, over Facebook's objection, the district court certified a Rule 23(b)(3) class of "Facebook users located in Illinois for whom Facebook created and stored a face template after June 7, 2011." *Id.* at 42a. Facebook timely petitioned for interlocutory review under Rule 23(f). *Id.* at 11a. While the petition was pending, the district court denied the parties' cross-motions for summary judgment. *In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-CV-03747-JD, 2018 WL 2197546 (N.D. Cal. May 14, 2018).

3. The Ninth Circuit granted interlocutory review and affirmed. The court first analyzed whether BIPA's statutory requirements "were established to protect" an individual's "concrete interests." Pet. App. 15a (internal quotation marks omitted). The court "conclude[d] that an invasion of an individual's biometric privacy rights" has a close relationship to traditional privacy claims, regardless of whether the individual's information is disclosed, and thus qualifies as a concrete interest. *Id.* at 18a-19a. To support that conclusion, the Ninth Circuit speculated, without any factual basis, about the possibility of future misuse of facial-recognition data, noting that "it seems likely that a face-mapped individual could be identified from a surveillance photo taken on the streets" and that "a biometric face template could be

used to unlock the face recognition lock on that individual's cell phone." *Id.* at 19a.

The court next analyzed "whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to," "concrete interests in privacy." *Id.* at 20a (internal quotation marks omitted). The Ninth Circuit concluded that because (in its view) "the privacy right protected by BIPA is the right not to be subject to the collection and use of * * * biometric data, Facebook's alleged violation of these statutory requirements would necessarily violate the plaintiffs' substantive privacy interests." *Id.* at 21a. Notably, the Ninth Circuit did not evaluate whether each named Plaintiff had suffered a personal, real-world harm to his privacy as a result of the alleged statutory violation. Similarly, the Ninth Circuit did not analyze whether Plaintiffs had standing in light of their sworn testimony that they were *not* injured—and one Plaintiff's testimony that he *liked* the Tag Suggestions feature.

Turning to class certification, the Ninth Circuit acknowledged that BIPA applies "only if the events that are necessary elements of the transaction occurred 'primarily and substantially within' Illinois." *Id.* at 23a (quoting *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853-854 (Ill. 2005)). Thus, the "parties' dispute regarding extraterritoriality requires a decision as to where the essential elements of a BIPA violation take place." *Id.* at 24a. But the court declined to make that determination. The court instead held that, because it found that two possible interpretations of BIPA would allow common resolution of this issue, a class could be certified. *See id.* at 24a-25a. Although the Ninth

Circuit recognized that a *third* possible interpretation of BIPA may require individualized inquiry that could defeat predominance, the court affirmed certification of the class on the theory that "if future decisions or circumstances lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can decertify the class." *Id.*

The Ninth Circuit denied Facebook's petition for rehearing en banc, *see id.* at 65a-66a, but stayed further proceedings pending disposition of this petition. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION CREATED AND DEEPENED TWO CLEAR SPLITS ON ARTICLE III STANDING.

The decision below created one clear split, and deepened another, on Article III standing. First, the Ninth Circuit held that so long as a statute protects a concrete interest, a plaintiff has standing to seek damages for the violation of that statute—regardless of whether the plaintiff in fact suffered a personal, real-world harm. In contrast, the Second, Fourth, Sixth, Seventh, and Eighth Circuits hold that even if a statute protects a concrete interest, the plaintiff must still demonstrate that she was personally harmed by the alleged statutory violation. Second, the Ninth Circuit's decision deepened an acknowledged circuit split over whether the mere possibility of future misuse of a plaintiff's personal information creates Article III standing. Both questions are independently worthy of the Court's review.

A. The Ninth Circuit's Decision Created A Clear Split With Respect To Whether A Plaintiff Is Required To Show A Personal, Real-World Harm To Establish Standing Based On An Alleged Statutory Violation.

1. In the decision below, the Ninth Circuit performed a two-step inquiry to evaluate Plaintiffs' standing. First, the court concluded that BIPA's requirements were enacted "to protect *an individual's* concrete interests in privacy." Pet. App. 20a (emphasis added and internal quotation marks omitted). Second, the court concluded that because "the privacy right protected by BIPA is the right not to be subject to the collection and use" of "biometric data, Facebook's alleged violation of these statutory requirements would *necessarily* violate the plaintiffs' substantive privacy interests." *Id.* at 21a (emphasis added). The Ninth Circuit missed a crucial step in the analysis: the determination of whether *these Plaintiffs* have alleged, or shown, that their privacy was in fact violated, and that they suffered a personal, real-world harm.

Had the Ninth Circuit looked for actual harm, it would have reached a different outcome. Plaintiffs have never attempted to show that anything in their lives would have changed had Facebook provided additional or different disclosures from those that it provided in its Data Policy. Indeed, Plaintiffs have not claimed any harm at all, let alone that they were harmed by the *difference* between Facebook's disclosures and the disclosures that they claim BIPA requires. They have neither alleged nor introduced evidence that they would have opted out of Tag Suggestions if Facebook had complied with BIPA's

alleged requirements. To the contrary, Plaintiffs argued before the Ninth Circuit that "[i]t is of no moment" whether any individual Plaintiff would have opted out of Tag Suggestions, or changed his behavior in some other way, had he received a different disclosure from Facebook. Appellees' Br. at 29, *Patel*, 932 F.3d 1264 (No. 18-15982). Despite filing this suit alleging that Facebook injured their privacy interests through its facial-recognition technology, Plaintiffs have not identified any concrete injury to their privacy, and at least one Plaintiff continues to use Tag Suggestions.[1]

2. The decision below is contrary to the approach adopted by the Second, Fourth, Sixth, Seventh, and Eighth Circuits. Those courts hold that a plaintiff lacks standing to challenge an alleged statutory violation unless the plaintiff can show that the violation caused a real-world injury *to that plaintiff*.

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[1] The Ninth Circuit permits consideration of record evidence where a defendant disputes the plaintiff's factual basis for standing, as Facebook did here. *See Safe Air for Everyone* v. *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Numerous courts agree that it is appropriate to consider evidence outside the complaint when evaluating standing, even on a motion to dismiss. *See, e.g.*, *Cortlandt St. Recovery Corp.* v. *Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015); *Sabri* v. *Whittier All.*, 833 F.3d 995, 998-999 (8th Cir. 2016); *Food & Water Watch, Inc.* v. *Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). The Ninth Circuit's failure to consider this evidence—which Facebook cited in its brief, C.A. Appellant's Br. at 13-14—was even more egregious given that the district court had ruled on the parties' summary judgment motions, and Plaintiffs were not permitted to "rest on * * * mere allegations" to demonstrate standing, *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted).

Importantly, each of these courts has emphasized that a statutory violation does *not* give rise to standing unless the plaintiff establishes that her behavior or circumstances would have changed in some meaningful way had the violation not occurred.

In *Strubel*, the Second Circuit evaluated whether a plaintiff had standing to maintain a class action seeking statutory damages under the Truth in Lending Act. *See* 842 F.3d at 185. The court noted that "an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests." *Id.* at 190. The Second Circuit emphasized, however, that a plaintiff only has standing if she demonstrates that she was affected by the alleged violation "in a personal and individual way." *Id.* at 191 (internal quotation marks omitted).

The Second Circuit concluded that the plaintiff was not injured by the lender's alleged failure to inform her that a billing error had been corrected—as required by statute—because the plaintiff did "not assert that the allegedly flawed notice caused her credit behavior to be different from what it would have been" had she received the required disclosure. *Id.* at 193. The court dismissed the plaintiff's claim with respect to this alleged statutory violation, while permitting her suit to proceed on other claims where she could allege that she was personally affected by a statutory violation. *See id*. at 190-191. Had this case arisen in the Second Circuit, the court would have found no standing because Plaintiffs did "not assert that [Facebook's] allegedly flawed [disclosures] caused [their] behavior to be different from what it would have been." *Id.* at 193.

The Fourth Circuit performed a similar analysis in *Dreher*. There, the plaintiff filed a class action alleging that a credit reporting bureau had violated the Fair Credit Reporting Act (FCRA) by failing to accurately disclose the source of information for his consumer report. *See* 856 F.3d at 344-345. The Fourth Circuit recognized that an "intangible injury" can "constitute an Article III injury in fact." *Id.* at 345. To establish standing, however, the plaintiff had to show that the alleged statutory violation "creates a 'real' harm with an adverse effect." *Id.* The court held that the plaintiff had failed to make that showing, because he did not demonstrate that the alleged FCRA violation "adversely affected his conduct in any way" or otherwise had a "practical effect" on him. *Id.* at 346-347. Similarly, Plaintiffs here have failed to demonstrate that Facebook's alleged failure to disclose its use of facial-recognition software "adversely affected [their] conduct in any way." *Id.*

The Sixth Circuit in *Huff* likewise considered whether an alleged statutory violation had a personal, real-world effect on the plaintiff. In that case, the plaintiff brought a class action alleging that a check verification company had violated the FCRA by failing to provide information about his checking accounts. *See* 923 F.3d at 461. Writing for the court, Judge Sutton held that the plaintiff lacked standing because he "never took any action" after learning of the omitted information, "indicating he wouldn't have done anything even if he had received it earlier." *Id.* at 467. The court concluded that statutory violations "that carry no actual consequences or real risk of harm" do not create standing. *Id.*

In *Groshek*, the Seventh Circuit followed the same approach. There, the plaintiff brought a class action seeking statutory damages for alleged violations of the FCRA after a prospective employer allegedly used the wrong kind of form to secure the plaintiff's consent to release his consumer report. *See* 865 F.3d at 885-886. The Seventh Circuit held that the plaintiff lacked standing, and that his privacy interests were not violated, because he failed to allege that "he would not have provided consent" if the employer had used the correct form. *Id.* at 887-889; *see also Gubala* v. *Time Warner Cable, Inc.*, 846 F.3d 909, 911-912 (7th Cir. 2017) (emphasizing that the plaintiff must allege a "risk of harm to himself from" a statutory violation to have Article III standing).

Finally, in *St. Louis Heart*, the plaintiff filed a class action alleging that the defendant violated the Telephone Consumer Protection Act, and the plaintiff's privacy interests, by sending faxes to the plaintiff without a proper opt-out notice. *See* 899 F.3d at 501-502. The Eighth Circuit concluded that the plaintiff lacked standing: Even if the faxes contained "technical deficiencies," the court explained, the plaintiff "never attempted to opt-out of receiving future faxes" from the defendant, "and there is no evidence that" the defendant "would have ignored such a request." *Id.* at 504. The court concluded that "[a]ny technical violation in the opt-out notices thus did not cause actual harm or create a risk of real harm." *Id.* at 504-505.

3. The Court should grant certiorari to resolve this clear split. In the decision below, the Ninth Circuit did not analyze whether Plaintiffs had alleged, or shown, that the alleged statutory violation "caused"

their "behavior to be different from what it would have been" had the violation not occurred. *Strubel*, 842 F.3d at 193. It did not consider whether the alleged statutory violation "adversely affected" Plaintiffs' "conduct in any way" or had a "practical effect" on Plaintiffs. *Dreher*, 856 F.3d at 346-347. The Ninth Circuit did not require Plaintiffs to show that they would have "done" something different if BIPA's requirements had been met, or that the alleged statutory violation created a "real risk of harm." *Huff*, 923 F.3d at 467-468. And the court did not ask whether Plaintiffs would have "provided consent" had they received the BIPA disclosure, *Groshek*, 865 F.3d at 887, or would instead have opted out of Tag Suggestions, *see St. Louis Heart*, 899 F.3d at 504-505. By failing to make any of these inquiries, the Ninth Circuit divided with five other circuits that have considered when a plaintiff can establish standing as a result of an alleged statutory violation. The Court should grant certiorari to resolve that conflict.

B. The Ninth Circuit's Decision Deepened An Acknowledged Circuit Split On When The Risk Of Misuse Of A Plaintiff's Personal Information Supports Standing.

This Court has held that to establish injury in fact, a plaintiff must plausibly allege an "actual or imminent" injury. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). "Imminent" means "that the injury is *certainly* impending." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2). "'[A]llegations of *possible* future injury' are not sufficient." *Id.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).

The Sixth and Ninth Circuits have nonetheless held that a plaintiff can establish standing based on the potential future misuse of her personal information, without showing any certainly impending harm. The First, Third, Fourth, and D.C. Circuits, in contrast, hold that the mere potential for future harm does not create standing. This Court's intervention is warranted. *See Beck*, 848 F.3d at 273 ("Our sister circuits are divided on whether a plaintiff may establish" standing "based on an increased risk of future identity theft.").

1. In the decision below, the Ninth Circuit found a concrete harm, sufficient to create standing, based on the risk of future misuse of the Plaintiffs' facial-recognition data. The Ninth Circuit first cited this Court's cases explaining that technological advances may raise privacy concerns. Pet. App. 17a-18a (citing *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), and *Riley* v. *California*, 573 U.S. 373 (2014)). The court then speculated that facial-recognition technology *in general* (rather than Facebook's technology in particular) "could" be used to identify an individual "from a surveillance photo taken on the streets." *Id.* at 19a. The court also theorized that it "could be used to unlock * * * that individual's cell phone." *Id.* Based on these possible risks of future harm, the court concluded that Facebook's alleged violation of BIPA created a concrete injury-in-fact. *See id.* The Ninth Circuit reached that conclusion without citing any allegations or record evidence that Facebook has used, will use, or even can use Plaintiffs' facial-recognition data for any of these purposes—or that there is any other basis to conclude that the possible harms identified by the Ninth Circuit are anything other than speculative. Nor did the

Ninth Circuit conclude that any of these risks were imminent.

The Ninth Circuit performed a similar analysis in *Krottner*. *See* 628 F.3d at 1140. There, the plaintiffs' personal information had been stored on a laptop, which was stolen from a coffee shop. The plaintiffs alleged that their data had "been stolen but not misused." *Id.* The Ninth Circuit concluded that this was sufficient to create standing, because the plaintiffs had alleged that their data *might* be misused in the future, even absent an allegation that their data had in fact been accessed or misused. *Id.* at 1143.

The Sixth Circuit reached an analogous conclusion in *Galaria*. There, the plaintiffs filed suit following a data breach at an insurance company. *See* 663 F. App'x at 386. They alleged that their personal data had been accessed as part of the breach, but did not allege that it had been misused. The district court dismissed the suit for lack of Article III standing, and the Sixth Circuit reversed. The court found standing based on an "increased risk of fraud and identity theft," without requiring any allegation that plaintiffs' data had been misused or was at imminent risk of being misused. *Id.* at 388.

2. In stark contrast, the First, Third, Fourth, and D.C. Circuits have held that a plaintiff cannot establish standing based on the possible misuse of her personal information, unless there is a certainly impending injury.

In *Katz*, a First Circuit case, the plaintiff alleged that the defendant had failed to adequately secure her personal information, creating the possibility of "unauthorized access" to her data and an increased risk of identity theft. 672 F.3d at 70, 79. But the

plaintiff did not allege "that her nonpublic personal information actually ha[d] been accessed by any unauthorized person." *Id.* at 79. Because the plaintiff's cause of action rested "entirely on the hypothesis that at some point an unauthorized, as-yet unidentified, third party might access her data and then attempt to purloin her identity," the First Circuit held that she did not have standing. *Id.* at 79-80.

The Third Circuit came to the same conclusion in *Reilly*. There, a hacker penetrated a payroll system that housed the plaintiffs' personal and financial information. *See* 664 F.3d at 40. The plaintiffs speculated that the hacker had "read, copied, and understood their personal information," and intended "to commit future criminal acts by misusing the information." *Id.* at 42. But there was no evidence that "the data has been—or will ever be—misused." *Id.* at 43. The Third Circuit concluded that in these circumstances, plaintiffs could not allege the type of "certainly impending" injury necessary to confer standing. *Id.* at 42-44 (internal quotation marks omitted).

The Fourth Circuit applied the same approach in *Beck*. In that case, plaintiffs filed suit following a medical center data breach, and "sought to establish * * * standing based on the harm from the increased risk of future identity theft." 848 F.3d at 266-267. But the plaintiffs had not uncovered any "evidence that the [stolen] information * * * has been accessed or misused or that they have suffered identity theft." *Id.* at 274. Accordingly, the court held that plaintiffs' claim of "an enhanced risk" that their personal information would be misused was "too speculative"

to confer Article III standing. *Id.* at 273-274 (acknowledging circuit split).

The D.C. Circuit performed a similar analysis in *EPIC*, where the Electronic Privacy Information Center (EPIC) sought to prevent the Department of Commerce from adding a citizenship question to the 2020 Census without performing a privacy impact assessment, as required by statute. *See* 928 F.3d at 98. EPIC argued that it had standing because its members would "suffer a privacy injury if their citizenship status information" was collected without the assessment. *Id.* at 101-102. The D.C. Circuit rejected that argument, holding that because EPIC had "not shown how a delayed [privacy impact assessment] would lead to a harmful disclosure," the risk of "potential disclosure" was too "speculative" to establish standing. *Id.* at 102 (internal quotation marks omitted).

3. By finding standing based on the possibility that Plaintiffs' personal information could be misused in the future—without concluding that such misuse was imminent—the Ninth Circuit deepened an acknowledged circuit split among multiple courts of appeals. The Court should grant certiorari.

C. The Decision Below Is Wrong.

The decision below badly contorted a fundamental doctrine that is meant to "confine[] the federal courts to a properly judicial role." *Spokeo*, 136 S. Ct. at 1547. First, the Ninth Circuit erred by concluding that because BIPA (in its view) protects a concrete interest, and the Plaintiffs alleged a violation of the statute, Plaintiffs *necessarily* have standing. *See* Pet. App. 21a. As five other circuits have explained, each Plaintiff must *also* show that the alleged statu-

tory violation had a real-world effect on him. Otherwise, every time a plaintiff claimed that a defendant violated a statute that protects a "concrete" interest, the plaintiff would have standing to sue—regardless of whether the plaintiff in fact suffered a personal, real-world harm (or an imminent risk of such harm). Article III always "requires a concrete injury even in the context of a statutory violation," *Spokeo*, 136 S. Ct. at 1549, and the plaintiff must have *actually suffered* that injury.

Even more troubling, the Ninth Circuit did not even consider Plaintiffs' sworn testimony that Facebook's alleged failure to comply with BIPA did not injure them at all. There is no record evidence that Plaintiffs would have altered their behavior in any way had they received BIPA-compliant notices; to the contrary, Plaintiffs argued on appeal that any such evidence is "of no moment" to the standing inquiry. *Supra* p. 17. Indeed, one Plaintiff testified that he *likes* Facebook's Tag Suggestions feature and continues to use it, despite being fully aware of the alleged BIPA violation at issue in this suit. Pet. App. 70a-73a. Accordingly, Plaintiffs cannot satisfy the requirements for Article III standing, and the Ninth Circuit's decision should be reversed.

Second, the Ninth Circuit erroneously held that a court can find standing based on the risk of future misuse of a plaintiff's personal information, without determining that this risk is certainly impending. In the decision below, the Ninth Circuit speculated about what technology *might* be developed, and how that technology *might* be misused, to compromise an individual's personal information. *See id.* at 19a; *supra* pp. 22-23. But there is no evidence—or even

an allegation—that Facebook has developed such technology, has "imminent" or "impending" plans to develop it, or would use it in this manner. *Clapper*, 568 U.S. at 409. In that respect, the court's conclusion that Plaintiffs have standing in this case is even further afield than the many cases cited above that involve a *known* data breach. In those cases, courts speculated about whether someone was likely to use *existing technology* to compromise a plaintiff's personal data. The decision below, in contrast, found standing based on the speculative risk of harm from *future technology*. That is fundamentally at odds with the limited role of Article III courts, which do not sit, Nostradamus-like, to predict the future. Because the Ninth Circuit relied on this speculative risk of future harm to find standing, the decision below should be reversed.

D. The Questions Presented Are Important And Recurring.

The questions presented are enormously important. No "principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks omitted). Yet the Ninth Circuit held that Plaintiffs have standing to seek *billions* of dollars in damages based on an alleged statutory violation that has not caused them any personal, real-world harm, and based on speculation about how Plaintiffs' information *might* be misused by some *hypothetical* facial-recognition technology in the future.

If allowed to stand, the decision below will have significant implications for class actions seeking damages based on alleged statutory violations. As the cases cited above demonstrate, plaintiffs frequently file suit seeking millions or billions of dollars in statutory damages even when they suffered no real-world harm. In most jurisdictions, courts have refused to allow such suits to go forward. After all, "[i]t is the role of courts 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). In the Ninth Circuit, however, those suits may now proceed through class certification—creating a clear incentive for forum shopping and a significant risk that defendants will accept "in terrorem" settlements to resolve "questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (internal quotation marks omitted).

These risks are further exacerbated in cases involving privacy interests. Under the Ninth Circuit's decision, if a plaintiff alleges *any* statutory interest in "privacy," and the court can conceive of *any* potential harm to that interest from *any* form of technology that could exist in the future, Article III is satisfied. The Court's intervention is necessary.

II. THE DECISION BELOW CREATED A CLEAR SPLIT AS TO WHETHER A COURT MUST DECIDE A THRESHOLD LEGAL QUESTION RELEVANT TO THE PREDOMINANCE INQUIRY BEFORE CERTIFYING A CLASS.

The decision below also created a split independent from the Article III questions. In the Second,

Eighth, and Eleventh Circuits, courts cannot certify a class without answering threshold legal questions that bear on class certification. In the Ninth Circuit (whose courts hear an outsized number of class actions), courts are *not* required to resolve such questions prior to certifying a class. The Court should grant certiorari to resolve this clear division among the federal courts, which has significant implications for class actions across the country.

A. The Ninth Circuit's Decision Created A Clear Circuit Split.

1. BIPA applies only if the "necessary elements" of the statutory violation "occurred primarily and substantially within Illinois." Pet. App. 23a (internal quotation marks omitted). In some cases, this determination is straightforward—for instance, where an Illinois resident sues his employer for collecting his fingerprints at his Illinois jobsite. *E.g.*, *Howe* v. *Speedway LLC*, No. 17-cv-07303, 2018 WL 2445541 (N.D. Ill. May 31, 2018). But the Ninth Circuit held that BIPA "does not clarify" where "a private entity's [alleged] collection, use, and storage of face templates without first obtaining a release, or a private entity's [alleged] failure to implement a compliant retention policy, is deemed to occur." Pet. App. 24a. The court concluded that this was an open question of statutory interpretation.

That question is central to class certification. Rule 23 requires courts to determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). And that determination must be made *before* certifying a class: "[C]ertification is proper only if [a] court is satisfied,

after a rigorous analysis" that Rule 23's requirements "have been satisfied." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013) (emphasis added and internal quotation marks omitted). If each member of a class must individually present evidence to establish where the "necessary elements" of her claim occurred, common issues would not predominate. The Ninth Circuit was thus required to determine whether this issue could be decided through common proof in order to decide whether Rule 23's predominance requirement was met.

The Ninth Circuit did not conduct this obligatory analysis. The court recognized that there were at least three possible interpretations of "where the essential elements of a BIPA violation take place," and that the "parties' dispute regarding extraterritoriality *requires*" a court to choose between those interpretations. Pet. App. 24a-25a (emphasis added). But the Ninth Circuit refused to make that choice. The panel found that *if* "the violation of BIPA occurred when the plaintiffs used Facebook in Illinois, then the relevant events occurred primarily and substantially in Illinois, and there is no need to have mini-trials on this issue." *Id.* at 25a (internal quotation marks omitted).[2] And it stated that *if* "the violation of BIPA occurred when Facebook's servers

[2] The Ninth Circuit cited the district court's comment that "the claims [in this case] are based on the application of Illinois law to the use of Facebook mainly in Illinois." Pet. App. 25a n.7; *see id.* at 60a. The class definition, however, is not limited to Plaintiffs who used Facebook in Illinois. *See id.* at 42a. To the extent that the place where a Plaintiff used Facebook is relevant to the extraterritoriality inquiry, it requires individualized proceedings.

created a face template, the district court can determine whether Illinois's extraterritoriality doctrine precludes the application of BIPA." *Id.*[3] "In either case," the Ninth Circuit reasoned, "predominance is not defeated." *Id.*

But the Ninth Circuit acknowledged that there is a third possible interpretation of BIPA, where the alleged BIPA violation occurs "*in some other place or combination of places*" that is *different* from where the plaintiff used Facebook, or the place where Facebook scanned photographs and stored face templates. *Id.* at 24a-25a (emphases added).[4] And the Ninth Circuit recognized that an individualized inquiry would be required to make this determination for each Plaintiff. This inquiry could turn on numerous factors, including where each class member signed up for Facebook (and thus first accessed Facebook's Data Policy), where each class member's photos were taken and uploaded, where each class member was at the time of any facial-recognition analysis, and where each class member was allegedly injured (if at all). *See* C.A. Appellant's Br. at 41-42. The "essential elements" of a BIPA violation may depend, for instance, on where a Plaintiff's *friends* were located when they tagged the Plaintiff in a photo. *See id.* Each of these factors would need to be balanced against the undisputed fact that Facebook's

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[3] As Facebook argued below, if the alleged BIPA violations occurred where Facebook's servers are located, *no* class member can invoke BIPA, because those servers are located outside of Illinois. *See* C.A. Appellant's Br. at 41; Pet. App. 68a.

[4] Facebook discussed this interpretation of BIPA below, which the Court did not address. *See* C.A. Appellant's Br. at 41-42.

facial-recognition analysis is *always* performed (and templates are always stored) outside Illinois, and that Facebook's allegedly faulty disclosures were created and disseminated from outside Illinois.

This third possible interpretation of BIPA would require millions of mini-trials to determine where each alleged BIPA violation occurred, defeating class certification. Despite this possibility, however, the Ninth Circuit certified the class. The Ninth Circuit justified its conclusion by noting that "if future decisions or circumstances lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can *decertify* the class." Pet. App. 25a (emphasis added).

2. The Ninth Circuit's holding—that a district court may certify first and evaluate predominance later—is contrary to the law of the Eleventh, Second, and Eighth Circuits.

In *Brown*, the Eleventh Circuit vacated a class certification ruling because the district court failed to decide a threshold legal question central to class certification. Although the district court found that "most of the elements" of plaintiffs' state-law breach of warranty claims "were susceptible to classwide proof," it did not determine that *all* of the elements of those claims could be decided through common proof. 817 F.3d at 1232. Writing for the court, Judge William Pryor explained that "if a question of fact or law is relevant" to the class certification determination, "then the district court has a *duty* to actually decide it." *Id.* at 1234 (emphasis added). "For example, a question of state law bears on predominance if, answered one way, an element or defense will require individual proof but, answered another way,

the element or defense can be proved on a classwide basis." *Id.* at 1237. The Eleventh Circuit concluded that because the district court did not *first* resolve questions of state law that "bear on predominance" *before* certifying the class, it was unable to "identify the overall mix of individual versus common questions for purposes of predominance," and certification was improper. *Id.* at 1237-38.

The Second Circuit reached a similar conclusion in *Petrobras*. There, plaintiffs filed a class action alleging that certain transactions violated federal securities laws. *See* 862 F.3d at 258-259. Because these laws do not have extraterritorial effect, plaintiffs were required to demonstrate that the transactions at issue were "domestic." *Id.* (internal quotation marks omitted). In certifying a class, however, the district court did not consider whether "the determination of domesticity" was "susceptible to generalized class-wide proof such that it represents a common question rather than an individual one." *Id.* at 271 (internal quotation marks omitted). The Second Circuit concluded that the district court's failure to consider that question "was an error of law." *Id.* Only by answering this "predicate" question could "the district court properly assess whether, in the case as a whole, common issues are more prevalent or important than individual ones." *Id.* (internal quotation marks omitted).

In *Perras*, the Eighth Circuit adopted the same approach. There, an out-of-state plaintiff filed a putative class action against a Missouri tax preparer under Missouri law for deceptive advertising. 789 F.3d at 915. The district court denied class certification, and the Eighth Circuit affirmed. The Eighth

Circuit emphasized that to determine "whether common questions of law predominate over individual questions, we *must* determine if the tax-return services performed and paid for outside of Missouri nonetheless constitute trade or commence 'in or from the state of Missouri,'" as required by the relevant state statute. *Id.* at 917 (emphasis added). The court concluded that the "evidence each class member would proffer" on that issue "would be specific to her experience in her state," and that common issues therefore did not predominate over individual ones. *Id.* at 918.

Unlike the Second, Eighth, and Eleventh Circuits, the Ninth Circuit permits a court to affirm a class certification order without deciding a question of law crucial to the predominance inquiry. The Court should grant certiorari to resolve this straightforward split.

B. The Decision Below Is Wrong.

Certification "is often the most significant decision rendered" in "class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That is why a party seeking class certification "must affirmatively demonstrate his compliance with Rule 23." *Comcast*, 569 U.S. at 33 (internal quotation marks omitted). That is, he must "be prepared to prove that there are *in fact* * * * common questions of law or fact," *id.* (internal quotation marks omitted), that "predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3). It is the court's duty to perform a "rigorous analysis" and decide all questions that "b[ear] on the propriety of class certification" *before* certifying a class. *Comcast*, 569 U.S. at 33-34 (internal quotation marks omit-

ted). The Ninth Circuit failed to perform that analysis below, and its decision should be reversed on that basis.

Prior to certifying a class, the court must "take a close look at whether common questions predominate over individual ones"—including, when necessary, "prob[ing] behind the pleadings" and considering the merits of the plaintiff's underlying claim. *Id.* (internal quotation marks omitted). Before a court can determine whether common questions predominate, the court must identify which questions are common and which are individual. *See Brown*, 817 F.3d at 1237-38. And if a court cannot determine whether a question may be answered through common or individual proof without interpreting a state or federal statute, the court must interpret that statute. *See id.* That is precisely why this Court has instructed courts to "probe behind the pleadings" before certifying a class. *Comcast*, 569 U.S. at 33 (internal quotation marks omitted).

The Ninth Circuit did not fulfill that obligation below. Instead, the court acknowledged that BIPA "does not clarify" what factor or combination of factors will determine when BIPA applies. Pet. App. 24a-25a. And the court offered no clarity itself. As a result, it punted "[t]hese threshold questions of BIPA's applicability" to the future. *Id*. at 25a. Because it failed to decide these "threshold questions," the Ninth Circuit could not determine whether each Plaintiff in the class could prove a BIPA violation through either common or individual proof. Without performing this analysis, the Ninth Circuit could not determine whether common questions

predominate, and it thus could not affirm class certification.

The Ninth Circuit's "certify first, evaluate predominance later" approach is irreconcilable with Rule 23. Instead of performing a rigorous analysis *before* affirming class certification, *see Comcast*, 569 U.S. at 33, the Ninth Circuit identified several scenarios in which common questions *might* predominate, and simply noted the possibility of decertifying the class later, Pet. App. 24a-25a. That is, in practical effect, a "tentative" certification forbidden by the Rules. *See* Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."); 3 William B. Rubenstein, Newberg on Class Actions § 7:33 (5th ed. 2019 update) (explaining that Congress amended Rule 23 to make clear that courts may not "tentatively certify a class or assume its existence").

Because the Ninth Circuit's analysis did not comport with Rule 23 and this Court's precedent, the Court should reverse.

C. The Question Presented Is Important.

The question presented is vitally important. In the Ninth Circuit, where a huge percentage of class actions take place, courts may certify class actions without resolving threshold questions of statutory interpretation critical to whether common questions will predominate. Instead, the Ninth Circuit found predominance *because* a question of statutory interpretation could be decided on a class-wide basis. The Ninth Circuit's decision threatens to turn class actions from the "exception" into the rule: Any

"competently crafted class complaint" can raise this sort of question to manufacture predominance. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 349 (2011) (internal quotation marks omitted). And now, any savvy plaintiffs' counsel will file that complaint in the Ninth Circuit.

The Ninth Circuit's decision will disrupt the careful balance Congress crafted in Rule 23. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). That is why a court must ensure *before* certifying a class that, on balance, a class action will promote more efficient, uniform results than a series of individual actions. The pressure to settle is particularly high in cases like this, where plaintiffs seek billions in statutory damages unconnected to any actual injury. *See Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting). Certifying a class of this type raises the specter of "a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class," which "raises[] due process issues." *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003). That very real danger of a due process violation is a strong reason to hew closely to the dictates of Rule 23.

The stakes in this case could not be higher. Plaintiffs seek tens of billions of dollars in statutory damages and, if this Court denies certiorari, the case will proceed quickly to trial. The Ninth Circuit's decision does not require *any* Plaintiff in the class to

show that he suffered an injury as a result of the alleged statutory violation, and it absolves Plaintiffs of the requirement to demonstrate that common issues predominate over individual ones. Absent this Court's review, Facebook will likely have only a few weeks to decide whether to litigate the questionable merits of Plaintiffs' claims in a time-consuming, expensive trial, or to accept an "in terrorem" settlement with an erroneously certified class.

The Ninth Circuit's approach is directly contrary to multiple precedents of this Court and the rulings of numerous federal courts. This case presents a clean vehicle to decide the three questions presented, which are equally worthy of the Court's attention. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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