No. 19-706

IN THE
Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

CARLO LICATA, ADAM PEZEN, AND NIMESH PATEL, 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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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.

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INTERESTS OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. It often appears here as an *amicus curiae* to urge the Court to confine the federal judiciary to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

Article III requires a plaintiff invoking the jurisdiction of the federal courts to allege a "concrete" injury, not a "bare procedural violation," *Spokeo*, 136 S. Ct. at 1548, 1550. Yet if the decision below is left in place, plaintiffs in the Ninth Circuit may walk into federal court with no more than a bare statutory claim divorced from any real-world harm—so long as they frame that claim, however loosely, as a "privacy" violation. None of this Court's standing precedents blesses so diluted a view of Article III's injury-in-fact requirement.

Allowing a plaintiff who has suffered no actual harm to sue for statutory damages would carry the federal judiciary far beyond its traditional and prop-

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief. At least ten days before the brief's due date, WLF notified all counsel of record of WLF's intent to file as *amicus curiae*. All parties have consented in writing to the filing of WLF's brief.

er role of adjudicating concrete disputes and remedying real injuries.

The Ninth Circuit's decision not only deepens a circuit split on a recurring and important issue of constitutional law, but also contravenes this Court's standing jurisprudence by virtually eliminating the case-or-controversy requirement as a meaningful check on federal-court jurisdiction in privacy-related cases. WLF urges the Court to grant review and bar the door to inchoate privacy harms before no-injury class actions swarm the federal courts.

STATEMENT OF THE CASE

Facebook is a social-networking service that allows its users to connect online and share content, including photos, with other Facebook friends. Pet. App. 5a. "Tag Suggestions," one of Facebook's optional features for photos, uses facial-recognition software to try to determine whether a user's uploaded photo includes one or more of her Facebook friends. *Id*. at 6a, 43a. If the software discerns that a user's uploaded photo likely includes one of that user's Facebook friends, Facebook may suggest a "tag" for that photo along with the friend's name and a link to that friend's Facebook page. *Id*. at 5a-6a. If the user approves the tag, the tagged friend receives notice of the tag and may "un-tag" herself. *Id*. Facebook does not share its facial-recognition data with any third party for any purpose. C.A. Appellant's Br. at 1, 9.

The respondents are Facebook users who agreed to Facebook's Data Policy when they signed up for Facebook. That Policy explains how Tag Sug-

gestions works and how a user can disable that feature, if desired. The respondents candidly admit that they have not been harmed by Tag Suggestions, a "nice feature" (in one respondent's words) that they continue to use. And no respondent claims he would have done anything differently had Facebook provided different disclosures.

Even so, the respondents sued Facebook under the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq*. While BIPA excludes from its sweep "information derived from" "photographs," the respondents allege that Facebook violated BIPA when it analyzed photos of them without giving them notice and without obtaining a written release. Pet. App. 7a. Desiring to represent a class of at least six million Illinois Facebook users, the respondents seek billions of dollars in damages. *Id*.

Contending that the respondents lack a concrete, "real-world" harm to satisfy Article III standing, Facebook moved to dismiss. Pet. App. 28a-29a. The district court denied that motion, deciding that depriving the respondents of "procedures that protected privacy interests" suffices as an Article III injury, even "without any attendant embarrassment, job loss, stress, or other additional injury." Pet. App. 37a. After the district court certified the respondents' proposed class under Rule 23(b)(3), the Ninth Circuit granted Facebook's Rule 23(f) petition for interlocutory review.

The Ninth Circuit affirmed, holding that because BIPA's statutory provisions "implicate privacy concerns," they are "substantive" and not procedural. Pet. App. 20a-21a. Invoking the "common law roots

of the right to privacy," the panel opined that BIPA protects one's inherent "right not to be subject to the collection and use" of "biometric data." *Id.* at 15a, 21a. The appeals court explained that *any* alleged BIPA violation "necessarily" harms the respondents' "substantive privacy interests." *Id.* at 21a.

SUMMARY OF ARGUMENT

To satisfy Article III's standing threshold, a plaintiff must "'[f]irst and foremost'" show that she suffered "an injury in fact" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Although the respondents concede they suffered no real injury and incurred no actual harm, the Ninth Circuit held that they satisfied Article III's injury-in-fact requirement simply by alleging a statutory violation under Illinois law. Under the panel's reasoning, a plaintiff may sue in federal court for a privacy violation under BIPA even if no public disclosure occurred and even if he knowingly shared the information at issue.

But every injury in law is not an injury in fact. A plaintiff cannot plead his way into federal court merely by alleging a statutory violation "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Nor can any legislature "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing" under Article III. *Id.* at 1547-48. Rather, a claimed injury to a statutorily conferred right "must actually exist"; it cannot be merely "abstract." *Id.* at 1548.

As Facebook's petition explains, the decision below sweeps aside this Court's rigorous approach to Article III standing. By allowing respondents to avoid *Spokeo*'s requisite real-world harm simply by invoking abstract privacy concerns coupled with an alleged statutory violation, the Ninth Circuit's holding contradicts this Court's precedents, widens an entrenched circuit split, and invites an avalanche of no-injury litigation. We write to elaborate on just how badly the Ninth Circuit mangled its historical analysis and to explain why the panel's departure from settled law will invite great mischief.

First, this Court has instructed lower courts deciding whether a plaintiff's alleged harm satisfies Article III to look in part to history—to the harms redressable by traditional remedies available at the time of the Constitutional Convention. The panel below made a hash of that analysis, declaring that a BIPA violation automatically satisfies Article III standing simply because privacy is generally at stake. Although the Ninth Circuit admits that the "common law roots of the right to privacy" were "first articulated in the 1890s," this Court's standing jurisprudence requires an inquiry that reaches much further back. A court must look to the "familiar operations of the English judicial system and its manifestations on this side of the ocean *before* the Union." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939)) (emphasis added). The Ninth Circuit's proclaimed "right not to be subject to the collection and use" of "biometric data," Pet. App. 21a, is of far more recent vintage.

Second, allowing plaintiffs to aggregate statutory damages under Rule 23 without the need to prove an injury in fact radically transforms the class action from a device designed to avoid the inefficiencies of trying the same claims repeatedly to a device that unfairly alters the parties' substantive rights. Because so few companies are willing to risk incurring a multi-billion-dollar judgment, no-injury class actions allow plaintiffs to extract enormous settlements without proving the merits of their claims. If the decision below becomes the final word on Article III standing for privacy injuries in the Ninth Circuit, the floodgates will be opened to every manner of baseless privacy class action.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO ENSURE THAT COURTS DO NOT INVENT AN AHISTORICAL "PRIVACY" EXCEPTION TO ARTICLE III'S INJURY-IN-FACT REQUIREMENT.

Article III standing requires proof of a "concrete injury" even "in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. A plaintiff cannot, for example, "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* But that is precisely what the decision below has allowed the respondents to do.

The Ninth Circuit says that violating any statute that "implicate[s] privacy concerns" constitutes an Article III injury. Pet. App. 18a. To justify its holding, the panel badly misreads, then misapplies, *Spokeo*'s emphasis on "historical practice." *Id.*

General "privacy rights," the panel says, "have long been regarded 'as providing a basis for a lawsuit.'" Op. 14 (quoting *Spokeo*, 136 S. Ct. at 1549). According to the Ninth Circuit, the "common law roots of the right to privacy" were "first articulated in the 1890s" in Warren and Brandeis's "influential law review article." *Id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890)). "Soon" after that article appeared, "the existence of a right to privacy [was] recognized in the great majority of the American jurisdictions that have considered the question." Op. 15 (citing Restatement (Second) of Torts § 652A cmt. a. (1977)).

But in clarifying Article III's injury-in-fact standard, *Spokeo* confirms that the only "historical practice" that matters is whether the plaintiff's alleged harms were legally cognizable *at the time* Article III was ratified. That is why *Spokeo* cites *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774-77 (2000), which looked to "the long tradition of *qui tam* actions in England and the American Colonies," during the time "immediately before and after the framing of the Constitution."

In crafting Article III, the Framers drew on "what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union." *Sprint Commc'ns Co.*, 554 U.S. at 274-75 (internal citation and quotation omitted). In evaluating Article III standing, then, courts must look to whether an alleged statutory injury "has a close relationship to a harm that has traditionally been regarded as provid-

ing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

A tort claim premised on the respondents' alleged privacy harms would have been unrecognizable to the Framers. "If one takes the time to dust off and read the rather colorful hodgepodge of English, Irish and American cases assembled by Warren and Brandeis, one is singularly impressed with the fact that a right to privacy clearly did not exist in any of those jurisdictions in the year 1890." Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1347 (1992). If anything, the suggestion that something like modern privacy rights existed at common law is "ambitiously *un*supported." *Id.* at 1336 (emphasis added).

Before 1890, "no English or American court had ever expressly recognized the existence of the right [to privacy]." Restatement (Second) of Torts § 652A cmt. a. (1977). As late as 1902, the New York Court of Appeals dismissed a complaint that sounded in a breach of the "so-called right of privacy." *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 544 (1902). Such a right, the court declared, had no "abiding place in our jurisprudence" and could be recognized only by "doing violence to settled principles of law." *Id.* at 556. And as recently as 2003, the House of Lords of the United Kingdom confirmed that no freestanding right to privacy exists under British common law. *See Wainright v. Home Office*, [2003] UKHL 53, [2004] A.C. 406 (appeal taken from Eng.) (U.K.).

Warren and Brandeis's case for "a right to be let alone," while "full of optimism," was "light on

hard precedent." Gormley, *supra*, at 1345. They "were not presenting a picture of the law as it was, but of the law as they believed (or hoped) it should be." *Id*. at 1348. And despite *The Right to Privacy*'s glowing critical reception, "the development of a privacy tort in the United States [after 1890] was anything but swift, organized, or universal in its acceptance." *Id*. at 1354.

Even Warren and Brandeis would not have recognized a privacy claim devoid of any actual harm. Above all, they urged greater privacy protections to alleviate "mental pain and distress"—concrete harms "far greater than could be inflicted by mere bodily injury." Warren & Brandeis, *supra*, at 196. That is why "the extent of the protection accorded a privacy right" has always turned "on the degree of dissemination of the allegedly private fact." *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989).

Simply put, a "wide gap" exists between "the creation and retention" of "face templates" and "the privacy interest[s] protected by [the common law]." *Rivera v. Google*, 366 F. Supp. 3d 998 1007, 1012-13 (N.D. Ill. 2018) (dismissing an indistinguishable BIPA claim on standing grounds). True, even at common law, certain defamation torts were redressable by general damages. But such damages were available only if the plaintiff could prove some "special harm," *i.e.*, "harm of a material and generally of a pecuniary nature." 3 Restatement of Torts § 575 cmts. a & b (1938). The respondents here disclaim any of that. The decision below thus flouts the common law's understanding that "tort recovery requires not only wrongful act plus causation reaching to the

plaintiff, but proof of harm for which damages can reasonably be assessed." *Doe v. Chao*, 540 U.S. 614, 621 (2004).

Rather than try to connect the harms cognizable under BIPA to the common law's requirement of "special harm," as *Spokeo* instructs, the panel instead turned to this Court's Fourth Amendment jurisprudence. But the Fourth Amendment's protection against "unreasonable searches and seizures" is a jarringly inapt analogy for BIPA's notice-and-consent provisions. Private companies like Facebook are not subject to the Fourth Amendment, whose "origin and history" confirm that it restrains only "the activities of sovereign authority." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). And the Court has cautioned repeatedly against "stretch[ing] the Fourth Amendment beyond its words." *California v. Hodari D.*, 499 U.S. 621, 627 (1991).

In short, the Ninth Circuit's proclaimed "right not to be subject to the collection and use" of "biometric data," Pet. App. 21a, has no common-law analogue. Far from being steeped in the "historical practice" of Anglo-American courts, the panel's peculiar version of the right to privacy is "a fairly recent invention." Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 Arizona L. Rev. 1, 1 (1979). If left to stand, the decision below would render this Court's directive to compare a plaintiff's alleged harm with the "historical practice" of the common law all but meaningless in privacy cases.

II. REVIEW IS NEEDED TO STEM THE TIDE OF ABUSIVE CLASS ACTIONS INVITED BY THE DECISION BELOW.

Beyond the constitutional infirmity, certifying a class whose members can prove no real-world injury (or a "certainly impeding" one) allows plaintiffs to avoid Rule 23's "stringent requirements for [class] certification." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). That is because a putative class whose members need not show any individualized facts to prove standing can more easily argue that injury and causation are capable of common proof under Rule 23. This is not only unfair to class-action defendants, but it corrodes the integrity of our civil-justice system.

In a normal consumer class action, class members have incurred actual damages in some small but identifiable amount, but they lack any incentive to sue individually to recover that amount. The class-action device offers a way of aggregating those claims and trying them together efficiently. But when, as here, no plaintiff claims any actual harm—pecuniary or otherwise—it "poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010).

The class-wide aggregation of no-harm statutory damages thus "distorts the purpose of both statutory damages and class actions." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003). It is no mystery why this approach to civil justice has become increasingly common. "What makes these statutory damages class actions so attractive to

plaintiffs' lawyers is simple mathematics: these suits multiply a minimum [$1,000] statutory award (and potentially a maximum [$5,000] award) by the number of individuals in a nationwide or statewide class." Shelia B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009). In these cases, "plaintiffs' lawyers, not plaintiffs, receive a windfall because they receive a percentage of the statutory recovery fees multiplied by potentially thousands or millions of class members." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 61 (2005).

Here the respondents seek to represent a class comprising at least six million Facebook users who claim statutory damages solely for a statutory injury. Under BIPA's statutory minimum of $1,000 per class member, the certified class could produce a staggering $6 billion award. The statutory maximum could yield a $30 billion recovery. So massive a recovery would wipe out most American companies. According to Judge Marvin Frankel, the chief architect of Rule 23, such an award "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to [the] defendant, for what is at most a technical and debatable violation." *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

No surprise, then, given the overwhelming pressure to settle, that so few defendants continue to litigate after a class is certified. "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). In fact, only an estimated two percent of certified class actions ever go to trial. *See 2019 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 34 (2019) <https://classactionsurvey.com>.

This irresistible pressure to settle holds true even if the plaintiffs' claims lack merit. "[F]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (emphasizing the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs.*, 559 U.S. at 445 n.3 (Ginsberg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims.").

In the end, a class action in which the plaintiffs need not show actual harm is a powerful cudgel for securing lucrative settlements. Few companies are prepared to roll the dice on incurring a $30 billion judgment. While this hydraulic leverage to settle is calculated to extract windfalls from large companies like Facebook, small businesses are even more susceptible to *in terrorem* settlements. But a world in which companies feel obliged to settle even baseless claims would not only be bad for business, it would erode the American legal system. Justice is never served when the plaintiffs' payday does not reflect the likelihood that the plaintiff was harmed or that the defendant did anything wrong.

Allowed to stand, the decision below would create a powerful incentive for plaintiffs' attorneys to sue for outsized recoveries divorced from any injury in fact. Worse still, aggregating statutory damages under Rule 23 without the need to prove any real-world harm would allow plaintiffs to extract from defendants enormous settlements even in the face of strong defenses to liability. That is not an approach to civil justice that any member of this Court should abide.

The decision below is thus not only wrong, it is of enormous consequence in the digital age. The Ninth Circuit's embrace of the no-injury class action exponentially increases the likelihood of opportunistic, lawyer-driven lawsuits. It undermines the interests of Article III. And it serves none of the interests of Rule 23. This Court's intervention is sorely needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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