Ex. A

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLEN MORGAN, individually and on behalf of all others similarly situated, Plaintiff - Appellant, v. TWITTER, INC., Defendant - Appellee.	No. 23-3764 D.C. No. 2:22-cv-00122-MKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Mary K. Dimke, District Judge, Presiding

Argued and Submitted February 11, 2025
Seattle, Washington

Before: GOULD and NGUYEN, Circuit Judges, and BENNETT, District Judge.**

Glen Morgan brought a putative class action against Twitter,[1] alleging that

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

[1] Twitter, Inc. merged into X Corp. and no longer exists. The Twitter platform was renamed "X." Given the timing of the events at issue, X Corp. refers to itself and X as "Twitter" for purposes of this appeal.

Twitter violated Washington's statute, RCW 9.26A.140, prohibiting the deceptive procurement and sale of telephone records. Morgan appeals the district court's denial of his motions for remand, motion for leave to amend the complaint, and dismissal of the complaint. We review *de novo* a denial of a motion for remand, *see Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 692 (9th Cir. 2005); questions of Article III standing, *see Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022); and dismissal for failure to state a claim, *see id.* We assess for abuse of discretion denial of leave to amend. *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly denied Morgan's first motion for remand based on untimeliness. A defendant must file a notice of removal either (1) within thirty days after the defendant receives the initial pleading or (2) "if the case stated by the initial pleading is not removable," within thirty days after the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b); *Harris*, 425 F.3d at 692–93.

Morgan's initial pleading and subsequent "other papers" did not provide an estimated class size, such that Twitter could have determined whether the Class Action Fairness Act's $5,000,000 amount-in-controversy requirement would have been met. *See* 28 U.S.C. § 1332(d)(2). The thirty-day time limit did not begin

even though Twitter could have estimated the class size using its own customer data or information from an identical lawsuit. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1141 (9th Cir. 2013) ("[W]e declined to hold that materials outside the complaint start the thirty-day clock.").

2. The district court did not abuse its discretion in denying leave to file a second amended complaint. The district court identified the proper legal rule, citing to *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011), which directs the district court to consider five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint."

The district court properly evaluated and made findings on each factor. First, Morgan had already filed an amended complaint. Second, amendment would have been futile because Morgan did not "state what *additional* facts [he] would plead if given leave to amend," *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) (emphasis added); he only sought to delete allegations, *see DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987). Third, Twitter would have been prejudiced as the amendment would have further delayed the case, required another round of unnecessary briefing, forced Twitter to refile a substantially similar motion to dismiss, and denied Twitter a chance to have the deleted claim addressed on the merits. *See e.g.*, *AmerisourceBergen Corp. v.*

Dialysist W., Inc., 465 F.3d 946, 953 (9th Cir. 2006). Fourth, undue delay resulted from the extra motion practice of Morgan's overriding filings, and Morgan could have made the requested amendments much earlier. *See id.*

3. Even if the district court had granted Morgan leave to file a second amended complaint, the remaining allegations provided Article III standing, so the district court correctly rejected Morgan's second remand motion. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). An intangible harm can qualify as an injury in fact where the legislature "elevate[d] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 425 (internal quotation marks omitted). A violation of a statute "codify[ing] a substantive right to privacy . . . gives rise to a concrete injury sufficient to confer standing." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 598 (9th Cir. 2020); *see, e.g.*, *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017). Here, RCW 9.26A.140(1)(b)—which proscribes the procurement of a "telephone record" of another "[b]y fraudulent, deceptive, or false means"—codifies a substantive privacy right in one's telephone record. A telephone record can contain highly sensitive information, such as "the telephone number dialed by the customer or the incoming number or call directed to a customer, . . . the time the call started and ended, the duration of the call, [and] the time of day the call was made . . . ." RCW 9.26A.140(3)(b). The Washington legislature intended this

statute to prevent disclosure of this information due to pretexting, which is when someone impersonates a customer to access their information. As a result, this statute is an example of a legislature "ensuring that consumers retain control over their personal information." *Eichenberger*, 876 F.3d at 983.

Additionally, common intangible harms that result in an injury in fact "are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 594 U.S. at 425. RCW 9.26A.140(1)(b) is closely analogous to the historically-recognized intrusion upon seclusion tort. *See id.* This tort can occur when there is an "investigation or examination into [the plaintiff's] private concerns, as by opening his private and personal mail, searching his safe or his wallet, [or] examining his private bank account." Restatement (Second) of Torts § 652B, cmt. b. Given the extent of information someone can glean about another from their telephone records, it could be just as intrusive to view the records as it would be to open someone's mail. *See* Telephone Records and Privacy Protection Act of 2006, PL 109-476, Jan. 12, 2007, 120 Stat 3568 (recognizing that "call logs may reveal the names of telephone users' doctors, public and private relationships, business associates, and more"). Accordingly, alleging a violation of RCW 9.26A.140(1)(b) gives rise to an Article III harm.

Further, Morgan conceded that the allegations regarding Twitter's wrongful

sale of the telephone numbers, *see* RCW 9.26A.140(1)(a), created an injury in fact, and those allegations remained in the operative complaint. Even if Morgan can be said to have abandoned the sale allegations, that did not divest the district court of jurisdiction over them. *See BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) (affirming summary judgment of an abandoned claim); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) (same). Nor were the sale allegations moot because they lacked merit. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redist. Comm'n*, 576 U.S. 787, 800 (2015) .

4. The district court provided four independent reasons for dismissing Morgan's complaint for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), each of which was sufficient to support the dismissal. First, RCW 9.26A.140(1)(b) prohibits the fraudulent collection of telephone *records*, not numbers. The definition of a "telephone record" includes difficult-to-obtain, nonpublic information about a customer's calling behavior—such as who, when, and how long they are calling—revealing that protection of an individual customer's phone number is not the purpose of this statute. RCW 9.26A.140(5)(b); *see Yates v. United States*, 574 U.S. 528, 543–44 (2015); *accord State v. Roggenkamp*, 106 P.3d 196, 200 (Wash. 2005). This understanding aligns with the legislature's intent to protect highly sensitive information from pretexting. *Rest. Dev., Inc.*, 150 Wash. 2d at 682. Morgan alleged that Twitter obtained only his phone number, so

he failed to state a claim under RCW 9.26A.140(1)(b).

Second, the statute only covers a telephone record that is falsely obtained from a telecommunications company, not an individual. The definition of "telephone record" is limited to "information retained by a telecommunications company." RCW 9.26A.140(5)(b). Morgan insufficiently alleged that Twitter obtained his telephone number directly from him.

Third, Morgan's claim sounded in fraud, yet he did not meet the higher pleading standards required.[2] *See* Fed. R. Civ. P. 9(b). "To properly plead fraud with particularity under Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018) (cleaned up). Morgan did not identify a specific statement by Twitter he believed to be false.

Fourth, Morgan's failure to identify a specific misleading statement additionally failed the basic pleading requirements of Federal Rule of Civil Procedure 8(a)(2). Morgan's complaint was properly dismissed.

AFFIRMED.

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[2] RCW 9.26A.140 need not require a showing of fraud for the higher pleading standard to apply. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Under Washington law, there are nine elements constituting fraud in the inducement, *see Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wash. 2d 157, 166 (2012), and Morgan's operative complaint alleged facts meeting all nine elements.

Ex. B

No. 23-3764

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLEN MORGAN,
Plaintiff — Appellant,
v.
TWITTER, INC.,
Defendant — Appellee.

Appeal from the United States District Court for the Eastern District of Washington; No. 3:22-cv-00122-MKD

PETITION FOR REHEARING EN BANC

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May 13, 2025

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I. RULE 35 STATEMENT AND INTRODUCTION.

This Court should grant rehearing en banc to clarify the Article III standing of a private party seeking statutory damages for the violation of a state statute which creates a new, privately enforceable statutory right. En banc rehearing will provide meaningful guidance to lower courts in this Circuit, and ensure uniformity of this Court's decisions. Here, the panel's decision found that Morgan pled an Article III justiciable concrete harm by alleging that Twitter took his non-private telephone number. This holding contradicts *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), as applied by panels of this Circuit in, *e.g.*, *Phillips v. U.S. Customs and Border Protection*, 74 F.4th 986 (9th Cir. 2023) and *Greenstein v. Noblr Reciprocal Exchange*, 2024 WL 3886977 (9th Cir. 2024). The panel's decision to retain jurisdiction over Morgan's abandoned sales claim, instead of vacating the decision below, directly conflicts with the Supreme Court's recent decision in *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023).

Prior to this panel's decision, this Court found harm through analogies to common-law privacy where the defendant's "access to that information 'would be highly offensive to a reasonable person,' Restatement (Second) of Torts § 652B, or otherwise gives rise to reputational harm or injury to privacy interests." *Phillips*, 74 F.4th at 996. Access to non-private information does not cause a privacy harm. *Id.* *Phillips* and prior decisions of this Court applying *TransUnion* were clear, authoritative, and routinely applied by district courts in this Circuit, often with little discussion. The *Phillips* rule has also been applied in the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The panel also erred in retaining jurisdiction over a moot, abandoned claim. Supreme Court precedent instead compels vacatur of the decision below, and remand of the non-moot claim over which it lacks Article III jurisdiction.

En banc review is justified to correct these inconsistencies in this Court's precedents, and the Court should grant rehearing.

II. BACKGROUND.

Plaintiff Glen Morgan sued in state court under the private attorney general provisions of RCW 9.26A.140, seeking $5,000 statutory damages on his own behalf and that of a putative class for violations of RCW 9.26A.140(1)(a) and (1)(b). The (1)(b) claim alleged that Defendant Twitter, Inc. procured his telephone number using deceptive or false means; the (1)(a) claim alleged that Twitter subsequently sold the number. Morgan abandoned his (1)(a) sales claim before the district court.

The district court held that it had Article III jurisdiction over both claims, analogizing them to the common law tort of disclosure of private information. It retained jurisdiction over Morgan's abandoned sales claim. Because the court denied an amendment to replace the operative FAC with a pleading excluding the claim, it remained in the text of the operative pleading, and the district court held this sufficed for Article III jurisdiction. The panel below affirmed in all respects. It found Article III jurisdiction in a concrete harm analogous to common law privacy claims, and held that it could rule on Morgan's sales claim because it could still be found in the FAC. It therefore ruled on the merits of the statutory claim, affirming dismissal.[1]

[1] The panel's decision on the statutory claim erred. Washington consumer protection law claims based on false or deceptive statements do not sound in fraud;

III. Reasons For Granting Rehearing En Banc.

A. The Panel's Decision Finding Article III Standing Directly Conflicts With *TransUnion* And Its Progeny In This Circuit And Sister Circuits.

In the 2021 *TransUnion* decision, the Supreme Court reaffirmed that federal courts may not hear claims based on bare statutory violations unless the complaint alleges a concrete harm. "This Court has rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 426. Concrete harm need not be a physical injury. "Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion." *TransUnion*, 594 U.S. at 425. To determine whether the harm claimed in *TransUnion* (reputational harm) had such a close relationship, the Court looked to the Restatement of Torts. *Id.* at 432.

The panel found Article III jurisdiction by analogy to the tort of disclosure of private information. But, following *TransUnion* and *Phillips*, the analogy fails because that tort requires "that another's access to that information 'would be highly offensive to a reasonable person,' Restatement (Second) of Torts § 652B, or

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the FAC identified false statements, including, *e.g.*, at FAC ¶ 65-67; and nothing in the statute supports the conclusion that the protected records are only protected when in the possession of a telephone company, a conclusion which renders nugatory two-thirds of the statute.

otherwise gives rise to reputational harm or injury to privacy interests. A person's name, address, date and place of birth, place of employment, ... and social security number are not generally considered private." *Phillips*, 74 F.4th at 996. If the disclosed information is not private, or its disclosure does not cause offense, there is no Article III concrete harm. A plaintiff may attempt to act as a private attorney general to enforce such a ban in state court, but federal courts may not entertain such claims. "If the law of Article III did not require plaintiffs to demonstrate a concrete harm, Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. … The public interest that private entities comply with the law cannot be converted into an individual right by a statute that denominates it as such, and that permits all citizens to sue." *TransUnion*, 594 U.S. at 428–29 (cleaned up). Federal courts lack Constitutional authority to police the metes and bounds of a state statute that penalizes taking non-private telephone numbers from Washington citizens.

A recent memorandum opinion from Judges Miller, Bade, and Vandyke dismissed a class action for lack of standing on these grounds. Plaintiffs in *Greenstein* alleged "their driver's license numbers were targeted in a cyberattack." *Greenstein*, 2024 WL 3886977 at *1. The panel found no standing in an analogy "to the common law torts of intrusion upon seclusion, invasion of privacy, and public disclosure of private facts." *Id.* at *3. Because "the disclosure of driver's license numbers is neither highly offensive, an egregious breach of social norms, nor offensive and objectionable to the reasonable person", *id.*, plaintiff lacked standing. Neither could a person characterize disclosure of a phone number in such a manner.

A recent unreported interlocutory decision from a district court in this Circuit reached that same unremarkable conclusion. *See, e.g.*, *Lien v. Talkdesk, Inc.*, 2025 WL 551664 (N.D. Cal. 2025) (intercepting plaintiff's phone number "is simply not private or personal enough to confer standing" and dismissing "without prejudice to refiling it in state court"). District Judge Chhabria found that his conclusion neither merited extensive discussion nor publication, no doubt because it followed not only *TransUnion* and *Phillips*, but similar decisions from sister circuits. The panel's contrary decision here contradicts *Phillips*, confuses district courts, and creates a split with the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. Those Circuit courts have refused to assert jurisdiction over statutory claims analogized to disclosure of private information where the information is not private, embarrassing, or publicized. Morgan's phone number was not private, its disclosure would not be embarrassing if made, and there is no allegation that Twitter subsequently disclosed it to anyone.

In *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136 (3d Cir. 2024), plaintiff alleged Keystone had transmitted information about her debts to a mailing vendor, for a purpose banned by the Fair Debt Collection Practices Act: creating a marketing letter to send back to her. The court found the allegations were not the kind of harm "known as the public disclosure of private information." *Id.* at 145. The court "conclude[d] that the harm from disclosures that remain functionally internal are not closely related to those stemming from public ones." *Id.* at 146.

Barclift's outcome agrees with *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236 (11th Cir. 2022), where the court rejected an identical FDCPA

claim. "*TransUnion* affirmed a simple instruction about how to [analogize]: see if a new harm is similar to an old harm. Although an exact duplicate of a traditionally recognized harm is not required, the new allegations cannot be missing an element essential to liability under the comparator tort." *Hunstein*, 48 F.4th at 1242. It identified four elements of public disclosure of private information: "one element of public disclosure is publicity; the others, for information's sake, are that the publicity concerns a matter in the private life of another, that it is highly offensive to a reasonable person, and that the disclosed information is not of legitimate public concern." *Id.* at 1245. Because *Hunstein* failed to allege publicity, the allegations failed to create Article III standing.

The Eleventh Circuit reaffirmed this in *Drazen v. Pinto*, 74 F.4th 1336 (11th Cir. 2023), where it surveyed its sister circuits' analytical approaches. "Just as the Seventh Circuit focuses on kind but not degree, the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits look to the types of harms protected at common law, not the precise point at which those harms become actionable. … The Second and Third Circuits similarly focus on the character of the new and old harms when determining whether the relationship is sufficiently close." *Id.* at 1344 (cleaned up). It therefore did not tally the number of unwanted calls or texts required to analogize to intrusion upon seclusion, because even one unwanted call caused the kind of harm protected by the common law tort.

The Seventh Circuit reached the same result in *Nabozny v. Optio Sols. LLC*, 84 F.4th 731 (7th Cir. 2023). Faced with the same allegation—disclosure of debt information to a mail vendor—the court reviewed the Restatement (Second) and

found the complaint did not allege the element of publicity. *Id.* at 736. The plaintiff urged that the "elements" approach from *Hunstein* conflicted with the Seventh Circuit's earlier approach in *Gadelhak* where then-Judge Barrett "held that analogizing to common-law harms requires us to look only for a close relationship in kind, not degree." *Nabozny*, 84 F.4th at 736. The court found that "*Hunstein* and *Gadelhak* are easily reconcilable." *Id.* "Because allegations of publicity are altogether missing from Nabozny's complaint, her injury from the alleged § 1692c(b) violation—if one exists at all—is different *in kind* from that which the common law traditionally has recognized as actionable." *Id.* at 737.

The Seventh Circuit also rejected standing over a statutory claim for wrongfully taking a driver's license number, in *Baysal v. Midvale Indem. Co.*, 78 F.4th 976 (7th Cir. 2023). The court found no concrete harm analogous to common law privacy claims because "a driver's-license number is not potentially embarrassing or an intrusion on seclusion. It is a neutral fact derived from a public records system, a fact legitimately known to many private actors and freely revealed to banks, insurers, hotels, and others." *Id.* at 980. Replace "driver's license" with "cell phone number" and the Seventh Circuit's description applies perfectly to this case. Here, however, the panel came to the opposite conclusion in finding Article III harm, contradicting not only *Phillips* but also the Seventh Circuit.

In *Shields v. Pro. Bureau of Collections of Maryland, Inc.*, 55 F.4th 823 (10th Cir. 2022), another FDCPA case, the court found ***both*** that the allegations failed to show a missing element of the tort of publishing private information ***and*** that Shields failed to allege the kind of harm protected by the common law tort. "Shields did not have

to plead and prove the tort's elements to prevail. But to proceed, she had to at least allege a similar harm." *Id.* at 829.

The Eighth Circuit has also rejected privacy analogues for lack of tort elements found in the Restatement (Second). In *Jones v. Bloomingdales.com, LLC*, 124 F.4th 535 (8th Cir. 2024), the court found no analogue to common law privacy violations where website session replay technology recorded the plaintiff's "mouse movements, clicks, and keystrokes …" The Court found that the information simply wasn't private at all. "Just as a security camera at a physical store might record how customers react to a display of products, session-replay technology captures how a store's online customers react to digital displays, to the extent 'clicks' and 'hovers' might reveal those reactions. We fail to see how this invades Jones's privacy, especially when she voluntarily conveyed the information she says is private to the defendants." *Id.* at 540.

Similarly, in *O'Leary v. TrustedID, Inc.*, 60 F.4th 240 (4th Cir. 2023), "O'Leary sued TrustedID in state court, alleging that TrustedID's practice of requiring six digits of consumers' SSNs violated [a state statute] and South Carolina's common-law right to privacy."[2] *Id.* at 241. TrustID removed and moved to dismiss. "The district court granted TrustedID's motion to dismiss on the merits, holding that O'Leary had not plausibly stated a claim under the Act …" *Id.* at 242. Despite both parties concurring in O'Leary's standing, the Court held that

[2] The statute forbade a company from asking for more than five digits of the SSN; TrustID asked for six.

disclosure of a social security number was not analogous to either intrusion upon seclusion nor the disclosure of private information. With no concrete harm, the Fourth Circuit vacated the decision and remanded with instructions for the district court to remand the case to state court. The court "offer[ed] no opinion about whether the alleged facts state a claim under the Act. Absent Article III jurisdiction, that's a question for O'Leary to take up in state court." *Id.* at 246.

The panel's decision here conflicts with every one of these cases, just as it conflicts with this Court's precedent in *Phillips*. The district court and panel both asserted jurisdiction over the RCW 9.26A.140(1)(b) claim on the theory that taking Morgan's phone number caused concrete harm analogous to the common law tort of disclosure of private information. However, no prior case in this Circuit or any sister circuit concurs in this outcome. Morgan's allegations do not track at least three elements of the common law tort. The FAC never alleges that Twitter re-disclosed his number to anyone else, failing the publicity element. His telephone number does not concern a matter in his private life, nor would any reasonable person find that disclosing it to someone else is highly offensive. Nor does he allege that he suffered the kind of harm remedied by the common law. As the analysis above shows, sister circuits come to the same result that this Court did in *Phillips*: where the information at issue is not private, and where its disclosure would not be offensive to a reasonable person, even if any harm can be found in the allegations, it is not sufficiently analogous to the common law tort to create Article III standing.[3]

[3] The FAC fails to specifically allege that Twitter "harmed" Morgan. Indeed, the word "harm" appears only twice, in FAC ¶¶ 6 and 7. Morgan specifically alleges

In sum, the outcome the panel reached here contradicts all previous cases in this Court and sister circuits which apply *TransUnion*. The FAC does not allege an Article III cognizable concrete harm. In holding otherwise, the panel contradicted earlier decisions of this court, creating confusion in this increasingly important area of the law, as well as creating a split with sister circuits.

B. The Panel's Decision Finding A Live Controversy Over Morgan's Abandoned Sales Claim Directly Conflicts With Settled Law Concerning Moot Claims.

As this Court recognized three decades ago, "mootness is a threshold jurisdictional issue." *S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or.*, 9 F.3d 807, 810 (9th Cir. 1993). "Mootness is 'the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Citizens for Quality Educ. San Diego v. Barrera*, 333 F.Supp.3d 1003, 1024–25 (S.D. Cal. 2018) (*citing U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). In other words, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (cleaned up).

As a result, "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence

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that defendants such as Twitter "contend that … there is no comparable, measurable financial harm to those whose rights they violate" and that they "also often contend that the harm to an individual is *de minimus* …".

(mootness)." *Geraghty*, 445 U.S. at 397. This Court has thus correctly held that "we lack jurisdiction to hear moot claims." *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). The Court lacks any Article III authority to rule on a moot claim except under rare and unusual circumstances, usually involving state action. The panel decision erred in finding that Morgan's sales claim was ***not*** moot. Morgan had clearly, affirmatively, and unequivocally abandoned the claim. "A claim is abandoned where the "litigant deliberately declined to pursue an argument by taking a position that conceded the argument or removed it from the case." *Walker v. Beard*, 789 F.3d 1125, 1133 (9th Cir. 2015). Under long-standing U.S. Supreme Court precedent, abandoned claims are moot.

The recent decision of *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023) demonstrate that the only recourse here is to vacate any merits decision as to the abandoned sales claim, and that the panel erred in offering an advisory opinion as to the state law merits. In *Acheson*, a self-described website tester and near-constant litigant had single-handedly created a circuit split as to her own standing to sue. After oral argument on standing before the Supreme Court, she filed a notice of voluntary dismissal in the trial court. *Id.* at 1. Nine justices agreed that the case had to be dismissed for lack of standing. Indeed, all nine agreed that the court could ***and must*** answer the question of standing. They all agreed they could ***either*** answer whether the plaintiff had initial standing to sue or whether the current controversy was live or moot.[4] Eight justices analyzed mootness, and found the dispute had been

[4] As *Acheson* shows, if this Court first addressed standing for the abandoned, moot sales claim, it would have to find an allegation of concrete harm before it proceeded

abandoned by the plaintiff. *Id.* at 5. Justice Thomas would have reached the question of plaintiff's original standing to sue, *id.* at 7. Only Justice Jackson in a concurrence believed the Court should not vacate the First Circuit's opinion. *Id.* at 14. In sum, seven justices joined the holding of the Court: mootness commanded vacatur of the underlying opinion. That holding commands the same outcome here, contrary to the panel's decision.

Twitter proffered two bases for the district court's retention of jurisdiction over this case. First, it urged that the statutory claims alleging the procurement of telephone numbers by deceptive means alleged a concrete injury sufficient to satisfy the standing requirements under *TransUnion.* The panel's acceptance of that ground for jurisdiction conflicted with prior decisions of this Court as well as similar decisions in sister circuits, as the previous sections of this brief demonstrated.

However, the panel also justified the continued exercise of jurisdiction by citing the claim contained in the FAC that Twitter improperly *sold* telephone records (the phone numbers they obtained). However, it is undisputed that Morgan abandoned the sales claim, and therefore it could not present a "case or controversy" justifying the continued exercise of the court's jurisdiction. *See, e.g.*,

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to determine whether the claim is moot—which it is. There's no point debating concrete harm under the abandoned sales claim where vacatur due to mootness reaches the same result.

Rosebrock v. Mathis, 745 F.3d 963 (9th Cir. 2014) (suit seeking injunctive relief rendered moot when defendant abandoned challenged practice).[5]

Abandonment of claims and mootness doctrine have no relationship to the contents of the most recently filed pleading. If that were the rule, no claim could ever become moot on appeal. By applying a novel rule—that a party's abandoned claim still creates Article III jurisdiction as long as a district court docket contains the claim—the panel contradicted decades of Ninth Circuit and Supreme Court jurisprudence.

The two cases cited by the panel in support of retaining jurisdiction over a moot claim do not support the result in this case. Indeed, *BankAmerica Pension Plan v. McMath*, 206 F.3d 821 (9th Cir. 2000), stands for the very proposition that commands vacatur for mootness here: when a party abandons a theory of recovery, that party cannot resuscitate it. Morgan has abandoned a theory of recovery (sales) and cannot resuscitate it. In *BankAmerica* there was no question of whether the court had jurisdiction over a party's remaining claims. Here, by contrast, because there is no federal jurisdiction over the procurement claims, Morgan's abandonment of the

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[5] *Rosebrock* makes clear that when a party abandons that aspect of the case that originally created a case or controversy, the court may only retain jurisdiction where there is a risk of the controversy recurring. However, that narrow exception to mootness arises almost exclusively in the context of a government defendant asserting it has abandoned a challenged statute, regulation or enforcement action, but where the court reasonably concludes the defendant could restart after dismissal. *BankAmerica Pension Plan* shows that plaintiff Morgan's abandonment of a claim has binding effect, such that he cannot raise it again.

sales claim leaves nothing for a federal court to decide. Similarly, in *Ramirez v. City of Buena Park*, 560 F.3d 1012 (9th Cir. 2009), the plaintiff brought § 1983 claims as well as state law claims. He abandoned his state law claims but the court properly exercised Article III (federal question) jurisdiction over the inmate's remaining § 1983 claims. Here, by contrast, when Morgan abandoned his sales claim, it became moot. Because there was no Article III jurisdiction over his procurement claims, the district court should have treated it the way that the Supreme Court treated Laufler's case in *Acheson*, vacating the judgment below and remanding the sole remaining claim in the case to state court.

C. The Panel Decision Creates A Split Of Authority On An Important And Recurring Issue.

There are an ever-increasing number of state statutes governing access to and use of information gathered in connection with the use of the internet and social media platforms such as Twitter. Most of these statutes, like RCW 9.26A.140, include private attorney general enforcement provisions and statutory damages. Especially subsequent to *TransUnion*, litigation under these statutes has resulted in thousands of analyses by district courts and courts of appeal over the questions of Article III concrete harm through analogies to privacy torts, illuminated by the Restatement (Second). For example, Westlaw shows that the Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. 14/1 *et seq.*, has been cited in 316 federal cases (and 38 reported state cases), including an analysis of standing by this Court in *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019). District courts in the Ninth Circuit have subsequently grappled with the statute over two dozen times,

with standing discussed in many reported decisions. Similarly, the California Invasion of Privacy Act has resulted in over three hundred reported federal decisions, including *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020), where this Court evaluated plaintiffs' standing. The issue is hardly settled; a panel of this Court re-analyzed the question based on allegations that "that Bloomingdales.com, LLC used third-party tracking software to intercept and record the online communications of visitors to its website …" in *Daghaly v. Bloomingdales.com, LLC*, 2024 WL 5134350 (9th Cir. Dec. 17, 2024). In 2025 to date, six separate federal cases just in California have analyzed whether allegations in a CIPA claim are analogous to common law privacy torts to create standing. *See, e.g.*, *Rodriguez v. Autotrader.com, Inc.*, 2025 WL 65409 (C.D. Cal. Jan. 8, 2025); *Gaige v. Exer Holding Co., LLC*, 2025 WL 559719 (C.D. Cal. Mar. 2, 2025); *Shah v. Cap. One Fin. Corp.*, 2025 WL 714252 (N.D. Cal. Mar. 3, 2025); *R.C. v. Sussex Publishers, LLC*, 2025 WL 948060 (N.D. Cal. Mar. 28, 2025); *Edwards v. MUBI, Inc.*, 2025 WL 985130 (N.D. Cal. Mar. 31, 2025); *Smith v. Rack Room Shoes, Inc.*, 2025 WL 1085169 (N.D. Cal. Apr. 4, 2025). The panel's decision in this case casts doubt on previously settled law that district courts have routinely applied in types of cases that arise dozens of times a year. Ensuring uniformity and consistency in this recurring and constitutionally mandated area of the law is vital for this Court.

IV. CONCLUSION.

For the reasons set forth above, the Court should grant this petition for rehearing en banc.

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May 13, 2025.

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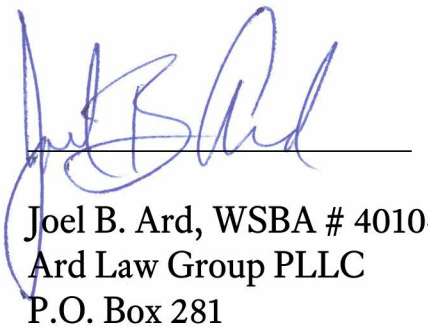
By: 

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This filing complies with the length requirements of Federal Rule of Appellate Procedure 35 because it contains **3,894** words.

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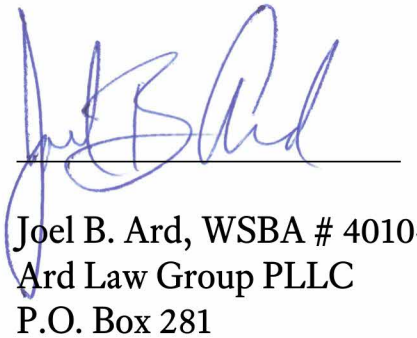
By: 

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLEN MORGAN, individually and on behalf of all others similarly situated,

Plaintiff - Appellant,

v.

TWITTER, INC.,

Defendant - Appellee.

No. 23-3764

D.C. No.
2:22-cv-00122-MKD
Eastern District of Washington, Spokane

ORDER

Before: GOULD and NGUYEN, Circuit Judges, and BENNETT, District Judge.*

Judge Gould and Judge Nguyen have voted to deny the petition for rehearing en banc, and Judge Bennett has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The petition for rehearing en banc (Dkt. # 51), filed May 13, 2025, is DENIED.

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.