No. 18-15982

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE FACEBOOK BIOMETRIC INFORMATION PRIVACY LITIGATION

CARLO LICATA; ADAM PEZEN; AND NIMESH PATEL,
Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Respondents,

v.

FACEBOOK, INC.,
Defendant-Petitioner.

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

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*[*]

Founded in 1977, 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.

The proliferation of abusive class actions in the federal courts stifles the American economy. To combat that trend, WLF often appears as an *amicus curiae* before this and other federal courts to oppose the certification of inappropriate and unwieldy class actions under Federal Rule of Civil Procedure 23. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). WLF has also repeatedly urged the federal judiciary to confine itself 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).

WLF urges the Court to grant rehearing *en banc* and repair the Circuit's understanding of both these issues.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of WLF's brief.

INTRODUCTION

The plaintiffs are users of Facebook, a social-networking service that allows them to connect online and share content, including photos, with their Facebook friends. "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. If the software discerns a likely match in a user's uploaded photo, Facebook may suggest a "tag" for that photo with the friend's name and a link to that friend's Facebook page. If the user approves the tag, the tagged friend receives notice of the tag and may "un-tag" herself.

When the plaintiffs signed up for Facebook, they all agreed to Facebook's Data Policy. That Policy explains how Tag Suggestions work and how a user can turn that feature off, if desired. ER 67, 69, 210. The plaintiffs candidly admit that they have not been harmed by Tag Suggestions, a "nice feature" (in one plaintiff's words) that they continue to use. ER 210. No plaintiff claims he would have done anything differently had Facebook provided different disclosures.

Even so, the plaintiffs sued Facebook under the Illinois Biometric Privacy Act (BIPA). 740 ILCS 14/1 *et seq*. Although BIPA excludes from its sweep "information derived from" "photographs," the plaintiffs allege that Facebook violated BIPA when it analyzed photos of them without giving them notice and without obtaining a written release. Claiming to represent a class of at least six million Illinois Facebook users, the plaintiffs seek billions of dollars in damages. After the district court certified the plaintiffs' proposed class under Rule 23(b)(3), this Court granted Facebook's Rule 23(f) petition for interlocutory review.

Although the plaintiffs concede they suffered no "real" injury (*i.e.*, no actual harm), the panel held that the plaintiffs satisfied Article III standing merely by alleging a statutory violation under Illinois law. As Facebook's petition shows, under the panel's approach to Article III, a plaintiff has standing to sue in federal court under BIPA, even if he admits to suffering no harm—even, in fact, if he knowingly shared the information at issue.

Facebook challenges class certification on predominance, superiority, and due-process grounds. Yet the panel failed to address Facebook's argument that class certification violates due process when

it creates irresistible pressure for a defendant to settle rather than face billions of dollars in statutory penalties. Such due-process concerns increase exponentially in the context of a suit like this one, which seeks to impose liability based on an inchoate injury causing no real harm or actual loss. While the panel ignored these concerns altogether, the district court dismissed Facebook's due-process argument as a question to be decided after trial.

But few class actions go to verdict. "Aggregating millions of claims ... makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of catastrophic judgment as much as, if not more than, the actual merits of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (Easterbrook, J.). Given this reality, interlocutory appeal of a class-certification order is often a defendant's last chance for meaningful review of its due-process rights. Yet this Court has tended, as it did here, to avoid addressing the troubling due-process implications of its certification decisions. *See Bateman v. Am. Multi-Cinema*, 623 F.3d 708 (9th Cir. 2010) ("We also reserve judgment as to

whether, if Bateman prevails at trial, the district court may be entitled to reduce the award if it is unconstitutionally excessive.").

Nor is that all. If statutory damages are available without the need to prove harm, plaintiffs will be able to extract enormous settlements from defendants even if there are strong defenses to liability. While this hydraulic leverage to settle is calculated to extract windfalls from large companies like Facebook, it is small businesses that are most susceptible *in terrorem* settlements. Most American companies would be wiped out by a ten-figure recovery. But settling frivolous claims is not only bad for businesses, it is bad for the legal system. It means that plaintiffs' massive payday will not reflect the likelihood that a business defendant is actually liable. The Court should grant the petition and take up Facebook's due-process argument.

It should also revisit the question of superiority under Rule 23(b)(3). This Court and others have rejected class certification in cases in which plaintiffs seek an eye-popping money judgment divorced from any actual harm. Under these circumstances, a class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS THE DUE-PROCESS IMPLICATIONS OF CLASS-WIDE AGGREGATION OF STATUTORY DAMAGES UNDER BIPA.

Both the district court and the panel gave short shrift to Facebook's contention that certifying a no-injury class seeking many billions of dollars violates due process, especially when the named plaintiffs identify no harm apart from a bare statutory violation. The need to squarely address Facebook's due-process argument supplies an independent basis for rehearing *en banc*.

While acknowledging that due process imposes some limits on the amount of damages the class may recover, the district court sidestepped Facebook's due-process concerns, citing its "discretion to reduce a liquidated damages award to comport with due process at a later stage of the proceedings." ER15. But at least the district court acknowledged those concerns. The panel failed even to address Facebook's due-process argument. Indeed, the words "due process" are conspicuously missing from the panel's opinion.

Overly broad judicial discretion can "invite extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*,

499 U.S. 1, 18 (1990). Given the enormous pressure to settle, depriving Facebook's due-process concerns of meaningful appellate review *now* could allow those "extreme results" to go uncorrected, even unnoticed. The right to meaningful appellate review is vital to protecting a party's liberty and property. *See Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510-11 (1984).

A. The Aggregation of Statutory Damages in a Class Action Raises Serious Due Process Concerns.

Due process "prohibits … 'grossly excessive' punishments." *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 434 (2001) (citation omitted). A statutory-damages award grossly out of proportion to the alleged misconduct is "essentially penal." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919). And when "statutory damages are aggregated in a class action," the available damages can be "astronomical, leading some courts to express concern about the combination of such statutory damages and class action aggregation." William B. Rubenstein, *Newberg on Class Actions* 4:83 (5th ed. 2012); *see* Shelia B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 111 (2009). ("When combined with the procedural device of the class action,

aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.").

Aggregating statutory damages in a class action serves no legitimate purpose when no one has been harmed. In a normal consumer class action, people have incurred actual damages in some small but identifiable amount, but they lack any incentive to sue to recover that amount. The class-action device is a helpful way of aggregating those claims and trying them efficiently. But here, no plaintiff has identified any actual harm. That removes the entire rationale behind the class action.

Class-wide aggregation of 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 "turn[s] the per-customer statutory damages in the [statute] into a hammer so heavy as to be beyond any plausible account of the underlying remedial scheme." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006).

It also creates a powerful incentive for plaintiffs' attorneys to sue. "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." Scheuerman, *supra*, at 114. This added incentive can lead to overdeterrence. "The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counter-productive to statutory policies." Note, *Developments in the Law—Class Action*, 89 Harv. L. Rev. 1329, 1361 (1976).

Here, the plaintiffs seek to represent a class comprising at least six million Facebook users. Under BIPA's statutory minimum of $1,000 per class member, so large a class could lead to a staggering $6 billion award. The statutory maximum could yield a $30 billion recovery. That potential for so outsized an award raises serious due process concerns. *See Fraley v. Batman*, 638 Fed. Appx. 594, 597 (9th Cir. 2016) (stating that "an award of $750 per claiming class member could implicate due process concerns"). These concerns deserve to be addressed, not evaded.

B. If Not Addressed Now, Facebook's Due Process Concerns Will Likely Evade Review.

The constitutional problem here lies not only in the potential for a massive, disproportionately punitive award detached from any harm. It lies also in the hydraulic leverage that so crippling a potential award provides in a case like this. "When representative plaintiffs seek statutory damages," the pressure on defendants to settle is "heightened because a class action 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) (Ginsburg, J., dissenting).

Class certification is often "the most significant decision" in "class-action proceedings." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Certification is pivotal because it "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Cooper & Lybrand v. Livesay*, 437 U.S. 463, 467 (1976).

Given the overwhelming pressure to settle, few defendants continue to litigate after a class is certified. Only the richest companies are willing to risk an enormous judgment if any chance remains of settling at a discount. "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). An estimated 2.1 percent of class action suits go to trial. *See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 25 (2017) <https://tinyurl. com/yyylv87x>.

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

Although Facebook pressed its due-process concerns repeatedly, the panel refused to address the constitutional implications of the district court's certification decision. As Judge Friendly noted in his

seminal article on due process, a fundamental element of a fair hearing is a written opinion setting forth the adjudicative body's reason for its decision. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1291 (1975). "The necessity for justification," he observed, "is a powerful preventive of wrong decisions." *Id.* at 1292. A written statement of reasons "may even make a decision somewhat more acceptable to a losing claimant. Moreover, the requirement is not burdensome." *Id.*

By that standard, the panel failed to provide adequate review of Facebook's due-process rights. For its part, the district court essentially recast Facebook's due-process argument as an issue solely for the end of trial. But while it is true that denying interlocutory review of an issue does not bar the complaining party from raising it at the end of the case, companies facing the potential for an enormous judgment bill cannot afford to wait.

In short, leaving due-process concerns for the remedies stage may be convenient for courts, but it leaves business defendants in an impossible bind. Very few companies are prepared to roll the dice on incurring a $30 billion judgment. Without rehearing *en banc*,

Facebook's due-process rights may never be considered, and class-action defendants in this Circuit will continue to have their due-process rights ignored. That is not an approach to civil justice that any member of this Court should abide.

II. UNDER THESE CONDITIONS, A CLASS ACTION IS NOT SUPERIOR TO INDIVIDUAL ACTIONS.

The panel devoted two perfunctory paragraphs to rejecting Facebook's argument under Rule 23(b)(3), which requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P 23(b)(3). Among the non-exhaustive criteria that courts should consider in determining whether a class action is superior is "the desirability or undesirability of concentrating the litigation of the claims." *Id.* According to the Advisory Committee Notes, Rule 23(b)(3) ensures that aggregating claims does not "sacrific[e] procedural fairness or bring[ ] about other undesirable results." *Id.*, 1966 Advisory Committee Notes. Facilitating settlement shakedowns at the expense of due process is both unfair and undesirable.

No surprise, then, that a class action is not superior under Rule 23(b)(3) if it seeks "outrageous amounts in statutory penalt[ies]." *Kline*

v. Coldwell, Banker & Co., 508 F.2d 226, 233-34 (9th Cir. 1974). *Kline* precludes class certification when the aggregated damages are so great that certification would lead to an "ad absurdum result" and would "shock the conscience." *Id.* 233-35. *Kline*'s prohibition squarely applies here, yet the panel dismissed it with a "*cf.*" cite.

Again, the plaintiffs seek a multi-billion-dollar recovery untethered to any actual harm. 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).

Under these circumstances, "plaintiffs' lawyers, not plaintiffs, receive a windfall because they receive a percentage of the statutory fees multiplied by potentially thousands or millions of class members, even though statutory damages were unnecessary to create incentive to bring the suit." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 61 (2005).

The panel's only answer is that no superiority problem exists unless "the legislature intended to place a cap on statutory damages." Slip Op. 24. But as Facebook has shown, that approach to superiority finds no support in Rule 23 or this Circuit's precedents.

What's more, the panel's evasion leaves superiority under Rule 23 at the mercy of the Illinois legislature. Yet the Illinois General Assembly should not have the last word on what counts as superior under Rule 23. Even less so should Facebook's due-process rights turn on the sausage made by state legislators. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.).

CONCLUSION

The petition should be granted.

September 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the page limit set forth in Circuit Rule 29-2(c)(2). It contains 2,821 words.

(ii) That this brief complies with the format, typeface, and type-style requirements of Fed. R. App. P. 32(a)(4)-(6) because it has been prepared using Microsoft Office Word 2016 and is set in 14-point Century Schoolbook font.

September 16, 2019

/s/ Cory L. Andrews

CERTIFICATE OF SERVICE

I certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are CM/ECF users so service will be accomplished by the appellate CM/ECF system.

/s/ Cory L. Andrews