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WLF Urges En Banc Ninth Circuit to Decertify Multi-Billion-Dollar Privacy Class Action

(In re Facebook Biometric Information Privacy Litigation)

“A plaintiffs’ class that may obtain billions of dollars in recovery without a showing of actual harm is able to extract an exorbitant settlement amount untethered from the merits.”

—Cory Andrews, WLF Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today filed an amicus curiae brief in the U.S. Court of Appeals for the Ninth Circuit, urging it to grant Facebook, Inc’s petition for rehearing en banc. WLF’s brief is highly critical of the appeals court’s August 8, 2019 decision, which threatens to permit large, no-harm class actions whenever plaintiffs can label the alleged statutory violation an “invasion of privacy.”

The case arises under the Illinois Biometric Privacy Information Act (BIPA), a 2008 law that requires companies to obtain written consent before collecting a person’s biometric information. It provides a private right of action allowing a plaintiff to recover up to \$5,000 for a single violation. Seeking to represent a class of six million Illinois Facebook users, the plaintiffs sued Facebook claiming that its Tag Suggestions feature—which uses facial-recognition software to suggest that Facebook users tag their friends in photos they upload to Facebook—violates BIPA.

As WLF’s brief explains, the panel’s certification ruling throws open the door to class claims threatening draconian liability, creating irresistible pressure to settle even dubious claims. Such hydraulic settlement pressure—leveraging many billions of dollars in potential recovery—raises serious due-process concerns. What’s more, a class action with so many inherent defects is not “superior” under Federal Rule of Civil Procedure 23(b)(3).

Celebrating its 42nd year as America’s premier public-interest law firm and policy center, WLF’s mission is to preserve and defend America’s free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law.

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