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## **WLF Asks Ninth Circuit To Reject Privacy Suit By Plaintiff Who Suffered No Cognizable Injury** *(Popa v. PSP Group, LLC)*

**“The word ‘privacy’ is not a magical talisman in whose presence Article III’s inflexible standing requirements suddenly melt away.”**

—Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today joined the U.S. Chamber of Commerce, NetChoice LLC, and the Interactive Advertising Bureau on a brief urging the U.S. Court of Appeals for the Ninth Circuit to affirm a trial court’s rejection of a suit in which the plaintiff lacked standing to pursue her state wiretapping claims. The amicus brief was drafted by Megan Brown, Jeremy Broggi, and Joel Nolette of Wiley Rein LLP.

The appeal arises from a lawsuit alleging that Microsoft’s Clarity software tracks “mouse movements, clicks, keystrokes, URLs of web pages visited, and/or other electronic communications in real-time.” The complaint also alleges that while on the website, the plaintiff browsed for different products for sale by using her mouse to hover and click on certain products, typing words into the search bar, and selecting a product to add to her shopping cart by clicking “add to cart”—though she never purchased anything. The trial court determined that browsing for pet supplies and using her mouse to hover and click on certain products “reveals nothing more than the type of products that interested Ms. Popa and thus is not the type of private information that the law has historically protected.” As a result, the court dismissed the suit for lack of a cognizable harm under Article III.

In an amicus brief asking the Ninth Circuit to affirm that decision, amici argued that dismissal was consistent with the Supreme Court’s recent teaching in *TransUnion LLC v. Ramirez* on Article III’s need for “a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” The plaintiff here cannot satisfy that standard because her alleged harms are unlike those traditionally protected at common law (and Pennsylvania’s Wiretap Act cannot make them so). Alternatively, the brief asks the court to affirm dismissal because the complaint fails to state a claim. Information about the plaintiff’s website navigation is not the “contents” of any communication as that term is used in the Wiretap Act and, in any event, the rule of lenity would require much more clarity before a common, industry-standard practice incurs enormous private liability under a law that predates the internet.

*Celebrating its 47th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.*

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