No. 18-15982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Facebook Biometric Information Privacy Litigation

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

vs.

FACEBOOK, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
No. 3:15-cv-03747-JD
The Honorable James Donato

REPLY TO FACEBOOK'S OPPOSITION TO PLAINTIFFS' MOTION TO VACATE ORDER GRANTING INTERLOCUTORY APPEAL AND DISMISS THE APPEAL

Rafey Balabanian
J. Aaron Lawson
EDELSON PC
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415/212-9300

Michael P. Canty
Corban S. Rhodes
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Telephone: 212/907-0700

Susan K. Alexander
Shawn A. Williams
ROBBINS GELLER RUDMAN
& DOWD LLP
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545

Counsel for Plaintiffs-Appellees
Additional Counsel Listed on Signature Page

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I. INTRODUCTION

What Facebook cannot avoid is that the Illinois Supreme Court has decisively ruled that collection of biometric information or identifiers in violation of the Illinois statute on which this litigation is based (the Biometric Information Privacy Act) is a "real and significant" "injury," "sufficient to support … [a] cause of action." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 (Ill. Jan. 25, 2019), ¶¶33-34; slip at 11. "No additional consequences need be pleaded or proved." *Id.* at ¶33; slip at 11. No additional "actual injury or adverse effect" is required to "be entitled to seek liquidated damages and injunctive relief pursuant to the Act." *Id.* at ¶40; slip at 13.

That determination, concerning Illinois' interpretation of an Illinois statute, is binding on this Court. *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). And it resolves not only the primary assertion of Facebook's Petition that something beyond a violation of the statute must be proved to show an individual was "aggrieved" (Petition at 8-15), but also Facebook's repetition of essentially the same assertion on appeal, elegantly dressed as an "Article III standing" issue.

Similarly, the Illinois Supreme Court's determination that "the legislature intended for [BIPA] to have substantial force," including "substantial potential liability" for violators (*Rosenbach*, 2019 IL 123186, ¶¶36-37; slip at 12) defeats Facebook's claim (not in its Petition, but added on appeal) that a class action is not a

superior method for resolving this controversy because the statutory damages alleged are "inconsistent with legislative intent." (*See* AOB 54) And, as with the primary issue above, Facebook's assertion fairs no better when dressed as a "due process" claim (made prior to the issuance of any damages award and overlooking the district court's discretion to amend any award).

Facebook's Petition for permission to file an interlocutory appeal was grounded in an Illinois Appellate Court decision that has now been reversed. (*See* Petition at 2-3, "principal error[]" 1, *citing Rosenbach v. Six Flags Entm't Corp.*, 2017 IL App (2d) 170317, ¶¶15, 23, *appeal allowed*, 98 N.E. 3d 36 (Ill. 2018), and *rev'd*, 2019 IL 123186) Had the Illinois Supreme Court issued its clear explanation of "aggrieved" and the legislature's intent regarding statutory damages before Facebook filed its Petition, Facebook would have had no basis for asserting those claims. This is a classic case of "an intervening court decision" that compels "summary disposition." Circuit Rule 3-6(a).

Summary disposition is especially appropriate here because, as the district court explained at the time Facebook claimed an emergency need for this Court's intervention, this case was on the very eve of trial when this Court granted the Petition:

> This case has been pending since 2015 and is one of the Court's oldest open matters. The parties have litigated it heavily, and the Court has heard and decided two motions to dismiss, three motions for

> summary judgment, a class certification motion, multiple discovery disputes, and other matters. Discovery closed many months ago and the expert witness work is done. The case is ripe for trial.

(Dist. Ct. Docket No. 404 at 4)

The lone "extraterritoriality" issue—a common issue to the class—is "so insubstantial as not to justify further proceedings" in this Court. Circuit Rule 3-6(b). This Court should vacate the Order granting the Petition, dismiss the appeal, and allow the district court to complete its work where "the well-developed record in this case indicates that the jury will be asked to decide relatively straightforward disputes of fact." (Dist. Ct. Docket No. 404 at 2)

II. ARGUMENT

A. *Rosenbach* resolves the majority of issues in Facebook's Petition as well as those added on appeal

Facebook does not—and cannot—dispute that its view of BIPA's "aggrieved" requirement has been decisively rejected. (Facebook's Opposition ("Opp.")) To be clear, that issue was Facebook's primary issue in its Petition to this Court for permission to bring an interlocutory appeal—and consumed the bulk of its briefing. (Petition at 8-15) There is no dispute that this Court's intervention on that point is no longer necessary or even appropriate. *See Kirkland*, 915 F.2d at 1238.

Facebook's effort to transform the same essential assertion into a supposed Article III issue on appeal fails for the same reason. As Facebook concedes in its Opening Brief, plaintiffs have standing based on a statutory violation when (1) "'the

statutory provisions at issue were established to protect [the plaintiffs'] concrete interests'; and (2) … 'the specific procedural violations alleged in th[e] case actually harm, or present a material risk of harm, to such interests.'" (AOB 21, *quoting Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112-13 (9th Cir. 2017); Opp. at 11) Answering what Facebook has conceded are the relevant questions, *Rosenbach* confirmed (1) that BIPA protects a "concrete interest" ("real and significant"—"no mere 'technicality'") and (2) that "collection" of biometric data is the "precise harm the Illinois legislature sought to prevent." 2019 IL 123186, ¶34; slip at 11.

That was no accident. The Legislature knew that "[w]hen private entities face liability for failure to comply with the law's requirements without requiring affected individuals or customers to show some injury beyond violation of their statutory rights, those entities have the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." *Id.*, ¶¶36-37; slip at 12. In other words, the Legislature found a material risk of harm from nonconsensual collection of biometric data and enacted this law to stop that collection.

Rosenbach clarifies that Facebook's "standing" assertion is baseless. Of course, "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007); *accord Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016).

Similarly, Facebook's insistence that its potential liability means a class action is not a superior method for resolving class members' identical claims is also based on pre-*Rosenbach* logic. *Rosenbach* held that each violation of the statute is "real and significant" (2019 IL 123186, ¶34; slip at 11)—and that the damages provision of BIPA "is as integral to implementation of the legislature's objectives as" the part of the statute that "impos[es]safeguards." *Id.*, ¶¶36-37; slip at 12. Thus, whether framed as an assertion about the superiority of class treatment or about due process, Facebook's repetition of its pre-*Rosenbach* view is no more effective as an assertion about potential damages than it is in the Article III context.

Moreover, Facebook's concern notwithstanding (Opp. at 15), class actions always involve "*aggregated* damages." (Emphasis in original) Indeed, *Rosenbach*'s discussion of "substantial potential liability" for violators was made in the context of the Illinois Supreme Court's express knowledge of this class action. 2019 IL 123186, ¶¶34, 36; slip at 11-12. Cases such as this one where the individual damages would be relatively small and recovery would require battling Facebook's well-funded legal team are precisely the types of cases where class certification is most appropriate. *Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975).

In short, *Rosenbach* defeats Facebook's claims grounded in the concept that some "actual harm" must be shown in addition to Facebook's collection of plaintiffs' biometric data without notice—whether couched as an argument about the meaning of

"aggrieved," Article III standing, superiority, or due process. The appeal should be dismissed.

B. The lone "extraterritoriality" issue is too insubstantial to justify an interlocutory appeal

The remaining "extraterritoriality" issue does not justify this Court's interlocutory review. Facebook's description of that issue as its "principal argument" or "lead argument" (Opp. at 8) is utterly disingenuous. The argument appeared at page 16 of Facebook's 20-page Petition.

The issue was never a strong basis for this Court's intervention. Facebook concedes that the Illinois Supreme Court's decision in *Avery v. State Farm Mutual Auto. Ins. Co.*, 216 Ill. 2d 100, 187 (2005), is controlling on the issue. (Opp. at 9) Further, it is undisputed that the district court applied the rule of *Avery* ("whether the circumstances relating to [the] disputed transactions … occurred primarily and substantially in Illinois" (216 Ill. 2d at 187)) in concluding: (1) that the "named plaintiffs are located in Illinois along with all of the proposed class members, and the claims are based on the application of Illinois law to use of Facebook mainly in Illinois;" (ER12) and (2) that Facebook's "extraterritoriality" "conjecture … and mere 'speculation' about class variability 'does not meet [defendant's] burden of demonstrating that individual … issues predominate." (ER12, 14, *quoting Gutierrez v. Wells Fargo Bank, NA,*, 704 F.3d 712, 729 (9th Cir. 2012).

It is hard to imagine that, had Facebook requested this Court's intervention on this issue alone, this Court would have granted the Rule 23(f) Petition. Simply, Facebook has not made the required showing of manifest error in the district court's application of agreed-upon controlling law to a record establishing "no genuine dispute that this case is deeply rooted in Illinois." (ER12) Even if there were location issues to be resolved, they would be in the nature of claims issues to be decided following merits resolution of the common liability issues. The issue is too "insubstantial" in the context of class certification to justify this Court's interlocutory review of the district court's broad discretion. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); Circuit Rule 3-6(b).

C. This Court may dismiss an interlocutory appeal

Facebook's position that the Court cannot dismiss this permissive appeal has no support in law. To the contrary, "[w]henever it appears that an order granting interlocutory appeal was improvidently granted, it is the duty of the court to vacate it." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966); *see also Crow Tribe of Indians v. State of Mont.*, 969 F.2d 848, 849 (9th Cir. 1992) (dismissing interlocutory appeal as improvidently granted); *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448 (9th Cir. 1990) (same). Facebook asks the Court not to consider those cases because they involve 28 U.S.C. §1292 instead of Rule 23(f), but that is a distinction without a difference. Rule 23(f) "was adopted pursuant to §1292(e)," and this Court "wield[s]

'unfettered discretion' under Rule 23(f), akin to the discretion afforded circuit courts under §1292(b)." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017) (internal citation omitted). The Court can and should exercise that discretion to vacate the Order granting this appeal.

III. CONCLUSION

For the reasons set forth in plaintiffs' motion and this reply, this Court should vacate the Order granting permission to appeal, dismiss the appeal, and allow this well-developed case to proceed to trial.

DATED: February 19, 2019

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SUSAN K. ALEXANDER
SHAWN A. WILLIAMS
ANDREW S. LOVE
JOHN H. GEORGE

s/Susan K. Alexander
SUSAN K. ALEXANDER

Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN
ELLEN GUSIKOFF STEWART
LUCAS F. OLTS
RANDI D. BANDMAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
PAUL J. GELLER
STUART A. DAVIDSON
CHRISTOPHER C. GOLD
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

LABATON SUCHAROW LLP
LAWRENCE A. SUCHAROW
MICHAEL P. CANTY
CORBAN S. RHODES
ROSS M. KAMHI
140 Broadway
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)

EDELSON PC
JAY EDELSON
BENJAMIN RICHMAN
ALEXANDER G. TIEVSKY
350 North LaSalle Street, 14th Floor
Chicago, IL 60654
Telephone: 312/589-6370
312/589-6378 (fax)

EDELSON PC
RAFEY BALABANIAN
J. AARON LAWSON
LILY HOUGH
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415/212-9300
415/373-9435 (fax)

Counsel for Plaintiffs-Appellees

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on February 19, 2019, I electronically filed the foregoing document: **REPLY TO FACEBOOK'S OPPOSITION TO PLAINTIFFS' MOTION TO VACATE ORDER GRANTING INTERLOCUTORY APPEAL AND DISMISS THE APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 19, 2019, at San Francisco, California.

s/Tamara J. Love
TAMARA J. LOVE