No. 18-15982

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIMESH PATEL
Individually and on behalf of all others similarly situated;
ADAM PEZEN; CARLO LICATA,
Plaintiffs-Appellees,

v.

FACEBOOK, INC.,
Defendant-Appellant.

BRIEF OF AMICUS CURIAE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANT FACEBOOK, INC.'S PETITION FOR REHEARING EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (NO. 3:15-CV-03747-JV)

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CORPORATE DISCLOSURE STATEMENT

The Consumer Data Industry Association ("CDIA") is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of CDIA's stock.[1]

Dated: September 16, 2019 HUDSON COOK, LLP

By /s/ *Allen H. Denson*

Attorney for Amicus Curiae
Consumer Data Industry Association

[1] Fed. R. App. P. 26.1(a), 29(a)(4)(A).

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STATEMENT OF INTEREST

CDIA is a trade association representing consumer reporting agencies ("CRAs") including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

CDIA is vitally interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), which governs the collection, use, maintenance, and dissemination of consumer report information.[2] With limited regulatory guidance in interpreting the FCRA, CRAs often face private litigation based on novel theories of liability. Expansive interpretation of Article III standing heightens CRAs' litigation risk, and that risk is compounded by the potential for unlimited statutory damages that successful plaintiffs may recover in class action lawsuits under the FCRA.

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[2] 15 U.S.C. §§ 1681 *et seq.*

Because CDIA has been involved in the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and users are all subject to potential claims under the FCRA's class action provisions, CDIA is uniquely qualified to assist this Court as it considers the petition for rehearing *en banc*, and has authority to file this brief under Circuit Rule 29-2(a) because all parties have consented to its filing.

STATEMENT OF *AMICUS CURIAE*

CDIA files this brief in support of Defendant-Appellant's petition for rehearing *en banc*.[3] The petition demonstrates that the panel opinion's expansive reading of requirements for injury-in-fact under Article III compromises the uniformity of the court's decisions and involves a question of exceptional importance. CDIA's members play a critical role in the United States economy, and this case—which has an impact far beyond a social media company's novel use of technology—threatens to substantially harm the consumer reporting ecosystem.

[3] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. The panel opinion compromises the uniformity of this Court's decisions by holding that statutory provisions that merely "implicate privacy" are concrete interests.

The panel opinion held that violation of the Illinois Biometric Information Privacy Act ("BIPA"), 740 Ill. Comp. Stat. 14/1 *et seq*. (2008), through use of facial-recognition technology, invaded "substantive privacy rights" and that—without any showing of individual harm—the alleged violation of such rights was sufficient to establish a concrete "injury-in-fact." *Patel v. Facebook, Inc*., 932 F.3d 1264, 1271 (9th Cir. 2019). The panel erred in both finding statutory provisions protect concrete interests if they merely "implicate privacy" and in the deference it provided to legislative findings from the state of Illinois.[4]

In reaching its determination that the BIPA was established to protect the Plaintiffs' concrete interests, the panel first asked whether the interest was akin to a historical, common law interest, as have other decisions from this court. *Patel*, 932 F.3d at 1270-71; *see Spokeo II*, 867 F.3d at 1113; *Dutta v. State Farm Mut. Auto.*

[4] This Court has adopted a two-step approach to determine whether the violation of a statute causes a concrete injury for purposes of standing under Article III, asking: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." *Robins v. Spokeo, Inc*., 867 F.3d 1108, 1113 (9th Cir. 2017) (*Spokeo II*). As discussed *infra*, the panel opinion misapplied both aspects of the framework.

Ins. Co., 895 F.3d 1166, 1174 (9th Cir. 2018). "Actions to remedy … invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *see Patel*, 932 F.3d at 1271.

But rather than compare the elements of the supposed common law analogues to BIPA—as Supreme Court and Circuit precedent require—the panel opinion adopted a sweeping conclusion: any statute that "implicate[s] privacy concerns" is analogous to common law causes of action for invasion of privacy. *Id.* at 1272. It reached this conclusion not from analogous torts at common law, but by drawing from Fourth Amendment jurisprudence involving novel applications of technology. *See Id.* at 1272-73 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (thermal imaging); *United States v. Jones*, 565 U.S. 400, 428 (2012) (GPS monitoring); *Carpenter v. United States*, 138 S. Ct. 2206, 2215 (2018) (cell-phone monitoring)). In the panel's view, any statute that touches a *possible* privacy concern creates a concrete interest that can form the basis for standing.

But the gulf between statutes that "implicate privacy concerns" and decisions from this Court regarding historical, common law interest is a wide one. In *Van Patten*, this Court looked to the specific elements of common law invasions of privacy, intrusion upon seclusion, and nuisance in order to determine that the TCPA was specifically designed to prevent similar types of harm: the "unwanted intrusion

and nuisance of unsolicited telemarketing phone calls and fax advertisements." 847 F.3d at 1043.

Likewise, in *Dutta*, this Court recognized in the context of the Fair Credit Reporting Act that "the dissemination of false information potentially harmful to future employment is analogous to common law concerns with defamation or libel that causes material damage—a harm that has traditionally been regarded as providing a basis for a lawsuit in both English and American courts." *Dutta*, 895 F.3d at 1175.

Disseminating false information and *unwanted intrusion* are far more specific, concrete interests than merely *implicating* privacy concerns. The panel has therefore expanded the first part of *Spokeo II's* framework to such an extent that the relationship to common law and historical causes of action is meaningless. For CDIA's members, expanding standing in this manner is no academic exercise. The FCRA was enacted to promote the accuracy, fairness, and *privacy* of information in the files of consumer reporting agencies. *See* 15 U.S.C. § 1681(e) (Congressional findings in enacting the FCRA include the need "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the *consumer's right to privacy*."). If any statute that "implicates privacy" threatens to establish a concrete injury, then CDIA's members face significant litigation risk, as any violation of the FCRA could be read to support

standing. Critically, the panel opinion's "implicates privacy" standard would invalidate this Court's own FCRA cases. *See, e.g.*, *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780 (9th Cir. 2018) (printing of credit card expiration date, in violation of the FCRA's credit card truncation provisions, did not amount to a concrete injury); *Spokeo II,* 867 F.3d at 1112 ("[P]laintiff must allege a statutory violation that caused him to suffer some harm that actually exists in the world …. [E]ven when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff.") (internal quotations omitted).

II. The panel opinion compromises the uniformity of this Court's decisions by giving undue weight to the Illinois legislature's pronouncements about the risks of using biometric data.

The panel further compromised the uniformity of this Court's decisions by giving undue weight to the Illinois legislature's vague pronouncements of the "risks" of using biometric data without connecting those findings to the specific alleged conduct at issue or determining whether those risks were "certainly impending" in this case. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 401 (2013).

In finding that Plaintiffs had established a concrete injury, the panel opinion explained that:

> [I]n enacting the BIPA, the [Illinois] General assembly found that the development and use of biometric data presented risks to Illinois's citizens, and that '[t]he public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling,

> storage, retention, and destruction of biometric identifiers and information.'

Patel, 932 F.3d at 1273 (citing 740 Ill. Comp. Stat. 14/5(g) (2008)). This is a sweeping pronouncement, but critically absent is any identification of *harm* or the imminent risk of harm required by the Supreme Court's decision in *Clapper*. Indeed, the Illinois legislature (and the panel opinion) focused exclusively on *generalized risk*. *Id.* And the panel has made no effort to connect the purported "risks" imposed by collection of biometric identifiers and the specific technology at issue here: facial recognition technology.

But other cases in this Court have identified a specific harm in considering legislative judgment, not vague statements of risk that—at best—only bear the most tenuous relationship to the alleged conduct at issue. For example, in *Eichenberger* this Court held that violation of the Video Privacy Protection Act ("VPPA") presented a concrete injury where the statute protected video rental records "to extend privacy protection to records that contain information about individuals." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017). Congress identified a specific type of harm, and the *Eichenberger* court analyzed whether that type of harm had occurred under the allegations. *See also Perry v. CNN, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017) ("The [VPPA] was enacted in response to a newspaper's publication of Supreme Court nominee Judge Robert H. Bork's video rental history from a particular store, and it seeks to preserve personal privacy with respect to the

rental, purchase, or delivery of video tapes or similar audio visual materials.") (internal quotes and citations omitted).

Likewise, in *Bassett* the court analyzed the specific provisions of the Credit and Debit Card Receipt Clarification Act to conclude that the FCRA's credit card truncation provisions did *not* protect concrete interests. 883 F.3d at 781–82 ("Of course, Congress did not eliminate the FCRA's expiration date requirement in the Clarification Act. But both the Clarification Act's finding that a disclosed expiration date by itself poses minimal risk and the law's temporary elimination of liability for such violations counsel that Bassett did not allege a concrete injury.").

Like its comparison of statutory provisions that "implicate privacy" to causes of action at common law, the panel opinion's reading of the legislative findings on "risk" is so expansive that conceivably any pronouncement could be used to justify standing. While the judgment of the *Congress*[5] is "instructive and important" to the standing inquiry, *Spokeo II*, 867 F.3d at 1112, those judgments cannot be completely divorced from the central point of standing: actual injury.

[5] While *Spokeo I* emphasizes **Congress's** judgment, it does not necessarily follow that the judgment of a **state legislature** regarding injury should be accorded the same weight. Congress regularly must consider Article III when it enacts legislative causes of action, and it must contemplate how—and whether—to afford access to federal court. State legislatures do not have the same considerations when they enact statutes.

III. The panel opinion compromises the uniformity of this Court's decisions by permitting speculative harms to satisfy Article III's injury requirement.

The panel opinion further erred in applying the second part of the *Spokeo II* framework: whether the specific violations alleged in this case actually harm, or present a material risk of harm to the *plaintiff*. *Dutta*, 895 F.3d at 1175.

This Court's decisions since *Spokeo II* have always required real-world harm, not speculative risk of harm. *Dutta*, 895 F.3d at 1174 (Plaintiff must "demonstrate how the 'specific' [FCRA] violation … alleged in the complaint actually harmed or 'present[ed] a material risk of harm' to him."); *Spokeo II*, 867 F.3d at 1116 (inaccuracies presented a "real risk" to plaintiff's future employment prospects); *Bassett*, 883 F.3d at 783 (issuance of an unredacted receipt did not create a material risk of harm in the form of identity theft or the invasion of privacy sufficient to confer standing where the consumer retained possession of the receipt and no one else had viewed it).

Yet rather than follow this Court's precedents, the panel chose to rely on speculative *risks* of harm that it deemed to arise from facial recognition *generally*:

> It seems likely that a face-mapped individual could be identified from a surveillance photo taken on the streets or in an office building. Or a biometric face template could be used to unlock the face recognition lock on that individual's cell phone.

Patel, 932 F.3d at 1273. The record is devoid of any indication that Facebook's technology is or could be used for such a purpose. This conclusion of harm or

material risk of harm is pure speculation, failing the fundamental lesson of *Spokeo*: statutory violations must "entail a degree of risk sufficient to meet the concreteness requirement." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (*Spokeo I*); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 (2013) (standing cannot be manufactured "based on hypothetical future harm that is **not certainly impending**") (emphasis added). The panel opinion lacks any such analysis, and in order to avoid conflict with both other decisions in this Circuit and of the Supreme Court, it should be reviewed *en banc*.

IV. The panel opinion's reformulation of standing requirements involves a matter of exceptional importance for CDIA's members.

Decisions on standing are of exceptional importance to CDIA's members because of the significant litigation risk they face in federal court. CDIA's members' business practices, which are subject to the FCRA, may involve millions of consumers each day, touching every aspect of the economy. Given their important role in the economy, it is not surprising that consumers sue CDIA's members hundreds of times each year, alleging violations of the FCRA. Through the sheer volume of consumer reports generated, and the FCRA's statutory damages provision, CDIA's members face crushing liability if no-injury plaintiffs can have open access to federal courts through diminished standing requirements.

The panel opinion essentially welcomes an onslaught of no-harm class actions against members of CDIA under the guise of "privacy interests" and speculative

injuries. Such increased litigation risk creates an obstacle for members of CDIA that might want to innovate by, for example, creating products that facilitate reporting of vulnerable or "credit invisible" consumers who have no credit history. That risk is also an obstacle for furnishers of information to CRAs, which face the same statutory damages scheme. In light of this risk, a number of furnishers have decided to stop furnishing information, and other potential furnishers have decided not to furnish information. At a macro level, the less information that is furnished to and compiled by CRAs, the less reliable the information in consumer reports becomes for purposes of risk modeling. At a micro level, reduced furnishing and reporting hinders the ability of "credit invisible" consumers to build credit history. Opening both CRAs and data furnishers to ruinous damages through no-injury class actions stifles innovation and discourages participation in the consumer reporting ecosystem.

CONCLUSION

For the foregoing reasons, as well as the reasons cited in the Defendant-Appellant's petition, the Court should grant the petition for rehearing *en banc*.

Dated: September 16, 2019 HUDSON COOK, LLP

By /s/ *Allen H. Denson*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2019, I electronically filed the foregoing *amicus* brief supporting the defendant-appellant's petition for rehearing *en banc* with the clerk of this Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

Dated: September 16, 2019 HUDSON COOK, LLP

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