No. 20-3249

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MELISSA THORNLEY ET AL.,

Plaintiffs-Appellees,

v.

CLEARVIEW AI, INC.,

Defendant-Appellant.

On Appeal From The
United States District Court For The
Northern District Of Illinois, Eastern Division
Case No. 20-cv-3843 – Hon. Sharon Johnson Coleman

CLEARVIEW AI, INC.'S MOTION TO STAY THE MANDATE PENDING THE FILING AND RESOLUTION OF A PETITION FOR A WRIT OF CERTIORARI

Clifford W. Berlow
Counsel of Record
David P. Saunders
Howard S. Suskin
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
cberlow@jenner.com

Lee Wolosky
Andrew J. Lichtman
JENNER & BLOCK LLP
919 Third Avenue
New York, New York 10022
(212) 891-1600

Floyd Abrams
Joel Kurtzberg
CAHILL GORDON & REINDEL LLP
32 Old Slip
New York, New York 10005
(212) 701-3000

Counsel for Defendant-Appellant

Pursuant to Federal Rule of Appellate Procedure 41(d)(1), Defendant-Appellant Clearview AI, Inc. ("Clearview") respectfully moves this Court to stay issuance of its mandate in this appeal pending the filing of a petition for a writ of certiorari in the Supreme Court and the petition's ultimate resolution. The petition for certiorari will present substantial questions worthy of a grant of certiorari, and the balance of the equities favors a stay.

This appeal is about whether a plaintiff who alleges that access to her biometric information was sold in violation of the Illinois Biometric Information Privacy Act ("BIPA") necessarily alleges an injury-in-fact for purposes of Article III standing. This implicates an open, unsettled question under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), meriting Supreme Court review. As Judge Hamilton noted in his concurring opinion, the criteria for determining when an alleged statutory violation necessarily alleges a concrete, particularized harm sufficient for purposes of establishing Article III standing is in need of clarification from the Supreme Court, as lower courts have struggled to identify consistent rules or standards. Further, staying the mandate will prevent potentially wasteful state court litigation should certiorari be granted.

BACKGROUND

Plaintiffs' Allegations. Plaintiffs filed a putative class action complaint in Illinois state court alleging that Clearview had engaged in the "unlawful collection, capture, use, and storage of Plaintiffs' biometric data" in violation of Sections 15(a), 15(b), and 15(c) of BIPA. Class Action Complaint, *Thornley v. Clearview AI, Inc.*, No. 20-cv-02916 (N.D. Ill.), ECF No. 1-1. Shortly before Clearview sought to remove that

complaint to federal court, this Court held in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), that removal of a complaint alleging violations of Section 15(b) was appropriate because claims under Section 15(b) necessarily allege an injury-in-fact. Six days after removal, Plaintiffs voluntarily dismissed their complaint. Notice of Voluntary Dismissal, *Thornley*, No. 20-cv-02916, ECF No. 13. Days later, Plaintiffs filed a second putative class action complaint, again in Illinois state court. Dkt. 17 at SA9–22 ("Compl."). The new complaint was largely identical to the first one, but now pleaded only one claim under Section 15(c). *Id.* ¶ 34. Plaintiffs also went from seeking to certify a class of all Illinois residents in Clearview's database to a class composed of those "who suffered no injury from Defendant's violation of Section 15(c)." *Id.* ¶ 25.

Proceedings Below. Clearview again removed to federal court. Dkt. 17 at SA1–7. Plaintiffs then moved to remand. Motion to Remand, *Thornley v. Clearview AI, Inc.*, No. 20-cv-3843 (N.D. Ill.), ECF No. 27. Plaintiffs conceded the requirements for removal under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2), were satisfied, but argued they did not "satisfy the injury-in-fact requirement of Article III." Mot. to Remand at 1. The district court granted the motion to remand, agreeing that the complaint did not allege an injury-in-fact because Plaintiffs had "purposely narrowed their claim by … specifically stating … that the class members did not suffer any injury under § 15(c) 'other than statutory aggrievement.'" Dkt. 16 at A3.

The Panel's Ruling. This Court granted Clearview permission to appeal pursuant to CAFA, 28 U.S.C. § 1453(c)(1). The Panel went on to affirm the district

court's remand order for two reasons. First, emphasizing that "allegations matter," the Panel highlighted that Plaintiffs had not expressly alleged they would suffer a concrete and particularized harm from the alleged statutory violation. *See* Slip Op. 9, 12 (identifying allegations potentially demonstrating a concrete and particularized injury). Second, the Panel held that violations of Section 15(c) do not necessarily cause concrete and particularized harms sufficient to give rise to Article III standing. In the Panel's view, Section 15(c) "addresses only the regulated entity—the collector or holder of the biometric data—and flatly prohibits for-profit transactions," and thus is "the same kind of general regulation as the duty to create and publish a retention and destruction schedule found in section 15(a)." *Id.* 12–13.

In a concurring opinion, Judge Hamilton noted that this case was part of a slate of "recent decisions by this court," which do not yield "a consistently predictable rule or standard." *Id.* 18 (Hamilton, J., concurring). After noting that the only example *Spokeo* provided of an alleged statutory violation that did not satisfy Article III "was utterly trivial: an incorrect zip code in the information about a debtor under the Fair Credit Reporting Act," Judge Hamilton asserted that "several of our recent opinions take *Spokeo* too far," including by being "too quick[] [to] invoke[] *Spokeo* to deny concrete injury even in cases alleging core substantive violations." *Id.* 19–20.

Petition for Rehearing or Rehearing En Banc. On January 27, 2021, Clearview filed a petition for rehearing and rehearing en banc. Dkt. 44. On February 16, 2021, the Court denied the petition. Dkt. 46. Barring a stay, the mandate will issue on February 23, 2021.

DISCUSSION

Where appropriate, this Court is empowered to stay the issuance of its mandate pending the disposition of a petition for a writ of certiorari. 28 U.S.C. § 2101(f). A motion for a stay pending the disposition of a petition for a writ of certiorari should be granted when "the petition would present a substantial question and … there is good cause for a stay." Fed. R. App. P. 41(d)(1). Both criteria are satisfied here.

I. This Case Raises a Substantial Question Warranting Supreme Court Review.

As Federal Rule of Appellate Procedure 41(d)(1) requires, the certiorari petition in this case "would present a substantial question." *Id.* The petition will raise the question of when, under *Spokeo*, a statutory violation necessarily gives rise to a concrete and particularized injury-in-fact to establish Article III standing. This is a substantial, open question worthy of Supreme Court review. Indeed, the Court has noted that *Spokeo* is far from clear on this point. *See* Slip Op. 18–19 (Hamilton, J., concurring).

The Supreme Court in *Spokeo* resolved that the violation of some rights "granted by statute can be sufficient … to constitute injury in fact," such that a plaintiff "need not allege any *additional* harm beyond the one [the legislature] has identified." *Spokeo*, 136 S. Ct. at 1549. But the Court provided few clues as to how to distinguish between statutory violations that necessarily give rise to concrete and particularized injuries and those that do not. As a result, lower courts have taken varying approaches to this inquiry since *Spokeo*.

Indeed, Judge Hamilton expressed his "hope" that "the Supreme Court will revisit the problem of standing in private actions based on intangible injuries under a host of federal consumer-protection statutes." Slip. Op. 20. Judge Hamilton's concurrence raises the specter that the Seventh Circuit's recent opinions "take *Spokeo* too far" in that they "do not give sufficient weight to *Spokeo*'s endorsement of standing where Congress has chosen to provide procedural and informational rights to reduce the risk of more substantive harm for consumers and others, and has created private rights of action to enforce them." *Id.* 19–20. This is an issue that the Supreme Court must address, and ultimately could address if it grants Clearview's petition.

The confusion over how to interpret *Spokeo* is not limited to the Seventh Circuit. The analysis courts apply in determining whether a statutory violation necessarily gives rise to a concrete and particularized injury-in-fact varies across different circuits. For example, the Ninth Circuit has held that where there are "*procedural* violations of [a statute] that would not invariably injure a concrete interest," a plaintiff must "plead additional harm to obtain standing." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982–83 (9th Cir. 2017). But a plaintiff "need not allege any further harm to have standing" where the plaintiff has alleged violation of a statute that "identifies a *substantive* right to privacy that suffers *any time*" it is violated. *Id.* at 983–84*; accord Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119 (9th Cir. 2020); *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1027 (9th Cir. 2020). This conflicts with Seventh Circuit precedent explicitly rejecting a distinction between

substantive and procedural violations. *Larkin v. Fin. Sys. of Green Bay, Inc.,* 982 F.3d 1060, 1066 (7th Cir. 2020).

There are still other approaches. Some courts have given weight to the legislature's decision to create a statutory protection with a private right of action. *E.g. In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017) (holding that in the Fair Credit Reporting Act, "Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury *in and of itself*—whether or not the disclosure of that information increased the risk of identity theft or some other future harm."). Other courts have emphasized history, relying on *Spokeo*'s admonition to "consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S. Ct. at 1549; *e.g. Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir. 2019) (holding that telephone calls made in violation of the Telephone Consumer Protection Act necessarily gave rise to an injury-in-fact because "[o]ur legal traditions … have long protected privacy interests in the home," and "[i]ntrusions upon personal privacy were recognized in tort law and redressable through private litigation," including "intrusions made via phone calls.").

The variety of approaches to applying *Spokeo* demonstrates that Supreme Court review of the issue to be raised in Clearview's petition would be appropriate. What is more, the Supreme Court already has recognized that this area of law is in need of clarification. Currently pending before the Supreme Court is *Trans Union*

LLC v. Ramirez (No. 20-297) (set for argument Mar. 30, 2021), where the question presented is "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." The Supreme Court's decision in *Trans Union* may well bear on the questions raised in Clearview's petition—indeed, it is not at all hard to imagine that the Court's decision in *Trans Union* may include language that would lead the Court to grant, vacate, and remand this matter on certiorari review.

Given the unsettled state of the law, as well as the potential significance of the pending *Trans Union* decision, it is plain that a petition from Clearview would present a "substantial question" worthy of Supreme Court review. *See* Fed. R. App. P. 41(d)(1).

II. Good Cause Exists for a Stay.

Here, a stay is necessary to prevent undue hardship and wasted resources. Without a stay, this case will be remanded to state court, and the parties will spend months litigating the matter in that forum. But if the Supreme Court grants Clearview's petition and reverses the remand order, then this case will proceed in federal court, and Clearview will have been subject to proceedings before and rulings by a judge who ultimately does not have jurisdiction over either Clearview or the claims presented in this case. Under those circumstances, the time the parties would have spent litigating in state court will have been a waste. It would be a waste of both party and judicial resources to force Clearview to proceed in a court that may not have jurisdiction when those proceedings may well prove to be unnecessary. The costs

and time Clearview will be forced to spend on a potentially unnecessary litigation represent irreparable harm warranting a stay. *See U.S. ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 451 (7th Cir. 2002) (granting a stay due to the injury movant "could suffer if it is required to prepare for trial before the Supreme Court takes action").

In contrast, there is no significant prejudice to Plaintiffs if this case is stayed pending a Supreme Court decision. As the Court well knows, Plaintiffs have carefully crafted their complaint to allege that they are not suffering any ongoing harm as a result of Clearview's conduct. Slip. Op. 10–11, 15. That leaves only the possibility that Plaintiffs could argue that they will be prejudiced if they are forced to wait to commence litigation in state court. But this Court has resolved that "the prejudice that comes with any delay in a judicial proceeding" alone does not warrant denial of a stay. *Chandler*, 282 F.3d at 451; *cf. Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) ("Nor is delay automatically a source of prejudice."). Accordingly, there is good cause for a stay.

CONCLUSION

For the foregoing reasons, Clearview AI, Inc. respectfully asks this Court to stay issuance of its mandate pending the resolution of Clearview's petition for a writ of certiorari to the Supreme Court of the United States in this case.

Dated: February 22, 2021

Respectfully submitted,

/s/ Clifford W. Berlow

Clifford W. Berlow
Counsel of Record
David P. Saunders
Howard S. Suskin
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
cberlow@jenner.com
dsaunders@jenner.com
hsuskin@jenner.com

Floyd Abrams
Joel Kurtzberg
CAHILL GORDON & REINDEL LLP
32 Old Slip
New York, New York 10005
(212) 701-3000
fabrams@cahill.com
jkurtzberg@cahill.com

Counsel for Defendant-Appellant Clearview AI, Inc.

Lee Wolosky
Andrew J. Lichtman
JENNER & BLOCK LLP
919 Third Avenue
New York, New York 10022
(212) 891-1600
lwolosky@jenner.com
alichtman@jenner.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This motion complies with the word limitation of Rule 27(d)(2) of the Federal Rules of Appellate Procedure because, according to the word count function of Microsoft Word 2016, this motion contains 2140 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12 point Century Expanded LT Std font for the main text and footnotes.

Dated: February 22, 2021

/s/ Clifford W. Berlow
Clifford W. Berlow

CERTIFICATE OF SERVICE

I, Clifford W. Berlow, an attorney, hereby certify that on February 22, 2021, I caused the foregoing motion to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Clifford W. Berlow*
Clifford W. Berlow