No. 19-706

In the
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NIMESH PATEL, ADAM PEZEN, AND CARLO LICATA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

TechFreedom is a non-profit, non-partisan public policy think tank based in Washington D.C. Its work on information technology policy issues rests on a belief that technology enhances freedom and freedom enhances technology.

TechFreedom has long been involved in debates over free speech and privacy and advocates for sensible and pragmatic approaches to complex and often misunderstood issues involving speech, data, and privacy. It believes that the freedom to collect, process, disseminate, and use data is essential, not just for the marketplace for goods and services, but also for the noncommercial "marketplace" of ideas, research, philanthropic causes, and politics.

TechFreedom is not an industry association. While it supports Facebook's petition for certiorari in this matter, it has criticized Facebook's privacy practices in the past and previously called for legal action against the company. TechFreedom submits this brief as a friend of the Court because it believes the Court should grant the petition and hold that procedural rights related to privacy do not warrant an ahistorical exception to this Court's standing doctrine.

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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than TechFreedom and its counsel made a monetary contribution intended to fund the preparation and submission of this brief. All parties were given at least ten days' notice and consented to the filing of this brief.

TechFreedom is concerned that the lower court's decision gives States undue authority to predetermine federal courts' standing decisions and, in violation of this Court's precedent, materially lowers Article III's standing threshold. If uncorrected, this decision threatens to unleash a wave of costly, "no-harm" class action "strike suits" that would enable forum-shopping plaintiffs' lawyers to file suits in the Ninth Circuit even when the law in question is from, say, Illinois. Traditional class-certification hurdles such as commonality and predominance could be rendered meaningless as anyone alleging a bare procedural violation of a federal or state privacy statute could seek multi-billion dollar statutory damages without showing a traditionally cognizable injury. The expense to Internet and technology businesses of defending such actions against millions of "similarly situated" plaintiffs and the threat of astronomical damages would create strong disincentives to defending even meritless claims.

This risk may impact Facebook's decision to offer useful products, including the facial recognition service at issue here. However, TechFreedom is concerned that smaller companies, who can less afford the increased exposure the decision below will engender, are likely to feel the greatest impact. Reducing Article III's injury-in-fact requirements may discourage innovative newcomers and dampen the relentless cycle by which past Internet giants have seen their dominance disrupted—a dynamic process that has kept the Internet open, innovative, and free for decades.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision would confer automatic standing upon virtually any plaintiff who plausibly alleges a company has violated a privacy-related statute. Still more, it would recognize a redressable claim even where, as here, there is no allegation that plaintiffs were harmed by the violation. This standard erodes the traditional constitutional barriers to standing and grants excessive deference to States' legislative determinations. The States may confer rights by statute and may create statutory damages provisions to enforce those rights. But States' policy priorities and legislative judgments do not alter the constitutional minima of Article III standing, which must be met before litigants asserting state-law claims may gain access to federal courts.

This Court held in *Spokeo, Inc. v. Robins* that plaintiffs who seek to establish Article III standing based on allegations of intangible harm arising from violation of a statute must show the alleged harm has a close relationship to a harm traditionally recognized as the basis for a lawsuit. 136 S. Ct. 1540, 1549 (2016). The decision below held that a defendant's violation of the notice-and-consent provisions of Illinois's Biometric Information Privacy Act causes an intangible harm that is closely related to a traditionally compensable harm—violation of one's right to control information about himself or herself. This erroneous conclusion sweeps all historic privacy interests into a single, generalized "right to privacy," ignoring the traditional distinctions between limitations on government searches and seizures on the one hand and ex-

changes of private information between private parties on the other. Before the turn of the twentieth century, common law courts generally did *not* recognize causes of action or injuries grounded solely on the alleged inability to control information about oneself. Even in more recent decades as some privacy torts have been recognized, plaintiffs almost never recover for common law claims sounding in privacy due to the frequent absence of any traditionally redressable injury. Here, the plaintiffs seek a multi-billion-dollar judgment while admitting that they have sustained no injuries apart from the desire to see Illinois's public-welfare law enforced. The Ninth Circuit's decision that the plaintiffs have Article III standing has no historical basis in the law and is contrary to this Court's standing precedent.

Because the Ninth Circuit's decision relinquishes judicial responsibility to interpret the constitutional requirements of standing and departs from this Court's decision in *Spokeo*, the Court should grant certiorari. Failure to do so will exacerbate the significant, growing confusion among federal courts on the proper application of *Spokeo*.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Cedes Judicial Authority to Decide What Constitutes Injury in Fact to State Legislatures

Respondent class representatives sued Facebook under Illinois's Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 *et seq.* ("BIPA"), in the Northern District of California. Invoking an Illinois statute that plaintiffs' lawyers have increasingly wielded nationwide in federal courts, Respondents allege that Facebook collected their biometric identifiers to generate facial templates without securing their written release or "establishing a compliant retention schedule." Pet. App. at 7a. They do not allege that they suffered any injury traditionally cognizable under Article III. Facebook thus moved to dismiss for want of standing.

In affirming the district court's denial of Facebook's motion to dismiss, the Ninth Circuit held that Facebook's alleged violations, while procedural, "would necessarily violate [Respondents'] substantive privacy interests" and presumed that this violation was an injury in fact sufficient to confer standing. *Id.* at 21a. According to the Ninth Circuit, "the procedural protections in BIPA" are "particularly crucial in our digital world" and the violation of these procedures *alone* is a "concrete injury-in-fact sufficient to confer Article III standing." *Id.* (quoting *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197, 1206 (Ill. 2019)). This decision warrants review both because it would confer standing upon plaintiffs who have not suffered injuries in fact and because it grants undue

weight to Illinois's legislative determinations in deciding when an alleged violation of BIPA is redressable in federal court.

This Court has held that the injury-in-fact requirement "is not an 'ingenious academic exercise in the conceivable'"; it requires "a factual showing of perceptible harm."[2] "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). While an intangible harm may suffice, it must be "concrete" and have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)).

This Court has recognized that federal and state legislatures may create new "legal rights, the invasion of which creates standing" to sue in federal court. *Lujan*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). But an injury in law is not necessarily an injury in fact. This Court distinguishes mere violations of a statutory right from violations of

[2] *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)).

a statutory right *that results in a concrete, particularized injury in fact giving rise to standing*.[3]

The injury-in-fact requirement is a constitutional "hard floor" that "cannot be removed." *Summers*, 555 U.S. at 497. "The need to insist upon meaningful limitations on what constitutes injury for standing purposes . . . flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993). Federal courts are inherently courts of limited jurisdiction,[4] and this Court has never held, in *Spokeo* or elsewhere, that a plaintiff may bring suit for a violation of a legislatively created right without a concrete injury in fact.[5] Doing so would disturb the separation of powers, because Congress, much less a State, may not

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[3] *Compare Sierra Club v. Morton*, 405 U.S. 727 (1972), *with Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("injury in fact to petitioners, the ingredient found missing in [*Sierra Club*, 405 U.S. 727], is alleged here").

[4] *Milwaukee v. Illinois*, 451 U.S. 304, 334 (1981) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

[5] *See Warth*, 422 U.S. at 501 ("Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.").

direct a federal court to hear a case in which Article III's requirements are not met.[6]

The judiciary's authority to interpret standing is a critical check on legislative overreach. Yet the Ninth Circuit presumes that an injury in fact sufficient to confer standing exists wherever a violation of a legally-created right is plausibly alleged, at least in the context of a privacy claim. Purporting to apply *Spokeo*, the court below concluded that violation of procedures intended to protect "biometric privacy rights" necessarily amounts to a violation of the underlying substantive rights. Pet. App. at 18a, 21a. The court thus found standing regardless of the presence of a harm that is traditionally justiciable, or that is concrete rather than abstract or hypothetical. That is, the Ninth Circuit's analysis does not consider whether Respondents alleged any real harm.

The Ninth Circuit's misapplication of *Spokeo*, if not corrected, would reduce constitutional standing to a formality: it would confer automatic standing on virtually any plaintiff who plausibly alleges that a business violated a procedural requirement of a privacy statute, even where, as here, there is no allegation that anyone was harmed by the violation. The only "injury" that an individual plaintiff or putative class representative would be required to allege, under the

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[6] Roberts, *supra*, 42 Duke L.J. at 1226 (noting Congress may "expand standing to the full extent permitted by Art. III," but it may not constitutionally "direct[] the federal courts to hear a case in which the requirements of Article III are not met") (citing *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)).

Ninth Circuit's formulation, is a violation of a procedure intended to safeguard an underlying or adjacent "substantive privacy interest"—*even in the absence of an actual or imminent threat to that privacy interest*. *See* Pet. App. at 20a–21a (holding that violation of the notice-and-consent requirements alone was a concrete injury to the Respondents' biometric privacy rights).

TechFreedom is concerned that the Ninth Circuit's decision allows state legislative determinations to dictate the federal judiciary's power to determine the presence of a "case or controversy" whenever "privacy" interests are implicated.

The federal judiciary cannot adopt the Illinois General Assembly's statutory standing determinations without independently performing the required federal constitutional standing analysis. The Ninth Circuit's decision *assumes*, out of regard for the newly created biometric privacy rights BIPA seeks to protect, that "[a]ny person aggrieved" under BIPA has suffered a sufficiently concrete injury in fact.

But this analysis effectively assigns the federal judiciary's obligation to independently interpret the Article III minima of standing to state legislatures. The Constitution does not admit of such a standing shortcut. A State's actions in creating new rights, drafting new procedural requirements to safeguard those rights, and authorizing statutory damages to protect those rights, do not in themselves amount to a redressable case or controversy. This is especially true in the realm of privacy injuries lacking any real-

world effect, which are traditionally *not redressable* because they are ephemeral and often attenuated. *See* Section II, *infra* (discussing the very limited historical recognition of privacy-based torts, their intersection and potential conflict with First Amendment-protected speech, and their non-redressability absent actual harm).

This Court's precedents have never allowed such legislative bootstrapping. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); citing *Gladstone*, 441 U.S. at 100 ("[i]n no event . . . may Congress abrogate the Art. III minima")). The Illinois General Assembly certainly cannot do what Congress cannot.

TechFreedom does not deny that Illinois may grant a private right of action to individuals "aggrieved" by Facebook's alleged violation. However, Illinois's decision to create a private right of action does not confer automatic standing in federal court to every member of the public who discovers a technically deficient BIPA notice. Federal courts must still perform the required constitutional analysis because "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing" and any other result would mean that every injury in law amounts to a presumed constitutional injury in fact. *Vermont Agency*, 529 U.S. at 772.

Since *Spokeo*, the district courts have seen repeated efforts to enforce state-statutory private rights of action and damages provisions against Internet and technology companies. *See, e.g.*, *Rivera v. Google, Inc.*, 366 F. Supp. 3d 998, 1001, 1014 (N.D. Ill. 2018) (dismissing BIPA claim for lack of subject matter jurisdiction); *Monroy v. Shutterfly, Inc.*, 2017 U.S. Dist. LEXIS 149604 at *26 (N.D. Ill. 2017) (denying motion to dismiss and "declin[ing] to hold that a showing of actual damages is necessary in order to state a claim under BIPA"). Confusion after *Spokeo* has spawned an epidemic of *in terrorem* class actions mired in alleged legislatively-created privacy interests.[7] Granting review would allow the Court to clarify the proper role of state legislative determinations in determining federal court standing.

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[7] *See Ill-Suited: Privacy Rights of Action and Privacy Claims*, U.S. Chamber Institute for Legal Reform (July 2019), https://bit.ly/2Q9csP8. TechFreedom shares the concern of other Amici who have discussed the societal consequences of the wave of *in terrorem* litigation that would ensue if the Ninth Circuit's decision were not corrected. *See* Brief of Washington Legal Foundation as *Amicus Curiae* In Support of Petitioner, at 11–14 (collecting sources discussing defendants' disincentives to litigate after the class certification stage and discussing plaintiffs attorneys' "powerful incentive" to aggregate ever-larger statutory damages claims as class action strike suits). In addition to a proliferation of strike suits under BIPA, the Ninth Circuit's decision may lead to the erosion of traditional barriers to standing under other statutes that include private rights of action that are frequently the subject of class action litigation, including but not limited to the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3), and the Truth in Lending Act, 15 U.S.C. § 1640(a)(1).

II. Invasion of Privacy Is Not a Traditional Harm Giving Rise to a Private Right of Action Unless Plaintiffs Show Actual Harm

Recognizing the violation of "statutory requirements" intended to protect individuals' biometric privacy as a species of intangible harm, the Ninth Circuit examined whether "invasion of an individual's biometric privacy rights 'has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" Pet. App. at 18a–21a (quoting *Spokeo*, 136 S. Ct. at 1549). Based on this examination, the Ninth Circuit incorrectly concluded that violations of "privacy rights" are traditionally recognized as actionable under the common law. This Court should grant Facebook's petition in order to correct the Ninth Circuit's inaccurate review of the relevant history.

A The Decision Below Confused General Regard for Personal Privacy with an Actionable Right to Assert Privacy Torts

Historically, the common law did not (and still does not) recognize injuries grounded solely on individuals' alleged inability to control information about themselves. Even as novel privacy tort theories have emerged in the last 130 years, plaintiffs asserting privacy-based claims almost never recover where they cannot allege resulting emotional or economic damages. To this day, the overwhelming weight of precedent militates against recognizing no-harm violations of statutory privacy rights as a "traditional" basis for a lawsuit or as grounds for standing in federal court.

In very limited circumstances, intangible injuries based on statutory violations may satisfy Article III's concreteness requirement, but the injury-in-fact requirement is not satisfied by the allegation of "bare procedural violation[s], divorced from any concrete harm . . . ." *Spokeo*, 136 S. Ct. at 1549 (quoting *Summers*, 555 U.S. at 496 ("deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing")).

In seeking an historic basis for a private right of action for alleged privacy violations, the Ninth Circuit ignored the generally-accepted rule that between private parties a privacy-related harm must be real—whether economic or otherwise—and cannot be ephemeral or attenuated. Although scholars routinely advocate for recognition of a "general right to privacy…," "the majority of courts have ruled that [privacy] injuries … are too speculative and hypothetical, too reliant on subjective fears and anxieties, and not concrete or significant enough to warrant recognition." Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 Tex. L. Rev. 737, 741 & nn.20–22 (2018) (collecting cases). Absent a concrete showing of traditional harm (economic, physical, or emotional), "concern that privacy claimants could recover for trivialities given the ethereal nature of the alleged harm" has thwarted those seeking judicial relief. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 Calif. L. Rev. 1805, 1825 (2010).

The decision below embraces the speculative, insubstantial harms—or anticipated harms—that this Court's standing doctrine has historically rejected. *See* Facebook Petition, at 25–27 (highlighting the decision below's inconsistency with this Court's "concreteness" and "imminence" requirements). The lower court's decision also conflates this Court's historical pronouncements regarding the right against unreasonable searches and seizures by the government under the Fourth Amendment for an actionable right against invasion of privacy by private individuals.[8]

Hypothetical fears based on the possible impact of rapid technological change inform the delineation of individuals' "reasonable expectation of privacy" under the Fourth Amendment. This Court has suggested in that context that individuals could be "at the mercy of advancing technology" if courts did not consider both current technology and "more sophisticated" future developments when deciding where reasonable privacy expectations begin and end. *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001); *see also Carpenter v. United States*, 138 S. Ct. 2206, 2216–17 (2018) (reviewing the expectation of privacy in cell-site location data). While advances in technology may bear on whether a privacy right exists or has been violated in any number of contexts, the question of *standing to sue in federal court based on such a right* requires an altogether different analysis. The required Article III

[8] *See* Pet. App. at 17a–18a (citing this Court's recent Fourth Amendment jurisprudence as evidence of judicial concern for "enhanced technological intrusions on the right to privacy").

injury-in-fact analysis is immutable. It persists despite advances in technology and changing conceptions of reasonableness.

If left uncorrected, the Ninth Circuit's standard threatens to give sanction to a torrent of statutory damages lawsuits that would further exacerbate the confusing state of post-*Spokeo* standing decisions among the circuit courts.

B The Decision Below Perpetuates an Ahistorical Fiction That Conflates Injury at Law with Injury in Fact

The Ninth Circuit's misreading of the historical redressability of private privacy claims begins, innocently enough, with a nod to Samuel D. Warren and Louis D. Brandeis's seminal article, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The Ninth Circuit cites *The Right to Privacy* as exemplifying (rather than departing from) the redressability of such claims under the common law. Yet, while *The Right to Privacy* remains a foundational expression of privacy law *theory*, "[i]t was as brilliant as it was loose with the existing Anglo-American legal precedent, which did not really protect a right to privacy at all." Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* 17 (Oxford University Press, 2015) (hereinafter, *Intellectual Privacy*). Even in 1890, Warren and Brandeis were "full of optimism" but "light on hard precedent." Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1345 (1992). According to Gormley:

> If one takes the time to dust off and read the rather colorful hodgepodge of English, Irish and American cases assembled by Warren and Brandeis, one is singularly impressed with the fact that *a right to privacy clearly did not exist in any of those jurisdictions in the year 1890*. Although [Warren and Brandeis] concluded the article by poetically suggesting that this new right had been "forged in the slow fire of the centuries," the truth was that there were shreds and ribbons of privacy adorning the jurisprudence of England and America, but nothing big enough to wrap up and place in a package. Warren and Brandeis were not presenting a picture of the law as it was, but of the law as they believed (or hoped) it should be.

Id. at 1347–48 (emphasis added, footnotes omitted).

Additionally, despite its heavy reliance on Justice Brandeis's early scholarship, the Ninth Circuit neglected his subsequent thinking, which curtailed privacy remedies where they conflict with free speech. "Although he never repudiated tort privacy, by the end of his life, Brandeis had moved to a position on publicity and free speech that was inconsistent with a broad reading of the tort theory of *The Right to Privacy*." *Intellectual Privacy* at 7. In 1890, "the core of the injury Warren and Brandeis were seeking to remedy was emotional harm." *Id.* at 18–23. Later, however, Justice Brandeis came to adopt a view of the

First Amendment that conflicted with an expansive theory of privacy harm; indeed, "by the end of his career, he was willing to contemplate only a tiny set of cases in which the disclosure tort was appropriate." *Id.* at 18–23, 45.

The decision below also placed mistaken reliance on the Restatement (Second) of Torts as a source of historic support. Pet. App. 15a–16a. The lower court correctly observed that, according to the Restatement, "the existence of a right of privacy [was] now recognized in the great majority of the American jurisdictions that have considered the question." *Id.* at 16a (quoting Restatement (Second) of Torts § 652A cmt. a). However, nothing in the Restatement reflects a consensus that a plaintiff has standing to seek redress of invasion of privacy torts where, as the record reveals in this case, there is an *absence of concrete emotional or economic injury*.

Since the Second Restatement, the American Law Institute ("ALI") has recognized that the common law does not supply an adequate foundation for the recognition of privacy-related causes of action or tortious harms such as those alleged here. In 2013, while working to update the Restatement (Third) of Torts, the ALI embarked on a project to summarize the current state of data privacy law. ALI Principles of the Law: Data Privacy, at xv (Tentative Draft April 15, 2019). During the course of this project, it concluded that no "established body of positive law" would substantiate a Restatement. *Id.* The ALI's decision to recharacterize its project as a principles project after a multi-year study reaffirms that nominal injuries to

dignity interests sounding in privacy, unlike dignity interests sounding in trespass,[9] are not presumptively actionable.

C Traditionally, First Amendment Rights Preclude Claims Rooted in Privacy Concerns

Even as they have gained limited recognition more recently, privacy claims are historically disfavored due to their capacity to conflict with free speech interests. Where they conflict, "First Amendment rights must trump disclosure privacy except in cases of truly extraordinary disclosures of private information." *Intellectual Privacy* at 50–51. For instance, in *Bartnicki v. Vopper* this Court reconciled individuals' interest in controlling private information with the First Amendment and came down squarely on the side of the First Amendment. 532 U.S. 514 (2001). In *Bartnicki*, the Court limited novel wiretapping claims in part because "privacy concerns give way when balanced against" competing First Amendment interests. 532 U.S. at 534 (citing Warren & Brandeis, *supra*, 4 Harv. L. Rev. at 214).[10]

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[9] Unlike the ancient private right against trespass to real property, which presumes injury in fact from a showing that "one man placed his foot on another's property" (*Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (citing *Entick v. Carrington*, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (1765))), there is no corresponding presumption for privacy interests.

[10] The historical tension between individual privacy interests and First Amendment free-speech rights has prevented the tort of public disclosure of private facts from being widely

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Controlling information relating to one's self is something important to many individuals. The law, as academics, legal institutions, and courts acknowledge, still requires a factual showing of perceptible harm. This Court may leave for another day whether *another* plaintiff might have standing based on claims of emotional or dignitary injury arising from an alleged BIPA violation.

The record *in this case* reveals that Respondents suffered no such injury. Respondents concede that they are unaware of any harm they have suffered—emotional, economic, or otherwise—as a result of Facebook's alleged conduct. *See* Petition at 5 (summarizing the absence from the record of demonstrated or alleged harm to Respondents); Pet. App. at 70a–78a. In the absence of such a "factual showing of perceptible harm" (*Lujan*, 504 U.S. at 566), Respondents' claims do not meet the requirements of a traditionally

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adopted. *See, e.g.*, *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979) (when "information is lawfully obtained, . . . the state may not punish its publication except when necessary to further [a substantial] interest"); *see also Bremmer v. Journal-Tribune Publ'g Co.*, 78 N.W.2d 762 (Iowa 1956) (rejecting invasion of privacy claims of parents of murdered child against newspaper because picture was of proper public interest, and listing cases coming to same conclusion). The creation of a right to control what is learned and expressed about an individual has been criticized on the grounds that it enables the government to impinge on free speech either directly or by authorizing private rights of action. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049 (2000).

recognized privacy action. Accordingly, they lack standing.

If allowed to stand, the holding below will give *de facto* license to states to increasingly commandeer federal courts, further the specter of *in terrorem* no-harm privacy class actions, and add further confusion to the interpretive split regarding *Spokeo*. It will also legitimize an historical fiction—that the common law traditionally recognized privacy interests as the basis of a cognizable injury whenever the merest legal injury is alleged.

CONCLUSION

For the reasons noted, TechFreedom respectfully urges this Court to grant certiorari.

Respectfully submitted,

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January 3, 2019

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