

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**

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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*.

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