In the

United States Court of Appeals

For the Seventh Circuit

No. 20-3249

MELISSA THORNLEY, *et al.*,

Plaintiffs-Appellees,

v.

CLEARVIEW AI, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 20-cv-3843 — **Sharon Johnson Coleman**, *Judge*.

ARGUED JANUARY 4, 2021 — DECIDED JANUARY 14, 2021

Before EASTERBROOK, WOOD, and HAMILTON, *Circuit Judges*.

WOOD, *Circuit Judge*. Illinois's Biometric Information Privacy Act, familiarly known as BIPA, provides robust protections for the biometric information of Illinois residents. See 740 ILCS 14/1 *et seq*. It does so by regulating the collection, retention, disclosure, and destruction of biometric identifiers or information—for example, retinal scans, fingerprints, or facial geometry. In recent years, the use of biometric data has

exploded. Predictably, that development has been followed by a spate of litigation testing the limits of the law's protections. Not all of those cases, however, have proven to be justiciable in federal court: some plaintiffs have failed to demonstrate that they have standing to sue as required by Article III of the Constitution.

The question now before us is whether, on the allegations of the operative complaint, the plaintiffs—Melissa Thornley and others, on behalf of themselves and a proposed class—have shown standing. (For convenience, we refer only to Thornley, unless the context requires otherwise.) Oddly, Thornley insists that she lacks standing, and it is the defendant, Clearview AI, Inc., that is championing her right to sue in federal court. That peculiar line-up exists for reasons that only a civil procedure buff could love: the case started out in an Illinois state court, but Clearview removed it to federal court. Thornley wants to return to state court to litigate the BIPA claims, but Clearview prefers a federal forum. The case may stay in federal court, however, only if the more stringent federal standards for standing can be satisfied; Illinois (as is its right) has a more liberal attitude toward the kinds of cases its courts are authorized to entertain. The district court held that Thornley has alleged only a bare statutory violation, not the kind of concrete and particularized harm that would support standing, and thus ordered the action remanded to the state court. Because the case meets the criteria of the Class Action Fairness Act, 28 U.S.C. § 1332(d), Clearview sought permission to appeal from that order. See 28 U.S.C. § 1453(c). We agreed to take the appeal, § 1453(c)(1), and we now affirm the decision of the district court.

I

Our description of the factual background of the case is necessarily brief because we have only the pleadings before us. We accept Thornley's account for present purposes. Clearview is in a business that would have been impossible to imagine a generation ago. Founded in 2017, it designed a facial recognition tool that takes advantage of the enormous amount of information that floats around the Internet. Users may download an application ("App") that gives them access to Clearview's database.

Clearview uses a proprietary algorithm to "scrape" pictures from social media sites such as Facebook, Twitter, Instagram, LinkedIn, and Venmo. The materials that it uses are all publicly available. The scraping process is not designed, however, simply to store photographs. Instead, Clearview's software harvests from each scraped photograph the biometric facial scan and associated metadata (for instance, time and place stamps), and that information is put onto its database. The database, which is stored on servers in New York and New Jersey, at this point contains literally billions of entries.

Clearview offers access to this database for users who wish to find out more about someone in a photograph—perhaps to identify an unknown person, or perhaps to confirm the identity of a person of interest. Many, though not all, of its clients are law-enforcement agencies. The user purchases access to Clearview's resources and, using the App, uploads her photograph to its site. Clearview then creates a digital facial scan of the person in the photograph and compares the new facial scan to those in its vast database. If it finds a match, it returns a geotagged photograph (not the facial scan) to the

user, and it informs the user of the source social-media site for the photograph.

In the beginning, Clearview appears to have kept a rather low profile. But on January 18, 2020, *The New York Times* published an article about Clearview and its extensive database. See Kashmir Hill, "The Secretive Company That Might End Privacy as We Know It," *The New York Times*, Jan. 18, 2020, https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html. A rash of lawsuits followed in the wake of the article. See, *e.g.*, *Mutnick v. Clearview AI, Inc.*, No. 1:20-cv-00512 (N.D. Ill.); *Roberson v. Clearview AI, Inc.*, No. 1:20-cv-00111 (E.D. Va.); *Calderon v. Clearview AI, Inc.*, No. 1:20-cv-01296 (S.D.N.Y.); *Burke v. Clearview AI, Inc.*, No. 3:20-cv-00370 (S.D. Cal.). This case was one of them. Notably, Thornley did not choose a federal forum; instead, she filed her case in state court—specifically, the Circuit Court of Cook County. Her initial complaint, filed on behalf of herself and a class on March 19, 2020, asserted violations of three subsections of BIPA: 740 ILCS 14/15(a), (b), and (c). (We explain below the scope of each of these provisions.) Clearview removed that case to federal court, see 28 U.S.C. § 1441, but shortly after the removal Thornley voluntarily dismissed the action.

In certain circumstances, met here, plaintiffs are entitled to take that action without leave of court should they so desire. See FED. R. CIV. P. 41(a)(1). Granted, if the plaintiff previously has dismissed either a federal- or a state-court action based on the same claim, "a notice of dismissal operates as an adjudication on the merits." *Id.* Rule 41(a)(1)(B). Thornley, however, had taken no such earlier action, and so her dismissal was without prejudice. She was thus within her rights when she

returned to the Circuit Court of Cook County on May 27, 2020, with a new, significantly narrowed, action against Clearview. The new action was more focused in two respects: first, it alleged only a violation of BIPA § 15(c), 740 ILCS 14/15(c); and second, the class definition was much more modest. Clearview again removed the case to the federal court. This time, Thornley filed a motion to remand, see 28 U.S.C. § 1447(c), in which she asserted that the violation of section 15(c) she described was only a "bare procedural violation, divorced from any concrete harm," see *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549 (2016), and thus did not support Article III standing. As we noted earlier, the district court agreed with her and ordered the case remanded to state court.

II

Ordinarily, it is the plaintiff who bears the burden of demonstrating that the district court has subject-matter jurisdiction over her case and that it falls within "the Judicial Power" conferred in Article III. But more generally, the party that wants the federal forum is the one that has the burden of establishing the court's authority to hear the case. See *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 758 (7th Cir. 2009); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005). As applied here, that means that Clearview must show that Thornley (as well as her co-plaintiffs) has Article III standing.

The Supreme Court's most recent restatement of the rules governing standing appears in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020):

> To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she

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