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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

*In re Facebook Biometric Information
Privacy Litigation*

Master Docket No. 3:15-cv-3747-JD
No. 3:16-cv-00937-JD

THIS DOCUMENT RELATES TO:
ALL ACTIONS

**PLAINTIFFS' JOINT RESPONSE IN
OPPOSITION TO FACEBOOK'S
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION**

Frederick William Gullen, individually and
behalf of all others similarly situated,
Plaintiff,

Date: September 14, 2016
Time: 10:00 a.m.
Location: Courtroom 11

v.

Facebook, Inc.,
Defendant.

Hon. James Donato

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INTRODUCTION

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2 In these actions, Plaintiffs seek redress for Facebook’s unlawful collection and retention
3 of their biometric data in violation of the Biometric Information Privacy Act, 740 ILCS 14/1 *et*
4 *seq.* Having failed in its bid to deny Illinois consumers the protection of their state’s biometric
5 privacy regime based on a choice of law clause in a contract of adhesion, Facebook now tries a
6 different tactic to usurp those same rights and negate the fundamental public policy of the state.
7 This time, Facebook argues that Article III of the United States Constitution prohibits the Court
8 from hearing this case, and seeks dismissal of all of the cases in the above-captioned actions,
9 including the cases that it removed from state court.¹ Stated plainly, Facebook misreads the
10 Supreme Court’s recent opinion in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), to hold that the
11 Plaintiffs here lack sufficient injury to proceed in federal court.

12 Plaintiffs possess Article III standing, and federal jurisdiction exists here for two
13 independent reasons. First, the invasion of their property right in the information that makes up
14 their own faces is a tangible injury that confers standing. Second, the informational injury
15 Plaintiffs suffered when Facebook failed to make statutorily required disclosures is grounded in
16 their right to privacy and to control the use of their own likeness, and is therefore also a concrete,
17 if intangible, injury.

18 Finally, with respect to Plaintiffs Licata and Gullen—whose cases were removed to
19 federal court by Facebook—a lack of standing could result only in remand, not dismissal. But
20 even remand is not required because, as explained in detail below, Plaintiffs have standing and
21 there is no question that this Court has jurisdiction.

ARGUMENT

22
23 Article III of the Constitution extends the judicial power of federal courts to “Cases” and
24 “Controversies,” U.S. Const. art. III, § 2, and requires the litigant invoking the federal courts’
25 jurisdiction to have “standing,” the first element of which being that the litigant has suffered an
26 “injury in fact.” *Edwards v. First Am. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). In *Spokeo*, the

27
28 ¹ See Facebook’s Notice of Removal, *Licata v. Facebook, Inc.*, No. 1:15-CV-04022, Dkt. 1
(N.D. Ill. May 6, 2015); Facebook’s Notice of Removal, *Gullen v. Facebook, Inc.*, No. 3:16-cv-
00937, Dkt. 1 (N.D. Cal. Feb. 25, 2016).

1 Supreme Court reiterated the long-standing rule that “[t]o establish injury in fact, a plaintiff must
2 show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and
3 particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” 136 S. Ct. at 1548
4 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Court also re-affirmed
5 that both tangible and intangible harms can be sufficient to confer standing. *Id.* at 1549. Here, the
6 harms alleged in the Consolidated Complaint filed in Master Docket No. 3:15-cv-3747-JD, and
7 the operative complaint filed in No. 3:16-cv-00937-JD, consist of both tangible harms, as well as
8 intangible harms, that fit directly within well-established standing principles.

9 **I. Plaintiffs Have Article III Standing Because Facebook Invaded Their**
10 **Property Interest in Their Faceprints.**

11 It is not disputed that tangible injuries, “such as ... the loss of money or property” are
12 concrete for the purposes of Article III. (Dkt. 129 at 4) (*citing Spokeo*, 136 S. Ct. at 1549).
13 Information is frequently considered proprietary in nature. *See Carpenter v. United States*, 484
14 U.S. 19, 26 (1987) (“Confidential business information has long been recognized as property.”);
15 *see also Facebook, Inc. v. ConnectU, Inc.*, No. C 07-01389 JW, 2008 WL 8820476, at *1 (N.D.
16 Cal. June 25, 2008) (“In essence, Facebook alleges that ConnectU gained unauthorized access to
17 Facebook’s servers and website and took information for its own unlawful use.”); *Bohannon v.*
18 *Facebook, Inc.*, No. 12-CV-01894-BLF, 2014 WL 5598222, at *4 (N.D. Cal. Nov. 3, 2014)
19 (granting Facebook’s motion to seal on the grounds that “information in these documents, if
20 disclosed, could both provide Facebook’s competitors with valuable proprietary information and
21 prevent Facebook from effectively enforcing its policies”). In a similar vein, the Illinois
22 legislature has already recognized that an individual has a property interest in his or her identity.
23 The Illinois Right of Publicity Act (“IRPA”) recognizes that Illinois citizens have a “right to
24 control and to choose whether and how to use an individual's identity for commercial purposes,”
25 and confirms that this right is a “property right[.]” 765 ILCS 1075/10, 15. Having such
26 information taken without permission is an Article III injury in fact.

27 In BIPA, the Illinois Legislature has recognized that biometric data is different from other
28 identifiers in that it is “biologically unique to the individual” and cannot be changed. 740 ILCS

1 14/5(c). Just as trade secrets or subscriber lists can be proprietary to a company like Facebook,
2 unique and unchangeable biometric identifiers are proprietary to individuals like Plaintiffs.
3 Indeed, it is difficult to imagine something that an individual has greater interest in than her own
4 body and the unique biometric data it contains. *See United States v. Kriesel*, 720 F.3d 1137,
5 1144–45 (9th Cir. 2013) (“The Rule’s definition of property includes ‘documents, books, papers,
6 any other tangible objects, and information.’ Fed. R. Crim. P. 41(a)(2)(A). The district court also
7 properly concluded that . . . the genetic code contained within the blood sample is information.”);
8 *see also Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Planned Parenthood of Southeastern Pa.*
9 *v. Casey*, 505 U.S. 833, 851 (1992).

10 In passing BIPA, the Illinois legislature set out the “fundamental policy of the state of
11 Illinois” that citizens have a right to control how their own biometric identifiers are collected,
12 stored, and used. (Order Re Motion to Dismiss and Summary Judgment, Dkt. 120 at 17-18).
13 Facebook invaded this right by collecting Plaintiffs’ biometric data without their consent, and
14 without providing disclosures required by the statute. And because biometric identifiers are
15 property, Facebook’s statutory violations are an invasion of Plaintiffs’ property rights. *See, e.g.,*
16 *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 76 (N.J. Super. Ct. Law Div. 1967) (holding that
17 individuals’ likenesses “belong to them[;] [a]s such they are property,” and that plaintiffs’ claims
18 for misappropriation of likeness was therefore “an action for invasion of their ‘property’ rights”).
19 For that reason alone, Plaintiffs have alleged an Article III injury in fact.

20 **II. Plaintiffs Have Suffered an Intangible Injury.**

21 Independently from the tangible injury to their property rights, Plaintiffs have also
22 suffered two distinct types of intangible injuries: the informational injury caused by Facebook’s
23 failure to make the disclosures required by 740 ILCS 14/15(a), (b)(1), and (b)(2), and the
24 invasion of their privacy rights caused by Facebook’s collection of their biometric identifiers
25 without obtaining the consent required by 740 ILCS 14/15(b)(3).

26 Like tangible harms, these intangible harms also provide the basis for an Article III injury
27 in fact. When a statute requires disclosure of certain information, and a defendant who is
28 required to provide that information fails to do so, the person who was supposed to receive the

1 information has suffered an injury in fact. Here, Facebook violated BIPA’s disclosure mandate,
 2 as Plaintiffs did not receive the information to which they were entitled. Further, both the
 3 common law and the reasoned judgment of the Illinois legislature confirm the concrete nature of
 4 consumers’ interest in controlling who is allowed to collect and store that sensitive and unique
 5 data, and in their knowledge of how that data is used.

6 **A. *Spokeo* confirmed that legislatures can identify intangible concrete harms**
 7 **redressable in federal court.**

8 In the context of an injury sufficient to confer Article III standing, “[c]oncrete’ is not ...
 9 necessarily synonymous with ‘tangible.’ Although tangible injuries are perhaps easier to
 10 recognize, we have confirmed in many of our previous cases that intangible injuries can
 11 nevertheless be concrete.” *Spokeo*, 136 S. Ct. at 1549. Thus, multiple appellate courts since
 12 *Spokeo* have noted that failure to receive statutorily required disclosures is an injury—though
 13 intangible—sufficient to support Article III standing. *Church v. Accretive Health, Inc.*, — F.
 14 App’x —, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (“[Plaintiff] has
 15 sufficiently alleged that she has sustained a concrete—*i.e.* ‘real’—injury because she did not
 16 receive the allegedly required disclosures.... While this injury may not have resulted in tangible
 17 economic or physical harm that courts often expect, the Supreme Court has made clear an injury
 18 need not be tangible to be concrete.”); *In re Nickelodeon Consumer Privacy Litig.*, — F.3d —,
 19 No. 15-1441, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (“Intangible harms that may give
 20 rise to standing also include harms that ‘may be difficult to prove or measure,’ such as unlawful
 21 denial of access to information subject to disclosure.”) (quoting *Spokeo*, 136 S. Ct. at 1548-49).²

22 To be sure, a plaintiff does not “automatically satisfy the injury-in-fact requirement
 23 whenever a statute grants a person a statutory right and purports to authorize that person to sue to
 24 vindicate that right.” *Spokeo*, 136 S. Ct. at 1549. But Facebook’s proposed test for Article III

25 _____
 26 ² *Hancock v. Urban Outfitters, Inc.*, — F.3d —, No. 14-7047, 2016 WL 3996710 (D.C. Cir.
 27 July 26, 2016), which held that a statutory prohibition on requesting zip code information was a
 28 “bare procedural violation,” is not to the contrary. The plaintiffs in that case, unlike Plaintiffs
 here, did not allege “any invasion of privacy” or other intangible injury, and they did not
 demonstrate that the D.C. City Council passed the statute at issue to remedy the kind of harm
 they suffered. *See id.* at *3.

1 standing in the context of a statutory violation entirely reads out the legislature’s “instructive and
2 important” judgment and its “role in identifying and elevating intangible harms[.]” *Id.* According
3 to Facebook, a harm is concrete only if it is “tangible” or if it is a “particular type[.]” of intangible
4 harm that a “*prior decision[] of the Court*” has recognized as being concrete. (Dkt. 129 at 10)
5 (emphasis added). Under Facebook’s reading, *Spokeo* relegates legislatures to the role of
6 scrivener, their powers reduced to passing statutes that allow lawsuits for things that already
7 meet some antecedent definition of “harm.”

8 This is simply incorrect. Adopting Justice Kennedy’s test from *Lujan v. Defenders of*
9 *Wildlife*, the Court held that *legislatures* have “the power to define injuries and articulate chains
10 of causation that will give rise to a case or controversy where none existed before,” even where
11 those injuries are intangible. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580
12 (Kennedy, J., concurring in part and concurring in the judgment)). In other words, a legislature
13 “can create new private rights and authorize private plaintiffs to sue based simply on the
14 violation of those private rights.” *Id.* at 1553 (Thomas, J., concurring); *see also Cantrell v. City*
15 *of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001) (“[S]tate law can create interests that support
16 standing in federal courts. . . . State statutes constitute state law that can create such interests.”).
17 Facebook’s test, which would effectively freeze the universe of sufficiently concrete harms to
18 those recognized as legal claims in the 18th Century, cannot be squared with that principle, nor,
19 as explained below, can it be squared with Supreme Court jurisprudence on informational injury.

20 **B. Plaintiffs’ informational injury is sufficient to confer standing.**

21 *Spokeo* confirms that “the existence and scope of an injury for informational standing
22 purposes is defined by Congress” (or, as here, the Illinois Legislature), and that “a plaintiff
23 seeking to demonstrate that it has informational standing generally ‘need not allege any
24 *additional harm*’” to have Article III standing. *Friends of Animals v. Jewell*, — F.3d —, No. 15-
25 5223, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016) (quoting *Spokeo*, 136 S. Ct. at 1549).
26 To that end, the *Spokeo* majority cited both *Federal Election Commission v. Akins*, 524 U.S. 11
27 (1998) for the proposition that “inability to obtain information that Congress had decided to
28 make public is a sufficient injury in fact to satisfy Article III,” and *Public Citizen v. Department*

1 *of Justice*, 491 U.S. 440 (1989) for its “holding that two advocacy organizations’ failure to obtain
2 information subject to disclosure under the Federal Advisory Committee Act ‘constitutes a
3 sufficiently distinct injury to provide standing to sue.’” 136 S. Ct. at 1549-50.

4 Although *Akins* and *Public Citizen* relate to information from government sources,
5 legislatures can also require private entities to disclose information. For example, in another
6 informational injury case, *Havens Realty Corporation v. Coleman*, 455 U.S. 363, 373 (1982), the
7 Supreme Court considered the portion of the Fair Housing Act that guarantees “a legal right to
8 truthful information about available housing.” The Court confirmed that a black “tester”—that is
9 a person who inquired about the availability of real estate “without any intention of buying or
10 renting a home”—had standing to sue an entity that gave her false information about the
11 availability of housing because of her race. *Id.* at 374.

12 To be clear, the “real” and “actual” injury in *Havens* was the denial of information to
13 which the plaintiff was entitled, not the underlying racial discrimination that caused her not to
14 get that information. The Court made that much clear by its treatment of the claims of another
15 plaintiff, a white man who had not received any false information about the availability of
16 housing. The white plaintiff lacked standing because he “alleged no injury to his statutory right
17 to accurate information concerning the availability of housing.” *Havens*, 455 U.S. at 375. The
18 fact that he did not “allege that he was a victim of a discriminatory misrepresentation” was
19 relevant only in that it showed that he had “not pleaded a *cause of action*” under the statute. *Id.*
20 (emphasis added). In other words, if he had been given false information for reasons other than
21 his race, then he would have had standing, but he still would have lost on the merits.

22 Thus, for Article III purposes, the “invasion” of a “statutorily created private right” to
23 information is a sufficient injury to allow a plaintiff to sue in federal court. *See Spokeo*, 136 S.
24 Ct. at 1553 (Thomas, J., concurring). Since *Spokeo*, courts have consistently found that plaintiffs
25 have standing to sue defendants who deprive them “of a fully appreciable disclosure to which he
26 or she is entitled under” a statute. *See Thomas v. FTS USA, LLC*, No. 3:13-CV-825, 2016 WL
27 3653878, at *9 (E.D. Va. June 30, 2016) (holding that it is “clear” that the plaintiff alleged a
28 concrete injury under the Fair Credit Reporting Act because he “alleged that he was deprived of

1 a clear disclosure stating that Defendants sought to procure a consumer report before the report
2 was obtained” without any additional or resulting harm); *see also Lane v. Bayview Loan*
3 *Servicing, LLC*, No. 15 C 10446, 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (concluding
4 that the plaintiff had “alleged a sufficiently concrete injury because he alleges that [the debt
5 collector defendant] denied him the right to information due to him under” a statute”).

6 The BIPA violations that Plaintiffs allege here are exactly the type of informational
7 injury that courts have deemed sufficient for Article III standing purposes. Specifically, Plaintiffs
8 pleaded that Facebook collected their biometric identifiers but failed to disclose its “written
9 policy ... establishing a retention schedule and guidelines for permanently destroying biometric
10 identifiers and biometric information,” 740 ILCS 14/15(a), did not tell Plaintiffs “that a
11 biometric identifier or biometric information is being collected or stored,” *id.* § 15(b)(1) and
12 failed to inform them “of the specific purpose and length of term for which a biometric identifier
13 or biometric information is being collected, stored, and used,” *id.* § 15(b)(2). (Dkt. 40 at 13-15.)
14 Being deprived of that information, access to which is guaranteed by statute, is an Article III
15 injury in fact.³

16 Because Plaintiffs were entitled to information about Facebook’s collection, retention,
17 and use of their biometric identifiers and did not receive it, they have suffered a legally
18 cognizable injury of the type that are routinely resolved in federal court. Accordingly, they have
19 standing and the Court has jurisdiction.

20
21
22 ³ It is worth noting that it is irrelevant that Plaintiffs did not specifically request this
23 information before filing the lawsuit, as would be required under other types of disclosure
24 statutes, nor does the absence of such a requirement transform Plaintiffs’ claims into a
25 “generalized grievance.” In some disclosure statutes, the event that triggers the defendant’s
26 obligation to disclose information is the plaintiff’s request. Here, the event that triggers the
27 obligation is the collection of biometric data (more specifically, the disclosure must be made
28 automatically disqualify [the] interest for Article III purposes.” *Akins*, 524 U.S. at 24; *see also*
Hajro v. USCIS, 811 F.3d 1086, 1105 (9th Cir. 2015).

1 **C. The common law and the legislature’s judgment confirm that both**
 2 **Facebook’s failure to make the required disclosures and its failure to obtain**
 3 **consent before collecting biometric data are concrete injuries.**

4 In the informational injury context, some cases suggest that the information must bear a
 5 relationship to a separate concrete interest before its nondisclosure will itself be a concrete
 6 injury. *See, e.g., Friends of Animals*, 2016 WL 3854010 at *3; *Wilderness Soc’y, Inc. v. Rey*, 622
 7 F.3d 1251, 1258-59 (9th Cir. 2010). Here, the disclosures Facebook was required (but failed) to
 8 make to Plaintiffs were directly related to their interest in controlling how their personal
 9 biometric data is collected, stored, and used. In addition to the informational injury, Facebook
 10 substantively invaded that same interest when it collected Plaintiffs’ biometric data without their
 11 informed consent, in violation of 740 ILCS 14/15(b)(3). This privacy interest—recognized by the
 12 Court as fundamental Illinois policy—is certainly concrete when examined through the lens of
 13 the two “important” and “instructive” sources identified by *Spokeo*—the legislature’s judgment
 14 and the common law. *See Spokeo*, 136 S. Ct. at 1549.

15 **1. BIPA bears a close relationship to well-established, traditional actions**
 16 **involving the right of publicity and right to privacy.**

17 Under *Spokeo*, “it is instructive to consider whether an alleged intangible harm has a
 18 close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit
 19 in English or American courts.” 136 S. Ct. at 1549. This is because federal judicial power under
 20 Article III applies to “cases and controversies of the sort traditionally amenable to, and resolved
 21 by, the judicial process.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). This is
 22 *not* a requirement that a statutorily created cause of action be absolutely identical to a common
 23 law tort. It would be bizarre, to say the least, to suggest—as Facebook does—that there is no
 24 federal jurisdiction in cases that “would have been unrecognizable to the Framers of the
 25 Constitution or ... throughout the most of the nineteenth century,” or to say that causes of action
 26 must always include an “indispensible element” of a traditional common law claim. (Dkt. 129 at
 27 11-12.) Such strict adherence to ancient precedent would deny standing in wide swaths of cases,
 28 including actions for wrongful death, *Covey Gas & Oil Co. v. Checketts*, 187 F.2d 561, 562 (9th
 Cir. 1951) (“Recovery for damages from death by such negligence did not exist in the common

1 law at the time of the adoption of the Constitution of the United States.”), copyright, *Mazer v.*
2 *Stein*, 347 U.S. 201, 214 (1954) (“[Copyright] did not exist at common law[.]”), breach of
3 contract entered into with a married woman, *see Dutton v. Rice*, 53 N.H. 496, 498 (1873)
4 (affirming dismissal of suit for plaintiff’s failure to plead the indispensable element that she was
5 unmarried at the time she entered into the contract), any case brought by a black plaintiff, *see*
6 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 408 (1856) (determining that federal courts
7 lacked diversity jurisdiction to hear a case brought by a black plaintiff based in part on the
8 English common law rule that persons “of the African race [were] regarded ... as an article of
9 property” and not as citizens), and all cases involving the Constitution, *see Flores-Miramontes v.*
10 *INS*, 212 F.3d 1133, 1142 (9th Cir. 2000) (“[T]he scope of review on habeas corpus could not
11 have been restricted to claims of ‘substantial constitutional’ violations, because the Constitution
12 did not exist at common law.”). Simply put, “[t]he judiciary clause of the Constitution ... did not
13 crystallize into changeless form the procedure of 1789 as the only possible means for presenting
14 a case or controversy otherwise cognizable by the federal courts.” *Nashville, C. & St. L. Ry. Co.*
15 *v. Wallace*, 288 U.S. 249, 264 (1933). Rather, courts are to consider whether a case is the *type* of
16 case that could be brought under common law. *See Steel Co.*, 523 U.S. at 102.

17 American courts have long recognized that allegations of invasions of privacy are a type
18 of case that they have jurisdiction to hear. True, the common law right to privacy in controlling
19 the use of one’s own likeness does not come from the dusty annals of 18th century English
20 jurisprudence. Rather, it is uniquely American, originating with “Samuel Warren and Louis D.
21 Brandeis, whose famous article *The Right of Privacy*, 4 Harv. L.R. 193 (1890) first used the
22 phrase ‘right of privacy.’” *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743 (Ill. App. Ct. 1952).
23 By the early 1950s, “the right [had been] recognized by the great preponderance of authority
24 throughout the country,” *id.* (collecting cases), *see also Abdul-Jabbar v. Gen. Motors Corp*, 85
25 F.3d 407, 414 (9th Cir. 1996) (recognizing California’s “common law cause of action for
26 appropriation of name or likeness”); *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (holding
27 that the expectation of privacy guaranteed by the Fourth Amendment can extend to a non-
28 physical intrusion). Illinois, specifically, has recognized the harm associated with invasions of

1 privacy for many years. *See Leopold v. Levin*, 259 N.E.2d 250, 253-54 (Ill. 1970) (citing *Eick*,
2 106 N.E.3d). Even after the decision in *Spokeo* was handed down, courts have continued to re-
3 iterate that “[t]he common law has long recognized a right to personal privacy, and ‘both the
4 common law and the literal understandings of privacy encompass the individual's control of
5 information concerning his or her person.’” *Thomas*, 2016 WL 3653878, at *10 (quoting *U.S.*
6 *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)
7 (emphasis added)).

8 The protections afforded by BIPA are simply an extension of these traditionally
9 recognized common law and Constitutional principles, applied by the Illinois legislature to a new
10 form of technology. The Illinois legislature granted its citizens the means to enforce a right to
11 privacy with respect to biometric identifiers and to prohibit companies from collecting and using
12 that data without consent. Facebook invaded that right when it took Plaintiffs’ biometric data
13 without their consent and without telling them what it planned to do with the information.
14 Plaintiffs have standing to seek redress.

15 **2. The Illinois Legislature exercised its judgment to protect an**
16 **individual’s interest in the privacy of their biometric data.**

17 Even if BIPA did not follow from the common law, which it does, the statute still creates
18 a valid legal right concerning a concrete harm. The power of the legislature is not limited by
19 strict adherence to the common law, and a legislative body can create “new rights of action that
20 do not have clear analogs in our common law tradition.” *Lujan*, 504 U.S. at 580 (Kennedy, J.,
21 concurring in part and concurring in the judgment). Indeed, even the common law itself is only
22 in force in Illinois by an act of the Legislature, *Hardin v. Jordan*, 140 U.S. 371, 386 (1891), and
23 the Legislature “has the full power to repeal or modify the common law as thus declared, except
24 as restrained by constitutional limitation.” *People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 835
25 (Ill. 1928). To create a new cause of action, the legislature must “identify the injury it seeks to
26 vindicate and relate the injury to the class of persons entitled to bring suit.” *Lujan*, 504 U.S. at
27 580 (Kennedy, J., concurring in part and concurring in the judgment). The Illinois Legislature
28 did just that here.

1 BIPA was sparked by an incident in which a company had collected a consumers'
2 biometric data, and, when the company went into bankruptcy, it became clear that consumers
3 were unaware of exactly who had collected their data and what they were allowed to do with it.
4 (*See* Dkt. 70-2.) To solve this problem, the Legislature required entities collecting biometric
5 identifiers to get consent first, and to tell consumers exactly what they planned to do with the
6 identifiers and how long they planned to keep it. As this Court has already recognized:

7 The [Illinois] legislature expressly found that: (1) “Biometrics are unlike other unique
8 identifiers...[and] are biologically unique to the individual; therefore, once compromised,
9 the individual has no recourse, is at heightened risk for identity theft, and is likely to
10 withdraw from biometric-facilitated transactions” ([740 ILCS] at 14/5(c)); (2) “[t]he full
11 ramifications of biometric technology are not fully known” (*id.* at 14/5(f)); and (3) “[t]he
12 public welfare, security and safety will be served by regulating the collection, use,
13 safeguarding, handling, storage, retention, and destruction of biometric identifiers and
14 information” (*id.* at 14/5(g)). In connection with these findings, the Illinois legislature
15 implemented a series of safeguards intended to protect the privacy of personal biometric
16 data.

17 (Dkt. 120 at 18.) In short, in the judgment of the Illinois legislature, consumers who unwittingly
18 gave away their unique biometric data without their consent and without the opportunity to
19 consider this important information have been injured and are entitled to relief.

20 That said, the principle that a legislative body can define new legal rights, the invasion of
21 which is an injury sufficient to support Article III standing, is limited in order to “keep[] courts
22 out of political disputes by denying private litigants the right to test the abstract legality of
23 government action.” *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring) (citing *Schlesinger v.*
24 *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974)). Congress or the Illinois legislature
25 could not, for example, pass a law requiring an “executive agency to ‘follow the law’” and
26 expect that obligation to be privately enforceable without some showing of harm beyond the
27 violation of the statute itself. *Id.* But that is not what the Illinois Legislature did. It created a right
28 that protects the privacy of consumers’ unique and unchangeable biometric data. “A plaintiff
seeking to vindicate a statutorily created private right need not allege actual harm beyond the
invasion of that private right.” *Id.* at 1553.

Although the plaintiff in a recent BIPA case, *McCullough v. Smarte Carte, Inc.*, No. 16 C
03777, 2016 WL 4077108, (N.D. Ill. Aug. 1, 2016), was unable to present the court with a

1 cogent explanation of why she had suffered a concrete injury, *see* Plaintiff’s Response to
2 Defendant’s 12(b)(1) and 12(b)(6) Motion to Dismiss, *id.* Dkt. 26 (June 27, 2016), the Plaintiffs
3 here do not have that problem. They have explained that they alleged an invasion of the private
4 right defined by the Illinois Legislature in BIPA, both by Facebook’s failure to make the required
5 disclosures and its collection of their biometric data without consent, and they have therefore
6 suffered an injury sufficient to allow them to pursue their claims in federal court. *Cf. In re*
7 *Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782, at *7 (“Congress has long provided
8 plaintiffs with the right to seek redress for unauthorized disclosures of information that, in
9 Congress’s judgment, ought to remain private.”); *Bona Fide Conglomerate, Inc. v.*
10 *SourceAmerica*, No. 14 Civ. 00751(GPC)(DHB), 2016 WL 3543699, at *8 (S.D. Cal. June 29,
11 2016) (holding, after a discussion of Article III standing in light of *Spokeo*, that plaintiff “alleged
12 a concrete and particularized injury—violation of its privacy rights—that is actual and
13 imminent.”). Further, unlike the plaintiff in *McCullough*—who did not identify the concrete
14 informational or other injury she suffered—Plaintiffs here detailed the specific ways that they
15 suffered both tangible harm, because Facebook invaded their property interest in their faceprints,
16 and intangible harm, because Facebook failed to give them information that they were entitled to
17 by law and because Facebook invaded their privacy. Because the *McCullough* court arrived at its
18 decision without the benefit of that explanation—and because the case was wrongly decided as a
19 result—it should not guide this Court’s reasoning.⁴ Article III poses no bar to the Court’s
20 jurisdiction here.

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23 ⁴ Compounding the district court’s error in *McCullough* is its conclusion that “a state statute
24 cannot confer federal constitutional standing.” 2016 WL 4077108, at *4. Both Seventh and
25 Ninth Circuit authority is to the contrary. *See FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir.
26 1988) (“Properly pleaded violations of state-created legal rights, therefore, must suffice to satisfy
27 Article III’s injury requirement. Thus, even in the absence of a specific finding that FMC was
28 injured by the misappropriation of its confidential business information, FMC sufficiently
alleged the violation of a state-law right that in itself would suffice to satisfy Article III’s injury
requirement.”); *Cantrell*, 241 F.3d at 684 (“We agree with the Seventh Circuit that state law can
create interests that support standing in federal courts.”) (citing *FMC*, 852 F.2d at 992).

1 **III. If There Is a Question about Federal Jurisdiction, Licata’s Case Must Be**
 2 **Severed and Remanded to Illinois State Court And Gullen’s Case Must Be**
 3 **Remanded To California State Court.**

4 Finally, *Spokeo* absolutely does not change who has the burden to demonstrate federal
 5 jurisdiction at every stage of the litigation. “[U]nder CAFA the burden of establishing removal
 6 jurisdiction is, as it was before CAFA, on the party wishing to see the case in federal court.”
 7 *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 399 (9th Cir. 2010). If there is a dispute with
 8 regard to jurisdictional issues, “the burden is on the party removing the case from state court to
 9 show the exercise of federal jurisdiction is appropriate.” *Id.* Because of the “strong presumption
 10 against removal jurisdiction[,] ... the court resolves all ambiguity in favor of remand to state
 11 court.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009).

12 Facebook removed Licata’s case from the Circuit Court of Cook County, Illinois to the
 13 United States District Court for the Northern District of Illinois and removed Gullen’s case to
 14 this Court from Superior Court of California, County of San Mateo. As the party asserting
 15 federal jurisdiction, Facebook maintains the burden to demonstrate that Licata and Gullen have
 16 Article III standing, which it has now disavowed. As explained in detail above, there is no
 17 question that plaintiffs have Article III standing here, since each has unambiguously suffered an
 18 injury in fact. However, should the Court determine that it is a close question, then there is no
 19 need to decide whether Licata or Gullen have properly alleged such an injury. Instead, per 28
 20 U.S.C. § 1447(c), Licata’s case must be severed and remanded to Cook County and Gullen’s
 21 case remanded to San Mateo County. *Albingia Versicherungs A.G. v. Schenker Int’l Inc.*, 344
 22 F.3d 931, 938 (9th Cir.), *opinion amended and superseded on denial of reh’g*, 350 F.3d 916 (9th
 23 Cir. 2003) (“[S]ection 1447(c) means that if it is discovered at any time in the litigation that there
 24 is no federal jurisdiction, a removed case must be remanded to the state court rather than
 25 dismissed.”); *Langford v. Gates*, 610 F. Supp. 120, 122-23 (C.D. Cal. 1985) (lack of standing is a
 26 jurisdictional defect, and “the proper course is remand” under § 1447(c), “not dismissal”).⁵

26 ⁵ Facebook itself acknowledged this point at the June 29, 2016 status conference.
 27 See Transcript of Proceedings, *In re Facebook Biometric Information Privacy Litigation*, Case
 28 No. 15-CV-3747, at 12:12-14 (N.D. Cal. June 29, 2016) (counsel for Facebook stating that “we
 think a remand would be appropriate if, and only if, the Court determines it does not have subject
 matter jurisdiction.”).

1 Facebook may attempt to argue that there is a “futility” exception to § 1447(c) that allows
 2 the Court to dismiss Licata’s case instead of remanding to state court. Although a 1991 Ninth
 3 Circuit decision accepts the rule that dismissal is permitted under § 1447(c) where “there is
 4 absolute certainty that remand would prove futile,” *Bell v. City of Kellogg*, 922 F.2d 1418, 1425
 5 (9th Cir. 1991), it is far from clear whether that case is still good law. *See, e.g., Villanueva v. 3M*
 6 *Co.*, No. CV160183DMGROX, 2016 WL 837896, at *3 (C.D. Cal. Mar. 3, 2016) (“To the
 7 extent that *Bell* stands for the proposition that federal courts may dismiss rather than remand
 8 upon finding that remand would be futile, *Bell* is no longer good law.”).

9 In any event, *Bell* doesn’t apply here because remand isn’t futile. Far from following
 10 federal standing law, Illinois has “expressly rejected federal principles of standing.” *Lebron v.*
 11 *Gottlieb Mem’l Hosp.*, 930 N.E.2d 895, 917 n.4 (Ill. 2010). Rather, in Illinois, the doctrine of
 12 standing is meant to ensure only that courts decide “actual, specific controversies” instead of
 13 “abstract questions or moot issues.” *In re Marriage of Rodriguez*, 545 N.E.2d 731, 733-34 (Ill.
 14 1989). Standing is meant to preclude persons having “no interest in a controversy from “bringing
 15 suit, but not to preclude “valid suit” from being litigated. *Id.* at 734. With those policy goals in
 16 mind, the Illinois Supreme Court has held that standing requires “*only* some injury in fact to a
 17 legally cognizable interest.” *Greer v. Illinois Hous. Dev. Auth.*, 524 N.E.2d 561, 574-75 (Ill.
 18 1988) (emphasis added). As an affirmative defense, it is “the defendant’s burden to plead and
 19 prove lack of standing.” *Id.* at 575.⁶ Consistent with Illinois law, in a recent BIPA case, a Cook
 20 County, Illinois court refused to dismiss the plaintiff’s claim for lack of standing based on
 21

22
 23 ⁶ Although Facebook argues that Illinois “follows federal principles of standing,” (Dkt. 129 at
 24 13), that is incorrect. The single case it cites for that principle, *Maglio v. Advocate Health &*
 25 *Hosp. Corp.*, 40 N.E.3d 746, 753 (Ill. App. Ct. 2015), states only that federal standing principles
 26 are “similar” to those in Illinois and that federal “case law is instructive.” That does *not* mean
 27 that Illinois automatically adopts every U.S. Supreme Court pronouncement on standing. *See,*
 28 *e.g., People v. \$1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 685 N.E.2d 1370,
 1377 (Ill. 1997) (“In Illinois, standing is part of the common law. However, federal principles of
 standing are grounded largely on the jurisdictional case and controversy requirements imposed
 by article III of the United States Constitution.”). In any event, there’s no reason for a federal
 court to rule on Illinois standing doctrine when an Illinois court is perfectly able to consider that
 issue on remand.

1 *Spokeo*. Transcript of Proceedings, *Rottner v. Palm Beach Tan, Inc.*, No. 15-cv-16695, at 38:15-
 2 17 (Cir. Ct. Cook County July 12, 2016) (attached hereto as Exhibit A). Likewise, California
 3 does not have a standing requirement remotely similar to Article III. *Jasmine Networks, Inc. v.*
 4 *Superior Court*, 103 Cal. Rptr. 3d 426, 432 (Ct. App. 2009) (stating that “[t]here is no similar
 5 requirement [to Article III standing] in our state Constitution,” and collecting cases).

6 “[B]ecause a successful assertion of standing in state court” is not only “conceivable” but
 7 has happened recently in a similar case, the futility exception couldn’t apply even if *Bell* were
 8 still good law. *See Bell*, 922 F.3d at 1425. Accordingly, if the Court lacks subject matter
 9 jurisdiction (which it does not), then remand is the only option for Licata’s and Gullen’s cases.

10 CONCLUSION

11 Defendants’ motion to dismiss should be denied because the Court has subject matter
 12 jurisdiction over this action. If the Court should determine that it lacks jurisdiction, then Licata’s
 13 case must be severed and remanded to the Circuit Court of Cook County, Illinois, and Gullen’s
 14 case must be remanded to the Superior Court of California, County of San Mateo.

15
 16 Respectfully submitted,

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 18 similarly situated,

19 Dated: August 4, 2016

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