No. 16-1105

In the
Supreme Court of the United States

POWER VENTURES, INC. AND STEVEN VACHANI,

Petitioners,

— v. —

FACEBOOK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

THOMAS LEE
Counsel of Record
ANDREW SCHWENK
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
thomas.lee@hugheshubbard.com

Counsel for Petitioners

JUNE 27, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Treatises and Periodical Material

INTRODUCTION

Respondent Facebook's Brief in Opposition ("BIO") poses three arguments against *certiorari*:

(i) there is no circuit split on the Question Presented regarding the interpretation of "without authorization" in the Computer Fraud and Abuse Act of 1986 ("CFAA"), BIO at 10-14;

(ii) this case is a bad vehicle because Petitioners Power Ventures, Inc. and Steven Vachani (collectively, "Power") waived their argument, and there is an "adequate and independent state-law ground" ("AISG") to support the lower court's decision, BIO at 14-18; and

(iii) the lower court's holding that Power acted "without authorization" in violation of the CFAA when it continued to access Facebook users' data with users' permission but after Facebook sent a cease-and-desist letter was correct, as a matter of statutory interpretation, BIO at 18-20.

None of Facebook's arguments have merit. First, a lack of conflict among circuits is an important, but not dispositive, factor, especially when the concentration of relevant industry in the Ninth Circuit makes a circuit split unlikely. Second, Respondent's vehicle concerns are based on distortions of Petitioners' main argument and a fundamental misunderstanding of AISG doctrine. Third, the Ninth Circuit's reading of whose "authorization" counts for CFAA liability is erroneous and will harm billions of internet users by shackling their ability to

control and move personal data among social-media and cloud-storage providers.

Before making its arguments against *certiorari*, Respondent recounts a lengthy, alternative-reality version of background facts and this case's procedural history. *See* BIO at 3-10. In a nutshell, Facebook paints Petitioners as engaged in "egregious, bad-faith conduct," BIO at 11, and as having suffered a devastating defeat in the appellate court.

Neither characterization is accurate. First, the Ninth Circuit held that Petitioners acted "without authorization" under the CFAA after Facebook issued a cease-and-desist letter on December 1, 2008, which Power fully complied with the following month. App. 17a-18a. The court never once asserted that anything Power did before that date violated the CFAA or any other law.[1] In fact, the court explicitly

---

[1] Respondent cites extensively to factual assertions in the record from district court proceedings that the appellate court did not adopt to paint Power as a shady enterprise. For example, Respondent uses the pejorative word "scraping" repeatedly to refer to what Petitioners were doing, *see, e.g.,* BIO at 4 (seven variations, on one page). The Ninth Circuit does not refer to Petitioners' acts as "scraping" at all. Rather, the lower court succinctly described the relevant facts. Power, with 5 million users, was a reputable start-up social-media aggregator that ran a promotion for its users who also had accounts with Facebook, which then had 130 million users.

Moreover, Petitioners did not "scrape" Facebook's proprietary data – their access was limited to the personal contact information of the Facebook friends of Power users with Facebook accounts. In fact, despite its lawsuit against Petitioners

Footnote continued

stated that Power was acting with authorization before December 1, 2008, because "Power reasonably could have thought that consent from *Facebook users* to share the promotion was permission for Power to access *Facebook's* computers." App. 16a-17a (emphasis in original). The unreasonableness of the lower court's conclusion that users' "authorization" sufficed to absolve Power of CFAA liability at Time X but not at Time Y is the core of what Petitioners are asking this Court to review.

Second, Respondent neglects to mention that the Ninth Circuit reversed the district court "in significant part" and "also vacate[d] the injunction and the award of damages" the district court granted, including an award of $3,031,350 under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"). App. 23a, 109a.[2] The dismissal of the CAN-SPAM claim leaves

---

Footnote continued from previous page

here, Facebook itself did the exact same thing against competitors like Google in its early years. *See* Michael Arrington, *Octazen: What the Heck Did Facebook Just Buy Exactly, and Why?* (Feb. 19, 2010) (detailing Facebook's purchase of Malaysian startup Octazen to obtain its engineers' expertise as "contact importers" for Facebook account holders with lesser-known email providers), *available at*: https://techcrunch.com/2010/02/19/octazen-what-the-heck-did-facebook-just-buy-exactly-and-why/

[2] On remand, the district court cut Respondent's entire monetary damages award to 4% of this award amount. *See* BIO at 9. The fact that the district court proceeded with the remand—

Footnote continued

a pristine vehicle for this Court to decide the nationally important question of whose "authorization" counts for CFAA liability in the Cyber Age.

I. THIS CASE IMPLICATES AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION THAT HAS SOWN CHAOS AMONG THE CIRCUITS, AND THE CONCENTRATION OF SOCIAL-MEDIA COMPANIES IN THE NINTH CIRCUIT MAKES A SPLIT UNLIKELY.

A circuit split, although important, has never been the be-all and end-all in deciding whether to grant *certiorari* on an important question. *See, e.g., Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002) (correcting Eighth Circuit's splitless interpretation of federal statute to forbid student peer grading).

Respondent, to its credit, does not deny this truth. Rather, it tries to distinguish this Petition, on the basis that Petitioners are "not governmental entities," and that this is "a civil dispute between private parties, involving egregious bad-faith conduct, and a decision that breaks no new ground." BIO at

---

Footnote continued from previous page

denying Petitioners' motion for a stay pending disposition of this Petition—has no bearing on the Court's consideration of the petition. If this Court grants *certiorari* and reverses the Ninth Circuit on CFAA liability, Petitioners would be entitled to relief from any judgment the district court renders to the contrary in the interim. *See* Fed. R. Civ. Pro. 60(b)(6).

11. As discussed above, the Ninth Circuit found Petitioners liable under the CFAA for a period of less than two months for accessing users' data with users' consent but not Facebook's—hardly "egregious bad-faith conduct." And although this case is a civil one, the same provision of the CFAA grounds criminal liability too. Finally, regardless whether a public actor like a school district is party, Respondent does not, and cannot, deny that the Ninth Circuit's decision affects billions of people who use online social-media like Facebook or cloud-storage providers like Dropbox and Microsoft.

Furthermore, as Justice Jackson observed, making a split the touchstone of *certiorari* is pointless when "a substantial portion of an industry [is] so concentrated in" one circuit "that litigation in other circuits, resulting in a conflict of decisions, is unlikely." *Muncie Gear Works, Inc. v. Outboard Marine Co.*, 315 U.S. 759, 766 (1942) (manufacture of outboard motors in the Seventh Circuit); *see also Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corp.*, 305 U.S. 47, 50 (1938) ("litigation elsewhere [on car-engine piston patents] with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit"). As Petitioners have noted, Pet. at 11 n.2, all the big social-media providers such as Instagram, Snapchat, Twitter and WhatsApp are based in California; the largest cloud-storage providers are also headquartered in the Ninth Circuit: Apple, Dropbox, Google, Microsoft, and Amazon.

Finally, it is not so clear that this case doesn't implicate a split. Respondent draws a strict line between the "without authorization" and "exceeds au-

thorized access" prongs of the statute, BIO at 11-13, but that is not how the lower courts have seen it. The statute defines "exceeds authorized access" in an exceedingly narrow way to mean access to forbidden information, such as a government contractor with Secret clearance accessing Top Secret information.[3] This statutory definition of "exceeding authorized access" would literally foreclose application to anyone with clearance to access information who did so for an improper use—a very common fact pattern in CFAA cases. For this reason, lower courts presented with cases where an authorized user accessed computers for an improper motive have focused on "without authorization" as the statutory hook for CFAA liability, or framed the issue fuzzily as one implicating both "without authorization and "exceeds authorized access" prongs. *See, e.g., Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006); *Brand Energy & Infrastructure Servs. v. Irex Contracting Grp.*, No. 16-2499, 2017 U.S. Dist. LEXIS 43497, at *32 (E.D. Pa. Mar. 23, 2017); *Am. Furukawa, Inc. v. Hossain*, 103 F. Supp. 3d 864, 871 (E.D. Mich. 2015) ("The circuit split has been cast as a clash between 'broad' and 'narrow' interpretations of the CFAA's phrases 'without authorization' and 'exceeds authorized access'"); *Infodeli, LLC v. W. Robidoux, Inc.*, No. 4:15-CV-00364-BCW, 2016 U.S. Dist. LEXIS 173173, at *16 (W.D. Mo. Mar. 7, 2016).

---

[3] The term "exceeds authorized access" is defined as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. §1030(e)(6).

II. THIS CASE IS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED.

This Petition has no vehicle issues. Respondent's arguments that Petitioners waived their main argument and that an adequate and independent state-law ground bar this Court's review are meritless.

First, Petitioners have argued consistently below that the CFAA does not extend liability for accessing the data of Facebook account-holders with the *users'* authorization. And Respondent has just as consistently argued that Facebook's authorization alone counts for CFAA liability because it owns the computers housing the users' data. The Ninth Circuit split the baby by holding that the users' consent constituted authorization to access users' data on Facebook's computers *before* Facebook sent a cease-and-desist letter but not *after* the letter was sent. App. 20a. The Question Presented is whether the one word "authorization" in the CFAA can have these two different meanings.

The type of "computer" that grounds CFAA liability against Petitioners is a "protected computer," defined elsewhere in the statute. 18 U.S.C. §1030(a)(2)(c). Petitioners did suggest that a narrower ground available to the Court would be to hold that the servers of a social-media company like Facebook housing users' personal data is not a "protected computer." *See* Pet. at 18-19. This was a secondary argument which may not have been explicitly made below.

But that is by no means grounds to conclude that Petitioners have waived their main argument

before this Court. To wit, the Court could simply assume for purposes of this Petition that Facebook is a "protected computer" under the statute, and nothing would change. The Question Presented of whether the "authorization" the statute requires is the user/account-holder's or the computer owner's would still be front and center.

Second, the Ninth Circuit's holding that Petitioners were also liable under §502 of the California Penal Code does not constitute an AISG barring this Court's review. The lower court was a federal court, not a state court, reviewing a case brought in federal district court under federal-question jurisdiction with supplemental jurisdiction over the state-law claim.[4]

The presence of a related state-law claim in a federal-question case brought in federal district court is not a reason for this Court to deny *certiorari*. In fact, to the contrary, if this Court were to grant and reverse on CFAA liability, the lower court should dismiss the entire case on remand, since there would be no federal claim left to anchor supplemental jurisdiction over the state-law claim—the only claim remaining. "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers of America*

---

[4] *See* First Amended Compl. ¶ 15, ER 178 (citing 28 U.S.C. §§1331, 1367).

v. Gibbs, 383 U.S. 715, 726 (1966); *see* 28 U.S.C. §1367(c).

The Respondent offers no legal support for the bizarre proposition that AISG doctrine applies to a case from *federal* court involving supplemental jurisdiction over state-law claims before this Court under 28 U.S.C. §1254. AISG doctrine applies, rather, to state-law grounds in *state*-court decisions subsequently reviewed by federal courts, whether by this Court under the state-court appellate jurisdiction statute, 28 U.S.C. §1257, or via its original habeas jurisdiction, or by the lower federal courts via writs of habeas corpus under 28 U.S.C. §2254. Indeed, the only cases Respondent cites to support its proposition are both decisions reviewing state-court decisions under 28 U.S.C. §1257. *See* BIO at 16 (citing *Michigan v. Long*, 463 U.S. 1032 (1983) (reversing and remanding Michigan Supreme Court decision because of ambiguity whether it relied on the Fourth Amendment or state-constitutional analogue); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955) (vacating prior decision reversing Iowa state courts' federal-law holding, upon being notified of an Iowa statute prohibiting racially restrictive cemetery covenants)); Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 480-509 (7th ed. 2015).[5]

---

[5] Moreover, careful parsing of the Ninth Circuit's decision shows that the state-law holding was not fully independent of the federal-law holding of CFAA liability. The lower court quoted circuit precedent saying that the state statute was "'dif-

Footnote continued

Finally, Respondent correctly notes that Petitioners suggested that this Petition could be consolidated with the Petition in *Nosal v. United States* (No. 16-1344) if this Court were disinclined to grant it outright. BIO at 14; Pet. at 11. Nosal, a former employee of the global executive-search firm Korn-Ferry, argues that he did not act "without authorization" because he acted through his ex-assistant who was an authorized account-holder and user of Korn-Ferry's database. What Nosal lacked was the authorization of Korn-Ferry itself, who was the owner of the proprietary database his ex-assistant accessed at Nosal's direction. Thus, the Question Presented by the Nosal petition was: "Whether a person who obtains an account holder's permission to access a computer nevertheless 'accesses a computer without authorization' in violation of the CFAA when he acts without permission from the computer's owner." Pet. at i, *Nosal*, No. 16-1344 (May 5, 2017).

Petitioners continue to believe that this case presents a better vehicle and more compelling facts

---

Footnote continued from previous page

ferent' than the CFAA" because the former required "knowing access" while the CFAA required "unauthorized access." App. 21a (quoting *United States v. Christensen*, 801 F.3d 970, 994 (2015)). The Respondent neglects to quote what the court said next: "But despite differences in wording, the analysis under both statutes is similar in the present case." *Id*. The court's entire analysis of the state-law claim cites no cases except *Christiansen* and comprises two short paragraphs, by contrast to the preceding thirteen paragraphs on CFAA liability.

than *Nosal*, because it directly implicates a Cyber Age application of the CFAA and because the account-holders who gave permission are also the owners of the data accessed on the computer network, by contrast to *Nosal*. But we would welcome consolidation of the two petitions, if the Court so wishes.

III. THE NINTH CIRCUIT'S INTERPRETATION OF "WITHOUT AUTHORIZATION" IN THE CFAA IS ERRONEOUS AND ENDANGERS INTERNET USERS' CAPACITY TO CONTROL AND MOVE PERSONAL DATA FREELY AMONG SOCIAL-MEDIA AND CLOUD-STORAGE PROVIDERS.

People increasingly live lives online, forming communities, sharing news, making memories, and staying in touch with friends and family. Facebook, with nearly two billion users, is the Goliath of the Cyber Age. As Justice Kagan observed at a recent oral argument, social-media sites like Facebook are "the way people structure their civic community life" today. Oral Arg. Tr., *Packingham v. North Carolina*, 15-1194, at 46 (Feb. 27, 2017). Justice Alito, half-facetiously, put it this way: "I know there are people who think that life is not possible without Twitter and Facebook." *Id*. at 54.

The CFAA is a 1986 statute enacted to extend civil and criminal liability to those who hacked into computer networks to steal sensitive data "without authorization." Congress was seeking to bring trespass into the Computer Age. The statute did not define whose authorization was necessary. But in the context in which the statute was enacted, it was plain that what was meant was the computer-network owner's or custodian's authorization.

Thirty years later, social-media providers invite ordinary people to open online accounts to share the details of their lives. From a technological perspective, the data are stored on providers' computer servers, but the data are very much the personal data of the account-holders. Whose "authorization" is required to access this data to avoid CFAA liability in the Cyber Age is no longer plain from context.

Petitioners respectfully submit that this Court should reject the Ninth Circuit's backward-looking interpretation of "authorization" in the CFAA to encompass only the computer owner's consent. The relevant personal data is the property of the users who created it, not the social-media company that stores it. *See* Amicus Brief of Cato Institute, No. 16-1105 (May 25, 2017). Indeed, Facebook itself engaged for years in precisely the same contact-importing which it accused Petitioners of having done, to attain its present social-media hegemony. If Facebook wants to change this default, it may explicitly do so in its contractual terms of service with account-holders. If Congress wants to change the default, then it should enact a new statute.

The policy consequences of letting the Ninth Circuit's interpretation of the CFAA stand are obvious and dire. It is difficult for people to move all their data from one social-media service to another without third-party assistance. A competitor seeking to do so must get Facebook's consent or risk civil and criminal liability under the CFAA as the Ninth Circuit reads it. This cloud of potential liability will deter new start-ups; Facebook's power to wield CFAA liability as a threat to competitors will lock-in its formidable first-mover advantage. There may soon

come a day when one social-media company rules them all, and dictates the terms on which billions of users live their lives online.

The recent words of Justice Kennedy for this Court seem particularly apt:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, slip op. at 6, No. 15-1194 (June 19, 2017).

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

Thomas Lee
Counsel of Record
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
thomas.lee@hugheshubbard.com