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
North District of Illinois, Eastern Division
Case No. 1:20-cv-3843 – Hon. Sharon Johnson Coleman

PLAINTIFFS' RESPONSE TO CLEARVIEW AI, INC.'S MOTION TO STAY THE MANDATE PENDING THE FILING AND RESOLUTION OF A PETITION FOR A WRIT OF CERTIORARI

Plaintiffs Melissa Thornley, Deborah Benjamin-Koller, and Josue Herrera submit this Response in opposition to the Motion to Stay the Mandate Pending the Filing and Resolution of a Petition for Writ of Certiorari (Doc. 47) ("Motion") filed February 22, 2021 by Defendant Clearview AI, Inc. ("Clearview").

Introduction

Fed. R. App. P. 41(d)(1) requires a party seeking to stay the mandate pending the filing of a petition for *certiorari* to show that its anticipated petition presents a "substantial question," and "that there is good cause for a stay." Fed. R. App. P. 41(d)(1).

To satisfy Rule 41's standard, the movant must demonstrate "(1) a reasonable probability of succeeding on the merits (meaning both that the Court will grant certiorari and that the Court

will reverse) and (2) irreparable injury absent a stay." *In re A.F. Moore & Associates, Inc.*, 974 F.3d 836, 840 (7th Cir. 2020); *accord United States v. Warner,* 507 F.3d 508, 510-11 (7th Cir. 2007) (Wood, J., in chambers). This standard is "demanding," *Jepson v. Bank of New York Mellon*, 821 F.3d 805, 807 (7th Cir. 2016), and "the grant of a motion to stay the mandate is 'far from a foregone conclusion.'" *Warner*, 507 F.3d at 510 (citation omitted).

Clearview has failed to satisfy either of Rule 41's requirements. With respect to the merits, Clearview asserts that it intends to seek *certiorari* to clarify when, pursuant to *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), violation of a statute "necessarily" gives rise to Article III standing (presumably absent any allegations of actual harm). Motion at 4. It is unlikely to succeed on the merits because even if the Supreme Court were inclined to consider this issue, this case does not present a proper vehicle for it to do so.

Clearview's argument is premised on its contention that § 15(c) of Illinois's Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/15(c), confers substantive individual rights, the violation of which "necessarily" give rise to Article III injury. This Court, however, rejected Clearview's interpretation of § 15(c) and held that § 15(c) is "a general regulation" that "addresses only the regulated entity." *Thornley v. Clearview AI, Inc*., 984 F.3d 1241, 1247 (7th Cir. 2021). In order to reach Clearview's contention, the Supreme Court would have to, *first*, agree to engage in an interpretation of Illinois *state* law and, *second*, overrule this Court's determination. It is extremely unlikely that the Supreme Court would do either. The interpretation of BIPA §15(c) raises no federal issues worthy of the Supreme Court's *certiorari* jurisdiction. And the interpretation of a state statute is a matter on which the Supreme Court generally defers to the courts of appeals. *See Phillips v. Washington Legal Found*, 524 U.S. 156, 167 (1998) (there is a

"presumption of deference given the views of a federal court as to the law of a State within its jurisdiction"). As a result, this case presents an unlikely vehicle for the broad-based clarification of *Spokeo* that Clearview optimistically posits the Supreme Court will be eager to undertake.

Moreover, even if that were not the case, the issue on which Clearview intends to seek *certiorari* was effectively decided (adversely to Clearview's position) by the Supreme Court last term. *See Thole v. US Bank, N.A.*, 140 S. Ct. 1615, 1621-22 (2020) (rejecting Article III standing where plaintiffs could not establish actual harm from violation of substantive ERISA statute). Clearview does not address *Thole*, which expressly "rejected the argument that 'a plaintiff automatically [*i.e.*, "necessarily"] satisfies the injury-in-fact requirement" of Article III based solely on the alleged violation of the substantive ERISA statute at issue. *Id*. at 1620-21.

Clearview, further, will suffer no "irreparable injury" in the absence of a stay. Clearview argues that "the costs and time [it] will be forced to spend on a potentially unnecessary litigation [in state court] represent irreparable harm warranting a stay." Motion at 7-8. But the law is well-established that "the ordinary incidents of litigation – the time and other resources consumed – do not constitute irreparable harm." *Crist v. Miller*, 846 F.2d 1143, 1144 (7th Cir. 1988); *see FTC v. Standard Oil of Cal*., 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"). To argue the contrary is "frivolous." *Sherwood v. Marquette Transp. Co., LLC*, 587 F.3d 841, 845 (7th Cir. 2009).

Moreover, as a practical matter, Clearview's argument that it will be forced to incur significant and potentially wasteful time and expense litigating in state court if the Supreme Court were to reverse the Panel's decision, fails to acknowledge the preliminary stage of plaintiffs' action and the limited nature of the litigation that is likely to occur on remand before Clearview's petition

is decided. Almost certainly, Clearview will, on remand, move to dismiss the action, and the briefing on that motion will be the principal litigation activity in this matter before Clearview's petition for *certiorari* is decided. If this case is ultimately returned to federal court, such briefing will be equally applicable to the determination of any motion to dismiss there.

Importantly, Clearview has failed to inform the Court that it is already litigating a BIPA action in Cook County Circuit Court involving the same BIPA § 15(c) claim plaintiffs raise here. *See ACLU, et al v. Clearview AI, Inc.*, Case No. 20 CH 04353 (Cook County Cir. Ct., Ch. Div.) (filed May 28, 2020). Even assuming that this action is not consolidated with the *ACLU* action, any litigation of this case in state court while Clearview is seeking *certiorari* is likely to mirror litigation in the *ACLU* action, thereby reducing (if not eliminating) any incremental time and resources that Clearview might expend on this case in state court before its petition is decided.

Precedent from other appeals involving CAFA remand orders arising, as here, pursuant to 28 U.S.C. § 1453(c)(1) demonstrates that Clearview is not in need of – or entitled to – a stay. As plaintiffs discuss below (at pp. 15-16), the Supreme Court has decided five cases involving § 1453(c)(1) appeals, and in none of those cases was the mandate stayed. Indeed, granting a stay in a § 1453(c)(1) appeal would undermine Congress's clear intent that such appeals be resolved on an expedited basis. *See* 28 U.S.C. § 1453(c)(2) (requiring courts of appeals to "complete all action" on such appeals within 60 days); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 93 n.6 (2014) ("Section 1453(c)'s timing provision … was designed to promote expedition.")

In sum, both because it is extremely unlikely that the Supreme Court will grant Clearview's proposed petition for *certiorari* and because Clearview will suffer no irreparable

injury from litigating this case in state court while its petition is pending, Clearview's Motion should be denied.

Argument

A. Clearview Has Failed to Present a "Substantial Question" for Supreme Court Review and Is Unlikely to Succeed on the Merits of Any Further Appeal.

As this Court has stated: "in order to demonstrate a reasonable probability of succeeding on the merits, the applicant must show both a reasonable probability that four Justices will vote to grant *certiorari* and a reasonable possibility that five Justices will vote to reverse the judgment of this court." *Warner*, 507 F.3d at 511. Rule 10 of the Supreme Court's Rules states that "[a] petition for a writ of *certiorari* will be granted only for compelling reasons." S. Ct. R. 10.

Clearview states that its "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." Motion at 4. Although Clearview attempts, for present purposes, to "federalize" this issue by framing it in general terms, the issue that Clearview really intends to present – as it has previously stated on this appeal – is "[w]hether an alleged *violation of Section 15(c) of BIPA* necessarily gives rise to a concrete and particularized injury-in-fact."[1] That is the issue that Clearview presented in its appeal brief[2] and in its petition for rehearing or rehearing *en banc*,[3] and it is the (real) issue Clearview must present to the Supreme Court in order to obtain reversal of this

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1 Clearview's Petition for Panel Rehearing or Rehearing En Banc, filed Jan. 27, 2021 (Doc. 44) ("Rehr'g Br.") at 1 (emphasis added).

2 Clearview's Brief on Appeal, filed Dec. 9, 2020 (Doc. 16) ("App. Br") at 8-10, 14-15.

3 Rehr'g Br. at 1 (emphasis added).

Court's decision. But because that issue turns on the interpretation of a state statute (BIPA § 15(c)), it is an issue that the Supreme Court is very unlikely to grant *certiorari* to review.

This Court's decision turns squarely – as Clearview admits – on the Court's interpretation of BIPA § 15(c), an Illinois statute. Clearview acknowledges that this Court found that "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 [BIPA] section 15(a).'" Motion at 3, quoting *Thornley*, 984 F.3d at 1247.

In its decision, this Court resolved the disagreement between the parties as to the scope of § 15(c), with plaintiffs having advocated the interpretation ultimately adopted by the Court, *see* 984 F.3d at 1247 (*i.e.*, it is a "general regulation"), and Clearview taking the view that § 15(c) protects individual rights, the violation of which "necessarily" results in concrete and particularized Article III injury. *See* App. Br. 14-15; Rehr'g Br. 1, 5-6. As the Court thus determined:

> Without any such allegations of concrete and particularized harm to the plaintiffs, we are left with a general rule that prohibits the operation of a market in biometric identifiers and information. If it is not profitable to collect or hold that data, one can assume that the incentive to collect it or hold it will be significantly reduced. Much the same rationale supports other laws that are directed against market transactions.

Thornley, 984 F.3d at 1247. While the Court acknowledged that "a different complaint" might give rise to standing under § 15(c), it concluded that plaintiffs' "allegations matter" and control for purposes of determining whether the Complaint, in this particular § 15(c) case, establishes Article III injury. *Id*. at 1246-47.

The Court further noted that the situation in this case is made possible by unique aspects of Illinois standing law. Specifically, plaintiffs "may take advantage of the fact that Illinois permits BIPA cases that allege bare statutory violations, without any further need to allege or show injury." *Id*. at 1248-49 (*Rosenbach v. Six Flags Entm't Corp*., 129 N.E.3d 1197 (Ill. 2019)); *see Bryant v. Compass Group USA, Inc*., 958 F.3d 617, 622 (7th Cir. 2020) ("Standing requirements in Illinois courts are more lenient than those imposed by Article III.").

Clearview's proposed Article III issue thus is inextricably intertwined with Illinois state law issues and the interpretation of Illinois statutes. The Supreme Court customarily applies a "presumption of deference [with respect to] the views of a federal court as to the law of a State within its jurisdiction," *Phillips,* 524 U.S. at 167, and such deference is particularly appropriate where, as here, this Court has extensive experience with BIPA, and, in particular, with standing issues relating to BIPA.[4] The ultimate determination of these state law issues lies with the Illinois – not the United States – Supreme Court, and Clearview offers no reason why the United States Supreme Court would choose to review this Court's interpretation of state law.

Clearview's contention that a violation of § 15(c) "necessarily" gives rise to Article III injury is predicated on its argument that the statute creates substantive individual rights. If, as may reasonably be expected, the Supreme Court has no interest in second-guessing (let alone overturning) the Panel's determination that § 15(c) is a general regulatory rule that does not confer such rights, the Supreme Court would never reach the Article III issue Clearview proposes for *certiorari*. It is, thus, highly unlikely that four Justices would vote to grant *certiorari* on

[4] *See, e.g., Fox v. Dakkota Integrated Sys. LLC,* 980 F.3d 1146 (7th Cir. 2020); *Bryant*, 958 F.3d at 620-26; *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019).

Clearview's proposed question and equally unlikely that five Justices would decline to defer to this Court's interpretation of Illinois state law, as required before the Panel decision could be reversed.

Even if this case did not turn on the interpretation of Illinois state law, and even if the Supreme Court were to overrule this Court's interpretation of §15(c), Clearview's contention that the Supreme Court is likely to grant *certiorari* and hold that, absent *any* allegations of actual injury, a violation of a statute conferring a substantive right can "necessarily" give rise to a concrete and particularized injury sufficient to establish Article III standing is extremely dubious – and certainly not probable, as Rule 41(d)(1) requires. *See Warner,* 507 F.3d at 511.

There is no dispute that, under *Spokeo*, "Article III requires a concrete injury even in the context of a statutory violation" and that "a bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement of Article III. 136 S. Ct. at 1549. As the Panel recognized, *Spokeo* further established the principle that the plaintiff must allege facts that demonstrating that injury-in-fact:

> [A]n important corollary to the rule that injury-in-fact must be both concrete and particularized, see *Spokeo*, 136 S. Ct. at 1548–49, is the requirement that "the plaintiff must clearly allege facts demonstrating each element." *Id.* at 1547 (cleaned up). In other words, allegations matter. One plaintiff may fail to allege a particularized harm to himself, while another may assert one.

Thornley, 984 F.3d at 1246.

Although Clearview presumably will argue that a different rule should apply when the statutory violation at issue involves a plaintiff's "substantive," as opposed to "procedural," rights,[5]

[5] It should be noted that nowhere in Clearview's Motion does it present any actual position on the standard it says the Supreme Court should adopt to allow some category of statutory

...continued on next page

the Supreme Court has unequivocally rejected the notion that a statutory violation, even of a substantive right, can "automatically" (*i.e.*, "necessarily") establish Article III injury. As the Court stated last term in *Thole*: "This Court has rejected the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate the right.'" *Thole*, 140 S. Ct. at 1620-21 (quoting *Spokeo,* 136 S. Ct. at 1549).

In *Thole*, the Supreme Court considered what was clearly a "substantive" ERISA mismanagement claim brought by participants in a defined benefit plan under ERISA, which "affords … participants in [such plans] … a general cause of action to sue for restoration of plan losses…." *Id.* at 1620. The plaintiffs, however, had suffered no injury from the claimed mismanagement, as they had "been paid all of their monthly pension benefits so far, and [were] legally and contractually entitled to receive those same monthly payments for the rest of their lives." *Id.* at 1618. The Court directly applied the *Spokeo* rule that "Article III requires a concrete injury even in the context of a statutory violation" to the claimed violation of plaintiffs' substantive ERISA rights, rejecting plaintiffs' claim of standing because "plaintiffs have failed to plausibly and clearly allege a concrete injury." *Id*. at 1621-22. Given its recent holding in *Thole*,

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violations, unaccompanied by allegations of actual harm, to create Article III injury-in-fact. It is unclear how this Court can assess the likelihood of the Supreme Court's agreeing to hear Clearview's appeal when Clearview does not apprise the Court of what standard its petition will actually argue. Plaintiffs submit there is a logical reason for this startling omission from Clearview's Motion. It would be bizarre for a class action defendant to ask the Supreme Court to *expand* Article III standing rules to allow a class of statutory violations, unaccompanied by allegations of actual injury, to create standing. Clearview's failure to articulate the standard it will ask the Supreme Court to apply suggests that the real purpose of its intended petition is delay, rather than reversal.

it is extremely unlikely that the Supreme Court would agree with Clearview's view of the law or grant *certiorari* to overturn *Thole.*

Significantly, other Courts of Appeals have held, consistent with the Panel's decision here, that Article III standing is lacking when a plaintiff alleges no particularized harm from the defendant's violation of a statute that creates a substantive private right. *See e.g.*, *Trichell v. Midland Credit Mgmt, Inc.,* 964 F.3d 990, 999-1002 (11th Cir. 2020) (citing *Thole* and finding no Article III injury where defendant's misleading statements in violation of substantive debtor protection provisions of the Federal Debt Collection Practices Act did not actually misled plaintiffs); *Frank v. Autovest, LLC*, 961 F.3d 1185, 1188-90 (D.C. Cir. 2020) (same); *Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776, 783 (9th Cir. 2018) (no Article III injury where defendant's disclosure violated substantive protections of the Fair Credit Reporting Act but plaintiff sustained no injury sine only he had seen improper disclosure).

These cases – like *Thole* and this case – establish a consistent principle in the Supreme Court and across the Circuits interpreting *Spokeo* to mean that a statutory violation, regardless of whether it is "substantive" or "procedural," taken alone, does not establish Article III injury. Unless a plaintiff can show actual harm resulting from the alleged violation, the concrete and particularized injury-in-fact necessary for Article III standing does not exist.[6]

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[6] Clearview argues that *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020), which held that substantive and procedural rights are both subject to the *Spokeo* rule, is in conflict with decisions from the Ninth Circuit. Motion at 5-6. But even assuming that the holding in *Larkin* were essential to the decision here (which it clearly is not, given the Panel's reliance on its interpretation of § 15(c)), the cases cited by Clearview – unlike *Larkin* – were decided before *Thole*, which clearly invalidates their holdings to the contrary. Moreover, *see Bassett*, 883 F.3d at 782-83, (discussed above), a Ninth Circuit case consistent with *Larkin*.

Clearview relies heavily on Judge Hamilton's concurring opinion to attempt to show that the courts of appeals are confused "over how to interpret *Spokeo*." Motion at 5. However, Clearview seems to overlook the fact that Judge Hamilton concurred in the Panel's decision, which he characterized as "careful and persuasive." 984 F.3d at 1249. The fact that Judge Hamilton believes that some *other* decisions in the Seventh Circuit may have taken *Spokeo* "too far," *id.* at 1254, does not suggest that he believes the Supreme Court would or should use the Panel's decision in this case as a vehicle for clarifying *Spokeo*. Indeed, neither Judge Hamilton nor any other active Judge in this Circuit voted to hear this matter *en banc*, a clear indication that neither Judge Hamilton nor any other Circuit Judge believes that this case presents an appropriate vehicle for clarifying any uncertainty about the meaning of *Spokeo*.

Clearview also offers a somewhat academic discussion of the different approaches taken by different federal circuits in applying *Spokeo*. Motion at 5-7. While this might make for an interesting law review article, it is unclear how it bears on the suitability of *this* case for Supreme Court review, and, in particular, how it makes this case any more appropriate for Supreme Court review than any of the other 534 court of appeals decisions (per Westlaw) citing *Spokeo*. The aspects of *Spokeo* at issue in this case – that "Article III standing requires a concrete injury even in the context of a statutory violation," *Spokeo*, 136 S. Ct. at 1549, and that "the plaintiff must clearly allege facts demonstrating each element," *id.* at 1547 – have not been the subject of controversy or different approaches in the Circuits.

Clearview's reliance on *TransUnion LLC v. Ramirez*, S. Ct. 20-297, Motion at 5-6, is also misplaced. In that case, the Supreme Court has granted *certiorari* to review the following issue: "Whether either Article III or Rule 23 permits a damages class action where the vast majority of

the class suffered no actual injury, let alone an injury anything like what the class representative suffered." Motion at 7. The issue in that case is whether a class action may proceed where only the class representative has suffered actual injury, not how the existence of "injury-in-fact" should be determined under *Spokeo* – the issue that Clearview claims is uncertain and worthy of Supreme Court review in this case.

Clearview asserts "it is not at all hard to imagine" that the Supreme Court's decision in *TransUnion* "may include language" that would lead the Supreme Court to "grant, vacate and remand this matter on certiorari review." Motion at 7. That would, of course, be true of any case involving standing issues, but it is not the standard applicable here. Rather, the Court must determine whether there is a "reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse." *Warner*, 507 F.3d at 511. The "not at all hard to imagine" speculation proffered by Clearview cannot satisfy the requirements of Rule 41(d).

B. Denial of Clearview's Stay Application Will Not Cause It "Irreparable Injury."

Even if Clearview could show a "reasonable probability" of success on the merits sufficient to satisfy the stringent requirements of Rule 41(d)(1), it is unable to show that it will suffer "irreparable injury" absent a stay, as required. *Warner*, 507 F.3d. at 510-11.

As noted above, Clearview argues that should the Supreme Court grant *certiorari* and reverse the Panel's decision, "the costs and time Clearview will be forced to spend on a potentially unnecessary litigation [in state court] represent irreparable harm warranting a stay." Motion at 7-8. But every case is litigated subject to the possibility that action by an appellate court may render some or all of the prior proceedings unnecessary, and this case is no different. It is axiomatic that

"the expense of litigation is not 'irreparable injury.'" *Sherwood*, 587 F.3d at 845; *see Standard Oil*, 449 U.S. at 244 ("the expense and annoyance of litigation is 'part of the social burden of living under government'…. 'Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury'"); *Crist*, 846 F.2d at 1144 ("The ordinary incidents of litigation – the time and other resources consumed – do not constitute irreparable harm"). To argue the contrary is "frivolous." *Sherwood*, 587 F.3 at 845.

Clearview cites *United States ex rel. Chandler v. Cook County*, 282 F.3d 448, 451 (7th Cir. 2002) (Ripple, J., in chambers), for the proposition that requiring a party to "prepare for trial before the Supreme Court takes action" can constitute irreparable injury. Motion at 8. But *Chandler* involved a wholly different consideration; the legal issue to be presented to the Supreme Court there involved the defendant County's claim of *immunity* from trial, and Judge Ripple concluded that loss of that immunity would be an irreparable injury. *Id*. at 451. Here, there is no dispute that Clearview will be required to answer to plaintiffs somewhere, and therefore the immunity-from-trial principle animating the holding in *Chandler* is simply inapplicable.

Equally important, and as a practical matter, Clearview faces no likely risk on remand of incurring significant and unnecessary litigation expenses before its petition is decided. Denial of Clearview's motion to stay will simply enable this action to proceed in the normal course. Once the Court issues its mandate, the case will be remanded, first to the district court, and then on to Cook County Circuit Court for further proceedings, where Clearview will be required to respond to the ordinary demands of civil litigation between now and when the Supreme Court chooses to act on its petition. At this early stage of the proceedings, Clearview is virtually certain to file a motion to dismiss in this action, and the likely litigation in the case will involve the briefing of the

motion. Clearview will plainly suffer no harm from engaging in this legal work: even assuming the Supreme Court decides to grant *certiorari* and reverse the Panel's decision, the parties' briefing of Clearview's motion to dismiss will be useable in the federal court proceedings.

Moreover, as noted above, Clearview is already engaged in litigation of a BIPA action pending in Cook County Circuit Court raising the same BIPA § 15(c) claim that plaintiffs present in this action. *See ACLU, et al v. Clearview AI, Inc.*, Case No. 20 CH 04353. The proceedings in the two cases – especially at their current preliminary stages – will likely mirror each other (and may even be consolidated), and it is likely that any litigation of this action will apply to the *ACLU* action as well. Indeed, the proceedings to date in the *ACLU* case illustrate that Clearview is unlikely to suffer any significant litigation harm during the period between remand and a decision on its petition for *certiorari*. The *ACLU* case was filed on May 28, 2020 (the day after this action was filed), and since its filing, the only significant litigation activity in the case has been the filing of a (yet-to-be-decided) motion to dismiss by Clearview and the parties' briefing of the motion, completed in January 2021.

This is scarcely harm, let alone "irreparable harm." And, if – contrary to any reasonable likelihood – the Supreme Court should choose to grant Clearview's *certiorari* petition, Clearview will be free to seek a stay at that time, and either the state trial court or the Supreme Court can enter appropriate orders regulating the proceedings in this case.

On the other hand, issuance of a stay will unnecessarily delay plaintiffs' legitimate efforts to pursue their claims. Clearview has previously argued to this Court that it is entitled to 150 days to file its petition. *See* Clearview's Resp. to Pl.s' Mot. to Issuance of the Mandate (Doc. 40),

at 3, ¶ 7.[7] Its petition, thus, will not be due until July 16, 2021 (150 days after February 16, 2021, the date on which Clearview's petition for rehearing and rehearing *en banc* was denied), and not decided, at the earliest, until the start of the Supreme Court's October 2021 term. Accordingly, a stay will delay this case for at least eight to nine months – doubling the nine months this case has already been delayed, since it was filed in May 2020, by this remand litigation. And if Clearview's petition, like approximately 99% of all such petitions, is ultimately denied,[8] then plaintiffs will have been unnecessarily deprived of eight or nine months of progress towards bringing their case to completion in state court.

The precedents pertaining to appeals, like this one, arising under 28 U.S.C. § 1453(c)(1) are directly contrary to Clearview's contention that it is need of – and entitled to – a stay. Since the enactment of § 1453(c)(1) in 2005 as part of the Class Action Fairness Act ("CAFA"), the Supreme Court has reviewed five cases involving remand rulings by the courts of appeals issued pursuant to the statute. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (8th Cir. No. 11-8030); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014) (10th Cir. No. 13-603); *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (9th Cir. No. 08-16963); *Mississippi ex rel. Hood v. AU Optronics Corp*., 571 U.S. 161 (2014) (5th Cir. No. 12-60704); *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743 (2019) (4th Cir. No. 17–1627). In *not a single one* of those five cases was a stay of the mandate entered. In *Dart*, the defendant's motion to stay the mandate was

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[7] *See* Sup. Ct. Rule 13(3) (as modified by order of the Court, dated March 19, 2020, extending the 90 days provided for in the Rule by 60 days due to COVID-19).

[8] "The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases." Public Information Office, "A Reporter's Guide to Applications Pending Before The Supreme Court of the United States," at 15-16, https://www.supremecourt.gov/publicinfo/reportersguide.pdf (last visited Feb. 25, 2021).

denied;[9] in *Hood*, the defendants' comparable motion to recall the mandate was likewise denied;[10] and in the remaining three cases, the parties seeking *certiorari* did not even seek to stay (or recall) the mandate.

Courts are understandably reluctant to stay the mandate while *certiorari* is sought in § 1453(c)(1) appeals. CAFA's special appeals provision, 28 U.S.C. § 1453, is designed to enable *expedited* resolution of remand appeals and prevent lengthy appellate delays, which defendants could otherwise seek for tactical advantage. *See* § 1453(c)(2) (requiring courts to "complete all action" on an appeal brought under § 1453 "not later than 60 days after" the appeal was filed).

The circumstances here are indicative of Congress's concern. As noted above, if Clearview waits until July 16, 2021, the petition will not be decided for at least eight months. Even if Clearview files its petition on an expedited basis, no ruling on the petition would be likely for at least 60-90 days, and the effect of any stay would, at a minimum, more than double the allowable statutory time for this appeal envisioned by Congress. Either of these delays is completely contrary to Congress's intent that CAFA-related remand appeals not impede the litigation of the underlying action. *See Dart*, 574 U.S. at 93 n. 6 ("Section 1453(c)'s timing provision … was designed to promote expedition.")

Finally, it should be noted that if Clearview is truly concerned about potential harm from being required to litigate this matter in the state court prior to a ruling on its *certiorari* petition (as opposed to simply seeking to delay the litigation of this matter anywhere), it is, of course, uniquely in a position to limit the time needed for a decision by the Supreme Court on its petition. Should

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[9] *See* 10th Cir. No. 13-603, Doc. 0101933759, filed September 30, 2013.

[10] *See* 5th Cir. No. 12-60704, Doc. 00512134027, filed February 4, 2013.

its appellate counsel prepare and file a prompt petition, Clearview can substantially minimize the extent of any litigation in this action prior to a ruling on *certiorari* and any perceived injury or need for a stay.

CONCLUSION

For the foregoing reasons, the Court should deny Clearview's Motion and issue its mandate.

Dated: February 26, 2021

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This document complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because this document contains 4618 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). In preparing this certificate, I relied on the word count of the word processing system used to prepare this document.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using 12 -point Times New Roman font.

Dated: February 26, 2021

/s/ *Daniel Feeney*
Daniel Feeney

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 26, 2021, he caused the foregoing Plaintiffs' Response to Clearview AI, Inc.'s Motion to Stay the Mandate Pending the filing and Resolution of a Petition for Writ of Certiorari to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit via CM/ECF. He further certifies that the following attorneys will be served via electronic mail on February 26, 2021:

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