No. 15-

IN THE

Supreme Court of the United States

K.D., *et al.*,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit panel upheld approval of a class action settlement agreement that included a blanket privacy waiver permitting respondent Facebook to seize and republish posted personal information of teen subscribers without limitation, and without the consent of or prior notice to the teens or their parents. Under the approved waiver, a child represents that his/her parent or guardian consented to the terms of this comprehensive waiver on the child's behalf. The questions presented are:

1. Whether an unpublished decision warrants review where it collaterally estops and serves as effective precedent regarding privacy rights and parental authority for over 10 million teens and 20 million parents, in every state, community and school in the nation.

2. Whether the Ninth Circuit committed error in holding that the settlement agreement was fair, adequate, and reasonable under Federal Rule of Civil Procedure 23(e)(2) where the settlement agreement was the product of forced collusion resulting from respondent's threat of financial liability against the child class representatives and their counsel through a reverse fee-shifting statute. In addition, the subclass of children lacked separate counsel, and the settlement agreement imposes on that subclass an unprecedented privacy abrogation.

3. Whether a blanket privacy waiver provision granting a commercial third party the right to expropriate the postings of a child without the explicit prior notice or consent of the parent violates the fundamental right to parent protected by the Due Process Clause of the Fourteenth Amendment.

4. Whether the blanket privacy waiver provision authorizes conduct that is clearly illegal under California statutory and constitutional law.

PARTIES TO THE PROCEEDINGS

Petitioners, K.D. and C.D. were objectors in the district court proceedings and appellants in the court of appeals proceeding. K.D. and C.D. are children who have Facebook accounts, are subject to the Settlement Agreement in this case, and are represented by their father, Michael Depot, as their *Guardian ad Litem*.

Respondents Angel Fraley, Paul Wang, James H. Duval, a minor, by and through James Duval as *Guardian ad Litem*, William Tait, a minor, by and through Russell Tait as *Guardian ad Litem*, Susan Mainzer, Lucas Funes and Instagram, LLC were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents C.M.D, T.A.B., H.E.W., B.A.W., A.D.Y & R.P.Y were intervenor plaintiffs in the district court proceedings and appellees in the court of appeals proceeding.

Respondent Facebook, Inc. is a publicly traded corporation that issues stock and operates a social networking website. Facebook was the defendant in the district court proceedings and appellee in the court of appeals proceeding.

Respondents Jo Batman, John Schacter, on behalf of himself and his minor son S.M.S., Kim Parsons on behalf of herself and her minor daughter C.B.P., Anne Leonard, on behalf of herself and her minor daughter D.Z., R.P. through her mother Margaret Becker, J.C. through his father Michael Carome, Wendy Lally, Alec Greenhouse,

Jonathan Bobak, Zachary Cochran, H.L.S., through her mother, Sheila L. Shane, Thomas L. Cox Jr., Tracey Cox Klinge, Katie Sibley, and Sam Kazman were objectors in the district court and appellants in the court of appeals proceeding.

RULE 29.6 STATEMENT

As individuals, Petitioners have no parent corporation and issue no stock.

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INTRODUCTION

Petitioners respectfully ask this Honorable Court to consider the background setting for the questions presented below. Much of this background is outlined in the Statement of the Case, *infra*. Plaintiff *Fraley et al.* filed a class action against *Facebook Inc*. for violation of privacy on behalf of its subscribers. A separate subclass consisting of children (teenagers allowed to subscribe) were also a part of the case. That subclass constituted a different grouping with separate issues of competency to agree to Facebook's "privacy" policy, parental consent avoidance, possibly disparate damage from disclosure of embarrassing posts and photos, and different statutes and public policies applicable to children.

The settlement at issue was agreed to by class/subclass counsel, with no separate counsel appointed for the subclass, notwithstanding the public offer of instant counsel to so serve.[1] Class counsel and the resulting settlement focused on compensation for class members and *cy pres* recipients. The agreement was struck after just over one year of litigation and the submission of a settlement proposal with fees for plaintiff class counsel of $10 million. Objectors later induced the trial court to reduce the fee to $4.5 million. More importantly, here the pleading had alleged violation of California Civil Code

1. Although class counsel is a recognized plaintiff's personal injury and consumer class action attorney, experience with representation of children is limited. Instant counsel for petitioners offered, on the record, to assume the role of subclass counsel, with qualified class representatives. (Depot Objection at 4, FN 1, ER 211.) Notwithstanding a substantial background in child representation, the offer was ignored.

Section 3344, which contains an unusual reverse fee shift element on plaintiffs — a failure to prevail would entitle Facebook counsel to fee compensation from the class representatives and/or their counsel. This threatened liability, in the millions of dollars, was repeatedly threatened by Facebook counsel to class representatives (and their counsel) during depositions.[2]

The major argument made by Facebook in the district court below was that no state law protecting children with regard to contract competence or privacy rights could apply because the federal Children's Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501-08) supplanted and voided all state law relevant to child internet privacy. However, COPPA only applies to children under the age of 13, and excludes in its scope all Facebook subscribers, who must be at least 13 by Facebook rules. During the appeal to the Ninth Circuit both the California Attorney General and the Federal Trade Commission (the agency that administers COPPA) filed amicus briefs arguing that there is no preclusion of state statutory or other protections for teen Facebook subscribers from COPPA or otherwise.[3]

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2. Arguably, a failure to agree to the Facebook settlement terms could mean credit ruination for counsel's clients and serious ramifications for him, which he explicitly acknowledged during oral argument.

3. Note that, in addition, the lead class representative (Fraley) rejected and disavowed the settlement, complaining about its betrayal in a communication to the court. (*See* Objections to Brief re Order on Administrative Motion to File Under Seal, and to Preliminary Approval of Class Settlement and Provisional Class Certification Order, ER 152-154.) Two of the *cy pres* recipients disavowed and rejected six figure awards. (*See* http://epic.org/2013/09/macarthur-

The 9th Circuit panel's decision, upholding the district court approval with little discussion of the above issues, seeks to avoid review by eschewing publication. A primary question presented by this case has to do with the role of this Honorable Court in serving as a check on erroneous decisions by lower courts. The Court is understandably focused on precedents, including the monitoring of conflicts between circuits that may threaten certitude or consistency. But there are two factors that warrant your consideration.

1. This may be an appropriate vehicle to impose a consistent precedential policy governing class action settlements. It raises the issues of conflict between class and subclass, forced collusion, failure to consider illegality a factor in what is fair, adequate and reasonable, failure to pay attention to the consequences of approval, and other problems that make this case a useful vehicle to guide the

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foundation-withdraws.html and Letter from the Campaign for a Commercial Free Childhood ("CCFC"), dated February 12, 2014 filed with the Ninth Circuit Court of Appeals in case number 13-16918, Docket Number 31, at p.2 ("CCFC…has decided to reject the approximately $290,000 – more than 90% of CCFC's annual budget – that it anticipated receiving from this settlement as a *cy pres* recipient. After careful reflection and a deeper understanding of the settlement, CCFC now believes it was wrong to agree to serve as a *cy pres* recipient.").) In addition, a number of noted authorities objected directly, or filed *amicus* briefs opposing the settlement as not meeting applicable standards of "fair, adequate and reasonable." These included Public Citizen representing objectors, amicus American Academy of Pediatrics, and leading child and privacy rights groups. Their briefs contended that the settlement was not only inadequate, but was unlawful, unconstitutional and affirmatively damaging, and providing citation of evidence about teen angst and the implications of the privacy intrusions here to be held lawful.

lower courts in their adjudication of the final product in class litigation.

2. More importantly, this decision operates functionally as a precedent more profoundly than most published decisions. **It finds "fair, adequate and reasonable," and hence enforceable, the above settlement applicable directly to over 10 million American teens in all fifty states, in every federal circuit. It does so as to the major social media communications system these millions of children use. It applies to what will soon be the vast majority of American teens. It is a momentous precedent *in practicum*.**

OPINIONS BELOW

The Ninth Circuit's *per curium* unpublished decision is reported at 2016 U.S.App.LEXIS 518. The Ninth Circuit's decision denying rehearing is unreported but can be found at *Fraley v. Facebook et al.* Nos. 13–16819, 13–16918, 13–16919, 13–16929, 13–16936, 13–17028, 14–15595 (9th Cir. Filed Feb. 16, 2016). The relevant decision of the District Court for the Eastern District of California (Seeborg, R.) is reported at 966 F. Supp. 2d 939.

JURISDICTION

The Ninth Circuit entered judgment on January 6, 2016, and denied a timely rehearing petition on February 16, 2016. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Rules of Civil Procedure provide in relevant part:

> "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. … If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."
>
> Fed. R. Civ. P. 23(e)(2).

The Children's Online Privacy Protection Act provides in relevant part:

> "Not later than 1 year after the date of the enactment of this Act [enacted Oct. 21, 1998], the Commission shall promulgate under section 553 of title 5, United States Code, regulations that -- require the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child-- to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children"
>
> 15 U.S.C.S. § 6502 (b)(1)(ii).

> "The term child means an individual under the age of 13."
>
> 15 U.S.C.S. § 6501 (1).

The California Constitution provides in relevant part:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."
>
> Calif. Const. art. I, § 1.

The California Civil Code provides in relevant part:

> "Any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting…without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable…"
>
> California Civil Code § 3344 (a).

The California Family Code provides in relevant part:

> "A minor cannot do any of the following:
> (a) Give a delegation of power.
> (b) Make a contract relating to real property or any interest therein.

> (c) Make a contract relating to any personal property not in the immediate possession or control of the minor."
> California Family Code § 6701.

STATEMENT OF THE CASE

Factual Background

Facebook is a web-based social networking site with over 150 million subscribers in the United States. (Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("Order re MTD") at 1, ER 429.) Members join Facebook.com for free; however, Facebook generates its revenue through the sale of advertising from a number of programs targeted at its users. (*Id.*) One of these revenue mechanisms has been the "Sponsored Stories" practice, which generates revenue for Facebook whenever a member utilizes the Post, Like, or Check-in features, or uses an application or plays a game that integrates with the Facebook website, and the content relates to an advertiser in some way determined by Facebook. (Order re MTD at 3, ER 431.) When this lawsuit was filed, Sponsored Stories were enabled for all users, including teen children. (*Id.*)

The nature of the Internet poses unique dangers to children. Children lack maturity, which may lead to ill-considered decisions. If a child posts regretted information, it is commonly accessible for years. (Objection and Notice of Intention to appear filed May 1, 2013 ("Depot Objection") at 8, ER 215.) The information can also be retransmitted by others to even larger audiences. Children may not have the maturity to comprehend this reality

and its implications. This immaturity is demonstrated in recent studies which show that more than two-thirds of teens confess that they have accepted such a Facebook "friend" request from persons they did not know, and nearly one in ten teens admit to accepting all "friend" requests they receive. (*Id.*) Moreover, the retransmission allowed in this settlement is not necessarily confined to those designated as "friends," but may well be released to the default audience for postings: "the general public."

The proposed settlement class in this action consists of 150 million members of Facebook, Inc.'s social network website, whose names and/or likenesses allegedly were misappropriated to promote products and services through Facebook's "Sponsored Stories" program. (Final Approval Order at 1, ER 5.) Approximately 10.9 million members of the settlement class are children. (Plaintiff's Memorandum of Law in Support of Motion for Class Certification, Appointment of Class Counsel, and Appointment of Class Representatives at 11, ER 151.) Information available as of August 31, 2012 indicated that Sponsored Stories had generated total revenue of more than $230 million for Facebook. (Plaintiffs' Motion and Memorandum of Law in Support of Motion for Attorneys' Fees and Costs and Class Representatives' Service Awards at 17, ER 275.)

Under the terms of the approved Settlement Agreement, Facebook would be allowed to amend its Statement of Rights and Responsibilities (its new name for "terms and conditions") from the following agreement: "You can use your privacy settings to limit how your name and [Facebook] profile picture may be associated with commercial, sponsored or related content (such as

a brand you like) served or enhanced by us. You give us permission to use your name and [Facebook] profile picture in connection with that content, subject to the limits you place." (Second Amended Complaint, at 9, *citing* § 10.1 of Facebook's "Statement of Rights and Responsibilities", ER 513.) As altered, it would include the following statement:

> **You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information. If you have selected a specific audience for your content or information, we will respect your choice when we use it.**
>
> **If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf.** (Amended Settlement Agreement and Release ¶ 2.1(a), ER 299.)

Although the second paragraph is limited to users under the age of majority, the first paragraph applies to all Facebook users. Thus, in addition to "representing" that children agree to whatever Facebook wants to do

with the child's name, image, content, and information, the child represents that he has the consent of his/her parent. Both emanate from the above paragraph within a long "Rights and Responsibilities" (formerly and usually called a "terms and conditions" set of provisions) for approval via a click of the mouse. This purported consent vehicle is normally only presented at initial point of subscription.

As to the consent of the 10 million plus existing teen subscribers, it will be effective simply by a notice by Facebook that the "Rights and Responsibilities" terms have been altered – without quoting the above paragraphs in bold or meaningfully explaining what changes have occurred. Continued use after that "notice" will effectuate the blanket consent from children to capture and transmit their posts or photos as Facebook selects without prior notice of what is to be transmitted or to whom, including supposedly conclusive attestation that parents have consented.

The terms of the proposed Settlement Agreement state that Facebook will encourage new users, upon or soon after joining Facebook, to include in their profile information their family, including their parents and children. Where both a parent and a child are users and confirm their relationship, Facebook's systems will record this relationship and utilize it to provide parental controls and parental educational information. (Amended Settlement Agreement and Release ¶§2.1 (c)(i)-(iii), ER 300.)

The Agreement continues: "Facebook will add a control in minor users' profiles that *enables* each minor user to indicate that his or her parents are *not* Facebook

users. Where a minor user indicates that his or her parents are not on Facebook, Facebook will make the minor ineligible to appear in Sponsored Stories until he or she reaches the age of 18." Where one of the few children so responding confirms that parents are Facebook subscribers, the parent is then "able" to opt his child from Sponsored Stories. (Amended Settlement Agreement and Release ¶§2.1 (c)(iii), ER 300 (emphasis added).) There is nothing in the Settlement Agreement to require parental notice or consent to the blanket waiver of all future notice/consent rights. There is no advance notice of actual content seized nor knowledge of its destination. In other words, these "limitations" or "exceptions" are disingenuous fig leaves. There is no real or lawful child or parental consent. The notion that where Facebook knows or learns there is a parent subscriber, that such a parent may somehow figure out that he or she can object to the blanket waiver is not a *bona fide* protection. Once again, neither the child nor any parent will necessarily nor even likely see what is being captured and how it will appear and to whom it will be sent. And neither will ever see it before it is sent. And once sent, it is there for many years, without a chance for retraction or qualification. The arrangement is a convoluted and bad faith "required opt out" "in the blind" arrangement. And the vast majority of millions of Facebook-subscribing children, as Facebook well knows, will be subject to the open season of blanket waiver, and parents will, in fact, know nothing about any of this.

Decisions Below

On March 11, 2011, plaintiff Angel Fraley and her co-Plaintiffs ("Plaintiffs") filed a class action lawsuit against Facebook in the Superior Court of the State of California

in and for the County of Santa Clara, entitled "*Angel Fraley, Paul Wang, and Susan Mainzer, individually and on behalf of all others similarly situated v. Facebook, Inc., a corporation, and DOES 1-100*", with case number 111CV196193. (Notice of Removal of Action Under 28 U.S.C. §§ 1332(d), 1446, and 1453(b) ("Notice of Removal"), at 2, ER 554.) On March 18, 2011, Plaintiffs filed their First Amended Complaint in Santa Clara County Superior Court. (Notice of Removal at 1, ER 553.)

Facebook removed the case to the U.S. District Court for the Northern District of California (ER 550-552), where it was assigned to Judge Lucy H. Koh (ER 549).

On June 6, 2011, Plaintiffs filed their Second Amended Class Action for Damages. (ER 505-548.) On July 1, 2011, Facebook filed a motion to dismiss the Second Amended Class Action Complaint. (ER 471-504.) On December 16, 2011, Judge Koh granted in part and denied in part Facebook's motion. (ER 429-466.) Although granting Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's claim for unjust enrichment, Judge Koh *denied* Defendant's motion to dismiss the complaint based on lack of Article III standing, immunity under § 230 of the federal Communications Decency Act, failure to state a claim under California Civil Code § 3344, and failure to state a claim under the Unfair Competition Law. (Order re MTD at 37-38, ER 465-466.)

On March 29, 2012, Plaintiffs filed a Notice of Motion and Motion for Class Certification; the hearing on the motion was set for May 24, 2012. (ER 425.)

On May 21, 2012, the court filed a Case Management Order indicating that "the parties represented that they have reached a settlement agreement in principle." (ER 424.) The court subsequently scheduled and continued the hearing on Plaintiffs' Motion for Class Certification to July 12, 2012, and stated that the July 12, 2012 hearing on Plaintiffs' motion for class certification "will be converted to a hearing on the motion for preliminary approval." (Order Re: Joint Status Update, ER 422)

On June 20, 2012, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement. (ER 377-421.) It called for Facebook to make limited changes to the Statement of Rights and Responsibilities as to Sponsored Stories (such as they are, discussed above), and contemplates Facebook making a *cy pres* payment of $10 million to certain organizations involved in Internet privacy issues. It also provided that Plaintiffs may **apply for an attorney fee award of up to $10 million, without objection by Facebook** (*see* Order Denying Motion for Preliminary Approval of Settlement Agreement, Without Prejudice, ("Order Denying Mot for Prelm Settlement Approval") at 1, ER 367.) At that point, the litigation had been in progress almost exactly one year.

On July 11, 2012, Judge Koh recused herself from the case and ordered that all "pending dates of motions, pretrial conferences, and trial are hereby vacated" and on July 12, 2012, the case was re-assigned to Judge Richard G. Seeborg, who rescheduled the hearing on the Motion for Preliminary Approval to August 2, 2012. (*See* Clerk's Notice, ER 375.)

On August 2, 2012, Judge Seeborg heard the Motion for Preliminary Approval and on August 17, 2012, he denied it. (Order Denying Mot for Prelim Settlement Approval, ER 367-374.) Judge Seeborg preliminarily questioned the propriety of a settlement that provides no monetary relief directly to class members (Order Denying Mot for Prelim Settlement Approval at 2-4, ER 368-370); the amount of the *cy pres* payment (*id.* at 4, ER 370); the injunctive relief and, specifically, Facebook's ability to obtain valid consent from minors (*id.* at 6,ER 372); the amount of attorney fees (*id.*); and other issues (*id.* at 8, ER 374).

On October 5, 2012, the parties filed a Joint Motion for Preliminary Approval of Revised Settlement. (ER 290-293.) The revised settlement provided for a $20 million settlement fund, from which Class Members may make claims to receive a cash payment of up to $10 each; provided that Facebook may oppose Plaintiffs' counsel's petition for fees and expenses; purported to provide a greater level of detail regarding how the injunctive relief will be implemented as to all class members and purported to augment the relief related to the child users; and provided that after payment of all claims, fees, and administrative expenses, any remaining portion of the $20 million will be awarded as *cy pres* to organizations proposed by the parties and approved by the Court. (*Id.* at 1, ER 290.)

A hearing was held on Nov. 15, 2012 (*see* Order Granting Joint Administrative Motion for Relief, ER 284-285) and on Dec. 3, 2012, Judge Seeborg issued an order granting preliminary approval of the class action settlement and provisional class certification (Preliminary

Approval Order, ER 276-283). On May 1, 2013, Michael S. Depot, as *Guardian Ad Litem* for his children, K.D. and C.D., filed an Objection and Notice of Intention to Appeal (ER 203-252), on the bases that the preliminarily approved settlement does not adequately consider the unique needs of the subclass of children, that it sanctions the violation of state law and other protections related to children, and that class counsel lacked adequate experience to protect the unique interests of the subclass of children, *et al.*.

On August 26, 2013, Judge Seeborg granted the motion for final approval of the settlement agreement. (ER 5-18.) Objector Depot filed a notice of appeal on September 24, 2013. (ER 32-33.)

On appeal, Objectors argued that the settlement agreement required greater judicial review than the cursory review provided by the District Court. Appellant Objectors argued the posture of the parties, coupled with the violations of law permitted by the Settlement Agreement, mandated close judicial scrutiny which had not occurred in the court below. Relying heavily on decisions discussing the usual deference given to settling parties (*Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996) and *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)), a panel of the Ninth Circuit affirmed the District Court's deferential approval of the Settlement Agreement. Critically, the panel never addressed Objector's argument that the subclass of children were subject to forced collusion in agreeing to the Settlement Agreement.

The Ninth Circuit subsequently denied a request for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. Although Unpublished, This Decision Collaterally Estops Over 10 Million American Teens and Their Parents -- Giving Facebook the Right to Seize Teen Postings and Republish Them Without Prior Consent or Notice.

While unpublished decisions are often assumed to lack precedential affect, the fact that a decision is unpublished should not necessarily carry weight in this Court's decision to review it. *See Commissioner v. McCoy* 484 U.S. 3, 7 (1987). In fact, review is particularly important where, as here, the one decision effectively establishes an erroneous judgment across all federal circuits. The 9th Circuit's panel decision this Honorable Court is being asked to review holds as "fair, adequate, and reasonable" a blank check delegation of power to a commercial third party. This delegation includes the right to take, rearrange, and republish the postings of American teens without prior consent by the teen, or by either parent, or even prior notice that the republication is occurring. Isn't this an issue for which review is commended?

The Panel below openly dismissed their own decision as without significant consequence during oral argument. *See Fraley v. Facebook et al.* Nos. 13–16819, 13–16918, 13–16919, 13–16929, 13–16936, 13–17028, 14–15595 (9th Cir. Oral Argument Sept. 17, 2015) 5:45-9:53 available at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008212. Remarks were made concerning how other jurisdictions may well bring criminal or other charges against Facebook for the acts complained of in the instant pleadings. *See Fraley v. Facebook et al.* Nos. 13–

16819, 13–16918, 13–16919, 13–16929, 13–16936, 13–17028, 14–15595 (9th Cir. Oral Argument Sept. 17, 2015) 4:32-5:34 and 7:25-9:53 available at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008212. The clear view of the three-judge panel was that the decision was a paperwork exercise in approving a settlement which would clear the lower court's docket — notwithstanding vigorous objection by Petitioner and others.

Petitioner recognizes the industry of "class settlement objectors" that has arisen, with counsel either objecting *pro forma*, or politically or financially motivated objections. The other side of the coin is here presented: the superficial review and approval of a holding with egregious error, inadequate consideration of relevant law, and momentous impact across the entire landscape of this Honorable Court's jurisdiction.

The court below seemed oblivious of the consequences of class action approval (*Id.*), even where the consequences involved over 10 million American teens and their parents. This distractive focus is particularly momentous where such a blank check allowance is given without effective check as to so many of our youth, and as to their major means of modern social communication. *Amicus* contributions from the American Academy of Pediatrics and national experts on the subject were not acknowledged. This issue is serious business. Teens have more than their share of angst, and social embarrassment correlates with teen suicides and other serious problems. The delegation of the parental function to protect a child's privacy to a commercial third party, to the extent and degree allowed in this settlement agreement, raises profound issues that should concern this Honorable Court.

Adding to the broad precedential effect of this erroneous approval is its manner. The approval of settlements which, far from being "fair, adequate and reasonable" are much worse than the status of the child subclass before the action was brought, and that purports to approve illegal intrusions, as discussed below, produces a problem appropriate for line drawing.

II. The Ninth Circuit Gave Improper Deference to the District Court's Finding That the Settlement Agreement was Fair, Adequate, and Reasonable when the Parties to the Agreement were Subject to "Forced Collusion."

As is clear from decisions across the Circuits, a court must review a settlement agreement for overall fairness, and needs to show it has explored all of the factors *comprehensively* for fairness, reasonableness and adequacy. *See Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1026 (9th Cir. 1998). *See also Grunin v. Int'l House of Pancakes* 513 F.2ds 114, 124 (8th Cir. 1975) (finding that, when evaluating the approval of a settlement agreement, the court must apply a "reasonableness under the totality of the circumstances" standard). The Third Circuit Court of Appeals has laid out a nine-factor test to help district courts analyze whether settlements are fair, reasonable, and adequate as required by Rule 23(e). *See Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of

the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Id.*

In cases where settlement agreements are negotiated before formal class certification, "settlement approval requires a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e)." *Dennis v. Kellogg Co.,* 697 F.3d 858, 864 (9th Cir. 2012) (citation and internal quotation marks omitted). Additionally, the posture of the parties, as discussed below, requires the court to play a more active role in assuring that the settlement the parties have negotiated (a settlement which may be beneficial to the named plaintiffs, their attorneys, and the defendants) is also beneficial to the millions that will be bound to its terms. *See In re Beef Industry Antitrust Litigation* 607 F.2d 167 at 174 (5th Cir. 1979) (explaining that some treatises point to the court's important role in preventing "collusion, individual settlements, 'buy-offs' where the class action is used to benefit some individuals at the expense of absent members, and other abuses" when evaluating a class action settlement before the class has been properly certified).

Although this was not a typical case or settlement, the District Court assumed a candidly deferential role. The Court stated his "**only role** in reviewing the substance of (that) settlement is to ensure that it is "fair, adequate, and free from collusion." (Final Approval Order at 3, ER 7, emphasis added.)

Indeed, at the June 28, 2013 hearing on the Settlement, the District Court reiterated his *laissez faire* approach. In response to arguments offered by the Appellants that the

proposed settlement did not adequately protect the rights of the subclass of teen children, the District Court stated:

> My function here is not to craft the perfect policy for minors. That's not what I'm entitled to do. What I am to do here is to determine whether or not this particular settlement ...is fair, reasonable and adequate. Not could I craft a better policy? That is not the – that isn't the world in which I operate.
>
> So when you are making your arguments, to the extent that the argument is 'Boy, there's a better way do this," that really doesn't go to the – the function that I have to engage in at the moment.
>
> It really is, this – this particular remedy is valueless, it's not fair, it's not reasonable. I mean, adequate, there, you may be closer to it, in terms of what you are arguing. But, just to keep in mind, it is not 'Can this be done with more protection for a minor,' because I am not in a position to craft it. I am here to either accept or reject.

(Reporter's Transcript of Proceedings in U.S. District Court, Northern District of California, before the Honorable Richard G. Seeborg on June 28, 2013 ("Reporter's Transcript") at 62, ER 47.)

This *laissez faire* approach was echoed by the panel in the 9th Circuit who affirmed the District Court's disposition and reiterated, without even discussing

the forced collusion discussed in detail, *infra*, "[w]hen approving a settlement, a district court should avoid reaching the merits of the underlying dispute." (2016 U.S.App.LEXIS 518, 5.)

Petitioners understand the considerations that commend deference to parties who have agreed on a resolution. That is what praiseworthy attorneys accomplish. As noted above, it is now common to have many reflexive objectors – even as to very meritorious settlements.[4] But such deference is less commended where the postings of millions of children may be expropriated by a commercial third party, and in the extraordinary circumstances outlined herein.

Comprehensive review of a settlement agreement is particularly compelled when there exists, as here, an element of "forced collusion". The stature of parties *vis-a-vis* each other may, as a matter of facts and law, mandate that any settlements reached between the parties cannot be *assumed* to be the results of arms-length negotiations but must, instead, be more closely scrutinized by the court approving the Settlement.

This is exactly the situation in the case at bar where defendant Facebook directed an extraordinary threat of financial sanction at each of the teen child subclass representatives. In every one of [the] depositions,

4. Indeed, the rise of sometime obstructionist and economically interested (or compensation seeking) objectors has understandably undermined their credibility and has created in many courts a marked sympathy for counsel who actually have to litigate a case, often for years, and who have admirably resolved the matter with some apparent benefit for many people.

including the depositions of children, Facebook asked the question: "Do you understand that you are responsible for all the fees and costs that is [*sic*] being generated in the defense of this case?" (Reporter's Transcript at 18, ER 42.)

This threat is based on California Civil Code § 3344 and its unusual reverse fee shift provision that may result in the imposition of defense fees and costs on plaintiffs where the latter do not prevail. That assessment would mean literally millions of dollars in personal liability for class representatives and even liability for class counsel. (*See* Order Granting in Part Motion for Attorney Fees, Costs and Incentive Awards at 6, ER 39.)

The threatened risk of financial obligation weighed heavy on the mind of class (and also subclass) counsel. At the hearing on the motion regarding settlement approval, lead class counsel, Mr. Arns, asked the court, "with Mr. Frank, with Mr. Fellmeth, would they be willing to take on this case, going back to 3344? Do they want to put $20 million in trust?...Do they want to be subject to the 3344 fee and cost shifting, and take over the case?" (OBr. 36-37.)

In order to appreciate the pattern of threats and intimidation by Facebook, we simply quote the request for admissions propounded by it on named Plaintiffs.

> Admit that YOU are aware that if FACEBOOK is deemed the prevailing party in this lawsuit, the Court may find that YOU are legally obligated to satisfy, in whole or in part, a judgment awarding reasonable attorneys' fees and costs to FACEBOOK.

(Declaration of Jonathan M. Jaffe in Support of Motion for Attorneys' Fees and Costs and Class Representatives' Service Awards at 3, ER 274 (emphasis original).) In situations such as this, there is no true check on any potential wrongdoing by counsel because those who would provide the check – named plaintiffs – are similarly placed in a position where only one outcome (settlement) assures they are not financially ruined. It is a situation properly referred to as "forced collusion" because the collusion is not voluntary but is forced upon the named plaintiffs due to one of the statutes under which relief was sought.

The Panel Decision condoned a moribund approach to approval of the Settlement Agreement without even considering the "forced collusion" between the parties and without adequately considering the fairness, adequacy, and reasonableness of a Settlement Agreement that is not, under applicable law, fair, adequate, or reasonable.

III. The Blanket Waiver Provision Deprives Parents of Their Fundamental Right to the Care, Custody, and Control of Their Children Under the Due Process Clause of the Fourteenth Amendment.

The "right to parent" is a federally recognized "fundamental liberty interest" under the Constitution, and one entitled to strict scrutiny in its limitation. For example, the termination of parental rights requires extraordinary due process safeguards, including even required counsel for parents threatened with the seizure of their children if such representation could make a difference in the outcome, and can only be ended by "clear and convincing evidence" of parental unfitness. See *Lassiter v. Department of Social Services* 452 U.S. 18

(1981); *Santosky v. Kramer* 455 U.S. 745 (1982). Parental authority to approve who may even see a child (even the child's own grandparents) was confirmed in the U.S. Supreme Court's holding in *Troxel v. Granville* 530 U.S. 57 (2000). The extensive caselaw on point would appear to be inconsistent with a federal court holding that a private commercial entity may cede unto itself this rather profound parental function, without the effective consent of the actual parent. As discussed, *supra*, the *pro forma* "check the box" blanket waiver which requires a pro-active opt-out and contains no actual parental consent or notice regarding the child's content seized nor knowledge of its ultimate destinations, gives to Facebook the right to make parental decisions without providing a child's actual parents with a true opportunity to exercise their own fundamental right to parent.

IV. The Ninth Circuit Erroneously Approved a Settlement That Included Clearly Illegal Conduct Under California Law.

Various Circuits have long recognized that "a settlement that authorizes the continuation of clearly illegal conduct cannot be approved." *Robertson v. Nat'l Basketball Ass'n,* 556 F.2d 682, 686 (2d Cir. 1977); *accord Isby v. Bayh,* 75 F.3d 1191, 1197 (7th Cir. 1996); *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 123-24 (8th Cir. 1975). "A court must examine the totality of the circumstances and must determine, under that broad inquiry, whether the proposed settlement is fair, adequate, reasonable, *and legal." Brooks v. State Bd. of Elections,* 848 F. Supp. 1548, 1552 (S.D. Ga. 1994) (emphasis added); *see also id.* at 1577 (denying approval where "certain provisions… would violate Georgia statutory and constitutional law";

and *Officers for Justice v. Civil Service Comm'n* 688 F2d 615, 625 (9th Cir. 2011); *See also Judges! Stop Deferring to Class Action Lawyers*, 2 U. Mich. J.L. Reform 80-90 (2013). Relying solely on a previous Ninth Circuit opinion rejecting some of plaintiffs' claims (*Fraley v. Facebook*, No. 13-16819, 13-16918, 13-16919, 13-16929, 13-16936, 13-17028, 14-15595 2016 U.S.App.LEXIS 518, at *8 (9th Cir. Jan. 06, 2016) *citing C.M.D. v. Facebook, Inc.,* No. 14-15603, 2015 WL 5675724, at *1 (9th Cir. Oct. 30, 2015)), and without any further analysis of the various claims brought by appellants, the three-judge panel below inappropriately affirmed the district court's approval of the proposed settlement agreement.

a. The Blanket Waiver Provision Violates the Right to Privacy Under Article I, Section 1 of the California Constitution.

The most recent leading case on California privacy notes: "[t]he phrase 'and privacy' was added to the [California] Constitution by a voter initiative adopted in 1972. (*Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 15) [the 'Privacy Initiative'].)" *Sheehan v. SF 49ers* (2009) 45 Cal. 4th 992, 997. The *Sheehan* court adds that unlike most constitutional protections applying only to state action, "the privacy clause **applies to private entities**" (*id.* at 999, emphasis added). *Sheehan* and other cases on point apply a "strict scrutiny" type of review for private incursions in this state. Indeed, the *Sheehan* case again cites *Hill* for the proposition that one of the two core privacy interests protected is "precluding the dissemination or misuse of sensitive or confidential information ('informational privacy')" (*id.*). A wide dissemination of personal child postings to potentially millions seems rather central to its intended application.

The issue of the California constitutional privacy, as raised by Objector Westfield below (Letter dated January 27, 2013 from Danielle Westfield, ER 253), and the invasion of privacy claims as made by Objector Schacter below (Objections to Proposed Settlement and Notice of Intent to Appear filed May 2, 2013 at 9-12, ER 168-171) join the explicit California privacy statutory claims raised by instant Petitioners as Objectors.

Despite the above, the district court apparently accepted the contention that the federal Children's Online Privacy Protection Act (COPPA) preempted and voided all state law on child privacy. *See* Final Approval Order at 13, ER 17. However, by its very terms, COPPA only applies to children under 13 (15 U.S.C.S. § 6501 (1).), not to this subclass, composed entirely of teens not within that grouping. *Amici* contributions by both the California Attorney General and the Federal Trade Commission (which administers COPPA) outlined and documented that error. Nevertheless, in the face of that information, **and the concession of Facebook that California law applies** (if not voided as erroneously contended) (Second Amended Complaint ¶ 48, ER 516-517), the Ninth Circuit panel below entirely ignored the law most applicable, a Constitutional provision directly applicable, and mechanically approved the settlement agreement.

b. The Panel Decision Approves a Settlement Which Violates California Civil Code Section 3344 and California Family Code Sections.

California Civil Code § 3344 provides in relevant part: "Any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner, on or

in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting…, without such person's prior consent, or, in the case of a minor, the prior consent of his parent of legal guardian, shall be liable …". (California Civil Code § 3344(a).)

California courts have even held that this section "and common law rights of privacy" are not affected by the limited immunity for internet service providers often claimed by the latter from the federal Communications Decency Act. It fully applies. See *Perfect 10 v. CCBill,* 340 F.Supp.2d 1077, as reversed and affirmed at 481 F.3d 751 (9th Cir. 2007). And, the law of the case under original District Judge Koh, established that the Decency Act did not immunize Facebook from the application of Civil Code § 3344. (Order re MTD at 19, ER 447.)

That children lack capacity to consent to many types of contracts underlies much of our system to protect them. California law "shields minors from their lack of judgment and experience and confers upon them the right to avoid their contracts in order that they may be protected against their own improvidence and the designs and machinations of other people, thus discouraging adults from contracting with them." *Sparks v. Sparks* (1950) 101 Cal.App.2d 129, 137 (citing *Niemann v. Deverich,* 98 Cal.App.2d 787). There exist age minimums applicable to everything from voting (USCS Const. Amend. 26, § 1) to smoking (15 USCS § 4401), to liquor (23 USCS § 158), tattoos (Cal. Pen. Code § 653), and even sex (Cal. Pen. Code § 261.5). The inability of the adolescent brain to regulate emotional responses, resist peer influences, and calculate the harmful future consequences of present actions is the basis for the this court's recent decisions abolishing the

death penalty for minors and prohibiting the mandatory imposition of a sentence of life without parole, even for homicide offenses. *See Roper v. Simmons*, 543 U. S. 551, 560 (2005); *Graham v. Florida*, 560 U. S. 48 (2010) and *Miller v. Alabama/Johnson v. Hobbs*, __U.S.__, 132 S. Ct. 2455 (2012). "It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant. Any loss occasioned by the disaffirmance of a minor's contract might have been avoided by declining to enter into the contract." *Niemann v. Deverich* (1950) 98 C.App.2d 787, 793. It is unclear how federal court approval of the instant blanket waiver protects the privacy and property rights of children (who lack the capacity to so consent), or to the parental rights of Mom and Dad.

California Family Code § 6701 echoes common law prohibitions against enforcing contracts against children, providing that certain types of contracts made by children are void as a matter of law.[5] Family Code § 6701 provides explicit restrictions on a child's authority to contract, by prohibiting a child from doing any of the following:

> (a) Give a delegation of power.
> (b) Make a contract relating to real property or any interest therein.
> (c) Make a contract relating to any personal property not in the immediate possession or control of the child.

5. In addition, the Family Code provides that many other contracts made by a child are voidable by disaffirmance (Family Code section 6710).

The proposed Settlement Agreement violates both subsections (a) and (c). Facebook claims that Family Code § 6701(a) is inapplicable to this case because "[n]either Facebook's current Terms nor the revisions contemplated by the Revised Settlement purport to delegate to Facebook a power of agency." (Defendant Facebook, Inc.'s Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Defendant's Motion for Final Approval") at 77, ER 143.) But § 6701(a)'s categorical prohibition against a delegation of power is here violated *in extremis*. The Settlement Agreement purports to delegate to Facebook unfettered power to take information posted by a child, package it, and transmit it in any form and to potentially millions of recipients and for any commercial purpose, as Facebook determines. The existence of an agency relationship has the distinguishing features of "representative character and derivative authority" (*see e.g., Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 207). Here, Facebook claims that it has the power, delegated to it by a child directly and through the child's representation that a parent so consents, to take, use, and promote (represent) the child's information and images to third parties *en masse*. Assuming for the moment that Facebook users (principals) really do retain "immediate possession and control" of their information and images once they are posted on Facebook (as Facebook itself contends (*see* Defendant's Motion for Final Approval at 77, ER 143)), this is a delegation of extraordinary power to Facebook, and a grant of power that is unwise given the cyber world in which the power is being wielded. The relationship has all of the features of a grant of agency power.[6]

6. As to Family Code § 6701(a), the facts of this case are distinguishable from *I.B. v. Facebook, Inc.* 905 F. Supp. 2d 989

Under the terms of the Settlement Agreement, the lone check on such a self-serving delegation would come from affirmative parental objection—blindly and in advance. Parents are somehow to know that Sponsored Story use may occur unrelated to any particular seizure and republication.

Beyond § 6701(a), the terms of the Settlement Agreement also violate Family Code § 6701(c) in two respects.[7] First, by explicitly prohibiting a child from

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(2012). There, the court properly declined to find an agency relationship between Facebook and minor Facebook users who charged items to their parents' credit or debit cards possibly without the parent's knowledge or consent. As Facebook argued in *I.B.*, that case involved the users' "simple act of making a purchase," which did not amount to a delegation of power to Facebook. Appellant agrees the court there is properly unsympathetic to minor plaintiffs who received the benefit of a bargain they knowingly and affirmatively sought out. None of those elements are present in the instant case, where Facebook is attempting to presume a delegation of authority from its users to represent the users' information and images to third parties — and here, the only entity receiving any compensation or benefit is Facebook itself.

7. As a preliminary matter relevant to both provisions, Petitioners note that the content and information that a minor user uploads to Facebook constitute "personal property" in California. According to Facebook, users "own all of the content and information" they upload to Facebook (*see* Declaration of Ana Yang Muller in Support of Facebook, Inc.'s Motion to Dismiss Second Amended Class Action Complaint, at Exhibit A, ER 468-470). "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property." (Cal. Civ. Code § 654.) Every kind of property that is not real is personal.

making "a contract relating to any personal property not in the immediate possession or control of the minor," § 6701(c) prohibits a child from, for example, contracting with respect to a future interest. *Sisco v. Cosgrove* (1996) 51 Cal. App. 4th 1302, 1307. However, the Settlement Agreement allows Facebook to infer from a child's creation of a Facebook account that the child accepts Facebook's contractual terms (or as Facebook now calls them) the "Statement of Rights and Responsibilities" — and not just with regard to information and content in the immediate possession or control of the child that day, but with regard to *all information and content that the youth comes into possession or control of in the future* which the child uploads to Facebook. Thus, a child who creates a Facebook account today would be deemed by the Settlement Agreement to be consenting to allow Facebook's use of all images and content the child uploads each day from now until the child closes his/her Facebook account or reaches the age of majority, whichever comes first — inarguably including images and content that were not in the possession or control of the child when the alleged contract was made as the images and content may well not even exist at the time the contract is made. Because the Settlement Agreement allows minors to enter into a contractual relationship with regard to personal property (photos, images, content, information) that may not yet exist — and that are not in the immediate possession or control of the child — it violates Family Code § 6701(c).

(Cal. Civ. Code, § 663.) The term "personal property" includes both tangible and intangible personal property (Cal. Code of Civ. Proc., § 680.290).

Second, even if each use of a child's Facebook account were deemed to infer the child's re-affirmation of the terms of Facebook's Statement of Rights and Responsibilities, the Settlement Agreement still sanctions a violation of Family Code § 6701(c). Facebook argues that § 6701(c) is not applicable because child users have "immediate possession or control" over the images and information they upload to Facebook (Defendant's Motion for Final Approval at 77, ER 143). However, the very act of posting content to Facebook involves the relinquishment of the kind of ***exclusive possession or control*** of that content that California law envisions with respect to personal property. "The ownership of a thing is the right of one or more persons to possess and use it ***to the exclusion of others.***" (Cal. Civ. Code § 654 (emphasis added).) Until a child removes his/her content from Facebook, he/she lacks the ability to possess and use it to the exclusion of others — a fact evident by Facebook's ability to take and transform the child user's content into a different format (*e.g.,* Sponsored Stories) which it then publishes and disseminates for its own commercial gain.[8] Judge Koh's decision on the Motion to Dismiss in the instant

8. In *I.B. v. Facebook, Inc.* (2012*) supra*, plaintiffs there also argued that Family Code § 6701(c) rendered the sales contracts void. But in that the minors were not in the immediate possession or control of their parents' credit cards or bank accounts when the purchases were made. Contrary to Facebook's theory here, the court agreed that plaintiffs have alleged a plausible claim that the transactions at issue are void contracts "relating to any personal property not in the immediate possession or control of [a] minor" and denied Facebook's motion to dismiss the claim for declaratory relief under section 6701(c). These facts are substantially *a fortiori* to the issue of simple credit card use by a child to pay for something legitimately received.

case found that Facebook is more than an interactive computer service but also meets the definition of a content provider by taking Plaintiff's information and repackaging it to republish it. *See* Order re MTD at 17-19, ER 445-447. Because the Settlement Agreement allows children to enter into a contractual relationship with regard to personal property that is not in their exclusive possession or control, it violates Family Code § 6701(c).

In a similar context to the one at issue here, the California Legislature set forth yet additional specific safeguards to protect a child's interest in his/her image. California Family Code §§ 6750 *et seq.* applies to the protection of their "likeness" (photos). These Family Code provisions relate to "contracts in art, entertainment, and professional sports"—*i.e.*, contracts pertaining to children who are paid as entertainers or athletes. These statutory protections for children subject to such marketing use are comprehensive and detailed. Family Code § 6752 requires all sorts of safeguards, including explicit, individualized consent of a parent or guardian for each such contract, and even requires minimum and specified compensation for the child, as well as many other protections. The detailed provisions make clear that the contract must be controlled front to back by "at least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time." (*See e.g.,* Calif. Family Code § 6752 (b)(2).) The Settlement Agreement stands in stark contrast – with *none* of these protections and more important, the denial of the underlying and generally applicable consent requirements for child contracts.

To be sure, most teen Facebook subscribers have never received compensation as actors or athletes and are

not within the protection of § 6752, but California hardly lacks examples of such children. Nevertheless, the blanket waiver sweeps them up as well, with no differentiation or exception. (Defendant's Motion for Final Approval at 78, ER 144.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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