No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK, ET AL.,
Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLASS RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEFS ON ARTICLE III STANDING

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The scope of judicial power—and the legal invasions that will sustain its exercise—must reflect the understanding of the judicial role at the Framing. The "Framers sought to incorporate, rather than to change, an existing conception of the 'judicial Power.'" U.S. Supp. Br. 2, *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828). Yet the government's and Google's supplemental briefs scarcely address the injuries that would sustain suit at the Framing. Their submissions read as if injury-in-fact depends not on judicial practice from the era of muskets but on causes of

action developed coincident with bell-bottom jeans and moon landings.

The government and Google say little about the Framing era because then-existing judicial practice says so much. The "disclosure of another's communication without their consent" has been actionable "since the framing." Oral Arg. Tr. 68 (citing *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)); see Class Supp. Br. 5-11. The government ignores historical practice—rooted in property, confidence, and contract interests—entirely. Google offers only hard-to-fathom distinctions for two cases. One fact remains: At the Framing, unauthorized disclosure of communications was actionable injury, regardless of content or further harm. Google and the government, moreover, fail to address the other "causes of action" in the Complaint and raised at argument. Oral Arg. Tr. 67; see Class Supp. Br. 19-22.

As the Solicitor General observed, this "Court granted certiorari * * * to review the approval of a class-action settlement involving *cy pres* distributions." U.S. Supp. Br. 1. But the Court now has before it fundamental questions that go well beyond that, and beyond Article III, including: (1) the scope of the SCA's cause of action; (2) what constitutes the "contents of" a "communication" under the SCA; (3) elements of mid-20th century privacy torts; (4) whether complaints govern standing for pleading-stage settlements; and (5) technological and privacy implications of online searches. Many of those have nothing to do with standing—history here should be "'conclusive.'" *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 285 (2008). But this Court has no analysis from decisions below. The parties have cited only *one* decision of *any* appellate court applying *Spokeo*'s framework to SCA claims. Class Supp. Br. 2; Pet. Supp. Br. 13. This

Court should not conclusively decide that issue before lower courts have developed it.

I. Named Plaintiffs Have Standing To Assert SCA Claims

A. Google and the Government Disregard Centuries of Judicial Practice

"[B]oth before and after the [F]ounding," *Sprint*, 554 U.S. at 285, English and American courts presumed that the unauthorized disclosure of communications inflicts actionable injury, Class Supp. Br. 5-11. Such disclosures invaded legally cognizable "property," "confidence," and "contract" interests. *Folsom*, 9 F. Cas. at 346. That "historical practice" establishes standing here: Injury-in-fact depends on whether the plaintiff asserts a "*harm* that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis added). For centuries, the injury of unauthorized disclosure itself has sustained the exercise of judicial power.

1. The government (Supp. Br. 14-19) and Google (Supp. Br. 16-17) err in equating an Article III injury-in-fact with the ability to state a claim—to establish the elements—for 20th-century torts, such as public disclosure of private facts. Article III standing is rooted in the "operations of the English judicial system and its manifestations on this side of the ocean." *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). Identifying the "cases that Article III empowers federal courts to consider" requires looking back centuries, not decades. *Sprint*, 554 U.S. at 274. The unauthorized disclosure of communications—letters, speeches, even recipes—was actionable without further harm at the Framing. Class Supp. Br. 5-11.

The government and Google also ask the wrong question. *Spokeo* asks whether the *injury* was traditionally sufficient. 136 S. Ct. at 1549. Whether modern courts impose additional elements on newer (and broader) *causes of action*, such as privacy torts arising from a "right to be let alone," is beside the point. The scope of a cause of action is a merits issue, not a standing issue. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). If the unauthorized disclosure of a communication was itself sufficient *injury* to support a lawsuit and injunctive relief at the Framing—and it was—it is *constitutionally* sufficient injury today. The *Restatement (Second) of Torts* can no more rewrite history than it can revise the scope of the judicial power.

2. Google agrees (Supp. Br. 18-19) that, "when the Constitution was ratified," courts regularly enjoined unauthorized disclosures of letters, without proof of further harm. But Google argues (Supp. Br. 19) that courts enjoined only publication of letters "entitled to *copyright* protection."

a. The argument is confused. It reflects an effort to conflate common-law and statutory copyright rejected long ago. The *common law* protected unpublished letters and communications against disclosure regardless of content. Class Supp. Br. 5-9. That so-called "common-law copyright" protected the individual's property "interest" in "intangible and impalpable thought," as well as form of expression. *Baker* v. *Libbie*, 210 Mass. 599, 605-606 (1912). Protection against disclosure did not depend on "pecuniary value" or "literary" merit. *Woolsey* v. *Judd*, 11 How. Pr. 49, 56 (N.Y. Super. Ct. 1855). Statutory copyright is distinct: It affords authors the exclusive right only to "*original*" works, including after publication, *if* they fall within statutory categories (*e.g.*, "lit-

erary" or "musical" compositions). 17 U.S.C. §102(a) (emphasis added). The common law protected communications *against* disclosure regardless of content, *Woolsey*, 11 How. Pr. at 52, 56, "wholly independent" of copyright "statutes" and their requirements, G. Curtis, *A Treatise on the Law of Copyright* 83 (1847).

Courts thus protected "general property" rights, "as well as * * * general copyright," in such communications regardless of content. *Folsom*, 9 F. Cas. at 346. Courts also enjoined unauthorized disclosures as a breach of "confidence or contract." *Ibid.*; see Class Supp. Br. 10-12. Google cannot wish away centuries of common-law protections by switching the topic to statutory copyright.[1] Nor can it vanquish legally protected "property," "confidence," and "contract" interests by ignoring them.[2]

b. Google fares no better in denying that search terms users transmit are "communications." Google Supp. Br. 20. Google compares them to "a written research query to a librarian" or "queries" to a "salesperson offering books." *Id.* at 11, 20. But such questions *are* communications: They tell the recipient what the requestor needs or desires. Class Supp. Br. 13. For centuries, courts afforded written "inquiries after the health of friends," *Pope* v. *Curl* (1741) 26 Eng. Rep. 608, 608 (Ch.),

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[1] Common-law copyright protected unpublished communications, while post-publication protections for literary works was statutory copyright's domain. *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 552 (1985). In 1976, Congress extended statutory copyright to unpublished works, extinguishing common-law copyright, to conform to the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132.

[2] Google may dispute the content of its promises. Class Supp. Br. 12. But that dispute concerns the merits—not jurisdiction. *Steel Co.*, 523 U.S. at 89.

or questions posted to manufacturers, *Rice* v. *Williams*, 32 F. 437, 439-443 (C.C.E.D. Wis. 1887), the same protections as other letters. They rejected content-based distinctions as "wholly groundless," *Woolsey*, 11 How. Pr. at 61-63, and "impossible," Curtis, *supra*, at 95; see 2 J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 948, at 221-222 (2d ed. 1839). Meaning is conveyed through both questions ("where can I find") and assertions ("I am looking for").

Google distinguishes search terms from "sealed" letters because the former are "shared with the search engine," not kept in a "locked diary." Google Supp. Br. 19-20. But Congress sought to give electronic communications the same protection as First Class letters. S. Rep. No. 99-541, at 5 (1986). Besides, anti-disclosure injunctions were not reserved for letters stolen by interlopers. See Class Supp. Br. 5-9. Even the "persons to whom" letters were addressed—rightfully in possession—had no "right or authority to publish" them without consent. *Folsom*, 9 F. Cas. at 346; see *Woolsey*, 11 How. Pr. at 63-65, 74-77, 79-80. Recipients could use communications only "for the purposes for which they were written." *Bartlett* v. *Crittenden*, 2 F. Cas. 967, 970 (C.C.D. Ohio 1849); see Curtis, *supra*, at 92. Google simply defied that limit. It disclosed communications provided to it for a specific purpose—finding websites—to pursue its own financial interests, "effectively selling" user search terms to advertisers. Class Supp. Br. App. 34a-35a (¶¶ 77-82) ("Compl.").

Search terms are not public—and do not function as—addresses. They are the content of a communication—an inquiry—transmitted from one device (the users') to another (Google's), through the same legally protected networks that carry phone calls. A government "wiretap" to

identify what citizens search for is as intrusive as tapping their phones or opening their mail. See *Katz* v. *United States*, 389 U.S. 347, 352 (1967); *Ex Parte Jackson*, 96 U.S. 727, 733 (1878). Google has resisted subpoenas because its users expect that "Google will keep private whatever information users communicate." Compl. 19a (¶43) (quoting Google filing in *Gonzales* v. *Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006)). Google can provide search results, and direct users to websites, without disclosing search terms. *Id.* at 24a (¶53), 26a-35a (¶¶61-82). But Google selectively *chooses* to disclose them without consent. *Ibid.*[3]

B. Modern Privacy Torts, If Relevant, Contradict Google's and the Government's Position

Rather than engage history, the government and Google engage privacy torts from the 1960s and 1970s. Those do not aid their cause. "Traditionally, the common law" provided privacy-tort victims with "presumed damages: a monetary award calculated without reference to specific harm." *Doe* v. *Chao*, 540 U.S. 614, 621 (2004). Such damages are not merely for "unproven" emotional or pecuniary harm; they reflect "that a violation of a dignitary right *is harm in itself*." D. Dobbs & C. Roberts, *Law of Remedies* §7.1(2), at 641 (3d ed. 1993) (emphasis added). That reflects centuries of decisions protecting communications from disclosure "without * * * consent," *Restatement (First) of Torts* §867 cmt. b (1939), "in all cases," regardless of "the particular nature of the injuries

[3] Google's description of *how* it discloses users' search terms invites confusion. Google Supp. Br. 2-5. Google discloses those terms to websites by appending them, as a "referrer heading," to the end of URL addresses. Compl. 25a (¶56). But Google cannot make search terms an "address" by gratuitously appending them to one.

resulting," S. Warren & L. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205, 213, 218-219 (1890).

The government (Supp. Br. 16-19) and Google (Supp. Br. 16-17, 20-21) invoke the elements of discrete, privacy torts originating in a generalized "right to be let alone." W. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389-407 (1960). But the *elements* of those causes of action are irrelevant. What matters is whether the *injury* is sufficient (so as to "open the courthouse door," *Doe*, 540 U.S. at 625). Historically, unauthorized disclosure of communication itself was sufficient injury. Class Supp. Br. 5-12. Relief and nominal damages were available absent any further harm. *Ibid.*; see Prosser, *supra*, at 409 n.214 (relief even when victim "benefited" from disclosure).

The modern privacy torts the government and Google invoke are not about communications, but information from myriad sources. Nor is it true that publication of private facts requires widespread publication causing further harm. U.S. Supp. Br. 18; Google Supp. Br. 16. A disclosure to *a single person* is tortious if "there is some breach of contract, trust or confidential relation." Prosser, *supra*, at 393-394. Such breach of contract and trust is alleged here. Class Supp. Br. 11-14. A court may "grant damages" without widespread publication if disclosure violates a statute. *Restatement (Second) of Torts* §874A cmt. f (illustration 4) (1979); see *id.* §652D. Those rules defy the government's and Google's ahistorical narrative.

Google and the government divorce standing from the principles of property, contract, privacy, and confidence upon which this Nation is founded. The Fourth Amendment protects property and privacy interests without regard to further injury. Class Supp. Br. 14-15; pp. 6-7, *supra*. Google and the government defy the SCA's fundamental purpose of extending traditional protections to

electronic communications to "ensure the fourth amendment's continued vitality." S. Rep. No. 99-541, at 1-3, 5 (1986).

C. Congress's Judgment Is Consistent with History

While history is dispositive, Congress's "judgment" confirms the result. *Spokeo*, 136 S. Ct. at 1549. The SCA forbids unauthorized disclosure of the "contents of" electronic "communications." 18 U.S.C. §2702(a). It authorizes suit by anyone "aggrieved." §2707(a). Most important, it provides equitable and monetary remedies *without* proof of "actual damages." §2707(b)-(c); see Class Supp. Br. 16-17. The government has previously recognized that Congress's decision to authorize relief without requiring a "separate showing of harm" speaks volumes about what constitutes an injury-in-fact. U.S. Supp. Br. 13 (citing U.S. Amicus Br. 33 n.6, *Spokeo*, *supra* (No. 13-1339) ("U.S. *Spokeo* Br.")). But the government ignores that decision here.

Google insists that "'not all'" disclosures cause injury. Google Supp. Br. 22-24. But Google ignores the SCA, invoking a statute that creates a "procedural" right to have accurate information reported. *Id.* at 24; see *Spokeo*, 136 S. Ct. at 1545-1546. That makes no sense. Displaying an "incorrect zip code" in a credit report might not cause harm. *Spokeo*, 136 S. Ct. at 1550. But the common law long ago recognized that unauthorized disclosure of *private* communications is itself an injury. See *Muransky* v. *Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208-1209 (11th Cir. 2018); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016); Class Supp. Br. 5-11.

The contention that Congress must "express[ly]" identify the "particular" persons who can claim injury, U.S. Supp. Br. 11-13; Google Supp. Br. 21-23, is frivolous. The

Civil Rights Act afforded relief to "'persons aggrieved.'" *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972). This Court construed that statute as "elevating" to protected status an interest (the "personal interest in living in a racially integrated community") "previously inadequate in law." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 578 (1992). Congress used the same language—"person aggrieved"—in the SCA. 18 U.S.C. §2707(a). Consistent with common law, that language surely encompasses users whose communications are unlawfully disclosed. *FEC* v. *Akins*, 524 U.S. 11, 19 (1998).

If Congress had meant to *restrict* the traditional rule—which allowed senders of disclosed communications to sue—it would have said so. See Class Supp. Br. 5-12, 14-15. Moreover, the original SCA provided language at least as specific as the "party aggrieved" language the government invokes (Supp. Br. 13 n.2) from *Akins*, 524 U.S. at 19. The SCA originally allowed suit by "subscriber[s]" and "customer[s] aggrieved," 18 U.S.C. §2707(a) (1994), leaving no doubt about Congress's focus on communications' senders, Class Supp. Br. 17-18. Article III standing did not contract when Congress later extended the SCA to permit suit by "any * * * other person aggrieved."[4]

The government argues that "[s]earch terms embedded in referrer headers" do not constitute "'contents of'" a "'communication'" under the SCA. U.S. Supp. Br. 13-14. That goes to the merits, not injury-in-fact. *Steel Co.*, 523 U.S. at 89. It is also wrong. The decision invoked by the government observes that disclosure of referrer

[4] Whether the term "aggrieved" imports a zone-of-interest test is irrelevant to *Article III* standing. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125-128 & n.4 (2014).

headers containing "search terms * * * *communicated to Google* * * * could amount to disclosure of the *contents of a communication*." *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1108-1109 (9th Cir. 2014) (emphasis added).

D. The Government's and Google's Remaining Arguments Lack Merit

The Complaint alleges that Google disclosed the contents of the named plaintiffs' communications in violation of the SCA; in contravention of Google's Terms of Service; and contrary to Google's confidentiality obligations. Class Supp. Br. 12-14. That establishes standing. "[H]istory" and "Congress's judgment" align: Unauthorized disclosure of a communication is actionable injury; no "additional" harm is required. *Spokeo*, 136 S. Ct. at 1549 (emphasis omitted). If the Court thinks additional risk of harm matters, the Complaint alleges that. Class Supp. Br. 18-19.

The Government concedes a risk of reidentification would make standing "closer," but calls the threat speculative. U.S. Supp. Br. 20-21. But courts "must construe the complaint in favor of the complain[ant]." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Google asserts that reidentifying users requires "at least" a multi-step process and cannot be done using IP addresses. Google Supp. Br. 14-15 & n.6. But the Complaint alleges otherwise—that Google users' IP addresses are disclosed with search terms, and that such information "often" permits reidentification. Compl. 41a-42a (¶¶ 95-96). Google argues that users would not suffer further harm if reidentified. Google Supp. Br. 15-17. But that conflates what is required for a concrete harm with what is needed to recover for public disclosure of private facts. See pp. 4, 7-9, *supra*. Here, private content—about health matters, financial concerns, etc.—were disclosed to Google. Class

Supp. Br. 13, 18. Google then disclosed the information indiscriminately to the next website clicked. *Ibid.*

Google's newly minted "entitle[ment] to an evidentiary hearing to disprove" allegations is waived many times over. Google Supp. Br. 24-25. By settling at the Complaint stage, Google waived any right to evidentiary proceedings. Pet. App. 72. This Court "must accept as true all material allegations of the complain[ant]." *Warth*, 422 U.S. at 501. Google, moreover, promised "to support the settlement." Google Br. 46; see Pet. App. 99 (§ 13.13). It cites nothing entitling it to breach that promise (again) in district court.

II. The Four Further Claims Independently Establish Injury-In-Fact

Neither Google nor the government address the four remaining causes of action—including breach of contract and unjust enrichment—pretending instead that the Complaint ends at paragraph 141. But those claims were raised at argument. Oral Arg. Tr. 67; see Class Supp. Br. 19-22. Google addressed standing for each separately, claim by claim, below.[5] Yet Google ignores four claims here.

The government agreed not long ago that private breach-of-contract and unjust-enrichment actions can be asserted without "further" injury or "consequential harm" beyond the breach itself. U.S. *Spokeo* Br. 19-22; see U.S. Amicus Br. 12, 15-17, 28-29, *First Am. Fin. Corp.* v. *Edwards*, 567 U.S. 756 (2012) (No. 10-708). That position remains correct. Class Supp. Br. 19-22.

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[5] Google understood CAFA independently supports jurisdiction, as a named plaintiff alleged. See C.A. S.E.R. 709 ¶ 8. Google thus attacked standing for "each * * * claim" below. D. Ct. Doc. 29, at 6-13; see D. Ct. Doc. 44, at 6-11; D. Ct. Doc. 19, at 5-9.

CONCLUSION

The Court should remand to address standing, dismiss the case as improvidently granted, or affirm.

Respectfully submitted.

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