No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al*.,

Respondents.

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

SUPPLEMENTAL REPLY BRIEF ON STANDING ISSUES FOR PETITIONERS

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PETITIONERS' REPLY TO SUPPLEMENTAL BRIEFS

Google and the government have certainly demonstrated that Gaos has a weak case on the merits. We already knew that from the feebleness of the settlement. But the Court has repeatedly held that "one must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (cleaned up). Yet this is precisely what Google and the government do throughout their briefs. When one strips away these category mistakes, we see that there is no basis for a facial challenge to standing in this case without an unprecedented shift in power from the legislature to the judiciary and from the federal government's ability to regulate interstate commerce to the states. Google's arguments against standing here would undo decades of precedent and numerous federal civil causes of action.

ARGUMENT

I. Gaos's difficulty in prevailing on the merits does not defeat standing.

The government argues (Supp. Br. 13–14) that search terms embedded in a referrer header are not "communications" for purposes of the Stored Communications Act, but then concedes that this is a question of the merits. Just so. That a plaintiff makes an allegation that may not succeed on the merits does not defeat the plaintiff's standing to bring the claim. *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989); *Bell v. Hood*, 327 U.S. 678, 682 (1946). "A legal shortcoming does not equate to a jurisdictional shortfall" and "jurisdiction is not defeated by the

possibility that the complaint ultimately fails to state a claim." *Johnson v. Wattenberger*, 361 F.3d 991, 993–94 (7th Cir. 2004) (Easterbrook, J.) (cleaned up). Any other result, and "defendants would never *win* in diversity cases. They could at best achieve jurisdictional dismissals, followed by new suits in state court." *Id.* at 994 (emphasis in original).

The same would be true in cases where federal questions are dismissed on jurisdictional standing grounds because of a failure of the merits; that simply invites bringing new suits with different class representatives to state courts that have a more favorable view of the merits. *Cf. Smith v. Bayer Corp.*, 564 U.S. 299 (2011) (class representatives do not bind absent class members in an uncertified class); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (rejecting shenanigans class counsel used to evade federal jurisdiction). This would be ultimately counterproductive to whatever Google is attempting to accomplish with its proposed rule here. *Cf. State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Const. and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 13 (2015) (statement of Andrew J. Pincus) (noting importance of federal removal jurisdiction in preventing "some of the most flagrant abuses of class actions," and identifying the use of *cy pres* "to inflate the claimed value of the class recovery" as one of those abuses).

A court faced with a plaintiff who accuses former President Jimmy Carter of strafing her dormitory room with planes as part of a conspiracy with IBM and Ross Perot to use earthquake technology to profit from reinstating slavery has the Article III jurisdiction to dismiss the complaint on the merits. This is so even

when common sense tells one that Jimmy Carter has no air force or earthquake technology and the plaintiff has not suffered any nondelusional redressable injury. *Cf. Tyler v. Carter*, 151 F.R.D. 537 (S.D.N.Y. 1993) (dismissing complaint *sua sponte* as implausible without considering jurisdiction), *aff'd*, 41 F.3d 1500 (2d Cir. 1994). Similarly, if the Gaos plaintiffs misunderstand the definition of "communications" under the SCA, or would have other difficulty demonstrating facts specific to themselves (much less on a classwide basis) necessary to prove damages, this is what Rule 12(b)(6) or Rule 56 are for. Plaintiffs have *alleged* a private injury caused by an arguable breach of a duty reasonably created by Congress and redressable by statutory damages; no one suggests that the allegations are made in such "bad faith" solely for the purposes of improperly claiming the mantle of federal jurisdiction. *Cf. St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 289 (1938) (amount in controversy).[1]

There is "injury enough to open the courthouse door" even if plaintiffs have little basis to go forward once inside. *Doe v. Chao*, 540 U.S. 614, 625 (2004). Google (Supp. Br. 16–17) and the government (Supp. Br. 17–19) complain about the implausibility of proving any damages, but that is again a merits question, as well as precisely the fact pattern of *Doe v. Chao*, where there was standing but no claim meriting relief. Neither Google nor the government reconcile their arguments with *Doe*, much less the long *Bell v. Hood* line of cases. *Compare* Pet. Supp. Br. 18–19; Gaos Supp. Br. 15–17 & n.4. Indeed, Google's only

[1] Compare "the example of a hypothetical dispute over bananas described by the parties as 'securities' so that they could litigate their dispute in the federal courts under federal securities law." *Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010).

discussion of *Doe* (Supp. Br. 20–21) is a quote of its holding on the *merits*.

Google and the government make other, often questionable, factual arguments regarding difficulty of proof or insufficiency of allegations that state a claim. For example, Google (Supp. Br. 7, 11–13, 21) and the government (Supp. Br. 21) refuse to draw reasonable inferences from the plaintiffs' allegations (Supp. Br. 18–19) regarding the ease of reidentification[2] to argue that plaintiffs have failed to plead that reidentification actually happened. But even if that sort of magic-word incantation was required to draw the reasonable inference, it would be trivial for Gaos to draw up a new complaint under 28 U.S.C. § 1653 with a new paragraph making that allegation explicit. Pet. Supp. Br. 21–22.

The government disputes (Supp. Br. 21) that vanity searches create a higher risk of reidentification, but plaintiffs' proposition seems a matter of "common sense" (*Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)), or at a minimum a colorable allegation subject to factual dispute that can survive a Rule 12 challenge. *E.g.,* Solon Barocas & Helen Nissenbaum, *Big Data's End Run around Anonymity and Consent*, in Privacy, Big Data, and the Public Good: Frameworks for Engagement 50 (Julia Lane *et al.* ed. 2014) (discussing reidentification in manner consistent with plaintiffs' complaint). Google alleges (Supp. Br. 13–14) multiple searches are required for reidentification, but their analysis ignores (Supp. Br. 4–5) that IP addresses

[2] Petitioners mistakenly cite (Supp. Br. 21) to the Second Amended Complaint, Dkt. 39 ¶¶ 42–83. A better citation is the later Consolidated Complaint, Dkt. 50 ¶¶ 56–98, found at Gaos Supp. Br. App. 25a–43a, but even the less detailed Second Amended Complaint demonstrates the point.

frequently disclose location and are readily cross-referenced with other collections of aggregated user data. Gaos Supp. Br. 18–19; Pet. Supp. Br. 22; *cf.* Jennifer Valentino-deVries *et al.*, *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, N.Y. Times (Dec. 10, 2018).

Perhaps Google and the government would be proven correct about all of these particular factual contentions after a full trial or even a summary judgment motion. And the individualized nature of proof certainly raises severe questions about class certification for trial. But the plaintiffs' allegations are not "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits" and that is all that is needed to satisfy *jurisdiction* at the complaint stage. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666–67 (1974) (cleaned up).

II. Google's arguments for limiting the legislative power fail.

1. Google proposes (Supp. Br. 20–21) that common-law privacy torts are of too recent a vintage to generate standing. If so, it would be an extraordinary consequence that *Spokeo* divested Congress of any power to create a private cause of action for privacy violations delineating the rights and obligations in the use of new technologies—but permitted Congress to federalize largely obsolete torts like the use of interstate communications in seduction or alienation of affections. *Cf.* Kyle Graham, *Why Torts Die*, 35 Fla. St. L. Rev. 359 (2008). Such a reading of *Spokeo* would have repercussions in labor law as well (Pet. Supp. Br. 18),

and might even undo portions of modern civil-rights law. *Compare, e.g., Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (containing no common-law standing analysis) *with* Upton Sinclair, *The Jungle* (1906) (protesting turn-of-century working conditions including, *inter alia*, lack of remedy for sexual harassment). It would nullify 18 U.S.C. §§ 2511 and 2520, which impose *per se* statutory liability of at least $10,000 for disclosing illegally intercepted electronic communications—even if the cell-phone conversation is about men's shoes. Indeed, the more important the disclosed illegally intercepted conversation, the more likely it is to be protected by the First Amendment and immune from liability. *Cf. Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Fortunately, the Court need not reach these questions, because Google's premise is incorrect. Warren & Brandeis simply occasioned a change in semantics (from "property" and "confidence" to "privacy"). It did not create new substance out of whole cloth:

> the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 213 (1890). Strict-liability privacy claims are an extension of common-law trespass. *See Olmstead v. United States*, 277

U.S. 438, 487 (1928) (Butler, J., dissenting) ("The communications belong to the parties between whom they pass."). After all, any violation of privacy—even a surreptitiously-filmed sex tape—is simply the disclosure of *true* facts one would rather have hidden. The privacy right simply assigns the default property ownership in those images to the subjects, rather than the witnesses. The *Spokeo* analysis does not obviate privacy torts; any reading of *Spokeo* that requires that result is self-refuting.

2. Google argues (Supp. Br. 10) that the complaint does not allege "pecuniary injury, emotional distress, or any other potential concrete harm." But as with common-law claims, the violation of the legal statutory duty owed plaintiff herself can itself be the harm. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). Anyway, the direct allegation was "privacy harm." Gaos Supp. Br. App. 40a–43a. And specifically, Italiano alleged that his queries were "personal, confidential searches that he did not want disclosed to third parties without his knowledge or consent." *Id.* 45a.

Google's position cannot be reconciled with other precedents where recent innovative federal statutes permitted suit for intangible injury and this Court not only found standing, but permitted the case to go forward on the merits. Pet. Supp. Br. 19. For example, testers who had no intention of actually renting from defendants had standing to sue under the Fair Housing Act solely for being given inaccurate information about the rental market, even when they knew the information they were to receive would be inaccurate. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

3. "[T]he point is not that [plaintiff's] harm would have been actionable at common law. The inquiry under *Spokeo* is whether the alleged harm bears a 'close relationship' to one actionable at common law." *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1211 (11th Cir. 2018). Thus, many of Google's and the government's arguments are simply beside the point. The breach of confidentiality tort, unlike the public disclosure tort, "focuses on the source and protects confidential information without regard to the degree of its offensiveness." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 175 (2007) (cleaned up). Nothing in *Spokeo* requires judges to act as gatekeepers and legislate whether a privacy violation is offensive enough for Congress to act.

4. Google argues (Supp. Br. 19–20) that Justice Story's jurisprudence (discussed at Gaos Supp. Br. 7–12 and Pet. Supp. Br. 8–11) dealt with copyright and property, rather than privacy. But *Folsom v. Marsh* recognized the independent interest in trust and confidence distinguishing "mere breach of confidence or contract" from "violation of the exclusive copyright of the writer." 9 F. Cas. 342, 346 (C.C.D. Mass. 1841). "The cases discussed above might be read as intellectual property cases, yet they were often based on two rationales—property and breach of confidence." Richards & Solove, 96 Geo. L.J. at 138; *see also* Warren & Brandeis, 4 Harv. L. Rev. at 211 (distinguishing between breach of confidence actions and the "theory of property," the latter being necessary "in granting a remedy against a stranger").

The right of confidence was the progenitor of modern privacy rights, existing "long before Warren and Brandeis published their article." Richards & Solove,

96 Geo. L.J. at 133; *see also Muransky*, 905 F.3d at 1209 (grounding standing to assert statutory FCRA claims in traditional common-law right of action for breach of confidence). One aspect of the right of confidence is the protection for confidential communications, a right that has existed in this country from its inception as early American legislators enshrined that principle into regulation of the U.S. Postal Service. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 558 (2007); *see also* Richards & Solove, 96 Geo. L.J. at 140–45. The Stored Communications Act extended that time-tested principle of confidence to electronic modes of communication on the theory that "[f]or the person or business whose records are involved, the privacy or proprietary interest in that information should not change" simply because technology is changing. S. Rep. No. 99-541, at 3 (1986).

And even if Google were correct that privacy sounded solely in property, plaintiffs also bring their complaint on a theory of a property interest. Gaos Supp. Br. App. 54a–56a.

5. Google's request for a "clear statement" rule (Supp. Br. 22), as it interprets it, would have dramatic retroactive effect on decades of settled legislative expectations. Neither Google nor the government contend that the legislative history and context for the SCA fail to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment). Here, unlike in a copyright case (*Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013)), Congress was legislating in a new area where there were *no* default

rules, and wanted to provide a new structural framework defining the scope of the property rights. Pet. Supp. Br. 12–13.

It is especially ironic that Google, having ignored the legislative history providing a reasonably clear statement of Congress's purpose, then goes on to suggest (Supp. Br. 23) that the "aggrieved" language in the SCA evidences Congress's limited concern. As Google admits (Supp. Br. 23 n.9), *FEC v. Akins* interpreted "aggrieved" to "cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." 524 U.S. 11, 19 (1998). This Court declined to construe "person aggrieved" in an "artificially narrow" way; rather it adopted a "zone of interests" test "enabling suit by any plaintiff with an interest arguably sought to be protected by the statutes." *Thompson v. N. Am. Stainless, L.P.*, 562 U.S. 170, 177–78 (2011) (cleaned up). Most recently, relying on the *stare decisis* of its pre-*Akins* cases, this Court interpreted "person aggrieved" language in the Fair Housing Act broadly to cover municipalities. *Bank of Am. Corp. v. City of Miami,* 137 S. Ct. 1296 (2017). Furthermore, the language is "*any* … person aggrieved." 18 U.S.C. § 2707(a) (emphasis added). "Any" is a qualifier of maximum breadth. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018).

The whole issue appears to be a red herring. The *Spokeo* elevation inquiry attempts to discern what interests concerned Congress, not who Congress has permitted to enforce those interests.

The reason that *Spokeo* held the FCRA "did not *categorically* give rise to concrete injury" (U.S. Supp. Br. 16) is that the FCRA contains both procedural and substantive components. Pet. Supp. Br. 11–12. The

SCA protections at issue here are only substantive. *Id.* The government's position (Supp. Br. 11–12) that the FCRA expressed a more robust judgment about extending rights than the SCA is dubious at best.

6. The government claims (Supp. Br. 16) that common-law privacy torts do not impose *per se* liability, but rather require an additional showing of harm, yet the government's very next sentence—a parenthetical quoting Restatement § 652H—refutes the proposition. The Restatement authorizes damages for a plaintiff's "harm to his interest in privacy." Restatement (Second) of Torts § 652H (1977). If the SCA violations *alleged* here do not categorically give rise to concrete injury (U.S. Supp. Br. 16), that is again a problem of the merits as in *Doe v. Chao*.

CONCLUSION

Google concedes (Supp. Br. 8) the pleading standard should apply. If so, at least named plaintiff Italiano has sufficiently pled concrete injury. But if the Court requires a greater showing than Italiano has made to date, then petitioners believe that plaintiffs should be able to demonstrate standing with § 1653 amendments and affidavits.

Respectfully submitted,

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