No. 18-1118

IN THE

Supreme Court of the United States

KIM KERRIGAN

v.

BAYVIEW LOAN SERVICING LLC

On Petition For a Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

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April 9, 2019

SUPPLEMENTAL AUTHORITY IN *FRANK v. GAOS*

This Court decided *Frank v. Gaos*, 586 U.S. __, 203 L.Ed.2d 404 (U.S. 2019) on March 20, 2019.

Three named plaintiffs brought class action claims against Google for alleged violations of the Stored Communications Act (SCA). Google moved three times to dismiss the case based on violations of the SCA for lack of Article III standing. The district court denied the motions and proceeded to the merits.

Google and the class representative, over the objections of five class members, then negotiated a settlement, which paid $7,000,000 to *cy pres* recipients and the attorneys for the class but did not allow for any payments to actual class members. Two of the class members, Theodore Frank and Melissa Holyoak, appealed the award to the Ninth Circuit.

After the appeal had been briefed, but before the panel of that court issued its decision, this Court decided *Spokeo, Inc. v. Robins*, 578 U. S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). Notwithstanding that *Spokeo* appeared on point with regard to whether the district court had standing to approve the settlement, and whether the Court of Appeals had standing to resolve the merits of the appeal, the Ninth Circuit refused to consider *Spokeo* as precedent.

Applying the familiar standing principles Kerrigan sets forth in her Petition for Certiorari, this Court concluded on March 20, 2019 in *Frank*:

> We have an obligation to assure ourselves of litigants' standing under Article III." *Daimler Chrysler Corp. v. Cuno*, 547 U. S. 332, 340, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)(quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); internal quotation marks omitted). ... A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976).
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> When the District Court ruled on Google's second motion to dismiss, it relied on *Edwards* [*Edwards v. First American Corp.*, 610 F. 3d 514 (2010)] reasoning that an Article III injury exists to hold that *Gaos* had standing to assert a claim under the SCA. Our decision in *Spokeo* abrogated the ruling in *Edwards* that the violation of a statutory right

> automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right. 578 U. S., at ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 645); *see Edwards*, 610 F. 3d, at 517-518. Since that time, no court in this case has analyzed whether any named plaintiff has alleged SCA violations that are sufficiently concrete and particularized to support standing. After oral argument, we ordered supplemental briefing from the parties and Solicitor General to address that question.
>
> After reviewing the supplemental briefs, we conclude that the case should be remanded for the courts below to address the plaintiffs' standing in light of *Spokeo*.

Frank, 203 L.Ed.2d at 409.

Bayview claimed it needed no standing because it was removing the case from state court. Additionally, Bayview argued it did not need to explain to Kerrigan or the federal courts its basis for standing. *Frank* states Bayview is wrong in both regards.

CONCLUSION

Given Respondent Bayview is a third party and has refused to set forth any factual basis for its standing to remove this case, other than Kerrigan sued it in a state court for a violation of a federal statute, this Court should require Bayview to set forth the factual basis for its Article III standing.

Date: April 9, 2019

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