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 BRIEF FOR RESPONDENT GOOGLE LLC

RANDALL W. EDWARDS
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
(415) 984-8716
redwards@omm.com

JED W. GLICKSTEIN
SAMANTHA C. BOOTH
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

DONALD M. FALK
Counsel of Record
EDWARD D. JOHNSON
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

ANDREW J. PINCUS
BRIAN D. NETTER
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondent Google LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

None of the three named plaintiffs has Article III standing.

The district court upheld Gaos's standing based on then-controlling Ninth Circuit precedent permitting a plaintiff to establish standing simply by alleging the violation of a federal statute. JA 27 (citing *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)).

This Court squarely rejected that approach in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), holding that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants [him] a statutory right and purports to authorize [him] to sue to vindicate that right." *Ibid.*

The complaint here does not plausibly allege either concrete injury or certainly impending risk of concrete injury caused by the disclosure of the named plaintiffs' search terms. But even if the allegations passed muster, a party or *amicus* could challenge the factual basis for those allegations and obtain judicial resolution of disputed facts to be assessed under this Court's current standing jurisprudence.

This Court could itself assess the sufficiency of the complaint, or remand to enable the lower courts to do so. If the Court finds the complaint sufficient, then it could remand to permit the district court to undertake the second, factual inquiry. Alternatively,

the Court could simply dismiss the petition as improvidently granted.[1]

STATEMENT

A. The Relevant Technology.

1. Internet-connected devices exchange information through data transmissions formatted according to industry-standard "protocols." The hypertext transfer protocol ("HTTP") is the generally applicable protocol that allows Internet users to access webpages through their web browsers. When a user clicks on a hyperlink to a webpage, the user's browser requests the webpage by sending an HTTP transmission. (An HTTP transmission also is sent when a user enters a web address into her browser (for example, typing "www.supremecourt.gov").)[2]

That message contains a "request line" (which identifies the webpage that the user is requesting) and "header fields" (which provide additional details relevant to the request). The server hosting the webpage then interprets the request and returns the requested webpage. RFC 2616 §§ 5, 14 (published 1999).

One of the standard header fields in an HTTP transmission is the "referrer" (sometimes spelled

---

[1] There appears to be no dispute that this Court cannot address the question presented if no named plaintiff has standing. *Robertson* v. *Allied Solutions, LLC*, 902 F.3d 690, 698 (7th Cir. 2018).

[2] The standards for HTTP transmissions are developed by the Internet Engineering Task Force. Although denominated "Requests for Comments" ("RFCs"), they are foundational standards. See RFC 2026, https://tools.ietf.org/html/rfc2026 (explaining the standard-setting process). The HTTP standards are RFC 2616, https://tools.ietf.org/html/rfc2616.

"referer"). When an Internet user clicks on a hyperlink to access a new webpage, the user's browser sends to the server hosting the webpage a referrer header that conveys the address of the webpage that contained the hyperlink.

For example, a user might visit this Court's webpage containing 2018 oral argument transcripts at the following address:

```
http://www.supremecourt.gov/oral_arguments/ar
  gument_transcript/2018
```

If the user clicked on the link for the October oral argument in this case, the HTTP request sent to the Court's web server would include this referrer header:

```
Referer: http://www.supremecourt.gov/
  oral_arguments/argument_transcript/2018
```

During the relevant time period, this standard process worked the same way when a user clicked on a hyperlink from a Google search results page. For example, if a user searched "Supreme Court" using Google and clicked on the link to this Court's website from the search results page, the HTTP request sent by the user's browser to the Court's server would include a referrer header resembling:

```
Referer: http://www.google.com/search/
  q=Supreme+Court
```

A referrer header is not disclosed to the general public; in the examples above, only the server hosting www.supremecourt.gov would receive the referrer header. The referrer header identifies only the immediately preceding website; it does not contain any other information about the search

history of the user requesting the webpage. RFC 2616 § 14.36.

Nothing in the HTTP protocol requires the server receiving the request to review or retain the information contained in the referrer header. But referrer headers can provide useful information; for example, the referrer headers leading to a page-not-found error might identify other webpages containing outdated hyperlinks. *Ibid.*

2. In addition to the referrer header, the server hosting the user-requested webpage also receives the user's Internet Protocol address (or "IP address"). The IP address is a numerical identifier that enables a message sent over the Internet to reach its intended destination. See, *e.g.*, RFC 791, https://tools.ietf.org/html/rfc791, § 2.3. When a user requests a webpage from a server, the server needs the user's IP address to send the webpage back. See *id*. § 2.2.

Laptop computers and smartphones rarely have fixed IP addresses. In the consumer context, IP addresses are assigned by the consumer's internet service provider ("ISP"). An ISP has a limited supply of IP addresses,[3] and it therefore assigns IP addresses to devices temporarily and changes them at its discretion. RFC 2131 § 2 (defining widely adopted Dynamic Host Configuration Protocol for distributing IP addresses).

For that reason, only the ISP knows the IP address assigned to a particular device at a

[3] See RFC 6302 § 1 (noting that "[s]ervice providers will [as of 2011] have a hard time finding enough [IP] addresses to sustain product and subscriber growth").

particular time. See, *e.g.*, *United States* v. *Vosburgh*, 602 F.3d 512, 518 (3d Cir. 2010) (FBI subpoenaed ISP to learn user associated with IP address that attempted to download illegal file).

Even though the server hosting the requested webpage may log the IP addresses associated with webpage requests, the IP address does not identify the device (or computer user) requesting the webpage.

3. Several Members of the Court raised questions during oral argument regarding the advertisements displayed on webpages that a user visits. See, *e.g.*, Tr. 39:9-40:4, 41:5-25.

Referrer headers identify the webpage from which the user clicked to the current webpage; plaintiffs do not allege that referrer headers play a role in ad serving.

In most cases, ad serving is based upon the information stored in cookies. A cookie—in the Internet sense—is a small data file inserted into and stored on a user's computer. Third-party advertising servers will sometimes use cookies to determine which advertisements to display to a web user, based on the user's browsing history. See generally RFC 6265.

Referrer headers do not modify, transmit, or control cookies. No claim in this case relates to information stored in cookies.

B. The Complaint's Allegations.

The consolidated amended complaint operative at the time of the settlement was brought on behalf of three named plaintiffs: Paloma Gaos, Anthony Italiano, and Gabriel Priyev. Compl. (Dist. Ct. Dkt.

No. 50) ¶¶ 100-129. Each plaintiff alleges that disclosures of search queries by Google to third-party website operators through the referrer header function violates the restrictions in the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. §§ 2701 *et seq.*, on "knowingly divulg[ing] to any person the contents of a communication" in electronic storage or carried on a remote computing service, *id.* § 2702(a)(1)-(2). See Compl. ¶¶ 130-141.

The complaint does not identify any specific search conducted by named plaintiffs Gaos or Priyev. Gaos alleges only that she "conducted numerous searches, including 'vanity searches' for her actual name and the names of her family members.'" *Id.* ¶ 101. And Priyev alleges that he "conducted numerous searches, including searches for financial and health information." *Id.* ¶ 115.

The third plaintiff, Italiano, alleges six searches, each a combination of his name and (a) "his home address"; (b) "bankruptcy"; (c) "foreclosure proceedings"; (d) "short sale proceedings"; (e) "Facebook"; and (f) "the name of his then soon-to-be ex-wife + forensic accounting." *Id.* ¶ 107. Italiano alleges that these searches occurred during "the time period from July 2010 to August 2011," and that during this time "he was going through formal divorce proceedings." *Id.* ¶¶ 107-108.

Neither Italiano nor the other plaintiffs identify which website or websites—if any—they clicked on from the Google search results page displayed after they entered their searches. In other words, they do not allege which websites received referrer headers.

Each plaintiff claims to have "suffered actual harm" from Google's "dissemination of * * * search

queries, which sometimes contained sensitive personal information, to third parties." *Id.* ¶¶ 104, 111, 118. No plaintiff alleges that any search by itself revealed the searcher's identity.

The complaint includes general allegations about the possibility of "reidentifying" the person associated with information that by itself is not linked to an individual. Compl. ¶¶ 83-98. Plaintiffs state that, although referrer headers do not reveal the Internet user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from referrer headers "with outside information to pry out obscured identities." *Id.* ¶ 86.

The complaint does not allege that any plaintiff was reidentified and tied to a particular search. It does not allege a substantial risk of any such reidentification. Nor does it allege that any person has "combined" the information from referrer headers relating to plaintiffs' searches "with outside information to pry out obscured identities." *Ibid.*

Finally, the complaint asserts several state common-law claims based on the same alleged conduct. *Id.* ¶¶ 142-171.

ARGUMENT

Plaintiffs Lack Standing to Pursue This Action.

A. Plaintiffs must show a concrete harm or certainly impending risk of concrete harm.

To establish Article III standing, a plaintiff must "[f]irst and foremost" demonstrate that she suffered "an injury in fact" that is both "concrete and

particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quotation marks omitted).

The Constitution requires an injury that "actually exist[s]" and is "'real,' and not 'abstract.'" *Id*. at 1548. This Court has cautioned that "concrete" is "not necessarily synonymous with 'tangible'"; some "intangible injuries can nevertheless be concrete" enough to support standing. *Id.* at 1549. And Congress to some extent can make actionable intangible harms not previously held sufficient to confer standing. See pages 21-24, *infra*. But all intangible harms must satisfy Article III's concreteness requirement in order to confer standing: they must be "*de facto*," not "conjectural" or "hypothetical." *Spokeo*, 136 S. Ct. at 1548.

Finally, "the risk of real harm can[] satisfy the requirement of concreteness." *Id.* at 1549 (citing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013)). The Court reiterated in *Clapper* "the well-established requirement that threatened injury must be 'certainly impending.'" 568 U.S. at 401 (citation omitted). "'Allegations of *possible* future injury' are not sufficient" to establish standing. *Id.* at 409 (citation omitted).

B. The complaint does not allege facts that establish the named plaintiffs' standing.

"Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element" of Article III standing. *Spokeo*, 136 S. Ct. at 1547 (alterations and quotation marks omitted).

Allegations supporting standing, like those supporting the elements of a plaintiff's claim, must contain sufficient factual support to "plausibly

establish[] injury." *Auer* v. *Trans Union, LLC*, 902 F.3d 873, 878 (8th Cir. 2018) (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). In other words, the complaint must plausibly allege that the claimed statutory violation resulted in real-world harm or a sufficient risk of harm to the plaintiff. See, *e.g.*, *Dutta* v. *State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018) (plaintiff must "plausibly allege a 'concrete' injury causally connected to the violation"); *Beck* v. *McDonald*, 848 F.3d 262, 270 (4th Cir. 2017); *Meyers* v. *Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2017); *Nicklaw* v. *CitiMortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016); *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Hancock* v. *Urban Outfitters, Inc.*, 830 F.3d 511, 513-14 (D.C. Cir. 2016).[4]

Plaintiffs' allegations do not satisfy that standard.

---

[4] Petitioners cite the remand opinion in *Spokeo* (Reply Br. 26), but the Ninth Circuit noted that "even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff." *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018). A plaintiff in the Ninth Circuit still must "demonstrate how the 'specific' violation of [the statute] alleged in the complaint actually harmed or 'present[ed] a material risk of harm' *to him*." *Dutta*, 895 F.3d at 1175 (emphasis added) (quoting *Robins*, 867 F.3d at 1113).

1. Plaintiffs have not alleged an already-recognized tangible or intangible harm or a certainly impending risk of such harm.

a. *Disclosure of the search terms by themselves could not inflict harm or create a plausible risk of harm.*

Plaintiffs appear to contend that disclosing the terms used in their searches by itself—without any link to the identity of the individual who conducted the search—is sufficient to inflict concrete harm or create a plausible risk of such harm. Settled case law forecloses that claim.

First, the complaint does not allege facts demonstrating any real-world consequence to plaintiffs from the disclosure of their search terms standing alone. For example, plaintiffs do not allege pecuniary injury, emotional distress, or any other potential concrete harm.

The complaint does contain a conclusory allegation of "actual harm" resulting from the disclosure of plaintiffs' search terms. Compl. ¶¶ 104, 111, 118. But *Iqbal* and *Twombly* require a court to disregard such "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). A complaint must support conclusory allegations with facts creating a plausible inference of actual harm.

Second, the complaint does not contain even a conclusory assertion that plaintiffs faced any certainly impending risk of harm from the disclosure of search terms not linked to the searcher's identity. Plaintiffs have therefore waived that contention.

Nor could the facts alleged support a plausible inference of certainly impending harm.

That failure is understandable. Without allegations plausibly establishing that a searcher's identity can be linked to his or her search terms, there virtually never can be harm or certainly impending harm from disclosure of those terms.

Examples from the physical world illustrate the point. Imagine that a person enters a store and asks for "brown lace-up shoes" without giving his name to the salesperson, and the salesperson subsequently reports to the store manager that "a man came into our store and asked for 'brown lace-up shoes.'" The reporting of that query by itself could not inflict real-world harm on the person who made it.

That remains true even if the content of the conversation touches upon matters that might otherwise be sensitive. If an individual asks a librarian for books on "divorce" or "bankruptcy" or a health problem without giving her name—and the librarian subsequently describes the anonymous queries to the research desk manager, or to a book salesperson offering books on those topics—there simply is no legally cognizable effect on the person who asked for the information.

Plaintiffs allege that some searches included the name of the plaintiff conducting the search. But "vanity searches" consisting solely of a name indicate only that someone is searching for information about that individual—they do not reveal anything about the individual or about who is conducting the search.

Neither does the inclusion of an individual's name as one of several terms in a search plausibly support a conclusion that the search terms reveal

personal information about the individual. Because the searcher could be anyone, there cannot be a plausible inference that the search terms involve accurate information about the individual named in the search—indeed, the search could be conducted by someone seeking to confirm that the named individual does not have financial problems or another characteristic related to the search terms. Certainly it is common knowledge that individuals frequently search the name of potential employees, potential dates, and friends in order to gain information about them. See, *e.g.*, Michael Fertik, "Your Future Employer Is Watching You Online," Harvard Business Review (Mar. 3, 2012) https://hbr.org/2012/04/your-future-employer-is-watchi (more than 75% of employers research prospective employees online).[5]

Third, petitioners and plaintiffs rely heavily on an alleged intangible privacy harm. See Pet. Reply Br. 25-26; Class Resp. Br. 55-56. But, as just discussed, the complaint does not explain how the disclosure of plaintiffs' search terms could cause such harm. Merely incanting the term "invasion of privacy" does not state a concrete injury. And the authorities on which they rely only underscore the complaint's failure to plausibly allege concrete harm.

For example, petitioners cite (Reply Br. 25) *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017), for the proposition that "with privacy torts, improper dissemination of

---

[5] Moreover, even if it were plausible to conclude that the search terms revealed accurate information about an individual, disclosure of the particular information here could not plausibly inflict concrete harm. See pages 16-17, *infra*.

information can itself constitute a concrete injury." *Id.* at 638-39. But *Horizon* involved alleged harm from "unauthorized dissemination" of the plaintiffs' own "names," "social security numbers," "medical histories," and "test and lab results." *Id.* at 629. The information allegedly disclosed here is not linked to a plaintiff.

b. *The absence of allegations plausibly linking search terms to the plaintiff conducting the search further confirms the absence of harm or sufficient risk of harm.*

Plaintiffs try to create the impression that search terms can be linked to the plaintiff who conducted the search. But they do not allege facts plausibly supporting that conclusion.

The complaint asserts generally that there is a "Science of Reidentification." Compl. ¶¶ 83-91. But plaintiffs do not allege that this "science" was actually used to link their searches to any plaintiff's identity.

Neither do plaintiffs plausibly allege a certainly impending risk that someone could link any of their searches to their identity. They simply declare that the possibility of reidentification creates a supposed "Imminent Threat" of harm. Compl. at 31; *id.* ¶¶ 92-93. But that conclusory allegation cannot create the necessary plausible inference. *Iqbal*, 556 U.S. at 678.

Moreover, the contention is purely speculative.

Plaintiffs' sole example of anyone tying search terms to a searcher's identity involves a journalist's efforts based on the information revealed in an AOL data release. Compl. ¶ 47. But that release included

much more information than the single search query provided to a website owner through a referrer header. The AOL release revealed an average of more than 30 searches per user as well as cookie contents and other information, allowing the journalist to correlate dozens of each user's searches. *Id*. ¶¶ 45-49; *id.* ¶ 47 (cookies).

A web server operator could obtain information regarding multiple searches only if a plaintiff conducted different searches and each time clicked on the same website, so that the website would receive multiple search queries from the same plaintiff. The operator would also have to keep track of all those queries. None of those prerequisites are alleged in the complaint. (In addition, there is no allegation that any of these website operators separately had access to the cookie and other information revealed in the AOL data release.)

And if those (unlikely) conditions were satisfied, the unidentified third-party website operator "adversary" (not Google) would have to take at least five additional steps described in the complaint (at ¶¶ 83-86):

(1) retrieve and combine these multiple anonymized search queries;

(2) identify "data fingerprints" in those queries;

(3) combine those fingerprints with unspecified other data such as cookies, presumably from other websites but not from referrer headers;

(4) discern individuals' identities and their personal information from this combined, unspecified data; and, finally,

(5) exploit individuals' discovered identities to their detriment.

This lengthy and "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. And it "rest[s] on speculation about the [capabilities and] decisions of independent actors" who are not before the Court. *Id.* at 414. Plaintiffs acknowledge that steps 3 and 4 require "combin[ing]" the information from referrer headers "with outside information to pry out obscured identities." Compl. ¶ 86. But they do not allege any actual combination involving referrer headers from a Google search results page.

Moreover, the complaint does not allege any facts supporting an inference that a referrer header was sent to a web server operated by an "adversary" that had any inclination to, let alone made any effort to, reidentify the plaintiffs or use the referrer information to harm them in some way. And the complaint alleges no facts explaining how any such outside "adversary" would be able to aggregate referrer headers, or link that information to an individual without additional information from additional unnamed third parties.[6]

[6] Plaintiffs also do not allege that any website operator identified them or that they were at substantial risk of being identified from the potential disclosure of their IP addresses. Nor could they: as explained above, there is no public or generally available method for linking an IP address to a computer user's identity.

c. *Even if the alleged search terms could have been linked to the named plaintiffs, disclosure of those terms could not inflict harm or create a sufficient risk of harm.*

Even if plaintiffs had plausibly alleged that their search terms could be linked to them as individuals, they have not plausibly alleged that any such link inflicted or could inflict concrete harm. Their attempted analogy to the public disclosure of private facts still fails, for at least two additional reasons.

First, the Restatement makes clear that it is not an invasion of privacy to communicate a private fact "to a single person or even to a small group of persons." Restatement (Second) of Torts § 652D cmt. a (1977). The particular tort requires "publicity," which is a communication "that reaches, or is sure to reach, the public." *Ibid*. Disclosing a search query to a single website—the website on which a user clicked from Google's search results page—does not in any way resemble the "publicity" required to support a common-law privacy tort claim.

Second, the complaint contains no allegations plausibly alleging a disclosure of *private* information that could give rise to a privacy injury. Gaos and Priyev do not allege any specific searches at all. As for Italiano, most of his searches contain facts that are a matter of public record and are therefore not actionable. "There is no liability when the defendant merely gives further publicity to information about the individual that is already public." Restatement (Second) of Torts § 652D cmt. b.

Italiano references his ongoing divorce proceedings at the time he conducted his searches.

But divorces are matters of public record, including in Italiano's home state of Florida. As the Florida Supreme Court observed long ago, Florida maintains "well-kept public records covering vital statistics, such as * * * divorces"; "the State Bureau of Vital Statistics is the custodian of records that reflect the granting of divorces in every county in Florida." *Teel* v. *Nolen Brown Motors, Inc.*, 93 So.2d 874, 876 (Fla. 1957); see also http://www.floridahealth.gov/certificates/certificates/index.html.

The subjects of most of Italiano's other searches are also matters of public record, including addresses (Fla. Stat. §§ 695.22, 695.26), foreclosures (*id.* § 45.031), and bankruptcies (11 U.S.C. § 107(a)).

Italiano's remaining searches are innocuous and concern nothing that "would be highly offensive to a reasonable person" if disclosed. Restatement (Second) of Torts § 652D & cmt. c. Italiano's link of his name and the word "Facebook" can hardly be considered private. Nor can the names of Italiano and his now ex-wife and the term "forensic accounting."

2. The Stored Communications Act does not elevate the disclosure of every search term to a harm sufficient to establish standing.

This Court identified two inquiries to aid in determining whether an intangible harm not previously deemed sufficient to confer standing has been elevated by Congress to the status of a concrete injury satisfying Article III.

First, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as

providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

Second, if Congress tries to "identify intangible harms that meet minimum Article III requirements," Congress's judgment is "instructive and important." *Ibid.* But "Congress's role * * * *does not mean* that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Ibid.* (emphasis added). Instead, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

The SCA violation alleged in this case fails each test.

a. *Disclosure of a search term is not analogous to a harm actionable at common law.*

Injury in fact may exist when "an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

The focus of analysis is the claimed "intangible harm" and the "harm" that was required to maintain an action at common law. *Ibid.* And the relevant time is the period when the Constitution was ratified: the injury-in-fact requirement ensures that the jurisdiction of federal courts does not expand beyond the "cases" and "controversies" permitted by Article III. See, *e.g.*, *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008); *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000).

Disclosure of a search term, without more, does not have a "close relationship" to any harm recognized at common law.

1. At oral argument, plaintiffs attempted to analogize the claims here to the interception and publication of a letter. But Justice Story's opinion in *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C. D. Mass. 1841) did not recognize an actionable interest against disclosure of every communication. *Folsom* holds only that George Washington's letters and other papers were entitled to *copyright* protection against unauthorized publication. *Id.* at 346-47; see also Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 211 (1890) (recognizing that *Folsom* is based on "the theory of property in the contents of letters"); *Woolsey* v. *Judd*, 1855 WL 6410 (N.Y. Super. 1855) (right to enjoin publication of letters based on writer's "right of property").

Copyright confers a concrete "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932). And copyright's status as a protected property interest is well grounded in the common law. See *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-55 (1998) (collecting English and early American cases).

Plaintiffs also pointed at oral argument to the government's briefing in *Bartnicki* v. *Vopper*, which explained that the common law prohibited "the publication of a private letter without the author's consent." U.S. Reply Br. 9-10 & n.6, *Bartnicki* v. *Vopper*, 2000 WL 1755243 (Nov. 27, 2000). But again, those cases are based on a property right in letters that has no analog here.

In addition, the search terms embedded in the webpage address in the referrer header are nothing like the contents of a private letter. They are not sealed, but rather shared with the search engine. In other words, they are more akin to a written research query to a librarian than to a locked diary. Nor, for the reasons explained above, is there publication of private facts. See page 16, *supra*.

These fundamental distinctions undermine petitioners' reliance on the Ninth Circuit's opinion on remand in *Spokeo* for the proposition that an alleged injury "need not 'exactly track[]' the common law." Reply Br. 26 (quoting *Robins*, 867 F.3d at 1115). Whatever the merits of that determination, *Spokeo* at least involved allegedly false information *tied to a specific person*. The absence of any similar link here to the person conducting the search underscores that any relationship between the plaintiffs' alleged injury and the harm that would support an action at common law is remote rather than "close," as *Spokeo* requires. 136 S. Ct. at 1549.[7]

2. Common-law privacy torts provide no basis for standing-by-analogy, as they arose more than a century after the Framing. "Prior to 1890 no English or American court had ever expressly recognized the existence of the right [to privacy]." Restatement (Second) of Torts § 652A cmt. a.

In any event, privacy torts generally require proof of harm. See *id.* §§ 652A, 652H. This Court has acknowledged "the traditional understanding that

---

[7] Plaintiffs pointed to this Court's Fourth Amendment cases. Class Resp. Br. 56. But the Fourth Amendment does not apply to private parties. See, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed." *Doe* v. *Chao*, 540 U.S. 614, 621 (2004) (citing PROSSER AND KEETON ON LAW OF TORTS § 30 (5th ed. 1984)).

To be sure, some "privacy * * * torts" permit recovery for "presumed damages" calculated "without reference to specific harm." *Ibid.* But presumed damages, like statutory damages, merely avoid problems of quantifying a nonmonetary harm that actually occurred; they are "an estimate, however rough, of the probable extent of *actual loss* a person had suffered and would suffer in the future." PROSSER ON TORTS, *supra*, § 116A (emphasis added); see also *Memphis Cnty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986) (liquidated statutory damages "roughly approximate the harm that the plaintiff suffered" from the violation—because "ordinary compensatory damages" are too difficult to quantify).

In sum, the disclosure of search terms to third-party websites through referrer headers alleged here does not resemble the public disclosures of private facts that may support a common-law privacy tort.

b. *Congress did not elevate disclosure of every search term to an actionable intangible harm.*

The SCA does not embody any "instructive" judgment by Congress (*Spokeo*, 136 S. Ct. at 1549) that all disclosures of communications should be actionable even if the plaintiff's allegations do not satisfy the ordinary standards of harm.

In other contexts where Congress legislates against the backdrop of default rules, courts have consistently held that Congress must expressly state its intent to displace the general rule.[8] The same approach should govern here: A statute cannot be interpreted to expand the class of persons entitled to sue without (at minimum) some indication in the text that Congress intended that effect.

Indeed, in explaining Congress's ability to elevate a formerly non-actionable harm to the status of an injury in fact, this Court cited (*Spokeo*, 136 S. Ct. at 1549) "Justice Kennedy's concurrence" in *Lujan* v. *Defenders of Wildlife*, which in turn explained that, if Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before[,] * * * Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit*." 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (emphasis added). It would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

There is no such "indication" in the SCA.

First, plaintiffs and petitioners contend that Congress recognized and elevated to the status of concrete injury all disclosures prohibited by the SCA.

---

[8] See, *e.g.*, *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013); *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991).

But just as the Court in *Spokeo* held that the FCRA does not make all inaccuracies actionable because "not all inaccuracies cause harm or present any material risk of harm" (136 S. Ct. at 1550), the SCA cannot be read to make all disclosures actionable. See also *Hancock*, 830 F.3d at 514 (explaining that, under *Spokeo*, "some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law").

The absence from the SCA's text of any indication that Congress intended to expand the class of intangible injuries sufficient to support a lawsuit therefore requires rejection of the contention that the statute has that effect.

Second, Congress limited the availability of a private cause of action to a "person *aggrieved* by any violation of this chapter." 18 U.S.C. § 2707(a) (emphasis added). The inclusion of that additional requirement precludes any conclusion that Congress intended to expand the class of eligible plaintiffs. Indeed, the Court has held that the statutory term "aggrieved" may be even more restrictive than the generally applicable Article III standard of injury—by requiring the plaintiff also to show that he "falls within the zone of interests sought to be protected by the statutory provision." *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170, 176-78 (2011). Thus, the SCA's text reflects a congressional judgment *not* to expand the class of persons entitled to sue.[9]

---

[9] In rejecting a challenge to a plaintiff's "prudential standing" in an earlier case, the Court associated "the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). That observation may not survive Justice Scalia's opinion in *Thompson*. See *Akins*, 524 U.S. at 30 (Scalia, J., dissenting) (arguing that the Court's

Third, the minimum damages provision does not show that Congress intended to create a new class of actionable harms. The FCRA contains a statutory damages provision for a willful violation of any of the statute's requirements. 15 U.S.C. § 1681n. But the *Spokeo* Court recognized that "[a] violation of one of FCRA's procedural requirements may result in no harm" and remanded for consideration of "whether the particular procedural violations entail a degree of risk sufficient to meet the concreteness requirement" (136 S. Ct. at 1550)—a remand that would have been unnecessary if the statutory damages provision sufficed to satisfy Article III.

C. Even if the complaint's allegations were sufficient, Google would be entitled to an evidentiary hearing to disprove the relevant allegations.

Standing is not conclusively established merely because the complaint's allegations are sufficient. A "factual" challenge to standing "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Leite* v. *Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). "[T]he plaintiff must support her jurisdictional allegations with 'competent proof,'" and it is generally for the district court to resolve any "disputed factual issues" on which the existence of jurisdiction depends. *Id.* at 1121-22 (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 96-97 (2010)).

---

interpretation of "aggrieved" "deprives it of almost all its limiting force"). But whether "aggrieved" encompasses a broader or narrower range of plaintiffs with conventional standing, the word certainly does not *expand* the category of injuries that confer standing.

If this Court holds that the complaint plausibly alleges injury in fact, then Google or an *amicus* would be entitled to question the veracity of the facts alleged in the complaint and have those factual disputes resolved by the district court before plaintiffs' standing could be conclusively established under *Spokeo* and *Clapper*.

CONCLUSION

The judgment of the court of appeals should be vacated and the action remanded with directions to dismiss for lack of Article III standing.

Respectfully submitted.

RANDALL W. EDWARDS
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
(415) 984-8716
redwards@omm.com

JED W. GLICKSTEIN
SAMANTHA C. BOOTH
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

DONALD M. FALK
Counsel of Record
EDWARD D. JOHNSON
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

ANDREW J. PINCUS
BRIAN D. NETTER
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondent Google LLC

NOVEMBER 2018