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 FOR RESPONDENT GOOGLE LLC


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Plaintiffs and petitioners do not—and cannot—maintain that the complaint plausibly alleges a concrete injury. While they vaguely assert harm and refer generally to a few search terms, plaintiffs' complaint does not allege reidentification of any named plaintiff or injury based on specific search terms.

Their principal submission, therefore, is that every disclosure of search terms contained in referrer headers and alleged to violate the SCA produces Article III injury—even when the person conducting the search is neither identified nor identifiable and the disclosure inflicts no real-world harm.

As we and the government have explained, there "is no historical or other evidence that violations of the SCA categorically create concrete harm." Gov't Br. 19; Google Br. 17-24.[1] Plaintiffs and petitioners cannot undermine that conclusion with inapt analogies between the routine browser function at issue here and the publication of private letters. And neither their misinterpretation of *Spokeo* nor their pivot to their state common-law claims cures plaintiffs' deficient standing.

### A. Plaintiffs Do Not Plausibly Allege That Disclosure Of Their Particular Searches Inflicted Article III Injury.

Neither plaintiffs nor petitioners seriously defend standing based on the complaint's allegations about the three plaintiffs' searches.

*First*, no party disputes that allegations supporting standing must satisfy the plausibility standard of *Iqbal* and *Twombly*. Google Br. 8-9; Pet.

[1] Cited briefs are the supplemental opening briefs on standing.

Br. 6. The complaint's conclusory assertion of "actual harm" cannot suffice. See Google Br. 10.

*Second*, plaintiffs and petitioners cannot plausibly demonstrate concrete harm based on the complaint's allegations about plaintiffs' particular searches. They say that search terms reveal private "interests, fears, desires, vanities" (Class Br. 13; see also Pet. Br. 13-14), but do not explain how the specific searches alleged here do so.

Indeed, they do not mention Gaos's searches at all. Of Priyev, they say only that he searched for "sensitive" information. Class Br. 18.

And they offer no plausible explanation how searches for Italiano's and his former wife's name along with another word or two reveal "dark corners of the marital dissolution" or "sacred confidences which subsist between husband and wife." Pet. Br. 14. They do not. See Google Br. 16-17; Gov't Br. 17-19.

*Third*, the allegations about reidentification are wholly speculative and do not come close to satisfying *Clapper* v. *Amnesty International, USA*, 568 U.S. 398 (2013). See Gov't Br. 20-21; Google Br. 13-15.

To begin with, neither plaintiffs nor petitioners argue that the complaint alleges that any plaintiff was reidentified using search terms contained in referrer headers—whether by themselves or in combination with anything else.

They invoke the complaint's allegations regarding the AOL data release (Pet. Br. 10, Class Br. 18-19), but we explained in our opening brief (at 13-14) why the data released there are nothing like

the isolated search terms at issue here. AOL revealed an average of more than 30 searches per user (grouped by user), cookie contents, and other information. On plaintiffs' own theory, reidentification requires multiple data points that (unlike a single search term) permit narrowing the pool of possible users. But the complaint does not allege that Google disclosed "multiple pieces of information from which a website operator could reconstruct [plaintiffs'] identities." Gov't Br. 21.[2]

Petitioners mention IP addresses (Br. 22), but allege no publicly available method of linking an IP address to a computer user's identity. See Google Br. 4-5, 15 & n.6. The article petitioners cite says nothing about referrer headers, and recognizes the need to subpoena information from an Internet Service Provider in order to obtain even potentially reliable information about a computer user's identity based on the IP address assigned to that user's device. Kashmir Hill, *How to Bait and Catch the Anonymous Person Harassing You on the Internet*, Forbes (Sept. 28, 2012).

Finally, plaintiffs point (Class Br. 18) to an allegation quoting a Google employee about potential privacy risks associated with search terms. But the quote addressed disclosing information "such as a credit card [or] social security number * * * that can only be tied to one person." Compl. ¶ 42. While particular search terms of that kind conceivably might raise a sufficient risk of harm—for example, of

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[2] The oral argument question petitioners quote (Pet. Br. 14) assumes identification of the searcher and disclosure of a history of her searches. That is not what is alleged here. See Google Br. 11 (disclosure more like anonymous query about shoes or asking librarian for books without providing name).

identity theft by a third party—the search queries alleged here are nothing like that.

### B. Every Disclosure Of A Communication Or Private Information Has Not Historically Been—And Is Not Today—Automatically Actionable In Court.

The crux of plaintiffs' and petitioners' position is that every disclosure of a search term in a referrer header, no matter how "innocuous" (Pet. Br. 14; see also Class Br. 5-18), by itself establishes standing. They posit a long tradition permitting legal actions based on disclosure of any private information or any communication.

No such tradition exists.

1. Both plaintiffs and petitioners emphasize *Doe* v. *Chao*, 540 U.S. 614 (2004). See Class Br. 15-16; Pet. Br. 15, 18-19. But the statute in *Doe*—the Privacy Act of 1974—provided a cause of action only when a government agency violates the statute "*in such a way as to have an adverse effect on an individual*." 5 U.S.C. § 552a(g)(1)(D) (emphasis added). This Court upheld standing based expressly on the statutory requirement of an "adverse effect": "an individual subjected to an adverse effect has injury enough to open the courthouse door." 540 U.S. at 624-25.

Thus, far from indicating that disclosure of information automatically establishes standing, *Doe* confirms that a real-world harm—satisfied there by the "adverse effect" requirement—is needed to satisfy Article III.

Petitioners also point to court of appeals decisions that found standing under the Video

Privacy Protection Act. Pet. Br. 11-12. But that statute, unlike the SCA, requires disclosure of a plaintiff's "personally identifiable information," 18 U.S.C. § 2710(a)-(b), that is, "information connecting a certain user to certain videos." *In re Hulu Privacy Litig.*, 86 F. Supp. 3d 1090, 1095 (N.D. Cal. 2015). That weighs *against* the contention that disclosure of any search terms, without a link to the individual, is sufficient.

2. Plaintiffs and petitioners attempt several analogies, but none fits.

*First*, the common-law authorities protecting private letters from unauthorized publication (Class Br. 5-10, Pet. Br. 8-9) all rested on the author's property interest in the letters, as plaintiffs acknowledge. Class Br. 7-8, 10; see also Google Br. 19.

Nothing in the provisions of the SCA at issue here grants to an individual initiating a search a property right in the information embedded in referrer headers. See Pet. Br. 20 & n.9.

The enactment of a statutory standard combined with a cause of action for its violation does not itself create a property right. The bare right to sue is "an entitlement to nothing but procedure." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 764 (2005); see also, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-75 (1999) (Lanham Act false-advertising provisions do not create a property interest).

*Spokeo* confirms as much. If a statutory standard of conduct plus a private right of action created an actionable property right, this Court could not have held that "Article III standing requires a concrete

injury even in the context of a statutory violation." 136 S. Ct. 1540, 1549-50 (2016). And it would have been meaningless for the Court to remand for the lower courts to consider "whether the particular procedural violations alleged * * * entail a degree of risk sufficient to meet the concreteness requirement." *Ibid.*

Congress properly may be reluctant to create property interests because of the collateral consequences that accompany them, such as the protections of procedural due process or the Takings Clause. See, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). That is why, if Congress intended to create a property right, "we would expect to see some indication of that in the statute itself." *Gonzales*, 545 U.S. at 765.

Plaintiffs and petitioners have identified no "indication" in the SCA that Congress intended to create a property right in the information embedded in referrer headers.[3]

*Second*, the common-law cases all involved letters or other communications where the author or speaker was identified. *None* involved anonymous communications. But the complaint here does not allege facts plausibly supporting the conclusion that search terms can be linked to the plaintiff who conducted the search. See Google Br. 13-15.

*Third*, the analogy to breach of confidence (Class Br. 10-12) fails because (1) the cases again rest on a

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[3] Plaintiffs incorrectly assert (Br. 12) that Google's Terms of Service create a property right by clarifying that users "'retain ownership of any intellectual property rights'" they already hold in content submitted to Google. Compl. ¶ 35. That preserves existing property rights without creating new ones.

property interest absent here; and (2) the complaint does not allege a special relationship of confidence between plaintiffs and Google remotely similar to the kind needed to support a claim at common law. *E.g.*, *Morison* v. *Moat*, 68 Eng. Rep. 492, 493 (1851) (trade secret obtained through business partnership); *Yovatt* v. *Winyard*, 37 Eng. Rep. 425, 426 (1820) (medical recipes obtained through apprenticeship); *Peabody* v. *Norfolk*, 98 Mass. 452, 452 (1868) ("property interest" in manufacturing process obtained "while engaged in * * * service" of the inventor).

Petitioners rely (Br. 16) on a law review article *proposing* a breach of confidence cause of action against search engines—underscoring that the analogy finds no support in established common law. As another cited article acknowledges, the breach of confidence tort "has not fully penetrated into the culture of American privacy law." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 156 (2007). The tort "applies only to a limited set of relationships, with most cases involving the patient-physician relationship." *Id.* at 158 (emphasis added).

*Fourth*, the attempted analogy to the common-law tort of public disclosure of private facts fails for the reasons discussed in the supplemental briefs: the disclosure is not public and the "facts" are not private. Google Br. 20-21; Gov't Br. 14-19.

*Fifth*, plaintiffs and petitioners also invoke this Court's Fourth Amendment decisions. Class Br. 14-15; Pet. Br. 9-10. But as Google explained (Br. 20 n.7), the complaint does not allege any form of state action or governmental search and seizure.

### C. Congress In The SCA Did Not Elevate Every Search Term Disclosure To An Actionable Intangible Harm.

As the government explains (Br. 13), "nothing in the SCA's text or history indicates that Congress sought to allow suit for injuries arising from disclosures of the kind plaintiffs allege." The statute's "aggrieved" requirement confirms that conclusion. 18 U.S.C. § 2707(a).

Plaintiffs contend (Br. 16) that Congress intended to give anonymous communications the "legal 'sanctity and privacy' enjoyed by letters." But that sweeping pronouncement rests on a single representative's floor statement that says nothing about letters—much less anonymous communications not linked to the author or speaker. 132 Cong. Rec. H4045-H4046 (June 23, 1986) (statement of Rep. Kastenmeier). This Court has repeatedly held that "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012).

Petitioners argue (Br. 11) that any violation of a "substantive" rather than "procedural" statutory right satisfies Article III's concreteness requirement. But the distinction between substantive and procedural rights is hopelessly malleable "because it depends entirely on the framing of the right." *Bassett* v. *ABM Parking Servs., Inc.*, 883 F.3d 776, 782 (9th Cir. 2018). And it does not address the dispositive question: whether the violation has caused the plaintiff real harm or a certainly impending risk of harm. "[O]ne of the lessons of *Spokeo*" is that "[a] violation of a statute that causes no harm does not trigger a federal case"—so "whether the right is characterized as 'substantive' or 'procedural,' its

violation must be accompanied by an injury-in-fact." *Meyers* v. *Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 n.2 (7th Cir. 2016); see also, *e.g.*, *Bassett*, 883 F.3d at 782 n.2 (court "must always analyze whether the alleged harm is concrete").

Petitioners also argue, based on Justice Thomas's concurrence in *Spokeo*, that Congress' creation of any private right establishes standing to sue for a violation of that right. Pet. Br. 16-21. But no other Member of the Court joined that opinion, which cannot override the plain language of the Court's opinion requiring that a plaintiff prove a "concrete" harm resulting from the alleged statutory violation. 136 S. Ct. at 1549; see Google Br. 17-18. Petitioners' implicit invitation to overrule *Spokeo* should be rejected—especially in light of *stare decisis*.

Finally, plaintiffs note that the SCA authorizes injunctive relief and restitution in addition to actual damages. Class Br. 16-17. But the availability of those remedies reveals no congressional judgment expanding the class of persons entitled to sue. Standing for injunctive relief requires the plaintiff to show real and immediate threatened injury. *E.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102-03 (1983). And the common law of restitution requires enrichment at the plaintiff's expense. See pages 11-12, *infra*.

### D. Plaintiffs' State Common-Law Claims Do Not Confer Standing.

#### 1. *Breach of contract.*

The breach of contract claim does not give plaintiffs standing.

*First*, plaintiffs try to rest standing on an allegation of breach without other alleged harm. But see *Marzetti* v. *Williams,* 109 Eng. Rep. 842, 845 (1830) (breach warranting nominal damages brought "discredit" on plaintiff and thus was "injurious in fact"). At a minimum standing on that theory requires alleged facts plausibly demonstrating that a breach occurred. A contrary rule would yield the absurd result that any plaintiff who put the words "breach of contract" in a complaint would satisfy Article III—even without plausibly alleging a breach (or a contract).

Plaintiffs do not come close to such a plausible claim here. Their contract claim is based on their assertion (Br. 20) that the search terms contained in referrer headers constitute "personal information." Compl. ¶¶ 25, 29, 144. But that term was defined as information that "personally identifies you" or can be linked to such information. Compl. ¶ 26. The complaint does not plausibly allege that plaintiffs' search terms met that definition.[4]

*Second*, California law requires "resulting damages to the plaintiff" in order to state a breach of

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[4] Plaintiffs also cite the Complaint's reference (¶ 144) to "personally-identifiable information," but that term is no different than "personal information" and therefore adds nothing.

Plaintiffs also point (Br. 12) to a Google policy about users' Web History—a record some users keep of their activity on Google and information about the webpages they visit. But the complaint does not plausibly allege facts showing that any plaintiff's Web History was disclosed to third-party website operators through referrer headers, which identify only the immediately preceding website. Google Br. 3-4.

contract claim. *Oasis West Realty, LLC* v. *Goldman*, 51 Cal. 4th 811, 821 (2011). Thus, California has determined that a plaintiff may not plead a breach of contract claim without concrete harm or sufficient risk of harm resulting from the breach, even if nominal damages might be available should damages not be proved.

Consistent with that understanding, lower courts have dismissed breach of contract claims for lack of Article III standing where the plaintiff failed to allege the requisite harm or risk of harm.[5] The district court in this case did so earlier in the litigation, because "Gaos does not identify what injury resulted from this dissemination" of her search terms or "plead facts sufficient to show that the disseminated information is of a nature that places her in imminent danger of harm." JA 26-27.

2. *Quasi-contract.*

Plaintiffs also maintain that the availability of unjust enrichment as a remedy for quasi-contract claims establishes injury in fact. Class Br. 21-22.

But the law of unjust enrichment creates a remedy that can be awarded only if the plaintiff is harmed by the misuse of his property—a property interest that is absent here. Restatement (First) of Restitution § 1 cmt. e (1937) (restitution may be available when a defendant "wrongfully disposes of the property of another" even if plaintiff suffered no economic loss). The action lies against "unjust enrichment by the defendant *at the expense of the*

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[5] See, *e.g.*, *Cahen* v. *Toyota Motor Corp.*, 717 F. App'x 720, 723 (9th Cir. 2017); *Reilly* v. *Ceridian Corp.*, 664 F.3d 38, 41-46 (3d Cir. 2011); *In re Google, Inc. Privacy Policy Litigation*, 2012 WL 6738343, at *6 (N.D. Cal. Dec. 28, 2012).

*plaintiff*." *Stone* v. *White*, 301 U.S. 532, 534 (1937) (emphasis added); see Restatement (First) of Restitution § 1.

Whether a court ultimately chooses to *quantify* a remedy based on a defendant's gain is beside the point: The plaintiff must show concrete harm or impending risk of harm from the defendant's conduct. In any event, the complaint's conclusory allegations that "Google is now *effectively* selling search queries to paying advertisers" and "has increased its revenues and profits" (Compl. ¶¶ 82 (emphasis added), 156) do not plead facts creating a plausible inference that Google profited from the referrer header function.[6]

[6] As we explained (Br. 24-25), if the Court holds that the complaint plausibly alleges injury in fact, then Google or an *amicus* would be entitled to an opportunity to disprove the relevant allegations. Petitioners are wrong to suggest (Br. 3-4) that every class-action settlement would require an evidentiary hearing: a party or the court must raise a factual challenge to the complaint's allegations.

## 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.

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