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.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
KATHERINE TWOMEY ALLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The United States respectfully submits this brief in response to the Court's order of November 6, 2018, which directed the parties and the Solicitor General to address "whether any named plaintiff has standing such that the federal courts have Article III jurisdiction over this dispute." In the government's view, none of the named plaintiffs has Article III standing.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

SUMMARY OF ARGUMENT

The Court granted certiorari in this case to review the approval of a class-action settlement involving *cy pres* distributions. As the government contended in its merits-stage amicus brief, the district court could not have approved the settlement unless it had jurisdiction,

which required that at least one of the named plaintiffs had Article III standing.

In contending that they have standing, the named plaintiffs appear to allege two distinct injuries arising from alleged violations of the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.* First, they allege that the disclosure of their search terms itself inflicted a harm, even though the disclosures did not identify them as the individuals who performed the searches. Second, they appear to allege that the disclosures created a risk of harm by enabling third parties to "reidentify" them and connect them to particular searches.

Neither of those alleged harms constitutes an injury in fact sufficient for Article III standing. In *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), this Court explained that determining whether an alleged statutory violation creates an Article III injury requires evaluating both the judgment of Congress and history. Here, Congress has not conveyed any express judgment that litigants in the named plaintiffs' position should be allowed to sue. The SCA simply states any "person aggrieved" by a knowing violation of the statute may recover in a civil action, 18 U.S.C. 2707(a)—a general statement that incorporates but does not seek to expand the range of plaintiffs permitted to sue under Article III.

Likewise, history does not suggest that the named plaintiffs' first alleged harm would have provided the basis for a lawsuit at common law. Nothing in the common law suggests that disclosures of the kind forbidden by the SCA categorically create concrete harms. And the harms plaintiffs actually allege are distinct from the closest common-law analog—the tort of public disclosure of private facts—in multiple significant ways.

Plaintiffs' second alleged harm is closer to an injury that would have been recognized at common law. But plaintiffs' allegations of potential "reidentification" are too speculative to satisfy the standing requirement. The Court should accordingly vacate the judgment below and remand with directions to dismiss for lack of jurisdiction. In the alternative, in keeping with the principle that this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should vacate and remand for the lower courts to address the standing question in the first instance.

ARGUMENT

NONE OF THE NAMED PLAINTIFFS HAS ARTICLE III STANDING

A. The Need To Demonstrate Article III Standing

This dispute arises from consolidated class actions brought against respondent Google, Inc., alleging violations of the SCA and related state-law claims. See Pet. App. 3. In the putative class action brought by named plaintiff Paloma Gaos, the district court dismissed the state-law claims for lack of Article III standing but allowed the SCA claim to proceed. J.A. 26-31. Gaos amended the complaint to add named plaintiff Anthony Italiano, and the district court consolidated a putative class action asserting similar claims filed by named plaintiff Gabriel Priyev. J.A. 82, 84-85.

The parties entered into a settlement agreement that consisted primarily of *cy pres* relief. Pet. App. 5. After a hearing to address petitioners' objections, the district court overruled the objections, certified the class, approved the settlement, and awarded attorney's fees. *Id.* at 34-60. The court entered a "final judgment" that dismissed the case with prejudice and imposed the

settlement as "binding" on the parties, with "*res judicata* and preclusive effect." *Id.* at 64-65. The court stated that it had "appropriate subject matter jurisdiction" and would "continue to have jurisdiction over," *inter alia*, the "implementation, enforcement, and administration" of the settlement. *Id.* at 63, 65-66.

Approving that settlement required Article III jurisdiction. See U.S. Merits Amicus Br. 11-15. In ordinary non-class litigation, parties can settle disputes on their own terms, and plaintiffs can voluntarily dismiss their claims "without a court order." Fed. R. Civ. P. 41(a)(1)(A). But in a class action, the "claims, issues, or defenses of a certified class * * * may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The court-approval requirement reflects the distinctive nature of class-action settlements, which release "the claims of absent class members," even though those class members are "not themselves part of the settlement negotiations." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:1, at 273 (5th ed. 2014). The court-approval requirement also makes class-action settlements different from non-class settlements as a jurisdictional matter. Because an approved class-action "settlement takes the form of a judgment of the court," the court can only approve such a settlement if it has "Article III power." *Robertson* v. *Allied Solutions, LLC*, 902 F.3d 690, 698 (7th Cir. 2018).

Here, determining whether the district court had Article III power requires determining whether the plaintiffs had Article III standing. In a class action, there must "be a named plaintiff who has" Article III standing "at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23." *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975).

Thus, as the Court's supplemental briefing order suggests, if no named plaintiff had standing in the district court, the suit should be dismissed.[1]

B. The Named Plaintiffs' Allegations

1. Plaintiffs' alleged statutory violation

Plaintiffs allege that Google violated the SCA, a federal statute that includes several provisions regarding disclosure of electronic communications. See 18 U.S.C. 2701-2703. Section 2703 authorizes the government to "require the disclosure" of certain communications or records if it satisfies a statutory standard. 18 U.S.C. 2703(a); see, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2221 (2018); *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186, 1187 (2018) (per curiam). The SCA provision at issue here, Section 2702, prohibits certain information service providers (ISPs) from voluntarily disclosing "to any person or entity the contents of" a "communication" stored, carried, or maintained by the ISP. 18 U.S.C. 2702(a)(1)-(2); see *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1103-1105 (9th Cir. 2014).

Section 2707(a) creates a private right of action that, as relevant here, entitles any "person aggrieved" by a knowing violation of the SCA to "recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. 2707(a). "[A]ppropriate relief" includes

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[1] As the government explained in its merits-stage amicus brief (at 22-25), the requirement that a court have Article III jurisdiction to enter a class-action settlement also means that the relief sought must "redress the alleged injury" that gave rise to the suit. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

equitable or declaratory relief, damages, and attorney's fees. 18 U.S.C. 2707(b). In a damages action, a court may award "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. 2707(c).

Plaintiffs allege that, when they perform a Google search and click on a link to a new website, Google transmits their search terms to the destination website through a "referrer header." Consolidated Compl. (Compl.) ¶¶ 57-58; see *Zynga*, 750 F.3d at 1101-1103 (discussing referrer headers). That transmission, plaintiffs allege, constitutes a knowing disclosure of the "contents of" a "communication" in violation of the SCA. 18 U.S.C. 2702(a)(1)-(2); see Compl. ¶¶ 136-137.

2. Plaintiffs' alleged harms

Although there is some ambiguity on this point, see Oral Arg. Tr. 30, the named plaintiffs appear to assert two related harms resulting from Google's alleged SCA violation: the disclosure of their search terms absent any information identifying plaintiffs as the users who conducted the searches, and the risk that those disclosures will be used to "reidentify" plaintiffs and connect them to particular searches, see *id.* at 69-70.

First, the named plaintiffs allege that the disclosure of their search terms itself inflicted a harm, even if they were not identified as the persons who had performed the searches. Compl. ¶¶ 104, 111, 116. Specifically, Gaos alleges that she "conducted numerous searches, including 'vanity searches' for her actual name and the names of her family members." Compl. ¶ 101. Priyev alleges that he "conducted numerous searches, including searches for financial and health information."

Compl. ¶ 115. Italiano alleges that he "conducted numerous searches," including searches for his name and his home address, "bankruptcy," "foreclosure proceedings," "short sale proceedings," "Facebook," the name of his then soon-to-be ex-wife, and "forensic accounting." Compl. ¶ 107. All three named plaintiffs allege that they "suffered actual harm in the form of Google's unauthorized and unlawful dissemination of" those "search queries, which sometimes contained sensitive personal information, to third parties." Compl. ¶¶ 104, 111, 118. Italiano alleges that "many of his searches related directly or indirectly to his divorce proceedings—exactly the sort of personal, confidential searches that he did not want disclosed to third parties without his knowledge or consent." Compl. ¶ 108.

Second, the named plaintiffs also appear to allege that the disclosure of their search terms inflicted a separate harm by creating a risk that third parties would "reidentify" them and connect them to particular searches. See Oral Arg. Tr. 28-32, 38-39, 43-44, 69. The complaint contains allegations about the "science of reidentification," a "relatively new area of study in the computer science." Compl. ¶¶ 83, 92; see Compl. ¶¶ 83-91. Drawing largely from a law-review article, Compl. ¶ 83 & n.55, plaintiffs allege that "reidentification creates and amplifies privacy harms" by allowing third parties to "connect[] the dots of 'anonymous' data and trac[e] it back to a specific individual," Compl. ¶ 84. Plaintiffs do not, however, allege that their searches actually led to reidentification.

C. The Standing Inquiry After *Spokeo*

1. To invoke a federal court's jurisdiction, a party must establish "three elements" of standing: (1) an "injury in fact" (2) caused by the defendant's conduct and

(3) redressable by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *id.* at 561. The central question here is whether any harm the named plaintiffs allegedly suffered constitutes an "injury in fact." *Id.* at 560. To establish injury in fact, a plaintiff must show "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent, not conjectural or hypothetical.'" *Ibid.* (citations and internal quotation marks omitted).

In many cases, the injury-in-fact inquiry is straightforward, as when a plaintiff alleges that that he has suffered economic loss or another well-recognized form of harm as a result of the defendant's violation of the law. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262-263 (1977). In other cases, however, plaintiffs allege that the injury in fact is the legal violation itself. The Court has explained that an Article III injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (citation and internal quotation marks omitted). At the same time, the Court has stated that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009); see *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

The Court addressed those twin principles in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). There, a plaintiff alleged a violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, which requires con-

sumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. 15 U.S.C. 1681e(b). The FCRA also includes a civil-liability provision stating that "[a]ny person who willfully fails to comply with any requirement imposed" by the statute "with respect to any consumer is liable to that consumer," for specified damages. 15 U.S.C. 1681n(a). The plaintiff in *Spokeo* alleged that a consumer reporting agency had disseminated inaccurate information about him. See 136 S. Ct. at 1546. The Ninth Circuit held that he had alleged a sufficiently "'concrete and particularized'" injury because "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins* v. *Spokeo, Inc.*, 742 F.3d 409, 412 (2014) (citation omitted).

This Court vacated that decision, clarifying that a plaintiff does not "automatically satisf[y] 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." *Spokeo*, 136 S. Ct. at 1549. The Court explained that the Ninth Circuit had failed to account for the requirement that "an injury in fact must be both concrete *and* particularized." *Id.* at 1548. Although the *Spokeo* plaintiff may have alleged a particularized injury, the Court emphasized that "Article III standing requires a *concrete* injury even in the context of a statutory violation." *Id.* at 1549 (emphasis added).

The Court explained that a concrete injury "must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. A concrete injury, however, need not be tangible. *Id.* at 1549. "In determining whether an intangible harm constitutes injury in fact," the Court explained, "both history and the judgment of Congress

play important roles." *Ibid.* As to history, "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." *Ibid.* "In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Ibid.*

In applying those principles, the Court explained that "the risk of real harm" can in some circumstances "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. Thus, plaintiffs alleging certain statutory violations can establish a concrete injury without alleging "any *additional* harm." *Ibid.* For example, the common law "has long permitted" recovery for libel and slander *per se* without any additional showing of harm. *Ibid.* The Court concluded, however, that the FCRA violations alleged in *Spokeo* did not *categorically* constitute concrete injuries. Rather, the Court determined, some FCRA violations "may result in no harm" and no "material risk of harm." *Id.* at 1550. For example, the Court explained that it "is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Ibid.*

2. Like the Ninth Circuit's initial decision in *Spokeo*, the district court's standing decision here relied entirely on the allegation of a statutory violation to create an Article III injury. J.A. 27. The named plaintiffs continue to rely on the statutory violation itself, as opposed to any economic or other additional harm, to create the injury in fact required for Article III standing. See Class Resps. Br. 56; Oral Arg. Tr. 68-70. Determining whether any of the named plaintiffs had standing thus requires analyzing whether any of their asserted harms

constitutes an Article III injury under the principles articulated in *Spokeo*.

D. The Disclosure Of Plaintiffs' Search Queries Without Any Identifying Information Does Not Constitute A Concrete Harm

The named plaintiffs' first asserted harm—Google's disclosure of their search terms without any information identifying them as the users who performed the searches—does not create a concrete injury under *Spokeo*. Unlike in *Spokeo*, Congress has not expressed a judgment that persons suffering the harm plaintiffs allege should have a right to sue. Nor does plaintiffs' alleged harm have "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 alleged disclosure of plaintiffs' search terms alone therefore does not create Article III standing.

1. Congress has not expressed a judgment that the harm alleged by the named plaintiffs constitutes a concrete injury

Spokeo explained that the "judgment of Congress" plays an important role in determining whether an alleged injury is concrete. 136 S. Ct. at 1549. The statute at issue in *Spokeo* provided that a person who committed a knowing violation "*with respect to any consumer* is liable to *that consumer*." 15 U.S.C. 1681n(a) (emphases added). That statement conveyed Congress's judgment that a statutory violation with respect to particular persons—"consumer[s]," as defined by the FCRA, 15 U.S.C. 1692a(3)—constituted an injury sufficient to justify a suit. Such an express congressional judgment

is "instructive" in determining whether the alleged statutory violation is sufficiently "concrete" to satisfy Article III. *Spokeo*, 136 S. Ct. at 1549; see U.S. Amicus Br. at 25, *Spokeo*, *supra* (No. 13-1339) (U.S. *Spokeo* Br.) ("By providing that '[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to *that consumer*,' 15 U.S.C. 1681n(a) (emphasis added), the statute requires a concrete and particularized link between the plaintiff and the alleged violation.") (brackets in original).

The statute at issue in *First American Financial Corp.* v. *Edwards*, 567 U.S. 756 (2012) (per curiam), in which this Court considered but ultimately dismissed as improvidently granted a question similar to the one it resolved in *Spokeo*, also conveyed an express congressional judgment. *Id.* at 757. *Edwards* involved a provision of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, that made a statutory violator "liable to the *person or persons charged for the settlement service* involved," 12 U.S.C. 2607(d)(2) (emphasis added). That provision indicated Congress's express judgment that a particular class of plaintiffs—persons charged for settlement services—had suffered an injury sufficient to justify suit. See U.S. Amicus Br. at 21-24, *Edwards*, *supra* (No. 10-708).

By contrast, the SCA provision at issue in this case contains no such express congressional judgment about particular injuries that give rise to suit. The SCA's private right-of-action provision simply states (in relevant part) that any "person aggrieved by any" knowing violation of the statute "may, in a civil action, recover from the person or entity * * * which engaged in that violation." 18 U.S.C. 2707(a). As this Court has explained, a statutory reference to any "person aggrieved" reflects

Congress's intent to allow suit by plaintiffs with Article III standing that are within the statute's zone of interest. See *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 177-178 (2011); *Federal Election Comm'n* v. *Akins*, 524 U.S. 11, 19-20 (1998). Such a statement does not, however, express a judgment about which particular injuries are sufficiently concrete to satisfy Article III. The statute here—and the inferences that can be drawn from it in analyzing standing—thus differ significantly from those at issue in *Spokeo* and *Edwards*. See U.S. *Spokeo* Br. at 33 n.6 (citing numerous statutes under which damages may be awarded without a separate showing of harm, but not including the SCA).[2]

Moreover, nothing in the SCA's text or history indicates that Congress sought to allow a suit for injuries arising from disclosures of the kind plaintiffs allege. The SCA bars an ISP from disclosing "the contents of" a "communication," 18 U.S.C. 2702(a)(1)-(2), and defines "contents" to "include[] any information concerning the substance, purport, or meaning of that communication," 18 U.S.C. 2510(8); see 18 U.S.C. 2711(1). Search terms

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[2] The Court in *Akins* concluded that the plaintiffs in that case, who had filed a complaint with the Federal Election Commission (FEC) pursuant to express statutory authorization, had adequately alleged an Article III injury based on their failure "to obtain information which [they alleged] must be publicly disclosed pursuant to a statute"—the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (1994). 524 U.S. at 21. The statutory right of action at issue in *Akins* applied to a "party aggrieved by an order of the [FEC] dismissing a complaint filed by such party," *id.* at 19 (citation omitted), as the FEC had done with the plaintiffs' complaint. The SCA right-of-action provision includes no similarly specific language, and the SCA creates no affirmative right "to obtain information which must be publicly disclosed." *Id.* at 21. To the contrary, the SCA protects *against* the public disclosure of information.

embedded in referrer headers are not naturally considered "contents of" a "communication." 18 U.S.C. 2702(a)(1)-(2). Indeed, the Ninth Circuit has held that referrer headers containing a "user's Facebook ID and the address of the webpage from which the user's * * * request to view another webpage was sent" do not constitute "contents" of a communication, but rather "function[] like an 'address,'" which is distinct from "contents." *Zynga*, 750 F.3d at 1107 (citation omitted). Although the scope of the SCA's liability provisions is distinct from the question of Article III standing, it nevertheless provides insight into the kind of injuries for which Congress sought to allow suit. See, *e.g.*, *Warth*, 422 U.S. at 500 ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted.") (citation omitted). Here, there is no basis to infer that Congress sought to allow suit for injuries arising from the disclosure of referrer headers.

2. The harm alleged by the named plaintiffs would not provide a basis for a suit at common law

In addition to considering any judgment expressed by Congress about whether an alleged injury creates a basis for Article III standing, *Spokeo* instructs courts "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." 136 S. Ct. at 1549.

According to most authorities, the common law recognizes four privacy torts: intrusion upon seclusion, appropriation, false light, and public disclosure of private facts. Restatement (Second) of Torts § 652A(2) (1977) (Restatement); see *id.* § 652A cmt. b; William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960) (Prosser); see

also *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 489 (1975). Of those torts, the closest analog to the SCA is the tort of public disclosure of private facts, which allows recovery for "giv[ing] publicity to a matter concerning the private life of another" that "would be highly offensive to a reasonable person" and is "not of legitimate concern to the public." Restatement § 652D; see Merits Reply Br. 25-26 (drawing this analogy); Oral Arg. Tr. 16, 28 (same). Indeed, Gaos sought recovery for public disclosure of private facts under state law earlier in the litigation. See J.A. 18, 25. Ultimately, however, the named plaintiffs' alleged harm does not have a "close relationship" to the harms that provided "a basis for a lawsuit" for the common-law tort of public disclosure of private facts. *Spokeo*, 136 S. Ct. at 1549; see J.A. 27 (dismissing state-law claim for public disclosure of private facts for lack of standing).[3]

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[3] None of the other three recognized privacy torts involves injuries analogous to those alleged here. Intrusion upon seclusion involves an unauthorized and "highly offensive" invasion into "the solitude or seclusion of another." Restatement § 652B; see, *e.g.*, *Noble* v. *Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 271 (Cal. Ct. App. 1973) (entry into hospital room by deception). The voluntary disclosures prohibited by the SCA do not involve "prying" or resemble an invasion. Prosser 390. Likewise, plaintiffs' injuries do not resemble those arising from the tort of appropriation, which involves "us[ing] or benefit[ing] [from] the name or likeness of another." Restatement § 652C; see, *e.g.*, *Flake* v. *Greensboro News Co.*, 195 S.E. 55, 61 (N.C. 1938) (unauthorized use of plaintiff's photograph in a bread advertisement). Disclosing communications does not involve using or benefiting from a name or likeness. The tort of false light is similarly inapposite. It prohibits knowingly "giv[ing] publicity to a matter concerning another that places the other before the public in a false light," and that "would be highly offensive." Restatement § 652E. The SCA's disclosure prohibitions, however, do not involve falsity.

a. As this Court explained in *Spokeo*, the common law has "long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." 136 S. Ct. at 1549. For example, the common law allowed recovery for torts like libel and slander *per se* even if a victim did "not allege any *additional* harm" beyond the legal violation. *Ibid.* That history, however, does not aid the named plaintiffs here. Unlike libel and slander *per se*, the tort of public disclosure of private facts has not traditionally permitted recovery absent a showing of harm beyond the legal violation. See Restatement § 652H (authorizing damages for a plaintiff's "harm to his interest in privacy," "mental distress," or "special damage" resulting from the tort). Indeed, this Court has described "the doctrine of presumed damages in the common law of defamation *per se*" as "'an oddity of tort law'" because "'it allows recovery of purportedly compensatory damages without evidence of actual loss.'" *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) (citation omitted). Just as *Spokeo* ultimately concluded that the FCRA violations at issue there did not *categorically* give rise to concrete injury, see 136 S. Ct. at 1550, the SCA violations alleged here do not categorically give rise to concrete injury. The named plaintiffs accordingly must show some additional harm of the kind that permitted recovery for public disclosure of private facts.

b. The named plaintiffs cannot show the specific kind of harm that would have permitted recovery for public disclosure of private facts. That is true for at least four independent reasons.

First, and most significantly, plaintiffs do not allege that Google's disclosure of their search terms would allow anyone to identify *them* as the users who conducted the searches. Indeed, plaintiffs acknowledge that in

most cases "the information contained in disclosed search queries does not directly identify the Google user." Compl. ¶ 4. Numerous authorities recognize that the harm contemplated by the tort of public disclosure of private facts requires "some reasonable grounds for concluding that *it is the plaintiff* whose privacy ha[d] been invaded." 1 Arthur B. Hanson, *Libel and Related Torts* ¶ 254, at 204 (1969) (emphasis added); see, *e.g.*, *Rawls* v. *Conde Nast Publ'ns, Inc.*, 446 F.2d 313, 318 (5th Cir. 1971) ("[T]he absence of public identification of the plaintiff[] * * * precludes recovery."). As Prosser explained, "there is no liability for the publication of a picture of [a plaintiff's] hand, leg and foot, his dwelling house, his automobile, or his dog, *with nothing to indicate whose they are*." Prosser 404-405 (emphasis added; footnotes omitted). Likewise, there could be no injury at common law for the publication of search terms "with nothing to indicate whose they are." *Id.* at 405.

Second, and relatedly, the injuries plaintiffs allege would not "be highly offensive to a reasonable person," which is the harm contemplated by the common law. Restatement § 652D. Plaintiffs allege only that a website operator would be able to determine that *someone* conducted the searches they allege. But it cannot be highly offensive to reveal that *someone* searched for plaintiffs' names, Compl. ¶¶ 101, 107, 115, or for "financial and health information," Compl. ¶ 115. Even with respect to Italiano's more specific allegations, it is unclear how a reasonable person could be highly offended by disclosure to a single website operator that *someone* searched for his name and "bankruptcy" or "foreclosure proceedings." Compl. ¶ 107. Such disclosures are far less offensive than the injuries that give rise to suits for public disclosure of private facts at common law. See, *e.g.*,

York v. *Story*, 324 F.2d 450, 451 (9th Cir. 1963) (nude photographs), cert. denied, 376 U.S. 939 (1964); *Bazemore* v. *Savannah Hosp.*, 155 S.E. 194, 195 (Ga. 1930) (photographs of child with birth defects); *Barber* v. *Time, Inc.*, 159 S.W.2d 291, 293 (Mo. 1942) (article and photograph depicting hospitalization for eating disorder).

Third, plaintiffs' alleged injuries do not arise from the "publicity" of their private information, as the common-law tort of public disclosure of private facts required. Restatement § 652D. The Restatement provides that "it is not an invasion of the right of privacy * * * to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *Id.* cmt. a; accord Prosser 393-394. But plaintiffs allege only that Google disclosed their search terms to the operators of the destination websites, Compl. ¶¶ 104, 111, 116, not that the terms were disclosed *publicly*. Plaintiffs' asserted injury is thus qualitatively different than the traditional harm giving rising to a common-law suit for public disclosure of private facts. See, *e.g.*, *Brents* v. *Morgan*, 299 S.W. 967, 968 (Ky. Ct. App. 1927) (publicly posting a large sign detailing a particular customer's debts); Restatement § 652D cmt. a (discussing a "publication in a newspaper or a magazine, * * * or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience").

Fourth, plaintiffs' alleged harms do not concern their "private life," as the injuries underlying the common-law tort of public disclosure of private facts did. Restatement § 652D. The Restatement provides that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." *Id.* cmt. b. Plaintiffs' search terms all

appear to reference "already public" information, *ibid.*, such as their names and family members' names, Italiano's soon-to-be-ex-wife's name, public proceedings such as foreclosures and bankruptcy, and the occupation of forensic accounting, Compl. ¶¶ 101, 107, 115. Plaintiffs' alleged injuries thus differ from those contemplated by the common law.[4]

* * * * *

In sum, plaintiffs' principal alleged harm—the disclosure of their search terms without information identifying them as the users conducting the searches—does not create Article III standing. Congress has not conveyed any express judgment that such an alleged injury should provide a basis to sue. See *Spokeo*, 136 S. Ct. at 1549. There is no historical or other evidence that violations of the SCA categorically create Article III harm in the way that torts such as libel or slander *per se* traditionally have. See *ibid.* And plaintiffs fail to show a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," because the harms underlying the closest common-law analog differ in significant ways from the harm alleged here. *Ibid.*

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[4] Different putative plaintiffs might be able to allege searches that do concern their private life. Cf. Oral Art. Tr. 21-22. But their asserted harms would likely still differ from the common-law analog in the other significant ways explained above. Moreover, absent a showing that large numbers of class members conducted similar searches, it seems unlikely that any set of named plaintiffs could satisfy the commonality, typicality, and predominance requirements of Rule 23 for a class approaching the size of the one at issue here. Fed. R. Civ. P. 23(a)(2)-(3) and (b)(3); see Pet. App. 5 (noting that the class includes "approximately 129 million people who used Google Search").

E. Plaintiffs' Allegations About Potential Reidentification Are Too Speculative To Create Standing

In addition to the allegations of harm from the disclosure of their search terms alone, the named plaintiffs' complaint also contains general allegations about the "science of reidentification." Compl. ¶ 92; see Compl. ¶¶ 83-91. Those allegations could be read to allege injuries based not only on the disclosures themselves but also on the risk that third parties will use the disclosed information to connect plaintiffs to their search terms.

To the extent plaintiffs make the latter allegation, their asserted injuries come closer to those recognized at common law. Such an allegation, if plausible, would cure a significant defect in their primary theory—the failure to allege that *their* privacy had been invaded. See pp. 16-17, *supra*. Plaintiffs' asserted injuries would still be removed from those recognized by the common law, because their search terms do not appear to be either "highly offensive," publicly disclosed, or related to their private lives in the ways the common-law tort of public disclosure of private facts required. Restatement § 652D; see pp. 17-19, *supra*. And Congress has not made an express judgment that any of plaintiffs' asserted harms constitute injuries justifying a suit. See pp. 11-14, *supra*. But the standing question would be closer, especially because *Spokeo* does not require exact correspondence between a plaintiff's asserted injuries and those recognized at common law. See 136 S. Ct. at 1549.

This Court need not resolve whether plaintiffs' reidentification-based theory would create standing, however, because plaintiffs' allegations about reidentification are too speculative. This Court reiterated in *Spokeo* that an Article III injury must not only be "concrete and particularized," but must also be "actual or

imminent, not conjectural or hypothetical." 136 S. Ct. at 1548 (quoting *Defenders*, 504 U.S. at 560). And the Court has repeatedly explained that plaintiffs lack standing if their allegations are overly "speculative." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

Plaintiffs' allegations about reidentification are highly speculative. Other than a general description of the "science of reidentification," Compl. ¶ 92, which they admit is largely drawn from a law review article, Compl. ¶ 83 & n.55, plaintiffs make no allegations suggesting that their searches exposed them to possible reidentification. They do not allege, for example, that they visited the same websites repeatedly, thereby providing multiple pieces of information from which a website operator could reconstruct their identities. Nor do they suggest that their "vanity searches" of their own names would create a higher risk of reidentification. Compl. ¶ 101. A destination website operator would have no reason to suspect, for example, that a Google user who searched for "Anthony Italiano" and "bankruptcy" was Italiano himself, rather than, say, a creditor or prospective lender. Compl. ¶¶ 105, 107.

In any event, even if some different set of plaintiffs could potentially demonstrate a non-speculative prospect of reidentification and resulting harms, the named plaintiffs here have not done so. If the Court elects to resolve the standing question, it should conclude that the named plaintiffs lack standing, and that the lower courts accordingly lacked jurisdiction over the case.

CONCLUSION

In the government's view, none of the named plaintiffs has Article III standing. The Court should vacate the judgment below and remand with directions to dismiss for lack of jurisdiction. In the alternative, the Court should vacate and remand for the lower courts to address the standing question in the first instance.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
KATHERINE TWOMEY ALLEN
Attorneys

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APPENDIX

1. 18 U.S.C. 2702(a) provides:

Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall

not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

2. 18 U.S.C. 2707(a)-(c) provides:

Civil action

(a) CAUSE OF ACTION.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) DAMAGES.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than

the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.