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 PETITIONERS

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners respond to the Court's Order of November 6. A named plaintiff must have individual Article III standing before bringing a class action. *E.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("*NOW*"). Whether any named plaintiffs have demonstrated standing as of this filing depends upon "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the current posture, the evidentiary standard should be satisfied with pleadings. Section I, below. Given that plaintiffs' standing was never *factually* (as opposed to facially) controverted below, the best view is that plaintiffs have sufficiently pled standing, because they allege a congressionally recognized injury consistent with those recognized in historical practice. Section II, below. Even if that were not the case, plaintiffs would normally be permitted to make additional factual allegations, or submit adequate evidence to meet any plausible higher evidentiary standard, and should be able to meet such a standard. Section III, below.

ARGUMENT

I. Under *Lujan*, if standing is not factually controverted, plaintiffs must merely sufficiently allege standing to satisfy the standard of proof for standing at the settlement-class-certification stage.

1. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," but as the case progresses, if standing is "controverted," standing must be supported by evidence. *Lujan*, 504 U.S. at 561. For example, "at the

final stage," facts demonstrating standing must be "supported adequately by the evidence adduced at trial." *Id.*

While this Court has not specifically identified the level of evidence needed at the settlement-class-certification stage, the most workable answer under *Lujan* is to require a plaintiff to plead facts showing standing in order to invoke the jurisdiction of the federal courts—the standard already required to initiate a case. There is no need to require more before approving a settlement if the allegations, if true, would be sufficient to show standing and those allegations are not factually controverted.

Lower courts have been even more permissive than this. The Fifth Circuit found standing at the judgment stage based on "allegations in the operative pleading" despite the existence of expert declarations from the defendant disputing standing. *In re Deepwater Horizon*, 739 F.3d 790, 802–03, 805–06 (5th Cir. 2014). It held "it would be improper to look for proof of injuries beyond what the claimants identified in the class definition can allege they have suffered at" the class-certification stage, without distinguishing between litigation-class certification and settlement-class certification. *Id.* at 806 (cleaned up). While the dissent disagreed with the result of the application of that standard, it did not dispute the standard. *Id.* at 824 (Garza, J., dissenting). *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241, 264, 275 (3d Cir. 2009), similarly refused to look beyond the allegations in the complaint.

2. But as Judge Clement's dissent from denial of rehearing *en banc* in *Deepwater Horizon* notes,

> There are sound reasons to evaluate Article III standing differently for pre-trial

> and settlement class certifications under Rule 23. Primarily, the settlement certification stage is more advanced in the life cycle of a class action than the pre-trial certification stage. When a settlement class is certified, all is resolved at the point of certification. However, in a pre-trial certification, the class must reach additional waypoints in the litigation—summary judgment, trial on the merits, or ultimately a settlement—to resolve the dispute. Accordingly, *Lujan*'s graduated approach for demonstrating the standing elements compels holding settlement class certifications to a higher standard than pre-trial certifications—the settlement certification stage has progressed further into the "successive stages of the litigation."

756 F.3d 320, 324 (5th Cir. 2014) (cleaned up). A decision on class certification at the settlement stage finally adjudicates the rights of absent class members, so requiring plaintiffs to meet a heavier burden of evidentiary proof makes some intuitive sense. A court would have to resolve factual questions of Rule 23(a) adequacy and typicality before certifying the class, so why not standing? Standing under *Lujan* is more than a "mere pleading requirement[]." 504 U.S. at 561.

One reason to not mechanically demand a "lengthy and costly inquiry that delves too far into the merits of the litigation,"[1] even at the judgment stage, is the implications such a rule would have for other forms of judgment. For example, if a defendant makes

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[1] 13B Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3531.15 at 330 (3d ed. 2018) ("Wright").

a Rule 68 offer of judgment, must a court hold evidentiary hearings on standing to determine if it has the Article III jurisdiction to enter judgment? Plaintiffs may be unwilling to settle class actions where standing is closely related to the merits if they face the same risk and expense of litigating the factual question that they would if they tried the case. *Cf.* Google Br. 39 (discussing "judicial economy and economic efficiency" of permitting settlements). On the other hand, requiring settling plaintiffs to satisfy a factual showing of standing may usefully discourage bringing low-merit class actions with attenuated claims of standing in the first place.

One can find the solution to balancing these problems in *Lujan*'s language of "*if* controverted." 504 U.S. at 561 (emphasis added), and the way courts handle Rule 12(b)(1) challenges to jurisdiction. Under Rule 12(b)(1), courts distinguish between facial and factual challenges. *E.g., Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016). If, as here, standing is not factually controverted in the lower courts, there is no need to demand evidence beyond what is alleged in the complaint, "construe[ing] the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). If, on the other hand, an objector makes a plausible factual challenge to the class representatives' standing, or a court suspects collusion by the parties to create jurisdiction, some evidentiary showing and factual finding is required, just as there would be with respect to disputes on other elements of the appropriateness of class certification under Rules 23(a) and (b). *Cf. id.* This intermediate approach avoids the burden of unnecessary litigation where there is no controversy over the underlying facts relating to standing, but protects absent class members' rights if a class

representative seeks to improperly invoke the federal jurisdiction of a court at absent class members' expense. It also deters abusive litigation where plaintiffs cannot legitimately hope to obtain a finding of standing or class-action certification in a fully-litigated case. Here, Google made only a facial Rule 12(b)(1) challenge to the named plaintiffs' standing. Google's Mot. to Dismiss First Am. Compl., Dkt. 29 at 4 n.1, 6–11. No lower court and no class member challenged the factual basis for named plaintiffs' standing. Thus, there is no reason to look beyond the allegations of the complaint as the government suggested at oral argument. *E.g., Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208–12 (11th Cir. 2018).

3. The Court has been inconsistent regarding the standard required to plead standing. Wright § 3531.15 at 302–07. In one line of cases, the Court states that the plaintiff must "*clearly* … allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth*, 490 U.S. at 518 (emphasis added); *accord Spokeo Co. v. Robins*, 136 S. Ct. 1540, 1547 (2016). This possibly implies a degree of particularity akin to that in Fed. R. Civ. P. 9(b).

But in other cases, the Court applies "the general liberal standards of notice pleading." Wright § 3531.15 at 305. In that line of cases, general allegations of injury, causation, and redressability suffice at the pleading stage; the burden "is relatively modest." *Bennett v. Spear*, 520 U.S. 154, 167–71 (1997). In *Steel Co. v. Citizens for a Better Environment*, though it did not find standing, the Court said it "must presume that the general allegations in the complaint encompass the specific facts necessary to support

those allegations." 523 U.S. 83, 103 (1998); *accord NOW*, 510 U.S. at 256; *Lujan*, 504 U.S. at 561. *Steel Co.* reaffirmed *Bell v. Hood*, 327 U.S. 678, 682 (1946), in holding that the "absence of a valid (as opposed to arguable) cause of action" did not eliminate jurisdiction. 523 U.S. at 89. *Cf.* Oct. 31 Tr. 18:7–17; *Doe v. Chao*, 540 U.S. 614 (2004).

Even after *Ashcroft v. Iqbal*, a claim is properly pled where the facts alleged allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009). Applying this standard, this Court unanimously held in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011), that a plaintiff could surmount a motion to dismiss and still adequately plead materiality from failure to disclose adverse events without pleading a statistically significant causal relationship between the adverse events and the defendant's product.

If the Court reaffirms the "relatively modest" *Bennett*/*NOW*/*Lujan* pleading standard to determine standing, then at least named plaintiff Italiano has standing here because of the complaint's plausible allegations. One can reasonably infer from plaintiffs' complaint that the privacy of the named plaintiffs, and of absent class members, has been compromised by Google's dissemination of their search queries to third parties.

II. Named plaintiffs' allegations of Electronic Communications Privacy Act violations are concrete for Article III standing.

A. Dissemination of plaintiffs' Google searches is closely related to the harm of disclosure of private communications protected at common law and elevated by Congress.

Named plaintiffs pled an injury in fact sufficiently "concrete" to establish Article III standing because they alleged that their private Internet search queries were unlawfully divulged to third parties in violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510, *et seq*. (The Stored Communications Act is Title II of the ECPA. This brief uses "ECPA" to refer to both to be consistent with the operative complaint, though it makes only Stored Communications Act claims.)

The violation of a statute may be sufficient to constitute injury in fact, even absent allegation of "any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis in original). When evaluating whether a statutory violation establishes concrete injury, *Spokeo* instructs courts to consider two factors: first, the "historical practice" regarding the intangible harm, and second, Congressional "judgment" regarding such intangible harm. *Id.* Both factors support jurisdiction here.

1. Here, the "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 dissemination of plaintiffs' private search queries

is in "close relationship" to common-law privacy rights regarding communications.

"The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them." Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890).

Justice Story found common-law private rights at issue when letters are published without authorization:

> a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit…

Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841).

Justice Story further detailed the reasoning behind equitable protection available to confidential letters. Such letters contained intimate expressions of the mind "reposed in the bosoms of others under the deepest and most affecting confidence." 2 Joseph Story, *Commentaries on Equity Jurisprudence: as Administered in England and America* § 946 (3d rev., corrected & enlarged ed. 1843) ("Story, *Commentaries*"). Without common-law protection, "every one, in self-defence, [would] write, even to his dearest friends, with the cold and formal severity with which he would write to his wariest opponents, or his most implacable enemies." *Id.*; *see also* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality,* 96 Geo. L.J.

123, 143 (2007) ("Numerous American cases protected the confidentiality of private letters" and established breach-of-confidence law to provide actionable remedy in equity against unwanted disclosures). Early cases bolster this view. *E.g., Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 485, 491 (Ky. Ct. App. 1867) ("modern common law" provided protection of private letters "by injunction against piracy or intrusion") (citing cases); *Waterhouse v. Spreckels,* 5 Haw. 246, 254 (1884) ("Equity will restrain the unauthorized publication of private letters, on the ground of violation of confidence and injury to the feelings.") (citing *Cooley on Torts* 356–59; *Kerr on Injunctions* 187–89; *Pomeroy's Equity Jurisprudence* § 1358; Story, *Commentaries* §§ 946, 948).[2]

Private letters enjoy a longstanding tradition of protection, and there is no "rational basis for denying to the modern means of communication the same protection that is extended … to the sealed letter in the mails." *Goldman v. United States*, 316 U.S. 129, 141 (1942) (Fourth Amendment) (Murphy, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967); *accord* Warren, 4 Harv. L. Rev. at 196 (the right to control one's expressions "is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed").

Similarly, in *Carpenter v. United States,* this Court recognized "the seismic shifts in digital technology" that enable private companies to now gather an "exhaustive chronicle" of sensitive information that

[2] Although it is unlikely that each of these equitable injunctions would survive on the merits under today's robust First Amendment jurisprudence forbidding prior restraints, that does not undermine the justiciability of the injury recognized in such early cases.

"hold for many Americans the privacies of life." 138 S. Ct. 2206, 2217, 2219 (2018).

As with private letters, Internet search queries reflect users' communications of intimate thoughts and sentiments that deserve the confidentiality protection the common law historically provided. "One's [Internet] search history eerily resembles a metaphorical X-ray photo of one's thoughts, beliefs, fears, and hopes." Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 Utah L. Rev. 1433, 1442 (2008). In August 2006, AOL publicly posted 20 million search queries entered by 658,000 users over a period of three months. Though the data was anonymized, the search queries themselves often suggested the identity of the searcher. Michael Barbaro & Tom Zeller, *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. Times (Aug. 9, 2006) ("My goodness, it's my whole personal life… I had no idea somebody was looking over my shoulder."); Tene, 2008 Utah L. Rev. at 1443; Second Am. Compl., Dkt. 39 ¶¶ 33–37 ("Compl.").[3] One user's search queries, for example, included "aftermath of incest … divorce laws in ohio … anti psychotic drugs." Tene, 2008 Utah L. Rev. at 1443. These queries reveal the same private matters historically protected at common law. Restatement (Second) of Torts § 652D (1977) (observing actionable invasion of privacy for public disclosure of private facts regarding "family quarrels, many unpleasant or disgraceful or humiliat-

[3] The resulting class action settled for "up to" $5 million. Though this was under $8 per class member, the settlement distributed cash to the class through a claims and arbitration process, with any unclaimed amounts reverting to AOL. *Landwehr v. AOL Inc.*, No. 11-cv-1014 (E.D. Va.) Dkt. 91-1 ¶¶ 12–17 (Dec. 17, 2012). The *Landwehr* court record does not disclose how much cash ended up in the class's hands. *Cf. also* Pet. Br. 25–27.

ing illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget"); Story, *Commentaries* § 946 (privacy protections extend beyond valuable manuscripts to "mere private letters on business, or on family concerns, or on matters of personal friendship").

2. When evaluating whether a statutory violation establishes concrete injury, the second *Spokeo* factor is Congress's "judgment" in "identifying and elevating intangible harms." 136 S. Ct. at 1549. While "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," a "bare procedural violation, divorced from any concrete harm" is not. *Id*. Thus, whether the statute at issue creates a procedural or substantive right is relevant to the concreteness determination.[4]

In *Eichenberger v. ESPN, Inc*., the Ninth Circuit held that a user of a sports-related news and entertainment application had Article III standing to bring a Video Privacy Protection Act (VPPA) claim against ESPN for sharing information concerning the user's device and his video viewing history without consent. 876 F.3d 979, 984 (9th Cir. 2017). The VPPA "codifies a context-specific extension of the *substantive* right to privacy" that "protects generally a consumer's substantive privacy interest in his or her video-viewing history." *Id.* at 983 (emphasis in original).

The "impetus" of the VPPA was a Washington newspaper that obtained from a video-store clerk, published, and commented upon Judge Robert Bork's videotape-rental records during his Supreme Court

[4] To some degree, this distinction maps onto that between private and public rights discussed by Justice Thomas's *Spokeo* concurrence. *See* Section II.B below.

nomination hearings. S. Rep. No. 100-599, at 5 (1988); *Eichenberger*, 876 F.3d at 984 n.2. *Eichenberger* found that Congress's judgment reflected the creation of a "substantive provision that protects concrete interests" because "Congress enacted the VPPA 'to extend privacy protection to records that contain information about individuals.'" 876 F.3d at 983 (quoting S. Rep. No. 100-599, at 2). (One can readily imagine a Silicon Valley employee similarly willing to violate his employer's rules and leak the search history of a controversial public figure he dislikes. *Cf.* Maggie Astor, *Rogue Twitter Employee Briefly Shuts Down Trump's Account*, N.Y. Times (Nov. 2, 2017).)

Unlike the Fair Credit Reporting Act ("FCRA") at issue in *Spokeo*, which "outlines *procedural* obligations that *sometimes* protect individual interests, the VPPA identifies a *substantive* right to privacy that suffers *any time* a video service provider discloses otherwise private information" without consent. *Eichenberger,* 876 F.3d at 983–84 (emphasis in original). The VPPA "does not describe a procedure that that video service providers must follow. Rather, it protects generally a consumer's substantive privacy interest in his or her video-viewing history." *Id*. at 983. The same is true with the ECPA.

Congressional judgment supports standing here because the purpose and structure of the ECPA codify a substantive privacy right. In passing the ECPA, Congress sought to ensure privacy protections for electronic communications comparable to those that already existed for physical records. S. Rep. No. 99-541, at 5 (1986); *cf.* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209–13 (2004) (noting contemporaneous uncertainty

about Fourth Amendment protections for Internet records). The ECPA mirrors the common-law interest by allowing disclosure of communications to the intended recipient or to others if necessary, compelled by law, or with the sender's consent, but generally disallowing most disclosures. 18 U.S.C. § 2702(a), (b). It chooses to fortify this interest by, *inter alia*, granting individuals a cause of action for statutory damages against companies that divulge their communications in violation of the Act. 18 U.S.C. § 2707.

Plaintiffs allege that Google violated the ECPA statutory prohibition against "divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." Compl. ¶ 116. Like the VPPA, that provision does not describe a "procedure" but protects a consumer's substantive privacy interest in his or her search query "history." *Eichenberger*, 876 F.3d at 983. Accordingly, just as the Ninth Circuit concluded, "*Spokeo I* and *Spokeo II* are distinguishable from this [ECPA] claim, and Plaintiff need not allege any further harm to have standing." *Id.*at 984; *see also Perry v. Cable News Network, Inc*., 854 F.3d 1336, 1341 (11th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.,* 827 F.3d 262, 274 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 624 (2017).

3. At argument, Justice Breyer expressed skepticism regarding the private nature *vel non* of named plaintiff Italiano's searches:

> What is the private—I mean, what I have here, my law clerk brought it up, is that the search that Mr. Italiano engaged in was his name, that's certainly public, his home address, I imagine that's public, … and his

> name and the name of his then soon-to-be ex-wife and the words "forensic accounting."

Oct. 31. Tr. 18–19. While the information Italiano *sought* may be public, the search queries themselves reveal his private thoughts and sentiments, a private detailing of a public episode. Italiano's divorce may be a matter of public record, but the dark corners of the marital dissolution are not, let alone his thoughts regarding that event. For example, Italiano's search for "[his name]" + "[his wife's name]" + "forensic accounting" (Compl. ¶¶ 90–96)—the process of investigating hidden or dissipated assets—indicate his feelings about his soon-to-be ex-wife, thoughts regarding the acrimony of his divorce proceedings, and his litigation strategy and considerations. As Justice Kavanaugh recognized, "I don't think anyone would want the disclosure of everything they searched for disclosed to other people. That seems a harm." Oct. 31 Tr. 31:4–7. This is especially true for revelations of the "sacred confidences which subsist between husband and wife" otherwise hidden "from public gaze." *Owen v. State*, 78 Ala. 425, 430 (1885).

But even if one deploys search queries that are entirely innocuous, their unauthorized dissemination still implicates a concrete personal interest. At common law any fixed "production of the mind" constituted a protected interest regardless of the subject matter of the expression. *Grigsby*, 65 Ky. at 485 (citing British and American authorities); *see also* Warren, 4 Harv. L. Rev. at 199 (protection does not "depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression").

Where the content or character of the expression matters, it goes to the merits of one's privacy claim,[5] or the appropriateness of a Rule 23(b) predominance finding for class certification, not to one's standing to bring the action. *Cf. Doe*, 540 U.S. 614 (requiring actual damages to state a claim under the Privacy Act for unlawful dissemination of information, but not for purposes of standing). "[W]hether [plaintiffs] are entitled to the relief that they seek goes to the merits, not to standing." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 151 n.1 (2010). "One must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (cleaned up). *Cf.* Oct. 31 Tr. 18:7–17.

That Italiano's "communication" was to a Google server and not another person makes no difference. Internet search queries are written expressions of users' intimate thoughts and feelings, no less deserving of protection than a diary: "The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public." Warren, 4 Harv. L. Rev. at 199; *see also Sheets v. Salt Lake Cnty.*, 45 F.3d 1383, 1388 n.1 (10th Cir. 1995) (common-law privacy torts would cover public disclosure of private diary). Indeed, Google searches are potentially *more* private or embarrassing than letters or email because they are directed to a machine and not filtered or edited for a human recipient. Further, plaintiffs' alleged injury

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[5] *See, e.g.,* Restatement (Second) of Torts § 652D (requiring plaintiff to show, *inter alia*, that the publication "would be highly offensive to a reasonable person").

need not "exactly track[] the common law," *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017), *cert denied, Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018), as Congress may expand and "elevat[e]" the preexisting common-law interests. *Spokeo*, 136 S. Ct. at 1549.

"When people establish a relationship with banks, Internet service providers, phone companies, and other businesses, they are not disclosing their information to the world. They are giving it to a party with implicit (and often explicit) promises that the information will not be disseminated." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 529 (2006); *see also* Tene, 2008 Utah L. Rev. at 1491–92 (positing a private cause of action against search engines for breach of confidence similar to confidentiality customers entrust in "physicians, psychotherapists, lawyers, and bankers"). Similarly, Italiano's Google searches were personal and confidential and he did not want them divulged. Compl. ¶¶ 90–96. Italiano's allegations of harm—dissemination of those private Google searches—closely relate to the common law's deep-rooted tradition of protecting individuals' private communications from breach of confidence.

B. Named plaintiffs allege a private right that satisfies Justice Thomas's *Spokeo* concurrence.

The allegations also meet the requirements of Justice Thomas's concurrence in *Spokeo*. Though *Spokeo* has "led to confusion about how harms involving personal data should be conceptualized,"[6] "Justice

[6] Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 Tex. L. Rev. 737, 744 (2018).

Thomas's concurrence may be one of the most fruitful things to happen to standing at the Supreme Court in many years." William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 198 (2017).

Like the *Spokeo* majority, Thomas's concurrence is attuned to the significant role that common-law tradition and Congressional judgment play in determining "injury-in-fact." *Spokeo*, 136 S. Ct. at 1551–53. But it also emphasizes the distinction between suits vindicating private rights, as in this case, and those vindicating public rights. *Id.* Plaintiffs alleging a violation of public rights (*i.e.*, rights involving duties owed to the whole community *qua* community) must demonstrate their own concrete and particularized injury to proceed in federal court. *Id.* at 1552. Plaintiffs alleging a violation of private rights (*i.e.*, rights involving duties owed to and belonging to individuals) need not demonstrate additional injury beyond infringement of their private right. *Id.*

"Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 136 S. Ct. at 1551. The same is true of legislatively created private rights: "A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Id.* at 1553 (citing, *inter alia*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982)).[7]

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[7] Plaintiff Italiano's claim (Compl. ¶¶ 136–140) that Google unjustly enriched itself using class members' search queries also states a justiciable controversy. Claims for unjust enrichment have a deep history in Anglo-American law. *See generally*

It could hardly be otherwise. Take, for example, an employee's right under the Fair Labor Standards Act to time-and-a-half overtime pay. *See* 29 U.S.C. § 207(a)(1). There is no pre-legal concrete harm in receiving one's usual wage for the forty-first hour worked in any given week. But there is no question that an employee who alleges a violation of FLSA's overtime-pay requirement has standing to press his grievance in federal court; the harm is the violation of the employer's congressionally-created legal duty to the employee. More broadly, Justice Thomas's concurrence can explain the well-established doctrine of nominal damages claims. "The very premise of nominal damages is that one cannot show any 'actual injury' apart from the violation of the legal right itself." Baude, 2016 Sup. Ct. Rev. at 217 (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978)); *accord Spokeo*, 136 S. Ct. at 1552 (citing *Carey*).

Distinguishing between private and public rights offers a way to reconcile past decisions of this Court. For instance, in *Doe v. Chao*, the Court unanimously agreed the plaintiff had standing to allege a violation of his rights under the Privacy Act when the Department of Labor disclosed his social security

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Restatement (Third) of Restitution and Unjust Enrichment § 1, Comment and Reporter's Note (2011). The injury is the invasion of the plaintiffs' equitable rights caused by Google's allegedly wrongful retention of a benefit. And the injury can be redressed by "imposition of a constructive trust on and restitution of the proceeds." Compl. ¶ 140. No further injury is required; "[i]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* § 2.1 at 51 (1978); *see generally* Ward Farnsworth, *Restitution: Civil Liability for Unjust Enrichment* (2014).

number, even though the plaintiff had sustained no consequential damages. 540 U.S. 614. Indeed, because plaintiff Doe had not alleged any actual damages, *Doe* found that he failed to state a claim under the Privacy Act despite "injury enough to open the courthouse door." *Id.* at 625.

Doe is not an outlier; Justice Thomas's concurrence harmonizes the general practice of this Court in past cases. "Since *Lujan*, the Court has regularly addressed the merits of claims involving improper dissemination of information about plaintiffs without discussing justiciability [or] exhibit[ing] concern regarding the plaintiffs' 'injury in fact.'" Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. Pa. J. Const. L. 745, 779 (2016). For example, this Court has adjudicated such disputes involving a Driver's Privacy Protection Act claim in *Maracich v. Spears*, 133 S. Ct. 2191 (2013); a Fair Credit Reporting Act claim in *United States v. Bormes*, 133 S. Ct. 12 (2012); a Family Educational Rights and Privacy Act claim in *Owasso Independent School District v. Falvo ex rel. Pletan*, 534 U.S. 426 (2002); and federal and state wiretapping statutory claims in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Kreimer, 18 U. Pa. J. Const. L. at 779–81 (compiling these among other examples); *see also* Baude, 2016 Sup. Ct. Rev. at 217–20 (observing that injury in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) arose as a result of a statutorily granted right regarding the listing of personal information on a passport, yet the Court was not troubled by an *amicus*'s standing argument). In each of these cases, legislative prerogative to exalt

privacy interests to the status of private legal rights legitimated this Court's exercise of judicial power.[8]

"It is unclear why, in [the area of privacy], Congress should not be allowed to protect interests beyond those protected by the common law, as it has been allowed in other cases." Baude, 2016 Sup. Ct. Rev. at 223. The ECPA vests a private right in persons aggrieved by violations of the Act. *See* 18 U.S.C. § 2707(a); *contrast Spokeo*, 136 S. Ct. at 1554 (Thomas, J., concurring) (hypothesizing a public-rights statute that vests "any and all consumers" with enforcement powers). Just as this private cause of action is a species of property for purposes of the Due Process Clause,[9] it should constitute a legally protected interest for purposes of Article III as well.

Justice Thomas's concurrence has garnered approbation and reliance in the lower courts. *See, e.g., Muransky*, 905 F.3d at 1210 n.4; *Springer v. Cleveland Clinic Employee Health Plan Total Care*, 900 F.3d 284, 290 (6th Cir. 2018) (Thapar, J., concurring); *Robins*, 867 F.3d at 1116; *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 638 n.18 (3d Cir. 2017); *Carlson v. United States*, 837 F.3d 753, 758 (7th Cir. 2016). Adopting its approach will provide a firmer footing for this Court's precedents, and will avoid an "indeterminate" "non-solution" that "leaves courts, litigants, and commentators in considerable doubt"

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[8] Likewise, the distinction between public and private rights explains many "regulatory compliance" cases in which this Court has found plaintiffs to lack standing. Baude, 2016 Sup. Ct. Rev. at 229 (citing *Lujan*; *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Muskrat v. United States*, 219 U.S. 346 (1911); and *Raines v. Byrd*, 521 U.S. 811 (1997)).

[9] *E.g., Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 363 (2011); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

about the fundamental scope of the Judicial Power. Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. Pa. L. Rev. Online 47, 61 (2016) (cleaned up).

The allegations of the complaint plainly meet the standard set forth in Justice Thomas's concurrence because they allege an injury of a private right created by Congress.

III. The named plaintiffs would normally be entitled to another opportunity to satisfy more stringent burdens of proof of Article III standing.

1. If the Court requires a factual finding or more specific allegations beyond the allegations of the operative complaint, remand nevertheless remains unnecessary. *E.g., Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 718 (2007) (accepting lodged affidavit in similar circumstances). "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. For example, in *McMahon v. Bunn-O-Matic Corp.*, the appellate court determined that the defendant's removal petition was defective, but permitted amendment after oral argument to establish jurisdiction. 150 F.3d 651, 654 (7th Cir. 1998) (Easterbrook, J.). *See also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

It is difficult to imagine that plaintiffs could not make this showing if it were required here or on remand. The underlying premise of the operative complaint is that Google transmitted class members' search queries to third parties, who could identify class members through their vanity searches. Compl. ¶¶ 42–83. Google (Oct. 31 Tr. 38:20–39:8) would apparently require the named plaintiff to plead that

third parties had in fact connected the dots and successfully identified class members, but that is implicit in plaintiffs' description of how easy reidentification is. Compl. ¶¶ 35–36, 78. One need not be a hacker; readily available code allows even amateur websites to deduce the identities of some readers who browse the website through the combination of referrer headers from Google and other search engines, IP addresses, and other information transmitted through the Internet browser to the website. *Cf.* Kashmir Hill, *How to Bait and Catch the Anonymous Person Harassing You on the Internet*, Forbes (Sept. 28, 2012) ("Programs like AWStats or Webalizer will keep visitor logs for you that will reveal where your readers are coming from."). An IP address "will narrow the location down and using cross-referencing and further research, it is very much feasible to … extract a name." *Id.* The process would, one imagines, be even easier for a website making commercial use of cookies and access to cross-referenced databases—or products like Google Analytics. *Cf.* Google, *Cookies and User Identification*, https://developers.google.com/analytics/devguides/collection/analyticsjs/cookies-user-id (retrieved Nov. 26, 2018). Thus, in combination with the IP address, "enough referrer headers" to "figure out" a user (Oct. 31 Tr. 44:7–10) is often as low as one. Finding an expert to testify to this reality should be a trivial hoop-jumping exercise for the plaintiffs.

2. That said, plaintiffs should not get an indefinite "train of opportunities" to establish standing. *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992). If the Court believes an evidentiary showing is required, the class should be required to amend its pleadings promptly. A "court may allow or require a plaintiff to supplement the record to show standing… If, after this opportunity,

the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1269 (2015) (cleaned up) (permitting plaintiffs to make additional showing on remand after Court clarified standing requirements and remanded for other reasons).

CONCLUSION

Given the current procedural posture, the *Bennett*/*NOW*/*Lujan* pleading standard should apply. If so, at least named plaintiff Italiano has sufficiently pled concrete injury. But if the Court requires a greater showing than Italiano has made to date, then petitioners believe that plaintiffs will be able to demonstrate standing with 28 U.S.C. § 1653 amendments and affidavits.

Respectfully submitted,

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November 29, 2018