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

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The parties acknowledge that this Court lacks jurisdiction unless at least one named plaintiff had Article III standing in the district court. See Pet. Supp. Br. 1; Class Supp. Br. 2-3; Google Supp. Br. 2 n.1. Petitioners and plaintiffs, however, largely abandon the theory of standing they advanced at the merits stage. Rather than rely on an analogy to common-law privacy torts, they now invoke historical protections for copyright and other intellectual-property rights. That new theory of standing is both forfeited and flawed. The harms plaintiffs alleged in their complaint involve invasions of their privacy, not misappropriation of their property. Likewise, the statute on which they base their claims, the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, protects privacy rather than property. Plaintiffs' pivot to their state-law claims, which the district court twice dismissed for lack of standing, is equally unavailing.

The jurisdictional basis for those claims is uncertain; the theory of harm that plaintiffs invoke is forfeited; and plaintiffs fail to show any other cognizable injury in fact. Plaintiffs lack Article III standing.

A. No Named Plaintiff Has Article III Standing To Bring The Asserted Stored Communications Act Claim

Plaintiffs primarily contend that they have standing to assert their SCA claim. Class Supp. Br. 5-19; accord Pet. Supp. Br. 7-21. Plaintiffs allege two distinct harms arising from the alleged SCA violation: first, the disclosure of their search terms alone, without any information identifying them as the searchers (Class Supp. Br. 5-18), and, second, the risk that their search terms will be used to "reidentif[y]" them as the searchers (*id.* at 18). Neither harm suffices to support standing.[1]

1. Plaintiffs' first alleged harm—the disclosure of their search terms alone—is not a concrete injury in fact

Plaintiffs now rely almost entirely on their first asserted harm: the disclosure of their search terms without any information identifying them as the searchers. Class Supp. Br. 5-19. That asserted harm does not give rise to standing under the framework set forth in *Spokeo,*

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[1] Respondents contend that plaintiffs need only allege facts that would support standing. Class Supp. Br. 4; Google Supp. Br. 8. In their view, a court that approves a class-action settlement resolves the case "at the pleading stage." Class Supp. Br. 4 (quoting *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016)); Google Supp. Br. 8. That view arguably creates some tension with *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992), which explained that the elements of standing "must be supported * * * with the manner and degree of evidence required at the successive stages of the litigation." The Court need not decide the applicable standard here, however, because plaintiffs' allegations do not give rise to standing even under the pleading standard they propose.

Inc. v. *Robins*, 136 S. Ct. 1540 (2016), because neither "the judgment of Congress" nor "history" supports allowing a suit for such an injury. *Id.* at 1549.

a. Congress has not expressed a judgment that plaintiffs' asserted harm provides a basis for suit

The SCA expresses no congressional judgment that the particular harm alleged by plaintiffs—disclosure of their search terms alone—provides a basis for suit. See U.S. Supp. Br. 11-14; Google Supp. Br. 21-24. To the contrary, the SCA extends a right of action to any "person aggrieved" by a knowing violation. 18 U.S.C. 2707(a). That general reference incorporates the default Article III standing inquiry, which requires concrete harm; it does not convey any express "judgment" by Congress about the type of harms cognizable for Article III purposes. *Spokeo*, 136 S. Ct. at 1549; see *Doe* v. *Chao*, 540 U.S. 614, 624 (2004).

Plaintiffs observe that the SCA right of action also extends to a "subscriber." Class Supp. Br. 17 (quoting 18 U.S.C. 2707(a)). But it is far from clear that plaintiffs became "subscriber[s]" to any service merely by performing Google searches. *Ibid.* That perhaps explains why plaintiffs' complaint relied only on the "person aggrieved" provision of the SCA right of action. Consolidated Compl. (Compl.) ¶ 140 (brackets omitted).[2] Plaintiffs also cite the SCA damages provision, 18 U.S.C. 2707(c), but they acknowledge that the scope of that provision "is a merits question—not an Article III" question. Class Supp. Br. 17 & n.4. And in any event,

[2] Plaintiffs likewise did not rely on any reference to "customers" in the SCA right of action—a reference that no longer appears in the statute. Class Supp. Br. 17.

the SCA damages provision does not address who should be permitted to bring suit.

Plaintiffs' broad theory of SCA standing, moreover, would produce untenable results. It would seemingly permit suit by anyone whose search terms were disclosed under any circumstances. If, for example, a Google employee stated publicly that searches for "New Year's Eve" had increased in recent weeks, anyone who had conducted such a search would have standing to step forward and sue for an unlawful disclosure. That scenario is not hypothetical. A Google webpage, *Google Trends*, provides aggregated data about users' search queries. See https://trends.google.com. For example, the page ranks the most frequent searches in the United States in 2018, with "World Cup" and "Hurricane Florence" atop the list. See https://trends.google.com/trends/yis/2018/US. Under plaintiffs' theory, Congress enabled each of the millions of users who entered those searches to bring suit under the SCA. That reading of the SCA is implausible.

b. Neither common-law privacy torts nor intellectual-property protections provide a historical analog for plaintiffs' asserted harm

Plaintiffs and petitioners rely primarily on historical practice as a basis for standing. See Class Supp. Br. 5-15; Pet. Supp. Br. 7-11, 13-16. In so doing, however, they abandon the analogy to common-law privacy torts that they invoked at the merits stage. See Class Merits Br. 55-56 (referring to privacy torts and "right[] to privacy"); Pet. Merits Reply Br. 25 (contending that "the injuries alleged share sufficient similarity with common-law privacy injuries") (emphasis omitted). In particular, they no longer rely on the analogy to "the common-

law tort of public disclosure of private facts," Pet. Merits Reply Br. 25, that they pressed in this Court, see Oral Arg. Tr. 16, 20 (petitioner referencing "common law" tort of "public disclosure of private facts"), and that plaintiff Gaos asserted as a state-law claim earlier in the litigation, see J.A. 18, 25.

Plaintiffs and petitioners were right to abandon that analogy. As explained in our supplemental brief (at 14-19), the harms plaintiffs allege would not have provided a basis for a lawsuit for the common-law tort of public disclosure of private facts. The disclosure of plaintiffs' search terms does not implicate plaintiffs' *own* privacy, as required by the common-law tort, because the disclosures do not identify plaintiffs as the searchers. Likewise, the alleged disclosures do not involve highly offensive information, were not publicized, and do not concern plaintiffs' private lives—all of which were part of the injury cognizable at common law. See *ibid.* Thus, although certain "privacy tort victim[s]" can recover damages without showing "specific harm[s]," *Doe*, 540 U.S. at 621, plaintiffs no longer seriously contend that their injuries resemble those recognized by such privacy torts.[3]

Plaintiffs instead analogize their asserted harms to those underlying common-law protections for copyright and other intellectual-property rights. Class Supp. Br.

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[3] *Doe* does not suggest that all common-law privacy tort victims are entitled to recover without showing harm. As explained in our supplemental brief (at 16), the common-law tort of public disclosure of public facts did not give rise to *per se* recovery. Indeed, the Restatement provision cited in *Doe*, 540 U.S. at 621 n.3, made clear that recovery would be allowed only where, *inter alia*, a privacy intrusion "has gone beyond the limits of decency" and the plaintiff would "be justified in feeling seriously hurt" by the disclosure, 4 Restatement of Torts (First) § 867 cmt. d (1939).

5-15; see Pet. Supp. Br. 8-11, 13-16 (similar). Plaintiffs, however, have not advanced a theory of property harm as a basis for standing at any point in the litigation. Their suit from the outset has been based on alleged "[p]rivacy [h]arm." Compl. 31; see D. Ct. Doc. 32, at 1 (Oct. 7, 2011) (invoking "privacy harms" in opposing motion to dismiss for lack of standing); Pet. App. 3 ("This case arises from class action claims that Google violated users' privacy."). Indeed, plaintiffs contended and the courts below agreed that the *cy pres* relief in the settlement was sufficiently related to plaintiffs' claims precisely because the recipients "pledged to use the settlement funds to promote the protection of Internet *privacy*." Pet. App. 7 (emphasis added).

Plaintiffs' pivot to a standing theory that has "never been presented to any lower court" likely comes too late in the day. *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109-110 (2001) (per curiam) (declining to consider belated standing argument). "Although a party cannot forfeit a claim that [a court] lack[s] jurisdiction, it can forfeit a claim that [a court] possess[es] jurisdiction." *Scenic America, Inc.* v. *United States Dep't of Transp.*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 2 (2017); see *Huron* v. *Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (explaining that forfeiture rules "appl[y] to standing, as much as to merits, arguments, because it is not the province of an appellate court to 'hypothesize or speculate about the existence of an injury [a plaintiff] did not assert' to the district court") (citation omitted). Plaintiffs thus likely forfeited the argument that they have standing based on a property injury by failing to make it below.

Regardless, plaintiffs' reliance on cases historically recognizing property-based injuries is unavailing because those cases are grounded in a specialized form of property—copyright or similar intellectual-property rights—that bears no resemblance to plaintiffs' claims. Plaintiffs' lead example, *Folsom* v. *Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4901), is illustrative. Although plaintiffs frame that case as about "disclosure of communications without consent," Class Supp. Br. 5, *Folsom* was a copyright-infringement action. The plaintiffs there claimed that the defendants had "pirated" passages of a biography of George Washington that they published. 9 F. Cas. at 345. The passages in question were letters written by President Washington, "bequeathed" to his nephew (Justice Bushrod Washington), and "acquired" by the author of the biography published by the *Folsom* plaintiffs. *Ibid.* Justice Story's opinion for the district court determined that President Washington held the "sole and exclusive copyright" in his letters, that the copyright was transferred to the *Folsom* plaintiffs, and that the defendants infringed the copyright. *Id.* at 346; see *id.* at 346-349.

The other English and early American common-law cases cited by plaintiffs (Class Supp. Br. 6-8) similarly address copyright and related property interests, not disclosure of allegedly private information. In *Pope* v. *Curl*, (1741) 26 Eng. Rep. 608 (Ch.), for example, the court held that selling "a book of letters" authored by the plaintiffs violated an English copyright statute. *Ibid.* In *Abernethy* v. *Hutchinson*, (1825) 47 Eng. Rep. 1313 (Ch.), the court concluded that "[a] person who attends oral lectures is not justified in publishing them for profit." *Ibid.* In *Yovatt* v. *Winyard*, (1820) 37 Eng. Rep.

425 (Ch.), the court held that an employee may not misappropriate his employer's recipes and go into business for himself. *Id.* at 426; see, *e.g.*, *Gee* v. *Pritchard* (1818) 36 Eng. Rep. 670, 671 (Ch.) (enjoining publication of widow's letters from late husband because "the letters were his private property, and * * * he was entitled to print and publish them"); *Grigsby* v. *Breckinridge*, 65 Ky. (2 Bush) 480, 482-486 (1867) (similar).

The harm involved in those cases—misappropriation of intellectual property through publication for profit—differs dramatically from the invasions of privacy and potential embarrassment alleged by plaintiffs. The relief requested in each case was "an injunction to stay printing and publishing the letters," thereby preventing a financial injury in the form of lost potential profits, not compensation for an intrusion on the plaintiff's private communications. *Thompson* v. *Stanhope*, (1774) 27 Eng. Rep. 476, 476 (Ch.). In many of the cases, the plaintiffs were not the authors of the letters, but third parties claiming a property interest. See, *e.g.*, *Folsom*, 9 F. Cas. at 345. And of particular relevance here, none of the cases involved letters by authors who were anonymous or had undisclosed identities.

The intellectual-property cases thus provide little historical support for the injuries plaintiffs allege here. Plaintiffs did not allege in their complaint that their claimed SCA violations deprived them of property or subjected them to any related financial harm. And the SCA itself, which Congress enacted in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 1, 100 Stat. 1848, focuses on protecting privacy rather than property. See, *e.g.*, S. Rep. No. 541, 99th Cong., 2d Sess. 5 (1986) ("Congress must act to protect the privacy of our citizens."). If plaintiffs perceived a harm to

a copyright or similar property interest in their search queries, they presumably would have asserted claims under the copyright or similar intellectual-property statutes, see, *e.g.*, 17 U.S.C. 501, which are the modern analog of the common-law cases they cite. Although *Spokeo* does not require exact correspondence between plaintiffs' asserted injuries and those recognized at common law, see 136 S. Ct. at 1549, the injuries asserted here are far too attenuated from the common-law property protections on which plaintiffs rely.

2. Plaintiffs' second alleged harm—the risk that disclosure of their search terms will result in reidentification —is overly speculative

Plaintiffs briefly assert in the alternative that disclosure of their search terms creates a risk that third parties will use their search terms to reidentify them and connect them to particular searchers. Class Supp. Br. 18-19. As explained in our supplemental brief (at 20-21), however, plaintiffs' allegations of possible reidentification are too speculative to support standing. Not only does the complaint fail to allege that plaintiffs were reidentified based on the disclosure of their search terms, it fails to allege any of the practices that would be necessary to enable reidentification, such as visiting the same website multiple times, using a static Internet Protocol address, accepting cookies, and the like. See Google Supp. Br. 13-15. Plaintiffs' supplemental brief (at 18) cites a newspaper article about the alleged reidentification of America Online (AOL) users, but the AOL episode apparently involved multiple practices that plaintiffs do not allege here. See Google Supp. Br. 13-15. Plaintiffs also make general references to "the increasing ubiquity of data brokers," Class Supp. Br. 19, but with nothing in the complaint to suggest that

data brokers played any role in disclosing any information about the named plaintiffs, those conclusory allegations remain too speculative to support standing, see U.S. Supp. Br. 20-21.

B. No Named Plaintiff Has Article III Standing To Bring The Asserted State-Law Claims

Finally, plaintiffs contend (Class Supp. Br. 19-23) that they have standing based on injuries arising from their state-law claims, particularly their breach-of-contract claim. But if the district court lacked jurisdiction over plaintiffs' SCA claim, it could not exercise supplemental jurisdiction over their state-law claims, because supplemental jurisdiction is permissible only in a "civil action of which the district courts have original jurisdiction." 28 U.S.C. 1367(a); see *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction" over any federal claim, "the court must dismiss the complaint in its entirety," including "pendent state-law claims."); *Scott* v. *Pasadena Unified Sch. Dist.*, 306 F.3d 646, 664 (9th Cir. 2002) (concluding that plaintiff "did not have standing" and that court therefore had "no discretion to retain supplemental jurisdiction" over state-law claims), cert. denied, 538 U.S. 1031 (2003). Plaintiffs suggest (Class Supp. Br. 4 n.1) that the district court would have jurisdiction over their state-law claims under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. 1332(d), but plaintiffs did not allege in their complaint that they satisfy CAFA's jurisdictional requirements, and no court has found that they do.

Moreover, plaintiffs do not appear to have argued at any point in the litigation that they have standing based on a breach of contract in its own right. In opposing Google's motion to dismiss the state-law claims for lack

of standing, for example, plaintiff Italiano contended that "the injury [he] suffered as a result of Google's dissemination of his search queries [wa]s the *increased risk of identity theft*," not breach of contract. D. Ct. Doc. 45, at 4 (July 19, 2012) (emphasis added). The district court subsequently dismissed the state-law claims because plaintiffs had not pleaded any "injury" or "imminent danger of harm" sufficient to create Article III standing, J.A. 27, and plaintiffs did not appeal or otherwise contest that determination. Like plaintiffs' new theory of standing based on property harms, plaintiffs' new theory of standing based on a breach of contract alone is likely forfeited. See p. 6, *supra*.

In any event, it is far from clear that the mere assertion of a breach-of-contract claim automatically creates Article III standing. See, *e.g.*, *Hutton* v. *National Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 621 (4th Cir. 2018) (explaining that a data-breach plaintiff fails to establish standing for a breach-of-contract claim if he "has made no allegations that show a sufficiently imminent threat of injury from future identity theft"); *Exel, Inc.* v. *Southern Refrigerated Transp., Inc.*, 807 F.3d 140, 148 (6th Cir. 2015) (concluding that plaintiff lacked standing because the contract imposed no duty to pay). Nor is there any reason to conclude plaintiffs could cure the absence of standing on their federal SCA claim simply by pointing to the same asserted harms in service of their state-law contract claim. Indeed, the district court initially dismissed both petitioners' federal and state claims for failure to allege any injury in fact. J.A. 21-22. That resolution was ultimately correct.

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For the foregoing reasons and those stated in our supplemental brief, no named plaintiff has Article III standing.

Respectfully submitted.

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