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Supreme Court Orders Standing Analysis in Google Settlement

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On March 20, 2019, the Supreme Court refused to address the adequacy of a $8.5 million Google privacy class action settlement and instead remanded to a lower court to determine whether the class action plaintiffs had standing to assert a claim under the Stored Communications Act ("SCA"). The Court's holding serves as a reminder that despite the recent trend in finding standing for privacy violations, it can still be an open issue.

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Frank v. Gaos arose out of Google's use of "referrer headers," whereby Google allegedly transmitted users' search terms to the servers that hosted the webpages the users selected as a result of the searches. Plaintiffs alleged that Google's transmission of users' search terms violated the SCA, which prohibits an entity providing an electronic communication service to the public from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." After lengthy motion practice, Google agreed to pay $8.5 million, most of which would be distributed to six non-profit *cy pres* recipients selected by class counsel and Google to "promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Five class members objected to the settlement on several grounds relating to fairness.

During the pendency of the class action and settlement, the Supreme Court issued its 2016 ruling in *Spokeo, Inc. v. Robins*, which held that Article III standing requires a concrete injury even in the context of a statutory violation. However, when the objecting class members' appeal reached the Supreme Court, no party made any arguments relating to standing. Nonetheless, the Solicitor General filed a brief as *amicus curiae* urging the Supreme Court to vacate and remand for the lower courts to address standing under the *Spokeo* standard. The Supreme Court ordered supplemental briefing on the issue and ultimately remanded for the lower courts to do just that, emphasizing that its opinion should not be interpreted "as expressing a view on any particular resolution of the standing question." Justice Thomas filed a lone dissent to the *per curiam* opinion, arguing that "[b]y alleging the violation of 'private dut[ies] owed personally' to them 'as individuals,' the plaintiffs established standing."

Over recent years, the trend among lower courts and state supreme courts has been to find standing for privacy violations even where the plaintiff did not sustain actual damage beyond a violation of his or her statutory right. Although the Court did not express a view on whether standing exists for such a claim under the SCA, its holding demonstrates—to plaintiffs, defendants, state legislatures, and Congress—that the issue of statutory standing in privacy cases has not been resolved.

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