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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19

20 DANIEL MATERA, as an individual, and
21 on behalf of other persons similarly
22 situated,

23 Plaintiff,

24 v.

25 GOOGLE, INC.,

26 Defendant.

Case No. 5:15-cv-04062 LHK

**PLAINTIFF’S SUPPLEMENTAL BRIEF
REGARDING *SPOKEO, INC. V. ROBINS***

Date: June 27, 2016
Time: 1:30 p.m.
Courtroom: 8 - 4th Floor
280 S. First Street
San Jose, CA 95113
Judge: The Hon. Lucy H. Koh

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INTRODUCTION

1 The Supreme Court’s recent opinion in *Spokeo, Inc. v. Robins* reaffirmed that violations of
 2 a statute protecting against “intangible” harm *can* constitute “concrete” injuries sufficient to
 3 confer Article III standing, without the need to show any further harm. 136 S. Ct. 1540, 1549
 4 (2016). Where, as here, the interests protected by a statute have a “close relationship” to rights
 5 rooted in the common law, or where Congress has “elevate[d]” certain rights “to the status of
 6 legally cognizable injuries,” violations of those interests amount to injury-in-fact. *Id.* Through his
 7 claims under the Electronic Communications Privacy Act, 18 U.S.C. § 2510, *et seq.* (“ECPA”)
 8 and the California Invasion of Privacy Act, Cal. Pen. Code § 630, *et seq.* (“CIPA”), Plaintiff
 9 alleges an injury that is tied to long-standing, common law rights to privacy and is explicitly
 10 contemplated in the legislative histories of the respective statutes. Far from being a “bare
 11 procedural violation,” Google’s conduct of intercepting and scanning Plaintiff’s private
 12 communications is the core harm that ECPA and CIPA guard against. *Spokeo* leaves no doubt
 13 that Plaintiff alleges a concrete and particularized injury sufficient to confer Article III standing.

ARGUMENT

I. The Supreme Court Reaffirmed that “Intangible” Injuries are Nonetheless “Concrete,” for Purposes of Article III Standing Where, as Here, the Legislature Codifies Long-Recognized Common Law Rights.

14 The Supreme Court’s *Spokeo* opinion did not create the “dispositive standing defense”
 15 anticipated by Google in its earlier briefing. (*See* Def.’s Mot. to Stay [Dkt. No. 21] at 6). Instead,
 16 the Supreme Court reiterated the fundamental—and uncontroversial—principle that to establish
 17 injury-in-fact under Article III a plaintiff must allege “an injury that is both ‘concrete *and*
 18 particularized.’” *Spokeo*, 136 S. Ct. at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw*
 19 *Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)) (emphasis in original). After
 20 clarifying that the “concrete” and “particularized” inquiries must be conducted separately, the
 21 Court affirmed the long-standing principle that a concrete injury can be either tangible, such as

1 monetary loss, or *intangible*, such as a violation of one’s free speech or free exercise rights. *Id.* at
 2 1549 (citing *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009) (free speech); *Church of*
 3 *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise)).

4 In evaluating whether an intangible injury is sufficiently “concrete” to satisfy the injury-
 5 in-fact requirement, the Court identified two important factors: “history and the judgment of
 6 Congress.” *Id.* First, because standing is “grounded in historical practice,” the Court explained
 7 that “it is instructive to consider whether an alleged intangible harm as a close relationship to a
 8 harm that has traditionally been regarded as providing a basis for a lawsuit in English or
 9 American courts.” *Id.* As an example, “the law has long permitted recovery by certain tort victims
 10 even if their harms may be difficult to prove or measure.” *Id.* Second, the Court made clear that
 11 Congress itself can “elevat[e] to the status of legally cognizable injuries concrete, *de facto*
 12 injuries that were previously inadequate in law.” *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S.
 13 555, 578 (1992)). In “such a case,” a plaintiff “need not allege any *additional* harm beyond the
 14 one Congress has identified.” *Id.* (emphasis in original).¹

15 As demonstrated below, both history and the judgments of Congress and the California
 16 legislature make clear that Google’s unilateral interceptions of Plaintiff’s electronic
 17 communications—without the need of any further allegations of harm—constitutes a concrete
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 19
 20

21 ¹ The Court’s recognition that intangible injuries can satisfy Article III’s demands renders
 22 irrelevant Google’s reliance, in its Motion to Stay, on cases analyzing statutory claims that
 23 require economic harm as an element of proof for the claim. See Def.’s Mot. to Stay [Dkt. No.
 24 21] at 3 (citing *In re iPhone Application Litig.*, No. 11-md-2250-LHK, 2011 U.S. Dist. LEXIS
 25 106865, at *17 (N.D. Cal. Sept. 20, 2011) (Koh, J.) (addressing a claim under the Computer
 26 Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”), which require a showing of economic loss);
 27 *In re Google Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 U.S. Dist. LEXIS 183041, at *14-
 28 15 (N.D. Cal. Dec. 28, 2012) (same, with regard to the plaintiffs’ claims under California’s Unfair
 Competition Law, Cal. Bus. & Prof. Code § 17200 (“UCL”), which requires a showing of loss of
 either money or property); *LaCourt v. Specific Media, Inc.*, No. SACV 10-1256-GW (JCGx),
 2011 U.S. Dist. LEXIS 50543, at *12 (C.D. Cal. Apr. 28, 2011) (same, regarding claims under
 the UCL and the CFAA)). As the Court explained in *Spokeo*, Congress has the power (and is in
 fact “well positioned”) “to identify intangible harms that meet minimum Article III
 requirements,” even if those harms prove difficult to measure. The legislature can also, of course,
 require proof of economic harm to plead a claim (as Google’s cited cases demonstrate), but
 neither ECPA nor CIPA contain such a requirement.

1 injury sufficient to confer Article III standing for Plaintiff's claims under ECPA and CIPA,
2 respectively.

3 **A. ECPA and CIPA Codify Concrete Privacy Injuries that Have Been Long-**
4 **Recognized in the Common Law.**

5 *Spokeo* instructs courts to consider whether the intangible injury at issue “has a close
6 relationship” to an injury recognized at common law. 136 S. Ct. at 1549 (citation omitted). Both
7 ECPA and CIPA (and their attendant prohibitions on interceptions of private communications)
8 expressly protect and codify fundamental privacy rights that are rooted in history and the
9 common law. ECPA allows “any person whose wire, oral, or electronic communication is
10 intercepted, disclosed, or intentionally used in violation” of the statute to bring a civil action. 18
11 U.S.C. § 2520(a). Likewise, CIPA allows a plaintiff to bring a lawsuit for “read[ing], or
12 attempt[ing] to read, or [] learn[ing] the contents or meaning of any message, report, or
13 communications while the same is in transit” Cal. Pen. Code § 631. Respectively, these are
14 codifications of well-established common law rights of privacy.
15

16 As Justice Brandeis explained in his seminal article, *The Right to Privacy*, “[t]he common
17 law secures to each individual the right of determining, ordinarily, to what extent his thoughts
18 sentiments and emotions shall be communicated to others.” Samuel D. Warren & Louis Brandeis,
19 *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). The Second Restatement of Torts
20 recognizes the same privacy rights through its tort of intrusion upon seclusion, explaining that
21 “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of
22 another or his private affairs or concerns, is subject to liability to the other for invasion of his
23 privacy.” Restatement (Second) of Torts § 652B (1977). The Supreme Court has similarly
24 recognized the primacy of privacy rights, explaining that the Constitution operates in the shadow
25 of a “right to privacy older than the Bill of Rights.” *Griswold v. Connecticut*, 381 U.S. 479, 486
26 (1965). For its part, California amended its constitution in 1972 to specifically enumerate a right
27
28

1 to privacy in its very first section. Cal. Const. art. I, § 1. And the California Supreme Court has
2 recognized the fundamental injuries at stake in privacy violations, explaining as follows:

3 [A] measure of personal isolation and personal control over the
4 conditions of its abandonment is of the very essence of personal
5 freedom and dignity A [person] . . . whose conversations may
6 be overheard at the will of another . . . is less of a [person], has less
7 human dignity, on that account. He who may intrude upon another
8 at will is the master of the other and, in fact, intrusion is a primary
9 weapon of the tyrant.

10 *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998) (quoting Edward J. Bloustein,
11 *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962,
12 973-74 (1964)); *see also Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 276 (1952) (“Recognition has
13 been given of a right to privacy, independent of the common rights to property, contract,
14 reputation and physical integrity. . . . In short, it is the right to be let alone.”) (internal quotation
15 marks omitted).

16 Courts have long-recognized common law tort claims that mirror ECPA’s and CIPA’s
17 prohibitions against the interception of private communications without consent. For example, in
18 *Vernars v. Young*, 539 F.2d 966, 968-69 (3d Cir. 1976), the Third Circuit held that the plaintiff
19 stated a common law invasion of privacy tort claim based on allegations that a fellow officer and
20 director of a corporation “opened and read without her consent” her personal mail. The Court
21 explained that “[j]ust as private individuals have a right to expect that their telephonic
22 communications will not be monitored, they also have a reasonable expectation that their personal
23 mail will not be opened and read by unauthorized persons.” *Id.* at 969. Similarly, in *Billings v.*
24 *Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973), the Texas Supreme Court recognized a common law
25 right of privacy cause of action based on an illegal wiretap of the plaintiff’s residence. *See also*
26 *Berger v. State of N.Y.*, 388 U.S. 41, 45-53 (1967) (setting forth the history of the development of
27 common law and statutory rights protecting individuals from eavesdropping).

28 In enacting the Omnibus Crime Control and Safe Streets Act of 1968, which ECPA

1 amended, Congress recognized that it was codifying claims rooted in the common law: “[T]he
2 right of privacy, the right to be left alone, and the right against unreasonable searches and
3 seizures—the right, that is, to be personally secure—are among the most highly valued rights of
4 an American citizen. These guarantees have been a part of Anglo-Saxon law ever since the 15th
5 century.” 114 Cong. Rec. S6194 (daily ed. May 23, 1968) (statement of Sen. Fong). Thus, there
6 can be no doubt that the interception of one’s private communications without prior consent—
7 codified as unlawful by ECPA and CIPA—amounts to a “concrete” injury that bears, at a
8 minimum, a “close relationship” to the common law’s steadfast protection of one’s fundamental
9 right of privacy.
10

11 **B. By Enacting ECPA and CIPA, the U.S. Congress and California Legislature**
12 **Recognized a “Concrete” Harm Stemming from the Interception of Private**
13 **Communications.**

14 The “judgment of Congress”—which is both “instructive and important”—also confirms
15 that the claims here satisfy Article III. *Spokeo*, 136 S. Ct. at 1549. The legislative histories of
16 ECPA and CIPA make clear that they were intended to recognize and codify the concrete harm
17 that results from having a third party, like Google, intercept and analyze individuals’ private
18 communications.

19 ECPA was passed in 1986 to afford electronic communications the same protections that
20 attach to private letters sent via the U.S. Postal Service. In recommending ECPA’s passage, the
21 Senate Committee on the Judiciary stated:

22
23 A letter sent by first class mail is afforded a high level of protection
24 against unauthorized opening by a combination of constitutional
25 provisions, case law, and U.S. Postal Service statutes and
26 regulations. Voice communications transmitted via common carrier
27 are protected by Title III of the Omnibus Crime Control and Safe
28 Streets Act of 1968. But there are no comparable Federal statutory
standards to protect the privacy and security of communications
transmitted by new noncommon carrier communications services or
new forms of telecommunications and computer technology. This is
so, even though American citizens and American businesses are
using these new forms of technology in lieu of, or side-by-side

1 with, first class mail and common carrier telephone
 2 services....*Congress must act to protect the privacy of our citizens.*
 3 *If we do not, we will promote the gradual erosion of this precious*
right.

4 S. REP. NO. 99-541, 5, reprinted in 1986 U.S.C.C.A.N. 3555, 3559 (Oct. 17, 1986) (emphasis
 5 added). In enacting ECPA, Congress’s unmistakable intent was to create an express legal right
 6 prohibiting the “unauthorized opening” of electronic communications, and a violation of this
 7 privacy right (such as Google’s unauthorized message scanning) is a concrete injury.

8 The California Legislature made its intent in passing CIPA equally clear. In its
 9 “Declaration of Policy,” CIPA states:
 10

11 The Legislature hereby declares that advances in science and
 12 technology have led to the development of new devices and
 13 techniques for the purpose of eavesdropping upon private
 14 communications and that the invasion of privacy resulting from the
 15 continual and increasing use of such devices and techniques has
 16 created a serious threat to the free exercise of personal liberties and
 17 cannot be tolerated in a free and civilized society.

18 The Legislature by this chapter intends to protect the right of
 19 privacy of the people of this state.

20 Cal. Pen. Code § 630. Like ECPA, CIPA protects individuals from “the invasion of privacy
 21 resulting from the...use” of an eavesdropping device to intercept “private communications.” *Id.*
 22 That privacy invasion is the precise concrete injury Plaintiff alleges here.

23 Because ECPA and CIPA authorize redress for now-codified injuries that were already
 24 recognized by the common law, suits alleging violations of these statutes—such as Plaintiff’s
 25 allegations that Google intercepted, acquired, and used the content of private electronic
 26 communications—allege concrete injuries that confer Article III standing.

27 **II. Plaintiff’s Injuries are “Particularized” and “Concrete,” and Do Not Amount to a**
 28 **“Bare Procedural Violation.”**

Plaintiff has alleged that, when he and Class members “sent emails to or received emails
 from Gmail users, Google intercepted these communications to scan, compile, analyze, and

1 archive the contents of the communications,” in violation of ECPA and CIPA. Compl. at ¶ 19;
2 *See also, id.* at ¶¶ 2, 4, 7, 20-25, 46-46, 61-66. Plaintiff has satisfied the “particularized”
3 requirement by alleging that Google “violated *his* statutory rights, not just the statutory rights of
4 other people,” and that his personal interests in the privacy of his communications “are
5 individualized rather than collective.” 136 S. Ct. at 1544 (emphasis in original) (citation omitted).
6 Plaintiff has also satisfied the “concrete” requirement because ECPA and CIPA draw on a
7 centuries-old right to privacy and declare, as their goal, the protection of individuals’ private
8 communications. *See* Section II, *infra*.

10 Google’s interception of Plaintiff’s private communications is, in fact, *the* concrete and
11 specific harm that both ECPA and CIPA were enacted to prevent. Thus, Plaintiff’s injuries do not
12 amount to a “bare procedural violation, divorced from any concrete harm” that will not give rise
13 to an Article III injury. *Spokeo*, 136 S. Ct. at 1549. As the Supreme Court previously said,
14 “deprivation of a procedural right without some concrete interest that is affected by the
15 deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.” *Summers*
16 *v. Earth Island Institute*, 555 U.S. 488, 496 (2009). But a “person who has been accorded a
17 procedural right to protect his concrete interests” has standing to assert that right, and may do so
18 “without meeting all the normal standards for redressability and immediacy.” *Lujan*, 504 U.S. at
19 572 n.7.

22 In *Spokeo*, the Court provided several examples of injuries that satisfy concreteness, as
23 well as a couple of “bare procedural violations” that might not. The Court cited favorably *Public*
24 *Citizen v. U.S. Department of Justice*, which held that the plaintiff had standing to challenge the
25 Department of Justice’s failure to provide access to information, the disclosure of which was
26 allegedly required by the Federal Advisory Committee Act, because the inability to obtain such
27 information “constitutes a sufficiently distinct injury to provide standing to sue.” *Spokeo*, 136 S.
28

1 Ct. at 1549 (citing *Public Citizen*, 491 U.S. 440, 449 (1989)). The Court also cited *Federal*
2 *Election Commission v. Akins* wherein “a group of voters’ ‘inability to obtain information’ that
3 Congress had decided to make public [was] a sufficient injury in fact to satisfy Article III.”
4 *Spokeo*, 136 S. Ct. at 1549-50 (citing *Akins*, 524 U.S. 11, 20–25 (1998)). By contrast, the Court
5 indicated that a person who alleges a procedural violation of a statute must at least show a risk of
6 the harm that the statute was meant to protect against. For example, when “a consumer reporting
7 agency fails to provide the [FCRA’s] required notice to a user of the agency’s consumer
8 information” (a notice that is not a precondition to anything)—the plaintiff’s path to a concrete
9 injury will be harder, because that information “may be entirely accurate” and FCRA is designed
10 to curb the inaccurate reporting of information. *Spokeo*, 136 S. Ct. at 1550. The Court suggested
11 that the same is true if the reported information contains only “an incorrect zip code.” *Id.*
12

13
14 In contrast to harmless procedural violations, Plaintiff’s ECPA and CIPA claims arise
15 from the precise injury that these statutes seek to prevent. The interception of the contents of
16 one’s private communications is the precise intangible harm that has long been recognized in the
17 common law and was “elevat[ed] to the status of legally cognizable injuries,” *Id.* at 1549
18 (quotation omitted), through the respective enactments of ECPA and CIPA. S. REP. 99-541, 1,
19 reprinted at 1986 U.S.C.C.A.N. 3555, 3555 (The Electronic Communications Privacy Act
20 amended the Federal wiretap law “to protect against the unauthorized interception of electronic
21 communications”). Plaintiff’s injury is thus concrete. The privacy intrusion inherent in the
22 interception of email content is not some violation of a mere procedural requirement intended to
23 prevent some downstream or consequential injury, but rather is the injury itself. An allegation of
24 interception—and nothing more—therefore confers Article III standing under *Spokeo*.
25

26 This position is supported by the other, intangible harms that *Spokeo* identifies as being
27 “difficult to prove or measure,” but which are nonetheless concrete, such as libel or slander *per*
28

1 *se.* 136 S. Ct. at 1549 (citing Restatement (First) of Torts §§569-570 (1938)). It is even more fully
2 developed in the concurrence of Justice Thomas, who explains the *de facto* Article III injury that
3 arises from common law claims for trespass and other private rights:

4 In a suit for the violation of a private right, courts historically
5 presumed that the plaintiff suffered a *de facto* injury merely from
6 having his personal, legal rights invaded. Thus, when one man
7 placed his foot on another’s property, the property owner needed to
8 show nothing more to establish a traditional case or controversy.
9 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.

10 *Id.* at 1551 (Thomas, J., concurring) (citations omitted). As in Justice Thomas’s trespass example,
11 here the interception is itself a harm—the proposition this Court entertained in its Order Granting
12 Motion for Stay of Proceedings in the instant litigation. (Dkt. No. 36), at 6 (“More persuasive is
13 Plaintiff’s argument that, unlike the statute at issue in *Spokeo*, ECPA and CIPA allegedly codify
14 common law rights, the violation of which has long been understood to supply a concrete injury
15 sufficient to support Article III standing.”); *see also*, Warren & Brandeis, *supra*, at 198 (“The
16 common law secures to each individual the right of determining, ordinarily, to what extent his
17 thoughts, sentiments, and emotions shall be communicated to others.”); S. REP. NO. 99-541,
18 reprinted in 1986 U.S.C.C.A.N. 3555, 3559 (stating that ECPA is meant to establish “Federal
19 statutory standards to protect the privacy and security of communications transmitted by new
20 noncommon carrier communications services or new forms of telecommunications and computer
21 technology”); Cal. Pen. Code § 630 (“The Legislature by this chapter intends to protect the right
22 of privacy of the people of this state.”).

23 Accordingly, Plaintiff’s claims of privacy intrusion under ECPA and CIPA are not “bare
24 procedural violations,” but rather are the concrete injuries that *Spokeo* firmly identifies as
25 satisfying Article III’s standing requirement.
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CONCLUSION

Plaintiff accuses Google of systematically intercepting and acquiring the contents of non-Gmail-users’ private electronic communications, without consent, and outside of the ordinary course of business of an electronic communications service provider. The resulting injury—an invasion of privacy—has long been recognized at common law and is the specific wrong sought to be prevented by the U.S. Congress and the California Legislature in passing ECPA and CIPA, respectively. Far from attempting to vindicate a “bare procedural” right, Plaintiff alleges concrete and particularized privacy intrusions that constitute statutory violations. The Supreme Court’s opinion in *Spokeo* reaffirms that such claims—with no further allegations of additional, consequential harm—confer Article III standing.

Dated: June 1, 2016

Respectfully Submitted,

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