No. _____

In the Supreme Court of the United States

AARON C. BORING and CHRISTINE BORING,
husband and wife,

Petitioners,

v.

GOOGLE INC., a California corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE
PREAMBLE

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...."
United Nations Declaration of Human Rights, Article 12, December 10, 1948

"There isn't any privacy, get over it."
Google's Vint Cerf, May 9, 2008, Seattle Post Intelligencer

Freedom begins with the right to be left alone. Privacy is not an incidental right, it is a fundamental right — if not the seminal principle upon which the United States of America was founded.

Google intentionally entered onto Petitioners' land, without permission, surveilling and collecting data for its profit purpose. If Google can do it, everyone can do it. That is the entire issue in this case. Petitioners and their counsel hold the point tightly, will not lose sight of it, and will not let it go. Google claims its acts are trivial. That is false. Google's acts are seminal. There is a difference.

Google is a technological, economic and social phenomenon. We are vigilant to recognize Google's control over the American infrastructure of technology, economy and social interaction, and our growing dependencies. If Google also controls our private property — the embodiment and reward of our time — there is nothing left, and we become Google's slaves. That is how seeds grow. The intrusions of technology must yield to privacy, or privacy must yield to the intrusions of technology. With potential fully realized, both seeds cannot stand, as equals, in the same place at the same time. One must be first. We cannot serve two masters.

Petitioners did not accept Google's offer merely to remove the surveilled information from Google's mitigation website. Petitioners' time and personal pursuits are not trivial, and Petitioners are highly offended that Google should presume to be master over them. History teaches that a policy of appeasement is not a final solution.

> It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. … We revere this lesson too much … to forget it." [1]

> I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations….This danger ought to be wisely guarded against.[2]

We Americans are deeply charitable, and, yet, not so much so to forgive the King for quartering soldiers in our homes — even for a fleeting and trivial single night. On principle alone, it is highly offensive. Even with a spare bedroom. On principle alone, it is highly offensive. The greater the principle, the more jealous. The more jealous, the more offended. Privacy is the first cause of war.

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[1] James Madison "Memorial and Remonstrance," Rives and Fendall, Letters and Other Writings of James Madison, 1:163.

[2] James Madison. Jonathan Elliot, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 5 vols. 3:87. Philadelphia: J.B. Lippincott Company, 1901.

Henry Ford, a great American entrepreneur, said: "The older I get, the less I listen to what people say, and the more I watch what they do." A wise saying. The law may be thought old, but it has evolved well-beyond a brash child's clever arguments that the wallet was not buttoned in the person's pocket, so it is okay to take it.

Google argues that it is okay to enter Petitioners' private property, to pass by clearly marked "**Private Road No Trespassing**" signage, to surveil and to collect data. Google, the first of its kind, claims an easement on the World's property from "license" by "general custom." Even the common sense of seeing a swimming pool, where children customarily swim, is not enough to stop Google's continued spying, recording and publication. Google is a corporation — indeed, Google is a technology. It does not eat, it does not sleep, and it does not feel pain.

This is a nation of People. Freedom begins with the right to be left alone. Privacy is not an incidental right, it is a fundamental right — if not the seminal principle upon which the United States of America was founded. Now we test how this Nation, so conceived, will endure.

We pray that this Supreme Court accept this case, deeds caught at the first experiment and arguments untangled. The rulings below cannot stand, the only question is when they will fall. We pray now. And, yet, but for the full errors of the courts below, this case could not have so timely ascended to the final power and authority of this United States Supreme Court, so Providence must see some goodness in it. Amen.

A. Facts Giving Rise to this Case[8]

1. Petitioners own private property which includes their home. They purchased the private property for seclusion. Their home is set back on a graveled private road approximately 1,000 feet from the paved public road junction. Petitioners' home has an adjacent outdoor swimming pool. Consistent with common and judicial experience, Petitioners and their guests, including children, customarily swim with such bodily nakedness as is customary without the expectation of being surveilled or recorded without consent and/or advance notice.

2. Petitioners had an overt statement of their expectation of privacy, "**Private Road No Trespassing**." The residence and swimming pool stand clearly and can be seen from a far distance with sufficient notice that there is no throughway by continuing forward.

3. Petitioners are not celebrities. Petitioners are common people. Petitioners do not have a locked gate, a guard dog standing watch, or a fence surrounding the perimeter their property. At some point of altitude, Petitioners' yard can be seen by satellite and low-flying aircraft. At times, Petitioners invite guests to their home.

4. Petitioners discovered that someone, Google in particular, had entered their private property, disregarding and contrary to the clearly the marked

[8] Boring's 3rd Cir. Opening Appellate Brief, August 25, 2009, ["**Borings App. Br.**"], at 11; District Court Document ["**Dist. Ct. Doc.**"] 18 ["**Amended Complaint**"], at ¶11-12.

"**Private Road No Trespassing**" sign, and, continuing forward with tires crunching, drove up to their home and next to the swimming pool, conducting surveillance with advanced 360° camera technology, which was published worldwide.

5. Google did not turn around when first seeing Petitioners' swimming pool or learning that the road was not a throughway, nor did Google stop surveilling. Google did not even stop surveilling while turning around directly in front of Petitioners' home and swimming pool. Google did not redact the information from the Google surveillance cameras. Google published anyway.

6. Correction and removal of the pictures by electronic facility requires the devotion of personal time, training, electronic connectivity services and equipment for removal.

7. Petitioners were highly offended by Google's acts. The context is a trespass, disregarding and contrary to express "**Private Road No Trespassing**" signage, with data collection, including in the form surveillance,[9] with recording, indexing and worldwide

[9] On or about May 15, 2010, the United States and other countries instituted investigations of data collection by Google Street View drivers regarding wireless data. Petitioners do not yet know whether their wireless data was collected. On May 13, 2010, Google filed a motion for protective order under Fed.R.Civ.P. 26 refusing to respond to discovery regarding its defense of "license." Dist. Ct. Doc. 81 ["**Google's Protection Motion**"] Petitioners' position at Dist. Ct. Doc 88 ["**Borings Opp. to Google's Protection Motion**"]. If Google claims it can take visual data by license, Google can take non-visual data. Google argues that the "license" to enter private property is not related to the purpose of entry. *See,* id., ¶6. No guard dog, *carte blanche*.

publication, and the requirement of removal at Petitioners' cost.[10] Moreover, the wonderment of what else and what other surveillance Google possesses.

8. Petitioners do not yet know exactly what data and pictures were taken. Google records, indexes, and publishes worldwide pictures of persons in immodest conditions as part of its Street View program.[11]

9. Google's technological, economic and social power permits it, for the first time in history, to send "Street View" drivers out to traverse the country, packed with data collection, recording and surveillance technology. Among other data collection,[12] Google "automatically record[s] the view that anyone would see while driving on the streets,"[13] and commercially uses the data, including by indexing and automatically publishing the data on the Internet worldwide. [14]

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[10] If you suddenly discover a picture of your bedpost published on the Internet, not having been taken or published by you, it is not necessarily the picture of your bedpost, *per se,* that is offensive. It is the context. Amended Complaint, at ¶11-12.

[11] *See, e.g.,* http://googlesightseeing.com/2009/03/24/naked-people-on-google-street-view. NOTE: There are or may be explicit pictures on this site. *See,* Borings' 3rd. Cir. Petition for Hearing En Banc, February 11, 2010 ["**Borings En Banc Petit.**"], at 65a.

[12] *See, supra,* note 9.

[13] Google's 3rd Cir. Brief, September 24, 2009 ["**Google App. Br.**"], at 1.

[14] *See, supra,* note 9.

10. The data collected by Google could not have been acquired but for trespassing or otherwise entering onto Petitioners' private property.

11. Google does not seek advance information about private roads, because, according to Google's Larry Yu, it "**would have slowed down deployment of Street View**."[15] It is "common sense" that persons who film and upload video could take steps to protect privacy and obtain consent, as stated by least Google's Vice President, when it suits Google's position:

> **Common sense dictates that only the person who films and uploads a video to a hosting platform could take the steps necessary to protect the privacy and obtain the consent of the people they are filming.**[16]

12. Apparently not to be slowed down, and to achieve deployment of a critical mass of researchable data for its self-interested profit motive,[17] Google does not make Street Maps an opt-in program. There are no call-in lines for senior citizens, no advance

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[15] As reported by *The Press Democrat,* http://news.google.com/newspapers?nid_=1673&dat=20080821&id=lbAjAAAAIBAJ&sjid=qSQEAAAAIBAJ&pg=6937,4285450 admitted by Google's Larry Yu; *reproduced* at Dist. Ct. Doc. 67 ["**Borings' Motion to Stay**"], at Exhibit 2; Borings App. Br., at 7.

[16] *CNN/Money* http://money.cnn.com/2010/02/24/technology/Google_Italy_privacy_ conviction as admitted by Google's Vice President, Matt Sucherman; *reproduced at* Borings' Motion to Stay, Exhibit 1.

[17] Borings App. Br., at 7.

community notices, no free public computers, no training programs for the less-sophisticated. Data is acquired and commercially used for Google's self-profit until discovered, at which point, Google points to its available post-injury mitigation website.[18]

13. Google's claims it is not wrong to enter onto private property to collect data, including by surveillance, and to record, index and publish the data collected. Google entered the expressly-stated defense of "license"[19] — stating in the record:

> **[Google's] defense is based on the implied consent given by general custom, that absent a locked gate or other express notice not to enter, the public may drive up the driveway or otherwise approach a private home without liability for trespass.[20]**

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[18] Id.

[19] Dist. Ct. Doc. 84 ["**Google Answer**"], ¶29.

[20] Google's Protection Motion (emphasis supplied). If this Court is curious as to how "express notice" reconciles with Petitioners' pleaded "**Private Road No Trespassing**" sign, this Court is invited to Dist. Ct. Doc. 11 ["**Google's Motion to Dismiss**"], at 4 ("Plaintiffs' allegation of a "private road" sign at the top of their street standing alone is insufficient to negate Google's privileged and trivial entry upon Plaintiffs' property."); *see, supra,* note 9; Borings Opp. to Google's Protection Motion, ¶ 6.4).

B. The Initial District Court Proceedings

On April 2, 2008, this action was commenced in the Court of Common Pleas of Allegheny County, Pennsylvania, and removed by Google pursuant to 28 U.S.C. §1441. On February 17, 2009, the District Court granted Google's Motion to Dismiss,[21] dismissing all counts with prejudice, and on April 6, 2009, denying the Borings' Motion for Reconsideration.[22]

In ruling on the privacy count, the District Court concluded, as a matter of law, that it is "hard to believe" that the Petitioners were highly offended by Google's surveillance, recording, indexing and worldwide publication. Judge Hay admitted *ex parte* "Googling."[23] The District Court required to be "convinced."[24] Moreover, Judge Hay performed unreferenced *ex parte* research to draw a serious incorrect statistical inference against Petitioners, to wit: that the lack of claims made against Google tends to prove that the Petitioners' privacy claim was not minimally pleaded pursuant to 12(b)(6).[25] Simultaneously, the District Court concluded that "any attempted amendment would be futile."[26]

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[21] Hay Op., at 27a-41a.

[22] Hay Recon. Op., at 21a-26a.

[23] Hay Op., at 31-32a.

[24] Id., at 31a.

[25] Id., at 32a ("viability," ""inundated"..."frequently consider"). Boring App. Br., at 9.

[26] Id., at 41a, footnote 8.

C. The Appellate Court Proceedings

The Third Circuit affirmed in part and reversed in part.[27] The Third Circuit affirmed the dismissal of all Petitioners' claims and requested relief, with one precise exception not based upon the Twombly Standard.[28] Petitioners' Petition for Rehearing *En Banc* outlines the primary claims of error,[29] also addressed below.

D. The Current District Court Proceedings

There are two pending motions in the District Court of which the undersigned requests this Court to take notice: 1) the Borings' Motion to Stay;[30] and 2) the Borings Opp. to Google's Protection Motion.[31] The request is not for this Court to adjudicate that fray;

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[27] Jordan-Rendell-Padova Op., at 1a.

[28] The District Court dismissed punitive damages on the merits, and compensatory damages because there was no physical injury to land. *See,* Hay Op., at 37a; Hay Recon. Op., at 25a. The District Court required Petitioners to substitute $1 (best case) nominal damages to maintain the trespass claim. Thus, the case was dismissed for lack of pleading an element that does not exist for the cause of action. *See,* Borings App. Br., at 22; Borings Appellate Reply Brief, dated October 10, 2009 ("**Borings App. Reply Br.**"), at 14. The Third Circuit reversed that determination, although it affirmed the punitive damage dismissal for failure of plausibility of intention for the intentional trespass claim it upheld. Jordan-Rendell-Padova Op., at 17a.

[29] Borings' Petition for Rehearing *En Banc* ["**Borings En Banc Petit.**"], at 44a-73a.

[30] *See,* note 13*, supra.*

[31] *See,* note 9*, supra.*

the request is because the existence of the disputes, and the arguments made therein, bear upon the reasons why certiorari should be granted. Google is unique.

1) On the deadline date for Petitioners to file their Motion to Stay, April 6, 2010, the undersigned received a Fed.R.Civ.P. 68 Offer of Judgment from Google in the amount of $10.[32] So this Court understands the impact as the undersigned interpreted that act, as stated in its Reply Brief[33] to the District Court:

> **Google seeks forgiveness, rather than permission. And, now it discloses more of its intention that, if you do not forgive it, it will destroy you in Rule 68 costs. That is the truth. Google's factual argument: Google can drive on your private property, past signage, take pictures and publish them worldwide for a profit. Google's legal argument: You cannot sue for punitive damages, you cannot sue for compensatory damages, you can sue for nominal damages of $1, but, if you get $1, being less than $10, it will claim all of the bully costs that a $34B company can generate against a mom and a pop vindicating their legal rights in America. [fn. 2. A dog that bites after the fact is relevant to prove its latent vicious propensity before the fact. Google's intention is relevant to the judiciability of**

[32] Borings Motion to Stay, Exhibit 3.

[33] Dist. Ct. Doc. 71 ["**Borings Motion to Stay Reply**"].

> **the question presented.] This is the truth.**[34]

Every defendant subject to a nominal damage claim merely sends a routine Fed.R.Civ.P. 68 $10 offer, or better, $1.01. How many moms and pops can endure the risk of winning their claim against Google to vindicate legal rights, and still have to pay all Google's costs? This is simply not fair.

2) Google did not enter a defense until after remand. In its answer, it claims the affirmative defense of "license."[35]

a. Google asserted to the courts below that there was no quasi-contractual basis, and now pleads a commercial license defense from the same transaction or occurrence that proves quasi-contractual plausibility.[36]

b. Even if Google offers the unqualified opinion of its legal counsel upon whose advice it relied at the time in question, Google's affirmative defense now proves the plausibility of the intentional disregard claim in the first instance. Google admits that it went onto Petitioners' property, because it asserts it has a right to be there, past signage, to surveil, record, index

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[34] Borings Motion to Stay Reply, at ¶8.

[35] *See,* notes 19-20*, supra.*

[36] *See,* Borings Opp. to Google's Protection Motion, at ¶11.b. (contract under Pennsylvania law). Jordan-Rendell-Padova Op., at 14a; Borings En Banc Petit., at 62a.

and publish, with "license" by "general custom."[37] Google admits plausibility of punitive damages by its own defense. Moreover, Petitioners assert that it is "common sense" that Google's mitigation website supports plausibility of intentional disregard in the first instance, and the lower courts reverse the inference in error.

REASON WHY CERTIORARI SHOULD BE GRANTED

[37] *See,* notes 19-20, and related text.