

Google loses bid to toss lawsuit over 'potentially embarrassing' Incognito mode data grabbing

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A federal court judge this week shot down Google's attempt to scuttle a multi-billion-dollar class-action lawsuit accusing it of making an

Orwellian grab of "potentially embarrassing" data from users' "Incognito mode" and other private browsing.

The three Californians and two others suing Google on behalf of themselves and tens of millions of other internet users claim Google captured the [data](#) despite promising it would not.

Google, in its bid to get the case thrown out, argued in a March court filing that it "never made any such promise."

In her order in U.S. District Court in Oakland, California, Judge Yvonne Gonzalez Rogers said she agreed with the plaintiffs who filed the lawsuit in 2020 that anyone using Incognito mode in Google's Chrome browser could reasonably deduce from the mode's opening "splash" screen that their data would not be accessible by Google. She also noted that Google's "Search & Browse Privately" help page—for users of Chrome and other browsers including Safari—says, "you're in control of what you information you share with Google when you search."

The Mountain View, California, digital-advertising and internet-search giant represented publicly since mid-2016 that "it would not collect their information while they browsed privately," Gonzalez Rogers wrote. "It did so anyway, collecting, aggregating, and selling plaintiffs' private browsing data without their consent."

Gonzalez Rogers explained how Google, when people use Incognito mode or private modes in other companies' browsers, gathers their data. When a user visits a website that uses Google services, she said in her order Monday, "Google's software directs the user's browser to send a separate communication to Google."

Both sides agree that the class of [internet users](#) browsing purportedly privately since June 1, 2016 numbers in the tens of millions, the judge

noted in a December order.

Gonzalez Rogers noted that the plaintiffs—Chasom Brown, Christopher Castillo and Monique Trujillo of California, William Byatt of Florida and Jeremy Davis of Arkansas—allege that Google links users' private browsing history to the user profiles the company builds for targeted advertising, and that Google denies making those connections.

However, Gonzalez Rogers added that the plaintiffs have provided as evidence internal Google communications stating that Google stores users' regular and private browsing data in the same logs, uses those "mixed logs" to send users personalized ads, and that "even if the individual data points gathered are anonymous by themselves, when aggregated, Google can use them to 'uniquely identify a user with a high probability of success.'"

The lawsuit alleges that Google's data practices infringe on privacy, deliberately deceive consumers, and give Google and its employees "power to learn intimate details about individuals' lives, interests, and internet usage." The data collection also makes the company "one stop shopping" for "any private, government, or criminal actor who wants to undermine individuals' privacy, security, and freedom," the lawsuit claims.

"Google knows who your friends are, what your hobbies are, what you like to eat, what movies you watch, where and when you like to shop, what your favorite vacation destinations are, what your favorite color is and even the most intimate and potentially embarrassing things you browse on the internet—regardless of whether you follow Google's advice to keep your activities 'private,'" the lawsuit alleges. "Google has made itself an unaccountable trove of information so detailed and expansive that George Orwell could never have dreamed it."

Google in its March court filing contended that the plaintiffs agreed to the company's privacy policy, which "expressly disclosed" the ways their data would be collected and used. In a Wednesday statement to this [news organization](#), Google said it strongly disputes the lawsuit's claims and that it would defend itself vigorously.

"Incognito mode in Chrome gives you the choice to browse the internet without your activity being saved to your browser or device," Google spokesman José Castañeda said. Google declined to address the claims that the company could identify users by mixing private and ordinary browsing data, including data from private browsing in non-Google browsers such as Safari. The company also declined to say if it would appeal the judge's ruling.

The legal setback for Google comes as it faces escalating political pressure over its data collection. In January, President Joe Biden in a Wall Street Journal op-ed assailed "Big Tech" and the "dominant incumbents" over their [data collection](#) and smothering of competition. Late last month, Sen. Elizabeth Warren, D-Mass., and Sen. Lindsey Graham, R-SC, put partisan differences aside to attack "Big Tech" in a New York Times op-ed. Companies "vacuum up our personal data," they wrote, singling out Google over a \$392 million privacy settlement it agreed to in November after 40 states sued it for allegedly misleading consumers by continuing to track them after "Location Services" was turned off.

The plaintiffs are seeking for themselves and class members the return of what they claim are billions of dollars in profits Google made from the browsing data, plus unspecified damages of more than \$5,000 for each plaintiff and class member. They also want a [court order](#) barring Google from "intercepting, tracking, or collecting" data from [users'](#) private browsing.

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