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IN THE SUPREME COURT OF THE UNITED STATES

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SPOKEO, INC., :

Petitioner : No. 13-1339

v. :

THOMAS ROBINS. :

- - - - - x

Washington, D.C.

Monday, November 2, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of Petitioner.

WILLIAM S. CONSOVOY, ESQ., Arlington, Va.; on behalf of Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 13-1339, Spokeo v. Robins.

Mr. Pincus.

ORAL ARGUMENT OF MR. ANDREW J. PINCUS

ON BEHALF OF THE PETITIONER

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has said that the irreducible constitutional minimum for standing is injury in fact; that the plaintiff suffered actual or imminent, tangible harm.

In Lujan, the Court said that Congress may elevate to the status of legally-cognizable injuries, concrete, de facto injuries that were previously inadequate in law.

Here, the Ninth Circuit held that there's no need for any de facto injury. A statutory violation that in some general sense relates to the plaintiff is all that's necessary, even though it has no tangible --

JUSTICE KAGAN: Why is it you think --

MR. PINCUS: -- consequences --

JUSTICE KAGAN: Let's say I agree with you that there needs to be a concrete injury; that Congress

1 needs to have recognized something that looks like a
2 concrete injury. But why isn't that exactly what
3 Congress did here? So let me just frame it in a
4 hypothetical.

5 Suppose that there's just a statute -- it's
6 a little bit of a simpler statute, and you can argue
7 with me or tell me why it might or might not be
8 different, but I just want to understand your position.

9 Suppose that there is a statute that just
10 says that one of these credit reporting agencies shall
11 not disseminate inaccurate information about people, or
12 shall -- shall not do it willfully or negligently or
13 what have you, but shall not disseminate inaccurate
14 information about people. And then there's a cause of
15 action that says if they disseminate inaccurate
16 information in a credit report about you, you can sue.
17 All right?

18 Is that enough of a concrete injury for you?

19 MR. PINCUS: No, it's not, for -- for three
20 reasons, Your Honor.

21 And let me preface my response by saying
22 that, of course, that isn't the case with respect to
23 three of the claims in this case, which don't have
24 anything to do with inaccuracy.

25 JUSTICE KAGAN: Okay. But let me focus on

1 what seems to be --

2 MR. PINCUS: I'm happy to focus --

3 JUSTICE KAGAN: -- the gravamen of the
4 claim.

5 And why isn't the dissemination of false
6 information about you in a credit report, why isn't
7 that -- why isn't it -- it perfectly sufficient if
8 Congress says that's a concrete injury?

9 MR. PINCUS: Well, I -- I guess as a
10 threshold matter, I think what the Court has said in
11 other contexts is that Congress should clearly say that
12 it is going beyond the tangible injuries that this Court
13 has defined. The Court has had a clear statement rule.

14 And so another difference between your
15 hypothetical -- I'm not sure whether your hypothetical
16 casts Congress clearly saying, and by the way, we are
17 creating a cause of action for people who otherwise
18 couldn't get into court.

19 JUSTICE KAGAN: I'm sorry.

20 MR. PINCUS: Let me start -- well, maybe I
21 can answer your question this way.

22 JUSTICE KAGAN: You said that there were
23 reasons why that was not a concrete injury --

24 MR. PINCUS: Yes.

25 JUSTICE KAGAN: -- the dissemination of

1 false information about a particular person.

2 Why? Because to me, I'll just say, seems
3 like a concrete injury to me.

4 MR. PINCUS: Well, first -- first of all --

5 JUSTICE KAGAN: You know? If -- I mean, if
6 somebody did it to me I'd feel harmed.

7 And I think that if you went out on the
8 street and you did a survey, most people would feel
9 harmed. Most people would feel as though they had some
10 interest that had been invaded. And Congress recognized
11 that, thought it was a significant problem, passed a
12 statute to deal with that problem.

13 MR. PINCUS: First of all, the -- the common
14 law tradition, which the Court has looked to, did not
15 say that the dissemination of any false statement was an
16 injury.

17 To prove defamation --

18 JUSTICE KAGAN: That's quite right. It's
19 not -- it's not completely in the common law tradition.
20 But we've said many times that Congress gets to look
21 beyond the common law tradition and gets to identify
22 real world problems out there in the world, harming
23 people in real-world ways. And that, it seems, is what
24 Congress did here.

25 MR. PINCUS: Well, let me answer your

1 question in two ways. I -- I want to explain why -- why
2 it isn't, and then I also want to explain why it's not
3 what Congress did here.

4 So why it isn't: There are places that the
5 Court has looked for guides. One is the common law,
6 other -- other kinds of torts, for example.

7 In -- in the restatement --

8 JUSTICE GINSBURG: Can -- can you explain,
9 then, the common law versus the legislature? So if we
10 have some historic practice where damages are awarded to
11 someone who has no out-of-pocket loss, if the common law
12 says so it's okay but if Congress says so it's not?
13 It's very strange.

14 MR. PINCUS: I don't think so, Your Honor.
15 I think -- well, this question takes me a little afield
16 from -- from Justice Kagan's question. But I think the
17 common law had some very specific areas where it defined
18 actual harm; for example, any intrusion on a property
19 right is actual harm, but there has to be a property
20 right for that to be so.

21 So I think Congress could create a property
22 right. And if it did that --

23 JUSTICE SOTOMAYOR: I'm sorry. You're
24 saying -- contrary to one citation, you're actually --
25 Ashby v. White -- that it isn't a right that Congress

1 has given you?

2 I --

3 MR. PINCUS: Your Honor, I think --

4 JUSTICE SOTOMAYOR: I mean, most of the
5 common law rights, like property rights, are -- are
6 given to you by statute. They're not given to you by
7 the common law. Most people are coming in to sue on the
8 basis of a statute.

9 MR. PINCUS: And -- and the question is --
10 there are several ways that they can establish standing.
11 One is to have the tangible harm, to meet the general
12 tangible harm test that this Court applies, generally,
13 in the standing context. And that can be economic
14 injury, it can be other kinds of injury. And the Court
15 has applied that in a -- in a wide variety of contexts.

16 The Court has also -- it is also clear that
17 in the property rights context, when Congress just
18 doesn't create -- or the common law doesn't just create
19 a right to sue but confers a property right, the right
20 to exclude, generally, as the Court has put it, that any
21 intrusion on that property right, on that right to
22 exclude, is tangible harm.

23 And the Court has made clear in the --

24 JUSTICE SOTOMAYOR: So if I have a dozen or
25 more cases that didn't involve property rights, where we

1 didn't require economic harm, those would mean nothing
2 to you?

3 MR. PINCUS: Your Honor, I --

4 JUSTICE SOTOMAYOR: Those legal rights, we
5 just decided through the centuries, all those cases
6 wrong?

7 MR. PINCUS: Well, I don't think -- there
8 certainly aren't any cases that my friends cite that --
9 that meet that test. It's not just economic harm. It
10 can be psychic harm. There are other -- it can be
11 discrimination.

12 JUSTICE BREYER: Well, what's the answer,
13 then, to Justice Kagan's question?

14 MR. PINCUS: Okay. I --

15 JUSTICE BREYER: You said it could be
16 psychic harm, there could be economic harm, there could
17 be all different kinds of harm. And that being so, why
18 isn't what she said right, that one kind of harm could
19 be the harm suffered when somebody tells a lie about
20 you, or gives false information?

21 What's different?

22 MR. PINCUS: It could be.

23 If I can just finish my answer to -- to
24 Justice Sotomayor, because I just want to make clear,
25 and I think the College Savings case is a perfect

1 analogy here, that every cause of action does not confer
2 a property right. The Court there made that clear, and
3 that's why the property right rationale doesn't apply
4 here.

5 Now, turning back to Justice Kagan's
6 question, I think there are other areas, other than
7 defamation where there's some guidance about what
8 constitutes tangible harm.

9 For example, in the False Light cases, the
10 restatement has a comment that I think -- this is a
11 Restatement (Second) of Torts 652E, comment (c) that's
12 very on point.

13 It says, "Complete and perfect accuracy of
14 published reports concerning any individual is seldom
15 attainable by any reasonable effort. And minor errors,
16 such as a wrong address or a mistake in the date of
17 employment, or similar unimportant details, would
18 not" --

19 JUSTICE KAGAN: These are not -- these --
20 these are not unimportant details. This is a -- they
21 basically got everything wrong about him. You know,
22 they got his marital status wrong, they got his income
23 wrong, they got his education wrong. They basically
24 portrayed a different person than --

25 MR. PINCUS: Well, Your Honor, your

1 hypothetical, though, is any false statement. And I'm
2 trying to respond why a ruling by -- a rule by Congress
3 of any false statement wouldn't qualify.

4 So there is some legal precedents that tells
5 us --

6 JUSTICE KAGAN: Here's the thing,
7 Mr. Pincus. It seems to me that the -- the one thing
8 that we have to say Congress is better at than we are is
9 identifying concrete harms. I mean, it's perfectly
10 fine, and I agree with very large portions of your brief
11 when you say they have to have identified a concrete
12 harm. It's like, fine, yes, they do.

13 But now the question is, did they identify
14 one? And it seems pretty clear what they wanted to do
15 here; that this statute is entirely about preventing the
16 dissemination of inaccurate information in credit
17 reports which they seem to think is both something that
18 harms the individual personally and also harms larger
19 systemic issues. And then they gave the cause of action
20 to the people it harmed personally.

21 And I guess -- I mean, don't we owe them a
22 little bit of respect that they've actually identified a
23 real-world harm that it -- that's out there?

24 MR. PINCUS: Well, I think there's a
25 threshold assumption in your question that Congress

1 actually identified that as a real-world harm. And I
2 think there are two problems with that.

3 First of all, the structure of the statute
4 indicates that that's not so. The willfulness cause of
5 action that provides for statutory damages applies to
6 every violation of the statute that's willful, including
7 those that don't involve false statements.

8 So by enacting -- if the argument is by
9 enacting the willfulness cause of action, Congress said
10 inaccuracy is so clearly harmful that it should be
11 actionable in any case, it couldn't -- it's just not
12 possible to look at the -- the way the statute was
13 constructed and say that that was so.

14 JUSTICE ALITO: Well, how much more do you
15 think the plaintiff in this case would have to allege or
16 prove in order to show injury in fact?

17 MR. PINCUS: I think if the plaintiff could
18 show that -- that there was some -- some consequence to
19 him, some -- from the false information: Something
20 happened to his credit. Something happened to an
21 employment --

22 JUSTICE KAGAN: But that's a really hard
23 thing to do, Mr. Pincus.

24 MR. PINCUS: Well, there's actually --

25 JUSTICE KAGAN: People get these reports,

1 and you don't know what they're doing with these
2 reports. They might have not given you a job for that
3 reason, or they might have not given you a job for some
4 other reason. They might have not given you credit for
5 that reason, or they might have not given you credit for
6 some other reason.

7 I mean, it's actually the quintessential
8 kind of injury that you will never be able to detect and
9 surely not to prove.

10 MR. PINCUS: Well, Your Honor, I'm not sure
11 that's so. I mean, I think defamation claims are
12 exactly the same situation. People don't know
13 necessarily. If -- if the -- if the statement is not
14 defamation per se, people have to go out and find proof,
15 or at least find --

16 JUSTICE KENNEDY: I suppose -- I suppose the
17 argument underlying some of the questions you've been
18 asked assumes that if neighbors are making false
19 comments, talking about someone, this is not actionable
20 enough unless it's defamation.

21 On the Internet with -- in this cyber age
22 that we have where all this information is out,
23 there's -- there's -- has to be some real injury.

24 Is it different because this is a credit
25 agency that is regulated?

1 Does a credit agency have less latitude when
2 it is defending on the ground of no concrete injury than
3 other entities?

4 MR. PINCUS: Well, I think there's a
5 threshold question, Your Honor, of whether Congress made
6 the determination that there should be a different
7 treatment for -- for credit agencies. And I think for
8 the reason that I gave about how the willfulness claim
9 came into the statute, it's hard to say.

10 But I think also --

11 JUSTICE KENNEDY: But does the statute apply
12 just to crediting? That's what -- that's what I was
13 asking.

14 MR. PINCUS: It does. Although, one of the
15 real-world litigation problems with this statute is that
16 lots of the claims are asserted against entities that
17 claim they're not credit agencies. And that sort of, in
18 the real-world of litigation, falls out, is not
19 something that often gets decided before the class gets
20 certified.

21 But I think it's important to --

22 JUSTICE GINSBURG: That's not disputed in
23 this case.

24 MR. PINCUS: Excuse me?

25 JUSTICE GINSBURG: It may have been disputed

1 at an earlier stage, but now it's accepted that the
2 defendant is a credit reporting agency.

3 MR. PINCUS: Well, it hasn't been ruled on
4 by the lower court. So as the case comes to this Court,
5 yes, that's --

6 JUSTICE GINSBURG: We must assume that
7 that's true.

8 MR. PINCUS: -- that's the -- that's the
9 posture.

10 But -- but I think, going back to
11 Justice Kennedy's question, I think what Congress did
12 here was to create a massive number of regulatory
13 requirements that are imposed on credit reporting
14 agencies. And all of those regulatory requirements
15 together were supposed to produce accuracy.

16 I -- I think there can't be a -- it's not
17 logical to impute to Congress a finding that the
18 violation of any one of those many, many, many
19 requirements is actionable --

20 JUSTICE SOTOMAYOR: Isn't that --

21 MR. PINCUS: -- in the absence of real harm.

22 JUSTICE SOTOMAYOR: Isn't that, though, a
23 question of the application of the statute?

24 MR. PINCUS: No. I think --

25 JUSTICE SOTOMAYOR: It doesn't invalidate

1 the injury here because this is the quintessential
2 violation of the statute.

3 He's saying they don't have reasonable
4 procedures to check their accuracy. We know from the
5 purpose section of the statute that that's what Congress
6 wanted, reasonable procedures. He's going to have to
7 prove that.

8 Number two, he says, the information about
9 me is false. I'm going to assume, for purposes of this
10 argument, because we have to, that -- and so does the
11 court below with respect to standing -- that much of
12 that information is inaccurate.

13 I will tell you that I know plenty of single
14 people who look at whether someone who's proposed to
15 date is married or not. So if you're not married and
16 there's a report out there saying you are, that's a
17 potential injury.

18 Now, I know the court below said it was
19 speculative, but that's what Congress was worried about:
20 both creditworthiness, and -- and your stature as a
21 person, your privacy, your sense of self; that I can
22 identify myself with some -- others can identify me with
23 some accuracy.

24 MR. PINCUS: Well, respectfully -- I'm
25 sorry.

1 JUSTICE SOTOMAYOR: So I guess my question
2 is, we've now taken a word, "concreteness," that the
3 Court in recent years has applied to injuries by
4 citizens and when they can bring actions or not. A
5 generalized grievance, we said, of a taxpayer is not
6 concrete enough.

7 We've taken this doctrine, and you're trying
8 to superimpose the word "concrete" into legally-created
9 rights. But for -- for two decades -- on, I mean, two
10 centuries, we've always said in our case law that injury
11 in fact is the breach of a legally-recognized right.

12 Where do we have a right? I think that's
13 Justice Kagan's question.

14 JUSTICE KAGAN: No.

15 JUSTICE SOTOMAYOR: It's a requirement.

16 CHIEF JUSTICE ROBERTS: Why don't you answer
17 Justice Sotomayor's question first?

18 MR. PINCUS: Respectfully, I don't think
19 that the cases say that. We discuss them in detail in
20 our -- in our blue brief.

21 I think what the Court said in Warth and
22 Linda R.S. was about what the Court said in Lujan, which
23 is, de facto injuries, as to which there's no cause of
24 action, can be made actionable when Congress creates a
25 cause of action. That's quite different from saying

1 that something that doesn't qualify under this Court's
2 injury-in-fact standard as tangible harm can be made
3 actionable, which is what the Ninth Circuit decided
4 here.

5 And I also -- I want to also --

6 JUSTICE KAGAN: Well, I agree with you
7 entirely on that.

8 MR. PINCUS: Okay. Can I just --

9 JUSTICE KAGAN: Go ahead.

10 MR. PINCUS: I -- I just want to also sort
11 of distinguish -- in responding to your question, I
12 think there are two questions. One -- one question is:
13 Is a false statement -- does a false statement by itself
14 inflict tangible harm within the meaning of this Court's
15 generally-applicable injury-in-fact standard? If it
16 does, it does. The Court has never said that, and we
17 argue that it doesn't.

18 The second question is: Can Congress expand
19 beyond where the Court has gone in defining things that
20 should qualify a sufficient injury to trigger
21 Article III jurisdiction?

22 And we think there are two questions there.
23 One is: Has Congress, in fact, done that? And there's
24 a question whether Congress has done that at all.

25 And I think Justice Kennedy, in his

1 concurrence in Lujan, said if Congress is going to do
2 that, it should say clearly because that obviously is a
3 change in the jurisdiction of the Federal courts.

4 And so Congress might be taken to --

5 JUSTICE KAGAN: Congress does it by doing
6 it, you know? Congress doesn't announce exactly --

7 MR. PINCUS: Well, I'm not sure --

8 JUSTICE KAGAN: -- here we are, we're just
9 going beyond the common law. It just does it. And --
10 and it does it -- and it did it here.

11 It said, you know, what are we concerned
12 about? We're concerned about following the kinds of
13 procedures that will make sure that there are accurate
14 credit reports. And then Congress told you exactly why
15 in the purposes section of the statute. And my gosh,
16 it's all over the legislative history.

17 The most serious problem in the credit
18 reporting industry, Congress says, is the problem of
19 inaccurate and misleading information.

20 MR. PINCUS: Well --

21 JUSTICE KAGAN: And -- and so Congress has
22 clearly done that here.

23 And I guess I -- if you want to just explain
24 to me why it is that Congress can't do -- I think we've
25 said that Congress can do that, can go beyond the common

1 law, and certainly can go beyond anything that we've
2 ever said is a concrete harm as long as they've
3 identified a concrete harm.

4 MR. PINCUS: Well, a couple of responses to
5 that. If it's a concrete harm in the first place, of
6 course, then they haven't really gone beyond this
7 Court's test.

8 I -- I think -- Let me --

9 JUSTICE KAGAN: Of course, harms can arise
10 in the world, and can be identified in the world even
11 though they haven't arisen before, or been identified
12 before.

13 MR. PINCUS: But the -- but the Court's -- I
14 think the question -- and I take the burden of my
15 friend's argument to be that Congress can define things
16 as sufficient to satisfy standing, even if they
17 wouldn't, if they just were asserted at a court,
18 satisfied the tangible harm requirement.

19 So I -- I guess, to respond to your
20 question --

21 JUSTICE KAGAN: If you're saying that, I
22 agree with you.

23 MR. PINCUS: Okay. Well, then -- well, I
24 think then the district court here held that that
25 tangible harm requirement wasn't satisfied.

1 JUSTICE SCALIA: Mr. Pincus, I would have
2 thought that your answer to Justice Kagan would have
3 been Congress did not identify, as the harm for which it
4 allowed suit to be brought, misinformation. It did not.
5 It identified as the harm the failure to follow the --
6 the procedures that it imposed upon credit reporting
7 agencies.

8 It said nothing about people who -- who have
9 been hurt by misinformation being able to sue. It said
10 anybody can sue who's been reported on if the agency
11 failed to use the procedures.

12 So in fact, Congress has not identified
13 misinformation as a suable harm. That's not what this
14 statute does.

15 MR. PINCUS: And I apologize if I haven't
16 been clear. That is exactly --

17 JUSTICE SCALIA: Isn't that your answer?

18 MR. PINCUS: That is exactly our argument --
19 (Laughter.)

20 MR. PINCUS: -- that Congress here created a
21 remedy for any regulatory violation. And many, many,
22 many, many --

23 JUSTICE KAGAN: But why did Congress do
24 that, Mr. Pincus? Congress did that --

25 MR. PINCUS: Well, can I --

1 JUSTICE KAGAN: -- Congress did that as a
2 safe harbor.

3 We are not -- it's a kind of
4 industry-friendly act that Congress did. It said we're
5 not going to punish any old inaccuracy. We're giving
6 you a safe harbor. If -- as long as you followed a
7 certain set of procedures, don't worry about it.

8 But did that procedural requirement -- this
9 is -- this is exactly what Lujan says, "It's a
10 procedural requirement, the disregard of which could
11 impair a concrete interest of the plaintiff."

12 And we distinguished that from procedural
13 requirements in vacuo.

14 MR. PINCUS: Well --

15 JUSTICE KAGAN: And that's what this is.
16 It's a procedural requirement, the disregard of which
17 can impair your interest in being represented accurately
18 in credit reports.

19 MR. PINCUS: Well, there is some problems
20 with that, Your Honor. I mean, there are many of the --

21 JUSTICE SCALIA: Excuse me. That -- that
22 would lead to the conclusion that anybody can sue --

23 MR. PINCUS: Exactly.

24 JUSTICE SCALIA: -- not just somebody who --
25 whose information was -- was wrong.

1 MR. PINCUS: Because most of the --

2 JUSTICE KAGAN: No.

3 MR. PINCUS: If I may, Your Honor.

4 Most of the statutory and regulatory
5 requirements have nothing to do with falsity. They have
6 to do with not following rules. There's nothing in the
7 cause of action that says you can only sue for
8 willfulness if you -- if the statement is false. It
9 says any willful violation of this entire regulatory
10 statute.

11 So the idea that Congress --

12 JUSTICE SOTOMAYOR: "Any person who
13 willfully fails to comply with any requirement imposed
14 upon this subjecter with respect to any consumer is
15 liable to that consumer."

16 So it's not the whole world; it's the
17 consumer that you dealt with --

18 MR. PINCUS: But, Your Honor --

19 JUSTICE SOTOMAYOR: -- or that the agency --
20 that the agency dealt with.

21 MR. PINCUS: But, Your Honor, if the
22 argument is that by enacting that, Congress meant to
23 identify as a harm false statements, there's nothing
24 that requires proof of a false or inaccurate statement
25 in order to bring the claim.

1 JUSTICE KAGAN: Well, but, Mr. Pincus, the
2 gravamen of this claim, as I said, and as more
3 importantly, as -- as the -- the Respondent has said, is
4 in 1681(e), which does talk about accuracy. And it
5 makes it clear that the procedures are linked to
6 accuracy.

7 And I totally take your point that, well,
8 how about the person who there's -- there's been no
9 inaccuracy. Well, that person does not have standing.
10 That person cannot come in and say that he's suffered a
11 concrete injury. But the person who has been
12 inaccurately represented can come in and say he's
13 suffered exactly the concrete injury that this statute
14 is designed to protect against.

15 MR. PINCUS: But -- but, Your Honor, I don't
16 see how you can say that a cause of action that says
17 nothing about inaccuracy applies to a previously
18 enacted -- one of the many provisions of the statute, to
19 create -- to say that Congress was focused on
20 inaccuracies.

21 JUSTICE KENNEDY: Are you -- are you
22 saying --

23 CHIEF JUSTICE ROBERTS: Justice Kennedy.

24 JUSTICE KENNEDY: Are you saying in this
25 case that Congress could have drafted a statute that

1 would allow this individual to bring suit?

2 MR. PINCUS: I think Congress -- yes, I
3 think it might be possible. And let me explain how,
4 Justice Kennedy.

5 I think, first of all, to respond to one of
6 Justice Kagan's earlier questions, I don't think it's
7 crystal clear what Congress was doing here because I
8 think the most likely interpretation of this provision
9 was it was enacted against the background of this
10 Court's jurisprudence, which requires tangible harm.

11 And it -- what Congress was most likely
12 saying was, we know that quantifying, monetizing that
13 tangible harm in this context is hard. So if there's a
14 willful violation, we're going to give you a minimum
15 recovery.

16 I think the reason why it makes sense to
17 require Congress to speak clearly, if it is going beyond
18 what this Court has required for tangible harm, is
19 precisely because it is necessary to identify that
20 Congress actually intends to give access to the Federal
21 courts beyond that which would be true under this
22 Court's otherwise applicable jurisdiction -- rule. And
23 it didn't do that here because of the willfulness
24 layered on top of all of the statutory violations.

25 And I think also, the fair way of looking at

1 this statute is as a complex of regulations which
2 Congress thought, taken together, would improve
3 accuracy.

4 I don't think you can say that any single
5 one of them -- the violation of any single one of them,
6 Congress thought, was going to so likely to inflict
7 injury on some person that they should be entitled to --

8 JUSTICE SCALIA: Do all of them go to
9 accuracy, or --

10 MR. PINCUS: No.

11 JUSTICE SCALIA: -- do some of them go to
12 privacy and other matters?

13 MR. PINCUS: Most of -- one is about having
14 an 800 number available. One has to do with notice
15 to -- to people who look at information --

16 JUSTICE SCALIA: And that would be a
17 violation, right, if -- if you didn't provide that?

18 MR. PINCUS: Under -- under --

19 JUSTICE SCALIA: And -- and presumably
20 anybody, if -- if you believe Respondent, anybody who --
21 whose information is not accurate can sue to get the
22 statutory damages for failure to provide an 800 number.

23 MR. PINCUS: Well, I think Respondents would
24 say even if the information was accurate, you could sue
25 to get the statutory damages. I think Justice Kagan

1 might limit it to people who were inaccurately --

2 CHIEF JUSTICE ROBERTS: Counsel, I -- when
3 we normally have a standing inquiry, you -- there can be
4 some people who have standing under a particular statute
5 and some who don't.

6 Is -- is your position simply that you have
7 to look at whether the plaintiffs have been injured in
8 fact, and that some plaintiffs will be able to proceed
9 if they can make that showing and others may not?

10 MR. PINCUS: Absolutely, Mr. Chief Justice;
11 that's our position. That's -- and the district court
12 held in this case, looking at the allegations of the
13 complaint, that the Court's injury-in-fact standard
14 wasn't satisfied by the Ninth Circuit --

15 JUSTICE KAGAN: Well, was this --

16 JUSTICE SCALIA: By the particular
17 violation? Injured in fact by the particular --

18 JUSTICE KAGAN: Yes.

19 JUSTICE SCALIA: Not by failure to have an
20 800 number, you're saying?

21 JUSTICE KAGAN: No. But would this man be
22 able? I mean, this is very much in line with the Chief
23 Justice's.

24 Would he be able to sue based on the fact
25 that there was inaccurate information about him?

1 MR. PINCUS: No, because the district court
2 found that all of the allegations of -- all of his
3 arguments about why there was any tangible harm to him
4 were speculative and flunked this Court's standard.

5 JUSTICE GINSBURG: Mr. Pincus --

6 JUSTICE KAGAN: I guess -- I guess what I --
7 that's okay.

8 JUSTICE GINSBURG: Before you sit down,
9 the -- the brief suggests that the real danger of
10 allowing this kind of action is that it -- it will be
11 brought on behalf of a class, and you could get millions
12 of plaintiffs and billions of dollars.

13 If we should hold that Congress can give
14 consumers a right to redress for false credit reporting,
15 if we held that, would you have grounds to oppose
16 certification of a class.

17 MR. PINCUS: Well, I think the problem here,
18 Your Honor, is if you accept the broad theory that
19 plaintiffs and the government espouse, which is all you
20 have to show is a statutory violation, it's a pretty
21 clear pathway to class certification because there is
22 only common issues. And that's what has happened in
23 case after case.

24 Now, if falsity has to be proven, then
25 obviously that is an individualized issue that might

1 make it more difficult.

2 I'd like to reserve the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

4 Mr. Consovoy.

5 ORAL ARGUMENT OF WILLIAM S. CONSOVOY

6 ON BEHALF OF THE RESPONDENT

7 MR. CONSOVOY: Mr. Chief Justice, and may it
8 please the Court:

9 Mr. Robins has Article III standing for
10 three independent reasons.

11 First, the violation of the statutory rights
12 under the Fair Credit Reporting Act constitutes injury
13 in fact.

14 Second, even if not, his entitlement to
15 monetary relief as a consequence of that violation shows
16 he has the personal stake that Article III requires.

17 And third, the fact that his claim follows
18 from the common law of defamation conclusively
19 establishes that it is a case or controversy within the
20 meaning of Article III.

21 JUSTICE KENNEDY: I -- your -- your number
22 two -- I mean, we can -- it sounds to me quite circular.
23 You say -- you say he -- he has a personal stake because
24 he has a -- because Congress said he has a personal
25 stake.

1 Is -- do I understand your argument?

2 MR. CONSOVOY: I view it just like a
3 contract case. So if this were a contract instead of a
4 statute, and the same duties and liabilities came to be,
5 and it was a liquidated damages clause, he had a duty
6 that was violated; he had an entitlement to money.

7 The one thing the Court would not do in that
8 case is look behind the entitlement to see whether he
9 really was harmed in some other way than other --
10 otherwise being owed the money.

11 JUSTICE SCALIA: All Congress has to do is
12 provide for damages, right?

13 MR. CONSOVOY: No. That's much more than
14 that.

15 JUSTICE SCALIA: Well --

16 MR. CONSOVOY: It has to still create an
17 interest, a discrete, legal interest that's personal to
18 him; that only -- that is not a generalized grievance;
19 that is not undifferentiated harm. It has to do all of
20 those same things.

21 The -- the point where we get --

22 JUSTICE KENNEDY: But -- but that is a harm.
23 It is a harm. And you said it's a harm because he -- he
24 can't get the money that he was provided. But that's
25 circular.

1 MR. CONSOVOY: So -- so the harm -- the
2 violation of a legally-vested interest at common law in
3 this Court's decisions throughout has always been deemed
4 a concrete harm.

5 Going back to Tennessee Electric where the
6 Court narrowly used to say that a legal right was an
7 injury. Then, in Camp, the Court expanded beyond that
8 to say no, practical injuries too can be legal injuries.
9 But it never negated the earlier, more difficult test.

10 CHIEF JUSTICE ROBERTS: What about a law
11 that says you get a -- \$10,000 statutory damages if a
12 company publishes inaccurate information about you?

13 You want -- you have an unlisted phone
14 number. You don't want people calling you. The company
15 publishes your phone number, but it's wrong. That is
16 inaccurate information about you, but you have no injury
17 whatever.

18 Can that person bring an action for that
19 statutory damage?

20 MR. CONSOVOY: Congress has a lot of work to
21 do there.

22 CHIEF JUSTICE ROBERTS: I'm sorry?

23 MR. CONSOVOY: Congress has a great deal of
24 work it needs to do to show --

25 CHIEF JUSTICE ROBERTS: But -- but can you

1 have -- do you have standing?

2 Do you have injury in fact when you don't
3 want people calling you; the company publishes a false
4 telephone number.

5 MR. CONSOVOY: So the call --

6 CHIEF JUSTICE ROBERTS: Whether Congress has
7 a lot of work or not, at the end of the day, can you
8 recover those statutory damages?

9 MR. CONSOVOY: If Congress identified the
10 interest of you receiving a phone call, and that's the
11 injury, and you don't receive the phone call, you
12 haven't suffered the injury Congress identified.

13 CHIEF JUSTICE ROBERTS: No, no, no, no. I'm
14 sorry.

15 MR. CONSOVOY: I'm sorry.

16 CHIEF JUSTICE ROBERTS: The injury they
17 identify is we don't think companies should public
18 false -- publish false information about you.

19 Is it the end of the standing inquiry to say
20 they published false information about me, or do you
21 have to ask were you injured in some way by that
22 publication?

23 MR. CONSOVOY: No. The -- Congress has done
24 its job there.

25 CHIEF JUSTICE ROBERTS: So it's in -- so

1 what -- what would you say the injury in fact, not in
2 law but in fact, is in that case?

3 MR. CONSOVOY: So I don't think the
4 contradistinction is between an injury in fact and an
5 injury in law. A legally-vested interest, whether it's
6 created by Congress or created by the common law, is
7 itself a concrete injury.

8 CHIEF JUSTICE ROBERTS: But our cases have
9 always said actual injury in fact. And I thought that
10 meant that that was different than actual injury in law.

11 You're saying when we say injury in fact, we
12 really mean injury in fact or injury in law?

13 MR. CONSOVOY: No. I -- I don't really
14 think there is a term "injury in law." I -- I've not
15 seen it in the cases.

16 What I do see, going back to Camp, which is
17 the first case that uses the phrase "injury in fact,"
18 that concept was designed to get at two really important
19 things:

20 One, that the harm is not speculative. And
21 not to play word games, but I think it means that you
22 are, in fact, injured, as opposed to that you have
23 actually been injured.

24 And the second, that it's not a generalized
25 grievance.

1 JUSTICE BREYER: No, but --

2 CHIEF JUSTICE ROBERTS: That's a very
3 different question. I understand generalized grievance.
4 You can't just say -- even I think you gather -- any
5 citizen in the United States can sue about this. You
6 have to particularize it to some extent.

7 But that's a different question as to
8 whether there's actual injury.

9 MR. CONSOVOY: So I think the -- the Court
10 uses the phrase "concrete and particularized." That's
11 two companion words, I think, getting at these same
12 concepts.

13 Now, two things have to happen: One, to
14 show that it's a differentiated claim, that it's not a
15 generalized grievance, you have to identify a subclass
16 of people who are distinctly harmed other than the
17 general population. That's the concrete part. That's
18 what Schlesinger says.

19 JUSTICE SCALIA: Well, I think that's the
20 particularized part.

21 MR. CONSOVOY: The particularized part is
22 that you're among those people. You need both things.

23 JUSTICE BREYER: But how in the
24 Chief Justice's --

25 JUSTICE KENNEDY: But -- but the law --

1 JUSTICE SCALIA: Concrete -- concrete has
2 nothing to do with particularized. It means it is -- it
3 is -- the only way to put it is an injury in fact. It's
4 a --

5 JUSTICE KENNEDY: And I was going to say,
6 the -- the Lujan case says de facto, which is actual,
7 existing in fact, having effect, even though not
8 formally or legally recognized.

9 MR. CONSOVOY: So -- yes. And then the
10 concurring opinion explained that it didn't -- your
11 concurring opinion, Your Honor, said that it -- Congress
12 could also play a role in that in identifying those
13 injuries. And here it did.

14 JUSTICE BREYER: Yes, but this is my own
15 view of this, maybe no one else's. But you sound as if
16 you're describing a forum of what used to be called the
17 "public action," of which there were no such examples in
18 Federal law. Most states have them. And because you
19 want people who aren't hurt in fact to be able to sue.

20 And the example here is not just the
21 Chief Justice's, which is one, but the more immediate
22 example, which seems to be in this case -- I didn't
23 think it was but it now seems to be -- are people --
24 perhaps not this plaintiff -- but people who in fact
25 notice that someone like the defendant has filed bad

1 procedures leading to false information. And those
2 people who were not injured bring a lawsuit, and they
3 say they're following bad information. That's it. Bad
4 procedure. And Congress gave me a hundred dollars, so
5 give it to me.

6 Now, that's the person I didn't know was in
7 this case, because this plaintiff seems to argue
8 specific discrepancies in fact that, in all likelihood,
9 hurt him. Okay? But we're leaving him out of it.

10 Now, I want to know what the government
11 thinks of the case I've just put.

12 Do -- does the government think a person who
13 admits nobody said anything wrong about me, they did say
14 something about me, it was all correct, but they are
15 using bad, bad in -- practices for assembling consumer
16 information --

17 In the government's view, does the person in
18 my hypothetical, similar to the Chief's, maybe
19 identical, does he or does he not have standing? Yes or
20 no?

21 MR. CONSOVOY: I'll be responding to you:
22 He does not.

23 JUSTICE BREYER: Fine. If you say he does
24 not, then we are limiting this case to the case of
25 people who are victims of not just bad practices but

1 false information about them, and that's what the words
2 "with respect to any consumer" mean.

3 MR. CONSOVOY: That --

4 JUSTICE BREYER: They mean any consumer who
5 has obtained -- who suffers from false information.

6 MR. CONSOVOY: That --

7 JUSTICE BREYER: If that's the government's
8 position, then it's not a public action. It's a private
9 action.

10 MR. CONSOVOY: That is -- that is
11 Respondent's position.

12 JUSTICE KAGAN: That's --

13 JUSTICE ALITO: In relation to that --

14 JUSTICE KAGAN: -- that -- that's --

15 JUSTICE ALITO: Could I just say --

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: In relation to that, can I
18 just ask you something about that, that goes to how
19 Spokeo operates: Is there anything here to indicate
20 that anybody other than Mr. Robins ever did a search for
21 him?

22 (Laughter.)

23 MR. CONSOVOY: Not in the record that I'm
24 aware of.

25 JUSTICE ALITO: Then how could -- then isn't

1 that quintessential speculative harm?

2 In my understanding -- you -- correct me if
3 I'm wrong -- you don't have files someplace for every
4 person in the United States or -- you have databases,
5 and you will do a search if somebody asks you to do a
6 search.

7 I assume you wouldn't say that somebody as
8 to whom there never had been a search would have
9 standing, right? Even if -- you know, even if it would
10 be the case that if there was a search it would come up
11 with a lot of false information.

12 MR. CONSOVOY: So for it to be a consumer
13 report, there must be communication to a third party.
14 So we have alleged communication to third parties. At
15 the pleadings stage, that must be accepted as true at
16 this point.

17 But Spokeo, I believe, on their website,
18 does not share that information who searched for you.
19 And this -- this is really important. It is almost
20 impossible to know.

21 If he applied for a job with a major
22 employer in this country who had 5,000 job applicants,
23 and they pulled his report, here is what Spokeo is
24 selling: We are the arbiter of truth. If it says he
25 went to College A on his resume, and we tell you he went

1 to College B, he is a liar. If -- if he says he is 30
2 years old and we say he is 55 years old, he is a liar.

3 That is their business. That is what they
4 are selling.

5 There is no way --

6 CHIEF JUSTICE ROBERTS: I thought they had
7 some -- I thought they had some disclaimer that Spokeo
8 does not verify or evaluate each piece of data, It makes
9 no warranties or guarantees about any of the information
10 offer -- offered.

11 MR. CONSOVOY: And -- and --

12 CHIEF JUSTICE ROBERTS: How is that saying
13 if it's not accurate you're a -- he's a liar?

14 MR. CONSOVOY: And -- and then it sells --
15 then it promotes its -- its service -- and this is in
16 the FTC report and also in the complaint -- to human
17 resources executives saying, if you want to run employee
18 checks, come to us.

19 It would be a strange business if they said,
20 Come to us, but who knows if what we're telling you is
21 true.

22 And -- and --

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: I think that's what
25 the disclaimer is saying.

1 MR. CONSOVOY: But the -- whether the
2 disclaimer is valid -- well, that is --

3 (Laughter.)

4 MR. CONSOVOY: -- that is exactly what the
5 disclaimer says, but of course, Congress stepped into
6 the breach --

7 JUSTICE SCALIA: You've got to do the best
8 you can, you know? I mean --

9 MR. CONSOVOY: I'm sorry?

10 JUSTICE SCALIA: I said you've got to do the
11 best you can.

12 MR. CONSOVOY: You do. We all do.

13 JUSTICE SCALIA: The person who hires
14 somebody, if -- if they all have this disclaimer, which
15 I expect they all do, you -- you either go without any
16 information or you accept one of them.

17 MR. CONSOVOY: Except Congress stepped in
18 and said, if you are operating as a consumer reporting
19 agency, you have duties and responsibilities.

20 JUSTICE SCALIA: I want to ask about what
21 you think Congress did.

22 You're -- you're saying it's limited to --
23 to people about whom false information has been given.
24 Suppose Congress enacts a statute that says everybody
25 has a right to sue for exorbitant expenditures by the

1 Department of Defense. This affects everybody, you
2 know, the \$900 toilet seat and so forth. Everybody can
3 sue. That clearly would not be allowable.

4 But suppose somebody is a -- a disappointed
5 bidder for the toilet seat, and he sues under that
6 statute. And he said, oh, yes, the statute didn't --
7 didn't just say the disappointed bidders can sue, or
8 that anybody who's proximally affected can sue. It said
9 that everybody can sue. But I, in fact, have been
10 proximally injured, and therefore, I ought to be able to
11 sue.

12 Do you think that would be true?

13 MR. CONSOVOY: Likely not. Likely no, it --

14 JUSTICE SCALIA: Well, why is this case any
15 different? You're -- you're saying only people who have
16 been injured, assuming that -- that false information is
17 injury -- only they can sue. But the statute doesn't
18 say that only they can sue. It says that everybody
19 about whom Spokeo did -- did a report can sue.

20 MR. CONSOVOY: So it says -- this statute
21 does things that the hypothetical statute does not.
22 This statute says, starting with the cause of action, if
23 you have done something that violates a statute with
24 respect to a specific consumer, that consumer can sue
25 you.

1 JUSTICE SCALIA: Right.

2 MR. CONSOVOY: Then second -- then you look
3 in the provision that we are basing the claim on here,
4 the reasonable procedures provision.

5 So that provision in particular, which is
6 the only one --

7 JUSTICE SCALIA: That's fine.

8 MR. CONSOVOY: -- before the Court --

9 JUSTICE SCALIA: Where do you get the -- the
10 necessity of injury in fact?

11 MR. CONSOVOY: So why --

12 JUSTICE SCALIA: Where do you get the
13 necessity that there has been false information which
14 you assert is there?

15 MR. CONSOVOY: So it says, "reasonable
16 procedures to ensure maximum possible accuracy. "

17 JUSTICE SCALIA: Procedures to ensure
18 maximum. That doesn't mean there has to be accuracy.

19 MR. CONSOVOY: No. Congress actually did
20 something better for the industry. They gave them a
21 limitation on liability. So Congress thought about
22 giving strict liability here.

23 And keep in mind, Justice Scalia, Congress
24 preempted almost all State law claims here. They
25 preempted State law defamation. So the notion that this

1 isn't about defamation when they preempted State law
2 defamation strikes me as a very different argument.

3 So you're only in Federal court, and that
4 Congress said we could impose strict liability.

5 JUSTICE BREYER: You have to say, don't you,
6 in answer to Justice Scalia, that the words, "follow
7 reasonable procedures to assure maximum possible
8 accuracy in respect to any consumer," the one who can
9 sue, means that the -- when you fail to do it in respect
10 to a consumer, you say something false about that
11 consumer. It doesn't use those words, and we would have
12 to so construe it in order to save the constitutionality
13 of the statute.

14 MR. CONSOVOY: And every lower court to
15 reach this question has held that --

16 JUSTICE SCALIA: But that wouldn't be true.
17 You could fail to -- to follow the procedures and still
18 come up with accurate information, like you could not
19 have an 800 number.

20 MR. CONSOVOY: Correct, and that person
21 would not have standing.

22 JUSTICE SCALIA: It's impossible to read it
23 that way because it's simply not true.

24 MR. CONSOVOY: So, Justice Scalia --

25 (Laughter.)

1 MR. CONSOVOY: -- every lower court to reach
2 this question has held that this particular provision
3 requires falsity as an allegation. Multiple Courts of
4 Appeals.

5 CHIEF JUSTICE ROBERTS: But I want to -- as
6 I understand -- I take the falsity out of the -- the
7 hypotheticals to get exactly what your position is on
8 the -- the breadth of Congress' power.

9 So let's say the statute says anybody who's
10 publishing information about you has to pay the
11 individual \$10 a year. They think that's a good way to
12 regulate it. It's information about you, good, bad, or
13 indifferent, pay them \$10 a year, no more, no less.
14 Spokeo, or whatever that business is, pays you \$20 one
15 year.

16 Now you've been -- the statute has been
17 violated with respect to you, a particular individual.
18 Can that -- and there's statutory damages of \$10,000.

19 Can that individual sue?

20 MR. CONSOVOY: So --

21 CHIEF JUSTICE ROBERTS: Now, does that
22 individual have injury in fact because the statute has
23 been violated with respect to him?

24 MR. CONSOVOY: That, I think no, because
25 that statute would apply to everybody in the country.

1 There would be no --

2 CHIEF JUSTICE ROBERTS: Oh, no, no, no. You
3 have to have published information about an individual.
4 Every individual who you publish information about gets
5 \$10 a year.

6 MR. CONSOVOY: Right. So I think that would
7 make it particularized but not concrete.

8 CHIEF JUSTICE ROBERTS: So there'd be no
9 standing -- that person would have no standing, even
10 though Congress gave him standing?

11 MR. CONSOVOY: Congress can confer
12 substantive rights that lead to standing.

13 CHIEF JUSTICE ROBERTS: Yes.

14 MR. CONSOVOY: But not everything Congress
15 does will convey a substantive right that differentiates
16 you from the general population.

17 CHIEF JUSTICE ROBERTS: So if the statute --

18 MR. CONSOVOY: This one does.

19 CHIEF JUSTICE ROBERTS: -- says \$10, no
20 more, no less, he gets \$20, does he have standing to sue
21 under that statute?

22 MR. CONSOVOY: I don't think so, because it
23 would apply so broadly to everybody --

24 CHIEF JUSTICE ROBERTS: No, no, no. Any --
25 you have -- I said this just before. They have to have

1 published information about you. If they don't, they
2 don't have to pay you anything.

3 MR. CONSOVOY: Right. And my -- my answer
4 is that that would make it particularized but not
5 concrete.

6 JUSTICE SOTOMAYOR: Isn't there always a
7 materiality question?

8 In every violation there's always a
9 materiality question: What is the falsehood? Is it
10 material to anything? It could be a transposition of a
11 telephone number.

12 MR. CONSOVOY: That's right. There is a
13 de minimis aspect to the statute as well. But even --
14 well, that is right, and even innocuous things can also
15 cause --

16 JUSTICE KAGAN: Mr. Consovoy, can I just
17 make sure I understand?

18 You said you -- you need for the information
19 to be inaccurate to have standing here. That is going
20 to mean that the class, as you've defined it, is not
21 going to be certified. And I think that that's the
22 right answer, but I just want to make sure that we're on
23 the -- we're on the same page here.

24 MR. CONSOVOY: Yes. So the class was -- and
25 this is going to come up later this term in the Tyson

1 case. But the class has to be defined as broadly as it
2 was because of what's called a failsafe problem.

3 You can't identify a class by an element of
4 the cause of action, and that's because it harms
5 defendants' rights. So if we had alleged the class here
6 was everybody who had inaccurate information, it would
7 be a trick against them, because if they defeated the
8 claim, the class would be empty, and they would get no
9 res judicata.

10 So at certification, we're going to have to
11 narrow the class, and we're going to have to come up
12 with common proof because we can't identify the class by
13 the allegation.

14 So what happens is, take the algorithm
15 issue. So we will have to allege under (b) (3),
16 23(b) (3), that a common algorithm led to all the
17 inaccuracies. But if they do, that is a certifiable
18 class.

19 And just --

20 JUSTICE KAGAN: And one very quick thing.
21 You said in your brief you're really only suing under
22 1681(e) (B).

23 MR. CONSOVOY: Uh-huh.

24 JUSTICE KAGAN: Can I understand that to be
25 that you're waiving all claims of other things?

1 MR. CONSOVOY: No. I think -- and let me
2 explain. We read the statute this way: There's A
3 reasonable procedures requirement. That is a general
4 framework. Some of that is discussed in the regulatory
5 commentary, explains what that is. But the specific
6 things mentioned in Count I, Count II, and Count III,
7 the furnisher notices, the user notices in the toll-free
8 number are specific examples of reasonable procedures
9 they failed to follow.

10 They support --

11 JUSTICE GINSBURG: Are you saying --

12 MR. CONSOVOY: -- the general claim.

13 JUSTICE GINSBURG: Are you saying you get
14 the statutory damages for the four claims that you
15 listed, or is it only what you've called the overarching
16 claim?

17 And in one footnote you said these other
18 claims are -- are just supportive of the main claim.

19 MR. CONSOVOY: Right.

20 JUSTICE GINSBURG: So are you asking for
21 four times the statutory damages, or are you saying, no,
22 this is really one -- one claim, and so we're asking for
23 \$100 dollars a head, or 10,000 -- or for \$1000 a head?

24 MR. CONSOVOY: It's -- it's one claim.

25 And --

1 JUSTICE GINSBURG: It's one claim.

2 MR. CONSOVOY: It is -- yes, Your Honor.

3 Now, these are big-picture questions, but
4 this case can be resolved on a much narrower issue.

5 This Court has always held that if the cause
6 of action you allege can be found in the common law, and
7 is developed from the common law as in Stevens, that you
8 have standing. This claim for false information follows
9 directly from the common law defamation.

10 CHIEF JUSTICE ROBERTS: The Ninth Circuit
11 didn't address that question, did it? I mean, as I
12 understand it, I'm looking at the footnote, you know, on
13 page 9A, it says it doesn't matter because you -- the
14 statutory injury in law is enough.

15 MR. CONSOVOY: Right. No. Well, but the
16 statute follows from defamation. Just as in Stevens, it
17 was about the statute, it wasn't about the particular
18 individual. They said the qui tam statute followed from
19 the common law there, just like this statute follows
20 from the common law defamation.

21 And remember --

22 JUSTICE SCALIA: Excuse me. How does it
23 follow from the common law of defamation? I mean,
24 you -- you could not bring a defamation action because
25 somebody said something false about you. It was either

1 in one of those areas where it is presumed to be
2 damaging, you know, such as it's, you know, about your
3 moral life or something like that, or -- or your
4 incompetence in your profession, or else you had to show
5 positive damage.

6 How can you say --

7 MR. CONSOVOY: So --

8 JUSTICE SCALIA: -- that it's from common
9 law.

10 MR. CONSOVOY: -- in Steel Co., Your Honor,
11 the Court said it must be in the tradition of the common
12 law of the sort, not precisely replicated.

13 JUSTICE SCALIA: Oh, I see. Okay.

14 MR. CONSOVOY: Not precisely replicated.

15 JUSTICE SCALIA: Close enough. Okay.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Stewart.

18 ORAL ARGUMENT OF MALCOLM L. STEWART

19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING RESPONDENT

21 MR. STEWART: Mr. Chief Justice, and may it
22 please the Court:

23 In Defenders of Wildlife, the Court gave the
24 following description of what injury in fact means: It
25 said injury in fact is, quote, "an invasion of a

1 legally-protected interest which is, A, concrete and
2 particularized, and, B, actual or imminent, not
3 conjectural or hypothetical."

4 And so the injury part of it was the
5 invasion of a legally-protected injury -- interest. And
6 I think it's clear what work the words "in fact" are
7 doing in that description.

8 If Mr. Robins had alleged that Spokeo is
9 circulating a lot of inaccurate consumer reports and I'm
10 afraid they'll do one about me, that wouldn't be good
11 enough. That --

12 JUSTICE SCALIA: What -- what happened to
13 "concrete and particularized"?

14 MR. STEWART: Well, particularized --

15 JUSTICE SCALIA: We -- we say that in --
16 in -- in, gee, a whole lot of cases. And -- and that
17 didn't appear in that quote you gave?

18 MR. STEWART: It did. It's --

19 JUSTICE SCALIA: Say it again.

20 MR. STEWART: -- "actual or eminent" --
21 well, "concrete and particularized" and "actual or
22 imminent, not conjectural or hypothetical."

23 And the Court has explained both the terms
24 "concrete" and "particularized" as aspects of the -- the
25 requirement that the wrong be done to the particular

1 plaintiff, not that it be done to the community as a
2 whole.

3 And the Court used the terms that way in
4 Schlesinger. I don't --

5 CHIEF JUSTICE ROBERTS: Mr. Stewart, let's
6 say your -- your -- Congress thinks that the president
7 is not doing enough to stop illegal immigration. So it
8 passes a law that says, anyone in a border state -- so
9 it's particularized -- who is unemployed may bring an
10 action against an illegal immigrant who has a job. And
11 they get damages, maybe they get an injunction.

12 Can Congress do that?

13 MR. STEWART: Well, I think there would be a
14 couple of different problems with that. The first would
15 be that there may be some -- there may be some legal
16 issues that Congress can't simply delegate to private
17 enforcement that are -- like the -- the criminal law,
18 for instance. There would be constitutional --
19 potential constitutional --

20 CHIEF JUSTICE ROBERTS: Well, I think that's
21 kind of avoiding the hypothetical. I mean, let's --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: But presumably you
24 would raise those issues after the action's been filed,
25 and -- and, you know, you could raise those issues as an

1 amicus defending the action.

2 MR. STEWART: I mean, I think that would --
3 typically when Congress has done this, and in all the
4 common law analogues that we've cited, the -- the class
5 of people who could file suit would be people whom the
6 prohibited conduct had a natural tendency to harm.

7 CHIEF JUSTICE ROBERTS: Yes, we're talking
8 about Congress says, Well, these people who are
9 unemployed, illegal immigrants have jobs, they should be
10 able to sue to stop that because the -- you know,
11 because they -- Congress thinks the president isn't
12 doing enough.

13 MR. STEWART: I mean, I think it would be --
14 I think that would stretch the limits of Congress's
15 power to -- to treat those -- that broad class of
16 individuals as victims of all acts of illegal
17 immigration. And obviously the statute in -- that we're
18 dealing with here doesn't come anywhere close to that.

19 And -- and I understand the Court's concerns
20 with the implications of our position, but I think it's
21 also worth pointing out, this is a mode of enforcement
22 that Congress has been using since 1790.

23 In the first Copyright Act, Congress enacted
24 a provision that said if there is infringement, the
25 copyright owner can get actual damages if he can prove

1 them, or failing that, he --

2 CHIEF JUSTICE ROBERTS: I mean, you know
3 the -- you know the objection behind -- behind my
4 hypothetical.

5 MR. STEWART: Yes.

6 CHIEF JUSTICE ROBERTS: Which is Congress
7 can say, basically, to a group of citizens, you get to
8 enforce one of our laws because we're giving you a cause
9 of action. It doesn't matter whether you've actually
10 been injured or not; we just have to particularize it to
11 some extent.

12 And I would have thought that the -- the
13 president would be concerned about Congress being able
14 to create its own enforcement mechanism. I thought that
15 you would be concerned that that would interfere with
16 the executive's prerogatives.

17 MR. STEWART: I -- I think when we get to
18 the point of -- of the hypothetical where any unemployed
19 person in the State is treated as the legal vitamin of
20 every act of unlawful immigration that occurs into that
21 State, we -- we do have concerns.

22 But the -- the statute we're dealing with
23 here says --

24 JUSTICE SCALIA: The statute we're dealing
25 with here treats everybody about whom false information

1 has been given as somebody about whom false information
2 that harms him has been given.

3 I mean, the class is not -- is not
4 coextensive with those -- those that are harmed. And
5 it's the same -- it's the same in -- in the
6 Chief Justice's hypothetical: The class is not
7 coextensive with everybody who has been -- who has been
8 cheated out of a job by a -- by an unlawful immigrant.

9 MR. STEWART: Well, again -- again, leaving
10 aside the -- the possibility that immigration is
11 something that can't be dealt with by private suits, if
12 there was some particularized connection required, if
13 the person could show that he applied for the job that
14 the illegal immigrant received, that -- that would be a
15 much different sort of statute.

16 Here the statute we're dealing with doesn't
17 say --

18 JUSTICE SCALIA: In the community -- in --
19 in the border states is not proximate enough for you.
20 Let's just say anybody who is unemployed in the
21 community where there is an illegal immigrant can sue.

22 MR. STEWART: I think that's still probably
23 too -- too broad a class.

24 And I understand the allure of the
25 hypotheticals, but you could do the same thing with

1 rational-basis review of substantive legislation. You
2 could come up with endless hypotheticals about statutes
3 that were just at the border between really stupid and
4 so stupid as to be actually irrational.

5 CHIEF JUSTICE ROBERTS: How -- how -- the
6 difference is that this is dealing with the requirement
7 of a case or controversy which has always been
8 recognized as at the core of Article III jurisdiction.
9 And we have a legion of cases that say you have to have
10 actual injury.

11 That's what makes it a decision appropriate
12 for resolution by the judicial branch. And it seems a
13 little bit more important than saying you can challenge
14 particular statutes.

15 MR. STEWART: Well, the point is -- I was
16 trying to make was that Congress has been doing this
17 since 1790, and nobody's pointed to a statute that comes
18 close to the hypotheticals.

19 But to -- to return to the point about
20 injury in fact, the Court has said there has to be
21 actual injury. But it has defined "injury" as the
22 invasion of a legal -- legally-protected interest, the
23 violation of a legal right.

24 The most recent addition of Black's Law
25 Dictionary gives, as its first definition of "injury,"

1 "the violation of another's legal rights for which the
2 law provides a remedy."

3 JUSTICE SCALIA: What -- we've also said
4 that violation of a procedure, even if you are given a
5 right to the procedure, that alone does not suffice for
6 standing. That is a procedure -- that -- that is a
7 procedure in vacuo that leads to nothing.

8 MR. STEWART: Well, what --

9 JUSTICE SCALIA: We -- we said that, so it
10 has to be something more than just the violation of what
11 the -- what Congress says is a legal right. That --
12 that is not enough.

13 MR. STEWART: And at -- the Court has also
14 said that Congress can't give every citizen an -- an
15 entitlement to sue simply by calling it a legal right.

16 But with respect to procedures, the Court
17 has said you can sue to complain about the deprivation
18 of lawfully-required procedures if those procedures are
19 intended to protect the --

20 JUSTICE BREYER: Right -- right here we have
21 in the complaint, I guess, there were certain errors: A
22 photograph of the wrong person; a statement that he's in
23 his 50s; he isn't. That he's married; he isn't. He's
24 employed in a professional or technical field; he isn't.
25 That he has children; he doesn't. That he has a

1 graduate degree; he doesn't. That his economic health
2 is very strong; it isn't. And his wealth level is in
3 the top 10 percent; it isn't. Okay?

4 So that, I gather, is what he is complaining
5 about. Something like that.

6 MR. STEWART: Exactly.

7 JUSTICE BREYER: Fine.

8 Now, for purposes of deciding this case, are
9 we simply to refer to this and say, this is a case about
10 a person who's complaining this? And is this, which I
11 just listed, a sufficiently-concrete injury?

12 MR. STEWART: Yes. Absolutely. And I --

13 JUSTICE BREYER: Thank you.

14 CHIEF JUSTICE ROBERTS: Was it -- then
15 that's not what the Ninth Circuit based its decision on.
16 The Ninth Circuit says he had standing by virtue of the
17 alleged violations of his statutory rights, without
18 respect to whether there was harm to his employment
19 process or related anxiety.

20 So I would suppose, if we're going to decide
21 it on that basis, we have to determine that the Ninth
22 Circuit's rationale was in -- was wrong.

23 MR. STEWART: I'm sorry I don't have the
24 exact wording in front of me, but if you look at the
25 very first sentence of the Ninth Circuit's opinion, the

1 Ninth Circuit says, "the question we confront is whether
2 a person has injury in fact when false information about
3 him is disseminated."

4 Now, the -- the Court said we don't have to
5 decide what is added to the complaint by the allegations
6 that employment prospects were actually harmed.

7 And it's -- and it's also true that the
8 Ninth Circuit didn't analyze the question that it framed
9 in quite the way we would have.

10 It didn't rely on the defamation analogy; it
11 relied on the statutory right. But it still described
12 the question before it as whether a person has injury to
13 complain about --

14 JUSTICE KAGAN: And -- and Mr. Stewart, if I
15 could just -- I mean, the -- maybe this is the sentence
16 that you're talking about.

17 At one point the Court says, "the interests
18 protected by the statutory rights at issue are
19 sufficiently concrete and particularized."

20 Now, look, it's not a good opinion, and then
21 it doesn't tell you why it is that they're sufficiently
22 concrete. But they clearly held that they were
23 sufficiently concrete. They understood that as part of
24 the test.

25 MR. STEWART: The -- the other point I would

1 make -- I -- I agree with that.

2 And the other point I would make about
3 Defenders of Wildlife is the statute at issue in that
4 case said any person can sue to complain about
5 particular types of Endangered Species Act violations.
6 And the Court said, that's just too broad. Congress
7 can't do that.

8 But it didn't say, therefore, the
9 authorization to sue is a nullity, and we don't have to
10 worry about whether this plaintiff has standing to sue.
11 It analyzed in depth the allegations and the evidence
12 that the particular plaintiffs in Defenders of Wildlife
13 had put forward and said this is insufficient.

14 And then later, in *Bennett v. Spear*, the
15 Court applied the same Endangered Species Act provision
16 at the behest of a plaintiff who did have standing.

17 So it isn't the case that, if Congress fails
18 to draw exactly the right line, people who would have
19 been within the right line are out of luck. I think the
20 allegations of the complaint are -- are the important
21 thing to focus on.

22 With -- with respect to the defamation
23 analogy, I'd say Congress, in one sense, is broader than
24 common law, and in another sense it's narrower.

25 It's broader in that the statute certainly

1 sweeps in categories of types of falsehoods --

2 May I finish?

3 -- types of falsehoods that wouldn't have
4 been defamation per se at common law.

5 On the other hand, it applies only to
6 Consumer Reports, documents that are intended to be used
7 for concrete, primarily economic purposes.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Pincus, you have three minutes
11 remaining.

12 REBUTTAL ARGUMENT OF MR. ANDREW J. PINCUS

13 ON BEHALF OF THE PETITIONER

14 MR. PINCUS: Thank you, Mr. Chief Justice.

15 Justice Kagan asked the question earlier
16 about how could people find this?

17 You know, our legal system is people have to
18 have allegations that they're harmed. And I'd urge to
19 the Court to look at the public justice amicus brief on
20 the other side of the case for a whole series of claims
21 in which the people filed and they were able to make
22 allegations of actual harm.

23 The argument that the Ninth Circuit relied
24 on falsity is a fiction. The first sentence, the
25 overture of its opinion, mentions that there is an

1 allegation of falsity. There is not a word in its
2 standing analysis that refers at all to falsity. It
3 relied on statutory violations, period, including the
4 violations that say nothing about falsity.

5 JUSTICE SOTOMAYOR: So are we ruling on the
6 outcome or are we ruling on the reasoning?

7 MR. PINCUS: Well, Your Honor, I -- I think,
8 as the Court comes -- the -- the question presented was
9 does the Ninth Circuit's rule that a mere statutory
10 violation unaccompanied by any harm is sufficient to
11 satisfy Article III?

12 I think the Court has to address that issue.

13 The next issue is: Did Congress elevate --
14 did -- did Congress say that false statements inflict a
15 certain kind of harm, and therefore, we're going to
16 single them out?

17 And I think, to rely on Congress, Congress
18 actually has to have made that determination. And there
19 is nothing in the statute that says that.

20 As Justice Breyer said, you have to actually
21 read falsity into the statute in order to find falsity.

22 Congress didn't say anything about the
23 particular harm inflicted by false statements.

24 JUSTICE SOTOMAYOR: I think --

25 MR. PINCUS: If it wanted to do that, it

1 should --

2 JUSTICE SOTOMAYOR: See, I look at this case
3 slightly differently. I think the breach of any legal
4 right you're given is -- gives Article III jurisdiction.

5 There is a difference between that and
6 whether you're within the zone of interest of a statute.
7 And so what you're saying -- I -- I guess that's why the
8 circuits below have said you have to be able to allege
9 some falsity in the credit report to get recovery under
10 the statute because those are the people the statute was
11 targeted to.

12 MR. PINCUS: Your Honor, that's not right.
13 The -- all of the decisions that my friends refer to
14 were decisions, not where there were willfulness claims,
15 but where there were actual damages claims. No surprise
16 that the courts have said to prove actual damages you
17 have to at least show falsity.

18 There has been no decision interpreting the
19 statute in the context of a willfulness claim to say
20 whether it does.

21 And I think the problem with the position on
22 the other side is they want to say Congress made this
23 decision that anything inaccurate is -- is harmful, but
24 there's nothing in the statute to say that. Congress
25 should speak clearly if it wants to do that, and then

1 this Court has to review that determination.

2 And I think the question would be, has
3 the -- is the class defined by Congress sufficiently
4 congruent with tangible harm to -- to satisfy Article
5 III?

6 And I think --

7 JUSTICE SOTOMAYOR: But here you --

8 MR. PINCUS: -- the class of all
9 inaccuracies can't possibly be a class of people, most
10 of whom are going to suffer one harm.

11 JUSTICE GINSBURG: We have one brief, the
12 brief of the restitution scholars who say if this Court
13 says that you have to show -- how can -- some harm, what
14 happens to all the restitution cases where you measure
15 the relief by the gain to the defendant? There has been
16 no loss to the plaintiff.

17 MR. PINCUS: Your Honor, restitution is all
18 about a measure of damages. And all those cases --
19 often they're breach of contract cases -- there's harm.
20 The property interest conferred by the contract has been
21 violated, and the question is a measure of damages. In
22 the fiduciary duty context, as in the property --

23 JUSTICE GINSBURG: So what is -- what is the
24 harm to the neighbor whose -- puts a toe into his
25 neighbor's land?

1 MR. PINCUS: It -- it is the intrusion on
2 the right to exclude the property interest created by
3 the common law. And this statute doesn't create a
4 property interest, so it can't be upheld on this basis.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 12:07 p.m., the case in the
8 above-entitled matter was submitted.)

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