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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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1 P R O C E E D I N G S

2 (11:06 a.m.)

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

5 Mr. Pincus.

6 ORAL ARGUMENT OF MR. ANDREW J. PINCUS

7 ON BEHALF OF THE PETITIONER

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

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

14 In Lujan, the Court said that Congress may
15 elevate to the status of legally cognizable injuries
16 concrete, de facto injuries that were previously
17 inadequate in law. Here, the Ninth Circuit held that
18 there is no need for any de facto injury. A statutory
19 violation that in some general sense relates to the
20 plaintiff is all that's necessary, even though it has no
21 tangible --

22 JUSTICE KAGAN: Why is it you think --

23 MR. PINCUS: -- consequences.

24 JUSTICE KAGAN: Let's say I agree with you
25 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?

4 So let me just frame it in a hypothetical.
5 Suppose that there is just a statute -- it's a little
6 bit of a simpler statute, and you can argue with me or
7 tell me why it might or might not be different, but I
8 just want to understand your position. Suppose that
9 there is a statute that just says that one of these
10 credit reporting agencies shall not disseminate
11 inaccurate information about people or shall -- shall
12 not do it willfully or negligently or what have you, but
13 shall not disseminate inaccurate information about
14 people. And then there's a cause of action that says if
15 they disseminate inaccurate information in a credit
16 report about you, you can sue. All right?

17 Is that enough of a concrete injury for you?

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

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

24 JUSTICE KAGAN: Okay. But let me focus on
25 what seems to be --

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

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

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

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

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

18 JUSTICE KAGAN: I'm sorry.

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

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

23 MR. PINCUS: Yes.

24 JUSTICE KAGAN: -- the dissemination of
25 false information about a particular person.

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

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

4 JUSTICE KAGAN: -- you know? If -- I mean,
5 if somebody did it to me, I'd feel harmed. And I think
6 that if you went out on the street and you did a survey,
7 most people would feel harmed. Most people would feel
8 as though they had some interest that had been invaded.

9 And Congress recognized that, thought it was
10 a significant problem, passed a statute to deal with
11 that problem.

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

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

23 MR. PINCUS: Well, let me answer your
24 question in two ways. I -- I want to explain why -- why
25 it isn't, and then I also want to explain why it's not

1 what Congress did here.

2 So why it isn't: There are places that the
3 Court has looked for guidance. One is the common law.
4 Other -- other kinds of torts, for example. In -- in
5 the restatement --

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

11 It's very strange.

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

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

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

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

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

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

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

20 And the Court has made clear in the --

21 JUSTICE SOTOMAYOR: So if I have a dozen or
22 more cases that didn't involve property rights, where we
23 didn't require economic harm, those would mean nothing
24 to you?

25 MR. PINCUS: Your Honor, I --

1 JUSTICE SOTOMAYOR: Those legal rights, we
2 just decided through the centuries, all those cases
3 wrong?

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

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

11 MR. PINCUS: Okay. I --

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

18 What's different?

19 MR. PINCUS: It could be.

20 If I can just finish my answer to -- to
21 Justice Sotomayor, because I just want to make clear,
22 and I think the College Savings case is a perfect
23 analogy here, that every cause of action does not confer
24 a property right. The Court there made that clear, and
25 that's why the property-right rationale doesn't apply

1 here.

2 Now, turning back to Justice Kagan's
3 question, I think there are other areas other than
4 defamation where there's some guidance about what
5 constitutes tangible harm. For example, in the False
6 Light cases, the restatement has a comment that I think
7 -- this is a Restatement (Second) of Torts 652E,
8 comment(c) that's very on point. It says, "Complete and
9 perfect accuracy in published reports concerning any
10 individual is seldom attainable by any reasonable
11 effort. And minor errors, such as a wrong address or a
12 mistake in the date of the employment or similar
13 unimportant details, would not" --

14 JUSTICE KAGAN: These are not -- these --
15 these are not unimportant details. This is a -- they
16 basically got everything wrong about him. You know,
17 they got his marital status wrong. They got his income
18 wrong. They got his education wrong. They basically
19 portrayed a different person than --

20 MR. PINCUS: Well, Your Honor, your
21 hypothetical, though, is any false statement. And I'm
22 trying to respond why a ruling by -- a rule by Congress
23 of any false statement wouldn't qualify. So there is
24 some legal precedents that tells us --

25 JUSTICE KAGAN: Here's the thing, Mr.

1 Pincus. It seems to me that the -- the one thing that
2 we have to say Congress is better at than we are, is
3 identifying concrete harms. I mean, it's perfectly
4 fine. And I agree with very large portions of your
5 brief when you say they have to have identified a
6 concrete harm. It's like, fine. Yes, they do.

7 But now the question is, did they identify
8 what? And it seems pretty clear what they wanted to do
9 here. That this statute is entirely about preventing
10 the dissemination of inaccurate information in credit
11 reports which they seem to think is both something that
12 harms the individual personally and also harms larger
13 systemic issues. And then they gave the cause of action
14 to the people it harmed personally.

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

18 MR. PINCUS: Well, I think there's a
19 threshold assumption in your question that Congress
20 actually identified that as a real-world harm. And I
21 think there are two problems with that.

22 First of all, the structure of the statute
23 indicates that that's not so. The willfulness cause of
24 action that provides for statutory damages applies to
25 every violation of the statute that's willful, including

1 those that don't involve false statements. So by
2 enacting -- if the argument is by enacting the
3 willfulness cause of action, Congress said inaccuracy is
4 so harmful that it should be actionable in any case, it
5 couldn't -- it's just not possible to look at the -- the
6 way the statute was constructed and say that that was
7 so.

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

11 MR. PINCUS: I think if the plaintiff could
12 show that -- that there was some -- some consequence to
13 him, some -- from the false information: Something
14 happened to his credit. Something happened to an
15 employment --

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

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

19 JUSTICE KAGAN: People get these reports,
20 and you don't know what they're doing with these
21 reports. They might have not given you a job for that
22 reason, or they might have not given you a job for some
23 other reason. They might have not given you credit for
24 that reason, or they might have not given you credit for
25 some other reason.

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

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

10 JUSTICE KENNEDY: I suppose -- I suppose the
11 argument underlying some of the questions you've been
12 asked assumes that if neighbors are making false
13 comments talking about someone, this is not actual
14 enough unless it's defamation. On the Internet with --
15 in this cyber age that we have where all this
16 information is out, there's -- there's -- has to be some
17 real injury.

18 Is it different because this is a credit
19 agency that is regulated? Does a credit agency have
20 less latitude when it is defending on the ground of no
21 concrete injury than other entities?

22 MR. PINCUS: Well, I think there's a
23 threshold question, Your Honor, of whether Congress made
24 the determination that there should be a different
25 treatment for -- for credit agencies. And I think for

1 the reason that I gave about how the willfulness claim
2 came into the statute, it's hard to say. But I think
3 also --

4 JUSTICE KENNEDY: But does the statute apply
5 just to crediting? That's what -- that's -- that's what
6 I was asking.

7 MR. PINCUS: It does. Although, one of the
8 real-world litigation problems with this statute is that
9 lots of the claims are asserted against entities that
10 claim they're not credit agencies, and that, sort of, in
11 the real-world of litigation, falls out, is not
12 something that often gets decided before the class gets
13 certified. But I think it's important --

14 JUSTICE GINSBURG: That's not disputed in
15 this case.

16 MR. PINCUS: Excuse me?

17 JUSTICE GINSBURG: It may have been disputed
18 at an earlier stage, but now it's accepted that the
19 defendant is a credit reporting agency.

20 MR. PINCUS: Well, it hasn't been ruled on
21 by the lower court. So as the case comes to this Court,
22 yes --

23 JUSTICE GINSBURG: We must assume that
24 that's true.

25 MR. PINCUS: -- that's -- that's the --

1 that's the posture.

2 But -- but I think going back to
3 Justice Kennedy's question, I think what Congress did
4 here was to create a massive number of regulatory
5 requirements that are imposed on credit reporting
6 agencies. And all of those regulatory requirements
7 together were supposed to produce accuracy. I -- I
8 think there can't be a -- it's not logical to impute to
9 Congress a finding that the violation of any one of
10 those many, many, many requirements is actionable --

11 JUSTICE SOTOMAYOR: Isn't that --

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

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

15 MR. PINCUS: No. I think --

16 JUSTICE SOTOMAYOR: It doesn't invalidate
17 the injury here because this is the quintessential
18 violation of the statute. He's saying they don't have
19 reasonable procedures to check their accuracy. We know
20 from the purpose section of the statute that that's what
21 Congress wanted, reasonable procedures. He's going to
22 have to prove that.

23 Number two, he says, the information about
24 me is false. I'm going to assume for purposes of this
25 argument, because we have to, that -- and so does the

1 court below with respect to standing -- that much of
2 that information is inaccurate.

3 I will tell you that I know plenty of single
4 people who look at whether someone who's proposed to
5 date is married or not. So if you're not married and
6 there's a report out there saying you are, that's a
7 potential injury.

8 Now, I know the court below said it was
9 speculative, but that's what Congress was worried about:
10 both creditworthiness and -- and your stature as a
11 person, your privacy, your sense of self, that I can
12 identify myself with some -- others can identify me with
13 some accuracy.

14 MR. PINCUS: Well, respectfully -- I'm
15 sorry.

16 JUSTICE SOTOMAYOR: So I guess my question
17 is, we've now taken a word, concreteness, that the Court
18 in recent years has applied to injuries by citizens and
19 when they can bring actions or not. A generalized
20 grievance, we said, of a taxpayer is not concrete
21 enough.

22 We've taken this doctrine, and you're trying
23 to superimpose the word "concrete" into legally created
24 rights. But for -- for two decades -- on, I mean, two
25 centuries, we've always said in our case law, that

1 injury in fact is the breach of a legally recognized
2 right. Where do we have a right? I think that's
3 Justice Kagan's question.

4 JUSTICE KAGAN: No.

5 JUSTICE SOTOMAYOR: It's a requirement.

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

8 MR. PINCUS: Respectfully, I don't think
9 that the cases say that. We discuss them in detail in
10 our -- in our blue brief. I think what the Court said
11 in Warth and Linda R.S. was about what the Court said in
12 Lujan, which is, de facto injuries as to which there's
13 no cause of action can be made actionable when Congress
14 creates a cause of action.

15 That's quite different from saying that
16 something that doesn't qualify under this Court's
17 injury-in-fact standard as tangible harm can be made
18 actionable, which is what the Ninth Circuit decided
19 here.

20 And I also -- I want to also --

21 JUSTICE KAGAN: Well, I agree with you
22 entirely on that.

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

24 JUSTICE KAGAN: Go ahead.

25 MR. PINCUS: I -- just want to also sort of

1 distinguish -- in responding to your question, I think
2 there are two questions. One -- one question is: Is a
3 false statement -- does a false statement by itself
4 inflict tangible harm within the meaning of this Court's
5 generally applicable injury standard? If it does, it
6 does. The Court has never said that, and we argue that
7 it doesn't.

8 The second question is: Can Congress expand
9 beyond where the Court has gone in defining things that
10 should qualify a sufficient injury to trigger
11 Article III jurisdiction? And we think there are two
12 questions there. One is: Has Congress, in fact, done
13 that? And there's a question whether Congress has done
14 that at all.

15 And I think Justice Kennedy, in his
16 concurrence in Lujan said, if Congress is going to do
17 that, it should say clearly because that obviously is a
18 change in the jurisdiction of the Federal courts. And
19 so Congress might be taken to --

20 JUSTICE KAGAN: Congress does it by doing
21 it. You know, Congress doesn't announce exactly --

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

23 JUSTICE KAGAN: -- here we are. We're just
24 going beyond the common law. It just does it. And --
25 and it does it -- and it did it here. It said, what are

1 we concerned about? We're concerned about following the
2 kinds of procedures that will make sure that there are
3 accurate credit reports. And then Congress told you
4 exactly why in the purposes section of the statute. And
5 my gosh, it's all over the legislative history.

6 The most serious problem in the credit
7 reporting industry, Congress says, is the problem of
8 inaccurate and misleading information.

9 MR. PINCUS: Well --

10 JUSTICE KAGAN: And -- and so Congress has
11 clearly done that here. And I guess I -- I -- if you
12 want to explain to me why it is that Congress can't
13 do -- I -- I think we've said that Congress can do that,
14 can go beyond the common law, and certainly can go
15 beyond anything that we've ever said is a concrete harm,
16 as long as they've identified a concrete harm.

17 MR. PINCUS: Well, a couple of responses to
18 that. If it's a concrete harm in the first place, of
19 course, then they haven't really gone beyond this
20 Court's test. I -- I think -- Let me --

21 JUSTICE KAGAN: Of course, harms can arise
22 in the world and can be identified in the world even
23 though they haven't arisen before or been identified
24 before.

25 MR. PINCUS: But the -- but the court's -- I

1 think the question -- and I take the burden of my
2 friend's argument to be that Congress can define things
3 as sufficient to satisfy standing, even if they
4 wouldn't, if they just were asserted a court satisfied
5 the tangible harm requirement.

6 So I -- I guess, to respond to your
7 question --

8 JUSTICE KAGAN: If you're saying that, I
9 agree with you.

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

13 JUSTICE SCALIA: Mr. Pincus, I would have
14 thought that your answer to Justice Kagan would have
15 been, Congress did not identify, as the harm for which
16 it allowed suit to be brought, misinformation. It did
17 not. It identified as the harm the failure to follow
18 the -- the procedures that it imposed upon credit
19 reporting agencies. It said nothing about people who --
20 who have been hurt by misinformation being able to sue.

21 It said anybody can sue who's been reported
22 on, if the agency failed to use the procedures. So, in
23 fact, Congress has not identified misinformation as a
24 sueable harm. That's not what this statute does.

25 MR. PINCUS: And I apologize if I haven't

1 been clear. That is exactly --

2 JUSTICE SCALIA: Isn't that your answer?

3 MR. PINCUS: That is exactly our argument --

4 (Laughter.)

5 MR. PINCUS: -- that Congress here created a
6 remedy for any regulatory violation. And many, many,
7 many, many --

8 JUSTICE KAGAN: But why did Congress do
9 that, Mr. Pincus? Congress did that --

10 MR. PINCUS: Well, can I --

11 JUSTICE KAGAN: -- Congress did that as a
12 safe harbor. We are not -- it's a kind of
13 industry-friendly act that Congress did. It said we're
14 not going to punish any old inaccuracy. We're giving
15 you a safe harbor. If -- as long as you followed a
16 certain set of procedures, don't worry about it.

17 But did that procedural requirement -- this
18 is -- this is exactly what Lujan says, "It's a
19 procedural requirement the disregard of which could
20 impair a concrete interest of the plaintiff."

21 And we distinguished that from procedural
22 requirements in vacuo.

23 MR. PINCUS: Well --

24 JUSTICE KAGAN: And that's what this is.
25 It's a procedural requirement, the disregard of which

1 can impair your interest in being represented accurately
2 in credit reports.

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

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

7 MR. PINCUS: Exactly.

8 JUSTICE SCALIA: -- not just somebody who --
9 whose information was wrong.

10 MR. PINCUS: Because most of the --

11 JUSTICE KAGAN: No.

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

13 Most of the statutory and regulatory
14 requirements have nothing to do with falsity. They have
15 to do with not following rules. There is nothing in the
16 cause of action that says you can only sue for
17 willfulness if you -- if the statement is false. It
18 says any willful violation of this entire regulatory
19 statute.

20 So the idea that Congress --

21 JUSTICE SOTOMAYOR: "Any person who
22 willfully fails to comply with any requirement imposed
23 upon this subjecter with respect to any consumer is
24 liable to that consumer."

25 So it's not the whole world; it's the

1 consumer that you dealt with --

2 MR. PINCUS: But, Your Honor --

3 JUSTICE SOTOMAYOR: -- or that the agency --
4 that the agency dealt with.

5 MR. PINCUS: But, Your Honor, if the
6 argument is that by enacting that, Congress meant to
7 identify as a harm false statements, there is nothing
8 that requires proof of a false or inaccurate statement
9 in order to bring the claim.

10 JUSTICE KAGAN: Well, but, Mr. Pincus, the
11 gravamen of this claim, as I said, and as more
12 importantly, as -- as the respondent has said, is in
13 1681(e), which does talk about accuracy. And it makes
14 it clear that the procedures are linked to accuracy.

15 And I totally take your point that, well,
16 how about the person who there's -- there's been no
17 inaccuracy. Well, that person does not have standing.
18 That person cannot come in and say that he's suffered a
19 concrete injury. But the person who has been
20 inaccurately represented can come in and say he has
21 suffered exactly the concrete injury that this statute
22 is designed to protect against.

23 MR. PINCUS: But -- but -- but, Your Honor,
24 I don't see how you can say that a cause of action that
25 says nothing about inaccuracy applies to a previously

1 enacted -- one of the many provisions of the statute, to
2 create -- to say that Congress was focused on
3 inaccuracies.

4 JUSTICE KENNEDY: Are you saying --

5 CHIEF JUSTICE ROBERTS: Justice Kennedy.

6 JUSTICE KENNEDY: Are you saying in this
7 case that Congress could have drafted a statute that
8 would allow this individual to bring suit?

9 MR. PINCUS: I think Congress -- yes, I
10 think it might be possible. And let me explain how,
11 Justice Kennedy.

12 I think, first of all, to respond to one of
13 Justice Kagan's earlier questions, I don't think it's
14 crystal clear what Congress was doing here, because I
15 think the most likely interpretation of this provision
16 was it was enacted against the background of this
17 Court's jurisprudence, which requires tangible harm, and
18 it -- what Congress was most likely saying was, we know
19 that quantifying, monetizing that tangible harm in this
20 context is hard. So if there's a willful violation,
21 we're going to give you a minimum recovery.

22 I think the reason why it makes sense to
23 require Congress to speak clearly if it is going beyond
24 what this Court has required for tangible harm is
25 precisely because it is necessary to identify that

1 Congress actually intends to give access to the Federal
2 courts beyond that which would be true under this
3 Court's otherwise applicable jurisdiction -- rule. And
4 it didn't do that here because of the willfulness
5 layered on top of all of the statutory violations.

6 And I think, also, the fair way of looking
7 at this statute is as a complex of regulations which
8 Congress thought, taken together, would improve
9 accuracy.

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

14 JUSTICE SCALIA: Do all of them go to
15 accuracy, or --

16 MR. PINCUS: No.

17 JUSTICE SCALIA: -- do some of them go to
18 privacy and other matters?

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

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

24 MR. PINCUS: Under -- under --

25 JUSTICE SCALIA: And -- and presumably

1 anybody, if -- if you believe respondent, anybody who --
2 whose information is not accurate can sue to get the
3 statutory damages for failure to provide an 800 number.

4 MR. PINCUS: Well, I think respondents would
5 say, even if the information was accurate, you could sue
6 to get the statutory damages. But I think Justice Kagan
7 might limit it to people who were inaccurately --

8 CHIEF JUSTICE ROBERTS: Counsel, I -- when
9 we normally have a standing inquiry, you -- there can be
10 some people who have standing under a particular statute
11 and some who don't.

12 Is -- is your position simply that you have
13 to look at whether the plaintiffs have been injured in
14 fact, and that some plaintiffs will be able to proceed
15 if they can make that showing and others may not.

16 MR. PINCUS: Absolutely, Mr. Chief Justice,
17 that's our position. That's -- and the district court
18 held in this case, looking at the allegations of the
19 complaint, that the court's injury-in-fact standard
20 wasn't satisfied by the Ninth Circuit --

21 JUSTICE KAGAN: Well, was this --

22 JUSTICE SCALIA: By the particular
23 violation? Injured in fact by the particular --

24 JUSTICE KAGAN: Yes.

25 JUSTICE SCALIA: Not by failure to have an

1 800 number, you're saying?

2 JUSTICE KAGAN: No. But would this man be
3 able? I mean, this is very much in line with the Chief
4 Justice's. Would he be able to sue based on the fact
5 that there was inaccurate information about him?

6 MR. PINCUS: No. Because the district court
7 found that all of the allegations of -- all of his
8 arguments about why there was any tangible harm to him
9 were speculative and flunked this Court's standard.

10 JUSTICE GINSBURG: Mr. Pincus --

11 JUSTICE KAGAN: I guess -- I guess what I --
12 that's okay.

13 JUSTICE GINSBURG: Before you sit down,
14 the -- the brief suggests that the real danger of
15 allowing this kind of action is that it -- it will be
16 brought on behalf of a class, and you could get millions
17 of plaintiffs and billions of dollars. If we should
18 hold that Congress can give consumers a right to redress
19 for false credit reporting, if we held that, would you
20 have grounds to oppose certification of a class?

21 MR. PINCUS: Well, I think the problem here,
22 Your Honor, is, if you accept the broad theory that
23 plaintiffs and the government, the spouse, which is all
24 you have to show is a statutory violation, it's a pretty
25 clear pathway to class certification because there is

1 only common issues. And that's what has happened in
2 case after case.

3 Now, if falsity has to be proven, then
4 obviously, that is an individualized issue that might
5 make it more difficult.

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

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 Mr. Consovoy.

9 ORAL ARGUMENT OF WILLIAM S. CONSOVOY

10 ON BEHALF OF THE RESPONDENT

11 MR. CONSOVOY: Mr. Chief Justice, and may it
12 please the Court:

13 Mr. Robins has Article III standing for
14 three independent reasons.

15 First, the violation of the statutory rights
16 under the Fair Credit Reporting Act constitutes injury
17 in fact.

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

21 And third, the fact that his claim follows
22 from the common law of defamation conclusively
23 establishes that it is a case or controversy within the
24 meaning of Article III.

25 JUSTICE KENNEDY: I -- your -- your number

1 two -- I mean, we can -- it sounds to me quite circular.
2 You say -- you say he -- he has a personal stake because
3 he has a -- because Congress said he has a personal
4 stake.

5 Is -- do I understand your argument?

6 MR. CONSOVOY: I view it just like a
7 contract case. So if this were a contract instead of a
8 statute, and the same duties and liabilities came to be,
9 and it was a liquidated damages clause, he had a duty
10 that was violated. He had an entitlement to money. The
11 one thing the Court would not do in that case is look
12 behind the entitlement to see whether he really was
13 harmed in some other way than other -- otherwise being
14 owed the money.

15 JUSTICE SCALIA: All Congress has to do is
16 provide for damages, right?

17 MR. CONSOVOY: No. That's much more than
18 that.

19 JUSTICE SCALIA: Well --

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

25 The -- the point where we get --

1 JUSTICE KENNEDY: But -- but that is a harm.
2 It is a harm. And you said it is a harm because he --
3 he can't get the money that he was provided. But that's
4 circular.

5 MR. CONSOVOY: So -- so the harm -- the
6 violation of a legally vested interest at common law in
7 this Court's decisions throughout has always been deemed
8 a concrete harm.

9 Going back to Tennessee Electric, where the
10 Court narrowly used to say that a legal right was an
11 injury. Then, in Camp, the Court expanded beyond that
12 to say no. Practical injuries too can be legal
13 injuries.

14 But it never negated the earlier, more
15 difficult test.

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

19 You want -- you have an unlisted phone
20 number. You don't want people calling you. The company
21 publishes your phone number, but it's wrong.

22 That is inaccurate information about you,
23 but you have no injury whatever. Can that person bring
24 an action for that statutory damage?

25 MR. CONSOVOY: Congress has a lot of work to

1 do there.

2 CHIEF JUSTICE ROBERTS: I'm sorry?

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

5 CHIEF JUSTICE ROBERTS: But -- but can you
6 have -- do you have standing? Do you have injury in
7 fact when you don't want people calling you, the company
8 publishes a false telephone number?

9 MR. CONSOVOY: So the call --

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

13 MR. CONSOVOY: If Congress identified the
14 interest of you receiving a phone call and that's the
15 injury and you don't receive the phone call, you haven't
16 suffered the injury Congress identified.

17 CHIEF JUSTICE ROBERTS: No, no, no, no. I'm
18 sorry.

19 MR. CONSOVOY: I'm sorry.

20 CHIEF JUSTICE ROBERTS: The injury they
21 identify is we don't think companies should public false
22 -- publish false information about you. Is -- at the
23 end of the standing inquiry to say they published false
24 information about me? Or do you have to ask were you
25 injured in some way by that publication?

1 MR. CONSOVOY: No. The -- Congress has done
2 its job there.

3 CHIEF JUSTICE ROBERTS: So it's in -- so
4 what -- what would you say the injury in fact, not in
5 law but in fact, is in that case?

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

11 CHIEF JUSTICE ROBERTS: But our cases have
12 always said "actual injury in fact." And I thought that
13 meant that that was different than actual injury in law.

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

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

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

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

1 actually been injured.

2 And the second, that it's not a generalized
3 grievance.

4 JUSTICE BREYER: No, but --

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

10 But that's a different question as to
11 whether there's actually injury.

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

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

22 JUSTICE SCALIA: Well, I think that's the
23 particularized part.

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

1 JUSTICE BREYER: But how in the
2 Chief Justice's --

3 JUSTICE KENNEDY: But -- but -- but the
4 law --

5 JUSTICE SCALIA: Concrete -- concrete has
6 nothing to do with particularized. It means it is -- it
7 is -- the only way to put it is an injury in fact. It's
8 a --

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

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

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

24 And the example here is not just the
25 Chief Justice's, which is one, but the more immediate

1 example, which seems to be in this case -- I didn't
2 think it was, but it now seems to be -- are people --
3 perhaps not this plaintiff, but people who in fact
4 notice that someone like the defendant has filed bad
5 procedures leading to false information, and those
6 people who were not injured bring a lawsuit, and they
7 say, they're following bad information. That's it. Bad
8 procedure. And Congress gave me a hundred dollars, so
9 give it to me.

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

14 Now, I want to know what the government
15 thinks of the case I've just put. Do -- does the
16 government think a person who admits, nobody said
17 anything wrong about me. They did say something about
18 me. It was all correct, but they are using bad, bad
19 in -- practices for assembling consumer information --
20 in the government's view, does the person in my
21 hypothetical -- similar to the chief's, maybe
22 identical -- does he or does he not have standing? Yes
23 or no.

24 MR. CONSOVOY: I'll be responding to you:
25 He does not.

1 JUSTICE BREYER: Fine. If you say he does
2 not, then we are limiting this case to the case of
3 people who are victims of not just bad practices but
4 false information about them, and that's what the words
5 "with respect to any consumer" mean.

6 MR. CONSOVOY: That --

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

9 MR. CONSOVOY: That --

10 JUSTICE BREYER: If that's the government's
11 position, then it's not a public action. It's a private
12 action.

13 MR. CONSOVOY: That is -- that is
14 Respondent's position.

15 JUSTICE KAGAN: That's --

16 JUSTICE ALITO: In relation to that --

17 JUSTICE KAGAN: -- that -- that's --

18 JUSTICE ALITO: Could I just say --

19 CHIEF JUSTICE ROBERTS: Justice Alito.

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

25 MR. CONSOVOY: Not in the record that I'm

1 aware of.

2 JUSTICE ALITO: Then how could -- then isn't
3 that quintessential speculative harm?

4 In my understanding -- correct me if I'm
5 wrong -- you don't have files someplace for every person
6 in the United States or -- you have databases, and you
7 will do a search if somebody asks you to do a search. I
8 assume you wouldn't say that somebody as to whom there
9 never had been a search would have standing, right, even
10 if -- you know, even if it would be the case that if
11 there was a search it would come up with a lot of false
12 information?

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

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

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

1 College A on his resume and we tell you he went to
2 College B, he is a liar. If -- if he says he is 30
3 years old and we say he is 55 years old, he is a liar.

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

6 There is no way --

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

12 MR. CONSOVOY: And -- and --

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

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

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

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

25 MR. CONSOVOY: But the -- whether the

1 disclaimer is valid -- well, that is --

2 (Laughter.)

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

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

8 MR. CONSOVOY: I'm sorry?

9 JUSTICE SCALIA: You have to do the best you
10 can do. The person who hires somebody, if -- they all
11 have this disclaimer, which I expect they all do, you --
12 you either go without any information, or you accept one
13 of them.

14 MR. CONSOVOY: Except Congress stepped in
15 and said, if you are operating as a consumer reporting
16 agency, you have duties and responsibilities.

17 JUSTICE SCALIA: I want to ask about what
18 you think Congress did.

19 You're -- you're saying it's limited to --
20 to people about whom false information has been given.
21 Suppose Congress enacts a statute that says everybody
22 has a right to sue for exorbitant expenditures by the
23 Department of Defense. This affects everybody, you
24 know, the \$900 toilet seat and so forth. Everybody can
25 sue. That clearly would not be allowable.

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

8 Do you think that would be true?

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

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

17 MR. CONSOVOY: This statute does things that
18 the hypothetical statute does not. This statute says,
19 starting with the cause of action, if you have done
20 something that violates a statute with respect to a
21 specific consumer, that consumer can sue you. Then
22 second -- then you look in the provision that we are
23 basing the claim on here, the reasonable procedures
24 provision. So that provision in particular, which is
25 the only one before the Court --

1 JUSTICE SCALIA: Where do you get the -- the
2 necessity of injury-in-fact?

3 MR. CONSOVOY: So why --

4 JUSTICE SCALIA: Where do you get the
5 necessity that there has been false information which
6 you assert is there?

7 MR. CONSOVOY: So it says "reasonable
8 procedures to ensure maximum possible accuracy. "

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

11 MR. CONSOVOY: No. Congress actually did
12 something better for the industry. They gave them a
13 limitation on liability. So Congress thought about
14 giving strict liability here.

15 And keep in mind, Justice Scalia, Congress
16 preempted almost all State law claims here. They
17 preempted State law defamation. So the notion that this
18 isn't about defamation when they preempted State law
19 defamation strikes me as a very different argument. So
20 you're only in Federal court and that Congress said we
21 could impose strict liability.

22 JUSTICE BREYER: You have to say, don't you,
23 in answer to Justice Scalia, that the words, "follow
24 reasonable procedures to assure maximum possible
25 accuracy in respect to any consumer," the one who can

1 sue means that the -- when you fail to do it in respect
2 to a consumer, you say something false about that
3 consumer? It doesn't use those words, and we would have
4 to so construe it in order to save the constitutionality
5 of the statute.

6 MR. CONSOVOY: And every lower court to
7 reach this question has held --

8 JUSTICE SCALIA: But that wouldn't be true.
9 You could fail to -- to follow the procedures and still
10 come up with accurate information like you could not
11 have an 800 number.

12 MR. CONSOVOY: Correct, and that person
13 would not have standing.

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

16 MR. CONSOVOY: So, Justice Scalia --

17 (Laughter.)

18 MR. CONSOVOY: -- every lower court to reach
19 this question has held that this particular provision
20 requires falsity of an allegation, multiple courts of
21 appeals.

22 CHIEF JUSTICE ROBERTS: But I want to -- as
23 I understand, I take the falsity out of the -- the
24 hypotheticals to get exactly what your position is on
25 the breadth of Congress' power. So let's say the

1 statute says anybody who's publishing information about
2 you has to pay the individual \$10 a year. They think
3 that's a good way to regulate it. It's information
4 about you, good, bad, or indifferent, pay them \$10 a
5 year, no more, no less. Spokeo or whatever that
6 business is pays you \$20 one year.

7 Now you've been -- the statute has been
8 violated with respect to you, a particular individual.
9 Can that -- and there's statutory damages of \$10,000.
10 Can that individual sue?

11 MR. CONSOVOY: So --

12 CHIEF JUSTICE ROBERTS: Now, does that
13 individual have injury-in-fact because the statute has
14 been violated with respect to him?

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

17 CHIEF JUSTICE ROBERTS: Oh, no, no, no. You
18 have to have published information about an individual.
19 Every individual who you publish information about gets
20 \$10 a year.

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

23 CHIEF JUSTICE ROBERTS: So there'd be no
24 standing -- that person would have no standing even
25 though Congress gave him standing.

1 MR. CONSOVOY: Congress can confer
2 substantive rights that lead to standing.

3 CHIEF JUSTICE ROBERTS: Yes.

4 MR. CONSOVOY: But not everything Congress
5 does will convey a substantive right that differentiates
6 you from the general population.

7 CHIEF JUSTICE ROBERTS: So if the statute --

8 MR. CONSOVOY: This one does.

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

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

14 CHIEF JUSTICE ROBERTS: No, no, no. Any --
15 you have -- I said this just before. They have to have
16 published information about you. If they don't, they
17 don't have to pay you anything.

18 MR. CONSOVOY: Right. And my -- my answer
19 is that that would make it particularized but not
20 concrete.

21 JUSTICE SOTOMAYOR: Isn't there always a
22 materiality question? In every violation, there's
23 always a materiality question: What is the falsehood?
24 Is it material to anything? It could be a transposition
25 of a telephone number.

1 MR. CONSOVOY: That's right. There is a
2 de minimis aspect to the statute as well. But even --
3 well, that is right, and even innocuous things can also
4 cause --

5 JUSTICE KAGAN: Mr. Consovoy, can I just
6 make sure I understand?

7 You said you -- you need for the information
8 to be inaccurate to have standing here. That is going
9 to mean that the class as you've defined it is not going
10 to be certified, and I think that that's the right
11 answer, but I just want to make sure that we're on the
12 -- we're on the same page here.

13 MR. CONSOVOY: Yes. So the class was -- and
14 this is going to come up later, this term, in the Tyson
15 case. But the class has to be defined as broadly as it
16 was because of what's called a "fail-safe problem." You
17 can't identify a class by an element of the cause of
18 action, and that's because it harms defendants' rights.
19 So if we had alleged the class here was everybody who
20 had inaccurate information, it would be a trick against
21 them, because if they defeated the claim, the class
22 would be empty, and they would get no res judicata.

23 So at certification, we're going to have to
24 narrow the class, and we're going to have to come up
25 with common proof because we can't identify the class by

1 the allegation. So what happens is, take the algorithm
2 issue. So we will have to allege under (b)(3),
3 23(b)(3), that a common algorithm led to all the
4 inaccuracies. But if they do, that is a certifiable
5 class. And just --

6 JUSTICE KAGAN: And one very quick thing.
7 You said in your brief you're really only suing under
8 1681(e)(B). Can I understand that to be that you're
9 waiving all claims of other things?

10 MR. CONSOVOY: No. I think -- and let me
11 explain. We read the statute this way: There's a
12 reasonable procedures requirement; that is a general
13 framework. Some of that is discussed in the regulatory
14 commentary, explains what that is. But the specific
15 things mentioned in Count I, Count II, and Count III,
16 the furnisher notices, the user notices in the toll-free
17 number are specific examples of reasonable procedures
18 they failed to follow. They support --

19 JUSTICE GINSBURG: Are you saying --

20 MR. CONSOVOY: -- the general claim.

21 JUSTICE GINSBURG: Are you saying you get
22 the statutory damages for the four claims that you
23 listed, or is it only what you've called the
24 "overarching" claim? And in one footnote you said these
25 other claims are -- are just supportive of the main

1 claim.

2 MR. CONSOVOY: Right.

3 JUSTICE GINSBURG: So are you asking for
4 four times the statutory damages, or are you saying, no,
5 this is really one -- one claim, and so we're asking for
6 \$100 dollars a head, or 10,000 -- or for \$1000 a head?

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

8 And --

9 JUSTICE GINSBURG: It's one claim.

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

11 Now, these are big-picture questions, but
12 this case can be resolved on a much narrower issue.
13 This Court has always held that if the cause of action
14 you allege can be found in the common law and is
15 developed from the common law as in Stevens, that you
16 have standing. This claim for false information follows
17 directly from the common law defamation.

18 CHIEF JUSTICE ROBERTS: The Ninth Circuit
19 didn't address that question, did it? I mean, as I
20 understand it -- I'm looking at the footnote, you know,
21 on Page 9A, it says it doesn't matter because you -- the
22 statutory injury-in-law is enough.

23 MR. CONSOVOY: Right. No, well, but the
24 statute follows from defamation. Just as in Stevens, it
25 was about the statute. It wasn't about the particular

1 individual. They said the qui tam statute followed from
2 the common law there, just like this statute follows
3 from the common law defamation. And remember --

4 JUSTICE SCALIA: Excuse me. How does it
5 follow from the common law of defamation? I mean,
6 you -- you could not bring a defamation action because
7 somebody said something false about you. It was either
8 in one of those areas where it is presumed to be
9 damaging, you know, such as it's, you know, about your
10 moral life or something like that, or -- or your
11 incompetence in your profession, or else you had to show
12 positive damage. How can you say that it's from common
13 law?

14 MR. CONSOVOY: So in Steel Co., Your Honor,
15 the Court said it must be in the tradition of the common
16 law of the sort, not precisely replicated.

17 JUSTICE SCALIA: Oh, I see. Okay.

18 MR. CONSOVOY: Not precisely replicated.

19 JUSTICE SCALIA: Close enough. Okay.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Stewart.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

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

24 SUPPORTING RESPONDENT

25 MR. STEWART: Mr. Chief Justice, and may it

1 please the Court:

2 In Defenders of Wildlife, the Court gave the
3 following description of what injury in fact means: It
4 said injury in fact is, quote, "an invasion of a legally
5 protected interest which is, A, concrete and
6 particularized, and, B, actual or imminent, not
7 conjectural or hypothetical."

8 And so the injury part of it was the
9 invasion of a legally protected injury -- interest. And
10 I think it's clear what work the words "in fact" are
11 doing in that description.

12 If Mr. Robins had alleged that Spokeo is
13 circulating a lot of inaccurate consumer reports -- and
14 I'm afraid they'll do one about me -- that wouldn't be
15 good enough. That --

16 JUSTICE SCALIA: What -- what happened to
17 "concrete and particularized"?

18 MR. STEWART: Well, particularized --

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

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

23 JUSTICE SCALIA: Say it again.

24 MR. STEWART: -- actual or eminent -- well,
25 "concrete and particularized" and "actual or imminent,

1 not conjectural or hypothetical."

2 And the Court has explained both the terms
3 "concrete" and "particularized" as aspects of the -- the
4 requirement that the wrong be done to the particular
5 plaintiff, not that it be done to the community as a
6 whole.

7 And the Court used the terms that way in
8 Schlesinger. I don't --

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

17 Can Congress do that?

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

25 CHIEF JUSTICE ROBERTS: Well, I think that's

1 kind of avoiding the hypothetical. I mean, let's --

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: So presumably you
4 would raise those issues after the action's been filed,
5 and -- and, you know, you could raise those issues as an
6 amicus defending the action.

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

12 CHIEF JUSTICE ROBERTS: Yeah, we're talking
13 about Congress says, Well, these people who are
14 unemployed -- illegal immigrants have jobs -- they
15 should be able to sue to stop that. Because the -- you
16 know, because they -- Congress thinks the president
17 isn't doing enough.

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

24 And -- and I understand the Court's concerns
25 with the implications of our position, but I think it's

1 also worth pointing out, this is a mode of enforcement
2 that Congress has been using since 1790. In the first
3 Copyright Act, Congress enacted a provision that said,
4 if there is infringement, the copyright owner can get
5 actual damages if he can prove them, or failing that,
6 he --

7 CHIEF JUSTICE ROBERTS: I mean, you know
8 the -- you know the objection behind -- behind my
9 hypothetical.

10 MR. STEWART: Yes.

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

17 And I would have thought that the -- the
18 president would be concerned about Congress being able
19 to create its own enforcement mechanism. I thought that
20 you would be concerned that that would interfere with
21 the executive's prerogative.

22 MR. STEWART: I -- I think when we get to
23 the point of -- of the hypothetical where any unemployed
24 person in the State is treated as the legal victim of
25 every active unlawful immigration that occurs into that

1 State, we -- we do have concerns. But the -- the
2 statute we're dealing with here says --

3 JUSTICE SCALIA: The statute we're dealing
4 with here treats everybody about whom false information
5 has been given as somebody about whom false information
6 that harms him has been given.

7 I mean, the class is not -- is not
8 co-extensive with those -- those that are harmed. And
9 it's the same -- it's the same in -- in the
10 Chief Justice's hypothetical: The class is not
11 co-extensive with everybody who has been -- who has been
12 cheated out of a job by a -- by an unlawful immigrant.

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

20 Here the statute we're dealing with doesn't
21 say --

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

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

3 And I understand the allure of the
4 hypotheticals, but you -- you could do the same thing
5 with rational-basis review of substantive legislation.
6 You could come up with endless hypotheticals about
7 statutes that were just at the border between really
8 stupid and so stupid as to be actually irrational.

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

15 That's what makes it a decision appropriate
16 for resolution by the judicial branch. And it seems a
17 little bit more important than saying you can challenge
18 particular statutes.

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

23 But to -- to return to the point about
24 injury in fact, the Court has said there has to be
25 actual injury. But it has defined "injury" as the

1 invasion of a legal -- legally protected interest, the
2 violation of a legal right.

3 The most recent addition of Black's Law
4 Dictionary gives, as its first definition of injury, the
5 violation of another's legal rights for which the law
6 provides a remedy.

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

12 MR. STEWART: Well, what --

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

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

20 But with respect to procedures, the Court
21 has said, you can sue to complain about the deprivation
22 of lawfully required procedures if those procedures are
23 intended to protect the --

24 JUSTICE BREYER: Right -- right here we have
25 in the complaint, I guess -- there were certain errors:

1 A photograph of the wrong person. A statement that he's
2 in his 50s; he isn't. That he's married; he isn't.
3 He's employed in a professional or technical field; he
4 isn't. That he has children; he doesn't. That he has a
5 graduate degree; he doesn't. That his economic health
6 is very strong; it isn't. And his wealth level is in
7 the top 10 percent; it isn't.

8 Okay? So that, I gather, is what he is
9 complaining about. Something like that.

10 MR. STEWART: Exactly.

11 JUSTICE BREYER: Fine. Now, for purposes of
12 deciding this case, are we simply to refer to this and
13 say, this is a case about a person who is complaining
14 this? And is this, which I just listed, a sufficiently
15 concrete injury?

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

17 JUSTICE BREYER: Thank you.

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

24 So I would suppose, if we're going to decide
25 it on that basis, we have to determine that the Ninth

1 Circuit's rationale was in -- was wrong.

2 MR. STEWART: I'm sorry, I don't have the
3 exact wording in front of me, but if you look at the
4 very first sentence of the Ninth Circuit's opinion, the
5 Ninth Circuit says the question we confront is whether a
6 person has injury in fact when false information about
7 him is disseminated.

8 Now, the -- the court said we don't have to
9 decide what is added to the complaint by the allegations
10 that employment prospects were actually harmed.

11 And it's -- and it's also true that the
12 Ninth Circuit didn't analyze the question that it framed
13 in quite the way we would have. It didn't rely on the
14 defamation analogy; it relied on the statutory right.
15 But it still described the question before it as whether
16 a person has injury to complain about --

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

20 At one point the court says, the interests
21 protected by the statutory rights at issue are
22 sufficiently concrete and particularized.

23 Now, look, it's not a good opinion, and then
24 it doesn't tell you why it is that they're sufficiently
25 concrete, but they clearly held that they were

1 sufficiently concrete. They understood that as part of
2 the test.

3 MR. STEWART: The -- the other point I would
4 make -- I -- I agree with that.

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

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

17 And then later, in Bennett v. Spear, the
18 Court applied the same Endangered Species Act provision
19 at the behest of a plaintiff who did have standing.

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

25 With -- with respect to the defamation

1 analogy, I'd say Congress, in one sense, is broader than
2 common law, and in another sense it's narrower.

3 It's broader in that the statute certainly
4 sweeps in categories of types of falsehoods --

5 May I finish?

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

8 On the other hand, it applies only to
9 Consumer Reports, documents that are intended to be used
10 for concrete, primarily economic purposes.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Pincus, you have three minutes
14 remaining.

15 REBUTTAL ARGUMENT OF MR. ANDREW J. PINCUS

16 ON BEHALF OF THE PETITIONER

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

18 Justice Kagan asked the question earlier
19 about, how could people find this?

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

1 The argument that the Ninth Circuit relied
2 on falsity is a fiction. The first sentence, the
3 overture of its opinion, mentions that there is an
4 allegation of falsity. There is not a word in its
5 standing analysis that refers at all to falsity. It
6 relied on statutory violations, period, including the
7 violations that say nothing about falsity.

8 JUSTICE SOTOMAYOR: So are we ruling on the
9 outcome or are we ruling on the reasoning?

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

15 I think the Court has to address that issue.

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

20 And I think, to rely on Congress, Congress
21 actually has to have made that determination. And there
22 is nothing in the statute that says that.

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

25 Congress didn't say anything about the

1 particular harm inflicted by false statements.

2 JUSTICE SOTOMAYOR: I think --

3 MR. PINCUS: If it wanted to do that, it
4 should --

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

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

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

21 There has been no decision interpreting the
22 statute in the context of a willfulness claim to say
23 whether it does, and I think the problem with the
24 position on the other side is they want to say Congress
25 made this decision that anything inaccurate is -- is

1 harmful, but there's nothing in the statute to say that.
2 Congress should speak clearly if it wants to do that,
3 and then this Court has to review that determination.

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

8 And I think --

9 JUSTICE SOTOMAYOR: But here you --

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

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

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

25 JUSTICE GINSBURG: So what is -- what is the

1 harm to the neighbor whose -- puts a toe into his
2 neighbor's land?

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

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

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

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