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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 That'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 this: 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. It has to do much more  
14 than 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 would think that's  
20 the 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 not, and  
14 here's why --

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

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

1 you.

2 JUSTICE SCALIA: Right.

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

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

8 JUSTICE SCALIA: That's fine.

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

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

12 MR. CONSOVOY: So why --

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

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

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

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

24 And keep in mind, Justice Scalia, Congress  
25 preempted almost all State law claims here. They

1 preempted State law defamation. So the notion that this  
2 isn't about defamation when they preempted State law  
3 defamation strikes me as a very different argument.

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

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

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

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

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

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

25 MR. CONSOVOY: So, Justice Scalia --

1 (Laughter.)

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

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

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

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

20 Can that individual sue?

21 MR. CONSOVOY: So --

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

25 MR. CONSOVOY: That, I think no, because

1 that statute would apply to everybody in the country.

2 There would be no --

3 CHIEF JUSTICE ROBERTS: Oh, no, no, no. You  
4 have to have published information about an individual.  
5 Every individual who you publish information about gets  
6 \$10 a year.

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

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

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

14 CHIEF JUSTICE ROBERTS: Yes.

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

18 CHIEF JUSTICE ROBERTS: So if the statute --

19 MR. CONSOVOY: This one does.

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

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

25 CHIEF JUSTICE ROBERTS: No, no, no. Any --

1 you have -- I said this just before. They have to have  
2 published information about you. If they don't, they  
3 don't have to pay you anything.

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

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

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

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

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

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

25 MR. CONSOVOY: Yes. So the class was -- and

1 this is going to come up later this term in the Tyson  
2 case. But the class has to be defined as broadly as it  
3 was because of what's called a failsafe problem.

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

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

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

20           And just --

21           JUSTICE KAGAN: And one very quick thing.  
22 You said in your brief you're really only suing under  
23 1681(e) (B).

24           MR. CONSOVOY: Uh-huh.

25           JUSTICE KAGAN: Can I understand that to be

1 that you're waiving all claims of other things?

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

11 They support --

12 JUSTICE GINSBURG: Are you saying --

13 MR. CONSOVOY: -- the general claim.

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

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

20 MR. CONSOVOY: Right.

21 JUSTICE GINSBURG: So are you asking for  
22 four times the statutory damages, or are you saying, no,  
23 this is really one -- one claim, and so we're asking for  
24 \$100 dollars a head, or 10,000 -- or for \$1000 a head?

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



1 And --

2 JUSTICE GINSBURG: It's one claim.

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

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

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

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

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

22 And remember --

23 JUSTICE SCALIA: Excuse me. How does it  
24 follow from the common law of defamation? I mean,  
25 you -- you could not bring a defamation action because

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

7 How can you say --

8 MR. CONSOVOY: So --

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

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

14 JUSTICE SCALIA: Oh, I see. Okay.

15 MR. CONSOVOY: Not precisely replicated.

16 JUSTICE SCALIA: Close enough. Okay.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Stewart.

19 ORAL ARGUMENT OF MALCOLM L. STEWART

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

21 SUPPORTING RESPONDENT

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

24 In Defenders of Wildlife, the Court gave the  
25 following description of what injury in fact means: It

1 said injury in fact is, quote, "an invasion of a  
2 legally-protected interest which is, A, concrete and  
3 particularized, and, B, actual or imminent, not  
4 conjectural or hypothetical."

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

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

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

15 MR. STEWART: Well, particularized --

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

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

20 JUSTICE SCALIA: Say it again.

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

24 And the Court has explained both the terms  
25 "concrete" and "particularized" as aspects of the -- the

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

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

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

13 Can Congress do that?

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

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

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: But presumably you  
25 would raise those issues after the action's been filed,

1 and -- and, you know, you could raise those issues as an  
2 amicus defending the action.

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

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

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

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

24 In the first Copyright Act, Congress enacted  
25 a provision that said if there is infringement, the

1 copyright owner can get actual damages if he can prove  
2 them, or failing that, he --

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

6 MR. STEWART: Yes.

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

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

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

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

25 JUSTICE SCALIA: The statute we're dealing

1 with here treats everybody about whom false information  
2 has been given as somebody about whom false information  
3 that harms him has been given.

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

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

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

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

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

25 And I understand the allure of the

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

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

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

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

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

25 The most recent addition of Black's Law



1 Dictionary gives, as its first definition of "injury,"  
2 "the violation of another's legal rights for which the  
3 law provides a remedy."

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

9 MR. STEWART: Well, what --

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

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

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

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

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

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

7 MR. STEWART: Exactly.

8 JUSTICE BREYER: Fine.

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

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

14 JUSTICE BREYER: Thank you.

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

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

24 MR. STEWART: I'm sorry I don't have the  
25 exact wording in front of me, but if you look at the

1 very first sentence of the Ninth Circuit's opinion, the  
2 Ninth Circuit says, "the question we confront is whether  
3 a person has injury in fact when false information about  
4 him is disseminated."

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

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

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

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

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

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

1                   MR. STEWART: The -- the other point I would  
2 make -- I -- I agree with that.

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

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

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

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

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

1           It's broader in that the statute certainly  
2 sweeps in categories of types of falsehoods --

3           May I finish?

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

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

9           Thank you.

10          CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

13                   REBUTTAL ARGUMENT OF MR. ANDREW J. PINCUS

14                           ON BEHALF OF THE PETITIONER

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

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

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

24           The argument that the Ninth Circuit relied  
25 on falsity is a fiction. The first sentence, the

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

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

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

13 I think the Court has to address that issue.

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

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

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

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

25 JUSTICE SOTOMAYOR: I think --

1                   MR. PINCUS:  If it wanted to do that, it  
2  should --

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

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

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

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

22                   And I think the problem with the position on  
23 the other side is they want to say Congress made this  
24 decision that anything inaccurate is -- is harmful, but  
25 there's nothing in the statute to say that.  Congress

1 should speak clearly if it wants to do that, and then  
2 this Court has to review that determination.

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

7 And I think --

8 JUSTICE SOTOMAYOR: But here you --

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

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

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

24 JUSTICE GINSBURG: So what is -- what is the  
25 harm to the neighbor whose -- puts a toe into his



1 neighbor's land?

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

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

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

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