

**No. 11-56843**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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THOMAS ROBINS, individually and on behalf of all others similarly situated,

*Plaintiff-Appellant,*

vs.

SPOKEO, INC.,

*Defendant-Appellee.*

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On Appeal from the United States District Court

for the Central District of California

Case No. 10-cv-05306

The Hon. Otis D. Wright II, United States District Judge

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**RESPONSE BRIEF OF APPELLEE SPOKEO, INC. FOLLOWING  
REMAND FROM THE SUPREME COURT**

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Attempting to rehabilitate his complaint in light of the Supreme Court's holding in this case, Robins abandons three of his claims and asks the Court to rewrite the FCRA—and the history of the common law—in order to save the fourth. He argues that the mere availability of inaccurate information on Spokeo's website is, by itself, intangible concrete harm satisfying the two-part test that the Supreme Court prescribed. That argument rests upon two false premises.

First, Robins maintains that the FCRA expresses a congressional judgment that anyone about whom inaccurate information was published in a consumer report has suffered concrete harm. But when it initially enacted the FCRA, Congress did not rest any violation of the statute on the bare publication of inaccurate information; proof of actual damages was required for a private action. And the subsequently-enacted statutory damages provision applied across the board to *all* violations; it was not in any way tied to proof of inaccuracy. In addition, Robins hints that his theory would not base standing on trivial inaccuracies, but he does not explain how to draw that line, much less where Congress recognized such a distinction. The congressional judgment on which Robins seeks to rely simply does not exist.

Second, and equally chimerical, is Robins' strained analogy between the common law of defamation and the FCRA cause of action for failure to use reasonable procedures to assure maximum possible accuracy. The relationship is

remote rather than “close,” as the Supreme Court requires. 136 S. Ct. at 1549. The common law did not presume injury from every false statement. On the contrary, presumed harm arose only from a small subset of facially injurious statements; other false statements supported an action only upon proof of harm. Extending that presumption of harm to all, or virtually all, falsehoods in a consumer report—including statements that might be innocuous or even beneficial—turns the common-law presumption on its head. The Supreme Court expressly forbade that approach in holding that “[i]t is difficult to imagine how the dissemination of [certain incorrect information,] without more, could work any concrete harm.” *Id.* at 1550.

Robins therefore cannot establish injury in fact based upon a new form of intangible harm.

## ARGUMENT

### **I. CONGRESS EXPRESSED NO JUDGMENT THAT THE PUBLICATION OF FALSE INFORMATION IN A CONSUMER REPORT AUTOMATICALLY CONSTITUTES AN INJURY IN FACT.**

Robins contended before the Supreme Court that a claimed violation of the FCRA’s requirement to “follow reasonable procedures to assure . . . maximum possible accuracy of the information” in consumer reports (15 U.S.C. § 1681e(b)) automatically satisfies the injury-in-fact requirement. The Court squarely rejected that argument, holding that “Article III standing requires a concrete injury even in

the context of a statutory violation,” and therefore “Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” 136 S. Ct. at 1549.

Apparently recognizing that the Supreme Court’s analysis dooms his case, Robins tries to rewrite the Court’s approach. The Court held that a plaintiff must demonstrate “concrete injury” resulting from a statutory violation that is “‘real’ and not ‘abstract’” (*id.* at 1548), but Robins says that the key inquiry is whether “the statutory right[] is concrete.” Br. 9. Focusing on the “right” rather than the “injury” is, of course, is a different question than the one the Supreme Court asked—and one that almost always will be answered “yes” unless the statutory violation is too amorphous to be adjudicated.

The second part of Robins’ test is equally inconsistent with the Supreme Court’s decision. It would ask merely whether the claimed statutory violation impinges on the statutory purpose—in his terms, whether the violation “is ‘divorced’ from the substantive interest Congress protected.” Br. 10. But whenever Congress enacts a regulatory requirement, its goal is to further the statutory purpose. In nearly every case, therefore, a regulatory violation, at least to some degree, hinders full accomplishment of the statute’s purpose.

The bottom line: Robins advocates a test that a plaintiff will virtually always be able to satisfy based on a bare claimed statutory violation, and that therefore

would render meaningless the Supreme Court’s holding that Article III requires something more. Robins completely writes out of the equation the dispositive question whether any individual plaintiff has suffered real harm or faces any certainly impending risk of harm. And he does so based entirely on passages from Justice Thomas’s concurrence, but that opinion was not joined by any other Member of the Court. Nor can it override the plain language of the Court’s opinion requiring that Robins prove a “concrete” harm resulting from the alleged statutory violation that satisfies the Supreme Court’s two-part test when the claimed harm is intangible.

Applying the analysis that the Supreme Court actually prescribed, there is no basis to conclude that Congress in the FCRA sought to expand the class of persons entitled to sue.

**A. The Supreme Court’s Test Requires An Indication By Congress In The Statutory Text That The Particular Alleged Intangible Harm Satisfies Article III.**

The Supreme Court’s remand requires this Court to determine whether Congress made a “judgment” that particular “intangible harms . . . meet Article III requirements,” and thereby sought to expand the class of persons entitled to sue in federal court beyond those satisfying the generally applicable injury-in-fact standard. 136 S. Ct. at 1549.

Congress's imposition of a regulatory obligation and creation of a private cause of action for failure to comply with that obligation cannot by themselves suffice to demonstrate a congressional "judgment" to expand the class of persons entitled to sue. The logical interpretation of such a statute is that Congress intended the private action to be circumscribed by the generally applicable injury-in-fact standard explicated by the Supreme Court.

In other contexts where Congress legislates against the backdrop of default rules, courts have consistently held that Congress must express in the statutory text its intent to displace the generally applicable rule.<sup>1</sup> The same approach governs here: a statute cannot be interpreted to expand the class of persons entitled to sue without some indication in the statute that Congress intended that effect.

Indeed, in explaining Congress's ability to elevate a *de facto* harm to the status of injury in fact, the Court cited (*Spokeo*, 136 S. Ct. at 1549) "Justice Kennedy's concurrence" in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which in turn explained that, if Congress seeks "to define injuries and articulate

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<sup>1</sup> See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013) ("[W]hen a statute covers an issue previously governed by the common law," we must presume that "Congress intended to retain the substance of the common law.") (quoting *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010)); *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (Congress "is understood to legislate against a background of common-law . . . principles"); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (quotation marks omitted)).

chains of causation that will give rise to a case or controversy where none existed before[,] . . . Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit.*” *Id.* at 580 (Kennedy, J., concurring) (emphasis added); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring) (respondents had no standing because “[n]othing in the statute here . . . indicates Congress intended to identify or confer some interest separate and apart from a procedural right”).

As explained below, the FCRA manifests no intent to expand Article III injury in fact.

**B. The FCRA Does Not Reflect A Judgment By Congress That The Category Of Persons With Standing To Sue Should Be Expanded.**

Seeking the necessary congressional judgment, Robins focuses on the single provision remaining in this case—Section 1681e(b)—and claims that it demonstrates Congress’s intent to broaden the class of persons permitted to file suit in federal court. That effort to rewrite the statute cannot withstand scrutiny.

*First*, when Congress enacted that prohibition, it provided private plaintiffs with a cause of action that required proof of “actual damages,” expressly requiring plaintiffs to demonstrate tangible harm and therefore plainly not identifying a new class of intangible harms justifying access to court. Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970). Moreover, Congress created a private cause of action for *every* violation of the FCRA (*see* 15 U.S.C. § 1681o(a))—most of which have

nothing to do with inaccurate statements.<sup>2</sup> Again, there is no evidence of a determination that violations of Section 1681e(b) in particular should be specially actionable.

Nor did Congress make any judgment about the harm inflicted by inaccurate statements when it subsequently authorized statutory damages—because it authorized them for *every* willful violation, including those that have nothing to do with inaccuracy (*see* Pub. L. No. 104-208, § 2412(b), 110 Stat. 3009-446 (1996)).

*Second*, Section 1681e(b) prohibits “unreasonable procedures” and does not expressly require inaccuracy as an element of the violation. The element of inaccuracy has been inserted into the statute by *courts*; a judicial inference of that kind cannot evidence a clear judgment by *Congress* about the status of inaccurate but potentially harmless statements. Spokeo Supp. Br. 21-22.

In sum, there simply is no evidence of a congressional judgment that all inaccuracies in a consumer report amount to injury in fact. Indeed, the Supreme Court held just the opposite, recognizing that “not all inaccuracies” in a consumer

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<sup>2</sup> The FCRA’s requirements include: providing certain notices to providers and users of information (15 U.S.C. § 1681e(d)); providing toll-free numbers for particular purposes (*id.* §§ 1681g(c)(2)(B), 1681j(a)(1)(c)); ensuring that users of information for employment purposes comply with statutory disclosure obligations (*id.* § 1681b(b)(1)); and disclosing a range of information about consumer rights and law enforcement agencies (*id.* § 1681g(c)(1)(B)-(E)).

report “cause harm or present any material risk of harm.” *Spokeo*, 136 S. Ct. at 1550.<sup>3</sup>

Robins and the CFPB pivot to a theory that *some* categories of inaccurate information *per se* present a risk of harm. Robins Supp. Br. 12, 19-20; CFPB Br. 19-21. They draw a vague distinction between supposedly “trivial” inaccuracies and those about “age, marital status, earnings history, employment circumstances, and physical appearance” (Robins Supp. Br. 19).

But that distinction appears nowhere in the statute. Congress did not determine that some inaccuracies are harmful and some are not.<sup>4</sup>

*Finally*, contrary to Robins’ and the CFPB’s arguments (Robins Supp. Br. 16-17; CFPB Br. 16-17), there is no sign of intent to create new types of cognizable injury in the text or legislative history of the 1996 amendments that added an action for willful violations and gave plaintiffs the option of recovering “actual damages sustained” or “damages of not less than \$100 and not more than

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<sup>3</sup> Robins asserts that unidentified (and unpleaded) “investigative studies” malign the accuracy of information on Spokeo’s website. Robins Supp. Br. 12. But these purported studies shed no light on whether *Congress* determined that inaccuracies of those kinds are automatically harmful—much less in 1970 or 1996, when Spokeo did not even exist.

<sup>4</sup> Robins, but tellingly not the CFPB, further argues that Spokeo’s alleged “misrepresentation of Robins’ marital status also creates a real risk of harm” to Robins’ dating prospects. Robins Supp. Br. 19-20. But that alleged harm is nowhere to be found in Robins’ complaint; he cites a 2016 blog post and the *Spokeo dissent*.

\$1,000.” 15 U.S.C. § 1681n(a)(1)(A). That provision is most naturally construed to relieve *injured parties* from having to quantify the *amount* of their damages, thereby providing an additional incentive for injured parties to sue. As the Supreme Court has observed, there is nothing “peculiar” about providing “only to those plaintiffs who can demonstrate actual damages” an award of “some guaranteed damages, as a form of presumed damages not requiring proof of amount.” *Doe v. Chao*, 540 U.S. 614, 625 (2004) (construing the Privacy Act and pointing out that such a remedial scheme parallels the common law of defamation). Even crediting the articles Robins that cites as reliably indicating congressional intent, they state only that the statutory damages provision was designed to increase the “incentive on the part of the consumer to bring an action” by “provid[ing] for minimum liability or presumed damages” (Robins Supp. Br. 16-17)—not by giving unharmed consumers standing to sue.

If Robins could show a congressional determination, and he cannot, *Spokeo* makes clear that a determination is “instructive” rather than dispositive. Congress could not transform by fiat an inaccuracy that “works no concrete harm” (such as publication of an erroneous zip code) (136 S. Ct. at 1550) into a “concrete” harm. That would transgress the “hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers*, 555 U.S. at 497.

**II. THERE IS NO “CLOSE RELATIONSHIP” BETWEEN COMMON-LAW DEFAMATION AND THE VIOLATIONS ALLEGED HERE.**

Injury in fact also may exist when “an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” 136 S. Ct. at 1549. There is no close relationship between the FCRA and common-law defamation, the historical analog on which Robins and the CFPB rely.

The focus of analysis is the claimed “intangible harm” and the “harm” that was required to maintain the common-law action. 136 S. Ct. at 1549. And the relevant time is the period when the Constitution was ratified: the injury-in-fact standard ensures that the jurisdiction of federal courts does not expand beyond the “cases” and “controversies” permitted by Article III. *See, e.g., Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000). Robins’ alleged harm does not have a “close relationship” to the reputational injuries that underpinned the early common law’s prohibition of defamatory statements.

*First*, the FCRA is not designed to provide recovery for injuries that bear any relationship to common-law defamation. Indeed, the text of Section 1681e(b) does not prohibit the falsity of any statement, but rather imposes a requirement that a consumer reporting agency adopt reasonable procedures to ensure accuracy. Contrary to Robins’ assertion (Robins Supp. Br. 24), the FCRA therefore does *not*

“follow directly from [a] common-law tradition” that required that statements be false and harmful to be actionable.

*Second*, the harm from mere inaccuracy on which Robins relies bears no resemblance to the harm needed for a common-law defamation action, because such actions required proof that the false statement was injurious to the plaintiff’s reputation. *See, e.g., Runkle v. Meyer*, 3 Yeates 518, 519 (Pa. 1803); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1827); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990) (“Since the latter half of the 16th century, the common law has afforded a cause of action *for damage to a person’s reputation* by the publication of false and defamatory statements.”) (emphasis added).

For that reason, the common law required proof of actual damage for the vast majority of allegedly false statements. Harm was presumed only for a small category of statements that by their nature were highly likely to harm an individual’s reputation. *Carey v. Phipus*, 435 U.S. 247, 262 (1978) (“[S]tatements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as injury to reputation.”).<sup>5</sup>

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<sup>5</sup> Similarly, the willingness of courts to presume injury for a broader set of published defamatory statements than oral defamatory statements is beside the point. That doctrine reflects the judgment that published defamatory statements are more likely to cause harm because of their broader distribution. *See, e.g., McClurg v. Ross*, 5 Binn. 218, 219 (Pa. 1812). It does not eliminate the requirement that the statement be defamatory in order to be actionable.

Robins tries to fit the inaccuracies claimed here into this narrow category. But the particular alleged inaccuracies in Robins' Spokeo search results bear no comparison to accusations that "will of course be injurious." 3 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*124 (1st ed. 1768) (giving as examples accusations of crime, of infectious disease, or of conduct that would automatically disqualify the subject from "a trade or livelihood"). The same limitation applied to the subsequently-recognized "false light" tort, which in other respects imposed liability more expansive than defamation: "[c]omplete and perfect accuracy in published reports . . . is seldom attainable by any reasonable effort . . . . The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken . . . ." RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).<sup>6</sup>

That does not mean that Congress cannot expand the category of false statements that could be actionable without proof of accompanying harm. For

<sup>6</sup> To the extent that Robins speculates about possible consequences of the alleged inaccurate statements, *see* Robins Supp. Br. 19, those consequences stem from individualized potential responses to specific alleged inaccuracies, not any defamatory content. Thus, Robins suggests that the false information about him may lead employers to think that he is overqualified or that his resume is inaccurate, or lead a prospective romantic partner to think that he is married. That consequences might flow from such inaccurate statements cannot make them defamatory in the absence of proof of actual harm.

example, Congress might specify that certain types of falsehoods, such as a false statement that an individual had been involuntarily terminated, were actionable irrespective of injury. Or Congress might provide that a false statement that would have been harmless to reputation in 1789—for example, an accusation of discrimination on the basis of race or sex—was now *per se* harmful. In each instance, the inquiry would be: (a) did Congress make the relevant determination; and (b) is the false statement by itself as likely to inflict concrete harm to reputation equivalent to that resulting from the false statements that were actionable without proof of harm at the time of the Founding. Neither requirement is satisfied here.

*Third*, unable to come close to demonstrating the necessary harm to reputation, Robins and the CFPB claim that injury to reputation was not an important element of the common-law claim. *See, e.g.*, CFPB Br. 25 (suggesting that it does not matter if harms are not “on all fours with the common law”). But harm to reputation was the very essence of a defamation claim. While the common law sought to redress injury to reputation, Robins alleges only facially neutral (and perhaps mildly flattering) statements that cannot possibly be said to “lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

Robins relies on a law review article to bridge the gap between the common law and his claims. *See* Robins Supp. Br. 13, 15, 21 (citing Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95 (1983)). But that article discusses the defamation action in the late 19th century (when credit reports began benefiting from a qualified privilege), a century after the Founding. And the article emphasizes the many *differences* between the common-law defamation action and the FCRA action for violation of a “duty to maintain reasonable procedures in preparing consumer reports” (72 Geo. L.J. at 113) when the violation “caused the individual to be denied access to credit, employment or insurance.” *Id.* at 97; *see id.* at 113 (referring to “the report that injured the subject”). There thus is no relationship between the reputational harm required in common-law defamation actions and the inaccuracies Robins alleges here, let alone the close one that the Supreme Court requires.

### **III. ROBINS HAS NOT ADEQUATELY PLEADED CAUSATION.**

Robins tersely reiterates his belief that he satisfies the causation requirement of Article III standing as long as he alleges that inadequate procedures led to inaccuracies in his Spokeo search results. Under Robins’ view, causation and redressability naturally follow from the statutory violation. But this ignores the Supreme Court’s command that a plaintiff identify either a concrete present harm or a certainly impending future harm. As we have explained (Spokeo Supp. Br. 25-

27), any harm that Robins might suffer in the future as a result of inaccurate search results on Spokeo will only be realized after multiple independent actions of unknown third parties. Such allegations are insufficient to establish the causation necessary for Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1152 n.7 (2013).

### CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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