

No. 11-56843

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

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

Plaintiff-Appellant,

v.

SPOKEO, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:10-cv-05306
The Honorable Otis D. Wright, II

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT

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Spokeo agrees that the only issue before the Court is whether Robins's claim that it willfully failed to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," 15 U.S.C. § 1681e(b), meets the concreteness requirement under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Furthermore, Spokeo now concedes, as it must, that the violation of a statutory right can be concrete without any further showing. The pertinent issue therefore is not, as Spokeo unsuccessfully argued, whether Robins suffered "real-world" harm. The issue is whether Section 1681e(b) protects a concrete interest. It does: the subjects of credit reports have a concrete interest in ensuring that consumer reporting agencies follow the procedures designed to ensure that those reports are as accurate as possible. Robins Supplemental Brief ("Robins Br.") 8-25.

Spokeo's arguments to the contrary miss the mark. First, Spokeo's assertion that the FCRA follows in the common-law tradition only if it perfectly replicates eighteenth-century libel and defamation has no precedential support. Second, Spokeo's argument that Congress reached no judgment that individuals have a concrete interest in an accurate credit report also is meritless; the Supreme Court's decision, the text of the FCRA, the statute's structure, and its legislative history all refute the assertion. Third, Spokeo's argument that Congress may not enforce that interest via the imposition of a procedural duty is likewise foreclosed by governing

precedent. Fourth, and last, Spokeo's reliance on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), is a transparent attempt to relitigate the fundamental issue Spokeo lost in the Supreme Court and conflates the concreteness and immanency requirements of Article III. Robins has standing.

I. The FCRA Follows from the Common Law Tradition.

Although it mostly talks around the issue, Spokeo begrudgingly admits that it has lost the key issue in dispute between the parties: namely, that an individual whose statutory rights have been violated need not plead or prove that he has suffered “real world” harm to have Article III standing. Rather, so long as the individual right Congress elevates meets the concreteness requirement, the plaintiff “need not allege any *additional* harm beyond the one Congress has identified.” *Spokeo*, 136 S. Ct. at 1549. In so holding, the Supreme Court reaffirmed this fundamental point: “injury-in-fact, as required by Article III, ‘may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.’” *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

The harm Congress identified—a false credit report—meets the concreteness requirement. This is an especially easy case because this harm has deep common-law roots. Robins Br. 20-25. Spokeo concedes that all libel, as well as defamatory

statements that may injure the subject in his trade or business, were actionable at common law without proof of real-world harm; Spokeo instead argues that the falsehoods it published about Robins do not rise to this level. Spokeo Supplemental Brief (“Spokeo Br.”) 19-21. That is incorrect. Robins Br. 19-20. But the argument also misconceives the inquiry. The issue is whether the FCRA addresses a claim “of the sort traditionally amenable to, and resolved by, the judicial process.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911)). It does. An action of this sort, *i.e.*, an action for publication of false statements generally, and for false credit reports specifically, has a long history “in English and American courts.” *Spokeo*, 136 S. Ct. at 1549; Robins Br. 21-23. Article III standing does not turn on whether every application of the FCRA perfectly replicates the common-law action in its original form.

Indeed, Spokeo holds up the right to access public records under the Federal Advisory Committee Act (“FACA”) as an example of a statute with a “historical” common-law “analogue.” Spokeo Br. 15-16 (citing *Public Citizen v. Dep’t of Justice*, 491 U.S. 440 (1989)). But the right to “information requested” under FACA does not perfectly replicate the “longstanding mandamus remedy” from which that law purportedly follows. *Id.* “[T]hose requesting information under” FACA need only show “that they sought and were denied specific agency records.”

Public Citizen, 491 U.S. at 449. The common-law mandamus standard is far more rigorous. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). If Spokeo’s straightjacketed approach had merit, most (if not all) freedom-of-information laws would lack the common-law pedigree Spokeo trumpets them as having.

The same goes for the historical analogue to “informer statutes” in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000), and the “historical tradition of suits by assignees” in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 285 (2008). In neither case was the plaintiff required to show that the statute perfectly replicated the relevant common-law analogue to satisfy Article III. All that was required there, and hence all that is required of Robins here, is that the statutory dispute took “a form *historically viewed* as capable of resolution through the judicial process.” *Sprint*, 554 U.S. at 274. The FCRA easily crosses that threshold.

II. Congress Determined that Inaccurate Reports Cause Concrete Harm.

Regardless, Congress does not need *any* historical analogue to meet Article III’s concreteness requirement. Robins Br. 13-17. “Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights.” *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part

and concurring in the judgment) (“Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission or Ogden seeking an injunction to halt Gibbons’ steamboat operations.”). To be concrete, the statute need only “identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” *Id.*

That is what Congress did here: Congress concluded “that it was appropriate to require consumer reporting agencies to adopt reasonable procedures to ensure the accuracy of information included in a consumer report.” Spokeo Br. 21. The FCRA also identifies the class of persons entitled to bring suit: the subjects of inaccurate reports; the “reasonable procedures” provision protects “the individual about whom the report relates.” 15 U.S.C. § 1681e(b); 15 U.S.C. § 1681n(a) (“Any person who willfully fails to comply with any requirement imposed under this subchapter *with respect to any consumer is liable to that consumer[.]*”) (emphasis added). Thus, Congress granted the consumer about whom the report relates the right to enforce the “reasonable procedures” the FCRA requires agencies to follow to protect his concrete interest in an accurate credit report. Robins Br. 17. That is all Article III requires.

Spokeo’s only response is that the concrete harm must be “an element of the cause of action,” Spokeo Br. 10, and that “proof of inaccurate information is not an express element of the cause of action for violations of Section 1681e(b),” *id.* at

21. Spokeo is doubly wrong. Proof of inaccurate information *is* an element of Section 1681e(b). *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Spokeo’s suggestion that this interpretation is limited to claims for actual (but not statutory) damages is mistaken. *Guimond* applies to all claims brought under Section 1681e(b). *Id.* at 1332 (“*Guimond* claimed that Trans Union negligently *and willfully* ... violated 15 U.S.C. § 1681e(b).”) (emphasis added). Controlling precedent defeats Spokeo’s argument on its own terms.¹

Regardless, Spokeo cites *no* case for the proposition that concrete harm must be an element of the action. *FEC v. Akins*, 524 U.S. 11, 21 (1998), another case upon which Spokeo relies, held that a group of voters had suffered an injury based on “their inability to obtain information ... that, on [their] view of the law,” they were entitled to under the Federal Election Campaign Act (“FECA”). The Court found the injury concrete because “the information would help [the voters] ... to evaluate candidates for public office.” *Id.* Notably, though, this interest is *not* an element of the action the voters brought. Under FECA, “[a]ny person” who

¹ Spokeo is correct that the complaint “did not limit the class to individuals about whom Spokeo’s website contained *inaccurate* information.” Spokeo Br. 6. But that is because if Robins had included falsity as a condition of membership, Spokeo would have claimed it was an impermissible “fail safe” class given that membership would be conditioned on proof of a violation. *Kamar v. RadioShack Corp.*, 375 F. App’x 734, 736 (9th Cir. 2010). The class will be certified based on the facts elicited during discovery—not the definition in the complaint.

believes a violation of the law has occurred “may file a complaint with the [FEC],” 2 U.S.C. § 437g(a)(1), and “[a]ny party aggrieved by an order of the [FEC] dismissing a complaint filed by such party” may bring an action in federal court, *id.* § 437g(a)(8)(A).

The same is true for other statutes. For example, many concrete statutory interests are only actionable pursuant to the Administrative Procedure Act, which provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. In those instances, too, the concrete statutory interest is not an element of the cause of action. *See, e.g., Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 736 F. Supp. 2d 24, 30 (D.D.C. 2010).

Spokeo accounts for this issue—but not by requiring that the protected interest be embodied in the action. *Spokeo* affirms “the existence and scope of an injury for informational standing purposes is defined by Congress.” *Friends of Animals v. Jewell*, — F.3d —, No. 15-5223, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016). Therefore, the plaintiff must show “(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, *and* (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.” *Id.* at *3

(emphasis added) (citing *Akins*, 524 U.S. at 21-22). “In some instances, a plaintiff suffers the type of harm Congress sought to remedy when it simply seeks and is denied specific agency records. In others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it.” *Id.* (citations and alterations omitted).

So too here. The Court “recognized that some inaccurate information cannot produce concrete harm—citing the example of an inaccurate zip code.” *Spokeo* Br. 22. But that was not to suggest Congress reached no judgment about the harm that subjects of inaccurate credit reports suffer. Congress certainly did. *Robins* Br. 13-17. The Court’s acknowledgment of this concern was to direct this Court’s attention to the “types of false information” at issue and to whether they cause the harm (or “material risk” of the harm) Congress identified. *Spokeo*, 136 S. Ct. at 1550 & n.8. The types of inaccurate information *Spokeo* disseminated about *Robins* do. *Robins* Br. 19-20.

III. Congress May Protect a Concrete Interest Through a Procedural Duty.

Spokeo also takes issue with Congress’s decision to protect this concrete interest through the FCRA’s “reasonable procedures” requirement. *Spokeo* Br. 16-19. According to *Spokeo*, *Robins* “cannot point to any principle of common law that allowed an action merely because a speaker followed inadequate procedures,”

nor can he “point to a congressional judgment that failure to use reasonable procedures to ensure maximum accuracy should permit an action in court in the absence of conventional injury in fact.” *Id.* at 18. Here too, Spokeo’s argument misses the point and contradicts precedent.

The “reasonable procedures” duty is not the interest the FCRA protects; the concrete interest, again, is accurate credit reports. The “reasonable procedures” provision is the *means* Congress chose to protect that interest. *Spokeo*, 136 S. Ct. at 1550. Congress did not want to hold consumer reporting agencies strictly liable for all inaccuracies; Congress wanted them held liable for inaccuracies that resulted from misbehavior. *Robins Br.* 14. Congress determined that an agency’s failure to follow “reasonable procedures” was an appropriate way to measure whether the inaccuracies should be actionable. *Id.* at 14-15. Thus, when the failure results from negligence, the consumer about whom the agency disseminated an inaccurate report is entitled to actual damages; when the failure is willful, he is entitled to statutory damages. *Id.* at 15-16. This is a perfectly sensible regime.

Nor is it Spokeo’s place to second-guess the manner in which Congress has chosen to protect the concrete interest the FCRA addresses. The judgment as to whether a private interest warrants legal protection—and how best to protect that interest—generally involves subjective, value-laden choices. In the main, such judgments are the essence of democratic lawmaking, and when Congress chooses

to protect an interest in a particular manner, that choice must be respected. The import of Spokeo's view is that Congress has the authority to hold a consumer reporting agency strictly liable for disseminating an inaccurate credit report, yet it lacks the power to take the incremental step of holding the agency liable only if the dissemination resulted from its negligent or willful failure to follow procedures designed to ensure maximum possible accuracy. That is untenable. Legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955).

Moreover, there is nothing unusual about Congress's decision to protect a statutory interest through a procedural duty. As the Supreme Court has explained, there is no Article III problem "where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *Lujan*, 504 U.S. at 572. The National Environmental Policy Act of 1969 ("NEPA") illustrates the point. There, "Congress has made the risk of environmental harm from the government's failure to prepare an [Environmental Impact Statement] a legally cognizable injury. Courts will give effect to that congressional determination in standing cases." *Fla.*

Audubon Soc’y v. Bentsen, 94 F.3d 658, 673 (D.C. Cir. 1996). In other words, the “risk of environmental harm” is the concrete interest, and that interest is protected through enforcement of NEPA’s procedural duties. *WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (“To demonstrate standing to bring a procedural claim—such as one alleging a NEPA violation—a plaintiff must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”) (internal quotations omitted).

The FCRA is no different. Section 1681(e)(b) is not “a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*[.]” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). The FCRA identifies a concrete interest—“curb[ing] the dissemination of false information”—and protects that interest “by adopting procedures designed to decrease that risk.” *Spokeo*, 136 S. Ct. at 1550. Accordingly, Robins is not alleging “a bare procedural violation of the FCRA.” *Spokeo* Br. 18. “The procedural injury” Robins alleges impairs his “separate concrete interest” in an accurate credit report. *Summers*, 555 U.S. at 501 (Kennedy, J., concurring) (quoting *Lujan*, 504 U.S. at 572). *Lujan* and *Summers* foreclose *Spokeo*’s argument.

IV. Spokeo's Reliance on *Clapper* Is Misplaced.

Finally, Spokeo argues that, under *Clapper*, Robins does not have standing unless he alleges that “inaccuracies in Spokeo search results caused imminent harm to his ‘employment prospects.’” Spokeo Br. 23. That is just a transparent attempt to relitigate the fundamental issue that Spokeo lost before the Supreme Court. The whole point of the decision is that Robins is not required to show *any* “real-world” harm—imminent or otherwise—to meet Article III’s concreteness requirement. The issue, again, is whether the FCRA elevates a concrete interest (it does) and whether the types of inaccuracies Robins alleges are tethered to that interest (they are). Beyond that, Robins need only allege that Spokeo disseminated an inaccurate report about him and willfully violated Section 1681e(b)’s “reasonable procedures” requirement (which he did). Robins Br. 2-3. In other words, Robins’s allegation that Spokeo violated his FCRA rights is more than “certainly impending.” Spokeo Br. 25. It has already transpired.

Indeed, accepting Spokeo’s argument would mean that *Havens* is no longer good law. There, the Court held that a “tester” had standing under the Fair Housing Act to bring an action to enforce the statutory right “to truthful information concerning the availability of housing.” *Havens*, 455 U.S. at 373. It did not matter that the tester could show no imminent “real-world” harm. The tester “suffered injury in precisely the form the statute was intended to guard against, and therefore

ha[d] standing to maintain a claim for damages under the [FHA's] provisions.” *Id.* at 373-74. Only the Supreme Court has “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). The Court did not exercise that prerogative to overrule *Havens*, see *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (citing *Havens*, 455 U.S. at 373-374); *Church*, 2016 WL 3611543, at *3, and *Spokeo*'s reliance on *Clapper* cannot be reconciled with that decision.

The Court cited *Clapper* for the straightforward point that Congress need not determine that individuals have already suffered the concrete harm against which the law protects before enacting remedial legislation. Rather, so long as Congress determines that there is “the risk of real harm,” it has satisfied “the requirement of concreteness.” *Spokeo*, 136 S. Ct. at 1549. That is why the Court emphasized that “the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.” *Id.* Like common-law courts, legislatures are permitted to make the judgment that the risk of harm is sufficiently concrete to warrant protection and, once it does, the plaintiff “need not allege any *additional* harm beyond the one Congress has identified.” *Id.*

That is what Congress did here. In passing the FCRA, Congress determined that inaccurate credit reports create the risk of real harm to the subjects of those reports because of the role they play in employment, credit, insurance, housing, or

any number of other important decisions that are made about consumers. *See, e.g.*, S. Rep. 91-517, at 1 (1969) (“The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report.”); 115 Cong. Rec. 2411-2413 (1969) (citing numerous examples of consumers being denied credit or insurance on the basis of inaccurate credit reports). This link is the kind of “chain[] of causation” that Congress may recognize when defining injuries by statute. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Moreover, Congress recognized that, in most cases, this harm would be difficult to prove. That is why the FCRA allows for statutory damages when the violation is willful. Robins Br. 16-17. Thus, as explained above, Article III is no barrier to enforcing Section 1681e(b) so long as the types of inaccuracies that Robins alleges “present [a] material risk of harm” to the concrete interest the FCRA protects. *Spokeo*, 136 S. Ct. at 1550.

Spokeo’s reliance on *Clapper* to argue traceability based on Robins’s “failure to sufficiently plea that Spokeo caused any injury that might befall him” is equally meritless. Spoke Br. 28. The injury that befell Robins is not “some future action by an unknown prospective employer.” Spokeo Br. 29. It is Spokeo’s violation of the “reasonable procedures” requirement. All Robins must show is that his inaccurate credit report can be traced to this violation.

Importantly, Article III's traceability requirement is relaxed when the law's separate concrete interest is enforced through a procedural requirement. The plaintiff "*never* has to prove that if he had received the procedure the substantive result would have been altered." *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007) (emphasis added); see *Lujan*, 504 U.S. at 572 n.7; *WildEarth Guardians*, 795 F.3d at 1154. All Robins must allege is "the procedural step was connected to the substantive result." *Massachusetts*, 549 U.S. at 518. Robins sufficiently alleges that his inaccurate credit report is "connected" to Spokeo's failure to follow reasonable procedures. Robins Br. 18-20.

CONCLUSION

The Court should reverse the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with Court's order dated June 20, 2016 because it contains 3,499 words, including footnotes; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font

/s/ William S. Consovoy

William S. Consovoy
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ William S. Consovoy

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