OPINION

U.S. Supreme Court Hears Argument in Big Data Case with Far-Reaching Implications

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According to Spokeo, operator of a "people search engine," Thomas Robins is a married father in his 50s with a graduate degree and a professional job. In actuality, however, Robins is a 29-year-old unemployed, unmarried man with no children and no graduate degree.

After finding inaccurate information about himself on Spokeo, Robins filed suit under the Fair Credit Reporting Act of 1970, which provides a monetary remedy of as much as $1,000 per violation, due to false information in credit and other consumer files. On Nov. 2, the Supreme Court heard oral arguments in Spokeo v. Robins regarding whether Robins suffered a sufficiently concrete harm resulting from Spokeo's inaccurate depiction of his identity, and is considering whether Robins has standing under Article III of the Constitution to pursue a class action complaint against Spokeo.

The Supreme Court's decision will have far-reaching implications in the privacy, consumer protection and class action arenas, particularly in light of the ever-increasing volume of information — both accurate and inaccurate — that is available on the Internet. More than 30 organizations and individuals filed amicus briefs making impassioned pleas on behalf of both sides, highlighting the importance of this case for companies in the digital, media, e-commerce and social media industries.

To offer its service, Spokeo collects information about individuals from a wide range of sources, including phone books and social media accounts and then compiles it into a searchable information database. Spokeo then sells access to that database to various parties, including human resources departments that use the information to conduct background checks, often for pre-employment and credit screening.


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Robins was "concerned that his ability to obtain credit, employment, insurance and the like will be adversely affected" by Spokeo's inaccurate profile of him, but he stopped short of claiming that he had actually been denied credit, a job or insurance because of the misinformation. The federal district court found Robins' purported harm to be "speculative, attenuated and implausible" and dismissed his suit, concluding that he lacked standing based on an absence of injury.

The 9th Circuit reversed, finding that this cause of action does not require proof of actual injury for willful violations and that Robins' claim was sufficiently pled to survive a motion to dismiss. Specifically, the court did not rule on whether Robins' claimed harms were actual injuries but rather rested on the idea that Robins had standing by virtue of the alleged violations of his statutory rights.

Robins and various amici believe that information companies frequently get their facts wrong — for example, falsely reporting a previous criminal conviction — and consequences do follow, such as the person not being offered a job he or she applied for. And, presumably, the candidate for the job will never know why he or she was not offered the job (or even if he or she would have been offered an interview if not for the incorrect information), and providing redress through government enforcement or traditional litigation is much more difficult. Hence, Robins argued, a private cause of action and class certification is needed to sufficiently correct these errors on a broad scale.

Several of the justices appeared sympathetic to this position. Justice Sonia Sotomayor, for example, set forth the analogy during the argument that many single people will conduct Internet searches on potential dates to determine whether they're married, "[s]o if you're not married and there's a report out there saying you are, that's a potential injury."

Spokeo, in contrast, argued that if the 9th Circuit's ruling is upheld, all companies that collect personal information — which includes data brokers such as Spokeo, as well as numerous e-commerce firms and social networks — will be subject to massive class action suits and staggering damage awards, despite an absence of concrete injury or any synthesis between the value of the data and the claimed harms. Spokeo argued that Robins' claimed harms rely on a "highly attenuated chain of possibilities that depend upon the decisions of independent actors," and thus fall outside of prior Supreme Court standing cases.

Likewise, other technology companies urged the court to reverse the 9th Circuit's ruling, arguing that numerous overlapping regulations and statutes as well as companies' own internal policies, i.e., providing a mechanism to update incorrect information, already provide remedies that are a sufficient deterrent and that provide consumers who are actually harmed an adequate remedy. For example, Facebook, eBay and others argued in an amicus brief that they serve hundreds of millions of users each day and process billions of transactions and interactions,

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person because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been unable to resist."

"To me, the plain language is clear in this case," deputy public defender Alan Kratz said to the justices last week. "You don't even have to resort to the legislative history. It's clear in the plain language the elements of the predicate offense have to be committed, and that would necessarily include the elements of a murder defense."

Even with the duress defense and acquittal on the attempt charge, the appeals court reasoned in its 2012 opinion that the prosecution could have succeeded in proving "all the elements" of the crime for the purpose of successfully convicting Doubleday of felony murder.

Calling the idea "kind of a red herring," the defense's argument, Kratz said, was not that a defendant had to be convicted of a predicate offense but "only that you have to be guilty of it."

"It's perfectly OK to charge only felony murder as a count and not charge the predicate of felony as a separate offense," Kratz said during rebuttal. "But the fact remains that when you do that, you have to prove each and every element to the predicate of felony, and that would include the elements of the affirmative defense." •

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we do that in the U.S., Colorado specifically, but just seeing that from (the detainees') perspective was pretty impactful."

Although Rhoades spent a lot of time learning about education and transatlantic operations, she also spent time getting to know other fellows in the program, "I spent a lot of time with my fellows dialoging about how education is so impactful not only in the U.S., but abroad."

Rhoades and her fellow fellows decided to keep in touch after the program ended. She said the fellows plan to start a giving circle. "The idea is that from our own resources we're going to generate some dollars, and every six months, we'll give to some organization that had some significance to our group."

For Rhoades, the entire application process took about nine months. She was nominated by Barbara Brohl, the Colorado Department of Revenue executive director. Brohl put together a nomination packet with reference letters, a biography and an extensive background analysis. Rhoades passed the nomination step, wrote her final application paper, then attended an in-person interview before being selected as a fellow.

To Rhoades, the scope of the program and leadership initiatives discussed was very dramatic and hard to fathom, but also very impactful. "We just learned such a great deal about identity, history, socioeconomic challenges, culture and love of country," she said. •

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magnifying the potential harm to them if class actions are able to proceed on this basis.

In addition, the value provided by these services is much greater than the very low cost that consumers bear in order to use the services, but that could be quickly reversed if damages for inaccurate information are allowed on a class basis absent a showing of concrete injury.

In short, the court appeared fractured, and its actual decision will not be known for several months. Notably, the FTC has been active in this area for some time, last year publishing a lengthy report on data brokers (not including Spokeo), noting they collect and store information covering nearly every consumer in the U.S., including one broker that has information on 1.4 billion consumer transactions and one that has 3,000 or more data segments for each individual consumer. The FTC's report provided its own recommendations to Congress for increased legislative activity in this area, along with a set of best practices for data brokers.

THE SUPREME COURT'S DECISION WILL HAVE FAR-REACHING IMPLICATIONS IN THE PRIVACY, CONSUMER PROTECTION AND CLASS ACTION ARENAS.

The court's more conservative justices appeared sympathetic to Spokeo and its amici's positions and posed hypotheticals to illustrate the perceived absurdity of allowing class certification without actual injury, such as when an unpublished phone number is accidentally published, but the number is incorrect. Justice Samuel Alito questioned why Robins should be allowed to proceed despite any record that anyone searched for his profile on Spokeo — presumably a necessary but not sufficient requirement to demonstrate injury.

Regardless of the outcome in Spokeo v. Robins, Big Data is here to stay and the court will likely have to grapple with similar issues in the future as it tries to fit modern digital fact patterns into constitutional and statutory frameworks developed over decades or even centuries. •

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