IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DERRICK A. MILBOURNE, and SAMANTHA CHURCHER, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

JRK RESIDENTIAL AMERICA, LLC,
Defendant.

Case No. 3:12-cv-00861-REP

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS BASED ON *SPOKEO, INC. V. ROBINS*

Almost four years ago, Derrick Milbourne and Samantha Churcher first filed this action alleging that the defendant, JRK Residential America, violated the Fair Credit Reporting Act's specific requirements governing the use of consumer reports for employment purposes. *See* 15 U.S.C. § 1681b(b). JRK soon filed a motion to dismiss for lack of jurisdiction, which this Court denied. *See* Dkt. 20. After this Court certified two classes of plaintiffs, JRK filed a summary-judgment motion on the class claims, which this Court again denied. *See* Dkt. 68. Late last year, JRK filed a second summary-judgment motion, arguing that Mr. Milbourne had not suffered a cognizable injury, and that he therefore lacked Article III standing. *See* Dkt. 148. This Court disagreed, concluding that Mr. Milbourne had "sufficiently alleged an injury-in-fact and thus ha[d] standing to pursue his § 1681b claims in federal court." Dkt. 200 at 10. It then determined as a matter of law that JRK is liable for violating the FCRA and set the remaining issues of willfulness and damages for trial.

Now, seeking to unravel these years of litigation, JRK again argues that this Court should dismiss the case because the named plaintiffs lack standing—this time based on a misreading of

the Supreme Court's decision in *Spokeo v. Robins*, 570 U.S. __, 2016 WL 2842447 (May 16, 2016). But despite JRK's claim (at 7) that "[t]he Supreme Court in *Spokeo* addressed, for the first time, whether bare procedural violations of the FCRA, standing alone, constitute concrete injuries in fact sufficient to satisfy Article III," the reality is that *Spokeo* broke no new ground. The Court's consensus opinion simply reiterated that, to have standing, a plaintiff must show an injury that is *both* particularized *and* concrete. In doing so, the Court reaffirmed well-established Article III-standing principles—that "intangible injuries can nevertheless be concrete," and that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, slip op. at 9.

Applying those principles here makes clear that the named plaintiffs have Article III standing. By obtaining Ms. Churcher's (and numerous other class members') consumer reports without first providing her proper disclosure and receiving her authorization as required by § 1681b(b)(2), JRK not only caused Ms. Churcher informational injury but also invaded her privacy—the very harms that specifically motivated Congress's enactment of the FCRA and that have long been recognized by the common law. It is irrelevant whether she understood how JRK would use her report; because she was the object of a violation of the FCRA's disclosure requirements, Ms. Churcher "suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). And by failing to timely provide Mr. Milbourne with the information required by § 1681b(b)(3) before using his background-check report to terminate his employment, JRK caused Mr. Milbourne to also suffer not only a privacy injury but also the very type of informational injury that the Supreme Court recognized in *Spokeo*. *See* slip op. at 10.

Thus, rather than unnecessarily revisiting its prior—and correct—standing decision, this Court should simply reaffirm its holding that the plaintiffs have Article III standing and deny JRK's motion to dismiss.

STATEMENT OF THE CASE

A. Statutory background

Congress enacted the Fair Credit Reporting Act in 1970 to protect the "consumer's right to privacy" by ensuring "the confidentiality, accuracy, relevancy, and proper utilization" of consumer credit information. 15 U.S.C. § 1681(b). And, recognizing the "vital role" that consumer reports play in the modern economy, Congress sought to encourage those who handling the sensitive information in those reports to "exercise their grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting." 15 U.S.C. § 1681(a); *Robinson v. Equifax Info. Servs.*, LLC, 560 F.3d 235, 239 (4th Cir. 2009). The FCRA fosters these purposes through a set of interlocking requirements—including strict restrictions on the use of reports for various purposes and detailed requirements about how consumers must be informed of their rights.

A prime motivation for the FCRA was the impact of third-party data collection on the employment market and particularly on individual job seekers. When it passed the FCRA, Congress voiced a strong "concern[]" that "permit[ting] employers to obtain consumer reports pertaining to current and prospective employees . . . may create an improper invasion of privacy." S. Rep. No. 104-185, at 35 (1995). As one legislator explained, the FCRA's protections represented "new safeguards to protect the privacy of employees and job applicants"; the Act as a whole, he continued, was "an important step to restore employee privacy rights." 140 Cong. Rec. H9797-05 (1994) (Statement of Congressman Vento); *see also* 138 Cong. Rec. H9370-03 (1992) (Statement of Congressman Wylie) (stating that the FCRA "would limit the use of credit reports

for employment purposes, while providing current and prospective employees additional rights and privacy protections").

In addition to the risk of privacy-related harm, Congress also "found that in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment"—often without consumers' knowledge. *Id.*; *see* S. Rep. No. 91-157, at 3–4 (1969) (describing the "inability" of consumers to discover errors). And even if consumers learned of an error, they usually had "difficulty in correcting inaccurate information" because of skewed market incentives: "a credit reporting agency earns its income from creditors or its other business customers," and "time spent with consumers going over individual reports reduces . . . profits." 115 Cong. Rec. 2412 (1969).

As a result, under the FCRA, an employer must disclose to a job seeker that "a consumer report may be obtained for employment purposes" and must obtain authorization from a consumer before procuring his or her consumer report. *See* 15 U.S.C. § 1681b(b)(2). And, to ensure that prospective employees are adequately informed about their rights concerning these consumer reports, the FCRA requires that this information be provided "in a document that consists solely of the disclosure." *Id.* § 1681b(b)(2)(A). Absent the job seeker's informed consent or strict compliance with the statute's disclosure requirements, it is flatly illegal for a company to obtain a job applicant's consumer report for employment purposes—a point Congress hammered home by criminalizing the acquisition of a consumer report under false pretenses. 15 U.S.C. § 1681q.

The FCRA also includes special requirements for when an employer plans on taking adverse action based in whole or in part on a consumer report. *See* 15 U.S.C. § 1681b(b)(3). "Specifically, before taking adverse action regarding the consumer's current or prospective employment, an employer must provide to the consumer a copy of the report and a written

description of the consumer's rights under the FCRA. The employer must also provide the consumer with a reasonable period to respond to any information in the report that the consumer disputes and with written notice of the opportunity and time period to respond." H.R. Rep. No. 103-486 (1994). As the FTC has explained, this requirement is designed not only to promote accuracy, but also to educate consumers: "Congress required employers to include [a] summary of rights in the pre-adverse action disclosure along with a copy of the consumer report so that consumers would be fully informed of their rights." http://1.usa.gov/1NS1Cbv.

B. Factual background

As this Court has already recognized, *see* Dkt. 200, there is no dispute that JRK has consistently and repeatedly flouted the FCRA's provisions governing the use of consumer reports for employment purposes. And, as a result of these violations, JRK has unlawfully obtained substantial personal information about prospective employees like Ms. Churcher—information that it has even used to fire current employees, as was the case for Mr. Milbourne.

As relevant here, JRK required all job applicants to sign a "standard disclosure form" as a condition of their job applications. *See* Dkt. 49-1, at 4; Dkt. 49-2.[1] This form requested personal information for JRK to conduct a "background investigation"—encompassing "a check of any identity, work and credit history, driving records and any criminal history"—as well as the applicant's authorization to do so. Dkt. 49-2, at 2. That information, however, was buried in several paragraphs typed in the fine print, along with "extraneous information" like liability releases and waivers. *See* Dkt. 149, at 2. And "the Standard Disclosure Form's inclusion of release and waiver language," this Court already determined, "violates the plain text of § 1681b(b)(2)(A)," the FCRA's disclosure and authorization requirement. Dkt. 198, at 11. In

[1] "JRK admits that it used the same form for the relevant time frame. And, it is not disputed that . . . all class members signed identical forms containing the same language." *Milbourne v. JRK Residential Am., LLC*, 2014 WL 5529731, at *7 (E.D. Va. Oct. 31, 2014).

addition, this Court has recognized that the "conspicuousness" and "clarity" of a § 1681b(b) disclosure is an objective inquiry, properly decided "as a matter of law." Dkt. 200, at 15–17.

Likewise, JRK regularly failed to comply with the pre-adverse-action requirements of the FCRA, § 1681b(b)(3). For example, JRK hired Mr. Milbourne on a conditional basis on November 19, 2010, and submitted a request for a background check to its vendor that same day. JRK then received the results of the background check several days later, "which showed two misdemeanor convictions and several other charges." Dkt. 55, at 6. Several weeks later, JRK terminated Mr. Milbourne's employment. Only *after* the termination occurred did Mr. Milbourne receive an adverse-action letter informing him of his rights under the FCRA—and even then, the letter came from the vendor, not JRK itself. *Id.* Granting the plaintiffs summary judgment, Court held that "it is undisputed that, as a matter of law, JRK failed to comply with § 1681b(b)(3)," because "[t]he undisputed record shows that JRK never sent the required information before it took adverse employment action." Dkt. 198, at 8–9. "Indeed, JRK admitted as much," this Court continued, as it "acknowledge[d] that, although it later sent adverse action notices to prospective employees, those notices uniformly reached the class members after adverse employment action had already been taken." *Id.*

The information that JRK obtained about prospective and current employees, notwithstanding its repeated FCRA violations, was deeply personal. For instance, JRK was able to access Mr. Milbourne's criminal history, which included decade-old misdemeanor convictions for drug and traffic crimes, as well as numerous criminal charges that were either not prosecuted or dismissed. *See* Dkt. 55, at 20 n.5.

ARGUMENT

I. *Spokeo* did not change the requirements for Article III standing.

To have standing to bring a claim in federal court, the plaintiff must first have suffered an injury in fact. This requirement has two components: the injury must be both (1) particularized and (2) concrete. JRK does not contest that the injuries suffered by Ms. Churcher and Mr. Milbourne are sufficiently "particularized." Nor does JRK contend that the plaintiffs fail to satisfy the other tests required for standing. Instead, JRK argues that, under the Supreme Court's recent decision in *Spokeo*, Ms. Churcher and Mr. Milbourne have not suffered "concrete" injury resulting from JRK's undisputed FCRA violations. Despite JRK's mischaracterization of the decision, however, *Spokeo* did not change the legal framework for analyzing standing nor overrule any of the relevant precedent. Instead, the Court in *Spokeo* simply reiterated that the Article III standing inquiry asks not only whether an injury is particularized, but also whether it is concrete—"that is, it must actually exist." Slip op. at 8.

Elaborating on the meaning of concreteness, the Court in *Spokeo* distilled several "general principles" from its prior cases, without going beyond those cases. *Id.* at 10. First, it acknowledged that, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize" as concrete injuries, "intangible injuries can nevertheless be concrete," as can injuries based on a "risk of harm." *Id.* at 9–10. Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 9. So if the "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"—or, put in fewer words, if "the common law permitted suit" in analogous circumstances—the plaintiff will have suffered a concrete injury that can be redressed by a federal court. *Id.* at 9–10; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)

(explaining that Article III encompasses "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process").

But the plaintiff need not dig up a common-law analogue to establish a concrete injury, because Congress has the power (and is in fact "well positioned") "to identify intangible harms that meet minimum Article III requirements," even if those harms "were previously inadequate in law." *Spokeo*, slip op. at 9. Accordingly, the third principle emphasized in *Spokeo* is that Congress can elevate even procedural rights to a concrete injury if they protect against an identified harm. Of course, "a bare procedural violation, divorced from any concrete harm" identified by Congress, will not give rise to an Article III injury. *Id.* at 9–10. But a "person who has been accorded a procedural right to protect his concrete interests" has standing to assert that right, and may do so "without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

Critically, none of these principles are new. *See, e.g.*, Amy Howe, *Opinion analysis: Case on standing and concrete harm returns to the Ninth Circuit, at least for now*, SCOTUSblog (May 16, 2016), http://bit.ly/1TB3vd1 (describing *Spokeo* as a "narrow" decision); Daniel J. Solove, Spokeo, Inc. v. Robins*: When Is a Person Harmed by a Privacy Violation?*, Geo. Wash. L. Rev. On the Docket (May 19, 2016), http://bit.ly/20fyAmS. And the Court in *Spokeo* did not even apply these principles to the facts before it, choosing instead to remand the case to the Ninth Circuit, whose previous analysis was "incomplete" because it had "overlooked" concreteness. Slip op. at 2. The Court, in other words, offered no assessment of the Ninth Circuit's analysis below, aside from its determination that the Ninth Circuit had failed to analyze concreteness as a separate step in the injury-in-fact inquiry.

JRK nonetheless claims (at 8) that *Spokeo* broke new ground by "refut[ing] the core premise of the Ninth Circuit's decision"—which JRK describes as holding that "*any* statutory

violation causes concrete harm." The Court did nothing of the sort. That a "bare procedural violation, divorced from any concrete harm" is not enough to confer standing has long been the rule for Article III standing. *Spokeo*, slip op. at 9–10 (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)). And, although it is true that, after *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation," that was just as true *before Spokeo*. *See, e.g.*, *Summers*, 555 U.S. at 497 ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

Thus, despite JRK's efforts to exaggerate the decision's importance, *Spokeo* has done very little to change (or even clarify) the law; it simply summarizes the doctrine and provides examples of injuries that might (or might not) constitute sufficiently concrete harm. *Spokeo* therefore should not alter this Court's earlier conclusion that the plaintiffs have standing here.

II. The plaintiffs have suffered concrete harm.

A. By failing to comply with § 1681b(b)(2), JRK caused Ms. Churcher both privacy and informational injuries.

JRK's violations of the FCRA caused Ms. Churcher two forms of well-established cognizable injury—invasion of privacy and informational injury—either one of which would alone be sufficient to confer Article III standing.

1. Invasion of privacy. Under the FCRA, "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, *unless*" it complies with the statutory requirements (i.e., disclosure and authorization) set forth in the following subsections. 15 U.S.C. § 1681b(b)(2) (emphasis added). As one court put it, "[t]he FCRA makes it unlawful to 'procure' a report without first providing the proper disclosure and receiving the consumer's written authorization." *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015).

This court has already held—and JRK does not dispute—that the standard disclosure form that Ms. Churcher (and all other class members) signed "violates § 1681b(b)(2)(A) as a matter of law." Dkt. 198, at 11. Thus, JRK's acquisition of Ms. Churcher's consumer report—which contained highly private information, including her credit and criminal history—was "unlawful." *Harris*, 114 F. Supp. 3d at 869. JRK flippantly claims (at 11) that "it is obvious that Ms. Churcher was not harmed at all" by its illegal intrusion into Ms. Churcher's personal life. That is inaccurate. Put simply, JRK unlawfully invaded Ms. Churcher's privacy—a clear form of concrete harm that JRK simply ignores in its motion.

Indeed, the invasion of privacy is a quintessential "harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and thus is a legally cognizable injury for standing purposes. *Spokeo*, slip op. at 9. For more than a century, American courts have recognized that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A (1977); *see id.* cmt. a (noting that "the existence of a right of privacy is now recognized in the great majority of the American jurisdictions"). In his seminal 1890 article on the right to privacy, Justice Brandeis explained even then that "what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances and applications of a general right to privacy." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890). And American courts at the turn of the century identified the right of privacy as "derived from natural law," and traced the concept back to Roman and early English legal traditions. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905). Because there can be no doubt that harms to an individuals' privacy have traditionally been regarded as a cognizable basis for suit, this Court should hold that Ms. Churcher's privacy injury here is sufficiently concrete "to constitute injury in fact." *Spokeo*, slip op. at 10.

What's more, Congress specifically enacted the FCRA to safeguard the privacy of job seekers like Ms. Churcher. As described above, Congress was openly "concerned" that "permit[ting] employers to obtain consumer reports pertaining to current and prospective employees . . . may create an improper invasion of privacy." S. Rep. No. 104-185, at 35 (1995). The FCRA thus "sought to protect the privacy interests of employees and potential employees by narrowly defining the proper usage of these reports and placing strict disclosure requirements on employers." *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 435 (M.D. Pa. 2004), *aff'd*, 135 F. App'x 499 (3d Cir. 2005); *see also id.* at 436 ("the Act provides strong protections against misuse of employees' personal information"). The FCRA's employment-specific provisions go beyond the general privacy protections of the Act—requiring employers to demonstrate a permissible purpose, provide a stand-alone disclosure form, and gain authorization from the consumer. These provisions demonstrate that Congress intended to allow consumers to make an informed choice over whether employers could view their report. By burying the stand-alone disclosure and authorization, JRK obtained a report without Ms. Churcher's freely given consent, invading her privacy in the process. The Supreme Court explained in *Spokeo* that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Spokeo*, slip op. at 9 (quoting *Lujan*, 504 U.S., at 578). Here, however, Congress recognized that employers' procurement of consumer reports without adequate disclosure and authorization harmed individuals' privacy interests—a concrete injury that had considered *adequate* long before Congress enacted the FCRA. Thus, there is no doubt that, on the basis of her privacy-related injuries alone, Ms. Churcher has standing to bring her § 1681b(b)(2) claims.

2. Informational injury. JRK does not even attempt to address the concrete harm to Ms. Churcher's privacy interests. Instead, it contends (at 10) only that its Section 1681b(b)(2)

violation "did not [cause her to] suffer any 'information injury' at all, let alone one that would be sufficient by historical standards to confer standing." Because Ms. Churcher suffered a concrete privacy injury, she has standing even if she didn't suffer an informational injury. But, as we now explain, JRK's contentions fail even as to informational injury, as this Court itself has recognized on numerous occasions.

JRK's argument largely reduces to the assertion (at 9–10) that, in violating § 1681b(b)(2), JRK did not fail "to provide the type of information the [FCRA] required JRK to disclose," but that it "failed to follow the process prescribed by [the FCRA] for making that disclosure." Not so. Under the FCRA, as this Court recently observed, individuals like Ms. Churcher "have the right to specific information at specific times"—and where that consumer "receive[s] a type of information, [but] not the type of information that he was entitled to under the FCRA," he has suffered an "informational injury." *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 123 F. Supp. 3d 810, 818 (E.D. Va. 2015).[2] That is what happened here. JRK failed to provide Ms. Churcher with the "kind of disclosure" that the FCRA "guarantees" before "procur[ing] a consumer report containing [her] information." *Id.* at 817; *see also Ryals v. Strategic Screening Solutions, Inc.*, 117 F. Supp. 3d. 746, 753 (E.D. Va. 2015) (finding standing where, like here, the plaintiff alleged "that he did not receive the required information at the required time, as required by the FCRA"). In other words, JRK did not merely flout a "process"; it denied Ms. Churcher information to which she was specifically entitled under the FCRA.

This, of course, is exactly what this Court held when JRK last raised questions about the plaintiffs' standing in this case. *See* Dkt. 200, at 10–12. And although JRK seems to (wrongly)

[2] JRK mischaracterizes this Court's holding in *Manuel*, claiming (at 6) that it held a plaintiff has standing to sue under the FCRA "regardless of whether the plaintiff suffered any concrete harm as a result." This Court did nothing of the sort. Rather, as explained above, it determined that the plaintiff in Manuel has sufficiently alleged a *concrete*, informational injury resulting from the defendant's violation of § 1681b(b)(2).

suggest that *Spokeo* requires this Court to employ a different type of analysis, it conspicuously fails to even cite *Spokeo* in its arguments that Ms. Churcher lacks informational injury. *See* Mot. at 10. Accordingly, JRK does not even offer a reason for why this Court should reverse course.

Moreover, that Ms. Churcher may have "understood that JRK would" obtain and use her consumer report for employment purposes, *id.* at 9, is, as this Court earlier held, "irrelevant" for standing purposes, Dkt. 200 at 11. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court held that a housing-discrimination "tester" had standing based on a violation of "[his] statutorily created right to truthful housing information." *Id.* at 374. Although the tester had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information," *id.* at 373–374, the Court held that "[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *Id.*

So too here. Whether Ms. Churcher "knew JRK would obtain her report," Mot. at 11, is irrelevant for standing purposes so long as she suffered the type of injury the FCRA "was intended to guard against," *Havens*, 455 U.S. at 373; *see also Spokeo*, slip op. at 10 (noting that "a plaintiff in [certain] case[s] need not allege any additional harm beyond the one Congress has identified" in the statute). And there is no question that she did here. To ensure that prospective employees are adequately informed about their rights concerning these consumer reports, the FCRA requires that the key disclosures be provided "in a document that consists solely of the disclosure." *Id.* § 1681b(b)(2)(A). By failing to comply with the requirements, JRK caused exactly the risk of harm "Congress has identified" in the statute.

And JRK's disclosure violations also correspond with longstanding claims at common law. For instance, the common law often recognizes heightened disclosure requirements in the cases of transactions between parties in a confidential or fiduciary relationship; transactions

concerning the acquisition of insurance, surety, or a release from liability; transactions in which the parties have unequal access to information; and transactions concerning the transfer of real property, among others. *See* Kathryn Zeiler & Kimberly D. Krawiec, *Common-law Disclosure Duties and the Sin of Omission: Testing Meta-Theories* 91 Va. L. Rev. 1795–1882 (2005). Congress's decision to relax the proof requirements, or to presume harm for the failure to disclose critical information or warnings, does not negate the fact that courts have historically recognized disclosure violations as distinct, cognizable injuries. For violations of statutory rights to notices and specific disclosures in consumer transactions, Congress may have replaced the remedy with statutory damages, but that does not break the "close relationship" that many statutory claims have with traditional common law duties requiring disclosure of information.

JRK also ignores an entirely separate and distinct form of informational injury that Ms. Churcher suffered as a result of its § 1681b(b)(2) violation. Even if Ms. Churcher knew that JRK would obtain her background reports, JRK makes no effort to show that Ms. Churcher was aware of the *other information*—for instance, the liability releases—that it unlawfully included in its standard disclosure form. As courts and the FTC (which enforces the FCRA) have observed, the "inclusion of a liability release in a disclosure form violates the FCRA." *Singleton v. Domino's Pizza, LLC*, 2012 WL 245965, at *8 (D. Md. Jan. 25, 2012) (citing Letter from William Haynes, Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W. Hauxwell, CEO, Accufax Div. (June 12, 1998)). That is so, the FTC explained, because one of the purposes of the FCRA is "'to prevent consumers from being distracted by other information side-by-side with the disclosure.'" *Id.* (quoting Letter from Clarke W. Brinckerhoff, Fed. Trade Comm'n, to H. Roman Leathers, Manier & Herod (Sept. 9, 1998)).

Here, JRK's disclosure may have "overshadowed" its inclusion of release language, harming Ms. Churcher by preventing her from adequately understanding the import of the

extraneous information. Forms that include both disclosures and an authorization on the same page may lead consumers to unwittingly authorize the employer to obtain private and potentially invasive personal information and waive important legal rights. Moreover, presenting these two pieces together leaves consumers unable to make independent decisions about whether to allow a consumer report and whether to sign a liability release. For this reason as well, Ms. Churcher suffered concrete harm.

B. Mr. Milbourne suffered both privacy and informational injuries as a result of JRK's § 1681b(b)(3) violation.

JRK's argument (at 11) that Mr. Milbourne has not suffered concrete harm turns on a fatally flawed premise: that its undisputed violation of § 1681b(b)(3) is a "bare procedural violation of a notice requirement that cause[d] no harm." Far from it.

1. Invasion of privacy. To begin, JRK's failure to comply with § 1681b(b)(3)'s requirements invaded his privacy interests. Similar to JRK's violation of § 1681b(b)(2), the company submitted a request for Mr. Milbourne's background check to its vendor, reviewed the results of that background check, "which showed two misdemeanor convictions and several other charges," Dkt. 55, at 6, and then terminated Mr. Milbourne's employment—all without providing him with the statutorily mandated adverse-action letter informing him of his rights under the FCRA. By its terms, § 1681b(b)(3) makes it unlawful for a employer, "in using a consumer report for employment purposes," to take "any adverse action based in whole or in part on the report" unless it provides the required notices in advance of its reliance on the report. JRK admittedly failed to comply with these safeguards—meaning that it had no authority to review and rely on the private information contained in Mr. Milbourne's background check to deny him employment. Accessing private information without a legal basis to do so is a classic example of a modern-day analogue to well-recognized common law torts. *See Intrusion Upon*

Seclusion, *Restatement (Second) of Torts* § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy…"); *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) ("The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others. This interest in "privacy" is a distinct aspect of human dignity and moral autonomy.")

2. Informational injury. Beyond Mr. Milbourne's obvious privacy injury, JRK's adverse-action violations also resulted in precisely the type of informational injury the Court in *Spokeo* identified as sufficient for standing. Indeed, by JRK's *own* logic, Mr. Milbourne has suffered an informational injury that the Supreme Court has "deemed sufficiently concrete." Mot. at 10.

In *Spokeo*, the Supreme Court discussed several forms of injuries that satisfy concreteness. In particular, the Court cited *Public Citizen v. U.S. Department of Justice*, which held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by the Federal Advisory Committee Act, because the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. 440, 449 (1989). It also cited *Federal Election Commission v. Akins* for a similar point, "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III." *Spokeo*, slip op. at 10 (citing *Akins*, 524 U.S. 11, 20–25 (1998)). These cases, which are consistent with binding precedent in this circuit, illustrate that an informational injury (*i.e.*, being denied access to information to which an individual is entitled by statute) is a concrete injury under Article III. *See Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 703 (E.D. Va. 2010); *see also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins

and Beyond, 147 U. Penn. L. Rev. 613 (1999). Courts have little difficulty applying this principle to the FCRA. As one court recently held, "[u]nder the FCRA, Plaintiff and other consumers have the right to specific information at specific times," and an "allegation that Defendants failed to provide that information is sufficient to show 'an invasion of a legally protected interest.'" *Panzer v. Swiftships, LLC*, CIV.A. 15-2257, 2015 WL 6442565, at *5 (E.D. La. Oct. 23, 2015) (quoting *Lujan*, 504 U.S. at 560).

JRK does not meaningfully engage with—let alone distinguish—these cases. Instead, it simply argues (at 12) that Mr. Milbourne was not harmed because the credit report that it eventually sent him was "accurate." But that is immaterial for standing purposes. The FCRA required JRK to provide Mr. Milbourne with a copy of his consumer report and a summary of his rights "*before* taking any adverse action based in whole or in part on the report." § 1681b(b)(3) (emphasis added). When it did not do so, to put it in JRK's own words, "JRK failed to provide [to Mr. Milbourne] the type of information the statute required JRK to disclose." Mot. at 9. And, under Supreme Court precedent expressly reaffirmed in *Spokeo*, *see* slip op. at 10, Mr. Milbourne thus "suffer[ed] an 'injury in fact,'" because he was unable "to obtain information which must be publicly disclosed pursuant to [the FCRA]," *Akins*, 524 U.S. at 21. That is, the deprivation of information that Mr. Milbourne suffered "constitutes a sufficiently distinct injury to provide standing to sue." *Public Citizen*, 491 U.S. at 449.

It bears noting (once again), that Congress specifically intended to safeguard against these types of injuries. With the FCRA, Congress sought to address employers' "increasing reliance on consumer reporting agencies to obtain information" about their prospective and current employees. *Dalton*, 257 F.3d at 414 (citing 116 Cong. Rec. 36570 (1970)). In particular, it was concerned that employers would use such information to "adversely affect[]" employees, who lacked any recourse to correct or even become aware of the consumer information. *Id.* Thus, it

enacted Section 1681b(b)(3) to require that employers provide employees with pre-adverse action disclosures; "[t]he 'clear purpose' of this section is to afford employees time to 'discuss reports with employers or otherwise respond before adverse action is taken.'" *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) (quoting Lynne B. Barr, *The New FCRA: An Assessment of the First Year*, 54 Bus. Law. 1343, 1348 (1999)). And, as the FTC has explained, the pre-adverse action disclosures mandated by Section 1681b(b)(3) also serve an important educational purpose: without them, consumers may never know of their rights. *See* http://1.usa.gov/1NS1Cbv. As the Supreme Court in *Spokeo* made clear, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements," its "judgment" is both "instructive and important." Slip op. at 9. This Court should respect Congress's considered judgment and conclude that Mr. Milbourne (and, by extension, all class members who did not receive pre-adverse-action notice) has standing on his Section 1681b(b)(3) claims.

Indeed, adopting any conclusion other than that the plaintiffs have standing would have far-reaching implications, not only for the FCRA, but for numerous other statutes that seek to protect consumers by requiring disclosures and allow the recovery of statutory damages for failure to comply. The Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, (TILA) and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, (RESPA) are only two consumer-protection statutes that would be gutted if *Spokeo* were misinterpreted as undermining standing based on informational injury. *See, e.g.*, 15 U.S.C. § 1638 (requiring disclosures under TILA); 15 U.S.C. § 1640(a)(2)(B) (allowing for statutory damages for failure to comply with TILA); 12 U.S.C. § 2605(c) (requiring disclosures under RESPA in certain circumstances); 12 U.S.C. § 2605(f)(1)(B) (allowing recovery of statutory damages for noncompliance with RESPA). If consumers are no longer permitted to seek redress when defendants fail to comply with

statutorily mandated disclosure requirements, the failure to comply with those requirements, and the attendant abuses, will not be far behind.

CONCLUSION

For the reasons provided above, JRK's renewed motion to dismiss should be denied.

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta (*pro hac vice*)
Matthew W.H. Wessler
Neil K. Sawhney
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com

Leonard A. Bennett
Susan Rotkis
CONSUMER LITIGATION ASSOCIATES, P.C.
736 J. Clyde Morris Blvd., Suite 1-A
Newport News, Virginia 23601

Matthew James Erausquin
Casey Shannon Nash
CONSUMER LITIGATION ASSOCIATES, P.C.
1800 Diagonal Rd., Suite 600
Alexandria, VA 22315

Thomas Ray Breeden
THOMAS R. BREEDEN PC
10326 Lomond Drive
Manassas, VA 20109

Counsel for Plaintiffs

May 27, 2016

CERTIFICATE OF SERVICE

I certify that on May 27, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

George P. Sibley, III
Thomas R. Waskom
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Phone: (804)788-8262
Fax: (804) 788-8218
gsibley@hunton.com
twaskom@hunton.com

/s/ Deepak Gupta

Deepak Gupta