

THE HONORABLE THOMAS S. ZILLY

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U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SARAH CONNOLLY, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

UMPQUA BANK, and STERLING
INFOSYSTEMS, INC.,

Defendants.

NO. 2:15-CV-00517-TSZ

**PLAINTIFF'S OPPOSITION TO
UMPQUA BANK'S MOTION TO
DISMISS**

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I. INTRODUCTION

1
2 Plaintiff Sarah Connolly alleges that Umpqua Bank unlawfully acquired her personal
3 credit report in the course of conducting a background check on her, in violation of specific
4 provisions of the Fair Credit Reporting Act (“FCRA”). She claims that Umpqua did so
5 willfully and knowingly as to her and a class of thousands of other job applicants, without
6 obtaining valid authorizations or providing required disclosures. In fact, rather than providing
7 class members with legally mandated, clear and conspicuous disclosure of their rights, or
8 obtaining valid authorizations, Umpqua attempted to take away those rights by requiring job
9 applicants to *wave* liability for violations of privacy rights as a condition of applying for a job.
10 Umpqua’s efforts to trivialize the patent illegality of its actions notwithstanding, this is no
11 “bare procedural violation.”

12 Ms. Connolly suffered two particularized and concrete harms as a result of Umpqua’s
13 actions: (1) invasion of privacy caused by the unauthorized viewing and retention of her
14 personal credit and other information, and (2) informational injury caused by the deprivation of
15 disclosure information to which she was legally entitled. She therefore has Article III standing
16 to pursue her FCRA claims.

17 For the reasons explained below, Plaintiff’s standing is unaffected by the Supreme
18 Court’s recent decision in *Spokeo*. In fact, *Spokeo* actually supports the position Plaintiff has
19 consistently taken on this issue.

II. FACTUAL AND PROCEDURAL BACKGROUND

20 Ms. Connolly applied for a job with Umpqua Bank in Seattle on December 15, 2014.
21 Complaint, Dkt. No. 1, ¶ 16. As part of the application process, Ms. Connolly was directed to
22 sign a document that purported to authorize Umpqua to procure a background check on her. A
23 copy of this form is attached as Exhibit A to the Complaint. *See* Dkt. No. 1-1. This document
24 does not consist solely of a disclosure that Umpqua would procure a consumer report for Ms.
25 Connolly. Instead, it contains a broad array of other information and requests for information.
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1 It contains a broad *release* of privacy rights and of other claims against any party from any
 2 liability for furnishing or obtaining information. The form also contains a request for
 3 additional background information from the applicant, including former addresses and driver's
 4 license information, and a description of the criminal penalties for violating the FCRA.

5 As a result of Umpqua including additional information and requests for applicant
 6 information on the same form as the purported disclosure, Umpqua never clearly and
 7 conspicuously provided Ms. Connolly with a disclosure that a consumer report would be
 8 procured for employment purposes. Under the FCRA, such a clear and conspicuous disclosure
 9 must be made in a document consisting solely of the disclosure in order to protect a job
 10 applicant's privacy rights. 15 U.S.C. § 1681b(b)(2)(A) (“[A] credit report for employment
 11 purposes cannot be obtained unless: (i) a clear and conspicuous disclosure has been made in
 12 writing ..., *in a document that consists solely of the disclosure*, that a consumer report may
 13 be obtained for employment purposes.”) (emphasis added); *see also* Complaint ¶¶ 18-21.

14 Courts and the Federal Trade Commission have consistently held that the inclusion of
 15 extraneous information, particularly a waiver of liability like that included in Umpqua's notice,
 16 violates this provision of the FCRA.¹

17 As a result, Ms. Connolly's signature on the form provided by Umpqua did not validly
 18 authorize Umpqua to procure Ms. Connolly's consumer report for employment purposes. *Id.*
 19 ¶ 19. Despite this lack of valid authorization, on or about December 15, 2014, Umpqua
 20 procured a consumer report regarding Ms. Connolly from Sterling Infosystems, Inc. *Id.* ¶ 21.
 21 As a result, Ms. Connolly's privacy was invaded and she was denied access to information to
 22 which she was entitled prior to such invasion.

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 25 ¹ *See e.g., Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2015 WL 3444227, at *11-12 (E.D. Pa. May 29,
 26 2015); Letter from William Haynes, Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W.
 27 Hauxwell, CEO, Accufax Div. (June 12, 1998), 1998 WL 34323756 (F.T.C.); *Miller v. Quest Diagnostics*, 85 F.
 Supp. 3d 1058, 1061 (W.D. Mo. 2015); *Reardon v. ClosetMaid Corp.*, 2:08-cv-01730, 2013 WL 6231606, at * 9
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 July 17, 2014).

1 On January 26, 2016, the Court stayed this case pending resolution of the Supreme
2 Court case *Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), *cert granted* 135 S. Ct. 1892
3 (Apr. 27, 2015). Dkt. No. 46. On May 16, 2016, the Supreme Court issued its opinion.
4 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). On June 2, 2016, this Court entered an order
5 allowing the parties to brief the issue of how *Spokeo* affects their respective positions. Dkt. No.
6 48.

7 III. AUTHORITY AND ARGUMENT

8 Umpqua contends that the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*,
9 136 S. Ct. 1540 (2016), deprives this Court of Article III jurisdiction over this case. Umpqua
10 misreads *Spokeo*.

11 A. Standing After *Spokeo*.

12 In *Spokeo*, the Supreme Court addressed the injury-in-fact requirement for Article III
13 standing. The Supreme Court’s decision did not change the law of standing. Instead, the
14 Supreme Court confirmed the long-established principle that “standing consists of three
15 elements.” *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
16 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the
17 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
18 judicial decision.” *Id.* The Supreme Court further confirmed that to establish injury in fact—
19 the element primarily at issue in *Spokeo*—a plaintiff must “allege an injury that is both
20 ‘concrete’ and ‘particularized.’” *Id.* at 1545 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl.*
21 *Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (emphasis added in *Spokeo*)).

22 *Spokeo* broke no new ground. See *Thomas v. FTS USA, LLC*, Case No. 3:13-cv-00825-
23 REP, 2016 WL 3653878, at *4 (E.D. Va. June 30, 2016) (“Contrary to Defendants’ position,
24 *Spokeo* did not change the basic requirements of standing.”); *Mey v. Got Warranty Inc.*, 5:15-
25 CV-101, 2016 WL 3645195, at *2 (N.D. W. Va. June 30, 2016) (“*Spokeo* appears to have
26 broken no new ground.”); see also Amy Howe, [Opinion analysis: Case on standing and](#)

1 concrete harm returns to the Ninth Circuit, at least for now, SCOTUSblog (May 16, 2016),
2 <http://bit.ly/1TB3vd1> (describing *Spokeo* as a “narrow” decision); Daniel J. Solove, *Spokeo,*
3 *Inc. v. Robins: When Is a Person Harmed by a Privacy Violation?*, Geo. Wash. L. Rev. On the
4 Docket (May 19, 2016), <http://bit.ly/20fyAmS>. Rather, *Spokeo* confirmed that a “concrete”
5 injury “must actually exist.” *Spokeo*, 136 S. Ct. at 1548. *Spokeo* further recognized that both
6 tangible and intangible injuries can satisfy the requirement of concreteness. *Id.* at 1549.

7 Where an injury is intangible, *Spokeo* summarizes two considerations courts may use to
8 determine whether the injury is concrete. First, courts should consider “whether an alleged
9 intangible harm has a close relationship to a harm that has traditionally been regarded as
10 providing a basis for a lawsuit in English or American courts. *Id.* (citing *Vermont Agency of*
11 *Nat’l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)). As the Court noted, “the law
12 has long permitted recovery by certain tort victims even if their harms may be difficult to prove
13 or measure.” *Id.* (citing Restatement (First) of Torts §§ 569 (libel), 570 (slander per se)
14 (1938)).

15 Second, Congress may identify and “elevat[e] to the status of legally cognizable injuries
16 concrete, de facto injuries that were previously inadequate in law.” *Id.* (quoting *Lujan*, 504
17 U.S. at 578). Congress “has the power to define injuries and articulate chains of causation that
18 will give rise to a case or controversy where none existed before” because Congress “is well
19 positioned to identify intangible harms that meet minimum Article III requirements.” *Id.*

20 While the Court noted that merely asserting a “bare procedural violation, divorced from
21 any concrete harm,” will not satisfy the concreteness requirement, *id.*, this observation has no
22 application to claims like Ms. Connolly’s, since her claims are based on substantive
23 prohibitions of actions directed toward specific consumers. Even for procedural rights, a “risk
24 of real harm” can satisfy Article III. *Id.* The Court stated: “[T]he violation of a procedural
25 right granted by statute can be sufficient in some circumstances to constitute injury in fact. In
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1 other words, a plaintiff in such a case need not allege any *additional* harm beyond the one
2 Congress has identified.” *Id.* The Court offered two examples:

- 3 • “[I]nability to obtain information that Congress had decided to make
4 public is a sufficient injury in fact to satisfy Article III.”
- 5 • “[F]ailure to obtain information subject to disclosure under the Federal
6 Advisory Committee Act constitutes a sufficiently distinct injury to
7 provide standing to sue.”

8 *Id.* at 1549-50.

9 In *Spokeo*, the defense bar sought a ruling that would have eviscerated causes of action
10 seeking statutory damages. But the Supreme Court did no such thing. Instead, it issued a
11 narrow ruling remanding the case to the Ninth Circuit solely on the basis that it failed to
12 address the extent to which Robins’ injuries were “concrete” as opposed to merely
13 particularized, notwithstanding prior Supreme Court precedent requiring a finding of both. *Id.*
14 at 1545. The Supreme Court explicitly took no position on whether Robins’ injuries were in
15 fact concrete for standing purposes. *Id.* at 1550. *Spokeo* thus creates no new law. As Justice
16 Alito noted, “[w]e have made it clear time and time again that an injury in fact must be both
17 concrete *and* particularized.” *Id.* at 1548 (emphasis in original).

18 In its Memorandum, Umpqua does not attempt to argue that *Spokeo* made any
19 meaningful new law. In fact, it cites multiple examples of earlier decisions that cite the same
20 requirements. *See* Memo., Dkt. No. 49, at 4-5 (citing *Lujan*, 504 U.S. at 560 and *O’Shea v.*
21 *Littleton*, 414 U.S. 488, 494 (1974)). That a “bare procedural violation, divorced from any
22 concrete harm” is not enough to confer standing has long been the rule for Article III standing.
23 *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496
24 (2009)). Here, however, Ms. Connolly suffered more than a bare procedural violation. She
25 suffered concrete harms sufficient to confer Article III standing.

26 **B. Plaintiff Suffered Concrete Harms Sufficient to Confer Standing After *Spokeo*.**

27 By failing to comply with 15 U.S.C. § 1681b(b)(2), Umpqua caused Ms. Connolly, and
every class member, two forms of well-established cognizable injury: invasion of privacy and

1 informational injury. Either one of these injuries alone is sufficient to confer Article III
2 standing.

- 3 1. Umpqua’s invasion of Ms. Connolly’s privacy when it illegally accessed her
4 consumer report caused concrete harm.

5 Congress enacted the FCRA in 1970 to protect the “consumer’s right to privacy” by
6 ensuring “the confidentiality, accuracy, relevancy, and proper utilization” of consumer credit
7 information. 15 U.S.C. § 1681(b). The FCRA promotes these purposes through a set of
8 interlocking requirements—including strict restrictions on the use of reports for various
9 purposes, strict requirements for authorizing access to a report, and detailed requirements about
10 how consumers must be informed of their rights.

11 A prime motivation for the FCRA was the impact of third-party data collection on the
12 employment market and particularly on individual job seekers like Ms. Connolly and other
13 class members. When it passed the FCRA, Congress voiced a strong “concern[.]” that
14 “permit[ting] employers to obtain consumer reports pertaining to current and prospective
15 employees . . . may create an improper invasion of privacy.” S. Rep. No. 104-185, at 35
16 (1995).² In addition, Congress was concerned that job applicants were unaware of information
17 that was being reported, and as a result were unable to correct it if it was inaccurate. *Id.*; *see*
18 S. Rep. No. 91-157, at 3–4 (1969) (describing the “inability” of consumers to discover errors);
19 115 Cong. Rec. 2412 (1969).

20 As a result, under the FCRA, an employer must disclose to a job seeker that “a
21 consumer report may be obtained for employment purposes” and must obtain a written
22 authorization from a consumer before procuring his or her consumer report. *See* 15 U.S.C.
23 § 1681b(b)(2). And to ensure that prospective employees are adequately informed about their

24 _____
25 ² As one legislator explained, the FCRA’s protections represented “new safeguards to protect the privacy of
26 employees and job applicants;” the Act as a whole, he continued, was “an important step to restore employee
27 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”).

1 rights concerning these consumer reports, the FCRA imposes strict requirements, including that
2 this information must be provided “in a document that consists solely of the disclosure.” *Id.*
3 § 1681b(b)(2)(A); *see also Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D.
4 Cal. 2015) (“The FCRA makes it unlawful to ‘procure’ a report without first providing the
5 proper disclosure and receiving the consumer’s written authorization.”). Absent the job
6 seeker’s informed consent, it is flatly illegal for a company to obtain a job applicant’s consumer
7 report for employment purposes—a point Congress hammered home by criminalizing the
8 acquisition of a consumer report under false pretenses, 15 U.S.C. § 1681q, and establishing a
9 statutory damages remedy for violations of this and other key provisions.

10 As described above, Congress’s stated aim in strictly limiting the circumstances in
11 which an employer may legally procure a report on a job applicant was to protect job
12 applicants’ privacy. By enacting § 1681b, Congress purposefully and particularly limited the
13 precise circumstances in which corporations can buy and sell reports containing highly private
14 information about individuals, including dates of birth, social security numbers, detailed
15 address history, and detailed criminal background information. The FCRA’s employment
16 specific provisions go even further than the general privacy protections of the Act—requiring
17 employers to demonstrate a permissible purpose, provide a stand-alone disclosure form, and
18 gain written authorization from the consumer. These provisions demonstrate that Congress
19 intended to allow consumers to make an informed choice over whether employers could view
20 their reports. Obtaining such personal information without having a legal basis to do so
21 constitutes an invasion of privacy.³ It is well within the bounds of Congress’s traditional
22 authority to circumscribe those limits, and it is the traditional role of the courts to enforce them.
23 As a result, “§ 1681b(b)(2) [of the FCRA] establishes a right to privacy in one’s consumer
24

25 ³ *See U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989) (holding that
26 privacy interests forbade release of “rap sheet” because even though much of the information contained therein
27 was publicly available, it was available only in bits and pieces, and the party had a privacy interest in preventing
the dissemination of the compiled information).

1 report” and “employers may invade [that right] only under stringently defined circumstances.”
2 *Thomas*, 2016 WL 3653878, at *7.

3 Not only did Congress identify this privacy harm as an injury the FCRA sought to
4 remedy, but an invasion of privacy is also a quintessential “harm that has traditionally been
5 regarded as providing a basis for a lawsuit in English or American courts.” *Spokeo*, 136 S. Ct.
6 at 1549. For more than a century, American courts have recognized that “[o]ne who invades
7 the right of privacy of another is subject to liability for the resulting harm to the interests of the
8 other.” Restatement (Second) of Torts § 652A (1977); *see id.* cmt. a. There can be no doubt
9 that harms to an individual’s privacy have traditionally been regarded as a cognizable basis for
10 suit.

11 Nothing in *Spokeo* or any other case suggests that Congress may not periodically adjust
12 the boundaries of the right to privacy to account for changing marketplaces and technologies,
13 such as the advent of giant databases and corporations whose sole function is to sell reports
14 about job applicants to prospective employers. Just as Ms. Connolly would have had certain
15 privacy rights at common law, through the enactment of the FCRA, Congress codified certain
16 rights in the specific context of consumer reporting agencies selling reports for employment
17 purposes. “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, de
18 facto injuries that were previously inadequate in law.’” *Spokeo*, 136 S. Ct. at 1549 (quoting
19 *Lujan*, 504 U.S. at 578). Here, Congress recognized that employers’ procurement of consumer
20 reports without adequate disclosure and authorization harmed individuals’ privacy interests—a
21 concrete injury that had been considered adequate at common law long before Congress
22 enacted the FCRA.

23 Thus, there is no doubt that on the basis of her privacy-related injuries alone, Plaintiff
24 has standing to bring her § 1681b(b)(2) claims. Because Plaintiff has pled that Umpqua
25 unlawfully obtained a report on her in a manner that disregarded the bounds of personal privacy
26 established by Congress, this Court should hold that Plaintiff’s privacy injury is sufficiently
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1 concrete “to constitute injury in fact.” *Spokeo*, 136 S. Ct. at 1549; *see also Thomas*, 2016 WL
2 3653878, at *10 (citing Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv.
3 L. Rev. 193 (1890)) (“[I]t has long been the case that an unauthorized dissemination of one’s
4 personal information, even without a showing of actual damages, is an invasion of one’s
5 privacy that constitutes a concrete injury sufficient to confer standing to sue.”).

6 2. Umpqua’s deprivation of information Ms. Connolly was legally entitled to
7 receive before her private information was accessed caused concrete harm.

8 In *Spokeo*, the Court also explicitly embraced informational injury as the kind of injury
9 that is sufficient to confer standing “without more.” As authority for the statement that in
10 certain kinds of cases the “plaintiff need not allege any *additional* harm beyond the one which
11 Congress has identified,” the Court cited two cases which held that statutory violations, without
12 more, constituted injury in fact: *Fed. Election Comm’n v. Akins*, 524 U.S. 11 (1998) and *Public*
13 *Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989). *Spokeo*, 136 S. Ct. at 1549-50. Each of
14 these cases involved an informational injury akin to that alleged here: the deprivation of
15 information to which the individual has a statutory right conferred by Congress. The result
16 should be the same in this case, in which Plaintiff also alleges that she was deprived of
17 information to which she had a statutory right.

18 Both *Akins* and *Public Citizen* dealt with statutory informational injuries—that is, in
19 both cases, the plaintiff was deprived of information to which he or she was entitled under a
20 statute, and in both cases, the Supreme Court held that the plaintiffs had standing. Neither case
21 involved any allegations of additional harm resulting from the plaintiffs not getting the
22 information. In other words, the injury that conferred standing was the plaintiffs not getting the
23 information to which they were entitled. The plaintiffs did not, and were not required to, allege
24 that something bad happened to them *as a result* of not getting the information. The Court’s
25 citations to *Akins* and *Public Citizen* as examples of circumstances when a plaintiff can satisfy
26 Article III standing without alleging “any additional harm” are crucial to understanding the
27

1 implications of *Spokeo* to this case. *Spokeo* did not change the holdings in those cases; instead,
2 it actually reinforced them.

3 In *Public Citizen*, non-profit groups sued for access the American Bar Association's
4 ("ABA") records related to its participation in the federal judicial nomination process, citing
5 the disclosure requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. §
6 APP. 2 § 1, *et seq.* The ABA challenged the groups' standing, arguing that the plaintiffs had
7 not "alleged injury sufficiently concrete and specific to confer standing." 491 U.S. at 448. The
8 Supreme Court rejected that argument, holding that "refusal to permit appellants to scrutinize
9 the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct
10 injury to provide standing to sue." *Id.* at 449. Importantly, the Court did not require the
11 plaintiffs to demonstrate some additional injury beyond not being able to access the
12 information to which they had a right. In *Akins*, which also involved non-profit groups seeking
13 public disclosures, the Court built on its conclusion in *Public Citizen*, holding that the
14 "informational injury" at issue in the case was "sufficiently concrete and specific" that
15 plaintiffs had standing. 524 U.S. at 24-25.

16 In *Akins* and *Public Citizen*, plaintiffs had standing despite the fact that they (1) had
17 suffered no monetary damages or other consequential harm, and (2) would not have had any
18 entitlement to the information at issue absent Congress creating that entitlement by statute.
19 Numerous circuit courts, including the Ninth Circuit, have followed the Supreme Court's lead
20 and found that informational injury confers Article III standing in a wide variety of contexts,
21 including consumer actions seeking statutory damages. *See, e.g., Alvarez v. Longboy*, 697 F.2d
22 1333, 1338 (9th Cir. 1983) (finding migrant workers demonstrated Article III standing by
23 alleging they had been deprived of a written disclosure they were entitled to receive pursuant to
24 the Farm Labor Contractor Registration Act); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d
25 947, 952 n.5 (7th Cir. 2000).⁴ *Spokeo* does nothing to undermine the conclusions of these

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27 ⁴ *See also Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014); *Charvat v. Mut. First Fed. Credit Union*, 725
F.3d 819, 823 (8th Cir. 2013) (finding informational injury created standing to pursue statutory damages claim

1 circuit courts. In fact, by citing *Public Citizen* and *Akins* with approval, and for the explicit
2 proposition that statutory injuries can, without more, confer Article III standing, the Supreme
3 Court in *Spokeo* reinforced this line of cases.

4 Under these well-established constitutional principles of informational injury—which
5 *Spokeo* explicitly reaffirmed—there is clearly standing in this case. By virtue of the FCRA,
6 individuals like Plaintiff “have the right to specific information at specific times”—and where a
7 consumer “receive[s] a type of information, [but] not the type of information that he was
8 entitled to under the FCRA,” he has suffered an “informational injury.” *Manuel v. Wells Fargo*
9 *Bank, Nat. Ass’n*, 123 F. Supp. 3d 810, 817-18 (E.D. Va. 2015) (holding plaintiffs had Article
10 III standing in a case alleging a violation of § 1681b(b)(2) because defendant failed to provide
11 plaintiff with the “kind of disclosure” that the FCRA “guarantees” before “procur[ing] a
12 consumer report containing his information”); *see also Thomas*, 2016 WL 3653878, at *9
13 (finding, post-*Spokeo*, that a plaintiff “has alleged a concrete informational injury” where “he
14 was deprived of a clear disclosure stating that [d]efendants sought to procure a consumer report
15 before the report was obtained”); *Panzer v. Swiftships, LLC*, No. 2:15-cv-2257, ECF Dkt. No.
16 27, at 11-12 (E.D. La. Oct. 23, 2015) (finding plaintiff had standing based upon informational
17 injury when defendant failed to comply with the stand-alone disclosure requirement of §
18 1681b(b)(2) in the employment context); *Ryals v. Strategic Screening Solutions, Inc.*, 117 F.
19 Supp. 3d. 746, 753 (E.D. Va. 2015) (finding standing where, like here, the plaintiff alleged
20 “that he did not receive the required information at the required time, as required by the
21 FCRA”). In other words, Defendant did not merely flout a general process; it denied Plaintiff
22 information to which she was specifically entitled under the FCRA, and then proceeded to
23 procure a report on her anyway.

24
25 under Electronic Funds Transfer Act, even without economic injury, where ATM was missing required disclosure
26 sticker); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Ctr. for Biological*
27 *Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 429 (5th Cir. 2013); *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 243
(D.C. Cir. 1999); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 693 (9th Cir. 2007), *aff’d in part, rev’d in part*
sub nom. Summers v. Earth Island Inst., 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

1 Whether Ms. Connolly knew from Umpqua’s faulty disclosure that it would obtain her
2 report is irrelevant for standing purposes so long as she suffered the type of injury the FCRA
3 “was intended to guard against.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982);
4 *see also Spokeo*, 136 S. Ct. at 1549-50. In order to ensure that prospective employees are
5 adequately informed about their rights concerning these consumer reports, the FCRA’s strict
6 requirements provide that the disclosure be provided “in a document that consists solely of the
7 disclosure.” 15 U.S.C. § 1681b(b)(2)(A). Receiving such information buried among other text
8 creates a risk that consumers will not be adequately informed of their rights by making it less
9 likely that they will read and understand the importance of the authorization they provide
10 prospective employers to access personal, private information. In other words, “[i]n Congress’
11 legislative judgment, where the disclosure does not satisfy [the FCRA’s] requirements, the
12 consumer has been deprived of a fully appreciable disclosure to which he or she is entitled.”
13 *Thomas*, 2016 WL 3653878, at *10. Defendant therefore caused exactly the risk of harm
14 “Congress has identified” in the statute.

15 Umpqua’s disclosure violations also correspond with longstanding claims at common
16 law. For instance, the common law often recognizes heightened disclosure requirements in the
17 cases of transactions between parties in a confidential or fiduciary relationship; transactions
18 concerning the acquisition of insurance, surety, or a release from liability; transactions in which
19 the parties have unequal access to information; and transactions concerning the transfer of real
20 property, among others. *See* Kathryn Zeiler & Kimberly D. Krawiec, Common-law Disclosure
21 Duties and the Sin of Omission: Testing Meta-Theories, 91 Va. L. Rev. 1795–1882 (2005). As
22 a result, Ms. Connolly suffered an informational injury sufficient to confer Article III standing
23 to bring her FCRA claims.

24 **C. Post-*Spokeo* Decisions Support Standing.**

25 Since *Spokeo* was decided, a number of courts have confirmed that an invasion of
26 privacy and the deprivation of statutorily mandated information confer Article III standing.
27

1 In a case addressing the exact same FCRA violations at issue here, the Eastern District
2 of Virginia held that the plaintiff had standing to pursue a claim for failing to provide a
3 compliant stand alone disclosure and authorization before accessing a job applicant's consumer
4 report. In *Thomas*, 2016 WL 3653878, the court thoroughly analyzed the *Spokeo* holding and
5 rejected the defendant's claim that its violation of the FCRA was a "bare procedural violation"
6 insufficient to confer standing. *Id.* at *11. The court held that the rights created by §
7 1681b(b)(2), the same rights at issue here, are substantive rights, and their violation constituted
8 an invasion of privacy and an informational injury sufficient to confer Article III standing. *Id.*
9 *Thomas's* analysis is both thorough and entirely on point for the claims Ms. Connolly asserts in
10 this case. This Court should follow *Thomas*.

11 Recently, in a case alleging similar harms under the Telephone Consumer Protection
12 Act (TCPA), the court cited the "intangible" injury of invasion of privacy resulting from
13 telemarketing calls as a basis for finding standing. *Mey*, 2016 WL 3645195, at *8 (rejecting
14 motion to dismiss under *Spokeo*). The *Mey* court noted that *Spokeo* did not change existing law
15 on standing, but "confirm[ed] that either tangible or intangible injuries can satisfy the
16 requirement of concreteness." *Id.* at *2 (citing *Spokeo*, 136 S. Ct. at 1549). The *Mey* court's
17 analysis of the privacy rights at stake there is analogous. The court emphasized that invasion of
18 privacy conferred standing because the common law "recognizes as actionable the harm caused
19 by invasion of privacy" and because "Congress identified it as a legally cognizable harm" in
20 enacting the TCPA. *Id.* at *4. Other post-*Spokeo* cases arising in a variety of contexts have
21 confirmed that invasions of the right to privacy are sufficient to support Article III standing.
22 *See, e.g., In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 WL 3513782, at *7-8
23 (3d Cir. June 27, 2016) (finding that plaintiffs had standing and opining that "Congress has
24 long provided plaintiffs with the right to seek redress for unauthorized disclosures of
25 information that, in Congress's judgment, ought to remain private"); *Boelter v. Hearst*
26 *Commc'ns, Inc.*, 15 Civ. 3934 (AT), 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016)

1 (finding standing where defendants disclosed private information in violation of a federal
2 statute and thereby “deprived [p]laintiffs of their right to keep their information private”).

3 Other cases also support the conclusion that informational injury is sufficient to confer
4 standing post-*Spokeo*. See, e.g., *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL
5 3611543, at *3 (11th Cir. July 6, 2016) (finding standing to pursue FDCPA claim where the
6 letter sent to plaintiff by defendant “did not contain all of the FDCPA’s required disclosures”
7 and that “this injury is one that Congress has elevated to the status of a legally cognizable
8 injury”).

9 The cases Defendant relies on to support its position are inapposite and contain far less
10 thorough or convincing analysis as compared with *Thomas and Mey*. In *Smith v. The Ohio*
11 *State Univ.*, No. 2:15-cv-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016), the plaintiffs
12 admitted that “they did not suffer a consequential damage as a result of Defendant’s conduct.”
13 *Id.* at *4. The court relied on this admission to hold that it “cannot find that Plaintiffs have
14 suffered an injury-in-fact from OSU’s alleged breach of the FCRA.” *Id.* The court did not
15 analyze whether invasion of privacy or an informational injury is sufficient to confer standing
16 post-*Spokeo*. *Gubala v. Time Warner Cable, Inc.*, No. 15-cv-1078-pp, 2016 WL 3390415
17 (E.D. Wis. June 17, 2016) involved no new disclosure of private information, but merely the
18 retention of information that the defendant was required, by statute, to destroy. *Id.* at *1. By
19 contrast, Ms. Connolly’s private information was newly disseminated to Umpqua, causing an
20 invasion of her privacy. *Hochendoner v. Genzyme Corp.*, No. 15-1446, 2016 WL 2962148 (1st
21 Cir. May 23, 2016) was dismissed post-*Spokeo* because the plaintiffs failed to plead sufficient
22 facts to support particularized injury; the court did not address the concreteness of the alleged
23 injuries. Finally, *Khan v. Children’s Nat’l Health Sys.*, No. TDC-15-2125, 2016 WL 2946165
24 (D. Md. May 19, 2016) explains that *state* legislatures cannot necessarily confer Article III
25 standing to bring cases in federal court by creating statutory rights. *Id.* at *7. This conclusion
26 is unremarkable and does not support Defendant’s position.

1 In short, the limited case law addressing the standing issue post-*Spokeo* supports Ms.
2 Connolly's position that the invasion of privacy and informational injury she suffered are
3 sufficient to confer Article III standing.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Defendant's motion to dismiss for lack of standing should be
6 denied.⁵

7 RESPECTFULLY SUBMITTED AND DATED this 12th day of July, 2016.

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25 ⁵ Standing is not a pleading requirement. For example, in *Booth v. Appstack, Inc.*, the court addressed the post-
26 *Spokeo* standing issue *sua sponte* and concluded that the plaintiffs had standing to bring TCPA claims. *See* Case
27 No. C13-1533JLR, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016). The court looked not at whether the
plaintiffs had explicitly *alleged* each underlying harm, but rather at whether the factual allegations regarding the
TCPA violations *demonstrated* that the plaintiffs had suffered a concrete harm. *Id.*; *see Spokeo*, 136 S. Ct. at 1547
(requiring a plaintiff "at the pleading stage" to "clearly allege facts *demonstrating* each element" of Article III
standing) (emphasis added). For this reason, Plaintiff does not believe that amendment of the complaint is
necessary to establish her standing. However, should the Court conclude that *Spokeo* requires that such harms
(i.e., invasion of privacy and informational injury) be explicitly pleaded, Plaintiff respectfully requests the
opportunity to amend her complaint to allege these harms.

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I, Beth E. Terrell, hereby certify that on July 12, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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