

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ELIANE EVERS, STEFON HARRIS and
JOSHUA COLVIN, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

THE TJX COMPANIES, INC.,

Defendant.

Case No. 1:15-cv-13071-RGS

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS
THE AMENDED COMPLAINT**

INTRODUCTION

Defendant TJX improperly obtained Plaintiffs' consumer reports. Consumer reports contain a wealth of private information and can have life-changing consequences. Recognizing the dangers that these impersonal commercial reports can pose, Congress passed the Fair Credit Reporting Act ("FCRA") and sharply limited the circumstances in which an employer may obtain a background report. Congress made it illegal for employers to obtain background reports without first making a conspicuous, stand-alone disclosure that a report would be procured if the employee authorized doing so and then subsequently obtaining the consumer's written authorization. Defendant deviated from these requirements by obtaining reports on Plaintiffs without providing Plaintiffs or the class with the information Congress deemed important for them to receive, in the manner Congress explicitly also deemed important. In so doing, Defendant illegally obtained the reports, invading Plaintiffs and the class members' privacy. Further, by failing to make the required disclosures, Defendant deprived Plaintiffs of information Congress deemed important for them to receive, causing informational injury. Under well-established precedent, this Court has authority under Article III to adjudicate Plaintiffs' claims.

Defendant's motion suffers from two primary defects. First, Defendant ignores *Spokeo's* reaffirmation of decades of precedent holding that abstract injuries can be sufficiently concrete to confer Article III standing: "Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 570 U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447 *9 (May 16, 2016). Second, even if Plaintiffs lacked standing, Defendant's request that the case be dismissed is completely unwarranted. Plaintiffs originally filed this case in state court, *see* ECF No. 1-1, and Defendant removed the action to this Court. (ECF No. 1.) If this Court finds that Article III

standing is lacking, the proper remedy would be remand, not dismissal. *See* 28 U.S.C.A. § 1447(c) (requiring remand of removed action if federal court lacks subject-matter jurisdiction).

Spokeo changes nothing with respect to this case. *Spokeo* explicitly affirmed that intangible injuries are sufficiently concrete to confer standing. The Court explicitly mentioned both invasion of privacy and the deprivation of information to which a plaintiff has a congressionally-established right as examples of such concrete injuries. *Id.* at 10. The Court said plaintiffs in informational injury cases demonstrated injury “without more”—i.e., without a showing of additional consequential harm. *Id.* *Spokeo* also reaffirmed the importance of Congressional judgment in evaluating standing: “In determining whether an intangible harm constitutes injury-in-fact, both history and the judgment of Congress play important roles.” *Id.*

In a case such as this, where Plaintiffs’ claims have strong common law analogs, such as invasion of privacy, standing is supported by both history and Congressional judgment. For this reason, a court that recently conducted a meticulous and thorough analysis of a plaintiff’s standing to pursue claims based on failing to receive the stand-alone disclosure required by the FCRA and concluded, in light of both historical precedent and Congressional judgment, that the plaintiff clearly had standing. *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2016 WL 3653878 (E.D. Va. June 30, 2016). In so holding, the court found that FCRA protections at issue in this case are “clearly substantive, and neither technical nor procedural.” *Id.* at *7.

For all these reasons, Defendant’s motion should be denied.

FACTUAL BACKGROUND

The Plaintiffs in this action are three individuals, Eliane Evers (“Evers”), Stefon Harris (“Harris”) and Joshua Colvin (“Colvin”) (collectively “Plaintiffs”). (ECF No. 36, First Amended Complaint (“FAC.”), ¶¶ 2-4.) The Defendant is The TJX Companies, Inc. (“Defendant”), a

Delaware corporation headquartered in Framington, Massachusetts, that operates retail stores, including T.J. Maxx, Marshalls, HomeGoods, and Sierra Trading Post. *Id.* at ¶¶ 5-7. After the Plaintiffs applied for employment with the Defendant, it obtained background reports from a consumer reporting agency regarding the Plaintiffs. *Id.* ¶¶ 17-25.

Employment-related background checks are considered “consumer reports” under the Fair Credit Reporting Act (“FCRA”), and are therefore subject to various restrictions and requirements. *See* 15 U.S.C. § 1681a(d)(1) (defining consumer report). One such requirement is that, before an employer obtains a background report on a job applicant, it must disclose that it is going to obtain the background report *in a document that consists solely of the disclosure*. 15 U.S.C. § 1681b(b)(2)(A)(i). This disclosure requirement underpins a number of important public policies, including allowing the applicant to correct errors in the report (which are common), to exercise other rights they may enjoy relating to the background report, and even to elect to withdraw the employment application. *See* 15 U.S.C. § 1681b(b)(3)(A) (establishing pre-adverse employment action notice requirement); § 1681b(4)(B) (requiring notification of national security investigation); § 1681c(h) (requiring notification of address discrepancy); § 1681d(a) (requiring disclosure of investigative report); § 1681g (requiring full-file disclosure to consumers); § 1681k(a)(1) (requiring disclosure of use of public record information); § 1681h (setting forth form and conditions of disclosure); § 1681m(a) (requiring notice of adverse action).

Defendant failed to comply with 15 U.S.C. § 1681b(b)(2)(A)(i)’s requirement of a stand-alone disclosure. In particular, while the Defendant provided Plaintiffs with a “Disclosure and Acknowledgement” form, Defendant’s Form included numerous items of information and authorizations that are unrelated to the disclosure. (FAC ¶¶ 26-27.) For example, the Form includes various disclosures relating to state law that are unrelated to the disclosure required

under federal law. *Id.*, Ex. A. The Form also includes a number of authorizations that are directed to various agencies, such as law enforcement agencies, state and federal agencies, schools and universities, and a number of other entities to release private records. *Id.*, ¶ 29. These authorizations purport to waive important rights that the job applicants would otherwise enjoy under state and federal law. *Id.*, ¶¶ 29-30. These authorizations operate like a liability waiver, which numerous courts, and the FTC, have concluded that including with the FCRA disclosure violates the stand-alone disclosure requirement.¹

Based on these violations, Plaintiffs assert claims for statutory damages under the FCRA. Plaintiffs allege that they suffered a concrete harm because they were deprived of a disclosure in a document consisting “solely” of the disclosure to which they have a statutory entitlement. *See*

¹ *Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2015 WL 3444227, at *12 (E.D. Pa. May 29, 2015) (“the inclusion of information on the form apart from the disclosure and related authorization violates § 1681b(b)(2)(A).”); *Lengel v. HomeAdvisor, Inc.*, No. 15-2198-RDR, ___ F. Supp. 3d ___, 2015 WL 2088933, at *8 (D. Kan. May 6, 2015) (“[I]t may be plausibly asserted that the stand-alone disclosure provision was recklessly violated by the use of the Release form because it did not consist solely of the disclosure that a consumer report may be obtained for employment purposes.”); *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-CV-3035-T-26TBM, 2015 WL 1456981, at *3 (M.D. Fla. Mar. 30, 2015) (plaintiff had stated a claim when he alleged that “the inclusion of the waiver along with the disclosure violated the FCRA”); *Milbourne v. JRK Residential Am., LLC*, ___ F. Supp. 3d ___, No. 3:12-cv-861, 2015 WL 1120284, at *6 (E.D. Va. Mar. 10, 2015) (“inclusion of a waiver within the document containing the disclosure would violate [the FCRA.]”); *Dunford v. Am. Databank, Inc.*, No. C 13-03829, ___ F. Supp. 3d ___, 2014 WL 3956774, at *6 (N.D. Cal. Aug. 12, 2014) (finding document that contained a liability release to “not consist solely of the disclosure because it added a paragraph exonerating [the defendant]”); *Avila v. NOW Health Grp., Inc.*, No. 14 C 1551, 2014 WL 3537825, at *2 (N.D. Ill. July 17, 2014) (finding inclusion of liability waivers to be “contrary to the express language of the FCRA, which requires a disclosure ‘in a document that consists solely of the disclosure’”); *Singleton v. Domino’s Pizza, LLC*, No. 12-cv-823, 2012 WL 245965, at *9 (D. Md. Jan. 25, 2012) (“an employer violates the FCRA by including a liability release in a disclosure document.”); *Reardon v. Closetmaid Corp.*, No. 2:-8-cv-01730, 2013 WL 6231606, at *10-11 (W.D. Pa. Dec. 2, 2013); *Jones v. Halstead Mgmt. Co., LLC*, ___ F. Supp. 3d ___, No. 14-CV-3125 VEC, 2015 WL 366244, at *5 (S.D.N.Y. Jan. 27, 2015); *Miller v. Quest Diagnostics*, No. 2:14-cv-4278, ___ F. Supp. 3d ___, 2015 WL 545506, at *3 (W.D. Mo. Jan. 28, 2015).

FAC ¶¶ 15, 28-34. Defendants inflicted an informational injury on Plaintiffs, *see* FAC ¶ 45, and their privacy was invaded. *Id.* ¶ 44. Consumer reports contain private information about an individual (which frequently is inaccurate or incomplete), and Congress has set specific conditions to be satisfied before employers access that information. Because Defendant failed to satisfy those conditions, Defendant had no legal right to access or use Plaintiffs' reports, and, in doing so, obtained personal information to which it had no legal right. In the realm of privacy litigation, the FCRA preempts traditional invasion-of-privacy claims. *See, e.g., Hasvold v. First USA Bank, NA*, 194 F. Supp. 2d 1228, 1238 (D. Wyo. 2002). However, the harm the FCRA intended to prevent, the invasion of privacy, occurs when the statute is violated.

Plaintiffs initially filed this action in the Business Litigation Section of Suffolk County, Massachusetts. Defendant then moved to stay this matter pending *Spokeo*, a motion this Court granted. (ECF No. 22.) With *Spokeo* decided, this Court lifted the stay, and Plaintiffs filed the FAC. (ECF Nos. 29 and 36.) Defendant now brings this motion, which should be denied.

STANDARD OF REVIEW

“The party invoking federal jurisdiction [through removal] has the burden of establishing that the court has subject matter jurisdiction over the case.” *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009). In this case, because Defendant removed, it should be Defendant's burden to establish standing. Because Defendant has reversed itself, first invoking federal jurisdiction by removing to this Court, and now insisting that this Court does not, in fact, have jurisdiction, Plaintiff will make the case for jurisdiction. If however, this Court finds that no jurisdiction exists, the case should be remanded to state court. 28 U.S.C.A. § 1447(c) (requiring remand of removed action if federal court lacks subject-matter jurisdiction).

ARGUMENT

I. SPOKEO DID NOT CHANGE THE REQUIREMENTS FOR ARTICLE III STANDING, NOR DID IT OVERRULE BINDING FIRST CIRCUIT PRECEDENT.

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. Defendant does not contest that the injury suffered by Plaintiffs is sufficiently “particularized.” Nor does Defendant contend that Plaintiffs fail to satisfy the other tests required for standing. Instead, Defendant argues that Plaintiffs have not suffered a “concrete” injury.

Alleging a concrete injury is not a Herculean task. On this topic, the Court in *Spokeo* distilled several “general principles” from its prior cases, without either going beyond or disavowing them. *Spokeo*, slip op. 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, in fewer words, if “the common law permitted suit” in analogous circumstances—the plaintiff has suffered a concrete injury. *Id.* at 9-10; *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998).

But the plaintiff need not always present a common-law analogue to establish a concrete injury because the Court also reaffirmed that Congress has the power (and is “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 a violation of procedural rights to a concrete

injury if the rights at issue 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 “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. Indeed, many commentators have noted that *Spokeo* did nothing other than reiterate already established principles. See, e.g., *Thomas*, slip op. at 11 (“Spokeo did not change the basic requirements of standing”); Arthur Bryant, No New Law in ‘Spokeo’—And That’s Big News, *National Law Journal* (July 25, 2016), <http://www.nationallawjournal.com/id=1202763447043>; 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>. The Court in *Spokeo* did not even apply these principles to the facts before it, instead to remanding the case to the Ninth Circuit, whose previous analysis was “incomplete” because it had “overlooked” concreteness. *Spokeo*, slip op. at 2. The Court offered no assessment of the Ninth Circuit’s analysis, aside from noting that the Ninth Circuit had not analyzed concreteness as a separate step in the standing inquiry.

In its brief, Defendant does not attempt to argue that *Spokeo* made any meaningful new law. Nor could it. 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)). 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...cannot be removed by statute.”).

The fact that *Spokeo* broke no new ground is fatal to Defendant’s motion. Established First Circuit precedent makes clear that “[t]he invasion of a statutorily conferred right may, in and of itself, be a sufficient injury to undergird a plaintiff’s standing even in the absence of other harm.” *Pollard v. Law Office of Mandy L Spaulding*, 766 F.3d 98, 101 (1st Cir. 2014). In *Pollard*, the First Circuit held that plaintiff had standing to sue for statutory damages under the Fair Debt Collection Practices Act (“FDCPA”) based on a notice which, like the notice at issue in the within action, was noncompliant with the statutory requirement. There, the debt collector’s collection letter contained the statutorily required information, but plaintiff claimed that it was “overshadowed or otherwise inconsistent with the required validation notice.” *Id.* at 102. The Court found plaintiff had suffered the requisite “concrete injury” and thus had standing even if the plaintiff was not personally confused by the notice. Under *Pollard*, there is no question that Plaintiffs in this case have sufficiently alleged standing based on a disclosure form that is inconsistent with the statutory mandate and included content that, as in *Pollard*, in effect overshadowed the required disclosure. The FCRA’s stand-alone requirement serves the same purpose as the FDCPA’s ban on overshadowing: to make sure additional material does not interfere with the consumer’s right to information. Defendant does not argue that *Spokeo* has displaced *Pollard*. Because *Pollard* remains good law, Defendant’s motion must be denied.

II. PLAINTIFFS HAVE SUFFERED CONCRETE HARM.

By failing to comply with 15 U.S.C. § 1681b(b)(2), Defendant obtained a report when it had no legal right to do so, thereby invading Plaintiffs’ privacy. Defendant also failed to give Plaintiffs important information at a specific time, causing informational injury. Either of these

injuries is sufficient to confer Article III jurisdiction on this Court. *See Thomas v. FTS USA, LLC*, No. 3:13-cv-825 (E.D. Va. June 29, 2016). In a meticulous opinion evaluating *Spokeo*, the text and legislative history of the FCRA, and the historical common-law analogs of plaintiff's claims, the *Thomas* court concluded:

§ 1681b(b)(2) establishes two rights. First, it establishes a right to specific information in the form of a clear and conspicuous disclosure. The statutory requirement that the disclosure be made in "a document that consists solely of the disclosure" helps to implement the textual command that the disclosure be clear and conspicuous. Second, § 1681b(b)(2) establishes a right to privacy in one's consumer report that employers may invade only under stringently defined circumstances. *Those protections are clearly substantive, and neither technical nor procedural.*

Slip op. at 17 (emphasis added). The court went on to conclude that plaintiff had alleged two concrete injuries in spite of the lack of consequential monetary damage: invasion of privacy and informational injury. *Id.* at 23-30. Both of these injuries were sufficient to confer standing under Article III, and the court denied defendant's motion. The result should be the same here.²

A. Invasion of Privacy.

Congress enacted the FCRA in 1970 to protect the "consumer's right to privacy" by ensuring "the confidentiality, accuracy, relevancy, and proper utilization" of consumer information. 15 U.S.C. § 1681(b). Employment background checks contain a wealth of information traditionally recognized as private—dates of birth, social security numbers, detailed address history, and information from a variety of jurisdictions and sources about criminal background and driving history.³ Background reports are sold in an impersonal marketplace by

² Defendant attempts to describe *Thomas* as an "outlier," Def's Br. at 12, but in fact, it is consistent with the numerous other cases reaching the same conclusions. See *infra* at 18-19. Furthermore, *Thomas* is by far the most thorough and carefully written opinion on this topic.

³ See *U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989) (holding that privacy interests forbade release of "rap sheet" because even though much of the information contained therein was publicly available, it was available only in bits and pieces from a variety of disparate sources, and the party had a privacy interest in preventing the

gigantic and often anonymous corporations who have no relationship with the people whose data they are selling. As the Ninth Circuit put it, consumer reporting agencies (“CRAs”) “traffic[] in the reputations of ordinary people.” *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1071 (9th Cir. 2008). 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). The FCRA “sought to protect the privacy interests of . . . 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 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 written authorization from the consumer. These provisions demonstrate that Congress intended to allow consumers to make an informed choice over whether employers could view their reports. 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

dissemination of the compiled information).

“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).

The disclosure requirement at issue here is contained in § 1681b, titled “Permissible Purposes of Consumer Reports.” Section 1681b(b)(2) requires employers to disclose to job seekers that “a consumer report may be obtained for employment purposes.” After providing such a disclosure, employers must also obtain written authorization from the consumer before procuring his or her consumer report. To ensure that prospective employees are informed about their rights, the FCRA requires that the disclosure be “clear and conspicuous” and provided “in a document that consists solely of the disclosure.” *Id.* § 1681b(b)(2)(A). Absent the job seeker’s informed consent, it is 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; see also *Thomas*, slip op. at 23 (§ 1681b(b)(2) creates two rights: “first, a legally cognizable right to receive a disclosure that is clear, conspicuous, and unencumbered by extraneous information; and second, a right to the privacy of one’s personal information, which an employer may not invade without first providing the above information and obtaining the consumer’s express written consent.”).

Framed in the language of the common law, an employer that buys a background report without a legal basis to do so has invaded the individual’s privacy. “[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 disclosure and authorization requirements. 15 U.S.C. § 1681b(b)(2)(A). “The 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).

Invasion of privacy is a “harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” and thus is a 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, Justice Brandeis explained 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). American courts at the turn of the century identified the right of privacy as “derived from natural law.” *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905). Harm to an individual’s privacy has been regarded as a basis for suit.

Even if Plaintiffs’ claims were not precisely cognizable at common law, 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, Congress recognized that employers’ procurement of consumer reports without adequate disclosure harmed individuals’ privacy interests. Congress’s enactment of the FCRA is its adjustment of the boundaries of the common-law right to privacy to account for changing marketplaces and technologies, such as the advent of CRAs whose sole function is to sell reports about job applicants to prospective employers. Just as Plaintiffs would have had certain privacy rights at common law, through the enactment of the FCRA, Congress codified rights in the specific context of CRAs selling reports for employment purposes.

Plaintiffs have pled that Defendant unlawfully obtained reports on them in a manner that disregarded the bounds of privacy established by Congress. Plaintiffs have therefore pled a privacy injury that is sufficiently concrete “to constitute injury in fact.” *Spokeo*, slip op. at 10.

Numerous district courts and one circuit court have found Article III standing post-*Spokeo* in analogous circumstances. See *Church v. Accretive Health, Inc.*, Case No. 15-15708 at 9, 2016 WL 3611543 at *3 (11th Cir. July 6, 2016) (plaintiff had standing for disclosure violation under FDCPA because “through the FDCPA, Congress has created a new right—the right to receive the required disclosures in communications governed by the FDCPA—and a new injury—not receiving such disclosures.”); *United States v. Koranki*, No. 10-cr-43, 2015 WL 4394947, at *1 (W.D. Okla. July 16, 2015) (finding that the government’s failure to follow necessary procedures before procuring bank customer’s financial records invaded statutory right to privacy under the Right to Financial Privacy Act, which conferred standing); *Boelter v. Hearst Commc'ns, Inc.*, --- F. Supp. 3d ---, 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (plaintiffs suffered a concrete injury in fact when defendant sold plaintiffs’ information to third parties in violation of the Video Privacy Protection Act); *Johnson v. Navient Sols., Inc.*, --- F. Supp. 3d ---, 2015 WL 8784150, at *2 (S.D. Ind. Dec. 15, 2015) (finding standing based on a violation of the plaintiff’s statutory right to privacy created by the Telephone Consumer Protection Act); *Bona Fide Conglomerate, Inc. v. SourceAmerica*, No. 3:14-cv-00751, 2016 WL 3543699, at *8 (S.D. Cal. June 29, 2016) (invasion of privacy was concrete injury under California wiretap law); *Potocnik v. Carlson*, 0:13-cv-02093, ECF No. 198 (D. Minn. July 15, 2016) (standing existed in case regarding unauthorized access to plaintiff’s driver’s license record).

The FCRA’s disclosure requirement is substantive in nature, and a plaintiff alleging his rights have been violated need not allege more consequential harm. The *Thomas* court

characterized the disclosure requirement as “clearly substantive”:

In these situations, legal rights reflect social judgments about where harm has and has not occurred. Often, these kinds of injuries exist where we think the harm is in the act itself. The public disclosure of private information or defamatory falsehoods does not need downstream consequences to be hurtful; neither does differential treatment on the basis of race. Procedural wrongs are an oft-seen category where the distinction between the legal violation and the injury may be so thin as to be essentially nonexistent. Proving the injury in many of these cases just entails proving the violation itself. . . . As a result, requiring some sort of additional indicia of harm beyond the violation itself ignores the nature of the injury and the reason for the remedy.

Thomas, slip op. at 15 (quoting *Who Should Define Injuries For Article III Standing?*, 68 STAN L. REV. ONLINE 76, 80-81 (2015)). The Third Circuit stated in its first post-*Spokeo* opinion that “when it comes to laws that protect privacy, a focus on economic loss is misplaced.” *In re: Nickelodeon Consumer Privacy Litigation*, No. 15-1441, slip op. at 21 (June 27, 2016). The court found that plaintiffs who alleged that a third party had disclosed information Congress deemed private had standing under Article III, despite lack of consequential harm:

While perhaps “intangible,” the harm is also concrete in the sense that it involves a clear de facto injury, i.e., the unlawful disclosure of legally protected information. Insofar as *Spokeo* directs us to consider whether an alleged injury-in-fact “has traditionally been regarded as providing a basis for a lawsuit,” *Google* noted that Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress’s judgment, ought to remain private. Accordingly, we conclude that the plaintiffs have alleged facts which, if true, are sufficient to establish Article III standing.

Id. at 25 (citing *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015)). The legislative history of § 1681b(b)(2) of the FCRA clearly demonstrates that Congress sought to protect consumer privacy by requiring consumers to be clearly informed that an employer would procure a consumer report on them, and to provide written consent thereto. Defendant’s violation of this carefully balanced statutory framework invaded Plaintiffs’ privacy, concretely injured him, and conferred Article III jurisdiction on this Court.

B. Informational Injury.

In addition to alleging Defendant procured information in a circumstance where it had no right to do so, Plaintiffs have also alleged that Defendant deprived Plaintiffs of information they were entitled to receive. *Spokeo* explicitly embraced informational injuries as the kinds of injuries which are sufficient to confer standing “without more.” Noting that the “plaintiff need not allege any additional harm beyond the one which Congress has identified,” the Court cited two cases which held that statutory violations, without more, constituted injury in fact: *Fed. Election Comm’n v. Akins*, 524 U.S. 11 (1998) and *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989). *Spokeo*, slip op. at 10. In both cases, the Court rejected the idea that plaintiffs who were deprived of information they were entitled to receive had to demonstrate an additional injury. Instead, the deprivation of information sufficed.

In *Public Citizen*, non-profit groups sued for access to records related to the American Bar Association’s (“ABA”) participation in the federal judicial nomination process, arguing that the ABA’s involvement in that process brought it under the ambit of the disclosure requirements of the Federal Advisory Committee Act (“FACA”), 5 U.S.C. § APP. 2 § 1, *et seq.* In addition to disputing the merits, the ABA challenged the groups’ standing. The ABA argued that the plaintiffs had not “alleged injury sufficiently concrete and specific to confer standing.” 491 U.S. at 448. The Supreme Court soundly rejected that argument, holding that “refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.” *Id.* at 449. Importantly, the Court did not require the plaintiffs to demonstrate some additional injury beyond not being able to access the information to which they had a right. Plaintiffs were not required to show they lost money, or faced the risk of any other consequence as a result of not having the information to which they

were entitled. Instead, the injury was coterminous with the violation of the statutory right. The injury the Court identified was not being able to access the information “to the extent the [law] allows.” *Id. Akins* entailed the same analysis. In that case, the Court held that “a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” 524 U.S. at 11, 21 (citing *Public Citizen*).

Also instructive is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which involved “testers” applying for housing they had no intention of ever living in for the purpose of determining whether the defendant-realtor would provide legally required disclosures. The Court described the tester as having no “intention of buying or renting a home” and said that he “fully expect[ed] that he would receive false information,” *id.* at 373-374. In other words, the tester suffered no tangible injury. Nonetheless, 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.*

In *Akins*, *Public Citizen*, and *Havens*, plaintiffs had standing despite the fact that they (1) had suffered no monetary damages or other consequential harm, and (2) would not have had any entitlement to the information at issue absent Congress creating that entitlement by statute. So too here. *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).⁴

⁴ Defendant attempted to distinguish *Akins*, *Public Citizen*, and *Havens* by noting that they arose in a different factual circumstance than this case. Def’s Brief at 11. However, their holdings fully apply. There is nothing about the circumstances of *Akins*, for example, which makes the holding that “a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute” inapplicable. 524 U.S. at 11, 21 (citing *Public Citizen*). As noted in note 5, these cases have been broadly applied.

Numerous circuits have followed the Supreme Court’s lead and found that informational injury confers Article III standing in a wide variety of contexts, including consumer actions for statutory damages.⁵ *Spokeo* does nothing to undermine the conclusions of these circuits. By citing *Public Citizen* and *Akins* with approval, and for the explicit proposition that statutory injuries can, without more, confer Article III standing, the Supreme Court in *Spokeo* reinforced these cases. By failing to comply with the FCRA, Defendant caused a material risk of the harm Congress has identified. Under the well-established constitutional principal of informational injury—which *Spokeo* explicitly reaffirmed—that is sufficient for standing. See p. 7, *supra*.

Both before and after *Spokeo*, numerous district courts have found Article III standing in cases like this, based on informational injury. See *Thomas*, slip op. at 24 (“[Plaintiff] has alleged a concrete informational injury: that is, [Plaintiff] has alleged that he was deprived of a clear disclosure stating that Defendants sought to procure a consumer report before the report was obtained”); *Manuel v. Wells Fargo Bank, Nat. Ass’n*, 123 F. Supp. 3d 810, 817-18 (E.D. Va. 2015) (holding plaintiffs had Article III standing in a case alleging a violation of § 1681b(b)(2), because defendant failed to provide plaintiff with the “kind of disclosure” that the FCRA

⁵ See, e.g., *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 under Electronic Funds Transfer Act, where ATM was missing required disclosure sticker, noting that “[d]ecisions by this Court and the Supreme Court indicate that an informational injury alone is sufficient to confer standing, even without an additional economic or other injury.”); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952 n. 5 (7th Cir. 2000); *Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014) (observing that “[t]he Supreme Court consistently has held that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute”); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (migrant workers demonstrated Article III standing by alleging they had been deprived of a written disclosure they were entitled to receive pursuant to the Farm Labor Contractor Registration Act); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Ctr. for Biological 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*, 555 U.S. at 488.

“guarantees” before “procur[ing] a consumer report containing his information.”); *Panzer v. Swiftships, LLC*, No. 2:15-cv-2257, ECF No. 27 at 11-12 (E.D. La. Oct. 23, 2015) (finding plaintiff had standing based upon informational injury when defendant failed to comply with § 1681b(b)(2)); *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”); *see also Lane v. Bayview Loan Servicing, LLC*, Case No. 15 C 10446, 2016 WL 3671467 (N.D. Ill., July 11, 2016) (denying *Spokeo* motion when plaintiff was deprived of information he was entitled to under the FDCPA). Defendant attempts to distinguish these cases by arguing that those plaintiffs suffered actual harm, specifically, job loss. Def’s Br. at 12. This, however, is a red herring. In none of the cited cases was the job loss causally connected to the inadequate disclosure, nor was it the determining factor. In all of these cases, the court found standing based on informational injury.

Defendant’s disclosure violations also correspond with longstanding claims at common law. For instance, the common law often recognizes heightened disclosure requirements in the case 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*, 91 Va. L. Rev. 1795–1882 (2005). Congress’s decision to expand the circumstances in which heightened disclosures are required, or to allow the recovery of statutory damages in lieu of proving actual damages to the certainty required in litigation, does not negate the fact that courts have historically recognized disclosure violations as conferring cognizable injuries which can be remedied in federal courts. Congress’s decision to update the

law to account for new business practices does not break the “close relationship” that statutory claims have with traditional common-law duties, and it does not deprive Plaintiffs of standing.⁶

III. IN THE ALTERNATIVE, REMAND, NOT DISMISSAL, IS APPROPRIATE.

If the Court does decide that there is no jurisdiction in this case, this matter must be remanded to state court, not dismissed. 28 U.S.C.A. § 1447(c). Section 1447(c) states that “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” As the First Circuit has noted, “[t]his command is obligatory and does not afford district courts leeway to dismiss rather than remand.” *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 108–09 (1st Cir. 2007). Defendant’s failure to mention this on-point federal statute is glaring, especially because Plaintiffs raised the issue in response to Defendant’s prior motion. See ECF No. 24 at 2. Defendant should not be permitted to file a reply to address this matter, and if Defendant is allowed to do so, leave to file a sur-reply should be granted.

⁶ In a last-ditch effort to save its motion, Defendant relies on an unreported out-of-circuit district court opinion, *Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675, at *1 (S.D. Ohio June 8, 2016). *Smith*, however, is unworthy of deference, for three reasons. *First*, the court issued its opinion without full briefing—a motion to dismiss was pending, and the court issued the opinion after receiving *Spokeo* in a notice of supplemental authority to which plaintiff was given no opportunity to respond. *See generally Smith* Docket. *Second*, *Smith* contains no analysis whatsoever of Sixth Circuit precedent and whether or not *Spokeo* has overruled it. Given that the holding in *Smith* (“[p]laintiffs admitted that they did not suffer a concrete consequential damage as a result of OSU’s alleged breach. . . . Accordingly, the Court cannot find that Plaintiffs have suffered an injury-in-fact,” (*Smith*, at *4)) is flatly contrary to the Sixth Circuit’s rule that “injuries need not be financial in nature to be concrete and individualized,” this is a glaring omission. *In re: Carter*, 553 F.3d at 989. *Third*, *Smith* is simply unpersuasive. Its discussion of invasion of privacy is limited to a single sentence, and it does not discuss informational injury at all. As a non-reported out-of-state district court opinion, the only value *Smith* might conceivably have is persuasive. However, when the sparse analysis in *Smith* is compared to the rich analysis of cases like *Thomas*, *In Re Nickelodeon*, *Manuel*, and *Panzer*, it becomes clear that *Smith* accomplishes little other than stating a conclusion without logic. Because *Smith*’s persuasive value is absent, this Court should disregard it in favor of better-reasoned cases.

CONCLUSION

Plaintiffs have Article III standing to pursue their claims. For the foregoing reasons, Defendant's motion to dismiss for lack of standing should be denied.

Respectfully submitted,

Dated: August 5, 2016

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CERTIFICATE OF SERVICE

Evers, et al. v. The TJX Companies, Inc.
Case No. 1:15-cv-13071-RGS

I hereby certify that on August 5, 2016, I caused the following document:

Plaintiffs' Response to Defendant's Motion to Dismiss the Amended Complaint

to be filed electronically with the Clerk of Court through ECF, which will send a Notice of Electronic Filing to the registered participants as identified on the NEF.

Dated: August 5, 2016

/s/ Joseph C. Hashmall
Joseph C. Hashmall