17-688

No. _____

In the Supreme Court of the United States

CORY GROSHEK,

Petitioner,

v.

TIME WARNER CABLE INC.;
GREAT LAKES HIGHER EDUCATION CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Robert J. Gingras
Heath P. Straka
GINGRAS, CATES & WACHS, SC
8150 Excelsior Dr.
Madison, Wisconsin 53717
(608) 833-2632
gingras@gcwlawyers.com
straka@gcwlawyers.com

Michael J. Modl
Counsel of Record
AXLEY BRYNELSON, LLP
Post Office Box 1767
Madison, Wisconsin 53701
(608) 257-5661
mmodl@axley.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether Groshek alleged a concrete injury-in-fact, sufficient to confer Article III standing, where he alleged a willful violation of the disclosure requirements under § 1681b(b)(2)(A) of the Fair Credit Reporting Act, including harm to privacy and informational interests which were magnified by inclusion of a prospective release of federal statutory rights in the disclosure documents.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

The parties to the proceedings are those listed on the cover of the Petition. Petitioner Cory Groshek is an individual. Respondent Great Lakes Higher Education Corporation is a non-public corporation with no parent corporation and no publicly held company owning more than 10% of its stock. Respondent Time Warner Cable Inc. ("TWC"), during the district court proceedings, was an independent publicly held corporation. TWC recently became a subsidiary of Charter Communications, Inc. TWC merged into Spectrum Management Holding Company, LLC, a limited liability company that is owned by Charter Communications Holdings, LLC. Charter Communications Holdings, LLC is a limited liability company owned by CCH II, LLC and Advance/Newhouse Partnership. CCH III, LLC is a limited liability company owned by Charter Communications, Inc., Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC. Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC are all direct or indirect wholly-owned subsidiaries of Charter Communications, Inc. Charter Communications, Inc. is a publicly held company. Liberty Broadband Corporation owns 10% or more of Charter Communications, Inc.'s stock. Liberty Broadband Corporation is also a publicly held company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Cory Groshek, respectfully submits this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit, in a consolidated appeal, affirmed the district court decisions. The Seventh Circuit decision is reported at *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017).

The memorandum and order of the district court in Groshek v. Great Lakes Higher Education Corporation (App., pages 11 through 18) is unreported and available at *Groshek v. Great Lakes Higher Educ. Corp.*, No. 15-cv-143-jdp, 2016 U.S. Dist. LEXIS 144867 (W.D. Wis. Oct. 4, 2016).

The memorandum and order of the district court in Groshek v. Time Warner Cable, Inc. (App., pages 19 through 30) is unreported and available at *Groshek v. Time Warner Cable, Inc.*, No. 15-C-157, 2016 U.S. Dist. LEXIS 104952 (E.D. Wis. Aug. 9, 2016).

STATEMENT OF JURISDICTION

Final judgment was entered by the United States Court of Appeals for the Seventh Circuit on August 1, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act ("FCRA") states:

> Except as provided in subparagraph (B), 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 –
>
> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
>
> (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2)(A)

INTRODUCTION

This case involves important questions of federal law concerning the boundaries of two separate branches of government; the Judiciary and the Legislative. As a result of Respondents' willful violation of the Fair Credit Reporting Act ("FCRA") Petitioner alleges that Respondents violated (1) a substantive right to privacy, and (2) a substantive right to information; each of which are conferred upon consumers by the FCRA. The violations and resulting harm were magnified by Respondents' inclusion of a prospective release of FCRA rights in the very disclosure which Congress required that employers provide to prospective employees to alert such employees of their substantive rights under the FCRA. The court of appeals below found that, when employers violate these rights, they do not create a harm that is sufficiently 'concrete' so as to confer standing in the federal court system. To reach this decision, the United States Court of Appeals for the Seventh Circuit misinterpreted the scope of this Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016).

After decades of inquiry, Congress, through the FCRA, implemented controls on the credit reporting industry. In a variety of ways, the FCRA erected limitations on how Consumer Reporting Agencies ("CRAs") may procure, synthesize, and disseminate credit information for individual consumers. At issue here is the mechanism created by the FCRA to protect consumers when an employer seeks to procure a consumer report for employment purposes.

That mechanism, codified in 15 U.S.C. § 1681b(b)(2), prohibits the procurement of consumer reports for employment purposes. However, it also affords employers a narrow exception to that general prohibition – obtaining consumer reports for employment purposes remains permissible, if, in advance of procuring a report, an employer provides a disclosure to the consumer in a "document that consists solely of the disclosure," alerting the consumer that the report may be obtained for employment purposes and obtains written authorization from the consumer. This narrow exception to the general prohibition on consumer report procurement is the core statutory language from which Petitioner's claims arose.

Petitioner's complaint alleges that Respondents willfully violated the aforementioned FCRA provision by procuring a consumer report on Petitioner without providing Petitioner the specific disclosure/ authorization document required under § 1681b(b)(2). Yet, this is not a case simply about extraneous information added to an otherwise proper authorization and disclosure document. The authorization and disclosure documents from each Respondent included a prospective release of rights. Prospective releases and waivers of federal statutory rights have been prohibited by this Court since 1945 (*Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945)), and, per the Federal Trade Commission, render such authorization and disclosure forms invalid. App. 31-35. It follows then that Petitioner never gave valid permission to either Respondent to actually procure a consumer report since both authorizations contained prospective releases of FCRA rights.

Despite this, the Seventh Circuit held that such a violation does not create a corresponding injury-in-fact sufficient to confer Article III standing upon Petitioner. However, to reach this conclusion, the Court of Appeals distorted a recent decision of this Court. Specifically, the Seventh Circuit Court of Appeals inflated the scope of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016) beyond its original, narrow focus and ignored relevant teachings of the *Spokeo* decision.

Spokeo provided guidance to lower courts on how to appropriately consider the "concreteness" of intangible, procedural injuries. The decision teaches that bare procedural violations do not confer Article III standing upon individuals. Yet, that which is absent from the *Spokeo* decision is supremely relevant here. That is, at no point does *Spokeo* address *substantive* injuries such as the one alleged by Petitioner. Correspondingly, the Seventh Circuit Court of Appeals' misapplied *Spokeo* in dismissing Petitioner's claims for want of standing. The implication of the lower court's ruling is significant for several reasons. The decision (1) split appellate circuits on the application of the standing doctrine, (2) limited access to justice in the federal court system, and (3) invaded Congressional dominion over consumer protection issues. For these reasons, this Court should grant this Petition for Writ of Certiorari and reverse the decision of the Seventh Circuit Court of Appeals.

STATEMENT OF THE CASE

Petitioner Cory Groshek applied for employment with Great Lakes Higher Education Corporation in 2014 and with Time Warner Cable, Inc. in 2015. In the application process for both entities, Petitioner was required to authorize Respondents to obtain a consumer report on Petitioner in order for Petitioner to be considered for an employment position. On both occasions, each Respondent obtained Petitioner's consumer report without first providing a compliant disclosure document to Petitioner as is required under §1681b(b)(2)(A). Class Action Complaint at ¶ 15, Ex. B, *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157); Class Action Complaint at ¶ 14, Ex. A, *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143). Instead, Respondents provided deficient disclosure documents to Petitioner that clearly violated the FCRA. *Id.* Specifically, the disclosures included extraneous information, contrary to the FCRA's "consisting solely of a disclosure" language – and each disclosure included a prospective release of Petitioner's rights under the FCRA. *Id.* At the time that these disclosures were used, 70 years of precedent from this Court made clear that such prospective releases and waivers of federal statutory rights were unlawful. Additionally, nearly half-a-century of Congressional action focused on preventing precisely the type of conduct perpetrated by Respondents.

Codified in the 1970s, the FCRA is the instrument through which Congress addressed two longstanding concerns: widespread inaccuracies in consumer reports and invasions of privacy through the dissemination of

highly personal and confidential consumer information. Congress addressed these dual concerns by mandating various disclosures and notices to consumers. In so doing, these mandatory disclosures became the primary vehicle for protecting consumers' substantive right to privacy and addressing inaccuracies in their consumer reports. These are not trivial concerns. Indeed, the interests Congress protected by regulating the consumer reporting industry through the FCRA correlate with profound moments in American life: access to consumer lending, homeownership, employment, and insurance.

To ensure continued protection of these concerns, Congress expanded the FCRA's scope, decades after its original enactment, to strengthen protections for prospective employees. Employers, under the original FCRA, routinely acquired consumer reports on job applicants as part of background checks, without notifying the job applicant. The original FCRA only required employers to notify applicants if they used a consumer report in taking adverse employment action. Yet, Congress and the FTC found employers regularly skirted this requirement. So, Congress responded. In 1996 Congress amended the FCRA to add § 1681b(b)(2)(A). This provision now required employers using CRAs to obtain consumer reports to provide to all job applicants a very simple disclosure, on a stand-alone document, noting that an employer may obtain a consumer report on the applicant and use it for employment purposes. Applicants also must sign an authorization to allow an employer to obtain a consumer report.

This new disclosure requirement furthered Congress's two primary purposes for the FCRA and the substantive protections the law was enacted to protect. First, by informing job applicants and employees that the employer intended to obtain a consumer report, the consumer was on notice of the existence of a consumer report and could request to see a copy of the report. In this way, any errors in the report could be identified and the consumer could request a correction of any erroneous information. At the time the law was amended, approximately 50 percent of all consumer reports contained inaccuracies. Second, the consumer could deny the employer's request to obtain and possibly disseminate the consumer's private credit and reputational information, thereby protecting the consumer's privacy.

Congress routinely employs disclosures to protect consumer privacy. This is exactly what Congress did with the FCRA generally and with the disclosure requirement in § 1681b(b)(2)(A) specifically. Congress recognized the significant harm and risk of harm to consumers resulting from widespread inaccuracies in consumer reports as well as the invasion of consumer privacy by dissemination of confidential information in consumer reports. These concerns have only increased as organizations use massive databases to retain highly-personal consumer information. As these databases regularly are breached by hackers, the importance of the FCRA's protections for American consumers has become even more apparent. Critically, to guarantee these protections, Congress provided consumers with a private right of action to enforce their rights under the FCRA, including a right to

recover statutory and punitive damages for willful violations of the FCRA.

Respondents' violation of § 1681b(b)(2)(A) of the FCRA created just the sort of harm Congress sought to protect against. Indeed, the Federal Trade Commission explained that the reason for requiring disclosure within a document that "consists solely of the disclosure," "was so that consumers will not be distracted by additional information at the time the disclosure is given." Advisory Opinion to Steer, FTC Informal Staff Opinion Letter, No. 10-21-97 (October 21, 1997); see Advisory Opinion to Coffey, FTC Informal Staff Opinion Letter, No. 02-11-98 (Feb. 11, 1998) (explaining that "Congress intended that the disclosure not be encumbered with extraneous information" that would "confuse the consumer or detract from the mandated disclosure").

When Respondents included extraneous information in their disclosure documents, and then informed those same applicants that they prospectively released their rights, those applicants were left no reason to investigate potential inaccuracies in their consumer reports and ameliorate them. After all, why investigate what you are powerless to correct? In the same vein, consumers, after being told they have released their rights, have no reason to pursue any action in redress of violations of their privacy. The misinformation and confusion spread by Respondents through their deficient disclosure documents directly impacts the interests that Congress intended to protect by passing and later amending the FCRA. That these interests were of such explicit concern, and were subsequently the target of legislative action by Congress

demonstrates that a corresponding corruption of those interests would result in what Congress ostensibly deemed a significant injury. So, having experienced precisely such injury, Petitioner filed a lawsuit against each Respondent.

I. Underlying Litigation

A. Great Lakes Higher Education Corporation

Great Lakes, after obtaining Groshek's consumer report, decided not to hire him based upon information in the consumer report. Additionally, Great Lakes, following Groshek's advising them that its disclosure violates the FCRA, refused to hire him. At this point, it is unclear whether the reason for the refusal to hire was information in his consumer report or Great Lakes' retaliation for Groshek's exercise of his FCRA rights, or a combination of the two. Petitioner filed a class action complaint against Respondent Great Lakes in the Western District of Wisconsin on March 4, 2014. Class Action Complaint *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143). Respondent Great Lakes filed a motion to dismiss on April 13, 2015. Great Lakes Higher Education Corporation's Motion to Dismiss and Memorandum in Support Thereof *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 10. Great Lakes did not allege deficient standing as a ground for support of this motion. *Id.* The district court denied this motion to dismiss on November 16, 2015. Order *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 37. After successful settlement negotiations, Petitioner and Respondent Great Lakes filed jointly for preliminary

approval of a class action settlement. Joint Motion for Preliminary Approval of Class Action Settlement and Joint Stipulation for Class Certification *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 43. On April 13, 2016 the district court granted the parties' motion for preliminary approval of the class action settlement. Order *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 46. Subsequently, notice of the class action settlement was mailed to all potential class members. On May 16, 2016, this Court rendered its decision in *Spokeo. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016). On September 9, 2016, Great Lakes moved the district court to dismiss, relying chiefly upon *Spokeo*. Defendants Motion to Dismiss for Lack of Subject Matter Jurisdiction *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 53. The district court granted Great Lakes' motion on October 4, 2016. *Groshek v. Great Lakes Higher Educ. Corp.*, No. 15-cv-143-jdp, 2016 U.S. Dist. LEXIS 144867 (W.D. Wis. Oct. 4, 2016). Petitioner gave notice of its appeal to the district court's grant of Great Lakes' motion to dismiss on October 19, 2016. Plaintiff's Notice of Appeal *Groshek v. Great Lakes Higher Educ. Corp.*, (W.D. Wis. Oct. 4, 2016) (No. 15-cv-143) ECF No. 67.

B. Time Warner Cable, Inc.

Petitioner filed a class action complaint against Respondent Time Warner Cable, Inc. on February 6, 2015, alleging willful violations of the FCRA. Class Action Complaint *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157). Time Warner

filed a motion to dismiss on May 8, 2015. Defendant's Motion to Dismiss *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157) ECF No. 13. Time Warner did not allege deficient standing in support of this motion. Defendant's Brief in Support of Its Motion to Dismiss Plaintiff's Complaint *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157) ECF No. 14. The district court denied this motion to dismiss on July 31, 2015. Decision and Order *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157) ECF No. 28. This Court rendered its decision in *Spokeo* on May 16, 2016. On May 27, 2016 Time Warner filed a motion to dismiss for lack of subject matter jurisdiction in reliance upon this Court's decision in *Spokeo*. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157) ECF No. 55. The district court granted Respondent's motion on August 9, 2016. *Groshek v. Time Warner Cable, Inc.*, No. 15-C-157, 2016 U.S. Dist. LEXIS 104952 (E.D. Wis. Aug. 9, 2016). Petitioner gave notice of its appeal to the district court's granting of Respondent's motion to dismiss on September 6, 2016. Plaintiff's Notice of Appeal *Groshek v. Time Warner Cable, Inc.*, (E.D. Wis. Aug. 9, 2016) (No. 15-cv-157) ECF No. 76.

C. The Seventh Circuit Court of Appeals

The cases were combined for the purposes of appeal. Order, *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017) (No. 16-3355) ECF No. 11. On November 30, 2016, Petitioner filed his joint brief in the consolidated appeal of both underlying district court decisions. Brief of Plaintiff-Appellant, *Groshek v.*

Time Warner Cable, Inc., 865 F.3d 884 (7th Cir. 2017) (No. 16-3355) ECF No 16-1. While Petitioner's appeal was pending before the Seventh Circuit Court of Appeals, the Ninth Circuit Court of Appeals, in *Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017) held that violations of §1681b(b)(2)(A) result in an injury sufficient to confer Article III standing.

The Seventh Circuit Court of Appeals affirmed the decisions of its district courts, holding that, as a result of a lack of standing, the district courts did not have subject matter jurisdiction to consider Petitioner's complaints. *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017). The Seventh Circuit held that, because Petitioner's complaints did not allege a misunderstanding, some confusion, or an otherwise unexpected consumer report, Petitioner only alleged statutory violations devoid of concrete harm or appreciable risk of harm. *Id.* at 887. Absent such harm, the court held, Petitioner did not satisfy the requirements for Article III standing. *Id.*

However, the decision relied heavily on a misapplication of the *Spokeo* decision; indeed, it considered Petitioner's alleged injuries in the context of the violation of a "procedural right," whereas violations of §1681b(b)(2)(A)(i) concern *substantive* rights. *Groshek v. Time Warner Cable*, Inc., 865 F.3d 884, 887 (7th Cir. 2017). Unlike the underlying court of appeals decision, the Ninth Circuit recognized these substantive rights, which Petitioner alleges in his complaint were violated. That court explained:

> A plaintiff who alleges a "bare procedural violation" of the FCRA, "divorced from any concrete harm," fails to satisfy Article III's

> injury-in-fact requirement. *Spokeo, Inc. v. Robins*, U.S., 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). However, [Plaintiff here] alleges more than a "bare procedural violation." The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check. By providing a private cause of action for violations of Section 1681b(b)(2)(A), Congress has recognized the harm such violations cause, thereby articulating a chain of causation that will give rise to a case or controversy.

Syed v. M-I, Ltd. Liab. Co., 853 F.3d 492, 499 (9th Cir. 2017) (internal quotations and citations omitted) (quoting *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (Kennedy, J., concurring)). This distinction – between substantive and procedural rights – was ignored by the various lower courts in the Seventh Circuit. As a result, the Seventh and Ninth

Circuits now disagree on how to assess Article III standing in the context of informational or privacy injuries that flow from a violation of a federal statutory disclosure provision.

Furthermore, the remaining guidance from *Spokeo* supports Petitioner's standing to assert his FCRA claims, even if the rights involved were procedural. As discussed *supra*, Congress elevated this injury to a level which it considers justiciable – going so far as to explicitly grant individuals a private cause of action. In addition, historical causes of action for invasion of privacy and informational injuries have been entertained in the American court system. Given these factors, and particularly in light of the conflict with the Ninth Circuit's decision in *Syed*, the Seventh Circuit's decision that Petitioner lacked standing to assert his FCRA claims should be reversed.

The Seventh Circuit Court of Appeals entered its decision on August 1, 2017, to which Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Has Incorrectly Decided an Important Question of Federal Law That Should be Settled by This Court.

Supreme Court Rule 10 provides, in relevant part:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court ...

Sup Ct. R. 10

The present Petition involves issues of public importance. Congress, over the years, has mandated disclosures and notices as the primary vehicle for protecting consumer rights and privacy rights. Congress has concluded that such notices and disclosures are the most effective tools for accomplishing its consumer and privacy protection goals.

The Seventh Circuit, in the present case, has negated Congress's legislative decisions on how best to protect consumers and their privacy from specific harms related to credit reporting. In the late 1960's and early 1970's, Congress identified significant harms befalling consumers as a result of practices in the credit reporting industry. The consumer reports for

approximately half of all consumers contained inaccuracies. The consequences of such inaccuracies included the loss of employment, credit, housing, and insurance coverage, key areas in every American's life. Moreover, the information that was collected on nearly half of the nation's population was highly confidential, and protections of the privacy of such information were minimal.

In the 1990's, Congress recognized that the FCRA needed to be amended to address changing technologies which included the growth of massive databases containing many billions of pieces of confidential information on over a hundred million Americans. Congress also amended the FCRA in the mid-1990's to address particular consumer reporting problems in the employment context. The 1996 amendments to the FCRA added the disclosure provision which is at the center of the present case. Prior to 1996, employers were obtaining consumer reports on job applicants without their knowledge or consent and were making hiring decisions based upon information in the reports, which often was inaccurate, without the applicant being told that the hiring decision was based, in whole or in part, on information in the consumer report. This situation created two serious problems. First, because an applicant was not aware a consumer report had been obtained and used by the employer in the hiring decision, the applicant had no way of educating him or herself as to their FCRA rights involving consumer reports, including how to correct errors in the report. Second, a job applicant had no way to protect his or her highly confidential information from a prospective employer, where such information may have nothing to do with a particular employment position. Congress

addressed these two problems with the § 1681b(b)(2)(A) disclosure requirement.

There can be no serious question that Great Lakes and TWC's disclosure documents violated § 1681b(b)(2)(A). The statutory provision requires that the disclosure document **consist solely of** a disclosure that an employer may obtain a consumer report for employment purposes. Both disclosures here contain additional extraneous information. More importantly, both disclosures included a prospective release of FCRA rights. In order for applicants to even be considered for an employment position, they had to agree to release their federal statutory claims, a requirement that this Court had prohibited for more than 70 years. The actual or substantial risk of harm is obvious and is the precise type of harm that Congress sought to prevent with the FCRA disclosure requirement.

For several reasons, the harm, or risk of harm, involved in the present case is not the "bare procedural violation" which this Court, in *Spokeo*, questioned as adequate to support standing. First, the disclosure/authorization mandate in § 1681b(b)(2)(A) confers a substantive rather than a procedural right. The disclosure requirement is the key provision in enabling job applicants to exercise their rights under the FCRA. It is the sole statutory vehicle for alerting consumers that their highly personal information will be disclosed to a prospective employer, regardless of whether the information has any relevance to the particular job. For example, if an individual had difficulty paying hospital bills for a medical procedure such as cancer treatment, this information would very likely be included in the individual's consumer report.

The disclosure requirement alerts job applicants that an employer may obtain a consumer report and the consumer can protect substantive privacy interests by declining to sign the authorization document.

Second, this Court confirmed, in *Spokeo*, that a substantial **risk** of harm can be adequate to confer Article III standing. In the present case, Great Lakes and TWC included, in a statutorily mandated disclosure, a prospective release of FCRA claims. The message to job applicants is, regardless of whether the employer violated the FCRA, including future violations of the law, the applicant had forfeited any claim. This would permit an employer to violate federal law with impunity. In order to be considered for a job, an applicant is required to release FCRA claims. Such a prospective release would clearly be impermissible under other federal employment statutes. For example, an employer could not require female job applicants to release gender discrimination claims under Title VII as a condition of being considered for a job. The risk of injury (forgoing enforcement of important federal rights) is apparent from such prospective releases. Whether an employer's inclusion of a prospective release in a mandatory statutory disclosure results in a harm or a substantial risk of harm supporting Article III standing, is an important question of federal law that this Court should settle.

Third, this Court has recognized that some statutory violations, by themselves, are adequate to establish a concrete injury-in-fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L.Ed.2d 635, 646 (2016). Here, the § 1681b(b)(2)(A) disclosure plays a

key role in protecting consumer privacy and is the job applicant's entry into the substantive protections of the FCRA. Congress made clear that the § 1681b(b)(2)(A) disclosure must be clear and conspicuous and must consist solely of a simple statement: the employer may obtain a consumer report for employment purposes. Congress permitted a single exception to the "consists solely of" requirement, i.e., the authorization could be on the disclosure form. The disclosure must be contained on a stand-alone document. Congress recognized the importance of the disclosure and mandated specific requirements to insure the disclosure would serve its intended purpose.

In the present case, and in hundreds of similar FCRA § 1681b(b)(2)(A) cases, employers violated the clear disclosure mandate by including extraneous information, including prospective releases of claims, in the required disclosures. Such violations are precisely the type which, by themselves, are adequate to establish concreteness for injury-in-fact purposes. The Supreme Court should grant review to settle the important standing question, whether inclusion of a prospective release of federal statutory rights in a mandatory statutory disclosure document is the type of statutory violation which, by itself, is adequate to confer constitutional standing.

II. The Seventh Circuit's Decision Conflicts With The Decision of The Ninth Circuit in *Syed v. M-I, LLC.*

United States Supreme Court Rule 10 identifies, as a consideration governing granting of a Petition for Writ of Certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; and

Sup. Ct. R. 10(a)

The decision in the underlying consolidated appeal directly conflicts with the Ninth Circuit's decision in *Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017).

In *Syed*, Mr. Syed applied for a job with M-I. He was provided an FCRA disclosure document to allow the prospective employer to obtain a consumer report. The disclosure form, like the disclosure in the present case, included a prospective release of FCRA claims. Syed's signature on the authorization, simultaneously allowed M-I to obtain a consumer report and served as a release of FCRA claims. Syed filed a putative class action alleging a willful violation of § 1681b(b)(2)(A) of the FCRA. Syed claimed that the disclosure with the prospective release of FCRA claims constituted a willful violation of the FCRA. The district court dismissed Syed's FCRA claim, finding that he had failed to plead a willful violation of the FCRA.

Syed appealed the dismissal of his claims and, on appeal, the parties addressed the threshold issue of

subject matter jurisdiction – whether, in light of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Syed had Article III standing. The Ninth Circuit Court of Appeals issued its decision, ruling that Syed had Article III standing and that he had alleged a willful violation of the FCRA.

The Ninth Circuit subsequently issued an amended opinion and order, again concluding that Syed had Article III standing. Citing the *Spokeo* decision, the *Syed* court observed that, if a plaintiff alleges only a "bare procedural violation" of the FCRA, such allegations will not satisfy Article III's injury-in-fact requirement. The *Syed* court concluded that § 1681b(b)(2)(A) created both the right to information and the right to privacy. Additionally, the *Syed* court found that, by providing a cause of action for violation of § 1681b(b)(2)(A), Congress recognized the harm caused by such violations. The *Syed* court held that Syed had alleged harm, including reasonable inferences that he was confused by the prospective release language in the disclosure and that he satisfied Article III standing requirements.

Groshek commenced putative class actions against Great Lakes in the Western District of Wisconsin and TWC in the Eastern District of Wisconsin. In both cases, he alleged a willful violation of the FCRA. In both cases, he alleged he was not given a disclosure which complied with § 1681b(b)(2)(A)(i) and (ii), thereby constituting harm to informational and privacy interests. Both disclosures contained prospective releases of FCRA rights, in violation of well-established United States Supreme Court law and FTC opinions and regulations. The complaints, in both cases,

prominently included allegations about the unlawful prospective releases of claims. As the *Syed* court concluded, there are reasonable inferences, at the pleading stage, that Groshek was confused by the scope and meaning of the prospective release of his FCRA rights.

In the Great Lakes case, the parties reached a full settlement of all claims and the district court granted preliminary approval to a class settlement. However, shortly before the final approval hearing, Great Lakes switched attorneys and the new attorneys moved to dismiss based on this Court's decision in *Spokeo*. The district court granted Great Lakes' motion to dismiss and Groshek appealed the dismissal of his action. In the TWC case, shortly after this Court's decision in *Spokeo*, TWC moved to dismiss based upon lack of Article III standing. The district court granted TWC's motion and Groshek appealed.

The United States Court of Appeals for the Seventh Circuit consolidated the two cases for appeal and affirmed the district courts' dismissal of Groshek's cases on standing grounds. The Seventh Circuit rejected informational injury by unjustifiably construing the Supreme Court decisions in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) too narrowly. The Seventh Circuit, as related to injury to Groshek's privacy rights, simply concluded that his pleadings were conclusory. Although Groshek disputes that his pleadings were inadequate, in response to the motions to dismiss in both the Great Lakes and TWC cases, he requested the opportunity to file an amended pleading. Neither the two district

courts nor the Seventh Circuit ever addressed Groshek's request to re-plead his claims. However, regardless of the re-pleading issue, Groshek pleaded that his privacy interests were harmed by the disclosure that not only violated the FCRA's disclosure requirements, but also required him to release his FCRA claims in order to even be considered for a position with either company.

The Seventh Circuit Court of Appeals largely ignored the fact that Great Lakes and TWC's disclosure documents required a prospective release of FCRA rights. Only in its brief discussion of the *Syed* decision did the appellate court mention the prospective release. The Seventh Circuit Court of Appeals stated that the plaintiff in *Syed* alleged facts from which the court could infer the prospective release confused Syed. The Seventh Circuit, in an unsupported passage in its opinion, stated that Groshek had not alleged facts from which one could infer he was confused. There is nothing in Groshek's complaint to suggest that he is trained in the law or would have any special appreciation for the importance of a prospective waiver of rights. There is no basis to conclude that Groshek would not be confused by legal release language. In fact, had he been given the opportunity to file an amended pleading, he would have included such allegations.

The *Syed* and *Groshek* cases are identical. Both involve willful violations of the FCRA. Both involve disclosure/authorization forms that violate § 1681b(b)(2)(A). Both involve prospective releases of FCRA claims that were included in the mandatory disclosure document. In both cases, the disclosure

document is the entry point into the substantive protections of the FCRA, including correcting inaccurate information in the consumer report which may preclude an individual from obtaining employment. The unlawful disclosure, particularly where a consumer is being told that he is prospectively releasing any FCRA claims, creates informational injury. In both cases, authorizing a prospective employer to obtain a consumer report with an unlawful disclosure violates a right to privacy, i.e. to prevent prospective employers from obtaining highly confidential personal information.

Hundreds of cases filed in the last three years, many of which are class actions, allege employer violations of the § 1681b(b)(2)(A) disclosure requirement through use of prospective waivers. This is an issue of immense public concern. The message to job applicants is to not bother learning about or enforcing your FCRA rights because you have already released them. The message to employers is that it is fine to disregard Congress's laws by telling individuals covered by the law that, if they would like to be considered for a job, they must prospectively release any FCRA claim they may have. Injury to consumer interests and to the public is readily apparent. This Court should grant the Petition for Writ of Certiorari to address and resolve the split in the circuits regarding a consumer's standing to pursue a violation of § 1681b(b)(2)(A) of the FCRA.

III. The Seventh Circuit's Decision Conflicts With This Court's Decisions.

Supreme Court Rule 10 provides, in relevant part, that, among the appropriate considerations for granting a writ of certiorari, is "a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court". Sup. Ct. R. 10(c). The Seventh Circuit's decision in the *Groshek* consolidated appeal conflicts with this Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016). In *Spokeo*, the Court ruled that the Ninth Circuit Court of Appeals had not analyzed the concreteness prong of the injury-in-fact element of Article III standing and remanded the case to the Ninth Circuit to perform this analysis. This Court provided guidance to the Ninth Circuit as to appropriate considerations to employ in its analysis. The Ninth Circuit, following remand, applied this Court's guidance and concluded that Plaintiff Robins had Article III standing to proceed on his FCRA claim.

Significantly, the Court in *Spokeo*, addressed intangible harm resulting from procedural violations. As noted above, the present case involves a substantive statutory provision; accordingly, the *Spokeo* decision would not be applicable. However, even assuming *Spokeo* is applicable, the Court specifically recognized that there would be circumstances in which a statutory violation, by itself, would be adequate to establish constitutional standing. The present situation is precisely such a circumstance. There is no question that Congress enacted the FCRA with two primary interests in mind: to protect individual's privacy interests and to provide individuals with information,

through disclosures, to allow such individuals to learn about their rights and to enforce such rights, such as the right to correct inaccurate information in a consumer report.

Consumer reports are used to make employment, credit, housing, and insurance decisions, areas that touch on every American's life. Disclosures that violate § 1681b(b)(2)(A) create actual, or a risk of, significant harm. In addition to the obvious harm resulting from non-compliant disclosures that contain extraneous information, the harm is multiplied when information in the disclosure includes a prospective release of claims, thereby discouraging consumers from pursuing violations of the very rights Congress attempted to protect. This Court's decision in *Spokeo* recognized that there would be cases, like the present case, where a violation, by itself, is adequate to confer Article III standing. The Seventh Circuit's decision disregarded this important teaching of *Spokeo*.

The *Spokeo* decision, in providing guidance to lower courts, observed that, with intangible injuries, only where the injury can be said to be a "bare procedural violation", such as a wrong zip code, should a lower court ignore Congress's legislative decisions to protect what it has concluded to be important interests. Under no circumstances can an unlawful disclosure that requires a prospective release of federal statutory rights be a "bare procedural violation". As discussed above, the disclosure/authorization document allows a job applicant to refuse to permit a prospective employer from obtaining highly confidential personal information about the applicant which may be wholly unrelated to a particular job. The applicant can simply refuse to

sign the authorization, thereby protecting his or her privacy. Additionally, a compliant disclosure will inform the applicant that the employer may obtain a copy of the applicant's consumer report, thereby alerting the applicant to look into his or her rights under the FCRA, including how to correct erroneous information in a consumer report. With a prospective release of claims, the risk of injury is magnified. Unlawful disclosure forms cannot be reasonably characterized as "bare procedural violations," the type of violation that the *Spokeo* case questioned would be adequate to confer constitutional standing. The Seventh Circuit's decision conflicts with *Spokeo* in this regard.

The *Spokeo* case also recognized that the **risk** of injury may suffice to establish Article III standing. Here the risk of harm is substantial. In the present case, Great Lakes denied Groshek employment based in whole or in part on information contained in the consumer report they unlawfully obtained on him for employment purposes. Information in Groshek's consumer report was inaccurate in that it misrepresented a non-criminal civil ordinance violation as a criminal misdemeanor, a fact which would have, had Groshek chosen to pursue a slightly different legal path, enabled Groshek to file a complaint over not only Respondent's deficient and unlawful disclosure, but the erroneous consumer report they relied upon in denying him employment as well. Had Groshek known, at the time he was required to authorize Respondent's unlawful consumer report on him, that Respondent would use inaccurate information in the report to deny him employment, he would not have authorized the procurement of the report.

This Court in the *O'Neill* and *Alexander* cases made crystal clear that prospective releases or waivers of federal statutory claims or rights under the FLSA and Title VII respectively, are prohibited. *O'Neill*, 324 U.S. 697 (1945); *Alexander*, 415 U.S. 36 (1974). The reason for this legal rule is the substantial risk that employers could violate congressional mandates to the detriment of employees and job applicants and the employees or applicants would do nothing to enforce their rights, having believed that they had no rights to enforce. There is substantial risks attendant to such prospective releases and waivers of federal statutory rights. The Seventh Circuit's decision is contrary to this Court's decisions, including *Spokeo*, where the Court expressly recognized a substantial risk of harm as being adequate to confer Article III standing. Additionally, the Seventh Circuit's decision is contrary to the *O'Neill* and *Alexander* decisions, where this Court specifically prohibited the prospective release or waiver of federal statutory claims and rights.

The *Spokeo* case also recognized that injury to informational interests is adequate to confer constitutional standing. The Court cited the continued vitality of its decisions in *Federal Election Comm'n v. Akins,* 524 U.S. 11, 20-25 and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989). The Seventh Circuit did not give these cases a reasonable interpretation. Instead, the Seventh Circuit gave both decisions an unreasonably narrow reading. The *Akins* and *Department of Justice* decisions recognize the importance of information and the harm that can result from a failure to provide such information. Congress, in the FCRA, mandated that certain specific information be provided to job applicants in a specific

form. There is no question that Great Lakes and TWC violated this mandate with their unlawful FCRA disclosures. Disclosures are a primary way in which Congress provides protections to consumers and assists them in enforcing their rights. Great Lakes and TWC's violation of the disclosure requirements results in the very harm Congress attempted to protect against and confers the standing recognized by this Court in the *Akins* and *Department of Justice* decisions. The Seventh Circuit's decision failed to appreciate the importance of the *Akins* and *Department of Justice* decisions on the standing issue.

Because the Seventh Circuit's decision conflicts with relevant decisions of this Court, the Court should grant the Petition.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted: October 30, 2017

Robert J. Gingras
Heath P. Straka
GINGRAS, CATES & WACHS, SC
8150 Excelsior Dr.
Madison, Wisconsin 53717
(608) 833-2632
gingras@gcwlawyers.com
straka@gcwlawyers.com

Michael J. Modl
Counsel of Record
AXLEY BRYNELSON, LLP
Post Office Box 1767
Madison, Wisconsin 53701
(608) 257-5661
mmodl@axley.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16-3355

[Filed August 1, 2017]

CORY GROSHEK,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TIME WARNER CABLE, INC.,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 2:15-cv-00157-pp — **Pamela Pepper**, *Judge*.

No. 16-3711

CORY GROSHEK, and all others similarly situated,	)
Plaintiff-Appellant,	)
v.	)
GREAT LAKES HIGHER EDUCATION CORPORATION,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:15-cv-00143-jdp — **James D. Peterson**,
Chief Judge.

ARGUED FEBRUARY 22, 2017 — DECIDED AUGUST 1, 2017

Before BAUER and WILLIAMS, *Circuit Judges,* and DEGUILIO,* *District Judge.*

BAUER, *Circuit Judge.* Over the course of a year and a half, Appellant Cory Groshek submitted 562 job applications to various employers, including Appellees Time Warner Cable, Inc. and Great Lakes Higher

* Of the United States District Court for the Northern District of Indiana, sitting by designation.

Education Corporation (collectively, "Appellees").[1] The job application, which Appellees provided to Groshek, included a disclosure and authorization form informing him that a consumer report may be procured in making the employment decision; the form also contained other information, such as a liability release. After Groshek submitted the job application, along with the signed disclosure and authorization form, Appellees requested and obtained a consumer report on him from a third party.

Shortly thereafter, Groshek filed a class-action suit against Appellees under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, seeking statutory and punitive damages for alleged violations of 15 U.S.C. § 1681b(b)(2)(A).[2] This section prohibits a prospective employer from procuring a consumer report for employment purposes unless certain procedures are followed: (i) a clear and conspicuous disclosure has been made in writing to the job applicant at any time before the report is procured, in a document that consists solely of the disclosure, that a consumer report

---

[1] We consolidated Groshek's appeals; and we need not discuss the specifics for each individual case because the underlying facts are consistent, except where noted.

[2] We will note the timing of the events leading up to the filing of the complaint: Groshek applied to Time Warner on September 22, 2014, worked his first day as an employee on October 24, 2014, resigned voluntarily on January 28, 2015, requested settlement negotiations on January 30, 2015, and filed a class-action complaint on February 6, 2015. As for Great Lakes, Groshek had an in-person interview on February 6, 2014, submitted the job application before February 11, 2014, and filed a class-action complaint on March 5, 2014.

may be obtained for employment purposes (commonly known as the "stand-alone disclosure requirement"); and, (ii) the job applicant has authorized in writing the procurement of the report. *See id.* § 1681b(b)(2)(A)(i)-(ii).

In his complaint, Groshek alleged that Appellees violated § 1681b(b)(2)(A)(i). As the predicate for his claimed statutory and punitive damages, he alleged that this violation was willful. *See id.* § 1681n. Additionally, he alleged that, as a result of the violation of § 1681b(b)(2)(A)(i), Appellees failed to obtain a valid authorization from him before procuring a consumer report, in violation of § 1681b(b)(2)(A)(ii).

Appellees moved to dismiss for lack of subject matter jurisdiction, arguing that Groshek lacked Article III standing because he did not suffer a concrete injury; Groshek responded that he suffered concrete informational and privacy injuries. The district court granted Appellees' motion. This appeal followed.

Article III of the Constitution limits our review to actual "Cases" and "Controversies" brought by litigants who demonstrate standing. The "irreducible constitutional minimum of standing" consists of three elements: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiff bears the burden of establishing each element. *Id.* at 561. In order to survive a challenge to standing, a plaintiff must plead sufficient factual allegations, that "plausibly suggest" each of these elements. *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015).

To establish injury in fact, Groshek must show that he "suffered 'an invasion of a legally protected interest'

that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). To be "concrete," an injury "must actually exist;" it must be "real," not "abstract," but not necessarily tangible. *Id.* at 1548–49. In determining whether an alleged intangible harm constitutes a concrete injury in fact, both history and Congress' judgment are important. *Id.* at 1549.

First, we consider whether the common law permitted suit in analogous circumstances. *Id.* We also recognize that Congress is well positioned to identify intangible harms that will give rise to concrete injuries, which were previously inadequate in law. *Id.* Nevertheless, "Congress' judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation creates an Article III injury." *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016). For instance, a plaintiff cannot satisfy the injury-in-fact element by alleging a "bare procedural violation" that is "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Instead, the plaintiff must show that the statutory violation presented an "appreciable risk of harm" to the underlying concrete interest that Congress sought to protect by enacting the statute. *Meyers*, 843 F.3d at 727; *see also Spokeo*, 136 S. Ct. at 1549–50.

In enacting the FCRA, Congress identified the need to "ensure fair and accurate credit reporting," and "protect consumer privacy." *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 52 (2007). "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136

S. Ct. at 1550. The stand-alone disclosure and authorization requirements are procedures closely tied to FCRA's overarching goals. Congress was concerned that employers' authority to obtain consumer reports on job applicants "may create an improper invasion of privacy." S. Rep. No. 104-185 at 35 (1995). Section 1681b(b)(2)(A)(i), the stand-alone disclosure requirement, is clearly designed to decrease the risk of a job applicant unknowingly providing consent to the dissemination of his or her private information. Section 1681b(b)(2)(A)(ii), the authorization requirement, further protects consumer privacy by providing the job applicant the ability to prevent a prospective employer from procuring a consumer report, *i.e.*, by withholding consent. S. Rep. No. 104-185 at 35 (1995).

Here, Groshek did not allege that Appellees failed to provide him with a disclosure that informed him that a consumer report may be obtained for employment purposes. His complaint contained no allegation that any of the additional information caused him to not understand the consent he was giving; no allegation that he would not have provided consent but for the extraneous information on the form; no allegation that additional information caused him to be confused; and, no allegation that he was unaware that a consumer report would be procured. Instead, he simply alleged that Appellees' disclosure form contained extraneous information. We conclude that Groshek has alleged a statutory violation completely removed from any concrete harm or appreciable risk of harm.

First, Groshek argues that he suffered a concrete informational injury as a result of Appellees' failure to

provide a disclosure compliant with § 1681b(b)(2)(A)(i). As support, he relies on the general rule arising out of *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), two cases that *Spokeo* referenced as instances where a violation of a procedural right was sufficient to constitute an injury in fact. *See Spokeo*, 136 S. Ct. at 1549.

In both *Akins* and *Public Citizen*, the Supreme Court held generally that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 22 (citing *Pub. Citizen*, 491 U.S. at 449). In *Public Citizen*, the plaintiff specifically requested, and had been refused, information. 491 U.S. at 449. The plaintiff filed suit against the defendant under the Federal Advisory Committee Act, in an attempt to compel the defendant to publicly disclose information as required by FACA. *Id.* The Supreme Court held that the inability to scrutinize the withheld information to the extent FACA allowed constituted an injury in fact. *Id.* The Supreme Court reasoned that the plaintiff's injury was akin to when "an agency denies requests for information under the Freedom of Information Act ... ." *Id.* As the Supreme Court noted, the plaintiff's injury was not simply the inability to obtain information, but also the inability to monitor and participate effectively in the judicial selection process without such information. *See id.*

Similarly, the plaintiffs in *Akins*, after a failed request for information, filed suit to compel the defendant to provide information that was required to be disclosed under the Federal Election Campaign Act

of 1971. 524 U.S. at 19–20. The Supreme Court held that the plaintiffs' inability to procure information under FECA qualified as a concrete injury. *Id.* The Supreme Court noted that the plaintiffs' harm was not simply the inability to obtain information, but also mentioned their inability to evaluate candidates for public office without such information—an informational injury "directly related to voting, the most basic of political rights ... ." *Id.* at 24–25. The Supreme Court determined that FECA sought to protect the plaintiffs "from the kind of harm they say they have suffered ... ." *Id.* at 22.

Groshek's reliance on *Akins* and *Public Citizen* is misplaced for two reasons. First, unlike the plaintiffs in *Akins* and *Public Citizen*, Groshek is not seeking to compel Appellees to provide him with information. Groshek has not alleged that, after realizing he was provided with a non-compliant disclosure, he requested that Appellees provide him with a compliant disclosure and was denied. Because Groshek has not "fail[ed]" to obtain information, he has not suffered an informational injury as illustrated in *Akins* and *Public Citizen*.

The second reason is that, unlike the statutes at issue in *Akins* and *Public Citizen*, the statute here does not seek to protect Groshek from the kind of harm he claims he has suffered, *i.e.*, receipt of a non-compliant disclosure. *See Akins*, 524 U.S. at 21–25.[3] Congress did not enact § 1681b(b)(2)(A)(i) to

---

[3] For this same reason, Groshek's reliance stemming from *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a case that was cited in *Spokeo*'s concurring and dissenting opinions, is also misplaced.

protect job applicants from disclosures that do not satisfy the requirements of that section; it did so to decrease the risk that a job applicant would unknowingly consent to allowing a prospective employer to procure a consumer report. Under the circumstances here, *Akins* and *Public Citizen* are inapposite. Groshek has failed to demonstrate that he has suffered a concrete informational injury.

Next, Groshek contends that he suffered a privacy injury as a result of the violation of § 1681b(b)(2)(A). Section 1681b(b)(2)(A)(ii)'s authorization requirement does implicate privacy interests. S. Rep. No. 104-185 at 35 (1995). It is also well established that "[v]iolations of rights of privacy are actionable ... ." *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017).

As mentioned above, Groshek alleged that, as a result of Appellees' failure to provide him with a compliant disclosure, Appellees failed to obtain a valid authorization from him to procure a consumer report, in violation of § 1681b(b)(2)(A)(ii). But, this is a conclusory allegation which we discard when considering well-pleaded factual allegations. *See Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 589 (7th Cir. 2016). Because Groshek admits that he signed the disclosure and authorization form, he cannot maintain that he suffered a concrete privacy injury.

See Spokeo, 136 S. Ct. at 1553 (Thomas, J. concurring); *id.* at 1555 (Ginsburg, J. dissenting). *Havens Realty* also demonstrates that, in order to have an informational-based injury, the injury must be "precisely the form the statute was intended to guard against ... ." 455 U.S. at 373.

Lastly, we briefly highlight the Ninth Circuit's opinion in *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), which was decided after briefing but was a topic of discussion at oral argument and in supplemental briefing. There, the plaintiff alleged in his complaint that he discovered, within the previous two years, that the defendant obtained a consumer report for employment purposes based on an illegal disclosure and authorization form. *Id.* at 499. The court held that this allegation was sufficient to confer standing because it inferred that the plaintiff was "deprived of the right to information and the right to privacy" under 15 U.S.C. §1681b(b)(2)(A)(i)-(ii). *Id.* The court, drawing all reasonable inferences in plaintiff's favor determined that the plaintiff was "confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it contained a sufficiently clear disclosure, as required by the statute." *Id.* at 499–500.

Syed is inapposite. The Ninth Circuit had factual allegations from which it could infer harm, whereas Groshek alleges none. Unlike the plaintiff in *Syed*, Groshek presents no factual allegations plausibly suggesting that he was confused by the disclosure form or the form's inclusion of a liability release, or that he would not have signed it had the disclosure complied with 15 U.S.C. § 1681b(b)(2)(A)(i).

We conclude that Groshek has not alleged facts demonstrating a real, concrete appreciable risk of harm. Because he has failed to demonstrate that he suffered a concrete injury, he lacks Article III standing. Accordingly, the judgments of the district courts are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

15-cv-143-jdp

[Filed October 14, 2016]

CORY GROSHEK,
And all others, similarly situated,

Plaintiff,

v.

GREAT LAKES HIGHER EDUCATION CORPORATION,

Defendant.

OPINION & ORDER

Plaintiff Cory Groshek brings this class action lawsuit against defendant Great Lakes Higher Education Corporation alleging violations of the Fair Credit Reporting Act (FCRA). In March, 2016, the parties reached a settlement agreement, Dkt. 43, which the court preliminarily approved in April, Dkt. 46. But in May, the Supreme Court decided *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), which held that a bare statutory violation of the FCRA may not be

sufficient in itself to establish a "concrete" injury, which is one of the requirements of Article III standing, without which this court would not have jurisdiction to decide this case.

Great Lakes now moves to dismiss the complaint for lack of standing, contending that Groshek has not alleged a concrete injury. Dkt. 53. Groshek opposes Great Lake's motion and he moves for final approval of class action settlement and final certification. Dkt. 61. Great Lakes' motion comes awfully late in the case, but because it goes to the court's jurisdiction, the court must decide it on the merits. For reasons given below, the court concludes that Groshek has not alleged a concrete injury. The court will grant Great Lakes' motion and dismiss the case for lack of subject matter jurisdiction.

ALLEGATIONS OF FACT

According to Groshek's complaint, Dkt. 1, Groshek applied for a job with Great Lakes in 2014. During an interview for the position, Great Lakes asked him to sign a two-sided document: one side was titled "Disclosure and Release of Information Authorization," and the other side was titled "Great Lakes Higher Education Corporation and Affiliates (Great Lakes) Applicant Disclosure of Criminal Conviction History." Great Lakes then acquired a consumer report on Groshek from Verifications, Inc., a consumer reporting agency.

Groshek filed suit against Great Lakes, contending that it willfully violated the FCRA by procuring a consumer report on Groshek without providing Groshek a clear and conspicuous written disclosure

that a consumer report may be obtained for employment purposes in a document consisting solely of the disclosure, as required by 15 U.S.C. § 1681b(b)(2)(A)(i). Specifically, the disclosure "included a liability release/waiver and other extraneous information." Dkt. 1, ¶ 28. It was also "included . . . with a plethora of other information and documents provided at the same time." *Id.* ¶ 46. Because of this procedural violation, Groshek argues that he is entitled to statutory and punitive damages.

In March 2016, Groshek and Great Lakes jointly moved for preliminary approval of a class action settlement and conditional class certification, Dkt. 43, which the court granted, Dkt. 46. The final fairness hearing concerning the settlement is scheduled for October 14.

ANALYSIS

On Great Lakes' motion to dismiss, the court accepts Groshek's well-pleaded factual allegations as true and draws all reasonable inferences from those facts in his favor. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003). But Groshek "bears the burden of establishing" the three elements of Article III standing: injury in fact, causation, and redressability. *Id.* At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

The only standing element at issue is injury in fact. "To establish injury in fact, [Groshek] must show that he . . . suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and

'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The *Spokeo* decision focused most particularly on the "concreteness" requirement, which the Court distinguished from the requirement of "particularization." A concrete injury is one that is real. And a concrete injury does not automatically flow from every statutory violation, because sometimes there might be some procedural violation which causes no real harm to the plaintiff. *Id.* at 1549. However, in some circumstances, when a risk of specific harm flows more or less directly from the statutory violation, then the plaintiff need not show any harm beyond the violation of the statute.

The statute at issue in *Spokeo* was the FCRA, the same statute at issue here. The *Spokeo* court remanded the case because the lower courts had not adequately considered whether the plaintiff in that case had suffered a concrete harm when Spokeo, as a consumer reporting agency under the FCRA, disclosed certain false information about the plaintiff. The *Spokeo* decision thus rules out the idea that the FCRA is a statute so directly tied to a risk of real harm that a plaintiff need only show the statutory violation without pleading any other concrete injury. So the question for this court is whether Groshek has pleaded concrete injury beyond the bare statutory violation. Based on the court's review of the complaint, the court concludes that he has not.

Groshek alleges that Great Lakes failed to provide the statutorily prescribed notice about its intent to obtain a consumer report under the FCRA. That is all. Groshek contends that Great Lakes' acquisition of his

consumer report implicates his privacy interest. But Groshek does not allege that he did not know that Great Lakes was seeking to acquire a consumer report. He does not allege that would not have granted permission for Great Lakes to acquire a consumer report. He does not allege that Great Lakes disclosed the report to anyone else. *See also Groshek v. Time Warner Cable, Inc.*, No. 15-cv-157, 2016 WL 4203506, at *2-3 (E.D. Wis. Aug. 9, 2016) (rejecting Groshek's privacy-interest argument in a nearly identical lawsuit and noting that "[h]e has not alleged that the defendant released the information in the report to other people, causing him embarrassment or damaging his credit [or] that the defendant used the consumer report against him in any way"). The deficiencies in the notice did not cause any injury to Groshek's privacy interests.

Groshek also argues that he suffered an "informational injury." In its prototypical form, an informational injury is caused by the violation of a statute that requires the disclosure of information, such as the Freedom of Information Act. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). Groshek cites cases in which the informational injury concept has been applied to claims under the FCRA, *see, e.g.*, *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 123 F. Supp. 3d 810, 817 (E.D. Va. 2015), but those cases pre-date *Spokeo*. Such an expansive view of "informational injury" is hard to square with *Spokeo*'s reasoning. If the statutorily defective notice

given to Groshek counts as a concrete informational injury, then it is hard to imagine a statutory violation that would not cause some form of informational injury. The court concludes that receiving a statutorily defective notice is not, in itself, a concrete injury. And Groshek has alleged no other harm.

Groshek suggests that the court is bound to follow *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014), which requires the court to deny Great Lakes' motion. Sterk's personal information had been disclosed by the defendant to a third party, and the Seventh Circuit concluded that that disclosure constituted an injury in fact sufficient to confer standing. *Id.* at 623. The *Sterk* court recognized that Congress could not lower the threshold for standing below that required by the Constitution, even though Congress has the power to enact statutes that create legal rights, without which standing could not exist. *Id.* In other words, some legal violation is a necessary prerequisite to standing, but it is not alone sufficient. There is nothing in *Sterk* that requires the court to conclude that Groshek has suffered concrete injury sufficient to confer standing.

The court understands Groshek's frustration, but his timing-related arguments are futile. A motion to challenge subject-matter jurisdiction under Rule 12(h)(3) may be made at any time and requires the court to dismiss the action if it finds it lacks jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). "[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*,

74 U.S. 506, 514 (1868). This court lacks jurisdiction and thus "cannot proceed at all." *Id.*

ORDER

IT IS ORDERED that:

1. Defendant Great Lakes Higher Education Corporation's motion to dismiss for lack of subject matter jurisdiction, Dkt. 53, is GRANTED.

2. Plaintiff Cory Groshek's motion for final approval of class action settlement and final certification of Rule 23 settlement class, Dkt. 61, is DENIED.

3. The clerk of court is directed to close this case.

Entered October 4, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

15-cv-143-jdp

[Filed October 14, 2016]

CORY GROSHEK,
And all others, similarly situated,

Plaintiff,

v.

GREAT LAKES HIGHER EDUCATION CORPORATION,

Defendant.

JUDGMENT IN A CIVIL CASE

This action came before the court for consideration with District Judge James D. Peterson presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Great Lakes Higher Education Corporation against plaintiff Cory Groshek and all others similarly situated dismissing this case for lack of subject matter jurisdiction.

s/ J. Smith, Deputy Clerk — 10/04/2016
Peter Oppeneer, Clerk of Court — Date

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 15-C-157

[Filed August 9, 2016]

CORY GROSHEK, and all others similarly situated,	)
Plaintiff,	)
-vs-	)
TIME WARNER CABLE, Inc.	)
Defendant.	)

DECISION AND ORDER GRANTING MOTION TO LIFT THE STAY, *NUNC PRO TUNC* TO MAY 25 (DKT. NO. 54); GRANTING DEFENDANT'S MOTION TO DISMISS (DKT. NO. 55); DENYING PLAINTIFF'S MOTION TO SEAL (DKT. NO. 61); AND DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE SUR-REPLY AS MOOT (DKT. NO. 66)

On March 29, 2016, the Honorable Rudolph T. Randa stayed the proceedings in this case pending a ruling from the Supreme Court in Spokeo, Inc. v. Robins (Dkt. No. 53); the Supreme Court issued its

decision just short of two months later, on May 16. Spokeo, Inc. v. Robins, 134 S. Ct. 1540 (2016). Days later, the plaintiffs moved to lift the stay. Dkt. No. 54. At around the same time, the defendant moved to dismiss the complaint for lack of standing in light of Spokeo. Dkt. No. 55.

The named plaintiff also has asked the court to seal certain documents. Dkt. No. 61. The defendant opposed that motion, Dkt. No. 62, the plaintiff filed a reply, Dkt. No. 65, and on July 19, 2016, the defendant filed a motion requesting leave to file a sur-reply, Dkt. No. 66.

On August 2, the case was reassigned to this court.

A. Plaintiff's Motion to Lift Stay (Dkt. No. 54)

The plaintiffs' May 24, 2016 motion to lift the stay simply noted that the Supreme Court had decided Spokeo, and thus that there was no longer any reason to delay moving forward. Dkt. No. 54. The defendant objected, arguing that the court ought to keep the stay in place until it could decide the defendant's May 27, 2016 motion to dismiss. Dkt. No. 58. The defendant argued that the motion to dismiss was based on the argument that the court does not have subject matter jurisdiction; if that turned out to be true, the court would not have jurisdiction to allow the parties to proceed with discovery or anything else. Id. at 58.

The court notes with interest that, despite the fact there was—and arguably until this order, continued to be—a stay in place, the defendant filed a motion to dismiss; the plaintiff filed a motion to seal; the defendant filed a motion to file a sur-reply; and the parties briefed all of these motions. A "stay" generally means that the parties should file nothing further in

the litigation as long as the stay is in effect. The fact that a stay was in place does not appear to have prevented the parties from filing numerous documents while the stay was in place.

Bowing to the inevitable, the court will grant the motion to lift the stay, *nunc pro tunc* to May 25, 2016. Dkt. No. 54.

B. **Defendant's Motion to Dismiss (Dkt. No. 55)**

Federal Rule of Civil Procedure 12(b)(1) provides for a party to bring a motion to dismiss for lack of standing. In considering such a motion, the court must "accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor." Lee v. City of Chi., 330 F.3d 456, 468 (7th Cir. 2003). The plaintiff, however, "as the party invoking federal jurisdiction, bears the burden of establishing the required elements of standing," including (i) injury in fact, (ii) causation, and (iii) redressability. Id. On a factual challenge to subject matter jurisdiction, district courts "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Evers v. Astrue, 536 F.3d 651, 656-57 (7th Cir. 2008).

To establish injury in fact, a plaintiff must show that he or she suffered an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In Spokeo, the Court emphasized the distinction between concreteness and particularization.

The latter is "necessary to establish injury in fact, but it is not sufficient. . . . We have made it clear time and again that an injury in fact must be both concrete *and* particularized." Spokeo, 136 S. Ct. at 1548 (emphasis in original). A concrete injury must be "'*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term – 'real,' and not 'abstract.' Concreteness, therefore, is quite different from particularization." Id.

The Spokeo Court went on to clarify that concrete is not "necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." Id. at 1549. In this context, the judgment of Congress is "important," but "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Id. A "bare procedural violation, divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III." Id.

The named plaintiff alleges that he applied for employment with the defendant, and that in the course of considering his application, the defendant obtained a consumer report on him "without first providing [him] a clear and conspicuous written disclosure, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes." Dkt. No. 1 at 4. He alleges that this failure to disclose violated §1681(b)(2)(A)(i) of the Fair Credit

Reporting Act. Id. While the complaint alleges, in several places, that the defendant's action violated the Fair Credit Reporting Act, it makes no mention of any concrete harm the plaintiff (or any putative class members) suffered as a result of the alleged violation.

In his response to the defendant's motion to dismiss, the plaintiff argues that the defendant's alleged violation of the FDCPA—obtaining consumer information about him without giving him a separate document warning him that it was going to do so—"invaded [the plaintiff's] privacy—a clear form of concrete harm that [the defendant] simply ignores in its motion." Dkt. No. 60 at 10. He also argued that the defendant unlawfully "sought to obtain *his* private information, and then it obtained *his* personal information as a result of the unlawful permission it received." Id. at 13. The named plaintiff argues that these two assertions constitute the kind of concrete, particularized injury Spokeo mandated as necessary to confer standing. Id.

This court, and others, have rejected this argument. In Gubala v. Time Warner Cable, Inc., Case No. 15-cv-1078, 2016 WL 3390415 at *4 (E.D. Wis. June 17, 2016), this court held that while alleging a statutory violation satisfies the *particularized injury* prong of the injury-in-fact requirement discussed in Spokeo and other cases, it did not, in and of itself, demonstrate a concrete harm. In Gubala, the plaintiff alleged that the defendant had failed to abide by the Cable Communications Policy Act's requirement that cable companies destroy personally identifiable information after a customer has terminated service. Id. at *1. The court found that the fact that the defendant had failed

to destroy the information did not constitute concrete harm.

> [The plaintiff] does not allege that the defendant has disclosed his information to a third party. Even if he had alleged such a disclosure, he does not allege that the disclosure caused him any harm. He does not allege that he has been contacted by marketers who obtained his information from the defendant, or that he has been the victim of fraud or identity theft. He alleges only that the CCPA requires cable providers to destroy personal information at a certain point, and that the defendant hasn't destroyed his.

Id. at 4.

The same is true in this case. The plaintiff has not alleged that he did not get the job he applied for as a result of the consumer report the defendant obtained. He has not alleged that the defendant released the information in the report to other people, causing him embarrassment or damaging his credit. He has not alleged that the defendant used the consumer report against him in any way. In fact, in his October 7, 2015 deposition, when defense counsel asked him if he was aware of anything in that might entitle him to actual damages, the plaintiff responded, "I do not know of any actual damages that I am claiming nor do I believe I've ever actually claimed actual damages against [the defendant] nor do I intend to." Dkt. No. 59-2 at 18 (deposition page 115), lines 9-11. In short, he has not alleged a concrete harm. See also, Smith v. The Ohio State Univ., Case No. 15-cv-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016) (no concrete injury based on

allegation that defendant violated the FCRA by including extraneous information, such as a liability release, in the disclosure and authorization).

Because the plaintiff has not alleged a concrete harm resulting from the defendant's alleged violation of the FDCPA, the plaintiff does not have standing, and the court must dismiss the case.

C. **Plaintiff's Motion to Seal (Dkt. No. 61)**

The court has established that it does not have subject matter jurisdiction in this case. The court notes, however, that prior to the court reaching this decision, the plaintiff filed a motion asking the court to seal various portions of his deposition transcripts, supplemental answers to discovery, and any other document that might make mention of any settlement agreement between him and "another party." Dkt. No. 61.

On May 27, 2016, the defendant filed a "Notice of Filing." Dkt. No. 59. The notice indicated that the defendant was provisionally filing, under seal, Exhibits 1 and 2 to the declaration of Anthony E. Giardino. Id. at 1. Exhibit 1 was the plaintiff's entire deposition transcript. Exhibit 2 was the plaintiff's supplemental answers to the defendant's first interrogatories. Dkt. Nos. 59-2 and 59-3. The defendant explained that it did not believe that the documents contained confidential information. It was filing the documents under seal, it explained, because the plaintiff had attempted, unilaterally and in the absence of an agreed protective order, to deem the documents "confidential" and "attorneys' eyes only (by means of an e-mail, citing Civil Local Rule 26(e) of the Eastern District. Dkt. No.

59 at 1; Dkt. No. 59-1 at 3. In the notice, the defendant pointed out that pursuant to Civil Local Rule 79(d)(7), the plaintiff had twenty-one days from the date the notice was filed to file a motion to seal, if he wanted to keep the documents under seal. Dkt. No. 59 at 1.

The plaintiff filed the instant motion to seal on June 17, 2016. Dkt. No. 61. The motion identifies specific pages in the deposition and the supplemental answers which the plaintiff wishes to keep under seal. Id. at 1. The plaintiff also attached to the motion a draft protective order.[1]

As grounds for sealing, the plaintiff states that the pages he seeks to keep sealed "concern confidential settlement agreements reached between [the plaintiff] and various third-parties." Id. at 2. He indicates that if the confidentiality of these documents were violated, the result would be a "serious financial burden" on the plaintiff. Id. He states that "[o]f principal concern, these agreements require that [the plaintiff] keep confidential the terms of the settlement, the fact of settlement, negotiations related to settlement, and documents related to those settlement negotiations." Id. at 1-2. He indicates that "the disclosure" of the documents would subject the plaintiff to legal action for

---

[1] Attaching a protective order to a motion to seal is putting the cart before the horse, pursuant to this court's local rules. Civil Local Rule 26(e) does not allow a party to "deem" a document confidential by saying so in an e-mail to opposing counsel. Rather, it explains the process for obtaining a protective order—the proper method, in this district, for protecting confidential documents in the discovery process. Rule 26(f) provides for filing documents under seal, including "the filing of information covered by a protective order."

breach of contract. Id. at 3. He also argues that the documents relate to private agreements between the plaintiff and other parties, outside of the context this case. Id.

As an initial matter, the court looked at some of the pages that the plaintiff alleges made reference to settlement negotiations and settlement agreements. The court was hard-pressed, on some pages, to find reference to anything related to settlements—the plaintiff's or anyone else's. Other pages do refer to the plaintiff making settlement demands on some companies, and to settling with some companies.

The plaintiff's argument in support of maintaining any of these documents under seal, however, is not persuasive. First, assuming that the plaintiff has entered into settlement agreements that prohibit him from disclosing the existence or terms of those agreements, it is not clear how the plaintiff has violated those agreements. It is the *defendant* who filed the documents, not the plaintiff. The plaintiff told the defendant in the e-mail at Dkt. No. 59-1 that he intended anything he said in his deposition or supplemental responses to be confidential, and he's filed the instant motion with this court. He has not publicly disclosed the information; he has *opposed* the disclosure of the information. So it is not clear how someone else's disclosure of information that he sought to keep private would constitute a violation of any agreements to which the plaintiff may be a party with entities not involved in this suit.

Further, the plaintiff's argument ignores the fact that he came to the court—a public forum—and instituted this lawsuit. He sued the defendant on a

cause of action for which he has sued a number of other companies, and yet he argues that those other suits are irrelevant to this one. In essence, he indicates that while he wants to be able to file suit against the defendant in federal court, he wants to prevent the defendant from enquiring into similar suits that he has filed against other companies for the same alleged conduct. That is not an appropriate basis for the court to seal documents from public view.

The court will deny the plaintiff's motion to seal.

D. **Defendant's Motion for Leave to File Sur-Reply (Dkt. No. 66)**

Finally, after the parties had fully briefed the motion plaintiff's motion to seal, the defendant filed a motion asking the court for leave to file a sur-reply. Dkt. No. 66. This court grants such leave only rarely; the local rules provide for a motion, a response and a reply, and in the vast majority of cases, this is sufficient.

Given the court's decision on the motion to dismiss, and on the motion to seal, the court will deny the motion for leave to file a sur-reply as moot.

E. **Conclusion**

The court **GRANTS** the plaintiff's motion to lift the stay, *nunc pro tunc* to May 25, 2016. Dkt. No. 54.

The court **GRANTS** the defendant's motion to dismiss. Dkt. No. 55. The court **ORDERS** that the complaint is dismissed for lack of subject matter jurisdiction, effective immediately. The clerk will enter judgment accordingly.

The court **DENIES** the plaintiff's motion to seal. Dkt. No. 61.

The court **DENIES AS** MOOT the defendant's motion for leave to file a sur-reply. Dkt. No. 66.

Dated in Milwaukee, Wisconsin this 9th day of August, 2016.

BY THE COURT:

s/_____
HON. PAMELA PEPPER
United States District Judge

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 15-cv-157-PP

[Filed August 9, 2016]

Cory Groshek, *Plaintiff*	)
v.	)
Time Warner Cable, Inc. *Defendant*	)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

* * *

X other: the complaint is dismissed for lack of subject matter jurisdiction, effective immediately.

This action was *(check one)*:

* * *

X decided by Judge Pamela Pepper on the defendant's motion to dismiss filed on May 27, 2016.

Date: August 9, 2016 *CLERK OF COURT*

/s/ Kristine G. Wrobel_____

Signature of Clerk or Deputy Clerk

APPENDIX D

Advisory Opinion to Hauxwell (06-12-98)

June 12, 1998

Richard W. Hauxwell, CEO
Accufax Div., Southwest
P.O. Box 35563
Tulsa, OK 74153-0563

Dear Mr. Hauxwell:

Re: Sections 604 and 606 of the Fair Credit Reporting Act

This is in response to your letter asking for clarification of sections 604 and 606 of the Fair Credit Reporting Act ("FCRA"). You note that your company is a consumer reporting agency and that you are asking these questions on behalf of your clients. Your questions are addressed below in the order in which you presented them.

1. Is it safe for us to assume, based on your opinion letter to Mr. Richard Steer, that we can combine the disclosure and release form, which includes applicant identifiers, in one form such as the enclosed sample?

Section 604(b) of the FCRA requires any employer who intends to obtain a consumer report for employment purposes to disclose this to the applicant or employee (in a document that consists solely of the disclosure) and to obtain the applicant or employee's written

permission. As noted in the letter you cited (Steer, 10/21/97), it is our position that the disclosure notice and the authorization may be combined. If they are combined, identifying information (such as date of birth, Social Security number, driver's license number, and current and former addresses) may be included in the form. However, the form should not contain any extraneous information.

While we believe that you may combine the disclosure and authorization (and include identifying information) as you have in the draft form that you included with your letter, we note that your draft disclosure includes a waiver by the consumer of his or her rights under the FCRA. The inclusion of such a waiver in a disclosure form will violate Section 604(b)(2)(A) of the FCRA, which requires that a disclosure consist "solely" of the disclosure that a consumer report may be obtained for employment purposes. Moreover, it is a general principle of law that benefits provided to citizens by federal statute generally may not be waived by private agreement unless Congress intended such a result. Brooklyn Savings Bank v. O'Neill, 324 U.S. 697 (1945). We note that no authorization for a waiver is contained in the FCRA; nor does the legislative history show that Congress intended that consumers should be able to sign away their legal rights under the Act. (1) Accordingly, employers and other users of information covered by the FCRA may not require consumers to waive their rights under the law.

2. Our members would also like further clarification with regard to Section 606 as to when a Summary of Rights should be provided to the applicant. The language of the law is confusing.

Section 606 of the FCRA mandates that specific procedures be followed when an investigative consumer report is requested by an employer or other user who has a permissible purpose to obtain the report. First, Section 606(a)(1)(A) requires any person procuring an investigative consumer report to disclose this fact to the affected consumer not later than three days after the date on which the report was first requested. Second, Section 606(a)(1)(B) requires that the disclosure include a statement of the consumer's right to obtain additional information and a copy of the summary of consumer rights prescribed by the Commission. Finally, Section 606(b) sets out the information that must be disclosed when the consumer requests a disclosure pursuant to Section 606(a)(1)(B).

The issue that you raise concerns exactly at what point the Commission's summary of rights must be sent. The language of Section 606(a)(1)(B) is not entirely clear in mandating that the disclosure "includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section [the nature and scope of the investigation] and the written summary of the rights of the consumer prepared pursuant to section 609(c)." As you can see, the reference to the summary of rights comes after a reference to subpart 606(b), but in a general discussion of the content of the sub-part 606(a)(1)(A) notice.

There are two possible interpretations of this ambiguous language: (1) that Congress intended for the summary to be sent with the initial Section 606(a)(1)(A) notice (that an investigative consumer report has been or may be procured); or (2) that Congress intended that the summary be provided with the subsequent Section 606(b) disclosure of the "nature and scope" of the investigation. The Commission's "Notice to Users of Consumer Reports: Obligations of Users Under the FCRA," (2) states that the summary of rights should be provided with the Section 606(a) notice that an investigative consumer report has been or may be obtained. However, because the statutory language may be interpreted to require that the summary be sent with the subsequent Section 606(b) disclosure, it is unlikely that the Commission's staff would recommend any enforcement action if the notice is sent with the Section 606(b) notice instead of the Section 606(a) notice.

3. We would like your opinion regarding end-user organizations which procure criminal and other public record information for employment purposes directly from a federal, state, or county record repository. Would the government repository (agency) providing the information directly to the end-user organization ... requesting the information be considered a consumer reporting agency and subject to the same laws as a privately held consumer reporting agency?

In general, information that is obtained by an employer directly from a federal, state or county record repository is not a "consumer report" because the

repository (such as a courthouse or a state law enforcement agency) is not normally a "consumer reporting agency" and is itself not covered by the FCRA. The attached staff letters (Copple, 6/10/98; Goeke, 6/9/98) discuss this issue in more detail. Therefore, an employer who obtains information directly from a public record source is not subject to the FCRA as to that information. However, because of the fact that information in public record sources may be inaccurate or incomplete, we believe that employers who use this type of information should voluntarily disclose to consumers the nature and substance of any public record information that they rely upon in taking any adverse action. If the information is, in fact, inaccurate or incomplete, the consumer may then take steps to correct the problem.

I hope that this information is helpful to you. The views that are expressed above are those of the Commission's staff and not the views of the Commission itself.

Sincerely,

William Haynes
Attorney
Division of Credit Practices

1. The FCRA is part of the Consumer Credit Protection Act, 15 U.S.C. § 1601. We note that the Truth In Lending Act, which is Subchapter I of the Consumer Credit Protection Act, does permit consumers to waive certain rights.

2. The Commission's notice may be found at 16 C.F.R. § 601, Appendix C (1997).