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What's in a Form? Employment Background Checks Under the Fair Credit Reporting Act

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Note

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EMILY SCACE

For employers, background checks, credit checks, and similar measures are a prudent step to guard against negligent hiring claims and other potential losses that can result from poor hiring decisions. But these practices necessarily require employees to relinquish some of their interests in privacy and may also introduce bias into the hiring process. The Fair Credit Reporting Act (FCRA), which applies to many of these employment screening measures, requires employers to follow certain procedural requirements that seek to ensure that employees and applicants understand the scope of the information that will be sought in a background or credit check, provide informed consent to the disclosure, and have an opportunity to explain or correct the information before an employer takes adverse action.

*While alleged FCRA disclosure and notification deficiencies are a frequent source of litigation between employers and employees, courts have been inconsistent in their approach to evaluating when these procedural issues cross the line into concrete harms. A recent Supreme Court decision, *TransUnion LLC v. Ramirez*, may further narrow applicants' and employees' ability to obtain relief for employers' FCRA missteps.*

This Note argues that although the FCRA's procedural mechanisms leave much to be desired, they serve an important purpose both in protecting individuals' interests in safeguarding their personal information and in lending predictability to employers' hiring practices. Courts, therefore, should avoid taking an overly restrictive approach in evaluating the harms alleged by plaintiffs when making standing decisions that turn on statutory violations of the FCRA. In addition, the FCRA should be strengthened in several key respects to close the gaps left by the statute's procedural rights and bring consistency to the employment screening landscape.

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What's in a Form? Employment Background Checks Under the Fair Credit Reporting Act

EMILY SCACE *

INTRODUCTION

Employers seeking information about prospective and current employees use a variety of methods to learn about their backgrounds, from professional reference checks to criminal background checks to credit checks and beyond.¹ When an employer uses a third-party consumer reporting agency (CRA) to carry out these investigations, the Fair Credit Reporting Act (FCRA)² imposes certain disclosure, authorization, certification, and notification requirements.³ In a nutshell, these requirements seek to ensure that employees and applicants understand the scope of the information that will be sought, provide informed consent to the disclosure, and have an opportunity to explain or correct the information before an employer takes adverse action, such as denying or withdrawing a job offer.⁴

For employers, background checks, credit checks, and similar measures are a prudent step to guard against negligent hiring claims and other potential losses that can result from poor hiring decisions.⁵ But these practices necessarily require employees to relinquish some of their interests in privacy and may also introduce bias into the hiring process that exacerbates existing disparities.⁶ Employees, for the most part, do not have a choice about this trade-off if they wish to be employed. Therefore, transparency into the process and safeguards to ensure its fairness and accuracy are crucial for balancing the interests of employers against those of applicants and employees.

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¹ HR.COM, HOW HUMAN RESOURCES PROFESSIONALS VIEW AND USE BACKGROUND SCREENING IN EMPLOYMENT 7–11 (2019). The report was based on a survey of 2,301 human resources professionals. *Id.* at 11.

² 15 U.S.C. §§ 1681–1681x.

³ *Id.* § 1681b(b)(2)(A), (3)(A).

⁴ *Id.*

⁵ U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT pt. III.B (2012) [hereinafter EEOC ENFORCEMENT GUIDANCE]; Margaret M. Clark, *How to Address Negligent Hiring Concerns*, SOC'Y FOR HUM. RES. MGMT. (Feb. 27, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx>.

⁶ EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at pt. I.

According to the Society for Human Resource Management (SHRM), the number of lawsuits brought under the FCRA has more than doubled since 2009 and continues to increase.⁷ Claims against employers primarily allege violations of disclosure requirements before a background check is run or failure to provide required notice before taking adverse action.⁸

Many lawsuits against employers under the FCRA turn on the question of whether deficiencies in disclosure requirements caused actual harm to the plaintiff or were “bare procedural violation[s]” as characterized in *Spokeo, Inc. v. Robins*.⁹ At the initial stage, the FCRA requires a clear and conspicuous written disclosure to be provided to the employee before an employer may obtain that employee’s consumer report.¹⁰ This document must consist solely of the required disclosure, with no extra information.¹¹ A 2017 case, *Syed v. M-I, LLC*,¹² turned on the question of whether a plaintiff suffered concrete harm from an employer’s inclusion of a liability waiver in the same document as the required disclosure.¹³ The Ninth Circuit held that the employer had committed a willful violation of the FCRA by including the liability waiver, in violation of the “clear statutory language that the disclosure document must consist ‘solely’ of the disclosure.”¹⁴

After the *Syed* decision, the question of when disclosure deficiencies cross the line from procedural violations into concrete harm continues to be litigated in both state and federal courts, with inconsistent results. According to a recent article, the growth in FCRA litigation may be at least partially because “filing these claims has become formulaic and low-cost, high-volume, and profitable” for law firms.¹⁵ But is this trend really driven primarily by law firms’ profit-seeking motives? And are the harms alleged by plaintiffs proportionate to the damages and settlements paid out by defendants in the successful cases? More broadly, is the litigation surrounding alleged FCRA violations providing a remedy that advances the aims of the statute in protecting employees’ interests?

This Note argues that although the FCRA’s procedural mechanisms leave much to be desired, they serve an important purpose both in protecting individuals’ interests in safeguarding their personal information and in lending predictability to employers’ hiring practices. Courts, therefore,

⁷ Roy Maurer, *FCRA Litigation on Track to Reach a New High*, SOC’Y FOR HUM. RES. MGMT. (Dec. 3, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/fcra-litigation-track-reach-new-high.aspx>.

⁸ *Id.*

⁹ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

¹⁰ 15 U.S.C. § 1681b(b)(2)(A)(i).

¹¹ *Id.*

¹² 853 F.3d 492 (9th Cir. 2017).

¹³ *Id.* at 495–96, 499.

¹⁴ *Id.* at 496.

¹⁵ Robert Quackenboss, Matthew Bobb & Alyson Brown, *Employer Compliance Reminders as FCRA Class Actions Rise*, LAW360 (Oct. 23, 2020, 11:11 AM), <https://www.law360.com/articles/1320405/employer-compliance-reminders-as-fcra-class-actions-rise->

should avoid taking an overly restrictive approach in evaluating the harms alleged by plaintiffs when making standing decisions that turn on statutory violations of the FCRA. In addition, the FCRA should be strengthened in several key respects to close the gaps left by the statute's procedural rights and counteract the trend of state and local laws that subject employers to unpredictable and inconsistent obligations depending on where their employees are located.

I. BACKGROUND CHECKS AND THE FAIR CREDIT REPORTING ACT

As its name implies, the FCRA is primarily concerned with ensuring the accuracy and transparency of the type of consumer credit information frequently used to approve and deny loans, insurance, and other financial products.¹⁶ The Congressional findings and statement of purpose make only a single passing reference to the statute's employment ramifications.¹⁷ Yet when an employer conducts a background check on a prospective or current employee, that process comes under the FCRA's umbrella if it entails obtaining a consumer report from a consumer reporting agency.¹⁸ As defined in the statute, a consumer report is not just a traditional credit report, but rather:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected . . . for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance . . . ; employment purposes; or any other purpose authorized under section 1681b of this title.¹⁹

A consumer reporting agency under the FCRA is an entity that "regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."²⁰

These broad definitions mean that almost all background checks conducted for employment purposes—meaning those "used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee"²¹—are covered under the FCRA. Although the statute does not apply when an employer performs an investigation itself

¹⁶ 15 U.S.C. § 1681(b).

¹⁷ "It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, *personnel*, insurance, and other information in a manner which is fair and equitable to the consumer . . ." *Id.* (emphasis added).

¹⁸ *Id.* § 1681b(a)(3)(B).

¹⁹ *Id.* § 1681a(d)(1).

²⁰ *Id.* § 1681a(f).

²¹ *Id.* § 1681a(h).

rather than using the services of a CRA, many types of information about an individual are not practically obtainable by any other means. Moreover, even for information an employer could feasibly investigate on its own, such as work and educational history, the time and effort involved in doing so, particularly for large organizations, mean that it is often more efficient for an employer to outsource the entire process to a CRA.

Certain procedural requirements apply to the background check process. First, before obtaining a consumer report for employment purposes, the individual whose report will be obtained must be given a “clear and conspicuous disclosure . . . in writing” and must “authorize[] in writing . . . the procurement of the report.”²² The disclosure must be a standalone document containing only the disclosure, with no extraneous information.²³ Next, if an employer intends to take adverse action based on the findings in a consumer report, it must provide the affected individual with a copy of the report and a written description of the person’s rights under the FCRA.²⁴ Those rights include the right to obtain a copy of one’s own consumer report and the right to dispute information contained in a report.²⁵ In the employment context, adverse action includes “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.”²⁶

These procedural steps may seem to be mere pro forma requirements, but they are a major source of litigation.²⁷ Given the prevalence of employment-related background checks, this is perhaps not surprising. According to a 2019 report, ninety-six percent of employers conduct one or more types of background screening, with eighty-six percent of respondents indicating that they screen all full-time employees and sixty-seven percent screening all part-time employees.²⁸ Criminal background checks are the most widely used, but many employers also obtain credit information, verify education or prior employment, check professional license status, or evaluate motor vehicle driving records, among other categories of

²² *Id.* § 1681b(b)(2)(A)(i)–(ii).

²³ *Id.* § 1681b(b)(2)(A)(i).

²⁴ *Id.* § 1681b(b)(3)(A)(i)–(ii).

²⁵ *Id.* § 1681g(c)(1)(B)(i), (iii).

²⁶ *Id.* § 1681a(k)(1)(B)(ii).

²⁷ *See, e.g.,* Syed v. M-1, LLC, 853 F.3d 492, 495–96 (9th Cir. 2017) (considering whether inclusion of extra information on a disclosure form caused harm to the plaintiff); Robertson v. Allied Sols., LLC, 902 F.3d 690, 699 (7th Cir. 2018) (finding a concrete injury conferring standing based on an employer’s failure to provide required information before taking adverse action); Walker v. Fred Meyer, Inc., 953 F.3d 1082, 1084 (9th Cir. 2020) (analyzing whether a disclosure may contain an explanation of terminology and considering whether the FCRA provides a right to discuss consumer reports directly with an employer); Grice v. Pepsi Beverages Co., 363 F. Supp. 3d 401, 405 (S.D.N.Y. 2019) (evaluating a class action settlement stemming from alleged violations of FCRA standalone disclosure requirements).

²⁸ HR.COM, *supra* note 1, at 3.

information.²⁹ Fifty-nine percent of employers conduct these background checks only during the hiring process, while twelve percent of employers use background checks at other times because of a legal requirement and eleven percent do so for cause.³⁰

The FCRA is not the only law that imposes limitations on employers' use of background check information. At the federal level, Title VII employment discrimination concerns may be implicated if an employer's use of background check information disproportionately harms members of a protected class.³¹ In addition, a number of states and municipalities have adopted "ban the box" laws, which limit employers' ability to obtain and consider criminal history in the hiring process, along with laws that restrict the use of credit checks in employment decisions.³² Some jurisdictions have adopted counterparts to the FCRA that provide additional protections for applicants and employees or place stricter limits on the types of information a consumer report obtained for employment purposes may contain.³³

II. *SYED* AND ITS AFTERMATH

When *Syed* was decided in 2017, it presented an issue of first impression in the Ninth Circuit: whether the inclusion of extra information—specifically, a liability waiver—on the required disclosure and authorization document violated the FCRA.³⁴ The defendant in *Syed* provided the necessary disclosure and authorization to the plaintiff before obtaining his consumer report, and the disclosures were "clear and conspicuous" as the statute mandates.³⁵ However, the page containing those mandatory elements also included the following provision:

²⁹ *Id.* at 7–11.

³⁰ *Id.* at 5.

³¹ U.S. EQUAL EMP. OPPORTUNITY COMM'N & FED. TRADE COMM'N, EEOC-NVTA-0000-38, BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW (2014).

³² BETH AVERY & HAN LU, NAT'L EMP. L. PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 2–3 (2020). For specific examples of state laws that limit pre-employment credit checks, see, e.g., CONN. GEN. STAT. § 31-51tt(b) (2021) (prohibiting employers from requiring employees and applicants to consent to requests for credit reports with limited exceptions); MD. CODE ANN., LAB. & EMPL. § 3-711(b)–(c) (2021) (prohibiting the use of credit reports or credit history to deny employment to an applicant, to discharge an employee, or to determine an employee's compensation or other employment terms and conditions with limited exceptions); WASH. REV. CODE § 19.182.020(2)(c)(i) (2021) (limiting the use of credit reports for employment purposes to situations in which the information is either required by law or "[s]ubstantially job related" and requiring employers to disclose their reasons for using such information to the affected individual).

³³ Examples include the Colorado Consumer Credit Reporting Act, COLO. REV. STAT. §§ 5-18-101 to -118 (2021), and the California Consumer Credit Reporting Agencies Act, CAL. CIV. CODE §§ 1785.1–.36 (Deering 2021).

³⁴ *Syed v. M-I, LLC*, 853 F.3d 492, 495–96 (9th Cir. 2017).

³⁵ 15 U.S.C. § 1681b(b)(2)(A)(i).

I hereby discharge, release and indemnify prospective employer, PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained from a third party without verification.³⁶

According to the court, that single sentence was sufficient to establish a willful violation of the FCRA.³⁷ By presenting the liability waiver alongside the disclosure and authorization document, the court reasoned, the defendant frustrated the statute's purpose of "guarding a job applicant's right to control the dissemination of sensitive personal information."³⁸ A disclosure and authorization document "focuses the applicant's attention on the nature of the personal information the prospective employer may obtain, and the employer's inability to obtain that information without his consent," explained the court, while "a liability waiver does just the opposite—it pulls the applicant's attention away from his privacy rights protected by the FCRA by calling his attention to the rights he must forego if he signs the document."³⁹

In finding that the defendant violated the FCRA by including the liability waiver with the disclosure and authorization, the *Syed* court examined the underlying purpose of the statutory requirements and considered how the addition of a liability waiver, specifically, acted contrary to that purpose. In other words, the court implied that it was significant that the clause at issue was a liability waiver, which is not just extraneous information with the potential to distract or confuse but arguably an inclusion that directly undermines the goal of obtaining an applicant's informed consent.

In other parts of its analysis, however, *Syed* relies on a more rigid application of the statute's plain language, focusing on the FCRA's requirement that the disclosure document "consist[] *solely* of the disclosure."⁴⁰ The specific exception allowing the authorization to appear on the same document as the disclosure,⁴¹ according to the court, further demonstrates Congress's intent that the disclosure be free from extraneous

³⁶ *Syed*, 853 F.3d at 508.

³⁷ *Id.* at 506.

³⁸ *Id.* at 501–02.

³⁹ *Id.* at 502.

⁴⁰ 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

⁴¹ *Id.* § 1681b(b)(2)(A)(ii) ("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 . . . 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.").

information.⁴² The use of the word “solely” in the disclosure requirement rendered the defendant’s interpretation of the statute “objectively unreasonable,”⁴³ and the court found that “M-I acted in ‘reckless disregard of statutory duty,’” leading to a willful violation of the FCRA.⁴⁴ Under this line of reasoning, the content of the extraneous information is irrelevant; the statute “says what it means and means what it says,”⁴⁵ and a disclosure document that does not “consist[] solely of the disclosure”⁴⁶ is a willful violation of its requirements.

So does the content of extraneous information on a disclosure document matter or not? *Syed* does not provide a definitive answer, at times signaling that the relationship between the substance of the extra information and the FCRA’s underlying purpose affects the severity of the violation and at other times suggesting that the inclusion of *any* information beyond the mandatory disclosure and authorization is equally problematic. The Ninth Circuit returned to this question in *Gilberg v. California Check Cashing Stores, LLC*, a 2019 case that examined whether an employer’s inclusion of disclosure statements required by various states along with the required FCRA disclosure violated the standalone document requirement.⁴⁷ Affirming its holding in *Syed*, the court held that the state disclosures were “extraneous information . . . as likely to confuse as [they are] to inform” and found a violation of the FCRA.⁴⁸ The *Gilberg* court reemphasized that *Syed*’s holding was grounded primarily in the FCRA’s plain language, rather than the specific nature of a liability waiver as opposed to some other piece of extraneous information.⁴⁹ Rejecting the defendant’s argument that its disclosure form should be treated differently from that in *Syed* “because it helps applicants understand their state and federal rights,” the court stated that “purpose does not override plain meaning.”⁵⁰

In 2020, the Ninth Circuit elaborated further on this line of reasoning. In *Walker v. Fred Meyer, Inc.*, a job applicant at a grocery store alleged that the defendant had willfully violated the FCRA by “providing an unclear

⁴² *Syed*, 853 F.3d at 500 (“The two clauses are consistent because the authorization clause is an express exception to the requirement that the document consist ‘solely of the disclosure.’”).

⁴³ *Id.* at 504.

⁴⁴ *Id.* at 506 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007)).

⁴⁵ *Id.* at 507 (citing *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016)).

⁴⁶ 15 U.S.C. § 1681b(b)(2)(A)(i).

⁴⁷ *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1171 (9th Cir. 2019). The disclosure form contained seven separate disclosure statements directed at residents of California, New York, Maine, Oregon, Washington, Minnesota, and Oklahoma. *Id.* at 1172–73. The statements detailed the rights of applicants and employees under various state laws to receive copies of their background check information, among other provisions. *Id.*

⁴⁸ *Id.* at 1176.

⁴⁹ *Id.* at 1175.

⁵⁰ *Id.*

disclosure form encumbered by extraneous information.”⁵¹ The information included in the *Walker* disclosure was more extensive than *Syed*’s single-sentence liability waiver, consisting of “several disclosure and acknowledgement forms, including two documents concerning an investigation of his background.”⁵² The plaintiff consented to the disclosure but later alleged that the documents were confusing and that he was “unable meaningfully to evaluate and understand the nature of the report that Fred Meyer intended to obtain about him.”⁵³

The court’s decision in *Walker* reiterated its stance in *Syed* and *Gilberg*, emphasizing that the FCRA requires “that a disclosure form contain nothing more than the disclosure itself.”⁵⁴ But having established that, the court turned to the question of “what language counts as part of the ‘disclosure’ itself” and held that a disclosure may include some “concise explanation,” such as a definition of the term “consumer report,” a description of how such a report will be obtained, and an explanation of the employment purposes for which it may be used.⁵⁵ Allowing this additional context, the court found, “would further the purpose of the disclosure by helping the consumer understand the disclosure.”⁵⁶ Applying this standard, the court then found that of the five paragraphs that made up the disclosure document at issue,

⁵¹ *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1084, 1086 (9th Cir. 2020).

⁵² *Id.* at 1084. The language of the disclosure read as follows:

We ([t]he Kroger family of companies) will obtain one or more consumer reports or investigative consumer reports (or both) about you for employment purposes. These purposes may include hiring, contract, assignment, promotion, reassignment, and termination. The reports will include information about your character, general reputation, personal characteristics, and mode of living.

We will obtain these reports through a consumer reporting agency. The consumer reporting agency is General Information Services, Inc. GIS’s address is P.O. Box 353, Chapin, SC 29036. GIS’s telephone number is (866) 265-4917. GIS’s website is at www.geninfo.com.

To prepare the reports, GIS may investigate your education, work history, professional licenses and credentials, references, address history, social security number validity, right to work, criminal record, lawsuits, driving record and any other information with public or private information sources.

You may inspect GIS’s files about you (in person, by mail, or by phone) by providing identification to GIS. If you do, GIS will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification.

If GIS obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation performed.

Id. at 1084–85.

⁵³ *Id.* at 1085.

⁵⁴ *Id.* at 1087.

⁵⁵ *Id.* at 1088–89.

⁵⁶ *Id.* at 1089.

the first three paragraphs were acceptable, but the final two paragraphs, which detailed applicants' rights to inspect the consumer reporting agency's files about them, exceeded the scope of a permissible FCRA disclosure and violated the standalone disclosure requirement.⁵⁷ Again applying the logic of *Syed*, the *Walker* court found that the inclusion of this language had the potential to distract an applicant by “pull[ing] the applicant's attention away from his privacy rights protected by the FCRA by calling his attention to the rights' that he has to inspect GIS's files.”⁵⁸

Unlike the liability waiver in *Syed*, and like the state disclosures at issue in *Gilberg*, the extraneous information in *Walker* was not directly contrary to the purpose of the FCRA's disclosure requirements; indeed, the court found it likely that the language was “included in good faith in order to provide additional useful information about an applicant's rights.”⁵⁹ Nevertheless, the court found the risk of distraction and confusion to be too high, and the information contained in the two paragraphs at issue to be too remote from the FCRA's required disclosures, to allow it to fall under the umbrella of permissible “concise explanation.”⁶⁰ Unlike in *Syed*, however, the court in *Walker* did not find the defendant's violation to be willful.⁶¹ A straightforward application of *Syed*'s logic—its emphasis on the FCRA's language and the importance of the term “solely”—would seem to suggest that the defendant's actions in *Walker* ran equally afoul of its statutory duty by including extraneous information in its disclosure documents. But the *Walker* court declined to take that approach. Although the decision in *Walker* does not state as much, the court seems less inclined to take a punitive approach against a defendant it views as acting in good faith, even if its efforts technically violated the FCRA's standalone disclosure requirement.

III. SPOKEO AND INTANGIBLE INJURIES

Underlying the analysis in *Syed*, *Gilberg*, and *Walker* is an attempt to connect the statutory violation committed by an employer that uses a noncompliant form with an actual harm suffered by the plaintiff. Without this connection, a deficient form is likely to fit the definition, established in *Spokeo v. Robins*, of a “bare procedural violation” that is insufficient to confer Article III standing in federal court.⁶² *Spokeo* also concerned the FCRA, but outside of the employment context. The plaintiff in *Spokeo* alleged that the defendant, a people search engine, had disseminated inaccurate information about his marital status, age, employment status,

⁵⁷ *Id.* at 1090–91.

⁵⁸ *Id.* at 1090 (quoting *Syed v. M-I, LLC*, 853 F.3d 492, 502 (9th Cir. 2017)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1088–91.

⁶¹ *Id.* at 1090.

⁶² *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1549 (2016).

income, and education level, in violation of the FCRA's requirement that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy."⁶³ Writing for the 6-2 majority,⁶⁴ Justice Alito explained that although Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,"⁶⁵ that power is not absolute. "Congress's 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," and a concrete injury is necessary "even in the context of a statutory violation."⁶⁶ The decision noted that "[a] violation of one of the FCRA's procedural requirements may result in no harm," specifically pointing to a failure to provide a required notice as an example of a technical violation that would likely be insufficient, by itself, to establish standing.⁶⁷

But despite the more demanding test for statutory injuries articulated in *Spokeo*, the Court did not hold that the plaintiff necessarily lacked standing as a matter of law. Instead, the majority found that the Ninth Circuit had engaged in an incomplete analysis of "the distinction between concreteness and particularization" and had failed to address the question of "whether the particular procedural violations alleged in this case entail[ed] a degree of risk sufficient to meet the concreteness requirement."⁶⁸ Notably, the Court "[took] no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct."⁶⁹ Indeed, on remand, the Ninth Circuit, analyzing the concreteness of the plaintiff's alleged injuries as the Supreme Court directed, found that the plaintiff had met his burden to establish standing; the Supreme Court declined to grant certiorari to that decision.⁷⁰

⁶³ *Id.* at 1544–46; 15 U.S.C. § 1681e(b).

⁶⁴ *Spokeo* was decided in May 2016, approximately three months after the death of Justice Antonin Scalia and prior to the appointment of Justice Neil Gorsuch. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 15, 2021). Thus, when the decision was issued, the Court consisted of only eight Justices. *Spokeo*, 136 S. Ct. at 1544; *Justices 1789 to Present*, *supra*.

⁶⁵ *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1550.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018) ("We are satisfied that Robins has alleged injuries that are sufficiently concrete for the purposes of Article III. . . . [W]e previously determined that the alleged injuries were also sufficiently particularized to Robins and that they were caused by Spokeo's alleged FCRA violations and are redressable in court. . . . The Supreme Court did not question those prior conclusions, and we do not revisit them now. Robins has therefore adequately alleged the elements necessary for standing.").

In assessing whether the plaintiff had proven a concrete injury, the Ninth Circuit analyzed the ways in which intangible injuries can constitute an injury in fact.⁷¹ Central to this inquiry are two questions: “whether the statutory provisions at issue were established to protect [the plaintiff’s] concrete interests (as opposed to purely procedural rights), and if so, . . . whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.”⁷² In justifying its decision, the court “ha[d] little difficulty concluding that [the] interests protected by FCRA’s procedural requirements are ‘real,’ rather than purely legal creations.”⁷³ Pointing to the importance of the information contained in consumer reports in a variety of contexts, including employment, the court emphasized that “the very existence of inaccurate information” in a credit report can pose a risk to a person’s livelihood and “conclude[s] that the FCRA procedures at issue in this case were crafted to protect consumers’ (like Robins’s) concrete interest in accurate credit reporting about themselves.”⁷⁴

Not “every minor inaccuracy” will result in harm, the court noted, opining that “the [Supreme] Court gave little guidance as to what varieties of misinformation should fall into the harmless category.”⁷⁵ Nevertheless, the Ninth Circuit found that Robins had clearly established the type of concrete harm the FCRA sought to prevent. “It does not take much imagination to understand how inaccurate reports on such a broad range of material facts about Robins’s life could be deemed a real harm,” the court explained.⁷⁶ “For example, Robins alleged that he is out of work . . . but that Spokeo’s inaccurate reports have ‘caused actual harm to [his] employment prospects’ by misrepresenting facts that would be relevant to employers, and that he suffers from ‘anxiety . . . about his diminished employment prospects.’”⁷⁷ Those facts on their own were sufficient to grant Article III standing without the need to prove “*additional* concrete harm as well (such as the loss of a specific job opportunity).”⁷⁸

The *Spokeo* decision has led to a significant amount of confusion surrounding the issue of concrete and particularized harms for intangible injuries.⁷⁹ Professor Jon Romberg has argued that the court’s two examples

⁷¹ *Id.* at 1112–13.

⁷² *Id.* at 1113.

⁷³ *Id.* at 1114.

⁷⁴ *Id.* at 1114–15.

⁷⁵ *Id.* at 1116–17.

⁷⁶ *Id.* at 1117.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1118.

⁷⁹ See Jon Romberg, *Trust the Process: Understanding Procedural Standing Under Spokeo*, 72 OKLA. L. REV. 517, 520 (2020) (discussing confusion regarding procedural standing following the *Spokeo* decision and proposing a framework to clarify the issue); Jackson Erpenbach, Note, *A Post-Spokeo Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 473 (2019) (arguing that *Spokeo* led to inconsistent and arbitrary results in later cases).

of procedural violations unlikely to result in harm—an incorrect zip code and a defective notice process when a credit report contains no inaccuracies—are “mistaken on their own terms” and lend themselves to misinterpretation with the potential to “sharply curtail the possibility of judicial redress for claimants under process-heavy statutes, including consumers.”⁸⁰ The FCRA, of course, is precisely the type of process-heavy statute that falls under this umbrella.

Romberg further contends that there are distinct categories of procedural rights created by Congress, with each category implicating a particular set of standing principles depending on Congress’s intent.⁸¹ *Spokeo*, Romberg argues, concerns “instrumental rights against private parties,” which are “intended to protect some distinct interest other than the denial of the right itself.”⁸² In the case of the FCRA, the “distinct interests” implicated would presumably include an individual’s interests in controlling the dissemination of personal information (a privacy interest), ensuring the accuracy of that information (a reputational interest), and consenting to its uses for specific purposes when engaged in activities such as applying for credit or seeking employment. The various procedural mechanisms in the statute, including the notice and disclosure requirements that employers must follow when conducting background checks, are not ends in themselves, but are—at least theoretically—all in service of those core interests. As Romberg points out, Congress may choose a procedural mechanism to protect a given interest rather than protecting the interest directly because it may be difficult to prove certain injuries or because “it believes the instrumental right is a necessary and proper means of prophylactically preventing members of a group from suffering the target injury, rather than simply affording compensation for the subset of group members who file suit and are able to prove the target injury has occurred.”⁸³

But is this assumption correct? Can a procedural mechanism like those in the FCRA effectively substitute for more direct protection of a target interest? A number of commentators have argued that, at least in the specific context of the FCRA, procedure does not adequately accomplish this goal.⁸⁴ Noam Weiss, for example, argued in 2012 that because “the FCRA is not a strict liability statute,” violations are difficult to prove, and “while private

⁸⁰ Romberg, *supra* note 79, at 546.

⁸¹ *Id.*

⁸² *Id.* at 570–71 (emphasis omitted).

⁸³ *Id.* at 573.

⁸⁴ See Noam Weiss, Note, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 274–75 (2012) (detailing courts’ struggles to meaningfully enforce the FCRA and impose liability for violations). See also Alexandra P. Everhart Sickler, *The (Un)Fair Credit Reporting Act*, 28 LOY. CONSUMER L. REV. 238, 241–42 (2016) (arguing that the FCRA’s procedural enforcement mechanisms are flawed and should be redesigned to accomplish its goal of ensuring accurate consumer reports).

litigation may have been intended as a way to enforce the FCRA's goal of ensuring accuracy in the reporting industry, the reality of engaging in protracted litigation often presents an insurmountable hurdle for consumers seeking relief, and even then, only after they have been injured."⁸⁵ As a remedy, Weiss proposed amending the FCRA to require that credit reports be provided to an individual before they are disseminated to an employer.⁸⁶ But while this step could decrease the risk of harm resulting from the dissemination of a report containing inaccuracies, it, too, is a procedural mechanism that presumably would not escape *Spokeo*'s requirements for a concrete and particularized injury.⁸⁷ It is not difficult to imagine courts struggling to determine whether the dissemination of a credit report to a prospective employer without first providing the report to the applicant resulted in concrete harm to a plaintiff. And because employers, when making employment decisions, must typically narrow a large pool of applicants to hire only a small number of individuals, it is exceedingly difficult to establish that any single factor—such as an erroneous background report—was dispositive in an employer's decision *not* to hire a particular applicant. Thus, it would be an exceptional case in which a plaintiff would be able to prove a causal connection between a violation of this proposed requirement and a concrete, particularized injury to the interests protected under the FCRA.

Returning to the issue of disclosure, *Syed*, *Gilberg*, and *Walker* all emphasize the importance of informed consent to the FCRA's protections.⁸⁸ But does a job applicant presented with a background check disclosure and authorization really have the agency the *Syed* court suggests "to control the dissemination of sensitive personal information"?⁸⁹ The decisions do not directly address his question, seeming to take for granted that the FCRA's disclosure and authorization procedure, when followed correctly, accomplishes this purpose. But while it may be literally true that an employer must obtain consent from an employee before obtaining a consumer report, in most cases, an employee who withholds this consent is effectively deciding to forego that particular employment opportunity. Indeed, the plaintiff in *Walker* seemed to be aware of this dilemma; as the decision states, he gave his consent to the disclosures "in order to proceed with this employment opportunity," despite his claimed lack of understanding of precisely what he was consenting to.⁹⁰ Nor does the statute itself address this issue. The FCRA requires an

⁸⁵ Weiss, *supra* note 84, at 274–75.

⁸⁶ *Id.* at 276.

⁸⁷ Weiss, of course, was writing four years before *Spokeo* was decided. *Id.* at 271; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1540 (2016).

⁸⁸ *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1173 (9th Cir. 2019); *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1086 (9th Cir. 2020).

⁸⁹ *Syed*, 853 F.3d at 502.

⁹⁰ *Walker*, 953 F.3d at 1085.

employer to provide a copy of an individual's consumer report and a written description of the person's rights under the FCRA if it intends to take adverse action based on the results of its investigation, but the Act is silent on the question of how an employer may treat an applicant who refuses to consent to the investigation in the first place.⁹¹

State and local laws sometimes attempt to provide more direct protection to applicants' and employees' FCRA-linked interests. For example, a growing number of jurisdictions have enacted criminal background screening laws that go beyond "ban the box" (i.e., prohibiting employers from asking applicants to disclose criminal history at the application phase) and require employers that wish to conduct criminal background checks to wait to do so until after they have extended a conditional job offer to an individual.⁹² Some of these statutes also require that an employer that intends to withdraw an offer based on the findings in a background check justify its decision using specified factors to establish a legitimate business reason that an applicant's criminal or credit history is a valid reason for declining to hire an individual.⁹³ These state and local laws take an important step toward safeguarding the rights the FCRA purports to protect, but, of course, they cannot confer standing in federal court unless there is an independent basis for subject matter jurisdiction, such as diversity.⁹⁴

The proliferation of state and local laws affecting background screening also poses complications for multistate employers. And with the rapid growth of remote work, many more employers may find themselves in this category, as many of these laws base applicability on where the employee performs work rather than where the employer's physical facilities are located. Indeed, the disclosure form at issue in *Gilberg* effectively illustrates the compliance maze many employers must navigate, with its provisions for applicants or employees based in New York, Maine, Oregon, Washington, California, Minnesota, and Oklahoma.⁹⁵ While the employer attempted to cover its bases by including all the pertinent state-required information on the form, the Court found that in doing so, it had both contravened the FCRA's standalone disclosure requirement and undermined the clarity

⁹¹ 15 U.S.C. § 1681b(b)(3)(A).

⁹² See, e.g., HAW. REV. STAT. § 378-2.5(b) (2021) (allowing employers to take criminal convictions into account when making employment decisions only after the extension of a conditional employment offer and only when the conviction "bears a rational relationship to the duties and responsibilities of the position"); 820 ILL. COMP. STAT. 75/15(a) (2021) (prohibiting employers from inquiring into an applicant's criminal history until after the individual has been selected for an interview or, if no interview occurs, until extending a conditional employment offer).

⁹³ See, e.g., N.Y. CORRECT. LAW §§ 752-53 (Consol. 2021) (requiring an employer to consider specified factors before denying employment based on an applicant's criminal background).

⁹⁴ See U.S. CONST. art. III, § 2, cl. 1 (limiting federal courts' jurisdiction to cases arising under, inter alia, "the [l]aws of the United States" and "between [c]itizens of different [s]tates").

⁹⁵ *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1172-73 (9th Cir. 2019).

requirement.⁹⁶ In theory, the employer could have separated these disclosures, but it is difficult to see how that step would make a material difference to an employee's ability to effectively parse and understand the information they contained—which is, of course, the underlying goal of the FCRA's disclosure provisions.

But beyond these logistical complications, state and local attempts to provide greater protections surrounding the use of employees' personal information are insufficient to support the needs of an increasingly national job market and economy. Individuals residing in jurisdictions that have not adopted these measures are no less deserving of heightened protections. Moreover, the current path of increasingly divergent rights under state and local laws may even create disparities between employees working for or applying to the same employer. If an employer hiring for a remote role may obtain background information on an employee based in Idaho or Florida more readily and with fewer restrictions than it may obtain the same information about an employee based in New York or Illinois, the potential exists for two types of disparities. First, applicants in states with fewer protections may be subject to more invasive examinations of their background information, with all the racial and gender disparities those practices can reinforce.⁹⁷ Second, an employer may preferentially choose to hire employees from the more lightly regulated jurisdictions, creating a different type of disparity—though not one explicitly prohibited under federal antidiscrimination laws. A uniform national approach is needed to avoid these outcomes and provide a consistent, predictable standard for employers to apply.

IV. THE POTENTIAL IMPACT OF *TRANSUNION*

A recently decided Supreme Court case, *TransUnion, LLC, v. Ramirez*, returned to some of the issues raised in *Spokeo*.⁹⁸ At issue in the case was credit reporting bureau TransUnion's practice of placing erroneous terrorist alerts ("OFAC alerts") on the consumer reports of thousands of individuals based on a name-only search without verification by an additional data point, such as date of birth or Social Security Number.⁹⁹ In addition, the plaintiffs alleged that formatting defects in mailings from TransUnion amounted to a

⁹⁶ *Id.* at 1176–77 (“[T]he disclosure would confuse a reasonable reader because it combines federal and state disclosures.”).

⁹⁷ Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 *GEO. J. ON POVERTY L. & POL’Y* 231, 233 (2012); Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 *S. CAL. INTERDISC. L.J.* 395, 395–96 (2016).

⁹⁸ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016).

⁹⁹ *TransUnion*, 141 S. Ct. at 2201–02.

failure “to provide a [consumer’s] . . . complete credit file, including a summary of rights,” on request.¹⁰⁰ The named plaintiff, Sergio Ramirez, alleged that the erroneous alert on his credit report caused him to be unable to purchase a car and to cancel a scheduled international vacation; TransUnion contended that Ramirez’s experience was sufficiently atypical of the class to invalidate the class for the purpose of statutory and punitive damages.¹⁰¹ The petition for certiorari sought a decision as to “[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.”¹⁰² In addressing this issue, the Court returned to the question of what constitutes an “actual injury” and ultimately landed on a stricter interpretation than that articulated in *Spokeo*.¹⁰³

A number of amicus briefs filed in support of TransUnion’s position raised the prospect of a deluge of litigation if the Supreme Court had affirmed the decision of the Ninth Circuit, which held that the informational injuries experienced by all of the affected class members were sufficient to confer standing without an additional concrete injury akin to that suffered by Mr. Ramirez.¹⁰⁴ For example, an amicus brief filed by eBay, Facebook, Google, and several other groups claimed that “[i]n similar cases, class action plaintiffs have exploited lower courts’ lax enforcement of Article II’s and Rule 23’s requirements and used the threat of exorbitant statutory and punitive damages to extract *in terrorem* settlements” and urged the Supreme Court to reverse the Ninth Circuit’s decision, which, they contended, “allows

¹⁰⁰ *Id.* at 2207. The information the plaintiffs received from TransUnion consisted of two separate mailings: one containing the credit report without a mention of the OFAC alert, and the other consisting of a “courtesy” letter informing the affected individuals of a potential match to someone in the OFAC database without a summary of rights or an indication that the OFAC information was present on the individuals’ credit reports. *Id.* at 2216 (Thomas, J., dissenting).

¹⁰¹ *TransUnion*, 141 S. Ct. at 2201–02; *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1033 (9th Cir. 2020).

¹⁰² Petition for Writ of Certiorari at i, *TransUnion LLC*, 141 S. Ct. 2190 (No. 20-297).

¹⁰³ *Id.* at i, 18–19, 22–23.

¹⁰⁴ *See, e.g.*, Brief for Amici Curiae eBay, Inc. et al. Supporting Petitioner, *TransUnion LLC*, 141 S. Ct. 2190 (No. 20-297) (contending that “in similar cases, class action plaintiffs have exploited lower courts’ lax enforcement of Article III’s and Rule 23’s requirements and used the threat of exorbitant statutory and punitive damages to extract *in terrorem* settlements”); Brief of the Nat’l Consumer Reporting Ass’n, Inc. as Amicus Curiae in Support of Petitioner, *TransUnion LLC*, 141 S. Ct. 2190 (No. 20-297) (arguing that “[t]he Ninth Circuit’s decision below poses a major threat to the consumer reporting industry” and “opens the flood gates for a tidal wave of similarly unharmed plaintiffs seeking their fortune”); Brief of Pro. Background Screening Ass’n as Amicus Curiae in Support of Petitioner, *TransUnion LLC*, 141 S. Ct. 2190 (No. 20-297) (claiming “potentially widespread and detrimental consequences” of upholding the Ninth Circuit’s decision); Brief of the Chamber of Com. of the U.S. of Am. & Nat’l Fed’n of Indep. Bus. as Amici Curiae in Support of Petitioner, *TransUnion LLC*, 141 S. Ct. 2190 (No. 20-297) (arguing that if the Ninth Circuit’s decision had been upheld, “other class-action plaintiffs’ lawyers [would] be encouraged to follow its roadmap to transform what should be an individualized dispute between a uniquely sympathetic plaintiff and a defendant into a multimillion dollar class action”).

plaintiffs to bring expansive class action lawsuits in federal court based on nothing more than an allegation of a bare statutory violation without any requirement of a material risk of actual harm.”¹⁰⁵

However, the Ninth Circuit did not hold that the unnamed class members were exempt from the requirement to show an injury sufficient to confer standing; the court held that all the class members *had* standing because “TransUnion inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security; it did not inaccurately report a zip code or a minor discrepancy.”¹⁰⁶ In addition, TransUnion “made all class members’ reports available to potential creditors or employers at a moment’s notice, even without the consumers’ knowledge in some instances,”¹⁰⁷ creating a risk of material harm to their reputation and ability to obtain employment, credit, and any number of other goals that may entail a credit or background check. “It is difficult to conceive of information on a credit report that is more damaging to a consumer than a statement that the consumer is potentially prohibited from transacting business in the United States because the consumer is a criminal or a threat to national security,” the court stressed.¹⁰⁸ Indeed, this would seem to be the exact type of harm the FCRA aims to prevent—and sufficiently actual or imminent to support standing.

But the Supreme Court disagreed, ultimately holding that only the class members who actually had their information disclosed experienced a concrete injury sufficient to confer standing with respect to the FCRA’s reasonable accuracy requirements, and only Sergio Ramirez himself had standing to sue for formatting errors in the mailings he received from TransUnion.¹⁰⁹ Writing for the majority in a 5-4 decision, Justice Kavanaugh reasoned that a risk of disclosure that did not materialize in the time frame in question, even for something as serious as an erroneous OFAC alert, was not itself a concrete harm sufficient to support Article III standing.¹¹⁰ With respect to the formatting errors, the Court concluded that because “the plaintiffs have not demonstrated that the format of TransUnion’s mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts,”¹¹¹ the deficiencies fell into the *Spokeo* category of “bare procedural violation[s], divorced from any concrete harm.”¹¹²

It remains to be seen how this development will affect future cases with fact patterns similar to those in *Syed* and *Gilberg*. Although the majority

¹⁰⁵ Brief for eBay, Inc. et al., *supra* note 104, at 4.

¹⁰⁶ *Ramirez*, 951 F.3d at 1026.

¹⁰⁷ *Id.* at 1027.

¹⁰⁸ *Id.*

¹⁰⁹ *TransUnion*, 141 S. Ct. at 2200.

¹¹⁰ *Id.* at 2211–12.

¹¹¹ *Id.* at 2213.

¹¹² *Id.* at 2213 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

opinion in *TransUnion* casts its logic as a straightforward application of *Spokeo*, Justice Thomas, writing for the dissent, contends that in fact the Court's decision has radically narrowed plaintiffs' ability to assert their legal rights in federal court. "Never before has this Court declared that legal injury is *inherently* insufficient to support standing," he observes, and "never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots."¹¹³ Moreover, Thomas notes, "TransUnion's misconduct . . . is exactly the sort of thing that has long merited legal redress."¹¹⁴ With respect to the formatting errors, he remarks, "[I]f this sort of confusing and frustrating communication is insufficient to establish a real injury, one wonders what could rise to that level."¹¹⁵

V. ADVERSE ACTION PROCEDURES

In the employment context, the primary shortcomings of the FCRA are twofold: at the outset, a form of consent that is illusory at best because of the power imbalance involved, and later in the process, adverse action notification procedures that are woefully inadequate to protect an applicant's interest in prospective employment. As to the first issue, consent that stretches the definition of "informed" is nothing unusual in today's economy, with the proliferation of impenetrable terms of service and contracts of adhesion associated with everything from credit cards to social media platforms. While undoubtedly a problem in need of a remedy, the FCRA's shortcomings in this respect are arguably less problematic than, for example, the routine collection and dissemination of personal data that enables targeted advertising. All things being equal, many job applicants might prefer to opt out of a pre-employment background check if given a choice, but at least the relinquishment of certain privacy rights in this context is tied to a concrete benefit—the possibility of employment—and limited to specific permitted uses.

But if an employer decides that the information it has obtained through a background check disqualifies an applicant from a particular role, the text of the FCRA imposes no requirements that the employer consider an applicant's response, even if the information in the background check is erroneous. The employer is required to provide a copy of the report and a pre-adverse action letter containing a description of the applicant's rights under the FCRA,¹¹⁶ but the applicant does not have a statutory right to

¹¹³ *Id.* at 2221 (Thomas, J., dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2223.

¹¹⁶ 15 U.S.C. § 1681b(b)(3)(A). The statute, in relevant part, states:

discuss the basis for the employer's decision, provide context for the findings, or point out inaccuracies directly to the employer. While the pre-adverse action requirement may "slow[] down the process and 'afford[] employees time to "discuss reports with employers or otherwise respond before adverse action is taken,""¹¹⁷ there is no mandate in the statute that this discussion occur; the statute seems to assume that the temporal delay suffices to secure this opportunity. Courts have noted that "the chance to . . . present [one's] side of the story" is "the very reason why the FCRA obligates employers to produce a copy of the report before taking adverse action,"¹¹⁸ but without a specific provision requiring that employers in fact give employees this chance, the pre-adverse action process may be treated as a mere procedural hurdle on the way to moving on the next candidate.

Employees do have a right to dispute the accuracy of a background report with the credit reporting agency,¹¹⁹ and the required explanation of rights must contain information on how to go about doing so, but the FCRA lacks a mechanism for this information to make its way back to an employer in a timely manner. The CRA has thirty days to investigate a dispute¹²⁰ and must provide written notice of the results of the investigation to the consumer within five days of its completion.¹²¹ If the disputed information is found to be inaccurate, the affected individual may request that the reporting agency notify "any person specifically designated by the consumer who has within two years prior . . . received a consumer report for employment purposes."¹²² This time frame seems unlikely to provide any meaningful chance of preserving the applicant's ability to remain in contention for an employment offer. Indeed, one court implicitly admitted as much, finding a plaintiff's contention that an employer should be required to wait out the thirty-day period for a CRA to complete its investigation before taking adverse action to

[I]n using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

- (i) a copy of the report; and
- (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3)

Id. For certain transportation roles, the adverse action procedures are even more perfunctory, allowing the employer to take adverse action before providing the required notices if the only interaction between the applicant and the prospective employer regarding the employment application has been by "mail, telephone, computer, or other similar means." *Id.* § 1681b(b)(3)(B)–(C).

¹¹⁷ *Wilson v. First Advantage Background Servs. Corp.*, 490 F. Supp. 3d 506, 511 (D. Conn. 2020) (quoting *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012)).

¹¹⁸ *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 699 (7th Cir. 2018).

¹¹⁹ 15 U.S.C. § 1681i(a)(1)(A).

¹²⁰ *Id.*

¹²¹ *Id.* § 1681i(a)(6)(A).

¹²² *Id.* § 1681i(d).

be an unworkable standard that “would create untenable constraints on employers.”¹²³ Thus, while correcting an erroneous report with a credit reporting agency is an important step for the affected individual—and may help the individual’s chances of successfully passing a background check at the *next* job he or she applies for—it does nothing to remedy the harm of being disqualified from the original job opportunity. Job opportunities are not interchangeable, nor are they necessarily abundant or easy to obtain.

If it is to serve its purpose in the employment context, the FCRA should be amended to require a meaningful opportunity for an applicant or employee to engage in an interactive dialogue with the employer about the results of the report, its accuracy or inaccuracy, and the context surrounding any findings the employer believes to provide a basis for adverse action. Some courts have maintained that, although the FCRA itself is silent on the issue of how long an employer is required to wait between sending a pre-adverse action notice and taking the contemplated adverse action, legislative history illustrates an intent to provide employees with an opportunity to respond.¹²⁴ However, although a 1994 bill, the Consumer Reporting Reform Act of 1994, would have amended the pre-adverse action provisions of the FCRA to explicitly require an employer to provide “a reasonable period (not required to exceed five business days following receipt of the report by the consumer) to respond to any information in the report that is disputed by the consumer,” the bill was never enacted.¹²⁵ Since that uncompleted attempt, the FCRA has undergone several substantive amendments, notably in 1996 and 2003.¹²⁶ Yet none of these amendments returned to the issue of a specific waiting period between sending a pre-adverse action notice and making the final decision to take adverse action or attempted to clarify whether an employer has an obligation to consider any information an employee may provide in response to a pre-adverse action notice. And even if the 1994 bill had become law, by its language it only addressed “information in the report that is disputed by the

¹²³ Johnson v. ADP Screening & Selection Servs., Inc., 768 F. Supp. 2d 979, 983 (D. Minn. 2011).

¹²⁴ See, e.g., Reardon v. ClosetMaid Corp., No. 2:08-cv-01730, 2013 U.S. Dist. LEXIS 169821, at *42 (W.D. Pa. Dec. 2, 2013) (quoting H.R. REP. NO. 103-486, at 30 (1994)) (holding that “Congress has made clear the ‘employer must [] provide the consumer with a *reasonable period* to respond to any information in the report that the consumer disputes[,] and with written notice and the opportunity and time period to respond’”); Wright v. Lincoln Prop. Co., No. 15-3483, 2017 U.S. Dist. LEXIS 11345, at *7–8 (E.D. Pa. Jan. 27, 2017) (quoting Moore v. Rite Aid Headquarters Corp., No. 13-1515, 2015 U.S. Dist. LEXIS 69747, at *13 (E.D. Pa. May 28, 2015)) (stating that “[t]he FCRA requires that an employer ‘provide job applicants with their background report, summary of rights, and a “real opportunity” to contest the contents of the background report before the employer relies on the report to take an adverse action against the applicant’”).

¹²⁵ Consumer Reporting Reform Act of 1994, H.R. 1015, 103rd Cong. § 103(b) (1994).

¹²⁶ Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104208, § 2403, 110 Stat. 3009, 3009-430-31 (1996); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 611, 117 Stat. 1952, 2010-11 (2003).

consumer.”¹²⁷ While an accuracy dispute is perhaps the most obvious situation in which an applicant would have an interest in engaging in a dialogue with the prospective employer prior to an adverse action, it is by no means the only one. An applicant may wish to provide context for an accurate finding or contend that the information at issue is irrelevant to the job, for example.

A number of courts have found that the statute implies a waiting period and a meaningful opportunity to respond by its requirement that the pre-adverse action notice precede the final decision of adverse action. For example, in *Magallon v. Robert Half International, Inc.*, an Oregon district court considering the FCRA’s pre-adverse action procedure noted that “although the text of the statute does not specify any particular requirement, permitting the employer to ‘deliver the notice and then take adverse action within seconds’ would render the statute’s use of ‘before’ meaningless.”¹²⁸ The court went on to explain that an employer must give an applicant “an opportunity to change the employer’s mind” before taking adverse action.¹²⁹ “This opportunity must be real,” the court emphasized; “a *pro forma* period between the preliminary and final decision does not satisfy the statute.”¹³⁰ However, this interpretation is not universal. In *Johnson v. ADP Screening & Selection Services, Inc.*, a Minnesota district court, while recognizing that “Congress’s use of the word ‘before’ shows that there must be some time between notice and action,”¹³¹ concluded that “[n]othing in the FCRA requires an employer to consider any correction that a reporting agency might make.”¹³² A Florida district court agreed, noting:

It is not improper for an employer to fully intend to carry out the adverse action absent a dispute by the consumer, or even to intend to carry out the adverse action *notwithstanding* the result of any dispute a consumer might initiate. . . . The FCRA requires an employer to pause and allow a reasonable opportunity for a consumer to dispute the contents of a consumer report, but does not mandate that the employer act decently with respect to the results of any such dispute.¹³³

Employers, of course, are not obligated to hire any given candidate for a job, and there may be situations in which other factors in the hiring process effectively disqualify a candidate, but because the background check may

¹²⁷ Consumer Reporting Reform Act of 1994 § 103(b).

¹²⁸ *Magallon v. Robert Half Int’l, Inc.*, 311 F.R.D. 625, 634 (D. Or. 2015) (citing *Johnson*, 768 F. Supp. 2d at 983–84).

¹²⁹ *Id.* at 633.

¹³⁰ *Id.*

¹³¹ *Johnson*, 768 F. Supp. 2d at 983.

¹³² *Id.* at 984.

¹³³ *Williams v. First Advantage LNS Screening Sols., Inc.*, 155 F. Supp. 3d 1233, 1247–48 n.15 (N.D. Fla. 2015).

have played a small role, the pre-adverse action process is nevertheless required. But by failing to specify what an employer must actually *do* with the information an applicant provides in response to a pre-adverse action notice, the FCRA does little to prevent employers from adopting blanket policies of disqualifying any applicant whose background check report is anything other than spotless—regardless of whether the information it contains is accurate or relevant to the job in question.

State and municipal approaches to criminal background checks may provide a workable model for filling some of these gaps. For example, the Illinois Human Rights Act, recently amended in March 2021, requires an employer to engage in an “interactive assessment” before disqualifying an applicant from an employment opportunity on the basis of a criminal conviction.¹³⁴ The employer must provide “notice of the disqualifying conviction or convictions that are the basis for the preliminary decision and the employer’s reasoning for the disqualification; . . . a copy of the conviction history report, if any; and . . . an explanation of the employee’s right to respond to the notice of the employer’s preliminary decision before that decision becomes final.”¹³⁵ The statute also requires the employer to give the applicant at least five business days to respond before the employer may make a final decision.¹³⁶ In addition, before initiating the disqualification notice process, the employer must evaluate the relationship between the employment the applicant is seeking and the conviction at issue, considering:

[T]he length of time since the conviction; . . . the number of convictions that appear on the conviction record; . . . the nature and severity of the conviction and its relationship to the safety and security of others; . . . the facts or circumstances surrounding the conviction; . . . the age of the employee at the time of the conviction; and . . . evidence of rehabilitation efforts.¹³⁷

The employer may only take adverse action if, after considering those factors:

[T]here is a substantial relationship between one or more of the previous criminal offenses and the employment sought or held; or . . . the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.¹³⁸

In a similar vein, the New York City Fair Chance Act prohibits an employer from denying employment based on the results of a criminal

¹³⁴ 775 ILL. COMP. STAT. 5/2-103.1(C) (2021).

¹³⁵ *Id.* 5/2-103.1(C)(1).

¹³⁶ *Id.* 5/2-103.1(C)(2).

¹³⁷ *Id.* 5/2-103.1(B).

¹³⁸ *Id.* 5/2-103.1(A).

background check without first providing a written copy of the report and analyzing specified “fair chance” factors surrounding the nature of the criminal conduct and its relationship to the employment sought.¹³⁹ The factors in the New York City ordinance are similar to those in the Illinois statute. They include the seriousness of the offense, the age of the individual at the time of the offense, the bearing of the offense on the individual’s fitness for the specific position, the employer’s interest in protecting property and safety, and information regarding the individual’s rehabilitation or good conduct in the time since the offense took place.¹⁴⁰ The New York City law goes a step further than the Illinois law, not just securing an opportunity for the employee to respond to a pre-adverse action notification but requiring the employer to proactively request information on the “fair chance factors” from the employee, analyze the factors and their relationship to the job, provide the employee with a written copy of the analysis, and give the employee an opportunity to respond.¹⁴¹ The employee thus has not just one, but two opportunities to engage in dialogue with the employer—upon receiving the initial inquiry about the fair chance factors from the employer and after receiving a copy of the employer’s analysis of the information the employee has provided.

Interestingly, until recently, Philadelphia’s Unlawful Credit Screening Practices in Employment ordinance required an employer to provide “the particular information upon which the employer relied” before deciding to take adverse action on the basis of a background check and “give the employee or applicant an opportunity to explain the circumstances surrounding the information at issue before taking any such adverse action.”¹⁴² However, a 2021 ordinance amended this requirement to strip out its more employee-friendly language and align its pre-adverse action procedures with those of the FCRA.¹⁴³ In the committee hearings that considered the bill, none of the testifying parties acknowledged that the

¹³⁹ N.Y.C., N.Y., ADMINISTRATIVE CODE § 8-107, subdiv. 11-a(b)–(c) (2021); N.Y.C., N.Y., LOCAL LAW NO. 4 §§ 1, 6 (2021) (amending the process required under the Administrative Code of the City of New York § 8-107 and specifying fair chance factors).

¹⁴⁰ N.Y.C., N.Y., LOCAL LAW NO. 4 § 1.

¹⁴¹ *Id.* § 6.

¹⁴² Phila., Pa., Bill 200614, Ordinance Amending Section 9-1130 of The Philadelphia Code, Entitled “Unlawful Credit Screening Practices in Employment,” by Revising Conditions on the Use of Credit Information for Adverse Employment Actions, Under Certain Terms and Conditions (Jan. 20, 2021).

¹⁴³ The ordinance now requires the following:

An employer that intends to take an adverse employment action with respect to any person, based in whole or in part on credit information, shall, pursuant to 15 U.S. Code § 1681b(b)(3), provide such person, before taking any adverse action, with a written copy of the information relied, the right to obtain and dispute such information, and such other information as may be required by law.

amended language in fact provides fewer rights to employees than the previous version.¹⁴⁴ In fact, the Executive Director of the Philadelphia Commission on Human Relations, testifying in support of the ordinance, stated that “Bill 200614 clarifies and strengthens [the adverse action] provision by specifically memorializing the language of the federal [FCRA].”¹⁴⁵ It is difficult to see how this could be the case, given that the FCRA already applied to the background screenings that are the subject of the ordinance and the preexisting language in the ordinance demanded a more meaningful interactive process than the FCRA’s minimal requirements. This situation provides just a single illustration of the need for a uniform federal statute that secures a meaningful right for an applicant or employee to engage in dialogue about the findings of a background check before an employer makes a final decision to proceed with an adverse action.

By requiring an employer to engage in this interactive process and provide not just a copy of the background check report, but the specific information that underlies its decision and its reasoning, the approach used by the Illinois and New York City laws forces employers to consider the applicant and any history of criminal convictions on a case-by-case basis rather than implementing a blanket disqualification policy. An employer that concludes, after performing this individualized assessment, that a particular applicant’s criminal history is truly a bar to an employment offer is free to make that determination, but by requiring the employer to document the basis for its decision, the statute greatly increases the likelihood that the decision will be based on objective job-related factors rather than assumptions or prejudices against individuals with a criminal history. And while the Illinois statute specifically applies only to criminal convictions, its requirements for a specified waiting period and an interactive assessment could easily be adapted and incorporated into the FCRA to apply to any information in a background report from a consumer reporting agency that forms the basis of an employer’s intended adverse action. While it would impose a somewhat higher administrative burden than the current scheme does, this interactive assessment process is not without precedent in other aspects of employment law. For example, both the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1968 require an employer confronted with an applicant or employee who requests a reasonable accommodation because of a disability or a religious belief to consider the request and engage in an interactive process to determine

¹⁴⁴ Transcript of the Meeting of the Council of the City of Philadelphia, Committee on Law and Government at 27, 30, 33, 46 (Nov. 24, 2020) (transcript available at <https://www.transcriptroom.org/tr/CAF/DownloadFile/1184454?docType=30&FileName=lg112420.pdf>).

¹⁴⁵ *Id.* at 33 (statement of Rue Landau, Executive Director of the Philadelphia Commission on Human Relations and Fair Housing Commission).

whether the individual's needs can be met without imposing an undue burden on the employer.¹⁴⁶

VI. RECOMMENDATIONS

In light of the shortcomings and ambiguity surrounding the FCRA's pre-adverse action procedures, I propose that 15 U.S.C. § 1681b(b)(3) be amended to add the following additional requirements:

1. *Require a seven-day waiting period following a pre-adverse action notice to give the employee a chance to respond.* If the employee responds by disputing the accuracy of the findings in question, the employer must allow a reasonable time for the employee to gather and submit information supporting his or her position and consider the information the employee has provided in good faith to determine whether the employee's account is likely to be more accurate than the information the employer has received from the consumer reporting agency. If the employee confirms the accuracy of an unfavorable finding, the employer must invite the employee to provide any information about mitigating circumstances or other context the employee deems relevant. A seven-day waiting period would strike a balance between an employer's interest in promptly filling a position and an employee's ability to gather information that may be pertinent to the employer's ultimate analysis regarding the accuracy and relevance of any unfavorable information uncovered during a background check.

2. *Amend the pre-adverse action notice requirement to require the employer to inform the applicant or employee of the specific finding or findings in the background check report that informed its decision to send the pre-adverse action notice.* A background check report may be lengthy, and without specific details about what the employer finds potentially problematic, an employee's ability to effectively respond with context or provide information that might encourage the employer to reconsider will be limited. In addition, requiring the employer to document the basis for its decision with specificity and communicate it to the applicant or employee will increase the likelihood of reasoned decision-making and consistent application of a company policy or procedure.

3. *Require an employer to analyze the relationship between the information based on which it is considering adverse action and the specific position sought or held by the applicant or employee, including any information the applicant or employee has provided in response to the*

¹⁴⁶ 29 C.F.R. § 1630.2(o)(3) (2021) (implementing regulations of the ADA specifying that, "[t]o determine the appropriate reasonable accommodation[,] it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation"); 42 U.S.C. § 2000e(j) (defining "religion" under Title VII as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business").

pre-adverse action notice. The employer must document this analysis and provide it to the applicant or employee before making a final adverse action decision and give the employee a final opportunity to respond. By analyzing the relationship between the potentially problematic findings and the demands and duties of a particular position, the employer may conclude in some cases that no such relationship exists, or that the relationship is too tenuous to disqualify an otherwise qualified applicant. This process should encourage employers to take a more nuanced approach to background check information and disqualify applicants only when a strong business reason exists—if not for concerns for fairness and equity, then out of self-interest in avoiding legal liability for disqualifying applicants on flimsy reasoning that may raise the specter of unlawful discrimination.

4. *Prohibit employers from initiating the background check process on an applicant before extending a conditional employment offer.* This provision would safeguard applicants' privacy rights by ensuring that an applicant who is required to submit to a background check has a strong chance of securing the position. In addition, as a practical matter, this provision would reduce the administrative burden of the interactive process I have proposed by limiting it only to candidates the employer wishes to hire rather than the larger pool of applicants.

CONCLUSION

The Fair Credit Reporting Act is not a statute within the traditional bounds of employment law, but it has far-reaching implications for whom employers choose to hire, and its impacts are not equitably distributed. In its current state, its protections against needless privacy invasion of job applicants are minimal at best, and its adverse action procedures do little to ensure that individuals are not disqualified from employment opportunities based on background check information without a sound business-related reason. Courts have an important role to play in upholding the protections it does contain and should approach allegations of FCRA violations with an emphasis on the underlying purpose of the statute—informed consent and a meaningful chance to make one's case before an adverse action decision becomes final. But judicial action is insufficient to transform the FCRA into a robust source of safeguards for applicants' and employees' interests in privacy and securing employment. To achieve that goal, the statute should be amended as I propose above, informed by the state and local laws that have already adopted this approach in order to increase transparency into the background check process and ensure a consistent, fair process that effectively balances the rights of applicants and employees against those of employers.