IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1889

FRANK LONG, JOSEPH SHIPLEY, and MICHAEL WHITE, individually and on behalf of all others similarly situated,
Plaintiffs/Appellants,
v.
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Defendant/Appellee.

PETITION OF APPELLEE FOR REHEARING OR REHEARING *EN BANC*

On appeal from the United States District Court
for the Eastern District of Pennsylvania

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I. Introduction

This appeal involves a putative class action by plaintiffs/appellants, Frank Long, Joseph Shipley and Michael White ("plaintiffs"), against defendant/appellee, Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleging violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 ("FCRA"), and the Pennsylvania Criminal History Records Information Act, 18 Pa. C.S.A. § 9125 ("CHRIA"), that was dismissed for lack of standing by the Honorable Petrese B. Tucker. In a precedential opinion, this Court reversed in part and found plaintiffs had standing to pursue a claim based on SEPTA's alleged failure to provide plaintiffs copies of their consumer reports under 15 U.S.C. § 1681b(b)(3)(A)(i).

II. Basis for Relief

SEPTA petitions for rehearing or rehearing *en banc* of the portion of the Court's opinion finding plaintiffs established standing to pursue their claim under 15 U.S.C. § 1681b(b)(3)(A)(i) on the grounds:

A. The Court overlooked or misapprehended facts that materially affected the outcome of the appeal by relying on an allegation not contained in the amended complaint as the basis for standing and incorrectly attributing plaintiffs' allegations to SEPTA when it found the District Court erroneously applied the *Federal Rule of Civil Procedure* 12(b)(1) standard. On page 12 of its opinion, the Court wrote:

> The District Court also failed to construe Plaintiffs' allegations in the light most favorable to them. It adopted the view (espoused by SEPTA) that their drug convictions categorically barred them from the jobs for which they applied. Plaintiffs allege, however, that SEPTA might have changed its decision if they had the chance to respond to their background checks. The District Court was required to assume the truth of this allegation.

Opinion attached as Exhibit A ("Op."). However, the amended complaint did not include the allegation "SEPTA might have changed its decision if [plaintiffs] had the chance to respond to their background checks" but did include the allegation: "SEPTA has a categorical and lifetime ban on hiring anyone with a felony drug conviction[.]" *See, e.g.,* Am. Compl. ¶ 92. The Court's precedential opinion is an application of law to erroneous, material facts that must be corrected.

B. The Court's precedential opinion reversed in part the District Court's opinion based on a misapplication of the *Federal Rule of Civil Procedure* 12(b)(1) standard but itself departed from the well-settled standard by depending on material not contained in the pleadings and disregarding binding, factual allegations by plaintiffs fatal to standing. The Court has an interest in correcting its precedential opinion to avoid inadvertently creating a new standard for facial attacks to standing and confusion among district courts.

C. The Court's precedential opinion is inconsistent with the example provided by the United States Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016), reflecting even a direct violation of a statutory right may not "cause harm or present any material risk of harm" and involves the question of

exceptional importance: whether the Supreme Court did intend, in *Spokeo*, to create a "requirement that a plaintiff show a statutory violation has caused a 'material risk of harm'" where the statutory violation is being used as a pretext to redress an unrelated injury. *See* Op. pp. 19-20 (quoting *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637-38 (3d Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1550)).

III. Statement Required by Local Rule 35.1

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration of the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and its progeny (Sections II-B, IV-B) and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (Sections II-C, IV-C) and that this appeal involves a question of exceptional importance: whether the Supreme Court did intend, in *Spokeo*, to create a "requirement that a plaintiff show a statutory violation has caused a 'material risk of harm'" where the statutory violation is being used as a pretext to redress an unrelated injury (Sections II-C, IV-C).

/s/ Candidus K. Dougherty
Candidus K. Dougherty

IV. Arguments

A. The Court Erroneously Found Standing Based on Overlooked or Misapprehended Facts

The Court found plaintiffs had standing for their adverse action claim under 15 U.S.C. § 1681b(b)(3)(A)(i) based on an allegation that did not exist in the amended complaint and a misattribution of plaintiffs' allegations to SEPTA. As a result, the Court applied its analysis using incorrect, material facts. The Court's opinion does not support standing for the 15 U.S.C. § 1681b(b)(3)(A)(i) claim when the factual inaccuracies relating to the content of the pleadings are corrected.

1. Overlooked or Misapprehended Pleadings

Plaintiffs did not allege or even suggest "SEPTA might have changed its decision if they had the chance to respond to their background checks." *See* Op. p. 12. There is no allegation in the amended complaint from which that inference could be reasonably drawn. To the contrary, plaintiffs' claims were based on the contention SEPTA's hiring policy that disqualified applicants with felony drug convictions was absolute and impenetrable, thereby rendering any explanation "why true but negative information is irrelevant to his fitness for the job" futile. *See* Op. p. 9. The phantom allegation relied on by the Court is squarely at odds with the substance of plaintiffs' claims challenging SEPTA's hiring policy.

The allegations of plaintiffs' amended complaint make clear the source of their alleged harm is the hiring policy itself, not the alleged lost opportunity "to advocate for [the information contained in the background check] to be used fairly[.]" *See* Op. p. 9. Plaintiffs expressly alleged:

> 12. In addition, SEPTA routinely violates the CHRIA through its blanket policy and practice of disqualifying job applicants with unrelated felony convictions from employment in positions involving the operation of SEPTA vehicles.
>
> 92. Specifically, SEPTA has a categorical and lifetime ban on hiring anyone with a felony drug conviction for "[a]ll positions which require the operation of a SEPTA vehicle[] as part thereof, whether or not they are in revenue service" and "[a]ll positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock."

See Am. Compl. ¶¶ 12, 92. The factual allegations of the amended complaint suggest the plaintiffs advocated to SEPTA for a position, despite allegedly not receiving a copy of their background checks. *See* Am. Compl. ¶¶ 44-46 (Long), ¶¶ 56-58 (Shipley), ¶¶ 68-69 (White). Plaintiffs, of course, commenced this action and an action in state court alleging SEPTA's hiring policy was unfair.

Plaintiffs did not claim they were denied employment based on the inability to contest information in the background checks. Instead, plaintiffs claimed they were denied employment "based on their criminal convictions and without those criminal convictions having sufficient relation to their suitability for employment in the positions involving the operation of SEPTA vehicles, violating the CHRIA."

See Am. Compl. ¶ 103. Plaintiffs baldly alleged "SEPTA's policy caused concrete injury (including risk of harm) . . . because they could not . . . explain why information reported should not preclude employment." *See* Am. Compl. ¶ 122. However, nowhere did plaintiffs claim they would have tried to change, or could have changed, SEPTA's decision if provided a copy of their background checks.

The Court relied on erroneous facts to find the District Court did not adhere to the *Rule* 12(b)(1) standard. The District Court adopted plaintiffs' allegations, not a view "espoused by SEPTA," when it found plaintiffs' "drug convictions categorically barred them from the jobs for which they applied." *See* Op. p. 12. The District Court was not "required to assume the truth of" the allegation "SEPTA might have changed its decision if [plaintiffs] had the chance to respond to their background checks" because the allegation did not exist in the amended complaint. *See* Op. p. 12.

The Court's error is material to the outcome of the appeal. As described, *infra*, removing the phantom allegation from the Court's legal analysis defeats standing for the remaining claim by plaintiffs. Accordingly, the Court should grant SEPTA's petition for rehearing and adjust its legal analysis to the corrected facts.

2. Plaintiffs Are Like Groshek When the Phantom Allegation Is Removed from the Court's Legal Analysis

Plaintiffs' claim under 15 U.S.C. § 1681b(b)(3)(A)(i) is a "bare procedural violation, divorced from any concrete harm," that cannot "satisfy the injury-in-fact requirement of Article III" absent an allegation "SEPTA might have changed its decision if [plaintiffs] had the chance to respond to their background checks." *See* Op. pp. 21-22 (quoting *Spokeo*, 136 S. Ct. at 1549). The Court illustrated this distinction when dispensing with plaintiffs' claim under 15 U.S.C. § 1681b(b)(3)(A)(ii) by juxtaposing the *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), and *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), opinions.

In both *Groshek* and *Syed*, the plaintiffs alleged they received FCRA disclosures that were not in FCRA-required format. *See* Op. p. 22. The difference between no standing (*Groshek*) and standing (*Syed*) was that Syed alleged he did not understand the disclosures and, if he had, then he would not have signed the waiver. *See* Op. p. 22. Syed therefore alleged a procedural violation with concomitant concrete harm satisfying the injury-in-fact requirement, whereas Groshek alleged a bare procedural violation only. *See* Op. p. 22.

The removal of the phantom allegation converts plaintiffs' claim to the scenario presented in *Groshek*. Like in *Groshek*, plaintiffs' adverse action claim is based on a procedural violation – failing to send a copy of the background check

before adverse employment action. Plaintiffs did not allege the information in the background checks (their felony convictions) was inaccurate or misleading. Plaintiffs did not allege they would have taken any action to explain or advocate for their employment if they had received a copy of the background check. The allegations of plaintiffs' amended complaint reflect they did not depend on the receipt of the background check to know the source of the adverse action, to advocate for employment with SEPTA without regard for their felony convictions or to sue SEPTA based on their belief the substance of the hiring policy is unfair. Like in *Groshek*, plaintiffs alleged only a bare procedural violation with no concomitant concrete harm and therefore cannot "satisfy the injury-in-fact requirement of Article III." Op. p. 22 (quoting *Spokeo*, 136 S. Ct. at 1549).

Plaintiffs failed to establish standing for their claim arising from SEPTA's alleged failure to provide copies of their background checks for the same reasons plaintiffs failed to establish standing for their other claims when the Court's legal analysis is applied to the correct facts. Plaintiffs did not, and cannot, allege an injury-in-fact without an allegation "SEPTA might have changed its decision if they had the chance to respond to their background checks," based on the legal rationale applied by the Court. Accordingly, the Court should grant SEPTA's petition for rehearing and adjust its legal analysis to the corrected facts.

3. *Robertson v. Allied Solutions, LLC* Is Distinguishable

Correcting the facts also distinguishes this action from *Robertson v. Allied Solutions, LLC*, 2018 U.S. App. LEXIS 24563, 2018 WL 4113815 (7th Cir. 2018). In *Robertson*, the plaintiff alleged she did not receive a copy of her background check before adverse employment action and that she would have changed the employment decision if given an opportunity to explain negative content to the prospective employer. At the pleadings stage, the Seventh Circuit found it "immaterial" that Robertson "ha[d] not pleaded what she may have said if given the chance to respond, or that she may not have convinced Allied to honor its offer[.]" *Robertson*, 2018 U.S. App. LEXIS 24563 *13-14. "What matters is that Robertson was denied information that could have helped her craft a response to Allied's concerns." *Id.* at *14.

Here, according to plaintiffs' own allegations, there was no information that could have helped plaintiffs craft a response to SEPTA's employment decision. Plaintiffs alleged no action they would have taken in reaction to receipt of the background checks. Plaintiffs did not overlook or forget to include allegations establishing harm from the failure to receive a copy of the background checks. Plaintiffs affirmatively made implausible their purported informational injury by

alleging their source of harm was SEPTA's "blanket policy" and "categorical and lifetime ban on hiring anyone with a felony drug conviction" for certain positions, not non-receipt of their background checks. *See* Am. Compl. ¶¶ 12, 92.

The Court appeared to depend, at least in part, on the phantom allegation to draw the corollary between this action and *Robertson*. The Court did not, however, account for the binding, factual allegations by plaintiffs that SEPTA's "categorical" and "blanket" policy was the source of their injury. *See* Am. Compl. ¶¶ 12, 92. Plaintiffs' allegations connecting their injury to the hiring policy, as distinct from the non-receipt of the background checks, are the only well-pleaded, non-conclusory factual averments left relating to injury when the phantom allegation is properly discounted from the Court's legal analysis.

The factual context of *Robertson* did not present a scenario where the plaintiff was trying to attack the substance of the defendant's hiring policy collaterally through the invocation of the technical requirements of the FCRA. The complaint in *Robertson* did not include the additional allegations included by plaintiffs in their amended complaint directed to challenging the substantive fairness of an alleged "blanket policy" or "categorical and lifetime ban on hiring anyone with a felony drug conviction for" certain positions. *See* Am. Compl. ¶¶ 12, 92. These additional allegations defeat standing under the FCRA and

distinguish *Robertson*. Accordingly, the Court should grant SEPTA's petition for rehearing and adjust its legal analysis to the corrected facts and unaddressed factual averments.

B. The Court Should Correct the Opinion to Avoid Confusion

The Court incorrectly relied on material not contained in the amended complaint and a misattribution of plaintiffs' allegations to SEPTA as the basis for its opinion. *See* Section IV-A, *supra*. As the Court noted in its opinion, "A court ruling on a facial attack considers only the complaint, viewing it in the light most favorable to the plaintiff." *See* Op. p. 11 (citing *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)). It is similarly well-settled that "[t]he plausibility determination is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Schuchardt v. President of the U.S.*, 839 F.3d 336, 343 (3d Cir. 2016) (quoting *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 675)). The Court should assume true "even outlandish allegations . . . except to the extent they resembled a 'formulaic recitation of the elements of a . . . claim' or other legal conclusion." *Connelly*, 809 F.3d at 789-90 (quoting *Iqbal*, 556 U.S. at 681 (internal quotation marks omitted in original)).

The Court found the District Court did not comply with the *Rule* 12(b)(1) standard based on this Court's inaccurate recitation of the allegations of the

amended complaint. The Court also appeared to fault the District Court for viewing the pleadings as a whole, rather than as 142-plus independent (as opposed to interdependent) averments. It is unclear how else the District Court could have addressed the competing and, in some instances, self-defeating allegations contained in the amended complaint absent picking and choosing what well-pleaded, non-conclusory factual averments to accept as truth, in clear violation of *Iqbal* and its progeny.

To the extent advertent, the Court's opinion dispenses with well-settled pleadings standards and creates a precedent that reviewing courts can correct otherwise defective pleadings by reading in new allegations that eclipse any semblance of a reasonable inference. The Court's opinion also suggests the reviewing court should consider each averment in a vacuum without regard for the remainder of the well-pleaded, non-conclusory factual averments and the application of common sense. None of these concepts are consistent with the well-established pleading standards.

The Court has an interest in correcting the precedential opinion to avoid inadvertently creating a new standard for facial attacks to standing or confusion among district courts in applying its precedential opinion. Accordingly, the Court should grant SEPTA's petition for rehearing or rehearing *en banc*.

C. The Violation Did Not Create a Material Risk of Harm

The Court has, in the past, declined to find the second hypothetical in *Spokeo v. Robins* created a "requirement that a plaintiff show a statutory violation has caused a 'material risk of harm.'" *See* Op. pp. 19-20 (quoting *Horizon,* 846 F.3d at 637-38 (quoting *Spokeo*, 136 S. Ct. at 1550)). However, the Court has never before been presented with a factual match paired with a compelling public interest to act. Both circumstances are presented here.

The Supreme Court acknowledged that even a direct violation of a statutory right may not cause harm or present any material risk of harm when analyzing a violation of 15 U.S.C. § 1681e(b) (a different section than at issue here):

> In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Spokeo, 136 S. Ct. at 1550. Similar circumstances are presented in this action arising from the alleged violation of 15 U.S.C. § 1681b(b)(3)(A)(i).

Under the facts alleged by plaintiffs in their amended complaint, the failure to receive the copies of their background checks before adverse action caused no harm or material risk of harm. Plaintiffs claimed they did not receive the background checks but attribute the harm they sustained to SEPTA's alleged "categorical" and "blanket" hiring policy. *See* Am. Compl. ¶¶ 12, 92. Plaintiffs did not allege the background checks contained inaccuracies that they were unable

to correct. Plaintiffs made clear no amount of advocating or recasting the negative information about their criminal histories would impact SEPTA's employment decision because the source of their injury was an allegedly unfair hiring policy, not the timely receipt of their background checks. Plainly stated, plaintiffs' claims under the CHRIA depended on facts, that plaintiffs plead, that are inapposite to facts necessary to plead standing for a violation of 15 U.S.C. § 1681b(b)(3)(A)(i).

Plaintiffs are employing a technical violation of the FCRA that caused them no material harm to attack the substance of SEPTA's hiring policy. Plaintiffs are not seeking (and have not alleged) redress for harm caused by the non-receipt of their background checks. Based on the allegations of plaintiffs' amended complaint, the result for plaintiffs would have been the same – even if they had timely received a copy of their background checks.

A more rigorous (though "not Mount Everest") application of the injury-in-fact element is warranted where the plaintiffs are suing to remedy a statutory violation as a pretext to redress an unrelated injury. *See* Op. p. 15 (quoting *Horizon*, 846 F.3d at 633). The Supreme Court set the stage for an enhanced injury-in-fact analysis in *Spokeo*. Plaintiffs' pleadings are remarkably blatant in their pretextual purpose. Plaintiffs have a judicial remedy in state court to adjudicate their true alleged injury (purported violations of the CHRIA). The circumstances presented in this action are ripe to dispel plaintiffs with pretextual,

statutory claims from Article III courts absent a showing of actual harm or a material risk of harm, as contemplated by *Spokeo*. Accordingly, the Court should grant SEPTA's petition for rehearing or rehearing *en banc* to consider this question of exceptional importance.

V. Conclusion

Defendant/Appellee, Southeastern Pennsylvania Transportation Authority, respectfully requests the Court grant its petition for rehearing or rehearing *en banc*.

Respectfully submitted,

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Dated: September 24, 2018 *Attorneys for Defendant/Appellee, Southeastern Pennsylvania Transportation Authority*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition for rehearing or rehearing *en banc* by Defendant/Appellee, Southeastern Pennsylvania Transportation Authority, was served on September 24, 2018 on all counsel of record through ECF.

/s/ Candidus K. Dougherty

Dated: September 24, 2018