17-1889-cv

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

FRANK LONG, MICHAEL WHITE, and JOSEPH SHIPLEY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– against –

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF JURISDICTION

The Court has appellate jurisdiction over the final order of the District Court for the Eastern District of Pennsylvania (the "District Court") granting Defendant-Appellee Southeastern Pennsylvania Transportation Authority's ("SEPTA's") motion to dismiss, entered April 5, 2017, pursuant to 28 U.S.C. § 1291.[1] The District Court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1681p. Plaintiffs-Appellants Frank Long, Joseph Shipley, and Michael White ("Plaintiffs") timely filed their Notice of Appeal on April 18, 2017.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in finding that Plaintiffs lacked standing under Article III of the United States Constitution to sue SEPTA for violations of Section 1681b(b)(3) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* *See* Joint Appendix ("JA") 4-13.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before the Court of Appeals for the Third Circuit ("Third Circuit"). As noted in Plaintiffs' Civil Appeal Information Statement, *In re Michaels Stores, Inc. Fair Credit Reporting Act (FCRA) Litigation*, No. 17-1429, is also on appeal to the Third Circuit as to the issue of standing for a Section 1681b(b)(3) claim, but is not otherwise related to this case.

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[1] The District Court subsequently closed the case for administrative purposes on April 18, 2017. JA14.

STATEMENT OF THE CASE

I. Pertinent Procedural History

Plaintiff Frank Long filed this action on April 27, 2016, against SEPTA. In the First Amended Complaint (the "Complaint"), filed May 26, 2016, Mr. Long was joined by Plaintiffs Joseph Shipley and Michael White. JA21. In pertinent part, Plaintiffs alleged, on behalf of themselves and a putative class of job applicants, that SEPTA systemically violates Section 1681b(b)(3) of the FCRA by using consumer reports to make adverse employment decisions without first providing a copy of the consumer report or a summary of FCRA rights. JA23.[2]

On June 24, 2016, SEPTA filed a motion to dismiss, which the parties fully briefed. JA49-175. The District Court granted SEPTA's motion on April 5, 2017, dismissing the case for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1). JA5. On April 18, 2017, Plaintiffs filed their notice of appeal of the District Court's order. JA1.

II. Pertinent Factual History

Plaintiffs each sought employment at SEPTA and were qualified for the jobs they sought. JA22. Plaintiff White has drug convictions from 2006 and 2007, and Plaintiffs Long and Shipley have drug convictions from 1997 and 2001,

[2] Plaintiffs also brought claims under Section 1681b(b)(2) of the FCRA and Pennsylvania's Criminal History Record Information Act ("CHRIA"), 18 Pa. Cons. Stat. Ann. § 9125. This appeal does not challenge the District Court's decision as to those claims. Plaintiffs' CHRIA claims are currently pending before the Philadelphia Court of Common Pleas.

respectively. JA28, 30, 31. Each Plaintiff detailed in the Complaint that his criminal history is not relevant to the job for which he applied for reasons including the nature of the crime, the age of the conviction, and the years he has been in the general population without any further convictions. JA28, 30, 31. Contrary to the District Court's ruling, each pled that SEPTA denied him employment based on information revealed from his consumer report. JA28-29, 31, 37-38, 43, 44.

A. Plaintiff Shipley's Facts

In or about October 2015, Mr. Shipley applied to be a Railroad Supervision Manager with SEPTA, and interviewed on or about January 28, 2016. JA25, 28. At his interview, Mr. Shipley discussed the experiences that qualified him for the position, together with his significant experience working for transportation companies, including a regional public transportation company similar to SEPTA. JA29. At SEPTA's behest, Mr. Shipley completed two SEPTA forms authorizing SEPTA to conduct a background check. JA29. Mr. Shipley's interview went well, and SEPTA offered him the position on approximately February 29, 2016. JA29. On approximately March 22, 2016, Mr. Shipley received a letter from SEPTA informing him that SEPTA's new hire orientation was scheduled for March 28, 2016. JA29. Approximately two days later, Mr. Shipley received a telephone call from a SEPTA recruiter telling him not to report to work, and that his background

check had not been cleared. JA29. On approximately March 25, 2016, the SEPTA recruiter called Mr. Shipley back and told him that SEPTA was denying him the Railroad Supervision Manager position because of his criminal history. JA29. The recruiter followed up on her call to Mr. Shipley with a letter stating the same. JA29. Mr. Shipley never received a copy of his consumer report or a statement of his FCRA rights from SEPTA. JA30.

B. Plaintiff White's Facts

In or about April 2015, Mr. White applied to be a Bus Operator with SEPTA, and interviewed on or about April 29, 2015. JA26, 30. At that interview, Mr. White discussed the experiences that qualified him for the position, including his job as a delivery driver at the time of the interview and that he had recently obtained his Commercial Driver's License. JA30. At SEPTA's behest, Mr. White completed a SEPTA form authorizing SEPTA to conduct a background check. JA30-31. Mr. White's interview went well, and the SEPTA employee with whom he interviewed told him that he would receive more information about starting training. JA31. Mr. White repeatedly asked SEPTA for updates about his hiring, and SEPTA told him it was waiting on the results of his background check. JA31. Approximately six months after his interview, and following Mr. White's numerous requests for updates, Mr. White received a letter from SEPTA denying him the Bus Operator position because of his criminal history. JA31. Mr. White

never received a copy of his consumer report or a statement of his FCRA rights from SEPTA. JA31.

C. Plaintiff Long's Facts

In or about October 2014, Mr. Long applied for the position of Bus Operator with SEPTA, and interviewed on or about October 17, 2014. JA25, 27. At that interview, Mr. Long discussed the experiences that qualified him for the position, including his Commercial Driver's License and his job as a school bus driver at the time of the interview. JA27. The recruiter told Mr. Long that he thought Mr. Long would be a good driver, he interviewed well, and he was qualified for the position. JA27. Consequently, on the same day of the interview, the recruiter extended an oral offer of employment to Mr. Long contingent on a background check. JA27. At SEPTA's behest, Mr. Long completed a SEPTA form authorizing SEPTA to conduct a background check. JA27. In or about late October 2014, the recruiter called Mr. Long to revoke the offer of employment for the Bus Operator position based on Mr. Long's previous criminal history. JA28. Over four months later, in or about early March 2015, Mr. Long received a letter from SEPTA's Human Resources Division Recruitment Manager, stating that "based on [its] hiring criteria," SEPTA had decided not to hire Mr. Long for the Bus Operator position. JA28. The correspondence indicated that this decision was made from the

information SEPTA had received from a consumer reporting agency, U.S. Security Care, Inc. JA28.

SUMMARY OF ARGUMENT

The District Court erred in holding that Plaintiffs did not have standing to sue for SEPTA's violation of its duties as a user of consumer reports for employment purposes in connection with Plaintiffs' application for employment. Specifically, SEPTA used consumer reports to deny employment to Plaintiffs (and the putative class represented by Plaintiffs) without first providing them with a copy of their consumer report or a statement of their rights under the FCRA. This statutory failure violates Section 1681b(b)(3) of the FCRA, which Congress enacted to ensure that individuals like Plaintiffs who are the subjects of consumer reports are provided with an opportunity to review that information, correct any inaccuracies and, even if accurate, explain why an adverse action should not have been taken against them based on that information.

Plaintiffs suffered particularized and concrete harm from SEPTA's failure to comply with Section 1681b(b)(3). Plaintiffs Shipley and White were never provided with their consumer reports, and thus had no way of knowing what information the reports contained and what information SEPTA used to reject their employment. All three Plaintiffs were denied the opportunity to review and explain the information contained in their consumer reports before SEPTA denied

them employment. Plaintiffs were not afforded the opportunity to explain to SEPTA why they should nonetheless have been hired in light of their significant work histories and the other mitigating factors pled in detail in the Complaint.

In granting SEPTA's motion to dismiss, and finding that Plaintiffs lacked standing to seek redress from these injuries, the District Court made four serious errors warranting reversal. First, the District Court imposed an impossible pleading requirement on Plaintiffs by requiring that they allege that their consumer reports were inaccurate when Plaintiffs Shipley and White *never* received (and to this day have not received) their consumer reports—and thus did not know what was on their reports and could not plead accuracy or inaccuracy. Relatedly, the District Court erred because accuracy is not even required to state a claim under Section 1681b(b)(3). Second, although Plaintiffs pled that they were denied employment because of information SEPTA stated was in their consumer reports, the District Court misconstrued the record by erroneously finding that Plaintiffs were denied employment because of information that they self-disclosed. Third, the District Court ignored Supreme Court and Third Circuit precedent holding that Congress can legislate into existence concrete injuries and that a denial of information is an injury sufficient to establish Article III standing. Finally, the District Court ignored Third Circuit authority requiring that the FCRA be interpreted broadly, in light of its protective purposes.

The District Court's decision ignored Plaintiffs' well-pled factual allegations establishing Plaintiffs' standing at the motion to dismiss stage. It flouts the strongly stated Congressional intent to protect job applicants and ensure that they are provided with a full opportunity to review their consumer reports and respond to the information contained therein before an adverse employment action is made. If the District Court's decision is allowed to stand, it will be a blueprint for employers to escape liability by withholding an applicant's consumer report and thereby denying a job applicant the opportunity to dispute the report, correct any errors, or explain why he or she should be hired in light of his or her work history and other mitigating factors. Such a result would incentivize employers to violate the law knowing that they would be free from any legal repercussion for those actions. This would be a clear statutory violation of the FCRA.

For these reasons, and as discussed in greater detail below, the Court should reverse the District Court and find that Plaintiffs have standing under Section 1681b(b)(3) of the FCRA.

ARGUMENT

I. Standard of Review

SEPTA moved to dismiss Plaintiffs' Complaint, pursuant to Rule 12(b)(1), on the grounds that the facts pled in the Complaint were insufficient to give rise to standing. In reviewing a facial attack, the Court "must only consider the

allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014) (citation omitted). A facial attack requires the district court to apply the same standard it would use in considering a motion under Rule 12(b)(6), "construing the alleged facts in favor of the nonmoving party." *Id.* The Court's review under Rule 12(b)(1) is plenary. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012) (citations omitted).

II. The Fair Credit Reporting Act's Statutory Background.

The FCRA permits consumer reporting agencies to furnish consumer reports to employers "to use the information for employment purposes." 15 U.S.C. § 1681b(a)(3)(B). However, the FCRA also imposes restrictions on employers' use of those consumer reports for employment purposes. *See* 15 U.S.C. § 1681b(b). Under Section 1681b(b)(3):

> Except as provided in subparagraph (B), in 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 Federal Trade Commission under section 1681g(c)(3) of this title.

15 U.S.C. § 1681b(b)(3)(A).

This section protects job applicants against adverse employment actions based on a consumer report that the job applicant has had no opportunity to review or discuss with his or her current or prospective employer. Thus, the text of Section 1681b(b)(3) provides an individual with a right to certain information (the consumer report and a description of rights conferred by the FCRA) before an employer takes adverse action based on that report. "The 'clear purpose' of this section is to afford employees time to 'discuss reports with employers or otherwise respond before adverse action is taken.'" *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) (quoting Lynne B. Barr, *The New FCRA: An Assessment of the First Year*, 54 Bus. Law. 1343, 1348 (1999)).

By requiring that job applicants receive the foregoing information from employers before an adverse action is taken, the statute provides job applicants with a substantive right to review the consumer report and discuss it with their putative or current employer before adverse action is taken against them. 15 U.S.C. § 1681b(b)(3). Congress permitted individuals to sue to redress a breach of the substantive rights set forth in Section 1681b(b)(3) and, if successful, to be awarded actual, statutory, and punitive damages, as applicable. 15 U.S.C. § 1681n.

The legislative history of the FCRA underscores the importance of the rights created by the statutory text. Congress "found that in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001) (discussing the FCRA's legislative history); *see also Cushman v. Trans Union Corp.*, 115 F.3d 220, 223 (3d Cir. 1997) (in enacting the FCRA, Congress acknowledged "the detrimental effects inaccurate information can visit upon . . . the individual consumer" (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 962 (3d Cir. 1996)) (internal quotation marks omitted)).[3] Therefore, Congress sought "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 632 (E.D. Va. 2016) (quoting S. Rep. No. 517, 91st Cong., 1st Sess. 2 ("S. Rep.") at 1).

Congress also specifically recognized "the inability at times of the consumer to know he is being damaged by an adverse credit report." *Id.* (quoting S. Rep. at 3); *see also Cushman*, 115 F.3d at 223. "Unless a person knows he is being

[3] In 1996, Congress amended the FCRA specifically to address the employment relationship. Congress found that employers were increasingly relying on consumer reporting agencies to obtain information on the backgrounds of prospective employees. *Dalton*, 257 F.3d at 414. "Consumer" in this context refers to the "individual" applicant. *See* 15 U.S.C. § 1681a ("The term 'consumer' means an individual.").

rejected for credit or insurance or employment because of a credit report, he has no opportunity to be confronted with the charges against him and tell his side of the story." *Thomas*, 193 F. Supp. 3d at 633 (quoting S. Rep. at 3). Congress emphasized that "the consumer has a right to know when he is being turned down for credit, insurance, or employment because of adverse information in a credit report and to correct any erroneous information in his credit file." *Id.* (quoting S. Rep. at 2). Therefore, Congress wished to "establish[ ] the right of a consumer to be informed of investigations into his personal life" and to "be told the name of the agency making the report" whenever the individual "is rejected for credit, insurance or employment because of an adverse credit report[.]" *Id.* (quoting S. Rep. at 1).

The restrictions on employers at issue here were subsequently added to the FCRA. In legislative history leading up to the amendment, the House Committee stated:

> The bill also triggers special provisions when an employer contemplates taking adverse action based in whole or in part on a consumer report. Specifically, before taking adverse action regarding the consumer's current or prospective employment, an employer must provide to the consumer a copy of the report and a written description of the consumer's rights under the FCRA. The employer must also provide the consumer with a reasonable period to respond to any information in the report that the consumer disputes and with written notice of the opportunity and time period to respond. A reasonable period for the employee to respond to disputed information is not required to exceed 5 business days following the consumer's receipt of the consumer report from the employer.

Thomas, 193 F. Supp. 3d at 633 (citations omitted).

The FCRA reflects Congress's concern with the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). The statute's legislative history establishes that Congress intended that the FCRA be construed to promote the credit industry's responsible dissemination of accurate and relevant information and to maintain the confidentiality of consumer reports. To that end, it was Congress's judgment, as clearly expressed in Section 1681b(b)(3), to provide consumers with the right to review their consumer report before adverse employment action can be taken.

III. The District Court Erred by Ignoring the Factual Record When Finding Plaintiffs Were Not Harmed.

The District Court refused to credit Plaintiffs' well-pled allegations of harm under the FCRA in two separate ways, constituting clear reversible error at the motion to dismiss stage. First, it adopted SEPTA's position that Plaintiffs were denied employment because of information they self-disclosed when Plaintiffs had plausibly pled that they were denied employment at least in part based on information contained in their consumer reports. Second, it held that Plaintiffs had not alleged that their consumer reports were inaccurate, notwithstanding the fact that Plaintiffs' claims are not predicated on reporting inaccuracies. Moreover,

Plaintiffs White and Shipley never received copies of their consumer reports—and thus have no way of knowing whether their consumer reports were accurate or not. Each of these errors warrants reversal of the District Court's decision.

A. The District Court Erred in Finding that Plaintiffs Were Denied Employment Based on Their Self-Disclosures and Not Their Consumer Reports.

The District Court erroneously found that SEPTA's denial of Plaintiffs' employment was based solely on Plaintiffs' self-disclosures, and thus Plaintiffs were not harmed by SEPTA's failure to provide them with their consumer reports. JA12-13 (finding "no harm" because "Plaintiffs allege that SEPTA denied jobs to Plaintiffs based on their criminal history, which Plaintiffs disclosed prior to SEPTA procuring their background checks").

First, each Plaintiff pled that SEPTA denied him employment based on the information revealed in his consumer report. *See* JA43 ("SEPTA violated the FCRA by taking adverse employment actions against . . . [Plaintiffs] based in whole or in part on the information contained within their consumer reports."); *see also* JA36 (defining class as "[a]ll applicants . . . who were subject to an adverse action based in whole or in part on information contained in a consumer report"); JA38 ("Plaintiffs are members of the classes they seek to represent.").

Each Plaintiff alleged that SEPTA informed him that its decision regarding his employment depended on the results of his background check. After being

offered a position, Plaintiff Shipley was told not to show up to work because "his background check had not been cleared." JA29. Plaintiff White was told that he could not start training because "SEPTA was waiting on the results of his background check." JA31. After receiving an offer of employment, Plaintiff Long received a letter from SEPTA's Human Resources Division Recruitment Manager stating that its denial of employment was based on "information SEPTA had received from [the consumer reporting agency's] background check." JA28.

The District Court ignored these well-pled allegations in finding that Plaintiffs were not harmed. In essence, the District Court adopted SEPTA's argument that Plaintiffs were denied employment based solely on self-disclosed information, and *not* as a result of information contained in their consumer reports. JA65-66 (arguing in its motion to dismiss moving brief that SEPTA "would still have revoked Plaintiffs' offers of conditional employment because Plaintiffs disclosed their convictions, separate and apart from any FCRA forums"). Such a ruling would be improper even at the summary judgment stage and is clear reversible error at the motion to dismiss stage, where Plaintiffs' allegations *must* be taken as true, thereby giving them the opportunity to challenge SEPTA's factual claims. *See Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 74 (3d Cir. 2011) (discussed in Rule 12(b)(6) context); *Aichele*, 757 F.3d at 358 (same standard applies when considering a Rule 12(b)(1) motion); *see also* JA94.

Second, the District Court ignored the legal standard for establishing a violation of Section 1681b(b)(3), which is triggered by an employer "taking any adverse action based *in whole or in part* on the [consumer] report." 15 U.S.C. § 1681b(b)(3)(A) (emphasis supplied). Here, Plaintiffs have pled facts sufficient to show that SEPTA's denial of employment was at least "in part" a result of their consumer reports. *See supra.* Each Plaintiff also pled that he was denied employment only *after* SEPTA extended a conditional offer of employment and he had authorized a background check. Plaintiffs have therefore adequately pled that SEPTA relied on their respective consumer reports in making the employment decisions at issue.

Moreover, *even* if the District Court thought that SEPTA's view of the facts would prove correct—that the record after discovery will show that SEPTA denied employment to Plaintiffs in totality based on their self-disclosures and not their consumer reports—adopting that perspective at the motion to dismiss stage is a reversible error. "A complaint may not be dismissed merely because it appears unlikely that the plaintiff . . . will ultimately prevail on the merits." *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009) (citation omitted)); *see also* JA94.

B. The District Court Erred in Requiring that Plaintiffs Plead that Their Consumer Reports Were Inaccurate.

The District Court also erred when finding that Plaintiffs did not allege concrete harm because they did not allege "that their [consumer] reports were

inaccurate in any way" for at least four related reasons. JA8, 13.

First, the District Court misconstrued the harm to Plaintiffs: which is that they did not receive copies of their consumer reports in time to review, correct, dispute or otherwise contextualize the information contained within before an adverse action was taken. *See infra* Argument, § IV.C.

Second, Plaintiffs Shipley and White could not plead that their consumer reports were inaccurate because they never received those consumer reports from SEPTA. The District Court's finding that concrete harm can only be established under Section 1681b(b)(3) when Plaintiffs allege that their consumer reports are inaccurate imposes an impossible pleading burden on Plaintiffs like Shipley and White who are prevented from ever reviewing their consumer reports because the employer failed to follow the law.

Third, the District Court's focus on accuracy is contrary to the Third Circuit's holding in *In re Horizon Healthcare Services Incorporated Data Breach Litigation* ("*In re Horizon Healthcare*"), which explained that even claimed "truthful information", if improperly disseminated, can cause "an injury in and of itself." 846 F.3d 625, 639 (3d Cir. 2017); *see also In re Nickelodeon Consumer Privacy Litig.* ("*In re Nickelodeon*"), 827 F.3d 262, 274 (3d Cir. 2016) (concluding that the "unlawful disclosure of legally protected information" in and of itself constitutes a "*de facto* injury").

Plaintiffs state a violation of Section 1681b(b)(3) even if their consumer reports were entirely accurate. "Congress did not … condition the protections in the FCRA on the accuracy or inaccuracy of the information contained in the consumer report." *Demmings v. KKW Trucking, Inc.*, No. 14 Civ. 494, 2017 WL 1170856, at *9 (D. Or. March 29, 2017); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) ("Congress plainly sought to curb the dissemination of false information by *adopting procedures designed to decrease that risk*." (emphasis supplied)); *cf. Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir. 1984) (noting, in analyzing violation of § 1681e(b) of the FCRA, that consumer "reports containing factually correct information that nonetheless mislead their readers are . . . no[t] fair to the consumer who is the subject of the reports").

Fourth, the District Court's focus on accuracy again improperly accepts SEPTA's view of the facts. It assumes that Plaintiffs could not be harmed by accurate consumer reports because those reports would only reveal what Plaintiffs had already disclosed. But this assumption requires adopting SEPTA's unsupported argument that it "would still have revoked Plaintiffs' offers of conditional employment because Plaintiffs themselves disclosed their convictions[,]" which is improper at the motion to dismiss stage. JA65-66. It also assumes that SEPTA did not base its decision on other information that might have been revealed in the consumer reports (including, potentially, credit history), which

is impossible to determine at this stage of the proceeding without discovery.

IV. Plaintiffs' Injuries Are Concrete Harms Under Article III.

Based on a proper reading of the well-pled allegations in Plaintiffs' Complaint, the District Court's ruling that Plaintiffs lack standing is completely undermined and its rationale evaporates—as shown by a straightforward application of *Spokeo* and fundamental principles of Article III jurisprudence.

A. Article III Standing Generally

To have Article III standing, plaintiffs must have "personal interest . . . at the commencement of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.(TOC), Inc.*, 528 U.S. 167, 189 (2000). Plaintiffs must satisfy three elements: (1) an injury in fact, *i.e.*, an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) a causal connection between the injury-in-fact and the defendant's challenged conduct; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling. *Id.* at 180-81, 189; *see also Spokeo*, 136 S. Ct. at 1547 (the "irreducible constitutional minimum" of standing consists of "an injury in fact . . . fairly traceable to the challenged conduct of the defendant, and . . . likely to be redressed by a favorable judicial decision").

An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560

n.1 (1992).). An injury is "concrete" if it is "*de facto*; that is, it must actually exist," meaning that it is "real and not abstract." *Id.* (internal quotation marks omitted). "'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, [the Supreme Court has] confirmed in many . . . previous cases that intangible injuries can nevertheless be concrete." *Id.* at 1549 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)).

While Article III's injury requirement cannot be displaced by statute, the Third Circuit's post-*Spokeo* analysis affirms that when a statute creates a legal right, the invasion of that legal right may create standing. *See In re Nickelodeon*, 827 F.3d at 273. A "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549; *accord In re Horizon Healthcare*, 846 F.3d at 638. A plaintiff cannot however, "allege a bare procedural violation [of a statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III[,]"*Spokeo*, 136 S. Ct. at 1549; *accord In re Horizon Healthcare*, 846 F.3d at 638, which, given the factual allegations, is inapplicable here.

B. *Spokeo* Did Not Alter Pre-Existing Requirements for Article III Standing.

The Supreme Court's opinion in *Spokeo* did not alter pre-existing requirements for Article III standing. *See, e.g.*, *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ S. Ct. __, No. 16-605, 2017 WL 2407473, at *4 (June 5, 2017) (citing pre-*Spokeo* standing jurisprudence as good law). Instead, in *Spokeo*, the Supreme Court elaborated on the meaning of concreteness, distilling several "general principles" from prior cases without going beyond them. 136 S. Ct. at 1550. First, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize," "intangible injuries can nevertheless be concrete," as can injuries based on "risk of harm." *Id.* at 1549. Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* If the "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"—*i.e.* if "the common law permitted suit" in analogous circumstances—the plaintiff suffered a concrete injury. *Id.*; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

However, a plaintiff does not need to point to a common-law analogue to establish a concrete injury, because Congress has the power (and is "well positioned") "to identify intangible harms that meet minimum Article III requirements," even if those harms "were previously inadequate in law." *Spokeo*,

136 S. Ct. at 1549. Accordingly, the third principle emphasized in *Spokeo* is that Congress can elevate even procedural rights to a concrete injury if they protect against an identified harm. A "person who has been accorded a procedural right to protect his concrete interests" has standing to assert that right, and may do so "without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7.[4]

The Third Circuit has repeatedly emphasized that none of the principles set forth in *Spokeo* are new. *See In re Nickelodeon*, 827 F.3d at 274 (explaining that *Spokeo* did not change Article III standing analysis); *Bock v. Pressler & Pressler, LLP*, 658 F. App'x 63, 65 (3d Cir. 2016) (*Spokeo* "did not change the rule for establishing standing"); *see also In re Horizon Healthcare*, 846 F.3d at 637-38 ("Although it is possible to read the Supreme Court's decision in *Spokeo* as creating a requirement that a plaintiff show a statutory violation has caused a 'material risk of harm' before he can bring suit, we do not believe that the Court so intended to change the traditional standard for the establishment of standing. . . . *Spokeo* itself does not state that it is redefining the injury-in-fact requirement. Instead, it reemphasizes that Congress 'has the power to define injuries' 'that were

[4] In *Spokeo*, the Supreme Court did not even apply the principles of standing to the facts before it; instead it remanded the case to the Ninth Circuit because the prior analysis was "incomplete" and had "overlooked" concreteness. 136 S. Ct. at 1545; *see also In re Nickelodeon*, 827 F.3d at 273 (*Spokeo* did not apply concrete harm analysis).

previously inadequate in law.'" (citations and internal quotation marks omitted)).

Further, the Third Circuit has rejected a view of *Spokeo* as "erect[ing] any new barriers that might prevent Congress from identifying new causes of action though they may be based on intangible harms." *In re Horizon Healthcare*, 846 F.3d at 638.

Thus, both before and after *Spokeo*, the Third Circuit has held that Article III standing "may exist solely by virtue of statues creating legal rights, the invasion of which creates standing." *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (citations omitted); *In re Nickelodeon*, 827 F.3d at 274.[5]

[5] Courts across the country have relied on the judgment of Congress in defining as concrete *de facto* injuries "previously inadequate in law." *See Church v. Accretive Health, Inc*., 654 F. App'x 990, 994-95 n.2 (11th Cir. 2016) (finding that plaintiff alleged a concrete harm sufficient for Article III standing because "Congress provided [her] with a substantive right to receive certain disclosures" which plaintiff alleged defendant violated, and "[w]hile this injury may not have resulted in tangible economic or physical harm . . . an injury need not be tangible to be concrete"); *Matera v. Google, Inc*., No. 15 Civ. 4062, 2016 WL 5339806, at *13 (N.D. Cal. Sept. 23, 2016) (analyzing congressional judgment and statutorily created substantive rights to find that plaintiff sufficiently alleged a concrete injury in fact); *Flaum v. Doctor's Assocs., Inc*., 204 F. Supp. 3d 1337, 1341-42 (S.D. Fla. 2016) (finding that plaintiff alleged an injury in fact so as to confer standing because he alleged a violation of his substantive legal right under the FACTA); *Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103, 1106-07 (N.D. Cal. 2016) (finding that plaintiff's claim is based on an "informational injury" sufficient to support Article III standing and collecting cases); *Guarisma v. Microsoft Corp*., 209 F. Supp. 3d 1261, 1265-67 (S.D. Fla. 2016) (concluding that plaintiff suffered a concrete harm because the statute created a substantive legal right, which plaintiff alleged was violated, and stating, "[T]he Supreme Court recognized where Congress has endowed plaintiffs with a *substantive* legal right, as opposed to

Crucially, no part of the Supreme Court's decision in *Spokeo* addressed, much less disturbed, existing case law regarding the burden of proof imposed on FCRA plaintiffs seeking statutory damages, including Third Circuit precedent regarding when injuries are concrete. The FCRA's statutory text, legislative history, and this Court's jurisprudence all make clear that consumers who have been deprived of their right to the information required by Section 1681b(b)(3) have standing to seek redress for that deprivation.

C. Plaintiffs Suffered Concrete Harm.

(1) Plaintiffs Each Suffered Informational Injury, the Precise Harm Against Which Congress Legislated the FCRA to Protect.

Plaintiffs each suffered the precise harm that Congress enacted Section 1681b(b)(3) to protect against and thus have Article III standing. *Spokeo*, 136 S. Ct. at 1549 (Congress has power to "identify intangible harms that meet minimum Article III requirements"). Through Section 1681b(b)(3), Congress created the legal right for individuals to possess and review information contained in consumer reports *before* they are denied employment based *in whole or in part* on that information. *See In re Horizon Healthcare*, 846 F.3d at 639 (Congress "created a private right of action to enforce the provisions of FCRA, and even allowed for statutory damages for willful violations—which clearly illustrates that Congress

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creating a procedural requirement, the plaintiffs may sue to enforce such a right without establishing additional harm.").

believed that the violation of FCRA causes a concrete harm[.]").[6] Here, all three Plaintiffs pled that SEPTA denied them employment based on information contained in their consumer reports without first being provided with an opportunity to review that information—stating a concrete injury.

Plaintiffs have standing through SEPTA's failure to provide Plaintiffs with legally-mandated information in the form of personal consumer reports and statements of FCRA rights. *See In re Nickelodeon*, 827 F.3d at 273 (Article III standing "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"); *Alston*, 585 F.3d at 763 (same quote pre-*Spokeo*). The denial of these tangible documents is a *de facto* harm. *See In re Nickelodeon*, 827 F.3d at 272 (explaining that a harm "is 'concrete' if it is 'de facto; that is, it must actually exist' rather than being only 'abstract'" (quoting *Spokeo*, 136 S. Ct. at 1548)); *see also id.* at 274 ("While perhaps 'intangible,' the harm is also concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information.").

Plaintiffs did not suffer a "bare procedural violation . . . [that] may result in no harm" like "an incorrect zip code, without more." *Spokeo*, 136 S. Ct. at 1550

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[6] *See also Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017) (in context of violation of Section 1681b(b)(2)(A) of the FCRA, explaining that "Congress has recognized the harm such violations cause, thereby articulating a chain[ ] of causation that will give rise to a case or controversy" (citation and internal quotation marks omitted)).

(noting it would be "difficult to imagine how the dissemination of" such information would cause concrete harm without further allegations). Rather, Plaintiffs were directly injured by SEPTA's actions. Plaintiffs White and Shipley were unable to verify whether the information contained in the consumer reports used to deny them employment was accurate because they were never provided with those reports. Plaintiffs White, Shipley and Long all were denied an opportunity to show why any information contained in their consumer reports (even accurate information) would not render them unfit for the positions to which they applied before SEPTA denied them employment.

Congress enacted the FCRA to protect individuals from the precise harms Plaintiffs (and the putative class) suffered. Congress sought "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information." *Thomas*, 193 F. Supp. 3d at 632 (quoting S. Rep. at 1). Congress also sought to ensure that individuals would be provided with the "opportunity to be confronted with the charges against [them] and tell [their] side of the story[,]" even if the information contained in the consumer reports was accurate. *Id.* at 633 (quoting S. Rep. at 3); *accord Goode*, 848 F. Supp. 2d at 537; *see also Thomas*, 193 F. Supp. at 638 (Even if Plaintiffs' "consumer reports were entirely correct[,]" they still "were deprived of the opportunity to explain any negative records . . . and discuss the issues raised in their reports with [the defendant] before suffering adverse

employment action."); *Moore v. Rite Aid Headquarters Corp.*, No. 13 Civ. 1515, 2015 WL 3444227, at *4 (E.D. Pa. May 29, 2015) (explaining that Section 1681b(b)(3) affords consumers a "real opportunity" to review and challenge the contents of their background report before an employer relies on the information to take an adverse action).

Here, Plaintiffs have pled a host of facts showing how they were harmed by SEPTA's decision to use their consumer reports without Plaintiffs' input. First, Plaintiffs each pled that they applied for and were qualified for an open position. JA25, 26, 27, 29, 30. Second, Plaintiffs each pled that their criminal history was irrelevant to the position in question due to the nature of the crime, age of conviction, and years in which they had been in the general population without further convictions. JA28, 30, 31, 35.[7] Third, Plaintiffs each pled that SEPTA denied them the opportunity to review the information SEPTA was using to make its employment decision and denied them the opportunity to respond to that information. JA28, 30-31, 43; *see also* JA23, 34, 36-38.

[7] As the court in *Demmings v. KKW Trucking, Inc.*, also recently explained, the failure of a company to provide consumer reports to individuals also harms individuals (irrespective of the accuracy of the report), in additional ways including denying them: (1) the opportunity to clean up their consumer report; (2) knowledge that a consumer report had been negatively considered by potential employers; and (3) the opportunity to proactively address red flags in consumer reports on future applications. 2017 WL 1170856, at *9.

SEPTA's refusal to provide Plaintiffs with a copy of their rights under the FCRA exacerbated the harm Plaintiffs suffered. Plaintiffs were not told how to dispute information in their consumer reports (or that they had the right to do so), among other legal rights. As the Federal Trade Commission has persuasively explained, pre-adverse action disclosures serve an important educational purpose: without them, consumers may never know the rights Congress intended them to have. *See* Letter from William Haynes, Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Harold Hawkey, Employers Assoc. of N.J., 1997 WL 33791224, at *3 (Dec. 18, 1997).[8]

[8] Courts have repeatedly construed Section 1681b(b)(3) to protect individuals' right to receive a copy of their consumer report and a description of their FCRA rights before adverse action is taken (irrespective of whether the information contained in the consumer report is accurate), and that violation of this right constitutes a concrete injury. *See, e.g.*, *Mix v. Asurion Ins. Servs., Inc.*, No. 14 Civ. 2357, 2016 WL 7229140, at *5 (D. Ariz. Dec. 14, 2016) (finding informational injury and explaining that statute "is not limited to situations where the violation of those rights results in the dissemination of false information."); *Thomas*, 193 F. Supp. 3d at 638 ("Even if all of the . . . consumer reports were entirely correct. . .[,]" the plaintiff had alleged another concrete injury because he and other class members were denied "the opportunity to explain any negative records in their consumer reports and" to contest the information in their reports before subjecting them to adverse employment action). Other district courts build on the principle that a violation of the statutory protections of the FCRA may cause a concrete injury creating standing. *See Banks v. Cent. Refrigerated Servs., Inc.*, No. 16 Civ. 356, 2017 WL 1683056, at *4 (D. Utah May 2, 2017) (concluding that defendant's failure to provide plaintiff with information to which he is statutorily entitled, is not a "bare procedural violation" but a violation of "substantive rights under the FCRA" sufficient to constitute an injury in fact); *Demmings v. KKW Trucking, Inc.*, 2017 WL 1170856, at *10 (finding allegations of concrete harms where the plaintiff alleged that he had suffered informational injury through

(2) SEPTA's Actions Increased the Risk of Harm to Plaintiffs.

Congress also sought to minimize the *risk* of inaccurately reported information through ensuring that individuals like Plaintiffs were provided with an opportunity to review their consumer reports *before* adverse actions were taken and to learn of their FCRA rights. *See* 15 U.S.C. § 1681b(b)(3); *Spokeo*, 136 S. Ct. at 1550 ("Congress plainly sought to curb the dissemination of false information by *adopting procedures designed to decrease that risk*." (emphasis supplied)).

By failing to follow the procedures laid out in Section 1681b(b)(3), SEPTA increased the "risk of harm" to Plaintiffs and the putative class—further establishing that their injuries were concrete. Specifically, SEPTA increased the risk that: (1) it would base its decisions for an entire class of job applicants on incorrect information or technically correct but misleading information; (2) it would ignore mitigating circumstances that could have caused SEPTA to revisit disqualifications based on correctly disclosed convictions, and (3) individuals would not know of their FCRA rights and have their claims lapse before they could bring suit. *See, e.g.*, *Mix*, 2016 WL 7229140, at *5 (explaining that a risk of real harm is created when "[i]n the context of employment-related background checks,

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defendant's failure to provide him disclosures required under § 1681b(b)(2)(B) and § 1681b(b)(3)(B)); *Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103, 1106-07 (N.D. Cal. 2016) (collecting cases and finding that plaintiff's claim regarding defendant's violation of disclosure requirement is based on an "informational injury" sufficient to support Article III standing).

information that is true but amenable to contextual explanation" is "delivered without time to provide that explanation").

(3) The Harm Plaintiffs Suffered Has a Close Relationship to Analogous Common Law Torts.

The harm Plaintiffs suffered "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts[,]" further establishing that Plaintiffs' injuries were concrete. *Spokeo*, 136 S. Ct. at 1549.

Under Section 1681b(b)(3), an employer cannot use the private information contained in a consumer report to take an adverse action unless it first provides the consumer report to the individual to review and provides that individual with a statement of rights under the FCRA. Having failed to comply with this procedure, SEPTA had no authority to review and rely on the consumer reports in denying Plaintiffs employment.

Accessing private information without a legal basis to do so is a classic example of a modern-day analogue to well-recognized common law torts, as the Third Circuit has repeatedly recognized post-*Spokeo*. *See In re Horizon Healthcare*, 846 F.3d at 639-40 (explaining that the "intangible harm" of the "unauthorized dissemination of personal information . . . that [the] FCRA seeks to remedy has a close relationship to a harm [i.e. the invasion of privacy] that has traditionally been regarded as providing a basis for a lawsuit in English or

American courts" (citations omitted)); *In re Nickelodeon*, 827 F.3d at 274 (noting that when considering whether "an alleged injury-in-fact has traditionally been regarded as providing a basis for a lawsuit . . . Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private" (citations and internal quotation marks omitted)); *see also* Intrusion Upon Seclusion, Restatement (Second) of Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy[.]"); *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) ("The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others.").

D. The District Court Erred in Misreading *Spokeo*.

The District Court's dismissal of Plaintiffs' claims was not only based upon a misreading of the Complaint but also on an incorrect reading of *Spokeo*, ignoring the weight of precedent holding that informational injuries can establish standing and that Congress has the power to define injuries for purposes of Article III standing.

(1) The District Court Disregarded Supreme Court Cases Holding That Informational Injuries Can Establish Standing.

The District Court failed to analyze the Supreme Court cases cited in *Spokeo* establishing that the type of informational injury Plaintiffs allege—the right to specific information at a specific time—satisfies concreteness. 136 S. Ct. at 1549. Under Supreme Court precedent expressly reaffirmed in *Spokeo*, 136 S. Ct. at 1549-50, Plaintiffs "suffer an 'injury in fact," when they are unable "to obtain information which must be publicly disclosed[.]" *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). In *Akins*, the Supreme Court found that a group of voters had standing because their injury consisted of the denial of relevant information that Congress had decided to make public through statute. 524 U.S. at 20-21.

The Supreme Court also cited *Public Citizen v. U.S. Department of Justice*, where the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by statute. 491 U.S. 440, 449 (1989). The Supreme Court found that the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue." *Id.*[9]

[9] *See also* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Penn. L. Rev. 613 (1999). Courts have applied this principle to the FCRA. *See Panzer v. Swiftships, LLC*, No. 15 Civ. 2257, 2015 WL 6442565, at *5 (E.D. La. Oct. 23, 2015) (quoting *Lujan*, 504 U.S. at 560); *accord Thomas*, 193 F. Supp. 3d at 632–33.

(2) The District Court Erred in Failing to Analyze Controlling Third Circuit and Persuasive Out-of-Circuit Authority.

The District Court also failed to analyze controlling Third Circuit rulings concerning Congress's power to define injuries giving rise to Article III standing. As the Third Circuit has repeatedly held, an invasion of statutorily created legal rights is sufficient to establish an injury-in-fact—which is precisely what Plaintiffs alleged in this case.

First, in *In re Nickelodeon*, the Third Circuit held that the violation of statutory rights may establish an injury-in-fact. 827 F.3d at 272-74. It concluded that the unauthorized disclosure of legally protected information involves a clear *de facto* injury sufficient to establish Article III standing. *Id.* at 274.

Second, in *In re Horizon Healthcare*, the Third Circuit concluded that plaintiffs alleging the unauthorized dissemination of their private information—"the very injury that [the] FCRA is intended to prevent"—in violation of their statutory rights had established a *de facto* injury satisfying concreteness for Article III standing. 846 F.3d at 640. In reaching this conclusion, the Third Circuit analyzed Congress's authority to "define injuries . . . that were previously inadequate in law." *Id*. at 638-40 (citation and internal quotation marks omitted). The Third Circuit explained that in the FCRA, Congress defined an injury establishing "a case or controversy where none existed before." *Id*. at 640. Even absent evidence that the disclosure of private information increased the risk of

harm to the plaintiffs, the violation of the FCRA's statutory protections causes a concrete harm to consumers. *Id.* at 637-39.

The Eleventh Circuit opinion in *Church v. Accretive Health, Inc.*, also is instructive on this point. There, the Eleventh Circuit held that a plaintiff's right to receive certain informational disclosures in connection with the collection of a debt under the Fair Debt Collection Practices Act established Article III standing. 654 F. App'x 990, 994-95 (11th Cir. 2016). Analogizing to a Fair Housing Act claim, the Eleventh Circuit noted than an injury-in-fact "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing[.]" *Id.* at 993 (citation and internal quotation marks omitted). The plaintiffs had standing simply because they had both been denied statutorily mandated information.

Similarly, in *Syed v. M-I, LLC*, the Ninth Circuit found that a related section of the FCRA, Section 1681b(b)(2), created a right to information and a concrete injury when violated. 853 F.3d 492, 499 (9th Cir. 2017). "By providing a private cause of action for violations of Section 1681b(b)(2)(A), Congress has recognized the harm such violations cause, thereby articulating a 'chain[] of causation that will give rise to a case or controversy.'" *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).[10]

[10] Moreover, in *Bock v. Pressler & Pressler, LLP*, the Third Circuit indicated that while the Supreme Court in *Spokeo* "did not change the rule for establishing standing[,]" it did "indicat[e] that a thorough discussion of concreteness is necessary in order for a court to determine whether there has been an injury-in-fact." 658 F. App'x 63, 65 (3d Cir. 2016) (citing *Spokeo*, 136 S. Ct. at 1545). The

E. The District Court Erred in Ignoring the Remedial Purposes of the FCRA and Case Law Interpreting FCRA Standing Broadly.

The Third Circuit recognizes that the FCRA is a remedial statute which should be broadly construed in favor of protection for individuals like Plaintiffs. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010). The "consumer oriented objectives" of the FCRA "support a liberal construction of the FCRA, and any interpretation of this remedial statute must reflect those objectives." *Id*. (citation and internal quotation marks omitted).

In finding that Plaintiffs' allegations of Section 1681b(b)(3) violations "amount to bare procedural violations without concrete harm," JA12, the District Court disregarded that broad interpretation of the FCRA. The District Court's ruling would allow employers to ignore the protections provided by the FCRA. There would be no incentive for an employer to ever provide job applicants like Plaintiffs with the information to which they are entitled. Employers would be free to deny employment to job applicants without ever telling them what information they relied on to make those decisions.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Third Circuit reverse the District Court and rule that Plaintiffs have standing to bring their claims

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District Court's analysis of concreteness falls far short of this obligation, which is an additional basis for reversal.

for redress under Section 1681b(b)(3) of the FCRA.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), the undersigned counsel hereby certifies that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit, and that I am a member in good standing of the Court.

/s/ Ossai Miazad
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CERTIFICATE OF COMPLIANCE

I, Ossai Miazad, hereby certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 8,616 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. The hard copy and the electronic copy of this brief are identical.

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Dated: June 12, 2017

/s/ Ossai Miazad
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Plaintiffs-Appellants was served on this 12th day of June, 2017, upon counsel of record via the Court's ECF filing system.

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