

No. 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,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* COMMUNITY LEGAL SERVICES, THE NATIONAL
EMPLOYMENT LAW PROJECT, AND SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 668

IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

Jamie Gullen, Esquire (Atty. ID No. 314518)
Michael Hollander, Esquire (Atty. ID No. 208077)
Community Legal Services
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3787
jgullen@clsphila.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTERESTED PARTIES	1
SOURCE OF AUTHORITY TO FILE AS <i>AMICI CURIAE</i>	4
STATEMENT UNDER FED. R. APP. 29(c)(5)	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. Criminal Records Create an Intractable Barrier to Employment for Millions of Americans, Particularly People of Color.....	7
II. Individuals with Criminal Records Are Thwarted from Asserting Their Employment Rights When an Employer Refuses to Provide a Copy of a Consumer Report.....	11
A. The Fair Credit Reporting Act Promotes Compliance with the Pennsylvania State Constitution, § 9125, and Federal Anti-Discrimination Law.	12
B. Blanket Bans On Hiring People With Criminal Records Have Been Found to Violate the Pennsylvania State Constitution.	14
C. Pennsylvania’s Policy Promoting Individualized Consideration of Job Applicants with Criminal Records is Codified in the Criminal History Records Information Act.	16
D. Title VII of the Civil Rights Act of 1964 Similarly Rejects Blanket Employment Bans for Applicants with Criminal Records.....	18
III. Applicants Must Receive Consumer Reports to Ensure Accuracy of Information Considered by Employers.....	20
CONCLUSION.....	22

TABLE OF AUTHORITIES

CASES

Cisco v. United Parcel Serv., 328 Pa.Super. 300 (1984).....17

El v. Southeastern Pennsylvania Transp. Auth., 297 F. Supp. 2d. 758 (E.D. Pa. 2003).18

El v. Southeastern Pennsylvania Transp. Auth., 418 F. Supp. 2d 659 (E.D. Pa. 2005)18

El v. Southeastern Pennsylvania Transp. Auth., 479 F. 3d 232 (3d Cir. 2007) 19, 20

Frankowski v. State Civ. Serv. Comm'n, Civ. No. 1706 CD 2012, 2013 WL 3198733 (Pa. Commw. Ct. June 25, 2013).....17

Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., 848 F. Supp. 2d 532 (E.D. Pa. 2012) 12, 13

Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975)19

Henderson v. HireRight Solutions, No. 10-459, 2010 WL 2349661 (E.D. Pa. Jun. 7, 2010)21

Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. 2012)15

Long v. Southeastern Pennsylvania Transp. Auth., No. 16-1991, 2017 WL 1332716 (E.D. Pa. Apr. 26, 2017) passim

McCorckle v. Schenker Logistics, Inc., No. CV 13-3077, 2014 WL 5020598 (M.D. Pa Oct. 8, 2014)17

Negron v. School Dist. Of Philadelphia, 994 F.Supp.2d 663 (E.D. Pa. 2014).....17

Nixon v. Com., 576 Pa. 385 (2003)16

Nixon v. Com., 789 A.2d 376 (Pa. Commw. 2001)16

Peake v. Com., 132 A.3d 506 (Pa. Commw. 2015) 11, 15

Roe v. Intellicorp Records, Inc., No. 12-CV-02567-YGR, 2012 WL 3727323 (N.D. Ca. Aug. 27, 2012).....21

Sec’y of Revenue v. John’s Vending Corp, 453 Pa. 488 (1973).15

Warren Cnty. Human Servs. v. State Civil Serv. Comm’n (Roberts), 844, A.2d 70 (Pa. Commw. 200416

White v. PNC Bank, No. CV 15-1345, 2016 WL 1404148 (E.D. Pa. Apr. 11, 2016)17

STATUTES

18 Pa.C.S. § 9125(b) 16, 17

LEGISLATIVE HISTORY

S. Rep. No. 517, 91st Cong., 1st Sess. 2.....13

OTHER AUTHORITIES

Devah Pager & Bruce Western, Nat’l Inst. of Justice, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* (2009).....10

Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *Annals Am. Acad.*, 195 (2009)10

Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. Soc.* 937 (2003).....8, 10

Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States* (2003)8

Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, Wash. C.L. Res. Paper No. 2015-3 (2015).....9

King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities,
Pew Research Center (Aug. 22, 2013).....8

Nat’l Center for State Courts, *Privacy/Public Access to State Courts: State Links* ..9

Patrick E. Langan, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Race of
Prisoners Admitted to State and Federal Institutions, 1926-1986* (1991)8

Roy Maurer, *More Employers Letting Candidates Explain Conviction Records*,
Soc’y for Human Res. Mgmt. (May 15, 2015)9

Thomas P. Bonczar, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prevalence
of Imprisonment in the U.S. Population, 1974-2001* (2003)8

U.S. Dep’t of Justice, Bureau of Justice Statistics, *Survey of State Criminal History
Information Systems* (2014)7

REGULATIONS

Office of Legal Counsel, Equal Employ. Opportunity Comm’n, *Enforcement
Guidance No. 915.002, Consideration of Arrest and Conviction Records in
Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012) 12,
19

STATEMENT OF INTERESTED PARTIES

Community Legal Services, Inc.

Community Legal Services, Inc. (CLS) was founded by the Philadelphia Bar Association in 1966 as an independent 501(c)(3) organization to provide free legal services in civil matters to low-income Philadelphians. Since its founding, CLS has served more than one million clients who could not afford to pay for legal representation. CLS has prioritized providing extensive services to people with criminal records for nearly two decades. It has been at the cutting edge of issues surrounding the civil consequences of criminal records, including the impact of records on employment, housing, and education.

CLS has worked on criminal records issues at the national level, including advocacy concerning the enforcement policies of the Equal Employment Opportunities Commission and the Consumer Financial Protection Bureau that impact on criminal records. CLS's Employment Unit serves more than 1,000 people every year who are facing barriers caused by criminal records, including in cases under 18 Pa.C.S. §9125 and Title VII of the Civil Rights Act for discrimination against job applicants because of their criminal records. These cases also include Fair Credit Reporting Act (FCRA) cases against credit reporting agencies for failure to provide accurate records.

The National Employment Law Project

The National Employment Law Project (“NELP”) is a non-profit legal research and advocacy organization with 45 years of experience advancing the rights of low-wage workers and those struggling to access the labor market. NELP seeks to ensure that vulnerable workers across the nation receive the full protection of employment laws. Specializing in the employment rights of people with arrest and conviction records, NELP has helped to lead the national movement to restore fairness to employment background checks. NELP works with allies in Pennsylvania and across the country to promote enforcement of federal, state, and local antidiscrimination laws and ensure that barriers to employment are minimized for workers with records. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers with arrest and conviction records.

Service Employees International Union Local 668

SEIU Local 668 is a Labor Organization which is the exclusive collective bargaining agent for approximately 20,000 public service workers across the state of Pennsylvania primarily in the areas of social and rehabilitative services. The membership is employed at all levels of government, state, county and municipalities. Members of Local 668 are required by the employers they work for to undergo a criminal background check in order to obtain and maintain

employment. An individual with a criminal record, regardless of whether the offense was minor and regardless of the length of time that has passed since the conviction, may be terminated from employment as a result of the existence of a criminal record. Further, many members work in occupations the responsibilities of which include helping members of the public reduce their reliance on public assistance benefits, and/or find and obtain employment. Helping to reduce barriers to employment is not only the nature of the work of some our members perform, in some cases it materially reduces their workload.

While we maintain an interest in this case given our work with those facing barriers to employment across Pennsylvania, it should be noted that our highest concentration of members is in Philadelphia. Some members, as well as their relatives, have faced, and/or are facing barriers to employment of their own.

SOURCE OF AUTHORITY TO FILE AS *AMICI CURIAE*

Under the Federal Rules of Appellate Procedure, entities other than the United States, its officers or agencies, or a state, may participate in an appeal as *Amici Curiae* by leave of court or if the brief states that all parties have consented to its filing. In this matter, all parties have consented to participation in this appeal by *Amici Curiae* and therefore leave of court is not required.

STATEMENT UNDER FED. R. APP. 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amici Curiae* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amici Curiae*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

The proliferation of criminal records and the rise of the commercial background check industry have substantially impeded access to badly needed employment opportunities for low-income, Black, and Latino workers.

Yet the District Court dismissed Plaintiffs' Fair Credit Reporting Act (FCRA) claims for lack of standing, stating that they "failed to allege that they were harmed in any non-abstract way as a consequence of SEPTA's purported FCRA violations." *Long v. Southeastern Pennsylvania Transportation Authority*, No. 16-1991, 2017 WL 1332716, at *4 (E.D. Pa. Apr. 26, 2017). This holding failed to credit the interplay between the FCRA, which requires employers to provide pre-adverse action notices and copies of background checks, and the substantive legal rights of people with criminal records that arise under the Pennsylvania Constitution, Pennsylvania statute, and Title VII of the Civil Rights Act of 1964. These laws prohibit absolute or overbroad bans on employment of people with criminal records in favor of individualized consideration of whether workers present risks to employers.

Compliance with the FCRA's pre-adverse action requirements is essential to provide people with criminal records opportunities to review exactly what appears on their background reports, understand how that information may be held against them, and engage in informed conversations with employers about their records.

Through this interchange, employers gain information necessary to properly assess job candidates, using the guidance provided in state and federal law.

By finding that individuals who did not receive pre-adverse action notices or copies of their background reports as required by the FCRA lacked standing, the District Court's opinion creates yet another roadblock to employment opportunities for millions of workers struggling to overcome barriers caused by criminal records. These barriers cause low-income individuals and communities of color to lose out on essential income and capital and remain trapped in poverty.

ARGUMENT

I. Criminal Records Create an Intractable Barrier to Employment for Millions of Americans, Particularly People of Color

The Department of Justice estimates that seventy to one hundred million American adults have a criminal record. U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems* 3 (2014).¹ This number translates to over 2.5 million individuals in Pennsylvania. *Id.* at Table 1. The prevalence of and easy access to criminal records has become a significant burden on individuals across the United States, and in particular on individuals and communities of color.

Communities of color have long been arrested, convicted and incarcerated at disproportionately high rates. African Americans account for 12% of the

¹ Available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

population, 27% of all arrests, and 44% of those convicted of felonies. Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States* (2003).² While eight percent of the working-age population possesses a felony record, Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 938 (2003), the figure is undoubtedly much higher for African-American men, who have a 33% likelihood of being incarcerated during their lifetime. Thomas P. Bonczar, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* 1 (2003).³ These disparities have only grown over time: in the 1920s, African Americans were three times as likely as Whites to be imprisoned, Patrick E. Langan, U.S. Dep't of Justice, Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986* 7 (1991),⁴ but by 2010, African Americans were six times as likely as Whites to be imprisoned. *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, Pew Research Center (Aug. 22, 2013).⁵

Access to criminal records has also increased in recent years. Twenty years ago, an employer or landlord would have to go to a local courthouse to view a physical file to find out whether a job applicant or potential tenant had a criminal

² Available at <https://ucr.fbi.gov/crime-in-the-u.s/2003/>.

³ Available at <https://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

⁴ Available at <https://www.bjs.gov/content/pub/pdf/rpasfi2686.pdf>.

⁵ Available at <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate>

record. Now, due to advances in technology and the resulting rise of a multi-billion-dollar background check industry, data collection companies, employers, and landlords are able to easily access criminal records online. *See* Nat'l Center for State Courts, *Privacy/Public Access to State Courts: State Links*;⁶ Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, Wash. C.L. Res. Paper No. 2015-3 (2015). As a result, employer use of background check information is now widespread: in a recent survey, 90 percent of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Roy Maurer, *More Employers Letting Candidates Explain Conviction Records*, Soc'y for Human Res. Mgmt. (May 15, 2015).⁷

The presence of even a minor criminal record—including an arrest that did not result in a conviction—can harm an individual's ability to obtain and keep employment. Researchers have found that the existence of a criminal record reduced the likelihood of a callback or job offer by nearly 50 percent, with an even more pronounced effect on Black applicants than white applicants. Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623

⁶ Available at <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx>.

⁷ Available at <http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/candidates-explain-conviction-records.aspx>.

Annals Am. Acad., 195, 199 (2009).⁸ One study found that the “criminal records penalty suffered by white applicants (30%) is roughly half the size of the penalty for blacks with a record (60%).” Devah Pager & Bruce Western, Nat’l Inst. of Justice, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 4 (2009).⁹ Moreover, white men with a felony record were half as likely as white men without a record to receive a callback after applying for a job, while African Americans with a felony record were only one third as likely to receive a callback as those without a record. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955-957 (2003).

Despite employers’ deep reluctance to hire individuals with criminal records, their fear is unsupported by empirical evidence. Dr. Kiminori Nakamura, an expert on the issue of recidivism for individuals with criminal records, concluded in a recent case that individuals with older criminal records “pose very little risk of reoffending and do not differ meaningfully from the risk posed by members of the general population.” Nakamura Declaration at 4-5, *Peake v. Com.*, 132 A.3d 506 (Pa. Commw. 2015) (No. 216 M.D 2015). He further explained, “[t]he value of criminal records in predicting future criminality diminishes with time and becomes virtually irrelevant after a maximum of no more than seven years for individuals

⁸ Available at https://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf.

⁹ Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>.

with single convictions, and no more than ten years for those with multiple convictions – and even less time for individuals with non-violent offenses.” *Id.*

Even so, *amici* regularly encounter employers who deny employment to individuals with very old or very minor records completely unrelated to the jobs sought. As a result, *amici* advocate on behalf of low-income individuals and communities of color who continue to be unlawfully denied employment by employers who are unaware of, or choose to disregard, protections under state and federal law that require a more nuanced assessment of criminal records in the hiring process.

II. Individuals with Criminal Records Are Thwarted from Asserting Their Employment Rights When Employers Refuse to Provide Copies of Consumer Reports and Pre-Adverse Action Notices.

Federal and state laws disfavor blanket employment bans for job applicants with criminal records in favor of individualized assessments of whether those records present unjustifiable risks to employers. These principles require communication between employers and job applicants, so individualized assessments can be made. *See, e.g.,* Office of Legal Counsel, Equal Employment Opportunity Comm’n, *Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012) (describing an interactive process where an

applicant is provided an opportunity to demonstrate their suitability for employment notwithstanding their criminal record).¹⁰

The FCRA's pre-adverse action requirements are one of the key vehicles that allow individuals to enforce these federal and state laws, as they were intended to provide individuals with 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).

Amici have directly seen the importance of the FCRA's pre-adverse action requirements: the opportunity to review and explain the result of a background check is often the difference between a job offer and a denial. The District Court's decision deprives the many millions of Pennsylvanians with criminal records this opportunity, making it even more difficult for those who need it most to access employment.

A. The Fair Credit Reporting Act Promotes Compliance with the Pennsylvania State Constitution, § 9125, and Federal Anti-Discrimination Law.

In this case, Plaintiffs allege that they were rejected by SEPTA for old drug convictions, based on SEPTA's policy of a lifetime ban for applicants with felony drug convictions. *See* Joint Appendix ("JA") 23 (First Amended Class Action Complaint, *Long v. Southeastern Pennsylvania Transportation Authority* (E.D. Pa.

¹⁰ Available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

2917) (No. 16-1991)). These allegations suggest potential violations of federal and state laws governing the hiring of people with criminal records.

The FCRA's requirement under § 1681b(b)(3)—which provides that employers must give individuals copies of their consumer reports and a summary of their legal rights prior to making adverse employment decisions—promotes compliance with the Pennsylvania Constitution, § 9125, and Title VII as it provides applicants with an opportunity to assess the accuracy of the reports as well as discuss the circumstances of the information being reported to employers. *See Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) (stating FCRA is intended to provide individuals with time to “discuss reports with employers or otherwise respond before adverse action is taken”); *see also* S. Rep. No. 517, 91st Cong., 1st Sess. 2 at 3 (detailing the FCRA right to “be confronted with the charges against him and tell his side of the story”).

In practice, *amici* have seen the concrete benefits to job applicants with criminal records when they properly receive copies of their background reports. Especially for individuals with older criminal records, it can be difficult to remember precise details regarding the types of charges, grades of charges, sentences imposed, and when, exactly, cases occurred. When individuals are provided copies of their background reports, they can better understand what is on their records, what employers may be holding against them, and what kinds of mitigating information

may be helpful to provide to employers to provide context and allow meaningful individualized assessments. *Amici* have found background reports to be instrumental to individuals being able to advocate for themselves successfully with employers and attain jobs for which they are qualified.

When individuals with criminal records do not receive copies of their consumer reports, they are left in the dark. This not only harms their ability to procure employment in the present, but can even impact their future employability as they lack the information needed to assess and communicate their suitability for future job opportunities. Moreover, employers do not get the information they need to ensure they are complying with state and federal laws governing the hiring of people with criminal records.

B. Blanket Bans On Hiring People With Criminal Records Have Been Found to Violate the Pennsylvania State Constitution.

Pennsylvania has a strong tradition of requiring individualized assessment of risk posed by people with criminal records. As early as 1973, the Pennsylvania Supreme Court has found that blanket prohibitions on employing individuals with criminal records undermine the:

[D]eeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. ... To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

Sec'y of Revenue v. John's Vending Corp, 453 Pa. 488, 494-95 (1973).

Accordingly, individuals have successfully mounted constitutional challenges to statutory provisions that impose lifetime employment bans. In *Peake*, the Pennsylvania Commonwealth Court held that the lifetime employment ban contained in the Older Adults Protective Services Act (OAPSA) violated the substantive due process guarantees of the Pennsylvania constitution. 132 A.3d 506, 521 (Pa. Commw. 2015).

A fatal flaw in the policy at issue in *Peake* was that it did not allow for consideration of individualized factors, such as “the nature of the crime, the facts surrounding the conviction, the time elapsed since the conviction, evidence of the individual’s rehabilitation, and the nature and requirements of the job.” *Id.*; see also *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 25 (Pa. Commw. 2012) (holding lifetime employment ban contained in Public Schools Code unconstitutional as applied to an employee with a 30-year-old conviction for voluntary manslaughter, as the policy had “no temporal proximity to Johnson's present ability to perform the duties of his position, and it does not bear a real and substantial relationship to the Commonwealth's interest in protecting children”); *Warren Cnty. Human Servs. v. State Civil Serv. Comm'n (Roberts)*, 844 A.2d 70, 74 (Pa. Commw. 2004) (asserting that a statute’s lifetime employment ban was unconstitutional because it foreclosed consideration of whether a conviction,

remote in time, was determinative of whether a person could act as a child caseworker); *Nixon v. Com.*, 789 A.2d 376, 382 (Pa. Commw. 2001) (holding that OAPSA was unconstitutional and that “[p]etitioners' conviction records do not reflect upon their present or indeed past ability to successfully perform their jobs in facilities covered by the Act”), *aff'd on other grounds*, 576 Pa. 385, 404 (2003).

By failing to give Plaintiffs copies of their consumer reports and pre-adverse action notices, as required by the FCRA, Plaintiffs were impeded from asserting their state constitutional rights.

C. Pennsylvania’s Policy Promoting Individualized Consideration of Job Applicants with Criminal Records is Codified in the Criminal History Records Information Act.

Recognizing that criminal records can have a severe and detrimental effect on individuals, the Pennsylvania legislature has codified the Commonwealth’s constitutional commitment to the individualized assessment of people with criminal records. To this end, § 9125 of the Criminal History Records Information Act specifically limits the extent to which employers are allowed to use criminal records in hiring decisions. Section 9125(b) states: “Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied.” 18 Pa. C.S. § 9125(b). By requiring that convictions are only considered

with respect to each applicant's suitability for a specific job sought, § 9125 does not permit blanket exclusions for classes of criminal records.¹¹

In applying § 9125, courts have required employers to look at the nature of the offense and the facts surrounding the conviction—as well as the applicant's subsequent history—in order to determine whether that conviction makes the applicant unsuitable for employment. *See White v. PNC Bank*, No. CV 15-1345, 2016 WL 1404148, at *6 (E.D. Pa. Apr. 11, 2016); *Negron v. School Dist. Of Philadelphia*, 994 F.Supp.2d 663, 667 (E.D. Pa. 2014); *McCorckle v. Schenker Logistics, Inc.*, No. CV 13-3077, 2014 WL 5020598, at *5 (M.D. Pa Oct. 8, 2014); *Frankowski v. State Civ. Serv. Comm'n*, Civ. No. 1706 CD 2012, 2013 WL 3198733, at *4 (Pa. Commw. June 25, 2013); *Cisco v. United Parcel Serv.*, 328 Pa.Super. 300, 307 (1984) (stating that § 9125's restriction on employers' consideration of criminal convictions is an expression of public policy¹²).

¹¹ Recognizing the interplay between the two statutes, Plaintiffs also brought a claim for violation of § 9125 in this lawsuit. The state claim was dismissed for lack of jurisdiction after the federal claims were dismissed, and Plaintiffs have subsequently filed suit in Pennsylvania state court.

¹² SEPTA relied upon *Cisco* in defense of its argument that a blanket ban on hiring individuals convicted of felonies serves a legitimate public objective under § 9125. *See* JA 71 (Motion to Dismiss the First Amended Class Action Complaint at 15, *Long v. Southeastern Pennsylvania Transp. Authority*, 2017 WL 1332716 (E.D. Pa. 2017) (No. 16-1991)). However, the Superior Court of Pennsylvania directly refuted this proposition when it distinguished UPS's treatment of *Cisco* from situations covered by § 9125, as the case involved "an arrest arising from appellant's performance of his extant duties, not an incident arising thirteen years earlier on an unconnected matter." *Cisco v. United Parcel Service*, 328 Pa.Super.

SEPTA's failure to comply with the FCRA prevented Plaintiffs from having the information they needed to engage with SEPTA about their suitability for employment under § 9125.¹³

D. Title VII of the Civil Rights Act of 1964 Similarly Rejects Blanket Employment Bans for Applicants with Criminal Records.

Blanket employment bans like SEPTA's are also disfavored under federal anti-discrimination law. Due to the disproportionate harm caused to Black and Latino job applicants, the EEOC has held that any blanket prohibitions on hiring individuals with criminal records is unlawful under Title VII. *See* Office of Legal Counsel, Equal Employ. Opportunity Comm'n, *Enforcement Guidance No.*

300, 307 (1984). In contrast, the Plaintiffs who were denied by SEPTA were denied on the ground of decades-old felony convictions that were unrelated to their ability to perform the job.

¹³ SEPTA maintains that it has not violated § 9125, on the ground that "at least one court [in *El v. Southeastern Pennsylvania Transp. Auth.*, 479 F.3d 232, 237 (3d Cir. 2007)] has found that a similar policy was justified by business necessity." JA 58 (Motion to Dismiss the First Amended Class Action Complaint at 2, *Long v. Southeastern Pennsylvania Transportation Authority*, 2017 WL 1332716 (E.D. Pa. 2917) (No. 16-1991)). When considering SEPTA's motion to dismiss, the District Court in *El* declined to make a definitive pronouncement with respect to whether SEPTA's blanket ban violated Pennsylvania public policy due to insufficient evidence within the record. *See* 297 F. Supp. 2d 758, 761 (E.D. Pa. 2003). The issue was never resolved, as the plaintiff subsequently withdrew his § 9125 claims. *See* 418 F. Supp. 2d 659, 664 n.1 (E.D. Pa. 2005). Additionally, when the Third Circuit held that a reasonable juror would necessarily find that SEPTA's practice was justified by business necessity under Title VII, it did so because plaintiff had "chosen neither to hire an expert to rebut SEPTA's experts on the issue of business necessity nor even to depose SEPTA's experts." 479 F.3d 232, 237 (3d Cir. 2007).

915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012).¹⁴

The EEOC's enforcement guidance requires that employers take into account the nature and gravity of the offenses on an applicant's criminal record, the time that has passed since any conviction, and the nature of the job held or sought. *Id.* These factors were articulated in *Green v. Missouri Pac. R.R. Co.*, where the court stated that "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense...in the permanent ranks of the unemployed." 523 F.2d 1290, 1298 (8th Cir. 1975).

Even in the case of *El v. Southeastern Pennsylvania Transp. Auth.*, where the court did not find a Title VII violation due to plaintiff's lack of expert testimony, the Third Circuit provided a roadmap for how a plaintiff could successfully challenge a blanket ban like SEPTA's. 479 F.3d 232 (3d Cir. 2007). The Court stated its "reasonable inference that SEPTA has no real basis for asserting that its policy accurately distinguishes between applicants that do and do not present an unacceptable level of risk." *Id.* at 248. After the *El* case, the EEOC developed its more detailed 2012 guidance which was grounded in empirical findings on the racially disparate impact blanket criminal records bans have on

¹⁴ Available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

people of color and the research showing that over time, people with criminal records are no more likely to re-offend than individuals without criminal records.

These developments and the increased emphasis on the importance of individualized assessment make employer compliance with the FCRA of paramount importance. Only through the transparent disclosure of background check information and rights under the FCRA can job applicants be informed and empowered to engage with employers to ensure they receive the individualized consideration they are entitled to under state and federal law.

III. Applicants Must Receive Consumer Reports to Ensure Accuracy of Information Considered by Employers.

SEPTA's failure to provide pre-adverse action notices and copies of background checks also injure individuals with criminal records because they are denied the opportunity to assess the accuracy of their consumer reports. In the case at bar, Joseph Shipley and Michael White allege that they never received copies of their consumer reports. *See* JA 30-31 (First Amended Class Action Complaint at 10-11, *Long v. Southeastern Pennsylvania Transportation Authority*, 2017 WL 1332716 (E.D. Pa. 2017) (No. 16-1991)). Although Mr. Shipley and Mr. White have felony drug convictions on their criminal records, the Plaintiffs were denied the opportunity to determine whether the background checks provided to SEPTA were accurate. Perhaps their background checks showed other convictions, misstated the years of their past convictions, or included stale information such as

old non-conviction arrest records that are not permitted to be reported under the FCRA. Without a copy of the consumer report, it is impossible to know what SEPTA considered.

Amici regularly advocate on behalf of individuals whose employment opportunities have been compromised by employers' reliance on inaccurate reports. Background checks conducted on applicants with common names, such as Plaintiff "Michael White," are more likely to yield a false positive, given the likelihood of coincidence matches. In addition, commercial background screeners' records are often outdated, resulting in individuals suffering the consequences of criminal records long after the charges have been dropped or their records have been expunged. *See, e.g., Roe v. Intellicorp Records, Inc.*, No. 12-CV-02567-YGR, 2012 WL 3727323, at *2 (N.D. Ca. Aug. 27, 2012) (describing complaint alleging that the Defendant had failed to maintain strict procedures designed to insure that such information is complete and up-to-date); *Henderson v. HireRight Solutions*, No. 10-459, 2010 WL 2349661, at *1 (E.D. Pa. Jun. 7, 2010) (alleging that the "[d]efendant regularly and illegally reports criminal records that have been expunged by court order, so that the individual's criminal history appears more serious than it actually is"). Given the high likelihood of error, individuals are injured when they are denied the chance to confirm whether their criminal record has been correctly reported.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the District Court and rule that Plaintiffs-Appellants have standing to bring their claims for redress under Section 1681b(b)(3) of the Fair Credit Reporting Act.

Respectfully Submitted,

/s/ Jamie Gullen

Jamie Gullen (Atty. ID No. 314518)

Michael Hollander (Atty. ID No. 208077)

Community Legal Services

1424 Chestnut Street

Philadelphia, PA 19102

(215) 981-3787

jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to the requirements of L.A.R. 28.3(d) I certify that the attorneys whose names appear on this brief are members of the bar of this Court.

/s/ Jamie Gullen

Jamie Gullen (Atty. ID No. 314518)

Michael Hollander (Atty. ID No. 208077)

Community Legal Services

1424 Chestnut Street

Philadelphia, PA 19102

(215) 981-3787

jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,823 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman font, 14-point type.

/s/ Jamie Gullen
Jamie Gullen (Atty. ID No. 314518)
Michael Hollander (Atty. ID No. 208077)
Community Legal Services
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3787
jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae

CERTIFICATE OF TEXT

I hereby certify that the text of the electronically filed Brief and the text of
The hard copies of the Brief are identical.

/s/ Jamie Gullen

Jamie Gullen (Atty. ID No. 314518)

Michael Hollander (Atty. ID No. 208077)

Community Legal Services

1424 Chestnut Street

Philadelphia, PA 19102

(215) 981-3787

jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae

CERTIFICATE OF VIRUS CHECK

I hereby certify that a check for computer viruses was performed on the electronic copy of this Brief, using Webroot Endpoint Protection, Version 9.0.15.6, and that no viruses were detected.

/s/ Jamie Gullen

Jamie Gullen (Atty. ID No. 314518)

Michael Hollander (Atty. ID No. 208077)

Community Legal Services

1424 Chestnut Street

Philadelphia, PA 19102

(215) 981-3787

jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Jamie Gullen
Jamie Gullen (Atty. ID No. 314518)
Michael Hollander (Atty. ID No. 208077)
Community Legal Services
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3787
jgullen@clsphila.org

June 19, 2017

Attorneys for Amici Curiae