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,

VS.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS' FRANK LONG, *ET AL*., AND IN SUPPORT OF REVERSING THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

The National Consumer Law Center ("NCLC") is a non-profit, tax exempt Massachusetts corporation qualified under section 501(c)(3) of the Internal Revenue Code. NCLC does not have a parent corporation and it has never issued shares or securities.

Dated: June 19, 2017

Respectfully submitted,

/s/ James A. Francis
James A. Francis

Attorney for *Amicus Curiae*

STATEMENT OF INTEREST

The National Consumer Law Center ("NCLC") is a national nonprofit research and advocacy organization. NCLC draws on over forty years of expertise working on protecting the integrity of the Fair Credit Reporting Act ("FCRA") rights of low-income consumers and jobseekers by providing information, legal research, and policy analysis to Congress, state legislatures, administrative agencies, and courts. Among other treatises,[1] NCLC publishes *Fair Credit Reporting* (8th ed. 2013), a volume that focuses upon the FCRA. In addition, NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on consumer reporting issues, including a report entitled Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses (April 2012).

NCLC's interest in this appeal flows from its efforts to protect the integrity of the FCRA rights of jobseekers like Plaintiffs and to advocate where law and policy intersects with consumer protection, to provide the very best and most accurate information about the subject, which information may be strongly related to the issues the court is considering but not directly raised in the advocacy positions of the

[1] The Supreme Court of the United States has cited NCLC treatises with approval. *See e.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 605 (2010) (citing to R. Hobbs *et al.*, National Consumer Law Center, *Fair Debt Collection* §§ 6.12.2, 7.3 (6th ed.2008)); *see also, id*. at FN 12.

parties. The issues presented in this case implicate the interests of millions of American jobseekers: joblessness caused by inaccurate, derogatory consumer reporting by background check companies and failure of employers to properly inform workers and job seekers of their rights when making an adverse determination based upon a background check. The FCRA provides essential protections to current and prospective employees that are imperiled by the decision below. NCLC's interest is to inform the Court how it views the history and significance of the FCRA's pre-adverse action requirement and how it affects jobseekers and employees.

STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rules 29(a) and 29(c) of the Federal Rules of Appellate Procedure. No party or counsel for any party in the pending action authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amicus curiae*, its members, or its counsel.

Both Appellants and Appellees consent to the filing of this *amicus* brief.

ARGUMENT

I. The FCRA's Pre-Adverse Action Provision is Vital to Protecting Jobseekers and Employees from the Harms of Criminal Background Screening.

The FCRA contains a number of provisions that are designed to protect jobseekers and employees' privacy and ensure accuracy in background reports. However, the FCRA's protections work only when a prospective employer informs a jobseeker that a potentially adverse employment action is the result of information contained in a background report and provides the content of that report *prior to taking the adverse action*. The "pre-adverse action" provision furthers the FCRA's goal of safeguarding jobseekers from unfair and inaccurate background checks. *See* 15 U.S.C. § 1681b(b)(3)(A).

Since its passage in 1970, the FCRA has regulated the use of background checks in employment because "Employers were placing increasing reliance on consumer reporting agencies . . . [which] in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment." *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001). The FCRA now requires that employers give jobseekers and employees a copy of the report and a reasonable opportunity to discuss its contents before taking any adverse action based upon the report. This a vital part of fulfilling the FCRA's purpose. Without the knowledge of what is within reports that

are being generated about them, jobseekers and employees cannot take steps to correct inaccuracies in those reports or explain mitigating factors surrounding a criminal record.

II. Criminal Background Screening Is Widespread and Often Inaccurate.

Criminal background screening exercises staggering influence in hiring decisions. Approximately ninety-three percent of employers procure background checks on employees and jobseekers.[2] The use of criminal background checks severely limits employment opportunities for sixty-five million adults who have some sort of criminal record.[3] As of May of 2016, background screening was a $2 billion a year industry.[4]

The consumer reporting industry is notoriously error prone. With credit reports, a landmark study by the Federal Trade Commission ("FTC") found that

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[2] National Consumer Law Center, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 7 (2012), *available at* http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf (last visited June 19, 2017).

[3] Michelle Natividad Rodriguez & Maurice Ensellom, The National Employment Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* 1 (2011), *available at* http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf (last visited June 19, 2017).

[4] IBISWorld, Inc., *Background Check Services in the US: Report Snapshot* (April 2014), *available at* http://www.ibisworld.com/industry/background-check-services.html (last visited June 19, 2017).

about 20% of consumers had a verified error in their credit reports from the "Big Three" credit reporting agencies (TransUnion, Experian, and Equifax).[5] The problem appears to be even worse in criminal background screening agencies. These companies disseminate millions of criminal records from a number of sources with data from county, state, and federal level sources. Unlike traditional credit reporting, which is dominated by the Big Three, it is nearly impossible for a jobseeker to verify that his or her criminal background check will be accurate in advance of the report being furnished to an employer, because there are hundreds of criminal background check companies from which to obtain a criminal background check.

Beyond the risks raised by the sheer volume of the information and players involved in the industry, the manner in which many companies prepare criminal history reports increases the risk of inaccuracies. Companies often purchase criminal data in bulk and in static form, or access databases that are infrequently updated. Online background check companies sell criminal history reports that contain information that is not current or accurate – arrests that result in dismissal, felony charges that are reduced to misdemeanor convictions. Moreover, few public record

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[5] U.S. Federal Trade Commission, Report to Congress under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (December 2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf (last visited June 19, 2017).

sources that are easily accessible provide all personal identifiers for the person associated with a record (*e.g.*, date of birth, social security number, or middle name) which causes records to be matched with the wrong consumer. Background check companies often report these mismatched, inaccurate, or incomplete records without any further corroboration or investigation. *See* NCLC, Broken Records, fn 2, *supra*, at 21-23. These errors can result in grave and calamitous consequences for people subject to these inaccurate reports.

Even when technically accurate, the information in criminal background check reports can be overbroad, leading employers to make misguided hiring decisions. A criminal history report is overbroad if it contains information about an arrest or detention that did not lead to conviction, a successfully completed diversion program, a stale conviction, or a conviction that was judicially set aside, dismissed, or expunged on a finding of rehabilitation. The reporting of, and the resulting undue weight given to, stale convictions and arrests not leading to conviction are particularly pernicious. It is only a few years before an individual's "criminal record empirically may be shown to be irrelevant as a factor in a hiring decision." Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, 263 Natl. Inst. of Just. J. 10, 14-15 (2009).

Similarly, the reporting of and resulting reliance on an applicant's arrest or detention not leading to conviction is often both unfair and a poor way to measure

the risk of an applicant. Many arrests do not lead to conviction. These unlitigated events are, by definition, instances when the government never proved – and in many instances did not even file – a case against the arrestee. In many instances, an arrestee may be factually or actually innocent of the offense in question, or may be a victim of identity theft who is arrested for another person's crime. The background check industry's reporting of arrests, and employers' reliance on them for hiring decisions, contravenes a cornerstone of our criminal justice system: The presumption that people are innocent until proven guilty. *Coffin v. U.S.,* 156 U.S. 432 (1895).

Overbroad reporting of criminal records also has a disparate impact on people of color, who are significantly overrepresented in the criminal justice system. Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1274 (2004). Compounding the injustices of their overrepresentation in the criminal justice system, African Americans and Latinos with criminal records experience significantly more difficulty securing employment than whites with criminal records.[6]

The problem of overbroad reporting is directly relevant to the FCRA's protections for employment use of consumer reports, especially the pre-adverse

[6] Having a record reduces job interview callback rates generally, but blacks with or without a criminal record are less likely to receive a callback for interviews than whites with a criminal record. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957-59 (2003).

action notice required by section 1681b(b)(3). This gives jobseekers prominent notice when overbroad reporting has occurred, such as reporting an arrest that never led to a conviction or a decades-old conviction. When an employer complies with the section, jobseekers receive the actual report that the employer will rely upon and can see these negative items that the employer will view. It gives the jobseeker a chance to explain to an employer the circumstances surrounding the record (*e.g.*, a jobseeker was wrongfully arrested as an innocent bystander or has a 20-year-old auto theft conviction from teenage joyriding).

III. The District Court's Decision Is Erroneous and Undermines the FCRA's Pre-Adverse Action Requirement.

To date, no court at the appellate level has addressed a plaintiff's Article III standing to bring suit pursuant to 15 U.S.C. § 1681b(b)(3). Numerous district courts have addresses this issue and are split, with a majority finding standing. Plaintiffs' appeal presents a unique opportunity for this Court to ensure the FCRA rights of jobseekers are protected in this Circuit and throughout the country.

A. *Article III Standing and* Spokeo v. Robins

To have Article III standing, a plaintiff 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). The required personal interest must satisfy three elements throughout the litigation: (1) an injury in fact, *i.e.*, an invasion of a

legally protected interest that is concrete and particularized,[7] as well as actual or imminent; (2) a causal connection between the injury-in-fact and the defendant's challenged behavior; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling. *Id.* at 180-81, 189; *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (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 "concrete" if it is "'*de facto*'; that is, it must actually exist," meaning that it is "'real' and not 'abstract.'" *Id.* "'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.

This Court has affirmed that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 273 (3d Cir. 2016); *see also*, *Spokeo*, 136 S. Ct. at 1549 (noting that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements"

[7] The District Court conceded that Plaintiffs' injuries were sufficiently particularized and this issue was not a basis for its decision to grant SEPTA's motion to dismiss. Joint Appendix ("JA") at JA-12.

and "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before").

Standing can be established by pleading a violation of a right conferred by statute so long as the plaintiff alleges "a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). 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 (emphasis in original). Additionally, in statutorily created causes of action, the plaintiff must demonstrate that he or she is within the "zone of interests" protected by the law invoked in order to have standing to sue for a violation of the statute. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-89 (2014). In class actions, if "at least one" of the named plaintiffs has standing, a class action may proceed. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 634 (3d Cir. 2017).

B. *The Supreme Court's Decision in* Spokeo *Did Not Change Traditional Requirements for Standing*

The Supreme Court's decision in *Spokeo* simply reaffirmed existing precedent, a reality this Court has repeatedly noted. *Horizon*, 846 F.3d at 637-38 (noting that *Spokeo* did not change Article III standing analysis); *Nickelodeon*, 827 F.3d at 274 (same). *Spokeo* confirmed that a litigant must demonstrate "'an invasion of a legally

protected interest that is concrete and particularized[.]'" *Spokeo*, 136 S. Ct. at 1548. It also confirmed that the violation of procedures designed to protect a statutorily granted right "can be sufficient in some circumstances to constitute injury in fact" without demonstrating more. *Id.* at 1549-50. It was already well established that a "bare procedural violation, divorced from any concrete harm" is not enough to confer standing. *Spokeo*, 136 S. Ct. at 1549 (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). Thus, *Spokeo* simply summarized existing principles and provided examples of injuries that might (or might not) constitute sufficiently concrete harm.[8]

Elaborating on the meaning of concreteness, the Court in *Spokeo* distilled several "general principles" from its prior cases, without going beyond those cases. *Id.* at 1550. First, it acknowledged that, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize" as concrete injuries, "intangible injuries can nevertheless be concrete," as can injuries based on a "risk of harm." *Id.* at 1549-50. Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id*. at 1549. If

[8] The Supreme Court in *Spokeo* did not even apply these established principles on standing to the facts before it. Instead, it remanded the case to the Ninth Circuit, concluding that an analysis of concreteness as a separate step in the injury-in-fact inquiry was necessary. 136 S. Ct. at 1545.

"the common law permitted suit" in analogous circumstances – the plaintiff will have suffered a concrete injury that can be redressed by a federal court. *Id.* at 1549-50; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (explaining that Article III encompasses "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.").

However, a plaintiff need not come up with 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 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) for the proposition that "inability to obtain information" that Congress mandated to be disclosed is a concrete injury); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (finding that failure to disclose information under Federal Advisory Committee Act is an injury conferring standing); *Church v. Accretive Health, Inc.*, 654 Fed. App'x 990, 995, n.2 (11th Cir. 2016) (citing *Spokeo* and finding that receiving mandated disclosures is a substantive right, the denial of which gives rise to standing).

A number of prior Supreme Court cases affirmed the concreteness of intangible injuries, like that suffered by Plaintiffs, for which Congress has provided remedies. These include:

> infringements on First Amendment rights,[9] aesthetic harm caused by violations of environmental laws to visitors of affected areas,[10] the denial of statutorily required information regarding housing,[11] the allocation of Social Security benefits so as to give benefits to recipients other than the plaintiff,[12] denial of the benefit of living in an integrated community to a tenant as a result of allegedly unlawful race discrimination in housing against housing applicants,[13] and the denial of information secured to voters by statute.[14]

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[9] *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (addressing infringement on free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (addressing infringement on free exercise of religion).

[10] *Friends of the Earth*, 528 U.S. at 183 ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity" (quotation omitted)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." (citation omitted)).

[11] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (plaintiff, who did not intend to rent or purchase a residence, suffered injury-in-fact when she was denied "truthful information concerning the availability of housing," as secured by the Fair Housing Act).

[12] *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984) (male retiree, a member of a class excluded from certain Social Security benefits, had standing to sue for violation of Equal Protection Clause, even though the statute at issue provided that, in the event of its invalidation on constitutional grounds, the relevant benefits would be withdrawn from the favored class and not extended to the excluded class).

[13] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-12 (1972) (injury in-fact suffered by tenants of housing complex as a result of denial of benefits of living in an integrated community due to racial discrimination against housing applicants).

[14] *FEC v. Akins*, 524 U.S. at 20-25 (voters who claimed "inability to obtain information" required to be made public by the Federal Election Campaign Act adequately alleged injury-in-fact).

Gambles v. Sterling Infosystems, Inc., 2017 WL 589130 at *4 (S.D.N.Y. Feb. 13, 2017) (finding standing with respect to FCRA claim regarding outdated information) (original footnotes modified for clarity).

Therefore, no part of the *Spokeo* decision addressed, much less disturbed, existing case law regarding the burden of proof placed on the shoulders of FCRA plaintiffs at the pleading stage.

IV. Employers That Obtain Consumer Reports for Employment Purposes Without Complying with the FCRA Inflict Concrete Harm on Jobseekers

The FCRA's statutory text and legislative history make clear that a jobseeker who has been deprived of his right to the information required by section 1681b(b)(3) has the standing to seek redress for that deprivation in the federal courts and Plaintiffs have more than cleared that hurdle.

A. *FCRA Section 1681b(b)(3) Creates Rights to Information for Jobseekers*

The FCRA permits the use of consumer reports by employers "to use the information for employment purposes." 15 U.S.C. § 1681b(b)(3)(B). However, such usage is not unrestricted. When debating the initial passage of the FCRA, "Congress found that in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment." *Dalton*,

257 F.3d at 414.[15] Before the passage of the 1996 amendments to the FCRA that created the duties at issue in this matter, Congress again weighed in on the importance of protections for jobseekers, seeking "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." S. Rep. No. 517, 91st Cong., 1st Sess. at 2.

Inaccurate information was not the only harm Congress sought to ameliorate with the passage of the FCRA. It also specifically recognized that "[o]ne problem which the hearings … identified is the inability at times of the consumer to know he is being damaged by an adverse credit report." *Id*. at 3. "Unless a person knows he is being 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." *Id.* 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*. at 2 (emphasis added). Therefore, Congress wished to "establish the right

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[15] The *Dalton* court quoted Representative Sullivan at length, who remarked, "with the trend toward … the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable." 116 Cong. Rec. 36570 (1970).

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*. at 1.

The House Committee described the steps the amendment would take to address these issues:

> 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.

H.R. Rep. No. 103-486, 103d Cong., 2d Sess. 30 (1994).

Ultimately, Congress distilled its concerns into Section 1681b(b)(3)'s restrictions and duties, to wit:

> [I]n using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –
>
> (i) a copy of the report; and
>
> (ii) a description in writing of the rights of the consumer under this subchapter …

15 U.S.C. § 1681b(b)(3)(A). This section's "'clear purpose' … 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)).

B. *Plaintiffs Alleged the Sorts of Injuries Spokeo Highlighted*

In their First Amended Complaint, Plaintiffs alleged precisely the exact sort of informational injury highlighted by section 1681b(b)(3) and identified in *Spokeo* as giving rise to Article III standing. *See Spokeo*, 136 S. Ct. at 1549 (citing *Public Citizen*, 491 U.S. at 449 and *FEC v. Akins*, 524 U.S. at 20-25 as examples of concrete informational injury). Plaintiffs alleged that SEPTA did not provide them with the mandated consumer information and copy of their background report – the very harm section 1681b(b)(3) was designed to prevent.[16] Indeed, the informational injury may be even more concrete than in *Public Citizen* or *Akin*, because the pre-adverse action disclosure report directly bears upon the individual consumer entitled to it – *it is information about that consumer*, not just information of general interest. SEPTA deprived Plaintiffs of this valuable information and of the opportunity to

[16] JA-23 at ¶¶ 8, 44, 47, 61, 72.

discuss the information in the report with SEPTA before they were disqualified for employment.[17]

Plaintiffs also alleged violation of Section 1681b(b)(3)'s protections for jobseekers' privacy interests. *See Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017) (affirming the Article III standing of a plaintiff to sue under 1681b(b)(2) on the basis of invasion of privacy). The pre-adverse action notice required by section 1681b(b)(3) is a prerequisite to using a consumer report and, as such, is also a vital part of fulfilling the FCRA's purpose of protecting privacy. The FCRA governs both when a report can be accessed and when it can be *used*, and both restrictions are intended to protect the privacy of the consumer. The pre-adverse action notices sets a precondition that must be fulfilled before there can be a "permissible use" of the consumer report for employment purposes. Absent compliance with the certification, the employer cannot *use* the consumer report for employment purposes. An employer who uses a consumer report without the required pre-adverse action has done so illegally. The privacy protections advanced by section 1681b(b)(3) apply regardless of the content of the report. An employer must not be allowed to argue that it can misuse a consumer report because the report is accurate.

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[17] JA-23 at ¶ 10.

Contrary to the District Court's conclusion, Plaintiffs alleged at least two injuries that *Spokeo* makes clear are adequately concrete for Article III standing: information deprivation and invasion of privacy.

V. The District Court Failed to Consider Plaintiffs' Substantive Rights to Receive Information Irrespective of the Accuracy of That Information

SEPTA deprived Plaintiffs of information concerning their statutory rights under the FCRA and, arguably more importantly, the opportunity to review the information used by SEPTA as the basis for denying them employment. Nevertheless, the District Court erroneously ruled that Plaintiffs did not allege informational injury in the First Amended Complaint, they failed to allege a sufficiently concrete injury to confer standing, at least in part, because Plaintiffs had not "allege[d] that their reports were inaccurate in any way."[18] Unmoored from the statutory text, the District Court's accuracy-focused rationale strips the statute of its intended purpose because jobseekers cannot determine if information reported about them is accurate *unless they first receive a copy of it*. Such a reading undermines the FCRA's remedial goals. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010) (FCRA addresses "the inability at times of the consumer to know he is being damaged by an adverse credit report," the lack of "access to the information in [his] file," the "difficulty in correcting inaccurate information," and "getting [his] version

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[18] JA-13.

of a legitimate dispute recorded in [his] credit file." "These consumer oriented objectives support a liberal construction of the FCRA," and any interpretation of this remedial statute must reflect those objectives.) (internal citations omitted).

A. *The District Court's Decision Is an Outlier; Other Courts across the Country Have Found Standing in Almost Identical Situations.*

While no appellate court has yet addressed the issue of whether a job applicant who alleges a claim under section 1681b(b)(3) has standing under Article III of the Constitution, numerous courts at the district level have addressed a plaintiff's standing under Article III to bring a 1681b(b)(3) claim.

In *Thomas v. FTS USA, LLC*, the court held that a plaintiff had standing to sue pursuant to section 1681b(b)(3) under facts nearly identical to those of Plaintiffs. 193 F. Supp. 3d 623 (E.D. Va. 2016). Drawing upon a thoroughgoing review of the statutory text and legislative history of the FCRA, the court held that section 1681b(b)(3) "delineates substantive rights" to information and privacy for which "Congress defined injuries and articulated chains of causation that give rise to a case or controversy," giving rise to standing. *Id*. at 632. The court noted that subsection 1681b(b)(3) was created by Congress to "protect[ ] the consumer against adverse employment actions based upon a consumer report that the consumer has had no opportunity to review or discuss with his or her current or prospective employer," and that if denied those rights, like the *Thomas* plaintiff, consumers would be denied

the "'opportunity to be confronted with the charges against him and tell his side of the story.'" *Id*. at 633.

Building upon the "broad principle" of *Thomas*, the court in *Mix v. Asurion Insurance Services, Inc*. noted that the *Spokeo* inquiry "is not limited to situations where the violation of those rights results in the dissemination of false information. The proper inquiry is whether a procedural violation creates a 'risk of real harm.'" *Mix v. Asurion Ins. Servs. Inc.*, No. CV-14-02357-PHX-GMS, 2016 WL 7229140, at *5 (D. Ariz. Dec. 14, 2016) (citing *Spokeo*, 136 S. Ct. at 1549-50). The court also noted that "in the context of employment-related background checks, information that is true but amenable to contextual explanation, delivered without time to provide that explanation, does create a risk of real harm." *Id*. Finding that the plaintiff, whose background check did not contain inaccurate information, nevertheless had standing to sue pursuant to section 1681b(b)(3), the court distinguished between the harm caused between losing a job and being denied FCRA-mandated information. *Id*. at *6. ("'It does not matter *why* [defendant] chose to reject [plaintiff's] application. [Plaintiff] is not suing [defendant] because it did not hire her. She is suing it because it took adverse action against her without providing her notice and an opportunity to explain her side of the story.' This is sufficient to allege an informational injury to support standing[.]") (citations omitted). *Id*.; *see also Moody v. Ascenda USA Inc.*, No. 16-CV-60364-WPD, 2016 WL 4702681, at *5 (S.D. Fla. July 1, 2016) (finding

that plaintiff had standing to bring section 1681b(b)(3) claim based upon allegations that defendant had not provided a copy of the pertinent consumer report and a reasonable opportunity to respond to the information in the report before taking adverse employment action).

Like the plaintiffs in *Thomas* and *Mix*, SEPTA denied Plaintiffs a copy of the consumer report that served as the basis for their dismissal, an opportunity to learn about their rights under the FCRA, and a chance to explain their side of the story.

B. *Inaccuracy Is Not, and Cannot Logically Be, a Prerequisite of a Section 1681b(b)(3) Claim*

Like the District Court below, the sole other district court that has held that a section 1681b(b)(3) plaintiff did not have standing to sue focused on the accuracy of the report in question, essentially holding that a jobseeker is not entitled to learn why he or she was denied employment if the prospective employer's basis is not mistaken.[19] However, as noted above, this narrow focus on accuracy misses the point of the statute. An inaccuracy requirement is not derived from the text of section 1681b(b)(3), and is logically disconnected from the particular harm Congress sought to address with its passage, eviscerating the statute's remedial purpose to empower

[19] *See, e.g.*, *Boergert v. Kelly Servs., Inc.*, 2017 WL 440272, at *3-4 (W.D. Mo. Feb. 1, 2017) (only inaccurate information supports standing). This decision, like that of the District Court, below, are flawed because of the court's narrow focus on accuracy.

jobseekers with additional information and not leave them guessing about the reason for a prospective employer's withdrawal of a job offer.

In *Demmings v. KKW Trucking, Inc.*, the court rejected the notion that the FCRA only exists "to allow prospective employees to correct inaccurate information in their consumer reports," and recognized that information deprivation creates "at minimum, a risk of concrete, informational harm, even when all of the information in his or her consumer report is accurate." 2017 WL 1170856 at *9 (D. Or. Mar. 29, 2017).[20] This is because while "[i]naccurate information in a consumer report … could be a potential roadblock to future employment," Congress "did not … condition the protections in the FCRA on the accuracy or inaccuracy of the information contained in the consumer report." *Id*. The court "envision[ed] numerous reasons why such protections were put in place, regardless of accuracy" including alerting the consumer to take steps to improve his or her report in anticipation of a future job application or to make educated decisions concerning travelling for interviews. *Id*. Denial of those opportunities were, for the *Demmings* court, part and parcel of the informational harm Congress sought to help jobseekers avoid by enacting this section of the FCRA. *Id*. The court also noted that *Spokeo*'*s*

[20] The *Demmings* court analyzed an analogous section of the FCRA, 1681b(b)(3)(B), which requires notices after adverse action is taken by certain prospective employers in the transportation and trucking industry.

"cautionary example that a consumer's information may be 'entirely accurate' was not referencing an employer's duty to give § 1681b(b)(3)(B) notice to an unsuccessful applicant," but rather "addressed … a hypothetical consumer reporting agency's failure 'to provide the required notice to a user of the agency's consumer information.'" *Id*., citing *Spokeo*, 136 S. Ct. at 1553-54 (Thomas, J., concurring) (distinguishing duties owed under the FCRA to the public collectively and duties owed to a consumer privately).

Following *Demmings* and *Thomas*, the court in *Banks v. Central Refrigerated Services, Inc.*, affirmed the Article III standing of a 1681b(b)(3)(B) plaintiff and highlighted the two-fold right created by the statute. No. 16 Civ. 356, 2017 WL 1683056, at *4 (D. Utah May 2, 2017). The *Banks* court noted that in passing 1681b(b)(3), "Congress created at least two substantive rights on behalf of applicable consumers who suffered an adverse employment action based in whole or in part on a consumer report: a right to information and a right to correct inaccurate information." *Id*. at *3. The District Court's analysis neglects the first right, the right to information, in its narrow focus on second, the right to correct inaccurate information. The statute only functions properly when both rights are preserved.

Some FCRA claims logically involve inaccuracy in a consumer report as a prerequisite to stating a claim. These include claims arising from errors that result

from a consumer reporting agency's use of unreasonable procedures that do not ensure maximum possible accuracy of a consumer report[21] and claims arising from a consumer reporting agency's duties to respond to a consumer's report of identity theft.[22] In these contexts, the harm to the consumer plaintiff is directly connected to inaccurate information maintained in a consumer report about that consumer.

In contrast, other FCRA claims, like Plaintiffs' section 1681b(b)(3) claim, are not and cannot logically be predicated upon the presence of inaccurate information in a consumer report. These include claims arising from the unauthorized usage of a consumer report,[23] claims arising from the inclusion of outdated information in a consumer report,[24] and claims arising from a consumer reporting agency's failure to provide complete and accurate statutorily-mandated disclosures to consumers.[25] Indeed, one of the most popularly recognized and utilized rights in the FCRA is the consumer's right to obtain a copy of his or her credit report, for free on an annual

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21 15 U.S.C. § 1681e(b); *see, e.g.*, *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 192-93 (E.D. Vir. 2015).

22 15 U.S.C. § 1681c-2; *see, e.g.*, *Haykuhi Avetisyan v. Experian Info. Sols., Inc.*, 2016 WL 7638189, at *13 (C.D. Cal. June 3, 2016).

23 15 U.S.C. § 1681b(c); *see, e.g.*, *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2010).

24 15 U.S.C. § 1681c; *see, e.g.*, *Seamans v. Temple Univ.*, 744 F.3d 853, 861 (3d Cir. 2014).

25 15 U.S.C. § 1681g(a), 1681j(a), (f); *see, e.g.*, *Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103, 1106 (N.D. Cal. 2016) (informational injury caused by incomplete disclosures is a concrete injury giving rise to Article III standing).

basis or for a fee otherwise. According to the District Court's analysis, if a consumer credit reporting agency failed to provide a consumer with his or her credit report, the consumer would not have standing to seek redress of the denial of this right absent an inaccuracy in the credit report.

The *Thomas* and *Demmings* courts understood perfectly the Congressional purpose behind section 1681b(b)(3): leveling the employment playing field by providing jobseekers with the same information available to prospective employers, irrespective of the accuracy of that information. It is possible to narrowly construe this section and to imagine that Congress merely intended to provide a period of time for jobseekers to dispute *inaccurate* information that appeared in a consumer report about them.[26] However, this would lead to an absurd result because unless prospective employers who use consumer reports provide *every* jobseeker with the information called for by section 1681b(b)(3), *no single* jobseeker will be able to identify the inaccurate information in the first place. Moreover, the prospective employer is rarely, if ever, in a good position to determine the accuracy or inaccuracy

[26] The five-day pre-adverse action time frame is essential to the remedial scheme put in place by section 1681(b)(b)(3). S*ee, e.g.*, *Goode*, 848 F. Supp. 2d at 537 (section 1681b(b)(3) requires an employer to provide applicant sufficient time after receiving the consumer report to dispute and discuss report with employer); *Moore v. Rite Aid Hdqtrs. Corp.*, 2015 WL 3444227, at *3-6 (E.D. Pa. May 29, 2015) (failing to provide full amount of time to dispute stated in pre-adverse action notice is a willful violation of section 1681b(b)(3)).

of the information on contained in a background report. Following the District Court's logic would have the absurd effect of leaving the determination of the accuracy of the consumer report in the hands of the party with the least information about the jobseeker, the prospective employer. Finally, the prototypical jobseeker protected by this section is someone who, like Plaintiffs, has accurate, negative information in their background but is trying to make a fresh start by seeking a job. A summary denial of the jobseeker's employment application or precipitous withdrawal of an offer of employment without providing the jobseeker the opportunity to view the consumer report prepared about them and discuss its contents with a prospective employer is also a denial of the second chance many jobseekers are looking for when they apply for a job.

For the above reasons, the public policy behind section 1681b(b)(3) militates against the District Court's narrow interpretation of the statute and in favor of the FCRA's fundamental purpose, to make sure consumer reports are "fair and equitable to the consumer" and to ensure "the confidentiality, accuracy, relevancy, and proper utilization" of consumer reports. 15 U.S.C. § 1681.

CONCLUSION

The District Court's decision must be reversed. In enacting and amending the FCRA, Congress created new rights to information that had not previously existed

and which are actionable in the federal courts. The District Court's decision undermines a core FCRA protection and should not be upheld.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,489 words, excluding the parts of the brief listed in Fed. R. App. P. 32(f).

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Dated: June 19, 2017

/s/ James A. Francis
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2017, I electronically filed the foregoing Brief of *Amicus Curiae* NCLC with the Clerk of the Court for the United States Court of Appeals for the Third Circuit, with service of copies to the following counsel using the appellate CM/ECF system:

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