IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 17-1889

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

Plaintiffs/Appellants,

v.

SOUTHESTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant/Appellee.

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

BRIEF OF DEFENDANT/APPELLEE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, Defendant/Appellee Southeastern Pennsylvania Transportation Authority is a "body corporate and politic [that exercises the] public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof." 74 Pa.C.S. § 1711(a). Therefore, no corporate disclosure statement is required.

Dated: July 12, 2017

/s/ Elizabeth A. Malloy
ELIZABETH A. MALLOY

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court properly concluded that Plaintiffs/Appellants, Frank Long, Michael White, and Joseph Shipley, lack standing to sue Defendant/Appellee, Southeastern Pennsylvania Transportation Authority, for violations of Section 1681b(b)(3) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, *et seq*.

II. STATEMENT OF THE CASE

This is a putative class action by Plaintiffs/Appellants, Frank Long, Joseph Shipley, and Michael White, individually and on behalf of all others similarly situated ("Plaintiffs"), against Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleging SEPTA violated the FCRA and the Criminal History Records Information Act, 18 Pa. C.S. § 9125 ("CHRIA"). The First Amended Complaint ("Amended Complaint") alleged that SEPTA did not provide statutorily compliant disclosures, adverse action letters, and summaries of rights to job applicants during the pre-employment period. Plaintiffs' CHRIA claims in the Amended Complaint were based on the contention SEPTA disqualified Plaintiffs from job positions based on drug convictions that did not relate to suitability for employment. Plaintiffs demanded statutory damages, injunctive relief and punitive damages. This appeal concerns only whether

Plaintiffs have standing to pursue their claims brought under Section 1681b(b)(3) of the FCRA.

A. Relevant Procedural History

Plaintiffs filed the Amended Complaint on May 26, 2016 on behalf of themselves and all others similarly situated. JA21. The Amended Complaint asserted four claims, namely:

- Plaintiffs alleged that SEPTA willfully violated the FCRA because it failed to make a disclosure to Plaintiffs purportedly required by the FCRA before it obtained consumer reports about Plaintiffs (Count I), JA41-43;
- Plaintiffs alleged SETPA willfully violated the FCRA because it failed to provide Plaintiffs with a pre-adverse action letter and a copy of the consumer report before revoking their conditional offers of employment (Count II), JA43-44;
- Plaintiffs alleged that SEPTA willfully violated the FCRA because it failed to provide Plaintiffs with a written description of their rights under the FCRA before revoking their conditional offers of employment (Count III), JA44-46; and
- Plaintiffs alleged that SEPTA willfully violated Pennsylvania's Criminal History Record Information Act, 18 Pa. Cons. Stat. Ann. § 9125 *et seq.* (the "CHRIA") because it declined to employ Plaintiffs as Bus Operators and a Railroad Supervision Manager because of their criminal drug convictions (Count IV), JA46.

SEPTA moved to dismiss Plaintiffs' FCRA claims (Counts I, II, and III) for lack of standing, alleging, *inter alia*, that Plaintiffs failed to plead facts that demonstrated they suffered a concrete and particularized injury as a consequence of SEPTA's purported FCRA violations. JA58, 62. SEPTA further moved to

dismiss the Amended Complaint on the grounds that Plaintiffs failed to state a claim for relief.

On April 5, 2017, the District Court granted SEPTA's Motion to Dismiss the Amended Complaint, finding that Plaintiffs lacked standing because they failed to meet "their burden of establishing that any one of them has suffered an injury in fact that would enable them to assert their FCRA claims." JA13. The District Court rejected Plaintiffs' claims that SEPTA's alleged failure to provide Plaintiffs with copies of their consumer reports or a summary of their rights "caused them harm because they could not evaluate information contained in the consumer reports to ensure accuracy, challenge and correct information, or learn of their FCRA rights." JA12 (quotation marks omitted). The District Court found that "Plaintiffs have failed to allege any *specific*, identifiable trifle of injury or allege that they were harmed in any non-abstract way as a consequence of SEPTA's purported FCRA violations." JA12 (emphasis in original). The District Court decided it "need not consider the other elements [of standing] or whether Plaintiffs can establish a claim on which relief can be granted for their FCRA and state law claims." JA13.

Plaintiffs subsequently appealed the District Court's ruling. JA1. Plaintiffs' appeal is limited to whether the District Court properly concluded that Plaintiffs lack standing to sue SEPTA for violations of Section 1681b(b)(3) of FCRA. (*See*

Pls.' Br. at 1.)[1] As the District Court properly concluded, Plaintiffs lack standing, and this Court should therefore affirm the Order of the District Court.

B. Facts Relevant to the Issue Submitted for Review

Plaintiffs are Philadelphia residents who applied for positions with SEPTA between 2014 and 2016. JA25-26. Frank Long and Michael White applied for Bus Operator positions, and Joseph Shipley applied to be a Railroad Supervision Manager. JA25-26. During the application process, Plaintiffs executed a document entitled "Authorization to Review Criminal History" (the "SEPTA Authorization") and a form permitting SEPTA to perform a background check. JA27, JA29-30.[2] The SEPTA Authorization requires job applicants disclose their criminal conviction history and to provide the "date, place, description of crime and sentencing imposed" before a background check is performed. JA76-78. This is a legal inquiry for an employer, as criminal convictions are public information readily available on the internet.

SEPTA considers certain criminal convictions when evaluating an applicant's suitability for employment. SEPTA's Policy #E20 disqualifies

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[1] This Court therefore need not consider whether the District Court properly concluded that Plaintiffs lack standing to sue SEPTA for violations of Section 1681b(b)(2) of FCRA.

[2] Copies of the executed SEPTA Authorizations were attached collectively as Exhibit A to SEPTA's Motion to Dismiss the Amended Complaint. JA75-78.

applicants with certain drug convictions from some job positions. JA30. Specifically, the policy disqualifies applicants from employment in "[a]ll positions which require the operation of a SEPTA vehicles [sic] as part thereof, whether or not they are in revenue service" and "[a]ll positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock," anyone who was convicted of a crime "involving the possession, sale, distribution, manufacture and use of controlled substances." JA30.

Each Plaintiff voluntarily disclosed disqualifying convictions for drug offenses in their respective SEPTA Authorizations. JA76-78; *see also* JA27, JA29-30 (conceding existence of drug convictions and Plaintiffs' pre-background check voluntary disclosures). Plaintiffs were thereafter denied employment by SEPTA. JA28 (Long), JA29 (Shipley), JA31 (White). Plaintiffs do not dispute their drug convictions disqualified them from employment pursuant to SEPTA's Policy #E20. In fact, Plaintiffs rely on the truth of the consumer information and the existence of the drug convictions as the basis for their state law claim. JA26

Plaintiffs alleged that they did not receive pre-adverse action notices and copies of their consumer reports and a summary of their rights under FCRA before SEPTA disqualified them from employment in the applied for positions. JA34. Plaintiffs did *not* allege that the consumer reports were inaccurate, or they would have been eligible for employment had they received pre-adverse action notices

and copies of their consumer reports and a summary of their rights. JA13. Rather, as stated above, Plaintiffs acknowledge that they were denied employment because of their criminal histories, the existence of which were not only disclosed voluntarily by each Plaintiff independent of any criminal background check, but were automatically disqualifying pursuant to SEPTA policy #E20. JA28-31.

III. SUMMARY OF THE ARGUMENT

The District Court properly granted SEPTA's Motion to Dismiss the Amended Complaint for lack of standing to assert claims under the FCRA. JA12-13. Specifically, in applying *Spokeo v. Robins* – a recent Supreme Court of the United States decision that is directly on point – the District Court correctly held that "Plaintiffs' allegations amount to bare procedural violations without concrete harm." JA12. The District Court's reasoning is sound and must be upheld.

This matter arose from SEPTA's decision to deny Plaintiffs employment based on automatically disqualifying criminal drug convictions that were not only discovered during the credit check, but also disclosed voluntarily by Plaintiffs prior to the credit check. Plaintiffs allege that SEPTA did not comply with FCRA requirements when it purportedly failed to provide them with a pre-adverse action notice and copies of their consumer reports and summary of rights before it denied them employment. As an initial matter, SEPTA denies Plaintiffs' contention that it failed to supply them with the subject notice and information. However, regardless

of whether SEPTA provided the notice and information, the outcome would have been the same. There were no inaccuracies in Plaintiffs' credit reports to correct, nor was there any information that was true but amenable to contextual explanation. Plainly stated, Plaintiffs were automatically disqualified from employment in the positions for which they applied due to their criminal drug convictions – the existence of which they disclosed to SEPTA themselves. This case thus presents a very narrow factual scenario.

Drawing upon the lessons of *Spokeo*, the District Court properly rejected Plaintiffs' claims that SEPTA's alleged failure to provide Plaintiffs with copies of their consumer reports or a summary of their rights "caused them harm because they could not evaluate information contained in the consumer reports to ensure accuracy, challenge and correct information, or learn of their FCRA rights." JA12 (quotation marks omitted). The District Court aptly found that "Plaintiffs have failed to allege any *specific*, identifiable trifle of injury or allege that they were harmed in any non-abstract way as a consequence of SEPTA's purported FCRA violations." JA12.

The District Court's decision should not be disturbed. Plaintiffs lack standing to assert claims under FCRA because Plaintiffs have not alleged facts sufficient to show that they suffered a concrete and particularized injury as a consequence of the purported FCRA violations. Specifically, SEPTA's alleged

failure to provide Plaintiffs with pre-adverse action notices and copies of their consumer reports and a summary of rights did not result in denial of employment, or any other concrete harm. This is because the negative consumer information – Plaintiffs' criminal drug convictions – was both accurate and not amendable to contextual explanation, such that Plaintiffs could have qualified for SEPTA employment. That is, not only would SEPTA have denied Plaintiffs employment for reasons independent of the negative consumer information – Plaintiffs' own disclosures of their criminal drug convictions – but no amount of pre-adverse action notice or opportunity to explain could have changed the fact that Plaintiffs' convictions disqualified them from employment in the positions for which they applied, as a matter of SEPTA policy.

For all of these reasons, SEPTA respectfully requests that this Court affirm the Order of the District Court granting its Motion to Dismiss the Amended Complaint with prejudice.

IV. ARGUMENT

A. Standard of Review

This action was dismissed for lack of subject matter jurisdiction. This Court reviews a dismissal for lack of subject matter jurisdiction pursuant to a plenary standard of review. *Komlo v. United States*, 657 Fed. Appx. 85, 87 n. 4 (3d Cir. 2016) (citing *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir.

2006)). "When resolving facts necessary for subject matter jurisdiction, the plaintiff's allegations are not entitled to a presumption of truthfulness." *Id.* (citing *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

The subject matter jurisdiction of this Court depends on plaintiffs' standing to maintain the action. A challenge to subject matter jurisdiction is properly made by motion to dismiss the complaint. Fed. R. Civ. P. 12(b)(1). "A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1) because standing is a jurisdictional matter." *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007). A plaintiff must allege facts to establish the elements of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 98-99 (1975)); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838 (3d Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). A plaintiff asserting multiple causes of action "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Dismissal of the action is the proper relief if plaintiffs' standing is not established.

Plaintiffs must establish all elements of Article III standing to establish subject matter jurisdiction. "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560). "The plaintiff must have (1) suffered an injury in fact, (2) that is

fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61). The party invoking federal jurisdiction bears the burden of establishing the elements. *Id.* (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). Plaintiffs must clearly allege facts demonstrating each element of standing to establish subject matter jurisdiction.

B. Plaintiffs Did Not Establish Injury In Fact

To establish the injury in fact element of standing, Plaintiffs must show that they suffered "an invasion of a legally protectable interest" that is "concrete and particularized," and "actual or imminent, rather than conjectural or hypothetical." *Id.* at 1548 (citing *Lujan*, 504 U.S. at 560. An injury must affect a plaintiff in a personal and individual way to be particularized. *Id.* at 1548 (citing *DaimlerChrysler Corp*, 547 U.S. at 342 ("plaintiff must allege personal injury")). Plaintiffs cannot establish injury in fact if the alleged injury did not impact them personally.

While particularization is necessary to establish injury in fact, it alone is not sufficient – An injury in fact must also be "concrete." *Id.* The Supreme Court in *Spokeo* distilled several "general principles" from its prior cases with respect to concreteness. *See id.* at 1549-50. For an injury to be concrete, it must actually exist. *Id.* at 1548. The injury must be real, and not abstract. *Id.* An injury can be

tangible or intangible. *Id.* at 1549. Tangible injuries plainly satisfy this requirement. *Id.* at 1549. "[N]evertheless," intangible injuries may also "be concrete." *Id.* In evaluating whether an intangible injury satisfies the "concreteness" requirement, the *Spokeo* Court identified two important considerations: (1) "whether an 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[;]" and (2) the judgment of Congress, which "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* (quoting *Lujan*, 504 U.S. at 580) (Kennedy, J., concurring in part and concurring in judgment).

The Supreme Court then elaborated on the connection between statutory standing and concrete injury. The Court explained that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* "[A plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."); *see also Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727, n.2 (7th Cir. 2016) ("A violation of a statute that causes no harm does not trigger a federal case.

That is one of the lessons of *Spokeo*."); *Llewellyn v. AZ Compassionate Care Inc.*, No. CV-16-04181, 2017 WL 1437632, at *3 (D. Ariz. April 24, 2017) (dismissing argument that violation of "substantive" statutory right is sufficient for standing without need to show concrete harm) (quoting *Spokeo*, 136 S. Ct. at 1549); *Boergert v. Kelly Services, Inc.*, No. 2:15-cv-04185, 2016 WL 6693104, *4 (W.D. Mo. Nov. 14, 2016), *on reconsideration in part*, No. 2:15-cv-04185, 2017 WL 440272 (W.D. Mo. Feb. 1, 2017) ("[T]he mere allegation of a statutory violation is not sufficient here, especially in light of *Spokeo*'s specific reference to the issue of inaccurate information."). Moreover, as discussed below, *Spokeo* provides courts with an example of a "bare procedural violation," which is directly on point and fatal to Plaintiffs' claim.[3]

1. *Spokeo v. Robins* is Dispositive

Plaintiffs' claims under Section 1681b(b)(3) amount to nothing more than bare procedural violations, divorced from any concrete harm. While many courts in the nation have wrestled with the meaning of a "bare procedural violation," this Court does not need to look further than the example provided by the Supreme Court in *Spokeo*. *See Spokeo*, 136 S. Ct. at 1550. Specifically, the allegations in the Amended Complaint embody the very example the *Spokeo* Court used to

[3] The example highlighted by the Supreme Court in *Spokeo* is discussed in Section IV(B)(1), *infra*.

describe a plaintiff's failure to satisfy the concreteness requirement of Article III standing. There, the Court explained:

> On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. **A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate.**

Spokeo, 136 S. Ct. at 1550 (emphasis added).

By including this example in *Spokeo*, the Supreme Court illustrated the concept of a "bare procedural violation" using facts analogous to Plaintiffs' allegations. *See Lee v. Hertz Corp.*, No. 15-cv-04562, 2016 WL 7034060, at *6 (N.D. Ca. Dec. 2, 2016) (agreeing "that the *Spokeo* Court addressed this very issue by providing the example discussed above"). Remarkably, the Supreme Court's chosen example of a "bare procedural violation, divorced from any concrete harm," is where a consumer reporting agency fails to provide a required notice – *i.e.*, where SEPTA fails to provide prospective employees with a pre-adverse action notice – but the information in the consumer report is nonetheless entirely accurate. *Spokeo*, 136 S. Ct. at 1550. The District Court properly honed in on the Supreme Court's chosen example and likened it to the facts of this case. JA12-13 ("The Supreme Court stated that 'a violation of one of the FCRA's procedural

requirements may result in no harm.' The case before the Court is an example of that.").

Here, even if SEPTA failed to provide Plaintiffs with pre-adverse action notices and copies of their consumer reports and summary of rights, the resulting Section 1681b(b)(3) violation caused no actual harm. The relevant negative information in Plaintiffs' consumer reports – their criminal drug convictions – was accurate, and not amendable to contextual explanation, such that they could have qualified for SEPTA employment. First, although Plaintiffs contend that "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," SEPTA learned of Plaintiffs' drug convictions not only from the consumer reports, but also from Plaintiffs' voluntary disclosure of the same information. JA76-78; *see also* JA27, 29-30 (conceding existence of criminal drug convictions and Plaintiffs' pre-background check voluntary disclosure of same). (Pls.' Br. at 26.) Moreover, Plaintiffs rely on the truth of the consumer information and the existence of the drug convictions as the basis for their state law claim. JA26 ("Messrs. Long, Shipley, and White . . . have criminal drug convictions that SEPTA considered when deciding not to offer them employment involving the operation of SEPTA

vehicles."). Thus, to argue that the relevant negative information that resulted in Plaintiffs' denial of employment was anything but accurate would be disingenuous.

Second, Plaintiffs' argument that they were "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," does not rise to the level of a concrete harm, as the negative consumer information was not amendable to contextual explanation, such that Plaintiffs could have qualified for SEPTA employment. (Pls.' Br. at 26.) Plaintiffs concede that they were denied employment because of their criminal drug convictions. JA28-31. But, pursuant to SEPTA policy, applicants with criminal drug convictions are automatically disqualified from employment involving the operation of SEPTA vehicles. JA30. Therefore, not only would SEPTA have denied Plaintiffs employment for reasons independent of the negative consumer information – Plaintiffs' own disclosures of their criminal drug convictions – but no amount of pre-adverse action notice or opportunity to explain could have changed the fact that, under these very narrow circumstances, Plaintiffs' convictions categorically disqualified them from the employment they sought.

Plaintiffs thus fail to show that they suffered concrete harm. Accordingly, this Court should affirm the Order of the District Court granting SEPTA's Motion to Dismiss the Amended Complaint.

2. Congress did not Intend Section 1681b(b)(3) to Protect Against Plaintiffs' Purported "Informational Injury"

Congress did not intend Section 1681b(b)(3) to protect against Plaintiffs' purported "informational injury." In enacting the FCRA, Congress sought "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." *See* S. Rep. No. 517, 91st Cong., 1st Sess. 2 (1969). While some FCRA provisions lend themselves to informational harm, Section 1681b(b)(3) does not. *See, e.g.*, Section 1681b(b)(2) (a violation may lead to the dissemination of inaccurate information to the public).

Section 1681b(b)(3) protects consumers against a specific harm – suffering an adverse employment action based on inaccurate or misleading information in a consumer report. *See Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010) (stating that Congress addressed the concern of protecting consumer privacy by including provisions in FCRA "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report"); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001) ("Congress found that in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment.").

Congress intended the pre-adverse action notice requirement of Section 1681b(b)(3) to permit consumers the opportunity to correct false information included in a consumer report.

The post-*Spokeo* case opinions analyzing standing in the context of Section 1681b(b)(3) necessarily consider Congress's expressed intent in determining whether an injury in fact exists. For example in *Boergert v. Kelly Services, Inc.*, the court addressed a case much like this matter where the plaintiff alleged a Section 1681b(b)(3) violation after the defendant-employer failed to give him a copy of his consumer report and notice and opportunity to correct any inaccuracy in it, before firing him. 2016 WL 6693104, *4. The defendant-employer argued the FCRA violation was merely technical, inasmuch as the plaintiff did not claim the information contained in the report was untrue, and that he therefore lacked standing to pursue the adverse action claim. *Id.* at *4. The plaintiff responded that he suffered a concrete, informational injury and therefore had standing. *Id.* The court found, while the plaintiff had been "deprived of statutorily required information, he ha[d] not shown any injury beyond the lack of access to the required information." *Id.*

In finding that the plaintiff lacked standing to pursue his Section 1681b(b)(3) claim, the court explained:

> absent any allegation that the information in the consumer report was inaccurate, or that compliance with

> the FCRA's pre-adverse action notice requirement would have resulted in Kelly Services reaching a different conclusion about his qualification for employment, any loss he suffered could not have resulted from Kelly Services' failure to give him a reasonable amount of time to address what was revealed in his criminal background report.

Id. (citing *Tyus v. United States Postal Serv.*, No. 15-cv-1467, 2016 WL 6108942, at *7 (E.D. Wis. Oct. 19, 2016) (finding plaintiff lacked standing where plaintiff claimed financial and other injury under FCRA due to lack of pre-adverse action notice, but did not allege the consumer report was inaccurate or that the employer would have reached different decision had he been given notice), *vacated on other grounds*, No. 15-cv-1467, 2017 WL 52609 (E.D. Wis. Jan. 4, 2017); *see also Campbell v. Adecco USA, Inc.*, No. 2:16-cv-04059, 2017 WL 1476152, at *3 (W.D. Mo. Apr. 24, 2017) (holding plaintiff lacked standing on Section 1681b(b)(3) claim because, he had "not shown any injury beyond the lack of access to [statutorily] required information," and, further, he had not "even alleged that he had a basis for challenging the information in the consumer report, which is the type of harm Congress was intending to prevent").

Here, Plaintiffs concede that they each had criminal drug convictions that they disclosed voluntarily to SEPTA as part of the application process. JA28-31. The consumer reports SEPTA subsequently procured merely corroborated what Plaintiffs themselves had already disclosed. SEPTA thereafter denied employment

to Plaintiffs pursuant to a SEPTA policy disqualifying anyone with criminal drug convictions from the very positions for which Plaintiffs applied. JA30. Even assuming SEPTA did not provide Plaintiffs with copies of their consumer reports and summary of rights prior to denying them employment, both *Boergert* and *Spokeo* teach that, without additional harm, such as the consumer information being inaccurate, this is simply a bare procedural violation. Notably, the Amended Complaint contains no allegations that the negative consumer information was inaccurate, or that SEPTA relied upon or disseminated false consumer information. *See Spokeo, Inc.*, 136 S. Ct. at 1550. Nor do Plaintiffs allege that they were denied the opportunity to rebut false or misleading consumer information, or that SEPTA's compliance with the FCRA's pre-adverse action notice requirement would have resulted in SEPTA reaching a different conclusion about their qualification for employment. *See id*.

Further, Section 1681b(b)(3) does not require pre-adverse action notice merely for the sake of providing notice.[4] In *Mix*, the court found consumer information that was true but amenable to contextual explanation and delivered

[4] Plaintiffs and the *Amicus Curiae* National Consumer Law Center (the "NCLC *Amicus*") rely heavily on *Mix v. Asurion Ins. Servs., Inc.*, No. CV-14-02357, 2016 WL 7229140, at *5 (D. Ariz. Dec. 14, 2016), arguing that it stands for the premise that the failure to provide an individual with a copy of their consumer report and a summary of rights before taking adverse action constitutes a concrete injury. (Pls.' Br. at 28-29; NCLC Amicus Br. at 23-24.) However, their reading of Mix is flawed, as discussed *infra*.

without time to provide explanation can create a risk of harm. The court determined that a job applicant had standing when her employment offer was revoked, based on her criminal history, before receipt of a pre-adverse action notice. *Mix*, 2016 WL 7229140, at *6. Although, like here, the negative consumer information was accurate, unlike here, the plaintiff had a legitimate explanation to offer her employer that would have qualified her for employment. *Id.* at *2. Specifically, at the time the background check was run, she had secured an agreement with the prosecutor to expunge the criminal charge from her record. *Id.*

The key distinction drawn by the *Mix* court was that an opportunity to comment after notice would have avoided the denial of employment. The information returned by the background check was, in effect, "misleading" because it did not reveal that expungement was imminent. The holding in *Mix* does not support the contention by Plaintiffs that the mere failure to give notice, without more, establishes an "informational injury." Rather, in the context of *Mix*, injury in fact is not established absent facts showing that the adverse action could have been avoided through an opportunity to comment.

Plaintiffs' claims do not implicate the wrongs and/or "informational injury" Section 1681b(b)(3) protects against. Plaintiffs did not allege that the negative consumer information was inaccurate or misleading. Plaintiffs' acknowledged their drug convictions disqualified them from employment in the applied-for

positions. In fact, Plaintiffs' own allegations demonstrated that SEPTA's adverse decision was unavoidable, even if adverse action notices were sent.

It is for this same reason that there was no *risk* of harm to Plaintiffs. The accurate information on Plaintiffs' consumer reports (which was the same information that Plaintiffs disclosed voluntarily to SEPTA) rendered them ineligible for employment. Plaintiffs have no legitimate explanation for their criminal drug convictions that could qualify them for the specific positions for which they applied. Notice and an opportunity to comment would not have changed the outcome for Plaintiffs. SEPTA's alleged violation of Section 1681b(b)(3) did not risk actual harm to Plaintiffs because the outcome would have been the same regardless of notice.

SEPTA's alleged failure to send pre-adverse action notices to Plaintiffs did not cause or risk causing the concrete harm that Congress intended Section 1681b(b)(3) to prevent. Accordingly, the opinion of the District Court should be affirmed and this action dismissed for lack of subject matter jurisdiction.

3. Plaintiffs' Authority Does Not Support Standing

The cases Plaintiffs rely upon should not inform this Court's analysis of the Congressional intent behind Section 1681b(b)(3), as they do not relate to the narrow issues presented in this action. Regardless, even though the cases are

presented as if contrary and ascribed significance, the opinions and holdings are not genuinely inconsistent with the finding of lack of standing.

The commonality of the cases relief upon by Plaintiffs is an analysis by the courts about whether a protected right existed, and if an invasion of that right occurred and resulted in, or risked, an actual harm sufficient to establish injury in fact. (Pls.' Br. at 19-32.) The two pre-*Spokeo* Supreme Court cases, *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989)), relate to statutes other than the FCRA. In *Akins*, a group of voters complained that a political action committee violated a statutory requirement to disclose certain financial information that could inform the public's voting decisions. The Supreme Court found the deprivation of information caused a concrete injury because of the importance of the information to the plaintiffs with regard to how they could utilize it. The Supreme Court explained that the information plaintiffs were deprived of

> would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular.

See Akins, 524 U.S. at 21. As such, the Court found that the failure to disclose the required information about candidates for office not only caused "injury of a kind

that [the Federal Election Campaign Act] seeks to address," but was "directly related to voting, the most basic of political rights." *See id.* at 20, 24-25.

In *Public Citizen*, the Supreme Court concluded the plaintiffs had suffered a concrete injury because providing the undisclosed information would have allowed the plaintiffs to "participate more effectively in the judicial selection process." *Public Citizen*, 491 U.S. at 449. The Supreme Court held that the deprivation of this information created the precise "harm that the underlying statute [(the Federal Advisory Committee Act)] sought to prevent" – the inability to monitor the ABA Committee's workings and participate effectively in the judicial selection process. *See id; see also Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 346-37 (4th Cir. 2017) (distinguishing *Akins* and *Public Citizen* as "inapposite because both cases involved the deprivation of information that adversely affected the plaintiffs' conduct").

Unlike in *Atkins* and *Public Citizen*, Plaintiffs were not deprived of information. Plaintiffs were the source of the conviction information. There existed no information that SEPTA could have provided to Plaintiffs that would have changed the fact that the mere existence of their convictions disqualified them from the positions for which they applied.

Relying on *In re: Nickelodeon Consumer Privacy Litigation*, Plaintiffs contend that "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." (Pls.' Br. at 20 (citing *In re: Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016)). But in *Nickelodeon*, this Court actually distinguished *Spokeo*. The *Nickelodeon* plaintiffs alleged substantive violations of the Video Privacy Protection Act, the Wiretap Act and the Stored Communications Act (among other statutes) as a result of the defendants' "disclosure of information about the plaintiffs' online activities" to prospective advertisers. *Nickelodeon*, 827 F.3d at 272. Plaintiffs here further posit that *Nickelodeon* stands for the premise that "the 'unlawful disclosure of legally protected information' in and of itself constitutes a '*de facto* injury.'" (Pls.' Br. at 17 (citing *Nickelodeon*, 827 F.3d at 274).)

But, Plaintiffs have made no such allegations regarding any disclosures by SEPTA. Moreover, unlike Plaintiffs' allegations, the disclosure of online activities to advertisers, which formed the basis of the injury alleged in *Nickelodeon*, was precisely the substantive injury Congress sought to protect against in enacting the statutes under which the plaintiffs in that case sought recovery. Thus, the Third Circuit in *Nickelodeon* did not hold (or even suggest) that procedural or technical violations of a statute or "informational injuries" in general were sufficient to establish Article III standing. *See generally*, *Nickelodeon*, 827 F.3d 262.

Further, Plaintiffs (and the NCLC *Amicus*) rely heavily on *Thomas v. FTS USA, LLC*[5] to bolster their "informational injury" argument. (Pls.' Br. at 26, 28; NCLC *Amicus* Br. at 22-23.) *Thomas*, however, is inapposite for three primary reasons. First, the authorities *Thomas* cites as precedent for its informational injury theory predate *Spokeo*, and the rationales of those cases do not survive. *See In re: Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, No. 14-7563, 2017 WL 354023 (D.N.J. Jan. 24, 2017) (noting that *Thomas* fails, in part, because it relies on pre-*Spokeo* precedent); *see also Nokchan v. Lyft, Inc.*, No. 15-cv-03008, 2016 WL 5815287, and *9 (N.D. Cal. Oct. 5, 2016) ("[I]n the wake of *Spokeo*, [cases] cannot be read to stand for the broad proposition that violation of a disclosure requirement under the FCRA, by itself, is sufficient to confer Article III standing on a plaintiff.").

Second, a recent Fourth Circuit decision effectively overruled *Thomas*'s misguided holding that a plaintiff may have standing if he is deprived of statutorily-required information. *See generally Dreher*, 856 F.3d 337. In *Dreher*, the Fourth Circuit reversed the district court's holding, which, applying *Thomas*, had found that FCRA "creates a statutory right to receive the sources of information for one's credit report, and when a credit reporting agency fails to disclose those sources, it violates that right, thus creating a sufficient injury-in-fact

[5] 193 F. Supp. 3d 623 (E.D. Va. 2016).

for constitutional standing." *Id.* at 342 (internal quotation marks omitted). In reversing the district court, the Fourth Circuit drew upon *Spokeo*, finding that

> a statutory violation alone does not create a concrete informational injury sufficient to support standing. *See Spokeo*, 136 S. Ct. at 1549. Rather, a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled **and that the denial of that information creates a "real" harm with an adverse effect**.

Dreher, 856 F.3d at 345 (emphasis added). Thus, in holding that a plaintiff may not "merely allege[] a statutory violation divorced from any real world effect, *Dreher* eviscerates *Thomas*'s holding, particularly to the extent Plaintiffs rely upon it in this case. *Id.* at 340; *Boergert*, 2017 WL 440272, at *4 ("[T]he mere allegation of a statutory violation is not sufficient here, especially in light of *Spokeo*'s specific reference to the issue of inaccurate information.").

Third, notwithstanding the above reasons to discount *Thomas*, the decision is simply not applicable to the narrow set of facts at issue here. Plaintiffs rely on the *Thomas* Court's finding that the plaintiffs there suffered an injury when they "were deprived of the opportunity to explain any negative records in their consumer reports and discuss the issues raised in their reports with Defendants before suffering adverse employment action." (Pls.' Br. at 26 (citing *Thomas*, 193 F. Supp. 3d at 638).) But, here, no amount of pre-adverse action notice or opportunity to explain the negative records could have changed the fact that

Plaintiffs' criminal drug convictions automatically disqualified them from employment.[6] The disqualifying information was neither inaccurate, nor amenable to contextual explanation. As such, Plaintiffs' alleged "informational injury" did not cause them injury in fact, even applying *Thomas*.

Section 1681b(b)(3) was designed to prevent avoidable harm to consumers by providing them with the opportunity to correct inaccurate or misleading information. In the narrow factual circumstance where the adverse action is unavoidable, like here, the consumer suffers no concrete harm even if the consumer is not provided with the statutorily required notice and information. As succinctly expressed by the Fourth Circuit in *Dreher*, "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury[.]" 856 F.3d at 346. Plaintiffs have not identified any case – much less any controlling case – that supports standing for their FCRA claims. Accordingly, the opinion of

[6] It is also worth noting that the *Thomas* Court did not rule on whether the plaintiffs' failure to obtain employment was directly traceable to the defendants' failure to comply with FCRA, as the Court had already found that the plaintiffs had standing due to other concrete and particularized injuries unrelated to the issue in front of the Court in the instant case. *See Thomas*, 193 F. Supp. 3d at 638 n.9.

the District Court should be affirmed and this action dismissed for lack of subject matter jurisdiction.[7]

C. Plaintiffs' Claims Also Fail to Satisfy the Remaining Elements of Standing

Even if this Court determines that Plaintiffs suffered an injury in fact, they nonetheless are unable to satisfy the remaining elements of standing. Specifically, in addition to proving injury in fact, plaintiffs must show their purported injury is fairly *traceable* to the challenged conduct of SEPTA, or that their purported injury is likely to be *redressed* by a favorable judicial decision. *See Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560-61). Plaintiffs must establish all three elements to have standing.

The traceability element of standing establishes causation. "The causation requirement is only satisfied where the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third

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[7] The Brief of *Amici Curiae* Community Legal Services, The National Employment Law Project, and Service Employees International Union Local 668 (the "CLS *Amici*") is not relevant to the issue before the Court. Rather, it appears to be a template brief better suited for a case involving race discrimination. The brief focuses on how FCRA violations can "cause low-income individuals and communities of color to lose out on essential income and capital and remain trapped in poverty." (CLS *Amici* Br. at 6.) It also discusses the impact "blanket prohibitions on hiring individuals with criminal records" have on minority job applicants. (*Id.* at 18.) There are no allegations of race discrimination here. Nor are Plaintiffs' state law claims regarding the legality of SEPTA's employment policy before this Court. Accordingly, the CLS *Amici* brief is not relevant to this appeal.

party not before the court." *Duquesne Light Co. v. United States EPA*, 166 F.3d 609, 613 (3d Cir. 1999) (citing *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154 (1997)) (finding that plaintiffs lack standing where alleged injury was not fairly traceable to challenged action of defendant because of independent action of a third party). Standing cannot be established absent a causal connection between the alleged harm and the conduct of the defendant.

Redressability is established where the court can remedy the injury. "To be 'redressable' for standing purposes, it must 'be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* Plaintiffs cannot establish standing unless their injury can be relieved through this adjudication.

The purpose of the FCRA notice requirements is to "provide individuals an opportunity to contest inaccurate information and to avoid an adverse decision by a potential employer based on erroneous information." *Ramos v. Genesis Healthcare, LLC*, 141 F. Supp. 3d 341, 347 (E.D. Pa. 2015). As such, injury to a plaintiff would generally consist of an inability to contest inaccurate information, leading to an adverse action by a potential employer. *Id.*

Plaintiffs cannot establish SEPTA's denial of employment was fairly traceable to SEPTA's alleged failure to provide the pre-adverse action letters with a copy of the report and summary of rights. SEPTA denied Plaintiffs employment

based on disqualifying drug convictions that were disclosed voluntarily by Plaintiffs prior to the background check. The consumer information was accurate, and there was no contextual explanation available to Plaintiffs to avoid disqualification for the applied-for positions. The outcome would have been the same whether SEPTA provided the notice and information. Plaintiffs therefore cannot show the adverse action was "fairly traceable" to SEPTA's alleged failure to provide notice and information required by the FCRA.

Plaintiffs also have not alleged an injury that is redressable by the Court. Plaintiffs did not allege that the conviction information was inaccurate or that adverse action would have been avoided if Plaintiffs had been provided an opportunity to correct the information. It is evident that Plaintiffs' complaints do not genuinely arise from the FCRA. Rather, the purported injury complained about by Plaintiffs amounts to a disagreement with the SEPTA Policy #E20 itself. However, this Court can only provide a source for adjudication of rights and relief for the claims actually asserted by Plaintiffs. A challenge about the substantive content of SEPTA Policy #E20 is not an issue that can be redressed through the FCRA.

Plaintiffs cannot establish any element of Article III standing. Accordingly, dismissal for lack of subject matter jurisdiction is required.

V. CONCLUSION

Defendant/Appellee Southeastern Pennsylvania Transportation Authority respectfully requests that this Honorable Court affirm the Order of the District Court granting its Motion to Dismiss Plaintiffs/Appellant's Amended Complaint with prejudice.

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CERTIFICATE OF BAR MEMBERSHIP

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,896 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATION AS TO E-BRIEF AND VIRUS SCAN

In accordance with Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies being filed. I further certify that the electronic submission was subjected to a virus scan by Trend.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant/Appellee Southeastern Pennsylvania Transportation Authority was served on this 12th day of July, 2017, upon counsel of record via the Court's CM/ECF system.

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