UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

FRANK LONG, JOSEPH SHIPLEY, and MICHAEL WHITE, individually and on behalf of all others similarly situated, Plaintiffs, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	**CIVIL ACTION NO. 2:16-cv-1991-PBT**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This lawsuit challenges the Southeastern Pennsylvania Transportation Authority's ("SEPTA") procurement and use of criminal history records to make hiring decisions to the known detriment of thousands of job applicants in obvious violation of federal and state law. SEPTA seeks to dismiss the claims in Plaintiffs' First Amended Complaint ("FAC") for three reasons, none of which stand up to critical examination. First, SEPTA makes a strained attempt to invoke the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540 (2016), to suggest that Plaintiffs lack standing because they were not harmed by SEPTA's violations of the law. But entirely consistent with *Spokeo*, the injuries Plaintiffs allege—SEPTA's deprivations of Plaintiffs' rights to privacy and information—have longstanding antecedents in the common law and are harms that Congress specifically enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, to protect against. Second, SEPTA incorrectly asserts that Plaintiffs have insufficiently pled that the disclosure form it uses to authorize background checks violates the FCRA's stand-alone disclosure requirements. In fact, Plaintiffs have shown that the form is replete with extraneous information, looks more like a job application than an authorization form, and causes precisely the confusion Congress legislated against in enacting the FCRA. Third, SEPTA erroneously argues that Plaintiffs failed to sufficiently plead a willful violation of the Criminal History Record Information Act ("CHRIA"), 18 Pa. Cons. Stat. § 9125. Plaintiffs challenge SEPTA's lifetime ban on hiring anyone with a felony drug-related conviction for a large category of SEPTA jobs. *See* FAC ¶ 98. Plaintiffs have provided examples of SEPTA's repeated violation of the CHRIA, and SEPTA has been on notice of the serious problems with its criminal history screening policies and practices since at least the Third Circuit's opinion in *El v. SEPTA*, where the court opined that "the reasonable inference [is] that SEPTA has no real basis for asserting that its policy

accurately distinguishes between applicants that do and do not present an unacceptable level of risk." 479 F.3d 232, 248 (3d Cir. 2007). Nonetheless, willfulness is an element of punitive damages, and not, by *any* stretch of the imagination, a necessary element to bring a claim under the CHRIA.

For the reasons stated herein, the Court should reject SEPTA's motion to dismiss.

STATUTORY BACKGROUND

Congress enacted the FCRA in 1970 to protect the "consumer's right to privacy" by ensuring "the confidentiality, accuracy, relevancy, and proper utilization" of credit information. 15 U.S.C. § 1681(b). Recognizing the "vital role" that consumer reports play, Congress sought to encourage those handling this sensitive information to "exercise their grave responsibilities" in a way that "ensure[s] fair and accurate credit reporting." 15 U.S.C. § 1681; *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 239 (4th Cir. 2009). The FCRA fosters these purposes through a set of interlocking requirements—including strict restrictions on the use of reports and detailed requirements about how to inform consumers of their rights.

When it passed the FCRA, Congress voiced a strong "concern[]" that "permit[ting] employers to obtain consumer reports pertaining to current and prospective employees . . . may create an improper invasion of privacy." S. Rep. No. 104-185, at 35 (1995); *see Thomas v. FTS USA, LLC*, No. 13 Civ. 825, 2016 WL 3661960, at *7 (E.D. Va. June 30, 2016) (finding FCRA's legislative history "underscores the nature and importance of the rights created by the statutory text"). As one legislator explained, the FCRA's protections represented "new safeguards to protect the privacy of . . . job applicants"; the Act as a whole, he continued, was "an important step to restore employee privacy rights." 140 Cong. Rec. H9797-05 (1994) (Statement of Congressman Vento); *see also* 138 Cong. Rec. H9370-03 (1992) (Statement of Congressman Wylie) (the FCRA "would limit the use of credit reports for employment purposes, while

providing . . . prospective employees additional rights and privacy protections"). Congress sought to establish "the right of a consumer to be informed of investigations into his personal life[.]" *Thomas*, 2016 WL 3661960, at *8 (quoting Senate Report at 1).

As a result of Congress's concerns, under the FCRA an employer must disclose to a job seeker that "a consumer report may be obtained for employment purposes" and must obtain authorization before procuring that report. *See* 15 U.S.C. § 1681b(b)(2). To ensure that prospective employees are adequately informed about their rights concerning these consumer reports, the FCRA requires that this information be provided "in a document that consists solely of the disclosure." *Id.* § 1681b(b)(2)(A). Absent the job seeker's informed consent or strict compliance with the statute's disclosure requirements, it is flatly illegal for a company to obtain a job applicant's consumer report for employment purposes—a point Congress hammered home by criminalizing the acquisition of a consumer report under false pretenses. 15 U.S.C. § 1681q.

The FCRA also includes special requirements for when an employer plans to take adverse action based in whole or in part on a consumer report. *See* 15 U.S.C. § 1681b(b)(3). "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." H.R. Rep. No. 103-486 (1994). As the Federal Trade Commission ("FTC") explained, this requirement is designed to promote accuracy, and educate consumers: "Congress required employers to include [a] summary of rights in the pre-adverse action disclosure along with a copy of the consumer report so that consumers would be fully informed of their rights." Letter from William Haynes,

Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Harold Hawkey, Employers Assoc. of N.J., 1997 WL 33791224, at *3 (Dec. 18, 1997) ("Haynes Letter"). Without that information, consumers would have "no opportunity to be confronted with the charges against [them] and tell [their] side of the story." *Thomas*, 2016 WL 3653878, at *8.

"[I]t was Congress' judgment, as clearly expressed in §§ 1681b(b)(2) and (3), to afford consumers rights to information and privacy." *Id.*

LEGAL STANDARD

When deciding a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the Court must accept all factual allegations in the complaint as true, construing them "in the light most favorable to the plaintiff[s]." *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 74 (3d Cir. 2011). The defendant has the burden to show there is no claim upon which relief can be granted. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). "A complaint may not be dismissed merely because it appears unlikely that the plaintiff . . . will ultimately prevail on the merits." *McTernan v. City of York, PA*, 564 F.3d 636, 646 (3d Cir. 2009) (citation omitted). When considering a Rule 12(b)(1) motion, a district court "appl[ies] the same standard of review it would use in considering a . . . Rule 12(b)(6) [motion]." *Constitution Party of Penn. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). The Court may dismiss the complaint only if it appears that the plaintiff cannot assert a colorable claim of subject matter jurisdiction. *Cardio-Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983).

In interpreting the FCRA, courts must be conscious that it "is undeniably a remedial statute that must be read in a liberal manner in order to effectuate the congressional intent[.]" *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010). This means "it should be construed to benefit consumers." *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 327 (3d Cir. 2015) (interpreting another "remedial" consumer protection statute, the Telephone Consumer

Protection Act ("TCPA")). Even where "various proposed interpretations . . . were equally plausible[,]" the statute's remedial nature "tip[s]" the "scales" in the consumer's favor. *Id.*

ARGUMENT

I. Plaintiffs Have Standing to Pursue Their FCRA Claims.

Relying on *Spokeo*, SEPTA argues that the Court should dismiss Plaintiffs' FCRA claims for lack of standing because of a purported failure to allege that Plaintiffs suffered particularized or concrete harms. *See* ECF No. 25-2 (SEPTA's memorandum of law supporting its motion to dismiss ("Def.'s Br.")) at 7. Further, SEPTA argues that Plaintiffs failed to allege that the revocation of their conditional offers were fairly traceable to SEPTA's failure to provide a copy of the background report and summary of rights. *Id.* at 9. SEPTA misconstrues the law on standing and ignores a myriad of allegations in Plaintiffs' FAC.

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

SEPTA's efforts to invoke *Spokeo* to dismiss Plaintiffs' claims must fail. *Spokeo* was not a departure from existing case law. It simply reaffirmed existing law, as two Circuits (including the Third) already have held. To have standing, a plaintiff must have suffered an injury in fact, *i.e.* a (1) particularized and (2) concrete injury. In *Spokeo*, the Supreme Court elaborated on concreteness, distilling several "general principles" from prior cases without going beyond them. 136 S. Ct. at 1550. First, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize," "intangible injuries can nevertheless be concrete," as can injuries based on "risk of harm." *Id.* at 1549. Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* If the "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"—*i.e.* if "the common

law permitted suit" in analogous circumstances—the plaintiff suffered a concrete injury. *Id.*; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

However, a plaintiff does not need to point to a common-law analogue to establish a concrete injury, because Congress has the power (and is "well positioned") "to identify intangible harms that meet minimum Article III requirements," even if those harms "were previously inadequate in law." *Spokeo*, 136 S. Ct. at 1549. Accordingly, the third principle emphasized in *Spokeo* is that Congress can elevate even procedural rights to a concrete injury if they protect against an identified harm. Of course, "a bare procedural violation, divorced from any concrete harm" identified by Congress, will not give rise to an Article III injury. *Id.* But a "person who has been accorded a procedural right to protect his concrete interests" has standing to assert that right, and may do so "without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

Critically, none of these principles are new. Before *Spokeo*, the Third Circuit held that Article III standing "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (citations omitted). Post-*Spokeo*, the Third and Eleventh Circuits have expressly reaffirmed this holding. *See In re Nickelodeon Consumer Privacy Litig.*, __ F.3d __, No. 15-1441, 2016 WL 3513782, at *6 (3d Cir. June 27, 2016) ("*In re Nickelodeon*") (same quote) (citation omitted); *Church v. Accretive Health, Inc.*, __ F. App'x __, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (per curiam) (same quote for Fair Debt Collections Practices Act ("FDCPA")).[1] In *Spokeo*, the Supreme Court did not even apply the principles of standing to the

[1] *See also Thomas* 2016 WL 3661960, at *4 ("*Spokeo* did not change the basic requirements of standing"); *Chapman v. Dowman, Heintz, Boscia & Vician, P.C.*, No. 15 Civ. 120, 2016 WL 3247872, at *1 & n.1 (N.D. Ind. June 13, 2016) (granting final approval of

facts before it; instead the Supreme Court remanded the case to the Ninth Circuit because the prior analysis was "incomplete" and had "overlooked" concreteness. 136 S. Ct. at 1545; *see also In re Nickelodeon*, 2016 WL 3513782, at *7 (*Spokeo* did not apply concrete harm analysis).

B. SEPTA's FCRA Violations Caused Plaintiffs to Suffer Particular Harm.

SEPTA fails to support its argument that Plaintiffs have not suffered particular harm and does not dispute Plaintiffs' well-pled allegations of particularized harm. *See* Def.'s Br. at 2, 7-8.

As the Supreme Court reaffirmed in *Spokeo*, to be "particularized," an injury "must affect the plaintiff in a personal and individual way." 136 S. Ct. at 1548 (collecting cases). The Supreme Court agreed with the Ninth Circuit that the plaintiff had suffered a particularized injury when he claimed that the defendant "violated *his* statutory rights," and his "interests in the handling of his credit information [were] *individualized*[.]" *Id.* (citation omitted).

Since *Spokeo*, the Third Circuit has reaffirmed that an injury is sufficiently particularized when the plaintiff alleges an improper disclosure of his information. *In re Nickelodeon*, 2016 WL 3513782, at *7 (FDCPA context). Similarly, in one of the first decisions to analyze FCRA standing post-*Spokeo*, the court in *Thomas* explained that an injury is particularized when the job applicants alleged that they received a copy of an improper disclosure form, and that the form violated their statutory rights. 2016 WL 3661960, at *9-11.[2]

Here, Plaintiffs have *each* pled the same particularized violation of *their* statutory rights. *See, e.g.*, FAC ¶¶ 42, 44, 47, 52, 56-57, 61, 65, 72.

FDCPA settlement over requirement to provide statutorily specified information; finding "*Spokeo* largely reiterated long-standing principles"); Amy Howe, *Opinion analysis: Case on standing and concrete harm returns to the Ninth Circuit, at least for now*, SCOTUSblog (May 16, 2016), http://bit.ly/1TB3vd1 (describing *Spokeo* as "narrow" decision); Daniel J. Solove, Spokeo, Inc. v. Robins*: When Is a Person Harmed by a Privacy Violation?*, Geo. Wash. L. Rev. On the Docket (May 19, 2016), http://bit.ly/20fyAmS.

[2] The *Thomas* court did not need to analyze the particularity of the (b)(3) injury because the defendants also recognized that they had no basis to challenge it. *See id.* at *10 n.8.

C. SEPTA's FCRA Violations Caused Plaintiffs to Suffer Concrete Harm.

(1) SEPTA Invaded Plaintiffs' Privacy, violating § 1681b(b)(2).

Under the FCRA, an employer cannot procure a consumer report unless it complies with strict disclosure and authorization requirements. *See* 15 U.S.C. § 1681b(b)(2); *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015). Through its improper disclosure and authorization, SEPTA invaded Plaintiffs' privacy by obtaining consumer reports without Plaintiffs' freely given consent. *See Thomas*, 2016 WL 3661960, at *11.

In controlling post-*Spokeo* authority, the Third Circuit explained that "Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private." *In re Nickelodeon*, 2016 WL 3513782, at *6-7. The Third Circuit held that "the unlawful disclosure of legally protected information" is a concrete harm. *Id.* at *7. This analysis applies equally to the FCRA.

Congress enacted the FCRA to safeguard the privacy of job seekers like Plaintiffs. Congress was openly "concerned" that "permit[ting] employers to obtain consumer reports pertaining to current and prospective employees . . . may create an improper invasion of privacy." S. Rep. No. 104-185, at 35 (1995). The FCRA "sought to protect the privacy interests of . . . potential employees by narrowly defining the proper usage of these reports and placing strict disclosure requirements on employers." *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 435 (M.D. Pa. 2004), *aff'd*, 135 F. App'x 499 (3d Cir. 2005); *see also id.* at 436 ("[T]he Act provides strong protections against misuse of employees' personal information[.]"). The FCRA's employment-specific provisions go beyond the Act's general privacy protections. They require that employers demonstrate a permissible purpose, provide a stand-alone disclosure, and gain authorization, showing that Congress intended for consumers to make

informed choices about whether employers could view their reports.[3]

Furthermore, invasion of privacy is a quintessential "harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. For more than a century, American courts have recognized that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A (1977).[4]

(2) SEPTA Caused Informational Injury, violating § 1681b(b)(2).

Under the FCRA, individuals have "the right to specific information at specific times[.]" *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 123 F. Supp. 3d 810, 818 (E.D. Va. 2015). When they "receive a type of information, [but] not the type of information that [they are] entitled to," they have suffered "informational injury." *Id.* As discussed *infra*, SEPTA failed to provide Plaintiffs with the "kind of disclosure" that the FCRA "guarantees" before "procur[ing] a consumer report containing their information." *Id.* at 817; *see also Ryals v. Strategic Screening Solutions, Inc.*, 117 F. Supp. 3d. 746, 753 (E.D. Va. 2015) (plaintiff alleged "he did not receive the required information at the required time"). This caused exactly the harm "Congress has identified[.]" *See Thomas*, 2016 WL 3661960, at *5-6.

The Supreme Court has repeatedly upheld rights to information made legally cognizable by Congress. For example, in *Havens Realty Corp. v. Coleman*, ("*Havens Realty*"), the Supreme Court held that a housing-discrimination "tester" had standing based on a violation of "[his] statutorily created right to truthful housing information." 455 U.S. 363, 374 (1982). Although

[3] Congress also "explicitly preempted" certain invasion of privacy suits, *see Thomas*, 2016 WL 3661960, at *10 n. 7, reinforcing Congress's intent that the FCRA remedy privacy harms.

[4] *See also id.* cmt. a ("right of privacy . . . recognized in the great majority of the American jurisdictions"); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890) ("what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances and applications of a general right to privacy"); *Pavesich v. N.E. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (right of privacy "derived from natural law").

the tester had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information," *id.* at 373–374, the court held that "[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *Id*. at 364.

Post-*Spokeo*, the Eleventh Circuit has applied *Havens Realty* to a disclosure claim in a consumer protections statute, the FDCPA. *See Church*, 2016 WL 3611543, at *3. Just as the tester-plaintiff in *Havens Realty* "had alleged injury to her statutorily-created right to truthful housing information," the *Church* plaintiff had "alleged injury to her statutorily-created right to information pursuant to the FDCPA." *Id.* Congress had created a new right—to receive required disclosures—and a new injury—not receiving them, and the plaintiff had sufficiently alleged a violation of the statute by alleging that the letter sent to her did not include all of the disclosures required under the statute. *Id.*; *accord Thomas*, 2016 WL 3661960, at *9.

Moreover, SEPTA's disclosure violations have a "close relationship" with longstanding common law claims. *Spokeo*, 136 S. Ct. at 1549. For example, the common law recognizes heightened disclosure requirements for transactions between parties in a confidential or fiduciary relationship; transactions concerning acquisition of insurance, surety, or release from liability; transactions where the parties have unequal access to information; and transactions concerning transfer of real property. *See* Kathryn Zeiler & Kimberly D. Krawiec, *Common-law Disclosure Duties and the Sin of Omission: Testing Meta-Theories*, 91 Va. L. Rev. 1795–1882 (2005).

(3) SEPTA Invaded Plaintiffs' Privacy, violating § 1681b(b)(3).

Section 1681b(b)(3) of the FCRA makes it unlawful for an employer, "in using a consumer report for employment purposes," to take "any adverse action based in whole or in part on the report" unless it provides the required notices before relying on the consumer report. SEPTA failed to comply with these safeguards. Thus, it had no authority to review and rely on

the private information contained in Plaintiffs' background checks to deny them employment.

Accessing private information without a legal basis to do so is a classic example of a modern-day analogue to well-recognized common law torts. *See* Intrusion Upon Seclusion, Restatement (Second) of Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy[.]"); *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 5 (S.C. Ct. App. 1989) ("The law recognizes that each person has an interest in keeping certain facets of personal life from exposure to others.").

(4) SEPTA Caused Informational Injury, violating § 1681b(b)(3).

SEPTA's adverse actions against Plaintiffs before providing them with required notices resulted in the type of informational injury that *Spokeo* identified as sufficient for standing—the right to specific information at a specific time. When the required information is not provided, it constitutes a concrete injury. *See Thomas*, 2016 WL 3661960, at *10-11.

First, in *Spokeo* the Supreme Court analyzed several cases establishing that this type of informational injury satisfies concreteness. 136 S. Ct. 1549. The Court cited *Public Citizen v. U.S. Department of Justice*, where the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by statute, because the inability to obtain such information "constitutes a sufficiently distinct injury[.]" 491 U.S. 440, 449 (1989). It also cited *Federal Election Commission v. Akins* for a similar point, "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury[.]" 524 U.S. 11, 20–25 (1998).

Public Citizen and *Akins* establish that an informational injury (*i.e.*, being denied access

to statutorily entitled information) is a concrete injury.[5] Courts routinely apply this principle to the FCRA. *See Panzer v. Swiftships, LLC*, No. 15 Civ. 2257, 2015 WL 6442565, at *5 (E.D. La. Oct. 23, 2015) (quoting *Lujan*, 504 U.S. at 560); *accord Thomas*, 2016 WL 3661960, at *10-11.

Second, Congress specifically intended to safeguard against these types of injuries. With the FCRA, Congress sought to address employers' "increasing reliance on consumer reporting agencies [("CRAs")] to obtain information" about their prospective and current employees. *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001) (citing 116 Cong. Rec. 36570 (1970)). It was concerned that employers would use such information to "adversely affect[]" employees, who lacked any recourse to correct or even become aware of the consumer information. *Id.* Congress enacted § 1681b(b)(3) to require that employers provide employees with pre-adverse action disclosures; "[t]he 'clear purpose' of this section is to afford employees time to 'discuss reports with employers or otherwise respond before adverse action is taken.'" *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) (citation omitted); *cf. Church*, 2016 WL 3611543, at *3 (standing through informational injuries "that Congress has elevated to the status of a legally cognizable injury"). As the FTC explained, pre-adverse action disclosures also serve an important educational purpose: without them, consumers may never know their rights. *See* Haynes Letter, 1997 WL 33791224, at *3.[6]

---

[5] *See also* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Penn. L. Rev. 613 (1999).

[6] Finding that Plaintiffs lacked standing would have far-reaching implications, not only for the FCRA, but for numerous other statutes that seek to protect consumers by requiring disclosures and allow for recovery of statutory damages for failure to comply. *See, e.g.*, 15 U.S.C. § 1638 (requiring disclosures); 15 U.S.C. § 1640(a)(2)(B) (allowing statutory damages for failure to comply); 12 U.S.C. § 2605(c) (requiring disclosures in certain circumstances); 12 U.S.C. § 2605(f)(1)(B) (allowing recovery of statutory damages for noncompliance). If consumers are no longer permitted to seek redress when defendants fail to comply with statutorily mandated disclosure requirements, the failure to comply with those requirements, and attendant abuses, will not be far behind.

Finally, Congress intended that the reports allow Plaintiffs to be "confronted with the charges against [them] and tell [their] side of the story." *Thomas*, 2016 WL 3661960, at *12 (quoting Senate Report at 3). Even if Plaintiffs' "consumer reports were entirely correct[,]" they still "were deprived of the opportunity to explain any negative records . . . and discuss the issues raised in their reports with [SEPTA] before suffering adverse employment action." *Id.*

(5) SEPTA's Cursory Analysis of Concrete Harm is Unpersuasive.

Although SEPTA argues Plaintiffs received and executed a stand-alone disclosure, Def.'s Br. at 8, it failed to follow the FCRA's requirements in procuring the disclosure. Consequently, SEPTA breached Plaintiffs' privacy and caused informational harm.

As to Plaintiffs' § 1681b(b)(3) claims, SEPTA argues that Plaintiffs were not harmed because they did not allege the consumer reports were "inaccurate." Def.'s Br. at 8. But accuracy is immaterial. The FCRA required SEPTA to provide Plaintiffs with a copy of their consumer report and a summary of their rights "*before* taking any adverse action based in whole or in part on the report." 15 U.S.C. § 1681b(b)(3)(A) (emphasis added). As *Spokeo* reaffirmed, *see* 136 S. Ct. at 1549, Plaintiffs suffered an 'injury in fact' because they were unable "to obtain information which must be publicly disclosed pursuant to [the FCRA]," *Akins*, 524 U.S. at 21; *accord Pub. Citizen*, 491 U.S. at 449 (deprivation of information "constitutes a sufficiently distinct injury").[7] *Even* if the reports were accurate, Congress intended that Plaintiffs be afforded opportunity to explain negative information by receiving their reports *before* an adverse action. *See Thomas*, 2016 WL 3661960, at *12. Nonetheless, Plaintiffs never received timely copies of their reports, and thus, did not even know if they were accurate. SEPTA also failed to provide a

[7] SEPTA mischaracterizes the holding in *Lopez v. Wendy's International, Inc.*, No. 11 Civ. 275, 2011 WL 6967932, at *8 (N.D. Cal. Sept. 19, 2011). *See* Def.'s Br. at 8. *Lopez* was decided in the context of a California wage and hour claim for failure to keep records, the "courts" cited were other courts interpreting that statute, and its holding was constrained by the language of that statute. 2011 WL 6967932, at *8.

statement of FCRA rights, which is a *separate* violation independent of a report's accuracy.

SEPTA quotes dicta from *Spokeo* that a procedural violation "may" not result in harm when, "[f]or example[,] a [CRA] fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate." Def.'s Br. at 7 (quoting *Spokeo*, 136 S. Ct. at 1549). *Spokeo* did not hold that a notice *must* be inaccurate to cause harm, only that it *may* be so.[8] The claim was not before the Court or briefed. Moreover, Justice Alito's comment must be read in the context of one of the main claims at issue in *Spokeo*—whether Spokeo (as a CRA) followed procedures to assure "maximum possible accuracy" of consumer reports. *Spokeo*, 136 S. Ct. at 1545 (citing § 1681e(b)). To establish a claim under this section, a plaintiff must plead that the consumer report included inaccurate information, *Cortez*, 617 F.3d at 708, and Justice Alito's comment on accuracy should be understood in this context. In sharp contrast, accuracy is not required for a § 1681b(b)(3) claim. Rather, as Plaintiffs' analysis shows, failure to adhere to FCRA's notice requirement is not a bare procedural violation; it is an injury causing concrete harm that Congress intended to remedy, as courts post-*Spokeo* have held. *See Thomas*, 2016 WL 3653878, at *11-12.

SEPTA cites two inapposite cases that stand in sharp contrast to Plaintiffs' wealth of authority. *See* Def.'s Br. at 7. *Gubala v. Time Warner Cable, Inc.*, was not a FCRA case, and the court did not analyze whether the plaintiff suffered an informational injury. No. 15 Civ. 1078, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) (appeal filed June 22, 2016). Although the *Gubala* court found that the plaintiff had not sufficiently demonstrated a privacy injury, it did not analyze the common law or judgment of Congress. *See id.* The plaintiff also alleged a different privacy violation that the defendant improperly retained personally

[8] The Third Circuit also cited this language in *In re Nickelodeon*, but only to explain that it did not call into question standing based on the case's facts. *See* 2016 WL 3513782, at *7.

identifiable information. *See id.* Although *Smith v. Ohio State University*, was a FCRA case, the plaintiffs "admitted that they did not suffer a concrete consequential damage" from the defendant's alleged breach of the statute. __ F. Supp. 3d __, No. 15 Civ. 3030, 2016 WL 3182675, at *4 (S.D. Ohio June 8, 2016). Here, in contrast, Plaintiffs have explained how SEPTA breached their rights to privacy and information, causing precisely the harm, against which Congress intended to protect. To the extent that SEPTA argues that plaintiffs must allege harm beyond that which Congress identified, it is wrong. *See Spokeo*, 136 S. Ct. at 1149.

D. SEPTA Can Redress Plaintiffs' Harms, Which are Traceable to SEPTA.

Plaintiffs' alleged violations are traceable to SEPTA's conduct. SEPTA provided Plaintiffs with defective disclosure forms, Plaintiffs signed the forms at SEPTA's behest, and SEPTA denied Plaintiffs employment *before* providing them with the required pre-adverse action notices. Plaintiffs seek redress for themselves (and the putative class) through the FCRA's statutory damages provision. This establishes causation. *See, e.g.*, *Thomas*, 2016 WL 3653878, at *5 ("It is undisputed that the alleged statutory violations are traceable to Defendants' conduct, and that the alleged violations are redressable by statutory damages.").

SEPTA argues that it did not cause Plaintiffs' injuries because Plaintiffs disclosed convictions. *See* Def.'s Br. at 8-10. This argument is irrelevant to the privacy and informational injuries that SEPTA caused, and does not challenge Plaintiffs' stand-alone disclosure claim. Plaintiffs pled that they were denied employment *because* of the information in their consumer reports. *See* FAC ¶¶ 44, 47, 56-58, 68-69. Even if their background checks were correct, Plaintiffs were injured by SEPTA's failure to provide their reports.[9]

[9] SEPTA argues that it would have denied employment to Plaintiffs because of their convictions no matter what. *See* Def.'s Br. at 9-10. SEPTA provides no admissible evidence for this argument (which, if true, would likely establish its CHRIA violation). In sharp contrast, Plaintiffs have each pled their qualifications for the jobs in question. *See infra* Argument, § IV.

SEPTA cites non-FCRA cases, which are irrelevant to causation as to Plaintiffs' privacy and informational injuries, and that are much more attenuated situations than SEPTA's failure to provide notices. *See Moore v. Johnson & Johnson*, 83 F. Supp. 3d 629, 630, 632 (E.D. Pa. 2014) (contractors hired to remove Motrin IB from stores had nothing to do with plaintiffs' injuries, and otherwise only performed market assessment); *Springfield Twp. v. Lewis*, 702 F.2d 426, 450 (3d Cir. 1983) (township lacked standing to challenge quarry acquisition without showing quarry otherwise would not have been bought); *Duquesne Light Co. v. U.S. E.P.A.*, 166 F.3d 609, 613 (3d Cir. 1999) (injury "manifestly the product of the independent action of a third party").[10]

II. Plaintiffs Adequately Plead that SEPTA Failed to Provide Stand-Alone Disclosures.

A. The SEPTA Authorization Violates § 1681b(b)(2).

Plaintiffs plausibly allege that the SEPTA disclosure form is "unclear and inconspicuous" and "contain[s] numerous statements and requests in clear violation of the requirements set out by the FCRA." FAC ¶¶ 42, 52, 65; *see also* Def.'s Br. at Ex. A ("SEPTA disclosure form"). For example, it contains voluminous text in addition to the simple disclosure language to which disclosures are limited, including questions about criminal conviction history and probation or parole status, and statements requiring applicants to acknowledge (1) SEPTA's falsification policy and the consequences for providing a false statement; (2) their status for continued employment; and (3) their responsibility to disclose future criminal charges or convictions. *See* Def.'s Br. at Ex. A. Courts routinely hold that including additional language like this violates the FCRA. *See, e.g.*, *Doe v. Sentech Emp't Servs., Inc.*, No. 15 Civ. 14348, 2016 WL 2851427, at *5

[10] SEPTA also cites *Ramos v. Genesis Healthcare, LLC*, 141 F. Supp. 3d 341 (E.D. Pa. 2015), but there, the plaintiff alleged a different liability theory—that defendants "inaccurately report[ed] information in [the plaintiff's] background report" and "den[ied] her a reasonable opportunity to contest the inaccurate information"—and found standing because the report contained inaccurate information. However, contesting inaccurate information is not the FCRA's only purpose (and *Ramos* did not hold that it was). *See supra*, Argument, § C(1).

(E.D. Mich. May 16, 2016) (language regarding request to list convictions, statement that incomplete/inaccurate information was disqualifying, and company's policy to consider suitability information); *Shoots v. iQor Holdings US Inc.*, No. 15 Civ. 563, 2016 WL 1733437, at *3-4 (D. Minn. Apr. 29, 2016) (language regarding accuracy of information and consequences for false statement).

Section 1681b(b)(2)(A) provides, in relevant part, that a consumer report may not be procured for employment purposes *unless*:

> [A] c*lear and conspicuous disclosure* has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists *solely* of the disclosure, that a consumer report may be obtained for employment purposes[.]

(emphasis added). When interpreting a statute, courts first look at whether it is plain and unambiguous. *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997); *see also Byrd v. Shannon*, 715 F.3d 117, 122-23 (3d Cir. 2013). They look "to the language itself, the specific context in which that language is used, and the [statute's] broader context[.]" *Robinson*, 519 U.S. at 341.

Because the stand-alone disclosure provision of the FCRA does not modify or qualify the term "solely," the Court should adopt the plain and unambiguous meaning of the term. "Solely" means "to the exclusion of all else" or "only."[11] Thus, to procure a consumer report, an employer must provide a document with "only" the disclosure "to the exclusion of all else." *See Robrinzine*, 2016 WL 212957, at *5; *Moore v. Rite Aid Hdqtrs Corp.*, No. 13 Civ. 1515, 2015 WL 3444227, at *11 (E.D. Pa. May 29, 2015) (§ 1681b(b)(2)(A) is unambiguous); *Reardon v. ClosetMaid Corp*., No. 08 Civ. 1730, 2013 WL 6231606, at *10 (W.D. Pa. Dec. 2, 2013). The

[11] Solely Definition, MERRIAM-WEBSTER.COM, http://tinyurl.com/zlkgxdr (last visited July 22, 2016); *see also Robrinzine v. Big Lots Stores, Inc*., No. 15 Civ. 7239, 2016 WL 212957, at *5 (N.D. Ill. Jan. 19, 2016) (defining solely); *Singleton v. Domino's Pizza, LLC*, No. 11 Civ. 1823, 2012 WL 245965 (D. Md. Jan. 25, 2012) (same).

FTC's longstanding administrative guidance also advances this interpretation. *See* Letter from Cynthia Lamb, Investigator, Div. of Credit Practices, Fed. Trade Comm'n, to Richard Steer, Jones Hirsch Connors & Bull, P.C., 1997 WL 33791227, at *1 (Oct. 21, 1997).[12]

The extraneous language in the SEPTA disclosure form violates § 1681b(b)(2)(A), as it is not the "only" information included in the disclosure, "to the exclusion of all else." This language also defeats the FCRA's purpose by misleading, distracting, and confusing applicants, and impeding their understanding of their substantive rights under the FCRA. *See* FAC ¶ 113.

SEPTA's form "authorize[s]" it to look into applicants' history, including the "gathering of information/records." Def.'s Br. at Ex. A. Yet it requires that applicants "declare under penalty of perjury that I have read and fully understand the foregoing questions and statements, and affirm that the answers provided are true, correct and complete" right before signing the form. *Id.* This language raises serious questions about *what* applicants think they authorized.

Finally, SEPTA does not challenge Plaintiffs' allegation that the SEPTA disclosure form is not a stand-alone disclosure, but rather directs the Court to a second extraneous document.

B. The Security Care Authorization is Extraneous to the Complaint.

Recognizing the deficiencies in the SEPTA disclosure forms, SEPTA attaches to its motion a second extraneous document: U.S. Security Care, Inc./SEPTA Notice and Authorization Under the Fair Credit Reporting Act ("Security Care Authorization"). *See* Def.'s Br. at Ex. B.[13] However, Plaintiffs did not rely on the Security Care Authorizations when drafting their FAC, and their cause of action does not rely on them. Plaintiffs based their

---

[12] Ample FTC guidance regarding the FCRA's stand-alone disclosure requirement existed at the time Defendant likely developed the SEPTA disclosure form. *See, e.g.*, Letter from David Medine, Assoc. Dir., Div. of Credit Practices, Fed. Trade Comm'n, to Karen Coffey, Chief Counsel, Texas Automobile Dealers Assn., 1998 WL 34323748, at *2 (Feb. 11, 1998); *see also* Haynes Letter, 1997 WL 33791224, at *1 & n.3.

[13] SEPTA attaches both forms to its brief, and does not authenticate either.

pleadings on the SEPTA disclosure form. *See* FAC ¶¶ 42, 52, 65 (alleging that Plaintiffs each "completed a *SEPTA form*" (emphasis added)).

Courts routinely disregard extraneous material defendants attach to motions to dismiss when the complaint is not "based on" them. *See Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014); *see also, e.g., Chambers v. Time Warner, Inc*., 282 F.3d 147, 154 (2d Cir. 2002) (district court erred in reviewing documents supporting motion to dismiss that plaintiffs did not rely on in drafting complaint); *Skold v. Galderma Labs.*, L.P., 99 F. Supp. 3d 585, 597-98 (E.D. Pa. 2015).

C. Even if the Court Considers It, the Security Care Authorization is Deficient.

Even if the Court considers the Security Care Authorization form (alone or in conjunction with its first form), it does not satisfy the FCRA. *See* Def.'s Br. at Ex. B. The form contains confusing extraneous information, including prompts requiring applicants to provide: (1) their highest level of education; (2) current or most recent employer's contact information; (3) current and previous jobs held; and (4) contact information for two previous employers. It improperly includes CRA contact information, and multiple state-specific disclosures unrelated to Plaintiffs' applications for a Pennsylvania position, in small "eye-straining" typeface. *See Jones v. Halstead Mgmt. Co., LLC*, 81 F. Supp. 3d 324, 333 (S.D.N.Y. 2015) (disclosure was not stand-alone when it included, *inter alia*, CRA contact information and state-specific disclosures unrelated to N.Y. position, and "eye-straining" typeface). It impermissibly blurs authorization for an "investigative consumer report' with authorization for a "consumer report," which causes confusion. For example, it is unclear what report is referenced when it states an applicant may request "a complete and accurate disclosure of the nature and scope of this investigation."[14]

[14] *See* Letter from Clarke W. Brinckerhoff, Attorney, Div. of Fin. Practices, Fed. Trade Comm'n, to Kenneth M. Willner, Paul, Hastings, Janofsky & Walker, 1999 WL 33932153, at *2 (Mar. 25, 1999) (only "very limited" investigative report authorization may be combined with consumer report and "surest way" to comply is to provide authorizations in separate documents).

SEPTA relies on inapposite cases to support its argument that the Security Care Authorization satisfies its FCRA obligation. *See* Def.'s Br. at 12. First, both *Smith v. Waverly Partners, LLC*, No. 10 Civ. 28, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012), and *Burghy v. Dayton Racquet Club, Inc*., 695 F. Supp. 2d 689, 698-99 (S.D. Ohio 2010), were decided at the summary judgment stage, which demanded a higher level of review (and where information beyond the complaint may be considered). *Waverly* also only analyzed whether an authorization form could have a waiver of liability. 2012 WL 3645324, at *6. In *Burghy*, the plaintiff challenged the conspicuousness of the form because it used the same style of text throughout the form, and buried the disclosure. 695 F. Supp. 2d at 696. This is far different from Plaintiffs' arguments. Moreover, neither the *Waverly* nor the *Burghy* Court gave the term "solely" in 1681b(b)(2)(A) the ordinary effect that is required as a basic tenet of statutory construction. *See Robinson*, 519 U.S. at 341. SEPTA directs the Court to *Just v. Target Corporation*'s discussion of acceptable authorizations under the FCRA. *See* __ F. Supp. 3d __, No. 15 Civ. 4117, 2016 WL 2757370, at *3-4 (D. Minn. May 12, 2016) (appeal filed June 16, 2016). However, none of the language, which the *Just* court contemplated as acceptable under the FCRA, is present in the Security Care Authorizations. Moreover, the *Just* court refrained from deciding whether the disclosure form was compliant, and instead analyzed willfulness.

Finally, SEPTA acknowledges that it unnecessarily required applicants to complete at least two separate disclosure forms. *See* Def.'s Br. at Exs. A and B. The fact that SEPTA has more than one disclosure form presents greater opportunity for confusion and misunderstanding, which § 1681b(b)(2)(A) is specifically targeted to eliminate.

III. SEPTA Willfully Violated the FCRA.

Plaintiffs have sufficiently pled that SEPTA's FCRA violations were willful. A plaintiff must establish that a defendant "knowingly and intentionally committed an act in conscious

disregard for the rights of others, but need not show malice or evil motive." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997) (internal quotation marks and citations omitted). Reckless disregard of FCRA requirements also qualifies as a willful violation. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-58 (2007). "A defendant's conduct is reckless only if it was objectively unreasonable in light of legal rules that were clearly established at the time." *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 249 (3d Cir. 2012) (internal quotation marks and citations omitted). A defendant's reading of the FCRA is unreasonable when it "had the benefit of guidance from the courts of appeals or the [FTC] that might have warned it away from the view it took." *Safeco*, 551 U.S. at 70; *see also Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 434 (E.D. Pa. 2010). Willfulness is a fact-intensive inquiry. *See, e.g.*, *Dixon-Rollins v. Experian Info. Solutions, Inc.*, 753 F. Supp. 2d 452, 462 (E.D. Pa. 2010); *HireRight*, 711 F. Supp. 2d at 434. At this stage, a plaintiff does not need to "prove" that the defendant's interpretation of the FCRA was objectively unreasonable. *Dougherty v. Quicksius*, No. 15 Civ. 6432, 2016 WL 3757056, at *7 (E.D. Pa. July 14, 2016).

Here, Plaintiffs' well-pled allegations easily demonstrate willfulness, establishing a pattern of SEPTA's repeated FCRA violation. Plaintiffs "completed a SEPTA [disclosure] form," which was "unclear and inconspicuous," and "did not 'consist solely of the disclosure." FAC ¶¶ 42, 52, 65. "SEPTA routinely and systemically violates the FCRA stand-alone disclosure requirement by failing to provide 'clear and conspicuous' disclosures in writing, in a document that consists solely of the disclosures, that a consumer report may be obtained." *Id.* ¶¶ 80, 114. "SEPTA has routinely and systematically failed to provide Plaintiffs and other job applicants with their consumer report and a summary of their rights under the FCRA before taking adverse actions against them." *Id.* ¶ 85; *see id.* ¶¶ 123, 132.

These allegations of repeated violations are sufficient to establish willfulness. *See, e.g.*, *Singleton*, 2012 WL 245965, at *4-5; *HireRight*, 711 F. Supp. 2d at 435 (willfulness established from three examples); *Sheffer v. Experian Info. Solutions, Inc.*, No. 02 Civ. 7407, 2003 WL 21710573, at *2 (E.D. Pa. July 24, 2003) (noting that willful violation may be found where evidence shows error arose "from something more than an isolated instance of human error which [the agency] promptly cure[s]") (internal quotation marks and citation omitted).

Plaintiffs also assert that SEPTA "knew or should have known its obligations under the FCRA," but "acted consciously, recklessly and willfully in breaching its known duties and depriving Plaintiffs and other job applicant of their [FCRA] rights[.]" FAC ¶¶ 87-88. Plaintiffs plead awareness by stating, "SEPTA's form letter denying employment to job applicants expressly references the FCRA[,]" *id.* ¶ 87, and that SEPTA's obligations under the FCRA are well-established "by the plain language of the FCRA, in the promulgations and opinion letters of the [FTC], and in longstanding case law." *Id.*; *see also id.* ¶¶ 88, 115-16, 124-25, 133-34.

Courts have found similar allegations of knowledge and awareness sufficient to plead willfulness. *See, e.g.*, *Robrinzine*, 2016 WL 212957, at *7 (alleging defendant "knew that it had an obligation to provide a stand-alone disclosure" sufficient to survive a motion to dismiss).[15]

SEPTA cites *Perl v. Plains Commerce Bank*, which actually supports Plaintiffs' position. No. 11 Civ. 7972, 2012 WL 760401, at *2 (S.D.N.Y. Mar. 8, 2012). Although the plaintiff failed to plead factual allegations establishing defendants' knowledge or reckless disregard of their FCRA obligation, *id.* at *2, the *Perl* court clarified that the complaint could have survived a motion to dismiss if it alleged *repeated* FCRA violations. *See id.* at *3.

---

[15] *See also Hawkins v. S2Verify LLC*, No. 15 Civ. 3502, 2016 WL 107197, at *3 (N.D. Cal. Jan. 11, 2016); *Martin v. Fair Collections & Outsourcing, Inc.*, No. 14 Civ. 3191, 2015 WL 4064970, at *5 (D. Md. June 29, 2015); *Speer v. Whole Food Mkt. Grp, Inc.*, No. 14 Civ. 3035, 2015 WL 1456981, at *4 (M.D. Fla. Mar. 30, 2015); *Singleton*, 2012 WL 245965, at *5.

SEPTA's reliance on *Safeco* is misplaced. The Supreme Court decided *Safeco* at summary judgment. *See* 551 U.S. at 54-55. *Safeco*'s analysis and standard of review is inapplicable to this motion. Determining willfulness is a fact-intensive undertaking that should not be resolved at a motion to dismiss. *See, e.g.*, *Singleton*, 2012 WL 245965, at *6; *Dixon-Rollins*, 753 F. Supp. 2d at 462; *HireRight*, 711 F. Supp. 2d at 434. Rather, resolving willfulness often requires facts outside the pleadings. *See Romano v. Active Network Inc.*, No. 09 Civ. 1905, 2009 WL 2916838, at *3 (N.D. Ill. Sept. 3, 2009).

SEPTA also inappropriately relies on *Hutchinson v. Carco Grp., Inc.*, No. 15 Civ. 1570, 2015 WL 5698283 (E.D. Pa. Sept. 29, 2015). The court in *Hutchinson* analyzed a CRA's noncompliance with 15 U.S.C. § 1681e(b), an entirely different statutory section of the FCRA, which requires different allegations that a CRA did not follow reasonable procedures to assure the accuracy of reports. *Id.* at *3-7.

IV. Plaintiffs Have Stated a Claim for Violation of the CHRIA.

Under the CHRIA, "[fe]lony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa. Cons. Stat. § 9125(b). Plaintiffs have sufficiently pled that SEPTA violated § 9125(b) when it denied them employment based on stale convictions that do not relate to their suitability for the position for which they applied. Each Plaintiff alleges that he applied for an open position and was interviewed for the position, FAC ¶¶ 22, 23, 26, 27, 30, 31, was qualified, *id.* ¶¶ 21, 25, 28, 39, 40, 51, 54, 64, and was denied the position because of his previous criminal history, *id.* ¶¶ 44, 57, 69. Plaintiffs also allege that their criminal history is irrelevant due to the nature of the crime, age of conviction, and years in which each Plaintiff has been in the general population without further convictions. *Id.* ¶¶ 46, 60, 71,

91. SEPTA does not dispute that it refused to hire Plaintiffs because of their past convictions, which is fatal to its argument. *See* Def.'s Br. at 5, 15, 17.

SEPTA's argument for dismissal is simply that Plaintiffs have not stated a claim for "willful" violation of § 9125(b). *See* Def.'s Br. at 14. But § 9125 does not have a willfulness requirement and SEPTA has not cited a single case holding otherwise. *See* Def.'s Br. at 14-17.

Willfulness is only required to establish "[e]xemplary and punitive damages[.]" 18 Pa. Cons. Stat. § 9183(b)(2). However, in addition to that remedy, Plaintiffs seek injunctive relief, *see* FAC ¶¶ 14, 141, which does not require a showing of "willfulness," only a showing of a failure "to comply with the provisions of [the statute]." 18 Pa. Cons. Stat. § 9183(a). Under § 9183(b)(2), Plaintiffs also may obtain "actual and real damages" and "reasonable costs of litigation and attorney's fees" "for each violation" of the statute without showing willfulness.

Nonetheless, Plaintiffs sufficiently pled willfulness. *See, e.g.*, FAC ¶¶ 12-13, 93-94, 142. SEPTA has repeatedly violated the CHRIA by denying Plaintiffs and the putative class employment. SEPTA had decades to comply with the CHRIA, and did not. To the extent SEPTA maintains that certain drug convictions forever disqualify applicants when the job involves the operation and/or maintenance of a SEPTA vehicle, that policy is unsustainable in light of repeated Pennsylvania cases recognizing that lifetime job bans are unreasonably broad—further highlighting the willfulness of its violation.[16] *E.g.*, *Peake v. Commonwealth*, 132 A.3d 506, 522 (Pa. Commw. Ct. 2015) (*en banc*) ("[I]t defies logic to suggest that *every* person who

[16] Further, longstanding U.S. Equal Employment Opportunity Commission Guidance has instructed employers against the use of automatic, across the board, exclusions when considering criminal records in making hiring decisions. *See Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, U.S. Equal Emp't Opportunity Comm'n (Feb. 4, 1987), http://tinyurl.com/3ffqjr4; *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp't Opportunity Comm'n (Apr. 25, 2012), http://tinyurl.com/hpywvsd.

has at any time been convicted of any of the [specified] crimes . . . presents a danger to those in an Act-covered facility."); *Warren Cnty. Human Servs. v. State Civ. Serv. Comm'n (Roberts)*, 844 A.2d 70, 74 (Pa. Commw. Ct. 2004) (rejecting "limitations that have no temporal proximity to the time of hiring"). Crucially, the Third Circuit expressed serious reservations about SEPTA's blanket exclusionary policy in *El* that put it on notice of its potential illegality (and further establishes willfulness). *See* 479 F.3d at 247. The two cases SEPTA cites, both on summary judgment, are not to the contrary. *See Dean v. Specialized Sec. Response*, No. 09 Civ. 515, 2011 WL 3734238, at *15 (W.D. Pa. Aug. 24, 2011) (CHRIA protects applicants from rejection but does not protect employees from termination); *El*, 418 F. Supp. 2d at 668 (rejecting employee's claim after he failed to rebut business necessity defense built into Title VII analysis but not CHRIA). Unlike *Dean*, Plaintiffs did not have convictions related to their job suitability, and were rejected as opposed to being hired and then terminated. Unlike *El*, Plaintiffs challenge a hiring policy unrelated to violent offenses and their claims are not brought under Title VII.[17]

CONCLUSION

For these reasons, SEPTA's motion is without merit and should be denied. *See* Ex. A.

Dated: July 22, 2016

Respectfully submitted,

/s Ossai Miazad

OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, NY 10016
Tel.: (212) 245-1000
Adam T. Klein (admitted *pro hac vice*)
Ossai Miazad (admitted *pro hac vice*)
Lewis M. Steel (admitted *pro hac vice*)
Christopher M. McNerney (admitted *pro hac vice*)
Cheryl-Lyn Bentley (admitted *pro hac vice*)

[17] SEPTA also cursorily suggests that Plaintiffs were denied employment pursuant to an alleged "legitimate public objective of protecting passengers of its transit system." Def.'s Br. at 15. Such an argument cannot be sustained, as it relies on "facts" not found in the FAC.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Jon Greenbaum (admitted *pro hac vice*)
Mateya Kelley (admitted *pro hac vice*)
1401 New York Ave., NW
Washington, DC 20005
Tel.: (202) 662-8600

PHILADELPHIA LAWYERS FOR SOCIAL EQUITY
Michael Lee
Pennsylvania Bar No. 307008
Michael Hardiman
Pennsylvania Bar No. 27018
1501 Cherry Street
Philadelphia, PA 19102
Tel.: (215) 995-1230

PUBLIC INTEREST LAW CENTER
Benjamin D. Geffen
Pennsylvania Bar. No. 310134
1709 Benjamin Franklin Parkway, 2d Floor
Philadelphia, PA 19103
Tel.: (267) 546-1308

WILLIG, WILLIAMS & DAVIDSON
Ryan Allen Hancock
Pennsylvania Bar No. 92590
Danielle Newsome
Pennsylvania Bar No. 320772
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Tel.: (215) 656-3679
Attorneys for Plaintiffs and proposed Class Members

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendant Southeastern Pennsylvania Transportation Authority's Motion to Dismiss Plaintiff's First Amended Class Action Complaint, and Exhibit A, was served on this 22nd day of July, 2016, upon counsel of record via the Court's ECF filing system.

/s/ Ossai Miazad
Ossai Miazad