No. 16-13031

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RYAN PERRY,
Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC., and
CNN INTERACTIVE GROUP, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division,
Case No. 1:14-cv-02926-ELR
Hon. Eleanor L. Ross, *Judge*.

PLAINTIFF-APPELLANT'S OPENING BRIEF

RYAN D. ANDREWS
ROGER PERLSTADT
J. AARON LAWSON
EDELSON PC
350 North LaSalle Street, 13th Floor
Chicago, IL 60654
Tel: 312.589.6370
Fax: 312.589.6378

Counsel for Plaintiff-Appellant
Ryan Perry

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RYAN PERRY,

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versus

CABLE NEWS NETWORK, INC., a Delaware corporation, and
CNN INTERACTIVE GROUP, INC., a Delaware corporation,

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Georgia

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant certifies that the following parties have an interest in the outcome of this appeal:

1. Ryan D. Andrews (attorney for Plaintiff-Appellant)

2. Alan W. Bakowski (attorney for Defendants-Appellees)

3. Rafey S. Balabanian (attorney for Plaintiff-Appellant)

4. Courtney C. Booth (attorney for the Plaintiff-Appellant)
5. Cable News Network, Inc. (Defendant-Appellee)
6. Clinton E. Cameron (attorney for Defendant-Appellee)
7. CNN Interactive Group, Inc. (Defendant-Appellee) (wholly owned subsidiary of Cable News Network, Inc.)
8. Historic TW Inc. (parent company of Turner Broadcasting System, Inc.)
9. Jay Edelson (attorney for Plaintiff-Appellant)
10. Jonathan S. Frankel (attorney for Defendants-Appellees)
11. Jennifer Auer Jordon (attorney for Plaintiff-Appellant)
12. Jeffrey G. Landis (attorney for Defendants-Appellees)
13. James A. Lamberth (attorney for Defendants-Appellees)
14. James D. Larry (attorney for Plaintiff-Appellant)
15. J. Aaron Lawson (attorney for Plaintiff-Appellant)
16. Roger Perlstadt (attorney for Plaintiff-Appellant)
17. Benjamin H. Richman (attorney for Plaintiff-Appellant)
18. Hon. Eleanor L. Ross (presiding district court judge)
19. Jacob A. Sommer (attorney for Defendants-Appellees)

20. Time Warner, Inc. (NYSE:TWX) (parent company of Historic TX Inc.)

21. Turner Broadcasting System, Inc. (parent company of Defendants-Appellees)

22. Marc J. Zwillinger (attorney for Defendants-Appellees)

No person or entity holds more than 10% of Time Warner Inc.'s (NYSE:TWX) outstanding common stock.

Dated: July 15, 2016

Respectfully submitted,

RYAN PERRY,

By: s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys

Ryan D. Andrews
randrews@edelson.com
Roger Perlstadt
rperlstadt@edelson.com
J. Aaron Lawson
alawson@edelson.com
EDELSON PC
350 North LaSalle Street, Suite 1300
Chicago, IL 60654
Tel: 312.589.6370
Fax: 312.589.6378

Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that oral argument be heard in this case because the Court's decisional process would be significantly aided by oral argument. *See* Fed. R. App. P. 34(a)(2).

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

I. The Video Privacy Protection Act 2

II. CNN disclosed a record of Ryan Perry's video-viewing history 6

III. Procedural History 9

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

I. Mr. Perry has Article III standing to sue CNN 12

II. The District Court erred by denying leave to amend 18

A. Mr. Perry could plausibly plead that he was a "subscriber." 19

i. Ellis v. Cartoon Network, Inc. 19

ii. Ellis *does not foreclose Mr. Perry's amended allegations* 22

iii. *The District Court misread* Ellis 26

B. Mr. Perry plausibly alleged that CNN discloses "personally identifiable information." 27

i. *The text of the VPPA is expansive* 30

ii. *The Act's common-law background counsels in favor of the subjective approach* 37

iv. *Practical concerns do not require an objective standard* 41

CONCLUSION 45

CERTIFICATE OF COMPLIANCE 46

CERTIFICATE OF SERVICE 47

TABLE OF CITATIONS

Cases

Bowling v. Pow,
301 So. 2d 55 (Ala. 1974) 39

Browder v. United States,
312 U.S. 335 (1941) 34

Cargill v. Turpin,
120 F.3d 1366 (11th Cir. 1997) 21

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 32

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__ F. App'x __, 2016 WL 3611543 (11th Cir. July 6, 2016) 13, 16

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510 F.3d 1307 (11th Cir. 2007) 18

Colvard v. Black,
36 S.E. 80 (Ga. 1900) 39

DeLima v. Bidwell,
182 U.S. 1 (1901) 34

Denis v. Leclerc,
1 Mart.(o.s.) 297 (Orleans 1811) 18

Ellis v. Cartoon Network, Inc.,
803 F.3d 1251 (11th Cir. 2015) ..... *passim*

FAA v. Cooper,
132 S. Ct. 1441 (2012) 38

Fortnightly Corp. v. United Artists,
392 U.S. 390 (1968) 33, 34

Grigsby v. Breckinridge,
65 Ky. 480 (Ky. 1867) 17

Hunt v. Aimco Props., LP,
814 F.3d 1213 (11th Cir. 2016) 18

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86 F. Supp. 3d 1090 (N.D. Cal. 2015) 42

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2016 WL 3513782 (3rd Cir. June 27, 2016) .....*passim*

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137 N.E.2d 1 (N.Y. 1956) 43

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504 U.S. 555 (1992) 15

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795 F.3d 1062 (9th Cir. 2015) 4, 30

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362 F.3d 923 (7th Cir. 2004) 40

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414 U.S. 488, (1974) 14

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781 F.3d 1245 (11th Cir. 2015) 12, 13

Pavesich v. New England Life Ins. Co.,
50 S.E. 68 (Ga. 1905) 38, 44

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817 N.W.2d 480 (Iowa 2012) 41

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608 F.3d 744 (11th Cir. 2010) 37

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(1849) 41 Eng. Rep. 1171 (Ch.) 17

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801 F.3d 1045 (9th Cir. 2015) 14

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529 U.S. 1 (2000) 14

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660 S.E.2d 822 (Ga. 2008) 39

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704 F.3d 910 (11th Cir. 2014) 30

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770 F.3d 618 (7th Cir. 2014) 14, 16

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623 F.3d 1371 (11th Cir. 2010) 40

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136 S. Ct. 1540 (2016) ..... *passim*

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 16

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422 U.S. 151 (1975) 33, 34

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11 How. Pr. 49 (N.Y. Sup. Ct. 1855) 18

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104 F. Supp. 3d 135 (D. Mass. 2015) 20

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U.S. Const. art. III, § 2 13

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158 Cong. Rec. S8321 (daily ed. Dec. 20, 2012) 5

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because this lawsuit arises under a federal law, the Video Privacy Protection Act, 18 U.S.C. § 2710. Mr. Perry timely appeals from a final judgment of the district court, so this Court's jurisdiction is secure under 28 U.S.C. § 1291. The district court entered its final judgment on April 20, 2016 (Dkt. 68), and Mr. Perry filed his notice of appeal on May 20, 2016 (Dkt. 69).

STATEMENT OF THE ISSUES

1. Does an individual who receives audio-visual materials from a company, both through a cable television subscription and through a proprietary mobile smartphone application, have an "ongoing relationship" with that company such that he is their "subscriber" within the meaning of the VPPA?

2. When a persistent, unique identifier is used by a third party to automatically identify an individual, does disclosure of that identifier coupled with a record of videos watched by the individual constitute "personally identifiable information" within the meaning of the VPPA?

STATEMENT OF THE CASE

This case concerns a company's practice of disclosing information about its customers, and a statute aimed at protecting individual privacy by placing control over that information in the hands of those customers. The company is CNN, whose subsidiary, CNN Interactive Group, Inc., develops and distributes a proprietary mobile smartphone application for CNN (the "CNN App" or "App") to supplement the news provided to its customers through its namesake cable television channel. The App transmits to a third party a record of every video watched on the App by a CNN consumer along with a persistent identifier unique to that individual's device that is correlated by the third party to the individual's name and a host of other information about that person maintained in an individualized dossier. The statute is the Video Privacy Protection Act ("VPPA" or "Act"), which prohibits the knowing disclosure of "personally identifiable information," including "information which identifies a person as having requested or obtained specific video materials." 18 U.S.C. § 2710(a)(3), (b)(1).

I. The Video Privacy Protection Act

Colloquially known as the "Bork Bill," the VPPA was passed in

1988 following the publication of the video rental records of then-Supreme Court nominee Robert Bork's family by a reporter who had obtained them from a Washington, D.C. video store. S. Rep. No. 100-599, at 5 (1998), *reprinted in* 1988 U.S.C.C.A.N. 4342-1. "Members of Congress denounced the disclosure as repugnant to the right of privacy." *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 485 (1st Cir. 2016). A bipartisan Congress was driven to action, not just to protect the privacy rights of public figures but also those of the average consumer. *See* S. Rep. No. 100-599, at 6 (1998). As one senator explained:

> In an era of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, *what sort of television programs they watch*, who are some of the people they telephone. I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against.

Id. at 5-6 (emphasis added). Similarly, another senator noted:

> The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide to businesses and others personal information without having any control over where that information goes. These records are a window into our loves,

likes, and dislikes.

Id. at 6-7. As the Senate Report on the VPPA recognized, "[p]rivate commercial interests want personal information to better advertise their products." *Id.* at 7. Congress thus passed the VPPA "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials." *Id.* at 1.

"Consistent with Congress's purpose, the statute's language is broad." *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1066 (9th Cir. 2015). The VPPA prohibits "video tape service providers" (essentially, persons or corporations that disseminate audio-visual materials, *see* 18 U.S.C. § 2710(a)(4)) from disclosing "personally identifiable information" about "any consumer" to "any person." *See id.* § 2710(b)(1). A "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). "Personally identifiable information" is non-exhaustively defined in the statute as "includ[ing] information [that] identifies a person as having requested or obtained specific video materials or services." *Id.* § 2710(a)(3). The statute's prohibition on the disclosure of personally identifiable information is subject to some limited exceptions, *id.* § 2710(b)(2)(A)–(F), but if a video

provider discloses a consumer's personally identifiable information and no exception applies, the consumer is entitled to bring suit. *Id.* § 2710(c)(1). "The Act [thus] allows consumers to maintain control over personal information divulged and generated in exchange for receiving services from video tape service providers. The Act reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual's consent." S. Rep. No. 100-599 at 8.

Congress amended the VPPA in 2013 "to keep pace with how most Americans view and share videos today—on the internet." 158 Cong. Rec. S8321 (daily ed. Dec. 20, 2012) (statement of Sen. Leahy). The new amendments sought "to protect digital privacy rights in cyberspace," including privacy rights associated with "new technologies, like video streaming." *Id.* Updating the act for the Internet era, however, did not require altering the language setting forth the core protections of the statute. *See* H.R. Rep. No. 112-312, at 2 (2001). This suggests "that Congress understood its originally provided definition to provide at least as much protection in the digital age as it provided in 1988." *Yershov*, 820 F.3d at 488.

II. CNN disclosed a record of Ryan Perry's video-viewing history.

The allegations here are straightforward. Mr. Perry has an iPhone, and elected to supplement the news he received on cable television with the CNN App. (Dkt. 25, First Amended Complaint ("FAC") ¶ 34.; *see* Dkt. 63, p.9 (seeking leave to allege that Mr. Perry receives CNN through a cable subscription).) Beginning in early 2013 Mr. Perry used the CNN App to read news stories and watch video clips. (FAC ¶ 34.) To install the App on his iPhone, Mr. Perry had to navigate to and through Apple's iTunes Store, and select the CNN App from approximately 1.5 million selections. (*Id.* at ¶ 11.) Once downloaded and installed, the App asks the phone's user for permission to "push" notifications to the phone's home screen. (*Id.*) And once the App is installed, a user like Mr. Perry may view the content CNN makes available through the App, including video clips. (*Id.* at ¶ 13.) The available content is expanded if the App's user, like Mr. Perry, also has a TV subscription to CNN. *See* CNN, *Watch Live TV-CNNGo*, http://cnn.it/1Oeb1so (accessed June 29, 2016).

In the background, however, the CNN App compiled a record of the content Mr. Perry viewed, including what videos he watched. (FAC

¶ 14.) When Mr. Perry closed the App, it transmitted that record, along with a media access control address (or "MAC address") assigned exclusively to Perry's phone, to Bango, a data analytics company. (*Id.*) The App neither informed Mr. Perry it was collecting and disclosing this information, nor sought his consent to make these disclosures. (FAC ¶¶ 12, 34-36.)

Bango is "smarter than the average bear." *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1254 (11th Cir. 2015). It uses a device's MAC address to link that device to a particular individual and to that individual's other devices, so that Bango can track individual consumer behavior across websites, applications, and devices. (FAC ¶¶ 15-17.) Bango receives information about individuals from a variety of sources, and the data Bango compiles is so comprehensive that, Bango says, it "automatically identifies" actual persons as they use the Internet or mobile apps. (*Id.* at ¶ 23.) Persistent, unique identifiers, like MAC addresses, are one key to Bango's ability to automatically identify individuals, because they reliably link a particular individual with a particular device. (*Id.* at ¶ 25.) Using data like MAC addresses, Bango is able to track consumer behavior over the Internet, and assemble a

comprehensive digital dossier about any particular individual. (*Id.* at ¶¶ 21-23.) These dossiers include an individual's name, address, email, phone number, and demographic information. (FAC ¶¶ 25-26.) Thus, when CNN discloses an individual's MAC address to Bango, Bango then connects that disclosure to the wealth of personal information already in its possession. (*Id.* at ¶¶ 53-54.)

In fact, a MAC address is particularly helpful to Bango in this regard. MAC addresses are both persistent and unique: they are permanently associated with a particular device. (*Id.* at ¶ 18.) *See* Ashkan Soltani, Federal Trade Comm'n, *Privacy trade-offs in retail tracking*, Tech@FTC (Apr. 30, 2015, 11:59 a.m.), http://1.usa.gov/1Pi0FUP (describing MAC addresses). A MAC address is, Mr. Perry alleges, "among the most stable and reliable identifiers for a given individual." (FAC ¶ 18) (Indeed, out of concern that third parties could track iPhone users, Apple's newer iPhone operating systems do not allow apps to transmit a user's MAC address. (*Id.* at ¶ 28.)) Thus, once Bango correlated the MAC Address on Mr. Perry's iPhone with Mr. Perry himself, Bango was able to add all of Mr. Perry's

activity within the CNN App to the digital dossier Bango had compiled on him. (*Id.* at ¶¶ 24-26.)

III. Procedural History

Based on CNN's disclosures, Mr. Perry sued CNN for violating the VPPA. (FAC.) CNN moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), asserting that (1) Mr. Perry had not suffered an injury-in-fact, (2) a MAC address is not "personally identifiable information," and (3) Mr. Perry was not a "consumer" under the VPPA. (Dkt. 49.)[1] The district court stayed consideration of CNN's motion pending this Court's decision in *Ellis*, which disposed of allegations concerning a consumer's downloading of a mobile app. *See* 803 F.3d at 1253-54. *Ellis* held that a subscription under the VPPA requires "an ongoing commitment or relationship," and that the act of downloading a smartphone application, by itself, did not create that relationship. *Id.* at 1257.

Following *Ellis*, the district court lifted its stay and accepted supplemental briefing from the parties. (Dkt. 61.) In his submission,

[1] CNN also asserted that it is not a "video tape service provider" as defined by the Act, but did not contest the sufficiency of Mr. Perry's allegations in that regard. (Dkt. 49, p. 10 n.3.)

Mr. Perry requested leave to amend in light of *Ellis*, informing the district court that he would allege that he also subscribed to CNN through his cable package. (Dkt. 63.)

The district court resolved all pending motions in a single order. (Dkt. 66.) The court first concluded that Mr. Perry had standing to sue CNN. (*Id.* at 4-5.) Turning to the merits, the district court concluded that *Ellis* controlled, and that Mr. Perry's claim, as expressed in the operative complaint, failed because Mr. Perry, like the plaintiff in *Ellis*, had alleged no more than downloading an app. (*Id.* at 6-7.)

The court also denied Mr. Perry's motion for leave to amend as futile. First, the court concluded that Mr. Perry's proposed allegations would not "alter the conclusion reached in *Ellis*" because "the fact that Plaintiff has a cable television account wherein he pays a third-party cable service provider and can view CNN programming does not somehow convert Plaintiff into a subscriber of CNN's free mobile app." (Dkt. 66, p. 7 n.5.) Second, the court concluded that Perry had not plausibly alleged that CNN disclosed "personally identifiable information." (*Id.* at 10.) The court expressed agreement with the reasoning of other district courts that had held "personally identifiable

information" is limited to information that identifies a person "without more," and that "anonymous strings of numbers" are thus not included in the statutory term. (*Id.* at 8-10.) The court denied leave to amend on the ground that Mr. Perry had not "pled any facts to establish that the video history and MAC address were tied to an actual person and disclosed by Defendants." (*Id.* at 10.)

SUMMARY OF ARGUMENT

The district court properly concluded that Mr. Perry has standing to sue CNN under the VPPA, but erred by denying leave to amend as futile. While this Court held in *Ellis* that the simple act of downloading a smartphone application did not result in a subscription under the VPPA because it did not create an "ongoing relationship," Mr. Perry's proposed amended allegations are materially different from those at issue in *Ellis*. Intentional, multiplatform access to a particular company's video content bespeaks a durable, ongoing relationship between video provider and consumer. This Court held in *Ellis* that such a durable relationship was the *sine qua non* of subscribing, as a subset of consuming, under the VPPA. Mr. Perry is therefore authorized to invoke the protections of the statute.

The district court's conclusion that Mr. Perry has not alleged the disclosure of "personally identifiable information" is similarly in error. As Mr. Perry's complaint explains, CNN discloses information that it knows Bango, the recipient, will use to identify Ryan Perry individually and the videos he watched on the CNN App. (FAC ¶ 14.) To supplement this assertion, Mr. Perry alleges how and why Bango can use CNN's disclosures to identify him in a firm and predictable manner, alleges that this identification is foreseeable to CNN, and is made automatically by Bango, rather than through unknown detective work. (FAC ¶¶ 14, 22-26.) These allegations must be taken as true at this stage, and have empirical support to boot. Mr. Perry's claim that CNN disclosed "personally identifiable information" is thus substantively plausible. Consequently, the district court's judgment should be vacated.

ARGUMENT

I. Mr. Perry has Article III standing to sue CNN.

The district court's determination that Mr. Perry had standing is reviewed de novo. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, DDS*, 781 F.3d 1245, 1251 (11th Cir. 2015). Article III of the

Constitution extends the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. To invoke federal jurisdiction, a litigant must have "standing," which in turn requires the litigant to have suffered (or be about to suffer) "an injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). CNN will renew its contention that Mr. Perry hasn't suffered the requisite injury.

The district court concluded that Mr. Perry suffered the required injury-in-fact because he alleged that CNN violated his personal legal rights as defined by the VPPA. That conclusion follows from the well-settled law of this Circuit that the "injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Palm Beach Golf*, 781 F.3d at 1250-51 (quoting *Warth v. Seldin,* 422 U.S. 490, 500 (1975)); *see Church v. Accretive Health, Inc.*, __ F. App'x __, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (reiterating this principle after *Spokeo*).

The Supreme Court's recent decision in *Spokeo* does nothing to change this Court's standing doctrine or to disturb the District Court's conclusion that Mr. Perry has standing. Every circuit to consider the question has concluded that allegations that a defendant disclosed

protected information in violation of the VPPA establish a plaintiff's standing to sue under the VPPA both before *Spokeo*, *see Rodriguez v. Sony Computer Entm't Am., LLC*, 801 F.3d 1045, 1053 n.5 (9th Cir. 2015) (concluding that plaintiff suffered an injury-in-fact because defendant invaded his legal rights under the VPPA); *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (same), and after, *see In re Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782 at *7 (3rd Cir. June 27, 2016) (concluding that under *Spokeo* plaintiff's alleged violation of VPPA results in harm that is "concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information").[2]

Spokeo simply clarifies that an injury must be concrete as well as particularized, and that the two elements require separate inquiries.

---

[2] Any suggestion that, after *Spokeo*, Congress lacks the power to create rights the violation of which results in injury-in-fact would mean that *Spokeo* dramatically limited numerous decisions of the Supreme Court, including *Warth,* 422 U.S. at 514; *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974) (same); and *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) (same). The suggestion is meritless: the Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

Spokeo, 136 S. Ct. at 1548. And, relevant here, the Court made clear that "[a]lthough tangible injuries are perhaps easier to recognize … intangible injuries can nevertheless be concrete." *Id.* at 1549. In determining whether an intangible injury is concrete, "both history and the judgment of Congress play important roles." *Spokeo,* 136 S. Ct. at 1549. Here, both factors establish that CNN's invasion of Perry's legally protected interest under the VPPA was a concrete injury in fact.

First, Congress is both "well-positioned to identify intangible harms that meet minimum Article III requirements" and empowered "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). If Congress creates a concrete right by statute, a litigant "need not allege any *additional* harm" beyond invasion of that right. *Id.* at 1549-50. Congress did just that with the VPPA. As explained above, in response to the disclosure of Judge Bork's video-rental records, and concerned about the creation of digital dossiers of individual consumer behavior, Congress prohibited exactly the conduct alleged here: disclosure of consumers' video choices

by their video providers. In other words, Congress identified a harm, and legislated directly to protect against that harm. Under *Spokeo*, invasion of the interest protected by the VPPA is a concrete injury. *See Church*, 2016 WL 3611543, at *3 ("Thus, through the FDCPA, Congress has created a new right—the right to receive the required disclosures in communications governed by the FDCPA—and a new injury—not receiving such disclosures.").

Neither can CNN resort to the Court's statement that a plaintiff "could not … allege a bare procedural violation [of a statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). "This statement is inapplicable to the allegations at hand, because [Mr. Perry] has not alleged a procedural violation." *Church*, 2016 WL 3611543, at *3 n.2. Instead, the alleged violation here is substantive: Mr. Perry alleges that CNN infracted a provision of the VPPA that directly tells video providers what not to do. A provision, in other words, that regulates substantive conduct. *See Sterk,* 770 F.3d at 623 ("impermissible disclosures of one's sensitive, personal information are precisely what Congress sought to illegalize by enacting the VPPA").

Second, the harm to individual, informational privacy guarded against by the VPPA also is closely related "to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. The VPPA's requirement that video providers keep their users' video selections confidential resembles the duty imposed by the tort of breach of confidentiality, which "has a long tradition in Anglo-American common law." Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. Miami L. Rev. 559, 617 (2015). One prominent example is *Prince Albert v. Strange*, (1849) 41 Eng. Rep. 1171 (Ch.), in which Prince Albert sued to enjoin publication of private etchings that had been provided to a printer solely to make a few copies. The court ordered the injunction to issue on the basis of "breach of trust, confidence, or contract" owed by the printer as merchant to the Prince. *Id.* at 1178-79 ("Every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk."). American courts heard similar claims for breach of confidence, such as for dissemination of private writings. *See Grigsby v. Breckinridge*, 65

Ky. 480, 493 (Ky. 1867); *Woolsey v. Judd*, 11 How. Pr. 49, 79-80 (N.Y. Sup. Ct. 1855); *Denis v. Leclerc*, 1 Mart.(o.s.) 297, 320 (Orleans 1811). By the end of the nineteenth century, "a robust body of confidentiality law protecting private information from disclosure existed throughout the Anglo-American common law." Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L. J. 123, 125 (2007). The VPPA is simply an extension of the common-law tort of breach of confidentiality. Mr. Perry's injury is therefore concrete.

II. The District Court erred by denying leave to amend.

When, as here, a district court denies leave to amend on the basis of futility, that decision is reviewed de novo. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). In conducting this review, the Court applies the familiar standards applicable to reviewing dismissals under Rule 12(b)(6): The plaintiff's factual allegations and proposed allegations are accepted as true, and dismissal is unwarranted if those allegations, and any reasonable inferences derived therefrom, plausibly show that the defendant is liable for the misconduct alleged. *Hunt v. Aimco Props., LP*, 814 F.3d 1213, 1221 (11th Cir. 2016).

Here, the district court concluded that amendment would be futile for two reasons. First, it "fail[ed] to see" how the proposed amendments would alter its conclusion that Perry was not a subscriber to CNN. (Dkt. 66, p. 7 n.5.) Second, it held that, regardless of the proposed amendments, dismissal was warranted because the persistent, unique identifier disclosed by CNN could not plausibly personally identify Mr. Perry. (*Id.* at 8-10.) As explained below, the proposed amendments regarding Mr. Perry's CNN television subscription suffice to establish that he is a subscriber under the VPPA, and that the information disclosed about him by CNN is "personally identifiable" under the Act.

A. Mr. Perry could plausibly plead that he was a "subscriber."

The District Court's conclusion that Mr. Perry's claim to being a "subscriber" remained implausible under *Ellis* both inappropriately extends *Ellis* and misreads that decision. In truth, that decision does not doom Mr. Perry's claim under the VPPA. A brief review of that decision will help demonstrate why.

i. Ellis v. Cartoon Network, Inc.

In *Ellis* this Court held that to be a "subscriber" under the VPPA, a plaintiff must have an "ongoing commitment or relationship" with the

defendant. *Ellis*, 803 F. 3d at 1257. Canvassing a series of dictionaries, and relying heavily on the analysis in the now-vacated district court opinion in *Yershov v. Gannett Satellite Info. Network, Inc.*, 104 F. Supp. 3d 135 (D. Mass. 2015), this Court concluded that subscriber relationships all share a "common thread": "some type of commitment, relationship, or association (financial or otherwise) between a person and an entity." *Ellis*, 803 F. 3d at 1256.

The plaintiff in *Ellis*, the Court concluded, lacked that relationship. *Id.* at 1258. His claim to being a subscriber rested exclusively on having downloaded the defendant's mobile smartphone application. *Id.* at 1254, 1257. The Court concluded that the plaintiff's lone allegation did not permit the inference that he had established any commitment or relationship with the defendant. *Id.* at 1258. Crucially, the Court noted, the plaintiff was "free to delete the app without consequences whenever he like[d]." *Id.* at 1257. Given that reality, the Court thought, it was unreasonable to infer anything about the plaintiff's commitment to the defendant. *Id.*; *see also* Rahul Vareshnaya, *7 Reasons Why Users Delete Your Mobile App*, Inc. (June 4, 2015), http://on.inc.com/1GPUinc (noting that most downloaded apps

are used once before being deleted); *but see Yershov*, 820 F.3d at 487 ("Yershov's decision to download the App seems a fair enough indication that he intended more than a one-shot visit."). And without any basis to infer that the plaintiff had established any commitment to the defendant, his claim to being a subscriber was implausible. *Ellis*, 803 F.3d at 1258.[3]

The Court did elaborate on the types of allegations it believed could permit a reasonable inference of an ongoing commitment or relationship. The Court wrote that allegations that an individual has somehow registered, created some sort of profile, or accessed otherwise restricted content all could permit an inference of an "ongoing commitment or relationship." *Id.* at 1257. None of these, however, were prerequisites; the Court held only that "the free downloading of a mobile app on an Android device to watch free content, without more, does not a subscriber make." *Id.* at 1258; *see id.* at 1252. The touchstone

[3] Mr. Perry believes that the Court's decision in *Ellis* drew the wrong inferences from the plaintiff's allegations, and ultimately reached the wrong conclusion about whether the plaintiff's relationship with the app's proprietor plausibly was the kind of relationship contemplated by the Act. *See Yershov*, 820 F.3d at 487-89. He raises the point only to preserve it for *en banc* consideration. *See Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997).

of the "subscriber" inquiry in the smartphone context remains whether there exists an "ongoing commitment or relationship between the user and the entity which owns and operates the app." *Id.* at 1257.

ii. Ellis *does not foreclose Mr. Perry's amended allegations.*

Under the framework established in *Ellis*, the district court was right to dismiss the operative complaint. Mr. Perry's allegations no more permitted an inference of an "ongoing commitment or relationship" than did the allegations in *Ellis*.

But the fact that Mr. Perry's complaint was condemned by *Ellis* is not dispositive, and is why Mr. Perry sought to amend his complaint to plead the "more" that *Ellis* requires. Specifically, Mr. Perry would allege that in addition to downloading the CNN App and viewing CNN content on his iPhone, he also subscribed to CNN's television channel through his cable package. (Dkt. 63, p. 9.) This new allegation permits the reasonable inference that Mr. Perry has the kind of "commitment, relationship, or association" with CNN that *Ellis* requires for a person to be a "subscriber" under the VRPA. 803 F.3d at 1256. That Mr. Perry subscribes to CNN's cable channel tells us something significant about Mr. Perry's subsequent decision to download and use CNN's app.

Consider the factors *Ellis* reasoned should guide the inquiry: payment, registration, commitment, delivery, expressed association, and access to restricted content. *See* 803 F.3d at 1256. Standing alone, Perry's cable subscription is material to the inquiry. He pays CNN, via his cable provider, sixty-one cents per month in exchange for regular access to content that is available only to CNN subscribers. *See* Brian Stetler, *Fox News to earn $1.50 per subscriber*, CNN Money (Jan. 16, 2015, 11:14 AM), http://cnnmon.ie/1IIpGqp. In light of this, it's no surprise that consumers who pay to receive a certain television channel in their homes are commonly called "subscribers" of that channel. *See, e.g.*, Brian Stetler, *Disney stock hit by ESPN fears*, CNN Money (Aug. 5, 2015, 6:10 PM), http://cnnmon.ie/1OQkpPr (reporting on ESPN's "subscriber declines"); Keach Hagey & Shalini Ramachandran, *Pay TV's New Worry: 'Shaving' the Cord*, Wall St. J. (Oct. 9, 2014, 7:58 PM), http://on.wsj.com/1BYCPpS ("[T]he top 40 most widely distributed channels in 2010—household names like CNN, ESPN and USA—have lost an average of 3.2 million subscribers[.]"). In fact, CNN's parent company refers to CNN's cable viewers in exactly this way. *See, e.g.*, TimeWarner Inc., *Annual Report 2015*, at 7 (April 2016), *available at*

http://goo.gl/3nTMW2 ("[I]n 2014, CNN launched CNNGo, which allows subscribers to watch CNN's news and original programming live and on demand."); *id.* at 36 (reporting "[s]ubscription" revenues for division that includes CNN).

And when Mr. Perry's new allegation is layered on top of his initial allegation, the Court may plausibly infer an "ongoing commitment or relationship." A study by the data analytics company Adobe demonstrates that app users are already more loyal to content providers than other consumers who simply visit the provider's website. *See* Tyler White, *Are Mobile App Users More Loyal?*, Adobe Digital Marketing Blog (Nov. 6, 2013), http://adobe.ly/1RcPLl2. And, as a white paper by the former American Press Institute further explains, users of proprietary mobile applications and users of mobile websites are quite distinct groups of consumers: "[U]nlike the mobile website, the app is where you serve a loyal, familiar audience." Jeff Sonderman, *Unlocking mobile revenue and audience*, Am. Press Inst. (June 10, 2014, 7:45 a.m.), https://goo.gl/FhEP0M. As Adobe puts it, "loyal and valuable customers prefer apps." Ray Pun, *Three Stories of Successful Mobile Engagements With Apps*, Adobe Digital Marketing Blog (June 8, 2016),

http://adobe.ly/25MVkOS. Thus, committed consumers who seek multiple points of access to a company's content are likely to download that company's app.

CNN itself understands this. For example, CNN allows consumers to "Watch Live TV on any device, anytime," including through the App at issue here. CNN, *Watch Live TV-CNNGo*, http://cnn.it/1Oeb1so (accessed June 29, 2016). To do so, however, the consumer must, like Mr. Perry, be a CNN television subscriber. *Id*. ("Your TV subscription that includes CNN is your key to watching CNN TV online. When you sign in through your TV service provider, you confirm your CNN TV subscription."). Thus, an app user is unable to access certain features of CNN's App unless they are—like Mr. Perry—a CNN television subscriber. In other words, whatever the relationship between Mr. Perry and CNN might be if the two interacted only through the CNN App, because Mr. Perry accesses CNN video content on multiple platforms, the Court can reasonably infer a larger two-way commitment of which the App is but one part. Because Mr. Perry downloaded the CNN App to supplement the content he could access on TV, rather than

relying solely on CNN's presence on the World Wide Web, the Court fairly can presume that Perry has a durable relationship with CNN.

iii. The District Court misread Ellis.

The district court also rejected Mr. Perry's amendment by reasoning that Perry's cable subscription "does not somehow convert [him] into a subscriber of CNN's free mobile app." (Dkt. 66, p. 7 n.5.) But under *Ellis* the question is not whether Perry is a subscriber of CNN's mobile app, but whether he is a subscriber of CNN, the entity that owns and operates the App—the "video tape service provider" in the argot of the Act. *See* 18 U.S.C. § 2710(a)(1) ("[T]he term 'consumer' means any renter, purchaser, or subscriber of goods or services from a video tape service provider."). True, the disclosures at the heart of Mr. Perry's claim relate to his viewing CNN content through the CNN App on his iPhone. But as this Court recognized in *Ellis* it is his relationship with the entity that owns and operates the app—not with the app itself—that matters under the VPPA. 803 F.3d at 1257 (requiring for subscription an "ongoing commitment or relationship between the user *and the entity which owns and operates the app*") (emphasis added).

This makes sense given the reality that CNN is a multi-platform entity. Rather than exist separately as a TV channel, an App, and a website, CNN operates as a more integrated whole. *See* TimeWarner, *CNN Leverages comScore Xmedia to Capture United View of Cross-Media Audience* (Apr. 27, 2016), http://goo.gl/PDoYtU (referring to CNN as "the global multiplatform leader in news").[4] Once the inquiry is properly focused, it is clear that, as explained above, Mr. Perry's proposed amended allegations permit the inference that he has the requisite relationship with CNN, and his claim of subscription is plausible.

B. Mr. Perry plausibly alleged that CNN discloses "personally identifiable information."

The District Court also concluded that adding allegations to bolster Mr. Perry's claim of being a "subscriber" was fruitless because his claim foundered on the alternative ground that he did not plausibly allege that CNN disclosed personally identifiable information. The district court concluded that persistent, unique identifiers were

[4] The TimeWarner release highlights the central point of Mr. Perry's claim, as well, noting that "CNN platforms are additive, extending reach and consumption." TimeWarner, *supra*.

"anonymous" and not "tied to an actual person." (Dkt. 66, pp. 9-10.) This conclusion, too, was in error.

In the wider world, scholars and government officials alike agree that it is factually incorrect to refer to persistent, unique identifiers as "anonymous" or as untethered to an individual's identity. As two prominent privacy scholars explain, "[t]he history of the Social Security Number makes clear that any random string that acts as a unique persistent identifier should be understood as a pseudonym rather than an 'anonymous identifier'." *See* Solon Barocas & Helen Nissenbaum, "Big Data's End Run around Anonymity and Consent," *in Privacy, Big Data, and the Public Good* 44, 53 (Julia Lane, et al., eds.) (Cambridge Univ. Press 2014). Thus, the Federal Trade Commission's Chief Technologist explains, "in the case of smartphones, apps … sometimes rely on MAC addresses [the identifier disclosed by CNN] as a mechanism to uniquely track behavior online—thereby providing a mechanism for linking offline (physical) and online behavior." Soltani, *supra*.

Within the narrower context of the VPPA, two federal appellate courts have considered whether persistent, unique device identifiers are

"personally identifiable information," and they have reached opposing conclusions. *Compare Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482 (1st Cir. 2016) (concluding that when a smartphone's unique identifier could be linked in a "firm and readily foreseeable" manner to a particular individual it was "personally identifiable information"), *with In re Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782 at *21 (3rd Cir. June 27, 2016) (concluding that unique device identifiers of a personal computer were not "personally identifiable" because an "ordinary person" could not, given the current state of technology, use the identifier to discern "a specific individual's video-watching behavior"). In broad strokes these cases represent a division over whether the term "personally identifiable information" is to be defined by a subjective standard (as in *Yershov*), which asks whether the information is identifiable to the actual recipient of the disclosure, or an objective one (as in *Nickelodeon*), which asks whether the information is identifiable to a hypothetical "ordinary" recipient.

This Court should adopt the subjective standard. The text of the Act implies a subjective standard, and the common-law backdrop against which the VPPA was written embodied privacy protections that

focused on an individual's subjective understanding. The course charted by *Yershov* more faithfully applies accepted canons of statutory interpretation and better reflects this common-law background.

i. The text of the VPPA is expansive.

As the Ninth Circuit has noted, the VPPA's language is "broad." *Mollett*, 795 F.3d at 1066. Under the VPPA, "'personally identifiable information' *includes* information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider[.]" 18 U.S.C. § 2710(a)(3) (emphasis added). As both the Third and First Circuits have observed, however, the text's breadth does not result in clarity. *See Nickelodeon*, 2016 WL 3513782 at *21 (3rd Cir. June 27, 2016); *Yershov*, 820 F.3d at 486 (calling the term "personally identifiable information" "awkward and unclear" and noting that the statutory definition "adds little clarity"). It is clear, however, that the definition is non-exhaustive. *See Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 915 (11th Cir. 2014) ("[T]he term 'means' denotes an exhaustive definition, while 'includes' is merely illustrative."). Relying on the Act's broad language, the First Circuit reasoned that "the language reasonably conveys the point that

[personally identifiable information] is not limited to information that explicitly names a person." *Yershov*, 820 F.3d at 486.

Here, the two courts part ways. The First Circuit took a cue from the statute's breadth and noted that "[m]any types of information other than a name can easily identify a person" including a social security number when provided to the government or a football player's jersey number when disclosed to someone with a game program. *Id.* The court recounted that this process, using information in one's possession to reveal the subject of a communication, was a familiar way of identifying people. *Id.* And because the plaintiff in that case had alleged that the defendant disclosed information that was connected in the same way by the recipient to the plaintiff's identity, the First Circuit concluded that the plaintiff had plausibly alleged the disclosure of "personally identifiable information." *See id.* ("The complaint therefore adequately alleges that Gannett disclosed information reasonably and foreseeably likely to reveal which *USA Today* videos Yershov has obtained.").

The Third Circuit took a different path. Explicitly abandoning any reliance on the text, the *Nickelodeon* court looked to the Act's legislative history. *Nickelodeon*, 2016 WL 3513782 at *16. The pivotal teaching to

be gleaned from the Congressional record, the court wrote, was that "Congress's purpose in passing the Video Privacy Protection Act was quite narrow." *Id.* As such, the court concluded, "personally identifiable information" was simply "information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits." *Id.* This reading of the law plainly excludes data like social security numbers from the Act's protections. But the statutory term, the Third Circuit wrote, was "static." *Nickelodeon*, 2016 WL 3513782 at *18.[5]

[5] Insofar as the legislative history should be accorded such dispositive significance, it points *away* from the Third Circuit's conclusion. The Senate Report discusses the VPPA as a measure to ensure informational privacy in the face of "trail[s] of information generated by every transaction that is now recorded and stored in sophisticated record-keeping systems" developed as a result of advancing technology. S. Rep. No. 100-599, at 6-7. If anything, this speaks to a legislative desire to protect the types of information generated by new and evolving technologies and stored in ever-more sophisticated systems, not to preserve a "static" understanding of what constitutes identifying information. And the *Nickelodeon* court drew a disfavored inference from Congress's decision to leave the term "personally identifiable information" intact in 2013. As the Supreme Court has instructed, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

To justify its interpretive tack, the Third Circuit cited the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), for the proposition that "[w]hen technological change has rendered its literal terms ambiguous, [a law] must be construed in light of its basic purpose." *Nickelodeon*, 2016 WL 3513782 at *16 & n.140) The *Nickelodeon* court derived from *Aiken* a lesson that is flatly contradicted by the Supreme Court's opinion.

Aiken resolved whether a store owner violated the Copyright Act of 1909 by playing a radio station in his store when the proprietor did not have a license to play the broadcasted songs but the radio station did. 422 U.S. at 152-53. The Copyright Act, drafted for a different age, did not directly answer the question, but the Court concluded the result was dictated by its then-recent decision in *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 398-99 (1968), which held that television broadcasters "performed" copyrighted acts, while viewers did not. *Aiken*, 422 U.S. at 161. *Fortnightly* has, much more recently, been cited by the Supreme Court for the proposition that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require

their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999).

Illuminating the interpretive canon applied in *Aiken*, *Fortnightly*, and *West*, Scalia and Garner observe that "broad language"—and the VPPA is broadly worded—"can encompass the onward march of science and technology." Antonin Scalia & Bryan Garner, *Reading Law* 86 (1st ed. 2012). While on the one hand the words of a statute should be given the meaning they carried when the statute was enacted, "[d]rafters of every era," Scalia and Garner explain, "know that technological advances will proceed apace and the rules they create will one day apply to all sorts of circumstances that they could not possibly envision." *Id.* Thus, although a "statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope." *DeLima v. Bidwell*, 182 U.S. 1, 197 (1901); *see Browder v. United States*, 312 U.S. 335, 339-40 (1941) (same).

This canon, perhaps counterintuitively called the fixed-meaning canon, Scalia & Garner, *supra*, at 85-87, is a perfect fit for the VPPA: it both acknowledges that Congress was responding to a particular

situation, and that it intentionally created a statute that swept more broadly than that particular situation. But the fixed-meaning canon does *not* mean that the statutory term "personally identifiable information" is "static." *Nickelodeon*, 2016 WL 3513782 at *18. The Senate Report for the law unequivocally establishes "that the drafters' aim was 'to establish a minimum, but not exclusive, definition of personally identifiable information.'" *Yershov*, 820 F.3d at 486 (quoting S. Rep. No. 100-599, at 12). Indeed, the Third Circuit recognized that in prohibiting "personally identifiable information" Congress was using "a term of art." *Nickelodeon*, 2016 WL 3513782 at *22 n.186.) That "term of art" now regularly encompasses types of information used to "distinguish or trace" an individual and which are "linked or linkable" to an individual. *See* Nat'l Inst. of Standards & Tech., *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)*, Special Pub. 800-122, at 2-1 (Apr. 2010), http://1.usa.gov/1DgxrRy. (The NIST, part of the Department of Commerce, is tasked by Congress to develop information security guidelines for all federal agencies. 15 U.S.C. § 278g-3(a)(3).) Explaining this definition, the NIST noted that whether a set of information was personally identifying depended on

the information a particular recipient could access. *See id.* (spinning out a scenario in which "someone with access to both databases may be able to link the information from the two databases and identify individuals"). This is a clear articulation of a subjective standard for determining whether information is personally identifiable.

The standard set forth by *Yershov* accurately reflects the development of this "term of art." The First Circuit held, simply and succinctly, that information was "personally identifiable" if it was "reasonably and foreseeably likely to reveal" an individual and the videos they watched. *See Yershov*, 820 F.3d at 486. That test accurately reflects the intentionally expansive term used by Congress. *See also Nickelodeon*, 2016 WL 3513782 at *17 (acknowledging that the "the text is amenable" to this interpretation).[6]

Under this text-based standard, Mr. Perry's allegations are adequate at this stage. Mr. Perry alleges that CNN, through its App,

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[6] The Third Circuit concluded that its analysis fully accorded with *Yershov* because *Yershov* turned on the disclosure of the plaintiff's GPS location. *Nickelodeon*, 2016 WL 3513782 at *20. That is a strained, almost disingenuous, reading of *Yershov*. As recounted, *Yershov* held that information linked in a "firm and readily foreseeable manner" to a particular individual was protected by the VPPA. The court discussed GPS only to highlight why the plaintiff's claim, even if limited to persistent, unique identifiers, was plausible. 820 F.3d at 486.

discloses to Bango information that Bango publically admits it uses to automatically identify Mr. Perry and the videos he watched on the CNN App. (FAC ¶¶ 16-19, 21-25.) The link between the MAC address of Mr. Perry's iPhone and Bango's identification of Mr. Perry "is both firm and readily foreseeable to" CNN. *Yershov,* 820 F.3d at 486. The link here is not "dependent on too much yet-to-be-done, or unforeseeable detective work." *Id.* As alleged, the link is automatic. It is not "hypothetical," as was the linkage alleged in *Nickelodeon*. 2016 WL 3513782 at *20. Moreover, CNN knows that the information it discloses to Bango identifies Mr. Perry as having obtained specific video materials. *See* 18 U.S.C. § 2710(a)(3). That is, of course, why CNN is disclosing it to Bango in the first place. As plausibly alleged, CNN disclosed "personally identifiable information."

ii. The Act's common-law background counsels in favor of the subjective approach.

The subjective approach also is more faithful to the VPPA's common-law background. Courts "presume that Congress legislates against the backdrop of established principles of state and federal common law," *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 758 (11th Cir. 2010), so those principles inform the interpretation of

congressional enactments. The relevant common-law background here is formed by the privacy torts, including not only breach of confidence but also the defamatory torts. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73-74 (Ga. 1905) (locating defamation within a common-law right to privacy). The VPPA's Senate Report explains that "the Act reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual's consent." S. Rep. No. 100-599, at 8. As the Supreme Court has recognized, the Privacy Act "serves interests similar to those protected by defamation and privacy torts, [so] there is good reason to infer that Congress relied upon those torts in drafting the Act." *FAA v. Cooper*, 132 S. Ct. 1441, 1450 (2012). Because the VPPA embodies the same underlying principle, it is reasonable to infer that the VPPA was drafted with the same background in mind. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that when Congress creates by statute a species of tort liability, it is assumed to know and incorporate background, tort-related common-law principles).

This background counsels in favor of adopting the subjective standard set forth in *Yershov*. Defamation, in particular, employs a

subjective standard for determining liability. The requirement that a defamatory communication be "of and concerning" the plaintiff to be actionable has long been defined to include publications that do not actually name the plaintiff but which are understood by their recipient to refer to the plaintiff. *See Smith v. Stewart*, 660 S.E.2d 822, 828-35 (Ga. 2008) (remanding for trial a claim that plaintiff was defamed by portrayal of character in fictional novel); *Bowling v. Pow*, 301 So. 2d 55, 59 (Ala. 1974) (noting that plaintiff's claim for defamation included allegations about "extrinsic circumstances" because "the alleged libelous letter did not in and of itself, that is, on its face…defame plaintiff"); *Colvard v. Black*, 36 S.E. 80, 82 (Ga. 1900) ("It is not necessary that all the world should understand the defamatory matter. It is sufficient if those who knew the plaintiff can make out that he was the person meant.").

In other words, the rule in defamation cases is that to be actionable a communication must be understood as defamatory by the disclosure's actual recipient. *See* Restatement (Second) of Torts § 564 ("A defamatory communication is made concerning the person *to whom its recipient . . . understands that it was intended to refer*.") (emphasis

added). This rule derives from the common-sense notion that every disclosure has a recipient and that recipient will make sense of the information she receives by using information outside the four corners of the disclosure. *See Yershov*, 820 F.3d at 486 (describing types of identification that make use of information outside what is disclosed). Put simply, context matters. *See, e.g.*, Restatement (Second) of Torts § 577 cmt. d ("A libel may be published in a foreign language provided it is understood by the person to whom it is communicated.").

Given the close relationship between defamation and the law of privacy as it has developed in Anglo-American common law, it is unsurprising that courts applying many privacy statutes have adopted a subjective approach to interpreting statutory protections. *See, e.g.*, *Speaker v. Dep't of Health & Human Servs.*, 623 F.3d 1371, 1384 n.12 (11th Cir. 2010) (concluding that it was for the jury to decide whether, in light of defendant's disclosures, the defendant was in fact identified); *Nw. Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004) (quashing a subpoena under HIPAA as invasive of privacy when even redacted records contained enough information that "persons of their acquaintance, or skillful 'Googlers'" could "put two and two together,

[and] 'out'" the subject of the records); *Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012) (upholding university's decision to withhold redacted records under FERPA because the school determined "the requester would otherwise know the identity of the referenced student").

We can add *Yershov* to this list. The First Circuit's approach fits comfortably alongside other cases interpreting and applying statutes that are branches splitting off from the same common-law root. *Nickelodeon*, on the other hand, marks a stark divide from this well-established tradition. This Court should reject *Nickelodeon*.

Applying the background rule of defamation to the VPPA, it is clear that Mr. Perry's allegations suffice. CNN disclosed information to Bango that it knows Bango to understand to refer to Mr. Perry himself, as well as the videos he watched. That is the crux of Mr. Perry's theory of liability.

iii. Practical concerns do not require an objective standard.

At bottom, the Third Circuit seems to have been motivated by its concern that a subjective standard for determining what constitutes "personally identifiable information" "lacks a limiting principal."

Nickelodeon, 2016 WL 3513782 at *20. For two reasons the Third Circuit's concern is misplaced.

First, the Third Circuit's opinion utterly ignores the fact that the VPPA only imposes liability where the violation is knowing. 18 U.S.C. § 2710(b)(1). This requirement means that the disclosure of information that the recipient can use to identify a person is not actionable if the defendant is unaware that the recipient has that capability. As one district court has articulated it, there must be a "mutual understanding that there has been a disclosure" of personally identifiable information. *In re Hulu Privacy Litig.*, 86 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015). That is, the disclosure must be made either for the purposes of identifying individuals and the videos they watched, or made in the face of an unacceptably high risk that such identification will occur.

Here, Mr. Perry's allegations easily permit an inference that CNN's disclosures were "knowing." This Court can easily infer from the complaint that CNN disclosed Mr. Perry's MAC address to Bango so that Bango would correlate the MAC address with Mr. Perry himself. (FAC ¶¶ 14 (explaining that MAC addresses were created to track consumer behavior), 30 (explaining that CNN elected to program its

App to disclose MAC address despite scrutiny of the ability of companies and other actors to track consumers using MAC addresses and similar disclosures).) Because Mr. Perry's complaint raises the reasonable inference that both CNN and Bango in fact understood CNN's disclosures to identify Perry, Mr. Perry's claim that CNN disclosed "personally identifiable information" is substantively plausible.

Second the difficulty of determining whether something is "personally identifiable" is no reason to craft an unduly narrow definition of the statutory term. There is, moreover, no need to graft that concern onto this case. As in *Yershov*, the allegations here describe an automatic, immediate identification. 820 F.3d at 486. Moreover, the First Circuit recognized three appropriate limitations for when information ceases to be "personally identifying": (1) "the linkage of information to identity becomes too uncertain," (2) the linkage is dependent on lots of prospective work by the recipient, and (3) the linkage is made only after unforeseen detective work. *Id.* These are sensible limitations, each consistent with a subjective understanding of "personally identifiable information." *Cf. Julian v. Am. Business*

Consultants, Inc., 137 N.E.2d 1, 12 (N.Y. 1956) (reasoning that a disparaging statement is actionable only if "the defamatory matter and the plaintiffs were linked together by a chain of unchallenged proof"). The First Circuit declined to define the limits further; this Court need not do so either. There is no need to locate a more definite limiting principle to the term because the allegations here plainly come within the compass of the VPPA.

In fact, similar concerns were raised in opposition to the initial, formal recognition of a right to privacy in tort. But the Supreme Court of Georgia, in its pathmarking opinion recognizing that right, rejected those concerns in language as relevant today as it was then: "It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended.... This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done." *Pavesich*, 50 S.E. at 72. Or, as the individual whose experiences provided the impetus for passing the VPPA has written, "Judges and lawyers live on the slippery slope of analogies, they are not supposed to

ski it to the bottom." Robert Bork, *The Tempting of America* 169 (1990). Concerns about the outer bounds of "personally identifiable information" are not implicated by this case.

CONCLUSION

The judgment of the district court should be vacated and the case remanded to permit Ryan Perry to amend his complaint.

Dated: July 15, 2016

Respectfully submitted,

RYAN PERRY,

By: s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys

Ryan D. Andrews
randrews@edelson.com
Roger Perlstadt
rperlstadt@edelson.com
J. Aaron Lawson
alawson@edelson.com

EDELSON PC
350 North LaSalle Street, 13th Floor
Chicago, IL 60654
Tel: 312.589.6370
Fax: 312.589.6378

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook, using Microsoft Word for Mac 2011.

Dated: July 15, 2016 s/ J. Aaron Lawson

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys

ADDENDUM

18 U.S.C. § 2710 – Wrongful disclosure of video tape rental or sale records

(a) Definitions. — For purposes of this section —

(1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term "ordinary course of business" means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term "video tape service provider" means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) Video tape rental and sale records. —

(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d) [*sic*].

(2) A video tape service provider may disclose personally identifiable information concerning any consumer —

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that —

> **(i)** is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;
>
> **(ii)** at the election of the consumer —
>
> > **(I)** is given at the time the disclosure is sought; or
> >
> > **(II)** is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and
>
> **(iii)** the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if —

> **(i)** the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and
>
> **(ii)** the disclosure does not identify the title, description, or subject matter of any video tapes or

> other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;
>
> **(E)** to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or
>
> **(F)** pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if —
>
> > **(i)** the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and
> >
> > **(ii)** the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) Civil action. —

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award —

(A) actual damages but not less than liquidated damages in an amount of $2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) Personally identifiable information. — Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) Destruction of old records. — A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under

subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) Preemption. — The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.