IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13031
D.C. Docket No. 1:14-CV-02926-ELR

RYAN PERRY,

Plaintiff-Appellant,

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

Appellant's Opposition to Appellee's Motion to Dismiss

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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:

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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.)
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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,

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Appellees Cable News Network, Inc. and CNN Interactive Group, Inc. (collectively, "CNN"), have moved to dismiss this appeal on the ground that Appellant Ryan Perry lacks standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). A panel of this Court, as well as the Third Circuit, has already rejected a similar misreading of Spokeo. CNN's motion should be denied.

Mr. Perry's single claim for relief arises under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710. He alleges that CNN violates that Act by disclosing to a third party a unique identifier that, Mr. Perry alleges, the third party uses to automatically identify him. (See Dkt. 25.) CNN moved the district court to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6). The district court denied the motion under Rule 12(b)(1), ruling that the defendants' alleged invasion of his rights under the VPPA was a cognizable injury-in-fact. (Dkt. 66, pp. 4-5.) The court granted the motion under Rule 12(b)(6), however, and denied Mr. Perry's motion for leave to amend his claim. (Dkt. 66, pp. 5-10.) The court then entered a judgment finally disposing of the entire lawsuit (dkt. 68), and Mr. Perry timely appealed. Before the parties

submitted their appellate briefs, however, CNN renewed its challenge to Mr. Perry's standing to sue in a motion to dismiss the appeal.

I. CNN is not entitled to the relief it seeks.

As an initial matter, CNN's arguments do not merit the relief it seeks. Dismissal of the appeal, the relief CNN requests, is proper only if this Court lacks jurisdiction to hear the appeal. *See* 15A Wright & Miller Fed. Prac. & Proc. *Jurisdiction* § 3903 ("The courts of appeals have jurisdiction to review virtually every action taken by the district courts, although review of most matters must await entry of a final district court judgment."). CNN's motion provides no reason to question whether this Court has appellate jurisdiction.

This Court has jurisdiction under 28 U.S.C. § 1291. *Spokeo* does nothing to change this. *See King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165-72 (11th Cir. 2007) (addressing appellate jurisdiction before original subject-matter jurisdiction because "if the requirements for appellate jurisdiction are not met 'we cannot review whether a judgment is defective, not even where the asserted defect is that the district court lacked jurisdiction'") (quoting *United States v. Machado*, 465 F.3d 1301, 1306 (11th Cir. 2006)); *United States v. One 1987*

Mercedes Benz Roadster, 2 F.3d 241, 242 & n.1 (7th Cir. 1993) (asserting jurisdiction under § 1291 because "we certainly possess jurisdiction to determine whether the district court correctly held that it was without jurisdiction"). Because *Spokeo* has nothing to say about this Court's power to hear this appeal, CNN's motion should be denied.

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

CNN's motion should be denied even if the motion is construed as one requesting that this Court vacate the district court's judgment and remand with instructions to dismiss the case without prejudice. CNN asserts that the Supreme Court's recent decision in *Spokeo* requires a plaintiff to allege consequential harm stemming from the violation of a statute to establish a cognizable injury-in-fact, and that Mr. Perry makes no such allegations. But CNN misreads *Spokeo*, which firmly rejected this argument. Instead, *Spokeo* confirms that when Congress identifies and protects a concrete interest by statute, a statutory violation that invades that interest results in a cognizable injury, even if the plaintiff suffers no additional harm. *Id.* at 1549-50. CNN strains to assert that *Spokeo* marks a sea change in the law of standing. But as a panel of this Court has already recognized, that simply isn't true. *See*

Church v. Accretive Health, Inc., __ F. App'x __, 2016 WL 3611543, at *2-*3 (11th Cir. July 6, 2016).

Thus, contrary to CNN's argument, Mr. Perry has standing under *Spokeo*: Congress identified a real interest in the privacy of an individual's video-viewing choices, and made invasion of that interest legally cognizable by enacting the VPPA. By disclosing Mr. Perry's video-viewing choices and violating the VPPA, CNN invaded Mr. Perry's legally protected interest, and thus concretely harmed him.

A. The VPPA protects a concrete interest.

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). 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*, 136 S. Ct. at 1547.

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,* 2016 WL 3611543, at *3 (reiterating this principle after *Spokeo*). And the district court is in good company: Every circuit to consider the question has concluded that allegations that a defendant disclosed protected information in violation of the VPPA established 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").

Spokeo does not change this Court's standing doctrine or disturb the district court's conclusion that Mr. Perry has standing. *Spokeo* simply clarifies that an injury must be concrete as well as particularized, and that the two elements require separate inquiries. *Spokeo,* 136 S. Ct. at 1548.[1]

Determining whether a plaintiff has suffered a concrete injury by virtue of a statutory violation proceeds in two steps. First, the Court must determine whether the interest to which Congress gave statutory protection is concrete. *Spokeo*, 136 S. Ct. at 1549. Second, the Court must determine whether the particular statutory violation alleged by the plaintiff invades the interest protected by the statute. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("Congress must … identify the injury it seeks to vindicate and relate the injury to the class of persons

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[1] Any suggestion that, after *Spokeo*, Congress lacks the power to create legal rights the invasion of which confers standing would mean that *Spokeo* dramatically limited numerous decisions of the Supreme Court without saying so, including *Warth,* 422 U.S. at 514; *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974); and *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982). But 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).

entitled to bring suit."). In other words, the statutory right—e.g., the plaintiff's entitlement that the defendant will not disclose their protected information—must not be "divorced from" the statutorily protected interest—e.g., the privacy of the plaintiff's protected information. *Spokeo*, 136 S. Ct. at 1549.

In parsing the first step of this analysis, 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." *Id.* at 1549. Here, both factors demonstrate that the VPPA protects a concrete interest.

i. Congress identified a concrete interest in the privacy of a consumer's video-viewing choices.

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*, 504 U.S. at 580 (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.

The Act was passed in the wake of 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). In passing the Act, Congress expressed concern not only for newsworthy invasions of privacy, but also for preventing subtler, more insidious invasions of privacy. 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.

Id. at 5-6. 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. In short, "the trail of information generated by every transaction that is now recorded and stored in sophisticated record keeping systems is a new, more subtle and pervasive form of surveillance." *Id.* at 7. Concerned with these "information pools," Congress enacted the VPPA.

In passing the Act, Congress prohibited exactly the conduct alleged here: disclosure of a consumer's video choices by his video provider. 18 U.S.C. § 2710(b)(1). Congress, in other words, created a real interest in the privacy of our video-viewing choices. Recognizing that "the [Supreme] Court stopped short of adopting an explicit right to personal information privacy," S. Rep. No. 100-599, at 4, Congress stepped into the breach. Congress thus identified an "intangible" harm—the disclosure of information concerning video-viewing choices—that it deemed to meet Article III's requirements. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). That judgment should be respected. *See Spokeo*, 136 S. Ct. at 1549 (noting that Congress's judgment that an intangible harm is

cognizable is deserving of respect); *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.").

ii. The common law permitted suit for similar harms.

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.

B. CNN's violation of the VPPA is directly connected to the concrete interest identified by Congress.

The second step of the *Spokeo* analysis asks whether the alleged statutory violation is connected to, not divorced from, the underlying statutory interest. *See* 136 S. Ct. at 1549. But as the Court made clear, this step is far more important when procedural rights are at issue. *Id.*; *see Lujan*, 504 U.S. at 572 & n.7. Because a plaintiff may vindicate a

procedural right without altering the substantive result, a court must ensure that a procedural right is connected to a concrete interest to guard against a suit seeking to enforce an "abstract, self-contained, noninstrumental 'right' to have the [defendant] observe the procedures required by law." *Lujan*, 504 U.S. at 573.

But those same concerns carry far less force when a substantive statutory right is at issue. *See Church*, 2016 WL 3611543, at *3 n.2 ("In *Spokeo*, the Court stated that a Plaintiff 'cannot satisfy the demands of Article III by alleging a bare procedural violation.' This statement is inapplicable to the allegations at hand, because Church has not alleged a procedural violation.") True, the statutory violation must still bear a connection to the statutorily protected interest. *See Spokeo*, 136 S. Ct. at 1549 (noting that a plaintiff does not "automatically" suffer a concrete injury from a statutory violation). But that connection will be immediate in most cases involving substantive statutory rights.

The alleged violation here is undoubtedly 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"). And there is an immediate connection between CNN's violation of the VPPA by disclosing Mr. Perry's choice in video materials and the invasion of Mr. Perry's statutorily protected interest in the nondisclosure of that information; the violation and the invasion are one and the same. Thus, as the Third Circuit held in *In re Nickelodeon*, Mr. Perry's claim "involves a clear *de facto* injury, *i.e.* the unlawful disclosure of legally protected information." 2016 WL 3513782, at *7. As it relates to standing, *Nickelodeon* is on all fours with this case.[2] Mr. Perry therefore has suffered a concrete injury.

C. CNN's responses are unpersuasive.

CNN offers a series of unavailing responses. First, CNN relies heavily on the Court's statement that Article III "requires a concrete injury even in the context of a statutory violation" and so a plaintiff

[2] In its page-long footnote devoted to distinguishing *Nickelodeon*, CNN suggests the case lacks persuasive value because the parties submitted only letter briefs addressing *Spokeo*. But a court has an obligation to address standing whether or not the issue is raised by the parties. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003). Purported infirmities in the presentation of standing issues are therefore irrelevant.

does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. But it does not follow, as CNN argues, that Article III always requires a concrete injury that is *separate* from the statutory violation. (E.g., Mot. at 10-11.) As the Court made clear, if Congress has identified a concrete interest, and the alleged statutory violation invades that interest, a plaintiff "need not identify any *additional* harm beyond the one Congress has identified." *Id.* at 1549 (emphasis in original) (citing *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1988)); *see also Friends of Animals v. Jewell*, No. 15-5223, slip op. at 5-6 (D.C. Cir. July 15, 2016).

Following this principle in *Church*, this Court rejected the notion that a concrete harm identified by Congress cannot serve as a cognizable injury-in-fact after *Spokeo*. 2016 WL 3611543, at *3; *see also In re Nickelodeon*, 2016 WL 3513782, at *7 (concluding that allegations that a defendant had disclosed protected information in violation of the VPPA alleged a concrete harm: "the unlawful disclosure of legally protected information"); *Mey v. Got Warranty*, 2016 WL 3645195, at *4

(N.D.W. Va. June 30, 2016) (observing that the "invasion of privacy" effected by a violation of the Telephone Consumer Protection Act is a concrete harm "because Congress so clearly identified it as a concrete harm"). As explained, where Congress has created a concrete interest by statute, the invasion of that interest, by itself, is a concrete injury.[3]

CNN is correct that *Spokeo* "does not limit the requirement of concrete injury only to procedural violations." (Mot. at 18.) But CNN utterly misunderstands what the Court is saying. CNN observes that the Court in *Spokeo* concluded that the "bare violation" of the statute at issue, the Fair Credit Reporting Act, was not enough for standing even though the law protected a concrete interest. From this, CNN mistakenly asserts that the violation of a statute is never sufficient to confer standing.

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[3] CNN's consequential-harm argument is particularly untenable because it does serious violence to civil-rights laws. The Court has long held, for instance, that "testers" need not actually intend to use a particular service to have standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). The Court, for instance, wrote in *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam), "That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant." *See also Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (concluding that testers had standing "even though they sustained no harm beyond the discrimination itself").

But the statutory right at issue in *Spokeo* was not the right to have accurate information published about the plaintiff. Instead, the *interest* protected by the statute was accurate information and fair treatment in the job and credit markets, but the *right* was simply that the defendant use "reasonable procedures to ensure maximum possible accuracy" in any report published about a plaintiff. 15 U.S.C. § 1681b. The "bare violation" of the statute did not necessarily result in the publication of inaccurate information. As the Court explained, remand was necessary to ensure that the defendant's alleged impairment of the plaintiff's procedural *right* was sufficiently connected to an invasion of the plaintiff's statutorily protected *interest*. *Spokeo*, 136 S. Ct. at 1549-50. An unreasonable procedure may not result in the publication of inaccurate information, the Court wrote, or the type of inaccurate information published may not impair the plaintiff's standing in the job or credit market. *Id.*

That reasoning is inapplicable here: "[I]n this case, there is a tight connection between the type of injury which [Mr. Perry] alleges and the fundamental goals of the statutes which he sues under—reinforcing [Mr. Perry's] claim of cognizable injury," *Baur v. Veneman*, 352 F.3d

625, 635 (2d Cir. 2003): his private information has been disclosed in violation of a statute that seeks to ensure the privacy of information that Congress has concluded should remain private.

CNN also attempts to draw a nearly incomprehensible parallel between this case and *Spokeo*. Pointing to provisions of the VPPA that permit disclosure in certain instances, CNN asserts that "the disclosures here are similarly procedural in nature." (Mot. at 17.) This is nonsense: Spokeo's publication of inaccurate information isn't "procedural." The *right* at issue in *Spokeo* was procedural because the statute required Spokeo to use "reasonable *procedures*" when compiling consumer reports. 136 S. Ct. at 1545 (emphasis added). And, the Court observed, there was no guarantee that Spokeo would publish accurate information if it used reasonable procedures. *Id.* at 1550. There is no similarly "procedural" right here: The VPPA tells CNN what (or what not) to do. There is no danger that CNN will continue to knowingly disclose Mr. Perry's protected information if it complies with the Act.

D. CNN's cases are distinguishable.

CNN relies heavily on two district court cases, but neither can bear the weight CNN places on it. The first is *Gubala v. Time Warner*

Cable, Inc., 2016 WL 3390415 (E.D. Wis. June 17, 2016). The plaintiff in *Gubala* presented a claim for unlawful retention of personally identifiable information under the Cable Act, 47 U.S.C. § 551(e). The court dismissed the claim on the grounds that the plaintiff had not alleged "a concrete injury as a result of the defendant's retaining his personally identifiable information." 2016 WL 3390415, at *4. The court did not engage in the analysis dictated by *Spokeo* but its holding is arguably consistent with *Spokeo*: the Cable Act, among other things, is intended "to protect the privacy of cable subscribers." H.R. Rep. No. 98-934 (1984), at 30. That interest is invaded by the disclosure of protected information, but retention on its own does not necessarily invade that interest.

True, *Gubala* proceeded to opine on what that plaintiff would need to show to establish injury in a disclosure action. But CNN's reliance on the court's further musings is doubly misplaced: They were (1) dicta, and (2) wrong. The court was neither presented with a disclosure claim, nor did it attempt to engage in the analysis set forth in *Spokeo* to determine whether violation of the statutory right to nondisclosure

invaded the statutory interest in preserving the privacy of certain information. *See Gubala*, 2016 WL 3390415, at *4.[4]

And the court in *Khan v. Children's Nat'l Health System*, __ F. Supp. 3d __, 2016 WL 2946165 (D. Md. May 19, 2016), CNN's second case, was presented with a different question entirely. The question addressed by that order was whether a data breach, on its own, created injury-in-fact. *Id.* at *3-*6. The court answered that question in the negative. *Id.* at *5. Briefly addressing the plaintiff's claim that she had suffered injury-in-fact by virtue of alleged violations of state consumer-protection laws, the court noted that "Khan has failed to connect the alleged statutory and common law violations to a concrete harm." *Id.* at *7. Whatever the court meant, *Khan* cannot stand for the proposition that invasion of a legally protected interest created by state statute

[4] While *Gubala* is dubious on its own, it has at-best-uncertain application to the VPPA. As the Senate Report for the VPPA explains, the purpose of the VPPA's regulation of the retention of information "is to reduce the chances that an individual's privacy will be invaded." S. Rep. No. 100-599, at 15. That Congressional declaration would appear to support standing on a material-risk-of-harm theory under *Spokeo*. In future-harm cases, the First Circuit has observed that "standing is more frequently found" when the risk of harm derives from a "present injury [] linked to a statute … that allegedly has been or will soon be violated." *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014). In such a case the standing inquiry is "easier" because Congress has "already identified the risk as injurious." *Id.*

cannot be a concrete injury-in-fact. *See Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met.").

CONCLUSION

Through the VPPA, Congress has created a new right—to the privacy and control of personal information about video-viewing choices—and a new injury—disclosure of that information. Because CNN invaded Mr. Perry's rights under the VPPA, he has suffered an injury that may be redressed in the federal courts. CNN's arguments to the contrary should be rejected.

Moreover, CNN's arguments, even if true, would not oust this Court of jurisdiction. As a motion to *dismiss* this appeal, CNN's filing is frivolous and vexatious. Because this Court's jurisdiction over this appeal is not in doubt, CNN's motion should be denied.

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Respectfully submitted,

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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