IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13031

RYAN PERRY,

Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC., and
CNN INTERACTIVE GROUP, INC.,

Defendants-Appellees.

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

No. 1:14-cv-02926-ELR

REPLY IN SUPPORT OF 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, Defendants-Appellees certify that the certificate of interested persons and corporate disclosure statement, as amended on June 27, 2016, is complete and correct.

Dated: July 22, 2016

Respectfully submitted,

Cable News Network, Inc. & CNN Interactive Group, Inc.

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Mr. Perry complains that when he watched free video clips on the CNN App, CNN passed the titles of those clips and his MAC address to a service provider CNN used to count the number of unique views its videos received. The VPPA authorizes the disclosure of information to certain service providers where the provider is engaged in debt collection, order fulfillment, or request processing. *See* 18 U.S.C. § 2710(2). Congress did not build in an exception for service providers who perform other internet functions, presumably because those functions did not exist in 1988. Mr. Perry does not claim he suffered any actual harm from this innocuous disclosure, or that it had any repercussions on him.

Whether this Court and the District Court have subject matter jurisdiction turns on the Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). Under *Spokeo*, the statutory violation Perry alleges is not a concrete harm that provides him with standing. The Opposition sets out a flawed reading of *Spokeo*, mis-describes concrete harm, and applies a novel test to determine when a statutory violation results in concrete harm. The alleged statutory violation here, even less than in *Spokeo* itself, caused no concrete injury to Perry. This Court should remand this case to the district court with instructions to dismiss for lack of jurisdiction.

ARGUMENT

I. Perry Cannot Rely on the Alleged VPPA Violation as his Injury in fact

A. Perry's Test Does Not Exist

Perry's argument fails from the start because he asks the Court to adopt a novel test that has no grounding in Article III cases to determine if a plaintiff has suffered injury. *Spokeo* makes clear that the harm a plaintiff suffers must be concrete in that it must be real and not abstract, and must actually exist. *Spokeo* 136 S.Ct. at 1548. But Perry claims that the Court must first determine whether "the *interest* to which Congress gave statutory protection is concrete." Opp. at 6-7 (emphasis added). But it is not the "Congressional interest" that must be "concrete," it is the asserted ***injury***. *See, e.g.*, *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1083 (11th Cir. 2004).

The second part of Perry's test also lacks foundation. Perry claims courts must next determine if the violation "invades the interest" the statute protects, and standing exists if a violation is not "divorced from" the statutorily protected interest. Opp. at 6 (quoting *Spokeo* at 1549). But *Spokeo* holds that a plaintiff cannot allege a bare procedural violation, "divorced from" any concrete harm to satisfy the injury in fact requirement. That is not the same thing as saying that a plaintiff satisfies the injury in fact requirement if the violation is not "divorced from" the so-called Congressional interest. *Id.* The latter test does not appear in *Spokeo* or elsewhere.[1]

[1] Perry cites the concurrence in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See* Opp. at 6-7. Perry omits that Justice Kennedy said Congress "must ***at the very least*** identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (emphasis added). The *Lujan*

Perry's test for concreteness is made up out of whole cloth.[2]

B. Spokeo Requires Concrete Injury

The key issue in *Spokeo* was not whether Congress "identifies and protects' a concrete interest," *see* Opp. at 3, but whether the claimed injury is concrete. Such an injury can, of course, be intangible. *Spokeo* at 1549. And a "risk of real harm" (which Perry does not allege) can also be a concrete injury. But a statutory violation alone is not always enough. "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

Perry consistently fails to recognize that Congress's determination informs, but does not control, whether harm is sufficiently concrete to support Article III standing. *Spokeo* reaffirms that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1548. Perry ignores this passage. He also ignores

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concurrence, even if adopted, only sets a floor; it is not a test.

[2] Perry cannot fit cases finding lack of concrete injury after *Spokeo* into his framework. *Gubala v. Time Warner Cable Inc.*, No. 15-CV-1078, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) is not "arguably" consistent, because the Congressional interest was "the risk to subscribers' privacy created by the fact that cable providers have an 'enormous capacity to collect and store personally identifiable data about each cable subscriber.'" *Gubala*, 2016 WL 3390415, at *4. Plaintiffs lack standing when there is no concrete injury notwithstanding a "congressional interest." *See Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 WL 3598297 (E.D. La. July 6, 2016) (no standing where plaintiffs "fail[ed] to plead facts demonstrating how this statutory violation caused him concrete harm" despite Congressional interest in preventing junk faxes from using fax machine resources.)

that "the violation of a procedural right granted by statute ***can*** be sufficient in some circumstances to constitute injury in fact," but is not always. *Id.* at 1549 (emphasis added). The Supreme Court remanded *Spokeo* to the district court to determine if the FCRA violation created an injury in fact. The Court clarified that "a violation of one of the FCRA's procedural requirements may result in no harm" and that "not all inaccuracies cause harm or present any material risk of harm." *Id.* at 1550. It did so even though it recognized that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* If Perry were correct, the Court would not have remanded the case. It would have concluded that Congress sought to protect a concrete interest and the alleged violation was not "divorced" from that interest. Opp. at 7. *Spokeo*'s result shows that harm to plaintiff, not Congressional interest, is the key inquiry.

Spokeo's dissenters agreed with that analysis, but would not have remanded because they believed the plaintiff had identified a concrete harm in the form of "inaccurate representations that could affect his fortune in the job market." *Spokeo* at 1556. But even the dissent would not find concrete harm here where Perry alleges that CNN disclosed information to a vendor, with no further claim that such disclosure resulted in concrete harm, tangible or intangible.

This analysis is consistent with Congress's ability to create legal rights, the invasion of which *may* confer standing. *Spokeo* at 1549 (quoting *Lujan*, 504 U.S. at

578). *Spokeo* reaffirmed Congress may elevate harms, but that "does not mean that a plaintiff automatically satisfies 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. Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo* at 1549.[3]

Comparing *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), which *Spokeo* cites, to this case illustrates the difference between elevating a concrete injury to legally cognizable status and enacting a statute, a violation of which may not result in any concrete injury. *Akins* found injury-in-fact in voters' "inability to obtain information" the statute made available to them that "would help them . . . evaluate candidates for public office." 524 U.S. at 21. *Public Citizen* found injury where interest groups "sought and were denied specific agency records" needed "to participate more effectively in the judicial selection process" that the law required

[3] Perry's claim that following this language would "limit[] numerous decisions" is wrong. Opp. at 6, n.1. In those cases, the Court found plaintiffs lacked standing. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982). *Valley Forge* stated that congressional enactments cannot "lower the threshold requirements of standing under Art. III." *Id.* at 487, n.24. The Supreme Court has reaffirmed this principle. *See Spokeo* at 1548; *see also Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.")

the government to disclose. 491 U.S. at 449. Unlike those plaintiffs, Perry concedes that he has no injury other than an alleged violation of the statute.

After *Spokeo*, courts have applied *Akins* and *Public Citizen* this way. In *Lane v. Bayview Loan Servicing, LLC*, No. 15 C 10446, 2016 WL 3671467 (N.D. Ill. July 11, 2016), the court analyzed whether denying information to plaintiff required by Fair Debt Collection Practices Act ("FDCPA") was a concrete injury. *Id.* at *4. Citing *Akins* and *Public Citizen* the court explained, "the right to information [under the FDCPA] is similar to the information-access interests protected by the Freedom of Information Act and other federal laws that authorize access to government records." *Id.* The court noted that "the right to get information to verify a debt is arguably *more* concrete than the right to obtain government records" because the information is necessary "to verify a *monetary* obligation that the creditor asserts." *Id.* (emphasis in original).[4] *See also Friends of Animals v. Jewell*, No. 15-5223, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016) (noting *Spokeo* indicated injury in "informational standing" was concrete.) Mr. Perry has not suffered a similar informational injury. He does not claim CNN's actions affected him.

[4] *Lane* found a concrete injury because "under the FDCPA, the right to information is not merely an end unto itself, but it actually permits the debtor to trigger . . . a moratorium on collection efforts until the verification information is mailed on the debtor." 2016 WL 3671467, at *4. *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016) (per curiam) was also an FDCPA case that found standing because the defendant deprived the plaintiff of information needed to evaluate and respond to a debt collection letter.

C. Perry Has Not Alleged Intangible Injury Sufficient to Confer Standing

The "intangible" harm that Perry allegedly suffered is a statutory violation, but does not confer standing because he does not allege that it caused any negative consequence to him. *Spokeo* recognizes that intangible harms can be concrete, and in making that determination, "both history and the judgment of Congress play important roles." *Spokeo* at 1549. But Perry cannot simply rebrand a statutory violation as an "intangible" harm.

First, Perry has not identified an "intangible" harm he suffered. In *Spokeo*, the court pointed to decisions identifying concrete intangible harms, such as depriving someone of free speech or the free exercise of religion. *Spokeo* at 1549 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise)). Perry, however, does not claim that CNN's disclosures embarrassed him, hurt his employment prospects, or negatively affected him.

Second, disclosing viewing information to an analytics provider does not bear "a close relationship to a harm traditionally providing a basis for a lawsuit in English or American courts." *Spokeo* at 1549. The existence of a few recent cases referencing "confidentiality" is not the "historical practice" *Spokeo* contemplated. *Spokeo* at 1549. In contrast, *Spokeo* cited *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774-77 (2000), which examined "the

long tradition of *qui tam* actions in England and the American Colonies," including those "immediately before and after the framing of the Constitution." *Id*. at 766, 776.

Perry's authority suggests the contrary. Breach of confidence was not "cemented as a common law action" in England until 1948. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 161 (2007). And breach of confidence requires "unauthorised use of th[e] information to the detriment of the party communicating it." *Id*. at 161-62. Perry thus argues that he need not allege actual injury because the VPPA creates a right similar to a uniquely British tort that requires actual injury.

The cases Perry cites that include the term "confidentiality" hurt his arguments. *Grigsby v. Breckinridge*, 65 Ky. 480 (Ky. 1867), *Woolsey v. Judd*, 11 How. Pr. 49 (N.Y. Sup. Ct. 1855), and *Denis v. Leclerc*, 1 Mart. (o.s.) 297 turned on ***property*** rights over letters in dispute. *See, e.g.*, *Woolsey*, 11 How. Pr. at 57-8 ("The exclusive right . . . is his right of property in the words, thoughts and sentiments . . . which his manuscript embodies and preserves."). And *Grigsby* recognized that courts "have not yet assumed jurisdiction to enforce duties merely moral, or to prevent a breach of epistolary confidence . . . in no way affecting any interest in *property*." *Grigsby*, 65 Ky. at 486 (emphasis in original). Nor do Perry's allegations resemble the injury in *Prince Albert v. Strange* (1849) 41 Eng. Rep. 1171 (Ch.), where the court addressed whether a defendant who acknowledged he could not publish the Queen's

stolen private etchings could publish a catalog of those etchings. *Id.* at 1178.

Third, Perry offers no evidence Congress determined that every violation of the VPPA is even an injury. Perry points to legislative statements about the privacy of viewing choices. Opp. at 8-9. But if the legislative purpose were sufficient, all statutory violations would "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* at 1549. *See also Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 6, 2016) ("[V]ague reference to Congress and the FCC provides no factual material from which the Court can reasonably infer what specific injury, if any, [plaintiff] sustained through defendants' alleged statutory violations.") The VPPA unquestionably allows disclosure to some service providers, 18 U.S.C. § 2710(e) & (a)(2). Thus it cannot be said that Congress viewed all disclosures as *per se* concrete injuries.

D. "Substantive" Violations Require Actual Injury

Perry wrongly suggests he need only allege a statutory violation because the "connection" between a statutory violation and a statutorily protected interest "will be immediate in most cases involving substantive statutory rights." Opp. at 12. *Spokeo* says no such thing. Perry's argument does not square with *Spokeo*'s statement that where a violation of FCRA led to the disclosure of false information, "not all inaccuracies cause harm or present any material risk of harm." *Spokeo* at

1550. Perry tries to avoid this by arguing that the right at issue in *Spokeo* was procedural, whereas the interest allegedly violated here is substantive. But he also concedes that *Spokeo* is not limited to procedural violations. Opp. at 15. In both kinds of violations, the statutory violation has to create adverse, concrete consequences to be applicable. Here, the disclosure to a non-qualified service provider caused plaintiff no more harm than the procedural violation in *Spokeo*.

II. Perry's Argument Regarding Appellate Jurisdiction Should Be Ignored.

Mr. Perry's attack on a strawman argument should be ignored. CNN does not dispute that this Court has appellate jurisdiction under 28 U.S.C. § 1291. But appellate jurisdiction is derivative of district court jurisdiction. *A.L. Rowan & Son,* Gen. *Contractors, Inc. v. Dep't of Hous. & Urban Dev.*, 611 F.2d 997, 998-99 (5th Cir. 1980). CNN's motion thus argues that this Court (and the district court) lack subject matter jurisdiction based on *Spokeo*. This Court should remand Perry's case to the district court with instructions to dismiss for lack of jurisiction.

CONCLUSION

This Court should grant CNN's Motion to Dismiss and remand to the district court with instructions to dismiss for lack of subject matter jurisdiction.

Dated: July 22, 2016

Respectfully submitted,

Cable News Network, Inc. & CNN Interactive Group, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 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 this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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