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VIA ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Chad Eichenberger v. ESPN, Inc.*, No. 15-35449
Set for Argument in Pasadena on October 3, 2017, 9:00 AM, in Courtroom 1

Dear Ms. Dwyer:

In accordance with this Court's September 8, 2017 order, Defendant-Appellee ESPN, Inc. ("ESPN") respectfully submits this letter brief addressing whether Plaintiff-Appellant Chad Eichenberger ("Plaintiff") has Article III standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo*"), and *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) ("*Robins*"). As set forth

below, the decisions in *Spokeo* and *Robins* confirm ESPN's prediction that "Plaintiff's claim will likely be subject to dismissal for lack of Article III standing." (ESPN's Answering Brief ("EAB") 29-30 n.10.)

Specifically, Plaintiff's complaint wholly fails to allege (and cannot plausibly be amended to allege) the "concrete" injury-in-fact that Article III requires. Where, as here, the only alleged injury is the violation of a statutorily-conferred right, Plaintiff can establish a concrete injury only by showing that ESPN's alleged violation of the statute caused "actual harm" or a sufficient "material risk of harm" to an underlying concrete interest of Plaintiff that the statute seeks to protect. *Robins*, 867 F.3d at 1113. Plaintiff's allegations fall far short of these standards.

Here, the concrete interests underlying the disclosure limitations of the statute Plaintiff invokes—the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710(b)—are to avoid the personal embarrassment, harassment, or other real-world adversity that could occur when a specific person's video-watching histories become publicly known and to avoid the chilling effect such knowledge by others could have on that person's future video selections. *See infra* section II(A). Plaintiff's complaint, however, fails to allege any actual harm or risk of harm to these underlying concrete interests. Plaintiff alleges only that ESPN electronically disclosed to Adobe Analytics his Roku device's serial number, together with the

video selections that were viewed on the WatchESPN Channel on that device, and that Adobe then "automatically" linked this data to other data available to it that could identify Plaintiff as the owner of that device. Even assuming *arguendo* that these allegations are adequately pleaded under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and that such an alleged disclosure by ESPN to Adobe would violate the VPPA—neither of which is true (EAB 13-39)—Plaintiff lacks the concrete injury necessary to confer standing. Because Plaintiff alleges only an electronic computer-to-computer transfer of limited information, and does not allege that any natural person ever learned his viewing behavior, there simply is no material risk of the sort of personal embarrassment or chilling effect that constitute the concrete interests that the VPPA seeks to protect against. *See infra* section II(B).

The judgment of dismissal should be affirmed.

ARGUMENT

I. Under *Spokeo*, a Plaintiff Has Standing to Sue for a Statutory Violation Only If He or She Alleges a Sufficient Risk of Real Harm to the Underlying Concrete Interests of the Plaintiff That the Statute Protects

A. The Supreme Court's Decision in *Spokeo*

In *Spokeo*, the Supreme Court addressed the standards for determining when a "'violation of a statutory right is … a sufficient injury in fact to confer standing'" under Article III of the Constitution. 136 S. Ct. at 1546. The plaintiff (Robins) alleged that, in generating an online profile of information about him, Spokeo had violated various provisions of the Fair Credit Reporting Act ("FCRA") and, as a

result, had disseminated a materially inaccurate profile. *Id*. at 1545-46. A panel of this Court held that the alleged violation of Robins's statutorily-conferred rights was *itself* sufficient to establish the "injury in fact" that Article III requires, but the Supreme Court concluded that this Court's "analysis was incomplete" and remanded the case. *Id*. at 1544-45.

Spokeo reiterated that one of the "'irreducible'" elements of Article III standing is a showing that the plaintiff "suffered an injury in fact." 136 S. Ct. at 1547. To satisfy this element, a plaintiff must plead and prove "that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548. The Supreme Court held that, in finding that Robins had satisfied these elements of "injury in fact," this Court had focused exclusively on the fact that Robins's injuries were "particularized" and had "elided" the "independent requirement" that the asserted "injury in fact must also be 'concrete,'" *i.e.*, it must be "'real,' and not 'abstract.'" *Id*.

The Court explained that, in evaluating whether an alleged violation of a statutorily-conferred right is sufficiently "concrete" to satisfy Article III, "both history and the judgment of Congress play important roles." 136 S. Ct. at 1549. Thus, it is "instructive to consider" whether such an asserted intangible injury "has a close relationship to a harm that has traditionally been regarded as providing a

basis for a lawsuit in English or American courts." *Id*. Because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," it can "'elevat[e] to the status of legally cognizable injuries'" harms that are "'concrete'" and "'*de facto*'" but "'that were previously inadequate in law.'" *Id*. The Court cautioned, however, that Article III standing still "requires a concrete injury even in the context of a statutory violation," and that a "bare" statutory violation "divorced from any concrete harm" is not enough. *Id*. As an example, the Court noted that, even though "the dissemination of an incorrect zip code" may be a technical violation of FCRA, "[i]t is difficult to imagine" how such a violation, "without more, could work any concrete harm." *Id*. at 1550. Accordingly, even in the context of an alleged statutory violation, there must be actual harm or a sufficient "risk of real harm" to the plaintiff's concrete interests. *Id*. at 1549-50. The Supreme Court remanded the case to this Court to consider whether Robins had satisfied this concreteness requirement. *Id*. at 1550.

B. This Court's Decision on Remand in *Robins*

On remand, this Court held that *Spokeo* established a two-step test for determining whether a particular violation of a given statute, standing alone, establishes the "concrete" harm required by Article III. 867 F.3d at 1113. The Court first must identify the underlying "concrete interests" (if any) that the statute seeks to protect. *Id*. Having done so, the Court must then address "whether the

specific procedural violations alleged *in this case* actually harm, or present a material risk of harm to, such interests." *Id*. (emphasis added).

Applying these standards, this Court first reviewed the legislative history of FCRA and concluded that Congress had enacted the statute in order to "protect consumers' concrete interests" in avoiding the "real-world" harms associated with "the dissemination of false information in consumer reports." 867 F.3d at 1113-14. The Court noted that "the legislative record includes pages of discussion of how such inaccuracies may harm consumers," especially "given the ubiquity and importance of consumer reports in modern life—in employment decisions, in loan applications, in home purchases, and much more[.]" *Id*. at 1114. These harms that FCRA sought to prevent were "at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit," and, "at least in general," could constitute concrete harms that would support Article III standing. *Id*. at 1114-15.

Turning to the second step, the Court examined "the *nature* of the specific alleged reporting inaccuracies" asserted by Robins in his complaint in order to determine whether they raised "a real risk of harm to the concrete interests that FCRA protects." 867 F.3d at 1116. Having identified the underlying concrete interests that FCRA sought to protect—*i.e.*, avoiding "the real-world implications of material inaccuracies" in credit reports, *id*. at 1114—the Court concluded that Robins's alleged injury was sufficiently concrete because he had adequately

alleged precisely such harms: "Robins alleged that he is out of work and looking for a job, but that Spokeo's inaccurate reports have 'caused actual harm to [his] employment prospects' by misrepresenting facts that would be relevant to employers, and that he suffers from 'anxiety, stress, concern, and/or worry about his diminished employment prospects' as a result." *Id*. at 1117. This Court "agree[d] with Robins that information of this sort (age, marital status, educational background, and employment history) is the type that may be important to employers or others making use of a consumer report" and that "[e]nsuring the accuracy of this sort of information" was "directly and substantially related to FCRA's goals." *Id*. Accordingly, Robins's complaint "sufficiently allege[d] that he suffered a concrete injury." *Id*.

II. Under the Standards Established in *Spokeo* and *Robins*, Plaintiff Lacks Article III Standing

Under *Spokeo* and *Robins*, Plaintiff lacks Article III standing because he has failed to plead facts showing that ESPN's alleged violation of the VPPA created a "material risk" that Plaintiff would suffer the sort of personal embarrassment or chilling effect that constitute the concrete harms the VPPA sought to prevent. As such, the judgment of dismissal can be affirmed based on lack of standing.

A. The VPPA Sought to Protect Against the Risk that Disclosure of One's Specific Video Choices Could Cause Embarrassment or Could Chill One's Future Selection of Videos

Under *Robins*, the first step in determining whether a statutory violation

gives rise to a sufficient injury-in-fact is to identify the underlying "concrete interests" (if any) that the particular statute seeks to protect. 867 F.3d at 1113. Here, the "legislative record" of the VPPA "includes pages of discussion" elaborating on two specific privacy-related harms that the VPPA sought to address by prohibiting disclosure of a consumer's video-watching records without that consumer's consent. *Id*. at 1114.

First, the VPPA's disclosure prohibition was aimed at the potential for embarrassment that arises when one's specific choices in movies become publicly known. "The impetus for the [VPPA] occurred when a weekly newspaper in Washington published a profile of Judge Robert H. Bork based on the titles of 146 films his family had rented from a video store." S. REP. NO. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1 (hereinafter "S. REP."); *see also Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015). As the Senate Report noted, such a public disclosure could cause considerable embarrassment, particularly if one's choices were outside the mainstream:

> "Although Judge Bork recently joked about how embarrassed he is to have the world learn that he watches dull movies, imagine if his confirmation had been doomed by the revelation of more unsettling viewing habits."

S. REP. at 7-8 (quoting *Video and Library Privacy Protection Act of 1988: Joint Hearing on H.R. 4947 and S. 2361 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary and the Subcomm. on*

Tech. & the Law of the S. Comm. on the Judiciary, 100th Cong. (1988) (hereinafter "Joint Hearing") at 68-69 (statement of Janlori Goldman, Staff Attorney, ACLU)). As one witness explained in the context of addressing the bill's initial comparable coverage of library records,[1] if others learn that a person likes materials that are "beyond the mainstream," that "can be very damaging to individuals, both personally and professionally." *Id*. at 126 (statement of Judith Krug, Director, Office for Intellectual Freedom, American Library Association).

By prohibiting the disclosure of such information, the VPPA thus sought to protect the "right to view films free from fear of harassment or adverse publicity." Joint Hearing at 78 (statement of Vans Stevenson, Director of Public Relations, Erol's, Inc.); *see also id*. at 27 (statement of Rep. McCandless) (describing the "process of intellectual growth" associated with reading books and watching films and stating that "[t]his intimate process should be protected from the disruptive intrusion of a roving public eye"); 134 CONG. REC. 31,069-70 (1988) (statement of Sen. Leahy) ("[VPPA] preserves our freedom to explore new ideas and to question popular beliefs without fear of criticism or recrimination"). As was repeatedly emphasized during Congress's consideration of this legislation, the embarrassment that the VPPA sought to protect against arises only when *other people*—and, worst

[1] At the time of the hearing, the proposed legislation that became the VPPA (S. 2631) would have covered not just video tape service providers, but also libraries. *See* Joint Hearing at 13.

of all, the public at large—learn what a particular person's viewing choices are. Joint Hearing at 18 (statement of Sen. Leahy) ("It was disturbing to see that personal information can be fair game for reporters or lawyers or nosy neighbors"); *id*. at 27 (statement of Rep. McCandless) ("people ought to be able to read books and watch films without the whole world knowing").

Second, and relatedly, there was the potential that, absent the protections of the VPPA, consumers would be "'*chilled* in their pursuit of ideas and their willingness to experiment with ideas outside of the mainstream.'" S. REP. at 7 (quoting Joint Hearing at 68 (statement of J. Goldman)) (emphasis added); *see also* Joint Hearing at 22 (statement of Rep. Kastenmeier) ("People must not be deterred from reading by fears of governmental or private 'snoops,'" and this principle "appl[ies] as much to customers of video stores as to patrons of libraries"); *id*. at 55 (statement of J. Goldman) (noting, for example, the "severe chilling effect on First Amendment freedoms that can result from the unauthorized disclosure of one's personal, political beliefs"). This chilling effect likewise arises only when there is a reasonable fear that *other people* may actually learn the specific video-watching choices of a particular individual.

Robins further instructs that, after identifying the underlying interests that the statute seeks to protect, the Court should consider whether, as a general matter, these two underlying interests are sufficiently concrete to support Article III

standing in an appropriate case. *Robins*, 867 F.3d at 1113-15. On this point, "'both history and the judgment of Congress play important roles.'" *Id*. at 1112 (quoting *Spokeo*, 136 S. Ct. at 1549).

As to history, the two underlying interests protected by the VPPA "resemble other reputational and privacy interests that have long been protected in the law," at least to the extent that significant publicizing is involved. *Robins*, 867 F.3d at 1114. The mental anguish associated with disclosing embarrassing private facts to "the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge," RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977), is "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. By contrast, the disclosure of such facts "to a single person or even to a small group of persons," with no risk of broader disclosure to the general public, has been considered too *de minimis*. RESTATEMENT § 652D, cmt. a; *cf*. *Spokeo*, 136 S. Ct. at 1550 (dissemination of false zip code in violation of FCRA is too trivial to support standing). The "chilling effect" associated with a comparable public disclosure of private information can support standing in appropriate cases as well. *Cf*. *ACLU v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015) (because government collection of private information about plaintiffs' "associations and

contacts" could have a "chilling effect" on plaintiffs' associational rights, plaintiffs had standing to challenge such collection).

As to the judgment of Congress, both the statutory language and the legislative history negate the suggestion that, in enacting the VPPA, Congress sought to "protect against such harms without requiring any additional showing of injury" beyond the statutory violation itself. *Robins*, 867 F.3d at 1114. In contrast to FCRA—which broadly states that any person who willfully violates "any requirement imposed under [FCRA] with respect to any consumer *is liable to that consumer*" either for actual or statutory damages, 15 U.S.C. § 1681n(a) (emphasis added)—the VPPA only grants a cause of action to a consumer who is "*aggrieved*" by a violation of the statute's disclosure provisions. 18 U.S.C. § 2710(c)(1) (emphasis added). In "common usage," that term generally requires *more* than the minimum standing requirements of Article III; it also requires a showing that the person falls within the "zone of interests" sought to be protected by the statute. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011); *see also Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 807 (9th Cir. 2015) (describing the "zone of interests" as an element of "statutory standing"). Accordingly, to bring suit under the VPPA, the plaintiff must show that he or she has suffered an actual or threatened injury of the sort the statute was intended to prevent. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-90 (2014). The

legislative history likewise confirms Congress's intent to require an actual injury beyond the statutory violation itself. *See* S. REP. at 8 (VPPA's civil action is intended to "ensur[e] that the law will be enforced by *individuals who suffer as the result of unauthorized disclosures*") (emphasis altered); *see also id*. (VPPA "provides that an individual *harmed* by a violation of the Act may seek compensation in the form of actual and punitive damages" and other relief) (emphasis added).

Even assuming *arguendo* that the VPPA would not require any such showing of actual injury and that, as a *statutory* matter, Congress did not intend to require any showing of injury beyond the statutory violation itself, the minimum requirements of Article III nonetheless still require Plaintiff to show at least a "material risk" of one of the concrete harms that the VPPA seeks to prevent. *Robins*, 867 F.3d at 1113. As explained in the next section, Plaintiff has failed to do so.

B. Disclosure of a Roku Device Serial Number to Adobe Does Not Create the Requisite Material Risk of Harm to the Concrete Interests That Congress Sought to Protect in the VPPA

Under *Robins*, the second step of the *Spokeo* analysis requires the Court to decide whether the specific statutory violations alleged by the Plaintiff "actually harm, or present a material risk of harm," to the particular concrete interests that

Congress sought to protect (as identified in step one of the analysis). 867 F.3d at 1113. The answer to that question here is clearly no.

Plaintiff's claim of injury rests on his allegations that, "each time [he] viewed a video clip using the WatchESPN Channel," ESPN disclosed "his unique Roku device serial number, along with the videos he viewed," to "third party data analytics company Adobe Analytics, which, on information and belief, was automatically correlated with existing user information possessed by Adobe, and therefore identified [Plaintiff] as having watched specific video materials." (Excerpts of Record ("ER") 44.) As an initial matter, these allegations are inadequately pleaded under *Iqbal* because the complaint alleges no facts that would support a plausible inference that Adobe actually *has* access to Roku account information identifying the respective owners of specific Roku devices, much less that Adobe then uses such identifying information to link the names of Roku device owners with the video-watching history it receives from ESPN. (EAB 30-36.)[2] Because Plaintiff has already been granted leave to replead on this point, and

[2] In fact, the very Adobe privacy policy that Plaintiff's complaint incorporates by reference (ER 42 n.3) affirmatively negates the plausibility of any speculative inference that Adobe would attempt to identify Plaintiff by his Roku device serial number, even assuming that it could. The privacy policy states: "Adobe does not use the information we collect for a company except as may be allowed in a contract with that company," which "is usually limited to providing our services to the company," and even in those instances where Adobe may share information between companies, it is "'aggregated' information" that "*is anonymous and does not identify individuals*." (Supp. Excerpts of Record 22 (emphasis added).) There

his allegations are still inadequate under *Iqbal*, Plaintiff likewise has failed to allege standing. *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013).

But even assuming *arguendo* that Plaintiff had adequately pleaded that Adobe's computers "automatically" linked his identity with the anonymized information it received from ESPN, that is not enough to establish a concrete injury. The "disclosures" at issue, as alleged in the complaint, took place entirely at the electronic level, and there is no allegation that *any natural person*—much less the public at large—ever actually learned what video selections Plaintiff chose to watch. Consequently, the complaint does not allege (and could not plausibly be amended to allege) that Plaintiff ever suffered embarrassment, harassment, or any other adverse consequence from this computer-to-computer communication or that his future video choices have been "chilled" by the mere movement of this limited information from ESPN's servers onto Adobe's servers. The complaint thus wholly fails to allege any "'actual harm'" to the concrete interests that underlie the VPPA. *Robins*, 867 F.3d at 1117; *see also Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (mere collection of zip code information did not

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is no allegation that, under its contract with ESPN, Adobe had the right to link data correlated with Roku device serial numbers to actual individual identities—much less that any Adobe employee is authorized to, or would, search Adobe's files in an effort to link together ESPN viewing records with individual identities (much less that there is any risk of that being done with respect to *Plaintiff's* records).

establish any basis for finding a concrete injury to privacy interests or a concrete pecuniary or emotional injury).

Nor does the complaint allege any plausible basis for concluding that the limited communications at issue "present a material risk" that Plaintiff will experience the concrete harms that the VPPA protects against. *Robins*, 867 F.3d at 1113. Plaintiff has provided no basis for concluding that, in analyzing WatchESPN usage patterns *for ESPN* on an aggregated and anonymized basis, Adobe thereby creates any risk, much less a material risk, that any natural person, much less a substantial number of people, *cf.* RESTATEMENT § 652D, cmt. a, will ever learn his video selections and thereby cause him embarrassment or harassment or chill his future video selections.

On this point, the contrast with *Robins* is instructive and dispositive. This Court there determined that the specific concrete interests protected by FCRA were the "real-world implications of material inaccuracies" in credit reports, such as adverse implications for "employment decisions, … loan applications, … home purchases, and much more." 867 F.3d at 1114. By pleading actual harm to his "employment prospects" as a result of the FCRA violations, the plaintiff had succeeded in alleging "a sincere risk of harm" to the precise "real-world interests that Congress chose to protect with FCRA." *Id.* at 1117. Here, by contrast, Plaintiff has wholly failed to allege any comparable harm, or material risk of harm,

to the "real-world interests that Congress chose to protect" with the VPPA. *Id*. Instead, he has alleged only a pure procedural violation of his supposed statutory right not to have the limited information in question transferred from ESPN to Adobe without his advance consent. That is not enough.[3]

Lastly, ESPN notes that three other circuits have found that particular plaintiffs had standing under the VPPA in the course of decisions that ultimately affirmed the lower court's dismissals of the plaintiffs' claims on other grounds. *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016); and *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014). To the extent that that the dicta in these courts' standing analysis can be read to suggest that *any* plaintiff alleging a mere violation of the VPPA, without more, *always* has Article III standing, such a conclusion is directly contrary to the Supreme Court's decision in *Spokeo* and to the analysis required under this Court's decision in *Robins*. *Spokeo*, 136 S. Ct. at 1550 (because, in a given case, a particular statutory

[3] For similar reasons, Plaintiff lacks "statutory standing," because his claim is not within the VPPA's "zone of interests." *See supra* at 12-13. Under the "zone of interests" test, a plaintiff whose claim otherwise fits within the literal language of a statute lacks statutory standing if his or her "'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Thompson*, 562 U.S. at 178. Plaintiff's asserted interest in preventing Adobe from performing data analytics for ESPN on an aggregated and anonymized basis is "so marginally related" to the purposes of the VPPA that his claim plainly falls outside the zone of interests of that statute.

violation "may result in no harm," the court must always consider whether the violation that the *plaintiff* alleges is "divorced from any concrete harm"); *Robins*, 867 F.3d at 1116 (*Spokeo* "requires some examination of the *nature* of the specific alleged" statutory violations "to ensure that they raise a real risk of harm to the concrete interests" that the statute protects). Such dicta would also be directly contrary to the comparable *Spokeo* analysis applied by the Second, Eighth, and D.C. Circuits. *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016); *Hancock*, 830 F.3d at 514.

CONCLUSION

The judgment of the district court should be affirmed.

DATED: September 22, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

This letter brief complies with the length limits permitted by Ninth Circuit Rule 32-3 for briefs filed pursuant to court order.

The body of the letter brief contains 4,192 words. The brief's type size and type face comply with FED. R. APP. P. 32(a)(5) and (6).

DATED: September 22, 2017

/s/ Daniel P. Collins
Daniel P. Collins

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 22, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: September 22, 2017

/s/ Daniel P. Collins
Daniel P. Collins