Edelson PC

350 North LaSalle Street, 13th Floor, Chicago, Illinois 60654
t 312.589.6370 | f 312.589.6378 | www.edelson.com

Via CM/ECF

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

Re: *Chad Eichenberger v. ESPN, Inc.*, No. 15-35449

Dear Ms. Dwyer:

Plaintiff-Appellant Chad Eichenberger submits this letter brief in response to the Court's order of September 8, 2017, requesting the parties to address Mr. Eichenberger's standing to sue in light of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (*Spokeo I*), and this Court's decision on remand, *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) (*Spokeo II*). As explained below, these decisions confirm that Mr. Eichenberger has standing to sue.

I. The *Spokeo* decisions.

Article III standing to sue requires a plaintiff to have suffered an injury-in-fact that is (1) concrete and particularized, (2) traceable to the defendant, and (3) redressable by judicial order. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must satisfy these elements "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

On appeal from the grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the Court asks whether Mr. Eichenberger's allegations, taken as true, establish his standing to sue. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

In *Spokeo I*, the Court considered just one part of one element of the familiar three-part *Lujan* inquiry: concreteness. *See* 136 S. Ct. at 1548. The Court clarified that concreteness is a separate inquiry from particularity and that intangible injuries, though more difficult to recognize, can nonetheless be concrete. *Id.* at 1548. Specifically, the Court's decision in *Spokeo I* addresses "the extent to which violation of a statutory right can itself establish an injury sufficiently concrete for the purposes of Article III standing." *Spokeo II*, 867 F.3d at 1112. The Court concluded that, in addressing that issue in a given case, courts should consult "history and the judgment of Congress" to determine if a particular statutory violation causes a cognizable harm. *Spokeo I*, 136 S. Ct. at 1549.

On remand this Court confirmed that "privacy interests ... have long been protected by the law" and held that statutory rights "similar *in kind*" to those privacy interests are "real" enough for Article III purposes that their alleged invasion is an injury-in-fact. *Spokeo II*, 867 F.3d at 1114-15 (emphasis in original). In so doing, the *Spokeo II* Court built on the foundation laid by two previous decisions of this Court holding that statutory privacy rights are cognizable in federal court in light of *Spokeo I*. *See Van Patten v. Vertical Fitness, Inc.*, 847 F.3d

1037, 1043 (9th Cir. 2017); *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017). This Court also concluded that statutory rights "are 'real,' rather than purely legal creations," when Congress identifies the harms it seeks to guard against and identifies a causal link between the statutory violation and that harm. *Spokeo II*, 867 F.3d at 1114. This holding, too, builds on the Court's previous cases. *See Van Patten*, 847 F.3d at 1043 (relying on "specific [Congressional] findings" to conclude that statutory privacy interest was "concrete").

II. Mr. Eichenberger alleges a concrete injury-in-fact.

Applying the Supreme Court's teachings and this Court's further elaborations confirms that Mr. Eichenberger has standing to sue in this case. Mr. Eichenberger alleges that Defendant-Appellee ESPN, Inc., violated the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710, by disclosing to a third party information that identified him and the videos he watched on ESPN's Roku channel. (EOR 40, ¶ 14; EOR 42, ¶ 19; EOR 43, ¶ 25; EOR 44, ¶ 29; EOR 47, ¶¶ 42-44.) That alleged disclosure gives rise to his claim under the VPPA, *see* 18 U.S.C. § 2710(c), and both history and the judgment of Congress permit the claim to proceed in federal court, as every court to consider the question with the benefit of *Spokeo I*'s guidance has concluded. *See Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d

262 (3d Cir. 2016); *Yershov v. Gannett Satellite Info. Network, Inc.*, 204 F. Supp. 3d 353 (D. Mass. 2016).

A. Congress's judgment establishes that disclosure of information protected by the VPPA is a concrete injury-in-fact.

First, "the structure and purpose of the VPPA supports the conclusion that it provides actionable rights." *Perry*, 854 F.3d at 1340. As Mr. Eichenberger explained in his opening brief (*see* Appellant's Opening Brief at 2-5), 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.

S. Rep. No. 100-599, 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 new, more subtle and pervasive form of surveillance." *Id.* at 7. At a joint House and Senate subcommittee hearing, Senator Leahy again noted that "these activities [i.e., requesting video materials] generate an enormous report of personal activity that, if it is going to be disclosed, makes it very, very difficult for a person to protect his or her privacy." *Video & Library Privacy Protection Act of 1988: Joint Hr'g Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the H. Comm. on the Judiciary and the Subcomm. on Technology & the Law of the S. Comm. on the Judiciary*, 100th Cong. 18 (1988). "It is not anybody else's business, whether they want to watch Disney or they want to watch something of an entirely different nature." *Id.* Concerned with the "subtle and pervasive" invasion of privacy caused by the disclosure of these viewing records, Congress enacted the VPPA.

These "specific findings" support the conclusion that this congressionally created right is concrete. *See Van Patten*, 847 F.3d at 1043. Congress identified a

particular harm—the invasion of privacy occasioned by the unconsented disclosure of personal video-viewing habits. And after considering the issue, particularly in light of the increasingly "intrusive" nature of modern technology, *see* S. Rep. No. 100-599, at 6, Congress concluded that the VPPA was "necessary" to preserve this aspect of informational privacy, *Yershov*, 204 F. Supp. 3d at 361. The Act's prohibition on unconsented disclosure of personal information creates a "substantive right" in line with this purpose. *Van Patten*, 847 F.3d at 1043.

"Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private." *In re Nickelodeon*, 827 F.3d at 274. And *Van Patten* holds that Congress's identification by statute of a particular type of privacy invasion suffices to create a concrete interest whose invasion gives rise to Article III standing. *See* 847 F.3d at 1043 (holding that a substantive statutory "right to be free from certain types of phone calls and texts" was sufficiently definite to be actionable in federal court). In these circumstances, Congress has "identif[ied an] intangible harm[] that meet[s] minimum Article III requirements," and its judgment should be respected. *Spokeo I*, 136 S. Ct. at 1549.

As this Court recognized in *Spokeo II*, though mere possession of a statutory cause of action doesn't unlock the federal courthouse doors, "the Supreme Court ... recognized that *some* statutory violations, alone, do establish concrete harm."

Spokeo II, 867 F.3d at 1113. The two *Spokeo* decisions focused on alleged procedural statutory violations, but that focus is inapposite here. Instead, as in *Van Patten*, the alleged statutory violation here infringes a "substantive right." 847 F.3d at 1043. Disclosures of information protected by the VPPA, "by their nature, invade the privacy" of the subjects of that information. *Id.* That was the harm Congress sought to avoid by enacting the law. Thus disclosures of information in alleged violation of the VPPA are themselves actionable without any showing of further harm. *See Perry*, 854 F.3d at 1340 ("We conclude that violation of the VPPA constitutes a concrete harm."); *see Spokeo II*, 867 F.3d at 1113 (recognizing that when a statutory violation directly infringes a concrete interest created by statute, there is a sufficient injury to support standing); *Van Patten*, 847 F.3d at 1043 (concluding that plaintiff need not allege any additional harm when statutory violation causes the harm the statute seeks to prevent).[1]

B. The common law permitted suit for similar harms.

Second, the statutory violation alleged here results in an injury that is "similar *in kind* to [harms] that have traditionally served as the basis for lawsuit."

[1] Even if the Court were to conclude that ESPN's alleged VPPA violations are procedural in nature, Mr. Eichenberger still has standing. As *Spokeo II* recognizes, when procedural rights are at issue, the inquiry is similarly bifurcated: The first question is whether the statutorily protected interest is concrete, and the second is whether the "specific procedural violations alleged ... actually harm, or present a material risk of harm to, such interests." 867 F.3d at 1113. As discussed, the privacy interest created by the VPPA is concrete. And the disclosure itself "actually harm[s]" that interest. *Id.*

Spokeo II, 867 F.3d at 1115. Both *Spokeo II* and *Van Patten* recognize that "privacy interests ... have long been protected in the law." *Id.* at 1114; *see Van Patten*, 847 F.3d at 1043 ("The right of privacy is recognized by most states."). More specifically, "it has long been the case that an unauthorized dissemination of one's personal information, even without a showing of actual damages, is an invasion of one's privacy that constitutes a concrete injury sufficient to confer standing to sue." *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 636 (E.D. Va. 2016). *Perry* holds that this tradition applies with full force to claims under the VPPA. *See* 854 F.3d at 1340-41.

As the Supreme Court has recognized, the legal concept of "privacy" encompasses a number of distinct interests, including "in avoiding disclosure of personal matters." *U.S. Dep't of Justice v. Reporters Cmte. for Freedom of Press*, 489 U.S. 749, 762 (1989). Thus, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Id.* A brace of cases decided after *Spokeo I* concluded that this common-law tradition would permit suit for unlawful disclosure of personal information, even if it claims for unlawful retention of information do not fall within this custom. *See Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017) ("Violations of rights of privacy are actionable, but ... there is no indication of any violation of the plaintiff's privacy because there

is no indication that Time Warner has released, or allowed anyone to disseminate, any of the plaintiff's personal information); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) ("Although there is a common law tradition of lawsuits for invasion of privacy, the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts.").

The well-recognized privacy interest in avoiding disclosure of personal matters is particularly implicated in this case. Congress's concern in enacting the VPPA was "information pools" created about individual consumers. S. Rep. No. 100-599, at 7. And Mr. Eichenberger specifically alleges that the information disclosed by ESPN is used to enhance "user profiles" or "digital dossiers" of individual consumers. (EOR 41.) *Reporters Committee* observes that "the power of compilations to affect personal privacy [far] outstrips the combined power of the bits of information contained within." 489 U.S. at 765. Congress specifically enacted the VPPA to prevent the disclosure of video-viewing habits to third parties so it could be added to such compilations.

Thus, a claim for unlawful disclosure under the VPPA bears a sufficiently close relationship to a claim at common law to be actionable in federal court. As *Spokeo II* holds, all Article III requires is a "close relationship to a harm that has traditionally been regarded as a basis for a lawsuit, not that Congress may

recognize a de facto intangible harm only when its statute exactly tracks the common law." 867 F.3d at 1115 (quotation omitted). That relationship is present here: The common law protected the privacy of certain information. *See* Restatement (Second) of Torts § 652A cmt. b. And at common law many invasions of privacy were actionable without further use of information gathered or disseminated. *See Perry*, 854 F.3d at 1340 (citing Restatement (Second) of Torts § 652B cmt. b); *see also* Restatement (Second) of Torts § 652D cmt. a ("While the cases to date allowing recovery for the type of invasion of privacy covered by this Section have been confined to the giving of publicity to the private matter, the courts may decide to extend the coverage to a simple disclosure."). The VPPA represents a specific instantiation of this type of privacy interest. What's more, the Restatement specifically recognizes the possibility that the common-law right to privacy might "expan[d]" "as a protection against ... the compilation of elaborate written or computerized dossiers." Restatement (Second) of Torts § 652A cmt. c. It would be quite bizarre for Congress's decision to recognize a privacy right specifically contemplated by the drafters of the Restatement not to be closely related to a common-law harm.

Thus, whether judged through the lens of congressional judgment or the common law, as those sources are interpreted by *Spokeo I* and *Spokeo II*, it is clear

that Mr. Eichenberger has suffered a concrete injury supporting his standing to sue ESPN in federal court.

* * *

Neither *Spokeo* decision addresses the remaining elements of the standing inquiry, but it is clear that Mr. Eichenberger can satisfy all aspects of the Article III standing inquiry. Mr. Eichenberger's injury is sufficiently particularized because he alleges that ESPN violated his statutory rights. *See Spokeo II*, 867 F.3d at 1111. The injury is also traceable to ESPN's conduct (ESPN programmed its Roku channel to transmit this personally identifiable information (EOR 40 ¶ 13)), and redressable by a favorable judicial decision.

In sum, Mr. Eichenberger has standing to sue ESPN. Assured of subject-matter jurisdiction, the Court should reverse the order of the district court dismissing Mr. Eichenberger's claim, and remand for further proceedings.

Respectfully submitted,

EDELSON PC

s/ J. Aaron Lawson

J. Aaron Lawson

9th Circuit Case Number(s) 15-35449

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