epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

September 28, 2017

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 before Hon. Graber, Murguia, And Christen, Circuit Judges

Dear Ms. Dwyer:

The Electronic Privacy Information Center ("EPIC") respectfully submits this letter brief, along with the attached motion for leave to file as *amicus curiae*, in response to the Court's order of September 8, 2017, requesting letter briefs concerning Plaintiff's standing 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*).

EPIC is a leading expert on the Video Privacy Protection Act of 1988 ("VPPA"), 18 U.S.C. § 2710, and has testified before Congress to explain the history and purpose of the Act.[1] EPIC also participated as *amicus curiae* in *Spokeo*

[1] *The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Subcomm. on Privacy, Tech., & the Law of the S. Comm. on the Judiciary*, 112th Cong. 5 (2012) (statement of Marc Rotenberg, Executive Director, EPIC).

v. Robbins and several subsequent cases concerning consumer privacy and Article III standing. *See, e.g.,* Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) in Support of Appellants, *Attias v. Carefirst*, 865 F.3d 620 (D.C. Cir. 2017) (No. 16-7108).

In *Spokeo I*, the Supreme Court said that courts should consider the "history and the judgment of Congress" to determine whether a violation of a statutory right establishes an injury sufficiently concrete for the purposes of Article III standing. *Spokeo I*, 136 S. Ct. at 1549. This Court on remand explained, "while Robins may not show an injury-in-fact merely by pointing to a statutory cause of action, the Supreme Court also recognized that some statutory violations, alone, do establish concrete harm." *Spokeo II*, 867 F.3d at 1113.

Regarding the Video Privacy Protection Act, the history and judgment of Congress leaves little doubt that Congress believed a violation of the Act would be a concrete injury. Congress created a statutory damages provision that is triggered by a violation of the Act, irrespective of the showing of consequential harm. Disclosure of a customer's confidential information in violation of the Act is therefore a concrete injury sufficient to establish standing under Article III. And it would be a usurpation of Article I to impose a judicial limitation on the exercise of legal remedies established by Congress for concrete harms. The court below was correct to assume Article III standing.

Congress enacted the VPPA with a clear purpose: "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials." Pub. L. No. 100-618, 102 Stat. 3195, 3195. The law ensures that consumers can "maintain control over personal information divulged and generated in exchange for receiving services from video tape service providers." S. Rep. No. 100-599, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342. The Act followed the disclosure of the personal viewing records of the family of Judge Robert Bork. S. Rep. No. 100-599, at 5. Reflecting public widespread concern about the disclosure of private facts in the new world of digital entertainment, Congress enacted the VPPA to "prohibit[] video tape service providers from disclosing personally identifiable information except in narrow and clearly defined circumstances." S. Rep. No. 100-599, at 8.

As the bill's original sponsor explained, a "person maintains a privacy interest in the transactional information about his or her personal activities. The disclosure of this information should only be permissible under well-defined circumstances." 134 Cong. Rec. 10260 (1988) (statement of Sen. Leahy). Congress intended the Act to "define the right of privacy by prohibiting the unauthorized disclosure of personal information" by video service providers and to "give meaning to, and thus enhance, the concept of privacy for individuals in their daily lives." S. Rep. No. 100-599 at 6. According to one senator, "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." S Rep. No. 100-599, at 7. Senator Leahy further noted "these activities 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 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).

To make clear that the disclosure itself was a concrete harm, Congress provided for a private right of action for a violation of the Act. Section 2710(c)(2) states "The court may award--(A) actual damages but not less than liquidated damages in an amount of $ 2,500." 18 U.S.C. § 2710(c)(2). Congress made the specific determination not to require an additional showing of consequential harm that could result from a violation of the Act. Statutory damages serve a deterrent function. *See L.A. News Serv. v. Reuters Television Int'l., Ltd., 149 F.3d 987, 996* (9th Cir. 1998) (noting that awards of statutory damages can serve compensatory, punitive and/or deterrent purposes).

A violation of the VPPA disclosure provision is a *per se* concrete injury. The statute prohibits wrongful disclosure of video tape rental or sale records and

creates a cause of action for "[a]ny person aggrieved by any act of a person in violation of this section." 18 U.S.C. § 2710(c)(1). As the Eleventh Circuit recently explained, the "structure and purpose of the VPPA supports the conclusion that it provides actionable rights," and therefore a "violation of the VPPA constitutes a concrete harm." *Perry v. CNN*, 854 F.3d. 1336, 1340 (11th Cir. 2017). *See also In re Nickelodeon*, 827 F.3d 262, 274 (3rd Cir. 2016) ("While perhaps 'intangible,' the harm is also concrete in the sense that it involves a clear de facto injury, *i.e.,* the unlawful disclosure of legally protected information.").

Furthermore, the VPPA reflects common law privacy claims that provide a basis for a legal "case or controversy." The Supreme Court said in *Reporters Privacy Committee* that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *DOJ v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 763 (1989). The right to privacy is widely established at common law, as many circuits have recently observed. *See, e.g, Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017) (establishing that "violations of the rights to privacy are actionable"); *Braitberg v. Charter Commc'n, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (stating that "there is a common law tradition of lawsuits for invasion of privacy").

The Restatement (Second) of Torts § 652, following the survey undertaken by Dean Prosser of case law across the United States, also makes clear that the privacy claims reflected in the VPPA, are well established at common law. The "existence of a right to privacy [has been] recognized in the great majority of American jurisdictions that have considered the question." Restatement (Second) of Torts § 652A cmt. a. (Am. Law Inst. 1977). Of particular significance, the Publicity Given to Private Life Tort makes "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D.

The VPPA mirrors this statement of common law almost precisely. Under the VPPA, video service providers are subject to liability when that provider discloses a consumer's confidential information. And the information covered in the act is both information that, if revealed, could be highly intrusive and is not of legitimate concern to the public.

But even so, it should not be necessary to show a common law predicate to uphold rights established by Congress. In *Lujan*, Justice Kennedy warned the courts not to second-guess Congress in areas of increasing complexity. "As Government programs and policies become more complex and far-reaching, we

must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Courts long ago abandoned this mode of reasoning. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

Moreover, a court is not empowered to override congressional judgments as to which injuries should be legally protected simply because they are "out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955). The Supreme Court has long rejected the view that the judiciary may "sit as super-legislature to judge the wisdom or desirability of legislative policy determinations[.]" *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 901 (1985).

But that would be the effect of imposing a consequential harm standard on an Act of Congress. If a court demands that a plaintiff prove harm in addition to the concrete injury that Congress has deemed actionable, it is "substitut[ing] its own judgment for that of the legislature." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal citation omitted).

The court below correctly assumed that Mr. Eichenberger had standing to bring claims for violations of the Video Privacy Protection Act.

CONCLUSION

For the foregoing reasons, this Court should find that under the VPPA, (1) Congress intended to protect consumers' concrete interests in the confidentiality of their video viewing records, and (2) disclosure of confidential information is sufficient to establish a concrete injury under Article III.

Respectfully submitted,

/s/ Marc Rotenberg

Marc Rotenberg
Alan Butler
Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave. NW,
Suite 200
Washington, DC 20009
(202) 483-1140

Dated: September 28, 2017

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 1,664 words. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Respectfully submitted,

/s/ Marc Rotenberg

Marc Rotenberg
Alan Butler
Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave. NW,
Suite 200
Washington, DC 20009
(202) 483-1140

Dated: September 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2017, the foregoing Motion for Leave to File Brief of *Amicus Curiae* Electronic Privacy Information Center was electronically filed with the Clerk of the Court, and thereby served upon counsel for the parties *via* electronic delivery.

Respectfully submitted,

/s/ Marc Rotenberg

Marc Rotenberg
Alan Butler
Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave. NW,
Suite 200
Washington, DC 20009
(202) 483-1140

Dated: September 28, 2017