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October 2, 2017

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Molly C. Dwyer
Clerk of Court
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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 Circuit Judges Graber, Murguia, and Christen

Dear Ms. Dwyer:

Pursuant to FED. R. APP. P. 29(a)(6), Defendant-Appellee ESPN, Inc. ("ESPN") respectfully submits this letter brief in response to the letter brief ("EPIC Br.") filed by *Amicus Curiae* Electronic Privacy Information Center ("EPIC").

EPIC's brief ignores the governing standards established in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo*"), and *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) ("*Robins*"), for determining when a "'violation of a statutory

right is … a sufficient injury in fact to confer standing'" under Article III of the Constitution. *Spokeo*, 136 S. Ct. at 1546 (citation omitted). Indeed, EPIC's brief mentions *Robins* only once, when EPIC quotes this Court's statement that "'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.'" *See* EPIC Br. 2 (quoting *Robins*, 867 F.3d at 1113) (restoring original emphasis omitted by EPIC). But EPIC then ignores the discussion in *Robins* that directly follows this quoted sentence, in which this Court set forth the two-step test that *Spokeo* establishes for identifying *when* a given statutory violation, by itself, can be considered as establishing a concrete injury. Under that test, "'an alleged procedural violation [of a statute] can by itself manifest concrete injury [1] where Congress conferred the procedural right to protect a plaintiff's concrete interests and [2] where the procedural violation presents "a risk of real harm" to that concrete interest.'" *Robins*, 867 F.3d at 1113 (citations omitted). EPIC's brief never even mentions this controlling test, much less explains how it applies to this case.

Instead, EPIC argues that, because Congress in the VPPA has statutorily prohibited disclosure of a consumer's personally identifiable information without that consumer's advance consent, any such asserted violation constitutes a "*per se* concrete injury" to that consumer. EPIC Br. 4. This contention is directly contrary

to *Spokeo* and *Robins*. The Supreme Court in *Spokeo* held that Article III standing still "requires a concrete injury even in the context of a statutory violation," and that a "bare" statutory violation that is "*divorced from any concrete harm*" is not enough. 136 S. Ct. at 1549 (emphasis added). And in *Robins*, this Court followed *Spokeo* in holding that, even in the context of an alleged violation of a statutorily created right, there must still be a showing of a "material risk of harm" to an *underlying concrete interest* that the statute seeks to protect. 867 F.3d at 1113. EPIC's brief does not mention these holdings, which refute its argument that any violation of the VPPA should "*per se*" be deemed to impair a concrete interest.

EPIC argues that its *per se* approach is supported by *Spokeo*'s statement that, in determining whether an asserted interest is sufficiently concrete, a court should consider "'history and the judgment of Congress.'" EPIC Br. 2 (quoting *Spokeo*, 136 S. Ct. at 1549). According to EPIC, *Spokeo*'s instruction to consider Congress's judgment requires *absolute* deference, because "[i]f a court demands that a plaintiff prove harm in addition to the concrete injury that Congress has deemed actionable, it is substituting its own judgment for that of the legislature." EPIC Br. 7 (citation, internal quotation marks, and EPIC's alteration marks omitted). This argument fails.

EPIC's plea for absolute deference to congressional judgments and for a "*per se*" approach to congressionally-defined injuries cannot be reconciled with the

Supreme Court's instruction that "'[i]n no event … may Congress abrogate the Art. III minima.'" *Spokeo*, 136 S. Ct. at 1548 (citation omitted). Nor can it be reconciled with *Spokeo*'s and *Robins*'s holding that, in all cases, there must be at least a "material risk of harm" to an underlying interest that has concreteness *apart from its being incorporated into a statute*. As *Spokeo* explains, "'Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" 136 S. Ct. at 1547-48 (citation omitted). What Congress may do is "*identify* intangible harms that meet minimum Article III requirements" and it may "'*elevate*[,] to the status of legally cognizable injuries[,] concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* at 1549 (emphasis added) (citation and Court's alteration marks omitted). By enforcing the requirement that even statutorily-recognized causes of action must always be supported by a material risk of harm to a concrete interest, the courts are not substituting their judgment for that of Congress; they are simply enforcing the requirements of the Constitution.

Moreover, neither the statute nor history supports EPIC's theory that *any* violation of the alleged procedural requirement to obtain advance consent is itself a "concrete injury." EPIC is wrong in contending that Congress created a cause of action for damages merely upon a showing of a statutory violation (EPIC Br. 4); on the contrary, the statutory cause of action only extends to a consumer who has been

"*aggrieved*" by such a violation. 18 U.S.C. § 2710(c)(1) (emphasis added). *See also* ESPN Supp. Letter Br. 12-13 (summarizing legislative history). History likewise does not support EPIC's "*per se*" approach. As EPIC recognizes, the closest analogy in the common law is the tort of giving publicity to private matters set forth in section 652D of the Restatement. EPIC Br. 6. But as the commentary to that section noted, the traditionally recognized causes of action covered by that section extended only to a disclosure of 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); *see* ESPN Supp. Letter Br. 11. Thus, both the judgment of Congress and of history confirm that some harm to a concrete interest beyond a mere statutory violation is required here to establish the concrete harm Article III requires.

In this case, applying the analysis required by *Spokeo* and *Robins* confirms that Plaintiff-Appellant Chad Eichenberger ("Plaintiff") lacks the "concrete" injury required by Article III. Indeed, this case is the quintessential example of a "bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Plaintiff objects that anonymized data concerning his video-viewing selections on the WatchESPN Channel were transferred electronically, without his advance consent, from ESPN's servers to Adobe Analytics' servers. But he does not allege any facts that would support a plausible inference that there is any

"material risk" that, as a result of this asserted failure to obtain his prior consent, he will thereby ever suffer any of the *concrete* harms that Congress sought to avoid in enacting the VPPA—namely, the embarrassment, harassment, adversity, or chilling effect that could result if any substantial number of natural persons were to learn his video-viewing selections. *See* ESPN Supp. Letter Br. 8-12. If Plaintiff's allegations were considered sufficient to establish Article III standing, "the federal courts would be flooded with cases based not on proof of harm but on an implausible and at worst trivial risk of harm." *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017).[1]

The judgment of the district court should be affirmed.

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: */s/ Daniel P. Collins*
Daniel P. Collins
Attorneys for Defendant-Appellee
ESPN, Inc.

[1] Contrary to what EPIC contends (EPIC Br. 5), *Gubala*'s observation (in dicta) that "[v]iolations of rights of privacy are actionable," 846 F.3d at 912, does not mean that *any* violation of a claimed "privacy" right, no matter how trivial and no matter how divorced from any concrete privacy-related harms, is actionable. Such a view cannot be squared with *Gubala*'s insistence that, under *Spokeo*, "'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id*. (quoting *Spokeo*, 136 S. Ct. at 1549).

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached letter brief is proportionately spaced, has a typeface of 14 points, and the body of the letter brief (including footnotes) contains 1,274 words.

DATED: October 2, 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 October 2, 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: October 2, 2017

/s/ Daniel P. Collins
Daniel P. Collins