No. 16-2613

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEREK GUBALA,
Plaintiff-Appellant,

v.

TIME WARNER CABLE INC.,
Defendant-Appellee.

On Appeal from the
United States District Court for the
Eastern District of Wisconsin
Case No. 15-cv-1078
The Honorable Pamela Pepper

BRIEF OF *AMICUS CURIAE* RYAN PERRY IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-2613

Short Caption: Gubala v. Time Warner Cable Inc.

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Attorney's Signature: s/ Ryan D. Andrews Date: 11/10/2016

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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INTEREST OF *AMICUS*

"An amicus brief should normally be allowed ... when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough to entitle the amicus to intervene and become a party in the present case)." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). *Amicus* Ryan Perry is in precisely that position. Perry, seeking to vindicate his own individual privacy rights, sued CNN for disclosing his personally identifiable information and video viewing choices in violation of a statute, the Video Privacy Protection Act, quite similar to the statute at issue in this appeal, and has appealed the dismissal of his claim. No. 16-13031 (11th Cir.) Undoubtedly, the outcome of this case will bear on Perry's appeal: CNN already has moved to dismiss the appeal for lack of standing after the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and in that motion cited the order of the district court in this case. CNN also cited the district court's order in its principal brief to support the argument that Perry lacked Article III standing to sue. The reasoning of this Court in disposing of this appeal, therefore, is likely to play a role in the resolution of Ryan Perry's appeal.

SUMMARY OF ARGUMENT

Derek Gubala sued Time Warner Cable, Inc. for retaining personally identifiable information about him longer than legally permitted by the Cable Communications Policy Act, 47 U.S.C. § 551(e). The district court correctly concluded that Gubala lacks standing to sue, but in doing so advanced an overly

broad reading of the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Amicus* writes to urge this Court to affirm the result but not the reasoning of the district court.[1]

Although not fleshed out by either party or by the district court, this appeal is framed by two potentially conflicting statements in *Spokeo* that the Supreme Court itself declined to clearly reconcile. On the one hand, the Court instructed that "Article III requires a concrete injury even in the context of a statutory violation," and on the other the Court reminded us that on many occasions "a plaintiff need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1548, 1549. How to resolve that tension is at the heart of this appeal.

Both parties agree that the district court was wrong to conclude that *Spokeo* requires alleging consequential harm resulting from a statutory violation, but that is the limit of their common ground. Gubala proposes that the requirement of separate concrete injury is a narrow exception to the general rule (which he says applies here) that a plaintiff has standing by virtue of the invasion of their personal statutory rights. Time Warner, by contrast, asserts that *Spokeo* requires an "actual harm," though it goes no further and does not explain what it means by "actual harm." Both of these statements may be true in certain cases and neither party attempts to resolve the apparent conflict present in *Spokeo*.

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[1] *Amicus* takes no position on any issue related to injunctive relief as without a cross-appeal those issues are not properly before this Court, even if they were addressed by the court below. *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 697 (7th Cir. 2015); *see also Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

Amicus argues that the key to reconciling *Spokeo*'s potentially conflicting pronouncements is to focus, as the standing inquiry always has, on what the legally protected interest is that the plaintiff seeks to vindicate. When a plaintiff's claim alleges a statutory violation that directly infringes the underlying statutorily protected interest, that violation of the plaintiff's statutory right, in and of itself, establishes standing to sue. When there is a disconnect between the statutory right and the underlying interest, the plaintiff bears the burden of alleging other facts to demonstrate that the underlying interest was invaded, or that the statutory violation created a material risk of the interest being invaded. One way of understanding this distinction is the heuristic proposed by Gubala, a distinction between substantive and procedural rights. Another way is simply to focus on the gap between statutory right and interest.

Here, the Cable Act protects Gubala's privacy by establishing certain measures to ensure that his personal information remains private. But Gubala does not allege that his legally protected interest in the privacy of this information was invaded. Time Warner may have violated a provision of the Cable Act by holding on to Gubala's information for too long, but there is a gap between Gubala's rights under § 551(e) and the privacy interest protected by the Act. Gubala's allegations do not bridge that gap. For that reason, the district court should be affirmed.

ARGUMENT

I. The district court's reasoning is flawed.

The district court understood *Spokeo* to impose a requirement of

consequential harm. (Gubala App. A-10 ("Even if he had alleged such a disclosure, he does not allege that the disclosure caused him any harm."). The court faulted Gubala for failing to allege that anything had happened as a result of Time Warner's retention and further reasoned that even alleging disclosure of his personal information was insufficient to establish Gubala's standing to sue.

The consequential harm requirement imposed by the district court is without foundation in *Spokeo*, or any other Supreme Court decision. *Spokeo* reaffirmed the longstanding rule that to have standing to sue a litigant must have suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And in doing so, the Court conclusively established that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Neither of these principles has ever been understood to require a litigant to suffer a consequential harm before a case is appropriate for judicial determination. As Justice Thomas put it, "[i]n a suit for the violation of a private right, courts historically have presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Id.* at 1551 (Thomas, J., concurring).

The district court's opinion resembles the position taken by the petitioner in *Spokeo*, which the Court rejected. Taking issue with language in past opinions that

"the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," *Warth v. Seldin*, 422 U.S. 490, 500 (1975), petitioner Spokeo, Inc. contended that Congress was empowered only to identify already-concrete injuries and provide remedies where none previously existed, but was *not* empowered to create what petitioner called "injuries in law." *See* Br. for Pet'r, at 13-17, *Spokeo, Inc. v. Robins*, No. 13-1339, 2015 WL 4148655 (U.S.). Petitioner went so far as to contend that "it is *only* in this way that 'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* at 15 (emphasis added).

The Court ultimately rejected that restrictive approach to Article III. *Spokeo* instead confirms that Congress may by statute identify and protect concrete interests, and that violation of these interests, by itself, may constitute an injury cognizable in federal court. 136 S. Ct. at 1549-50. The interest need not be pre-existing to be judicially cognizable, it need only be legally protected. *See Simon v. E. Ky. Welfare Org.*, 426 U.S. 26, 41 n.22 (1976) ("The reference in *Linda R.S.* to a statute expressly conferring standing was in recognition of Congress' power to create new interests the invasion of which will confer standing."). Moreover, in many cases "a plaintiff need not allege any *additional* harm" beyond invasion of a legally protected interest to have standing. *Spokeo*, 136 S. Ct. at 1549; *id.* at 1553 (Thomas, J., concurring) ("Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights.").

To be sure, after *Spokeo* it would be incorrect to read *Warth* too expansively. *See Braitberg v. Charter Commcn's, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016). Yet *Spokeo* does not take from Congress the very power *Warth* recognized: To create and protect interests that Congress deems worthy of legal protection. In other words, Congress has the authority to define the substantive duties members of society owe each other, and to decide how those rights will be enforced. *Cf. Armstrong v. Exceptional Child Care Ctr., Inc.*, 135 S. Ct. 1378, 1383-84 (2015) ("It is unlikely that the Constitution gave Congress such broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation.").

The district court's analysis is thus flawed, and this Court should decline to endorse it: *Spokeo* does not require a plaintiff to suffer consequential harm before invoking federal jurisdiction. Nevertheless, *amicus* believes that the district court reached the right result, and it is to this issue we now turn.

II. Nevertheless, Gubala's allegations are insufficient.

A. Gubala alleges a procedural violation.

Gubala proposes one possible way to resolve the apparent tension in *Spokeo*: a distinction between substantive and procedural statutory rights. (Gubala Br. 7.) As Gubala would have it, whenever a plaintiff alleges infringement of a substantive statutory right, *Spokeo* simply does not apply. (Gubala Br. 9.) Even accepting Gubala's framework, it is likely more correct to say that no additional harm is

needed when a defendant violates a plaintiff's "substantive" rights, even if the resulting harm is intangible.

This Court need not decide that issue as Gubala's contentions are only relevant on the underlying assumption that Gubala has indeed alleged a violation of a substantive statutory right. Gubala asserts that the right to destruction of personally identifiable information is substantive. (Gubala Br. 9.) In Gubala's telling, the key to whether a statutory violation is procedural or substantive appears to be whether the statute uses the word "procedures." (*Id.*) Time Warner asserts that the Cable Act's prohibition on retention creates a procedural right, describing, with little explanation, the data-destruction provision as a "procedural means of protecting" personally identifiable information. (TWC Br. 11.)

Though the question is close, Time Warner has the better of this argument. Section 551 mandates certain procedures designed to prevent disclosure or dissemination of personally identifiable information, which is the underlying concrete interest protected by the statute. Congress found when it drafted the Act that "cable systems ... have an enormous capacity to collect and store personally identifiable information about each cable subscriber" that "can reveal details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions." H.R. Rep. 98-934, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4666. As such, § 551 "established a self-contained and privately enforceable scheme for the protection of cable subscriber privacy." *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 876 (10th Cir. 1992).

This scheme consists of "procedural safeguards to consumers for the protection of their privacy interests." 1984 U.S.C.C.A.N. at 4714. These safeguards are drafted to track the life cycle of the provider-subscriber relationship. Subsection (c)(1) flatly prohibits the unconsented-to disclosure of personally identifiable information. Other provisions focus on data security: (c)(1) also requires cable providers to "take such actions as are necessary to prevent unauthorized access" to personally identifiable information, (b)(2) limits the purposes for which personally identifiable information can be collected, and (e) limits how long a cable provider can retain personally identifiable information. The remaining provisions ((a) and (d)) deal, essentially, with notice that must be given to the subscriber.

Under this framework, the disclosure prohibition is substantive, and violation of the notice provisions, whether or not procedural, causes informational injury. *See, e.g.*, *Thomas v. FTS USA, LLC*, No. 13-cv-825, 2016 WL 3653878, at *9-*10 (E.D. Va. June 30, 2016).[2] But the provisions dealing with data security, including the data-destruction provision at issue, endow cable subscribers with procedural rights: These provisions establish guidelines for *how* cable providers must treat a customer's personally identifiable information. But "unless the denial of a procedural right endangered a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate denial of that procedural right." *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 952 (7th Cir. 2005). Even Gubala recognizes that *Spokeo* applies to violations of procedural rights,

[2] Gubala does not allege that his information was disclosed, or that he was not provided with the requisite notice.

meaning that Gubala must allege that Time Warner's procedural violation has somehow "endangered a separate substantive right" of his, i.e., his interest in the privacy of his personal information.

B. There is a gap between the Cable Act's prohibition on retention and the privacy interests protected by § 551.

On the other hand, in some cases, as in this one, classifying a right as procedural or substantive will not be a clear-cut endeavor. Moreover, *Spokeo* was about what constitutes a "concrete" injury, and the concern for procedural rights is that they are divorced from "concrete" harm, i.e., the underlying interest protected by the statute. Surely what is "concrete" does not depend on how the right is classified.[3]

A different approach, which helps to resolve close cases like this one, was taken by Judge Kennelly in *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2016 WL 4439935 (N.D Ill. Aug. 23, 2016). Taking stock of the decision in *Spokeo*, the judge reasoned that "the Supreme Court's point ... was not that a statutory violation cannot constitute a concrete injury, but rather that where the bare violation of a statute conferring a procedural right could cause a congressionally identified harm or material risk of harm and just as easily could not, it is not

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[3] The cases adopting Gubala's procedural/substantive heuristic as relevant to whether a litigant has suffered a concrete injury have generally considered the question only as part of the analysis into Congress's judgment. *See Matera v. Google Inc.*, No. 15-cv-4062, 2016 WL 5339806, at *11-*14 (N.D. Cal. Sept. 23, 2016); *Guarisma v. Microsoft Corp.*, No. 15-cv-24326, 2016 WL 4017196, at *4 (S.D. Fla. July 26, 2016) (discussing whether "Congress intended to create a substantive right"). Notably, the focus on Congress's judgment is particularly unhelpful to Gubala because the House Report on the Cable Act describes the requirements of § 551 as "procedural safeguards." 1984 U.S.C.C.A.N. at 4714.

sufficient simply to allege that the statute at issue was violated." *Id* at *5. Thus, in assessing the tension inherent in the *Spokeo* decision, Judge Kennelly reasoned that a plaintiff need not allege any additional harm when "there is no gap" between the statutory right and the interest protected by the statute. *Id*. When there is a gap, the plaintiff must allege some infringement of the underlying legally protected interest. *Id*. This approach recognizes that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests." *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

Here, the underlying interest is in the nondisclosure of personal information, because only disclosure can reveal the types of sensitive personal details that Congress deemed worthy of protection. There is plainly a gap between that interest and the statutory right to have a cable provider destroy personally identifiable information once it is no longer needed. And because there is a gap, Gubala was tasked with alleging some harm or risk of harm to the underlying interest.

C. Gubala does not allege that his privacy interests were invaded.

So whether through the lens of procedure versus substance or of gap versus no gap, it is clear that Gubala cannot use the bald allegation that Time Warner retained his information by itself as his ticket to federal court. But this does not mean that Gubala must allege the type of consequential harm required by the district court or that all claims for the improper retention of personal information should fail. Instead Gubala needed to make some showing that Time Warner's actions invaded his legally protected privacy interests or that Congress believed

that the retention of this information itself posed a material risk of an invasion of his privacy. Gubala's attempts to show an invasion of his privacy interests are unavailing.

Gubala's principal failing is that he repeatedly conflates retention of personally identifiable information with disclosure or dissemination of that same information. All courts to address the issue, both before and after *Spokeo*, have concluded that plaintiffs alleging unlawful *disclosure* of information have suffered a concrete injury in fact that supports standing to sue. *See, e.g.*, *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016); *Yershov v. Gannett Satellite Info. Network, Inc.*, No. 14-cv-13112, 2016 WL 4607868, at *10 (D. Mass. Sept. 2, 2016); *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014). Time Warner appears to agree that disclosure of information made private by statute, like that belonging to Mr. Perry and disclosed by CNN, is a concrete injury in fact. (TWC Br. 12, 14.) Gubala repeatedly relies on cases where there was an improper disclosure of protected information to support his argument that his privacy interests were invaded, but he never explains why principles applicable to disclosure cases automatically apply in the retention context.

For instance, Gubala suggests that there is a common law tradition of suits based on a right to privacy. (Gubala Br. 15.) But the only support Gubala can muster for this proposition is *Yershov*, 2016 WL 4607868, at *8, which involved a claim of unlawful disclosure, not unlawful retention. *Id.* at *2. As *Braitberg*

recognized, the common law tradition of suits for disclosure of private information does not encompass claims of unlawful retention. 836 F.3d at 930-31.

The importance of disclosure and the distinction between retention and disclosure was explored in *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012). In *Sterk* this Court held that a different statute, 18 U.S.C. § 2710, failed to authorize suit for unlawful retention of personally identifiable information. 672 F.3d at 539. This conclusion was driven in part by the fact that retention by itself caused no injury. *Id.* at 538. Disclosure, on the other hand, the Court observed, is "a perceived though not quantifiable injury." *Id.* at 539. And twice the Court contrasted retention with lack of disclosure, reasoning that disclosure caused an injury, but retention by itself did not. *See id.* at 538 ("How could there be injury, unless the information, not having been destroyed, were disclosed? ... [I]f failure of timely destruction results in no injury because there is never any disclosure, the only possible estimate of actual damages ... would be zero."). Even after *Spokeo*, courts have recognized that the allegedly unlawful disclosure of legally protected information is "a clear *de facto* injury." *In re Nickelodeon*, 827 F.3d at 274. It doesn't matter that the right of action sweeps more broadly: that simply means that plaintiffs can sue over the precise procedural violations that are proximately related to the invasion of their privacy interests.

A similar mistake inheres in Gubala's assertion of an economic injury. As Gubala frames this injury it cannot support standing to sue for injunctive relief. Gubala argues that Time Warner's statutory violation robbed him of the full benefit

of transactions he completed with Time Warner many years ago. (Gubala Br. 19-20.) Gubala may well be right about the value of personal information, but allegations that Gubala overpaid for cable eight years ago cannot possibly count as an injury-in-fact sufficient to permit him to have standing for injunctive relief. "While past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016). "In actions for injunctive relief, harm in the past ... is not enough to establish ... an injury in fact." *White v. Bank of Am., N.A.*, No. 12-cv-581, 2016 WL 4099043, at *5 (D.D.C. Aug. 2, 2016) (quotation omitted); *see Schirmer v. Nagode*, 621 F.3d 581, 585 (7th Cir. 2010). Nor is his theory supported by the cases he cites. The plaintiff in *Carlsen v. GameStop, Inc.*, 833 F.3d 903 (8th Cir 2016), for instance, alleged that the defendant had *disclosed* information in violation of an explicit contractual term. *Id.* at 907. Gubala, by contrast, does not allege the violation of any contractual term, or that his information was disclosed or was at a material risk of disclosure. *See Padilla v. Dish Network LLC*, 12 C 7350, 2013 WL 3791140, at *5 (N.D. Ill. July 19, 2013) ("so long as that [personally identifiable] information remains *safely* tucked away on Defendant's servers, its value is undiminished"). *Carlsen*, therefore, is unhelpful.

None of this is to say, however, that, as Time Warner would have it, "Plaintiff could not ... plead actual harm absent TWC's disclosure of his personally identifiable information." (TWC Br. 14.) As *Spokeo* makes clear, "the risk of real

harm" may sometimes be a sufficiently concrete injury. 136 S. Ct. at 1549. Time Warner contends that a "material risk of harm" suffices only if the harm is "certainly impending," (TWC Br. 16), but this reads far too much into the Court's citation to *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). In the first place, *Clapper* was resolved primarily on traceability and redressability grounds, not as a matter of concreteness. *See* 133 S. Ct. at 1149 ("respondents can only speculate as to whether the Government will seek to use § 1881a-authorized surveillance" rather than "other methods ... none of which [are] challenged here"), 1151-52 (rejecting the argument that "respondents' present injuries" are traceable to § 1881a); *see also Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) (noting that the Court's previous cases "do not discuss the separate offices of the terms 'concrete' and 'particularized'"). Second, the Court's discussion of the "risk of real harm" focused not on *Clapper* but on harms "that may be difficult to prove or measure." *Id.* at 1549. In context, then, the Court's recognition that "the risk of real harm" may be a concrete injury simply establishes that Congress need not wait for a harm to materialize before enacting remedial legislation.

It may be, and likely is, the case that when Congress compiles a comprehensive legislative record and "articulate[s] chains of causation" from a statutory violation to a congressionally identified harm that a concrete injury is apparent. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in the part and concurring in the judgment). Thus, in *Spokeo* itself the Court remanded to determine whether the "types of false information" published as a result of the

defendant's procedural violation entailed a risk of harm sufficient to satisfy Article III's requirement of concreteness. 136 S. Ct. at 1550 n.8. The focus, the Court instructed, is not necessarily on the circumstances of an individual plaintiff, but on what Congress specifically determined is harmful.

The problem for Gubala is that his allegations and briefing tell the Court nothing about the particular procedural violation committed by Time Warner. He points to nothing in the legislative history of the Cable Act to suggest that Congress found that violations like Time Warner's are particularly harmful, nor does he suggest that this particular statutory violation placed Gubala's privacy interests at any risk of invasion. "While 'enhanced risk' of future injury may constitute injury-in-fact in certain circumstances, such injuries are only cognizable where the plaintiff alleges actual future exposure to that increased risk." *Nicosia*, 834 F.3d at 239. But neither Gubala's allegations nor his elaborations supply any of the needed alleged harms. He therefore lacks standing to sue.

CONCLUSION

Questions about *Spokeo*'s application to "substantive" rights, or when a "risk of real harm" constitutes a concrete injury-in-fact, are not presented by this appeal. Derek Gubala alleges a procedural violation unconnected to the underlying interest in informational privacy protected by the Cable Act, but does not even suggest that this particular procedural violation is harmful in any way. The Court should affirm the judgment of the district court, but decline to endorse its reasoning.

Dated: November 10, 2016

Respectfully submitted,

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 4,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface, 12-point Century Schoolbook, using Microsoft Word for Mac 2011.

Dated: November 10, 2016 s/ J. Aaron Lawson

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ J. Aaron Lawson