No. 25-3320

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DESMOND BANKS, *individually and on behalf of a class of similarly situated individuals*,
Plaintiff-Appellant,

v.

COSTAR REALTY INFORMATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Missouri, No. 4:25-CV-00564-CMS
The Honorable Cristian M. Stevens, District Court Judge

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America ("the Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: May 7, 2026 /s/ Adam G. Unikowsky

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in the resolution of this case, which raises issues at the heart of the Internet economy. Many of the Chamber's members engage in data sharing—a longstanding and routine business practice. Data sharing supports targeted advertising geared toward a user's individual characteristics or revealed interests. Targeted advertising provides an important revenue stream for providers of online content, many of whom do not have a sufficiently widespread base of website visitors to support their operations through non-targeted advertising alone. Plaintiff here, and other plaintiffs in similar lawsuits, seek to impose far-

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

reaching liability on this practice under the Video Privacy Protection Act ("VPPA")—and, ultimately, to alter the fundamental business model of targeted advertising. The Chamber's viewpoint would provide the Court with helpful context in interpreting the scope of the VPPA.

SUMMARY OF ARGUMENT

I. The district court correctly dismissed Plaintiff's VPPA claim on three independent grounds. First, CoStar is not a "video tape service provider" because it is not "engaged in the business[] … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4). The promotional apartment-tour clips on apartments.com are not "similar" to the movie rentals Congress sought to protect when it enacted the VPPA. Further, CoStar's actual business is connecting property owners with renters, not delivering audiovisual content. Second, Plaintiff is not a "consumer" within the meaning of the VPPA because, even assuming his free apartments.com account qualifies as a "subscription," he did not subscribe to any video-related goods or services. Third, CoStar did not disclose "personally identifiable information" because the third-party tracking tag transmits only a string of characters that, standing alone, identifies no one and requires cross-reference against a separate third-party database to translate into a name. Plaintiff's view would impose strict VPPA liability on virtually every

modern website that uses cookies or analytics tools—a sweeping regulation of the Internet's advertising ecosystem that Congress never enacted.

II. This case is part of a broader litigation campaign that seeks to weaponize the VPPA as a means to effectively ban targeted advertising. The litigation effort threatens many websites' business models to the detriment of the industry and their customers. The VPPA, a statute enacted in the 1980s to prevent video stores from publicizing their customers' movie rentals, was not intended to remake the Internet. It should be left to Congress, not the courts, to determine appropriate policy for tracking personal information online.

ARGUMENT

I. The District Court Correctly Rejected Plaintiff's Aggressive and Unworkable Proposals to Expand the VPPA.

The district court dismissed Plaintiff's suit on three independent grounds: (1) CoStar is not a "video tape service provider" because it is not in the business of delivering materials similar to prerecorded video cassette tapes; (2) Plaintiff is not a "consumer" because he did not subscribe to any video-related goods or services; and (3) CoStar did not disclose Plaintiff's "personally identifiable information" because the third-party tracking tag at issue does not, standing alone, identify him. Each holding is correct.

A. CoStar is not "engaged in the business … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials."

CoStar—a business that connects property owners with potential renters—is not "engaged in the business[] … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials," 18 U.S.C. § 2710(a)(4), merely because it hosts pre-recorded video tours on its website.

First, a streaming Internet video depicting an apartment tour is not "similar to" the types of "video cassette tapes" one might have rented or bought a generation ago. "Prerecorded video cassette tapes" were physical objects one would rent or buy at a store like Blockbuster Video. The phrase "similar audio visual materials" encompasses technologies like DVDs or BluRay discs that were similarly made available for rental or purchase. That phrase, however, does not encompass the online video at issue here, which is fundamentally different from—not "similar" to—a "prerecorded video cassette tape."

As Judge Randolph explained in a recent concurrence, "[t]he function and operation of a 'prerecorded video cassette tape[]' bears little similarity to those of a short online video clip." *Pileggi v. Wash. Newspaper Publ'g Co.*, 146 F.4th 1219, 1239 (D.C. Cir. 2025) (Randolph, J., concurring) (some quotation marks omitted), *petition for cert. filed*, 94 U.S.L.W. 3284 (U.S. Mar. 4, 2026) (No. 25-1040). "An online … clip and a VHS rental may both be videos at some high level of generality,

but the VPPA's statutory language forecloses such a broad-brush approach." *Id.* Indeed, the differences between VHS rentals and CoStar's online video clips are stark. The expressive significance of the two media is worlds apart. Renting a VHS tape required an affirmative trip to a store, a deliberate selection, and the commitment of time and money to a single title. These choices, in the aggregate, painted a portrait of a person's private life. A brief apartment walkthrough watched while comparison-shopping for a one-bedroom, by contrast, reveals nothing about the viewer's inner life; it reflects only that he is interested in browsing for apartments. Moreover, video cassette tapes were tangible articles of commerce. A consumer paid money to take physical possession of an object, which he then carried home. The transaction yielded a rental receipt or sales record—the sort of "record" that gave rise to the VPPA's enactment after a newspaper obtained Judge Bork's video rental list. The fleeting click on a streaming web video, by contrast, generates no comparable record of acquisition. The consumer never possesses anything, pays nothing, and acquires no proprietary interest in the content viewed. In short, the apartment walkthrough videos here are not remotely "similar" to the movie rentals that Congress sought to protect.

The district court was also correct in concluding that CoStar is not "engaged in the business[] … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4). The district court's textual

analysis of this provision was spot on. A company is "engaged in the business" of delivering "audio visual materials" if *that is its business*; Blockbuster Video, for example, was "engaged in the business" of renting and selling "prerecorded video cassette tapes." *Id.* By contrast, while CoStar may have a business *purpose* in putting promotional videos online, it is not *in the business* of providing promotional videos; it is in the business of connecting property owners and renters. Add.10.

The district court's interpretation of "engaged in the business" aligns with the VPPA's purpose. As noted above, the VPPA was enacted in response to the publication of Judge Robert Bork's video rental history during his Supreme Court confirmation hearings. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 278 (3d Cir. 2016) (citing S. Rep. No. 100-599, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5). The VPPA was laser focused on preventing similar incidents from recurring. It barred video rental stores—paradigmatic "video tape service providers" under the VPPA—from sharing personal information from their consumers—*i.e.*, "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1), (4). Hence, the VPPA shielded the kind of intimate window into a person's private life that a list of rented movies can provide. That concern made sense in the world of Blockbuster Video, where the rented tape was the product—the very thing the consumer affirmatively sought out.

By contrast, the promotional videos on apartments.com are advertisements, deployed by property owners to market a different product (the apartment itself) to consumers who are comparison-shopping for housing. A renter who clicks through a virtual walkthrough is not expressing artistic taste or political conviction; he is evaluating square footage, finishes, and floor plans. Imposing liability based on such advertisements would untether the VPPA from the privacy interest Congress legislated to protect and would sweep within the VPPA virtually any modern business that happens to embed videos on its website.

B. Plaintiff does not satisfy the statutory definition of a "consumer."

The VPPA defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider[.]" 18 U.S.C. § 2710(a)(1). The district court correctly held that to qualify as a "consumer," a person must rent, purchase, or subscribe to the provider's video tape service.

Plaintiff offers the implausible theory that if he purchases, rents, or subscribes to anything from CoStar—even something distinct from audiovisual content—he becomes eligible to sue under the VPPA because CoStar also provides free videos on its webpage. Thus, Plaintiff claims that he is a "subscriber" to CoStar's service merely because he signed up for a free account on apartments.com, regardless of whether that "subscription" had anything to do with videos on the website. There is good reason to be skeptical that signing up for a free account qualifies as

"subscribing" under the VPPA; in 1988, video subscriptions were services that people paid for. But even accepting the premise that Plaintiff "subscribes" to apartments.com within the meaning of the VPPA, Plaintiff is not a "subscriber of goods or services from a video tape service provider" when the service to which he subscribes does not constitute video tape services. As the district court and other courts have held, the plain text of the VPPA forecloses Plaintiff's interpretation. Add.13; *see, e.g.*, *Pileggi*, 146 F.4th at 1237; *Salazar v. Paramount Global*, 133 F.4th 642, 650-51 (6th Cir. 2025), *cert. granted*, No. 25-459, 2026 WL 189831 (U.S. Jan. 26, 2026). Although there is a circuit conflict on this issue that recently led the Supreme Court to grant certiorari in *Salazar*, the district court's decision reflects the better-reasoned approach. The VPPA "tethers the definition of 'consumer' to that of 'video tape service provider.'" *Salazar*, 133 F.4th at 650. "So the most natural reading, which accounts for the context of both definitions, shows that a person is a 'consumer' only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials.'" *Id.* at 650-51.

The district court's interpretation makes sense. The VPPA was enacted to protect people who purchased, rented, or subscribed to video services—not people who obtained goods or services from businesses that happened, separately, to offer video services. In enacting the VPPA, Congress recognized that "[t]he definition of personally identifiable information includes the term 'video' to make clear that

simply because a business is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill." S. Rep. No. 100-599, at 11–12 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-9. It gave the example of "a department store that sells video tapes," which "would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products." *Id.* Yet under Plaintiff's vision of the VPPA, a department store that includes a single shelf of VHS movies for sale would owe VPPA duties to shoppers who bought a sweater or a tube of toothpaste.

This concern over expansive VPPA liability is not merely theoretical: VPPA plaintiffs now bring such claims routinely. In *Hernandez v. Container Store, Inc.*, No. 23-cv-5067, 2024 WL 72657 (C.D. Cal. Jan. 3, 2024), for example, the plaintiff argued she was entitled to relief under the VPPA because she had previously purchased goods from the Container Store, and it had then allegedly collected information about her when she watched an unrelated video about custom closets on its website. Similarly, in *Carroll v. General Mills, Inc.*, the plaintiffs argued that the defendant breakfast-cereal manufacturer had violated the VPPA by sharing information about videos they watched because they "ha[d] purchased and eaten [its] products before." *Carroll v. Gen. Mills, Inc.*, No. CV23-1746, 2023 WL 6373868, at *4 (C.D. Cal. Sept. 1, 2023). A third VPPA plaintiff signed up for the defendant

website's general email list and then separately played online casino games on the defendant's website (which did not require signing up for emails). *Mendoza v. Caesars Ent., Inc.*, No. 23-CV-03591, 2024 WL 2316544, at *6 (D.N.J. May 22, 2024). Such lawsuits depart dramatically from Congress's purpose in enacting the VPPA. The court should not adopt an interpretation that would transform the VPPA from a targeted protection for video-rental records into a freestanding privacy code governing every transaction conducted by any business that incidentally offers video content.

C. CoStar did not disclose "personally identifiable information."

The district court correctly held that the CoStar did not disclose Plaintiff's "personally identifiable information" via pixel technology. Plaintiff alleges that CoStar used the "Meta Pixel," which caused CoStar to transmit an "ID code" containing a "string of character[s]" to Meta. Add.15. But, as typical among third-party tracking tag technology, this string of characters does not, on its own, convey any useful information to a reader: it consists merely of "a phrase such as 'c_user=123456' or 'c_user=00000000.'" *Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 54 (2d Cir. 2025). As the Second Circuit rightly held in *Solomon*, a string of digits that means nothing to anyone who sees it, does not "identify" anyone in any ordinary sense of the word. *See id.* at 54-55.

The district court eschewed the complex tests established by other courts and instead hewed to the statutory text: "personally identifiable information" must, on its own, identify someone. Add.14-15. That analysis was correct. The VPPA defines "personally identifiable information" as information that "identifies a person as having requested or obtained specific video materials or services." 18 U.S.C. § 2710(a)(3). The operative verb is "identifies"—not "could conceivably be combined with other information held by some third party to identify." In ordinary usage, information "identifies" a person when it picks him out as a particular individual. For example, a driver's license identifies its bearer. A meaningless string that means nothing to anyone who encounters it does not "identify" anyone. The district court's reading thus respects both the statutory text and the common-sense understanding of what it means to "identify" a person.

Plaintiff's contrary reading would convert the VPPA into a strict-liability regime for the routine operation of the Internet. Virtually every commercial website transmits some form of pseudonymous identifier—cookies, device IDs, and the like—to advertising and analytics providers. If the mere transmission of such an identifier were enough to trigger VPPA liability, then every website that serves a targeted advertisement or runs an analytics script would face potential class-action exposure whenever a video happens to appear on the page. Congress did not silently

impose that regime in 1988, when it legislated against the disclosure of paper rental records.

II. The Court Should Reject Plaintiff's Effort to Transform the Internet Using Class-Action Suits Under the VPPA.

Plaintiff's suit is part of a broader, nationwide litigation campaign seeking to transform the VPPA from a 1980s law about brick-and-mortar rentals of VHS tapes into a de facto ban on targeted advertising. This litigation program would decimate many businesses—especially small businesses—and make the Internet more expensive for companies and less usable for consumers. This Court should not allow class-action lawyers to regulate the Internet via the VPPA.

A. This case is part of a broader effort to use the VPPA to abolish targeted advertising.

With this lawsuit, Plaintiff seeks to ride the wave of recent class actions trying to fit "a square peg (modern electronic technology) into a round hole (a statute written in 1988 aimed principally at videotape rental services)." *Nickelodeon*, 827 F.3d at 283-84 (quotation marks omitted). Plaintiffs across the country have filed VPPA claims like this one against businesses from every sector of the economy,

ranging from print media publishers and movie theatres,[2] to advocacy groups,[3] to sports leagues,[4] to health and fitness websites,[5] to parenting-advice companies,[6] to chess websites,[7] to crafting websites,[8] to nursing training services,[9] to notary training services,[10] to media and entertainment companies,[11] to professional networking

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[2] *Bretto v. AMC Ent. Holdings, Inc.*, No. 23-cv-2317, 2025 WL 2144996 (D. Kan. July 29, 2025); *Braun v. Phila. Inquirer, LLC*, No. 22-cv-4185, 2025 WL 1314089 (E.D. Pa. May 6, 2025); *Lee v. Springer Nature Am., Inc.,* 769 F. Supp. 3d 234, 243 (S.D.N.Y. 2025); *Osheske v. Silver Cinemas Acquisition Co*., 132 F.4th 1110 (9th Cir. 2025); *Berryman v. Reading Int'l, Inc*., 763 F. Supp. 3d 596, 599 (S.D.N.Y. 2025).

[3] *Chandra v. Prager Univ. Found*., No. 25-cv-3984, 2025 WL 3049870 (C.D. Cal. Oct. 21, 2025).

[4] *Joiner v. NHL Enters., Inc.*, 23-cv-2083, 2025 WL 3126106 (S.D.N.Y. Sept. 29, 2025); *Hughes v. NFL*, No. 24-2656, 2025 WL 1720295 (2d Cir. June 20, 2025), *cert. denied*, No. 25-868, 2026 WL 642810 (U.S. Mar. 9, 2026); *Wong v. MLB Advanced Media, L.P.,* No. 24-CV-00779, 2025 WL 2180445 (N.D. Cal. Jan. 22, 2025).

[5] *Manza v. Pesi, Inc*., 784 F. Supp. 3d 1110, 1114 (W.D. Wis. 2025); *Sarhadi v. Pear Health Labs, Inc.*, No. 24-cv-7921, 2025 WL 1350033 (N.D. Cal. Apr. 18, 2025); *Jancik v. WebMD LLC*, No. 22-CV-644, 2025 WL 560705 (N.D. Ga. Feb. 20, 2025)

[6] *Carruth v. KD Creatives, Inc.*, No. 2:24-cv-2484, 2025 WL 2623291 (E.D. Cal. Sept. 11, 2025).

[7] *Krueger v. Chess.com, LLC*, No. 24-cv-5722, 2025 WL 2765375 (N.D. Ill. Sept. 28, 2025).

[8] *Croteau v. TN Mktg., LLC*, No. 25-CV-0940, 2026 WL 810813 (D. Minn. Mar. 24, 2026)

[9] *Benson v. Simplenursing, LLC*, No. 24-1118, 2026 WL 1045614 (D. Del. Apr. 17, 2026).

[10] *Turner v. Nat'l Notary Ass'n*, No. CV 25-0334, 2026 WL 947171 (C.D. Cal. Mar. 27, 2026).

[11] *Korn v. Simplilearn Ams. Inc.*, No. 25-10461, 2026 WL 472984 (D. Mass. Feb. 19, 2026); *Simon v. Scripps Networks, LLC*, No. 24-cv-8175, 2025 WL 3167915 (S.D.N.Y. Nov. 13, 2025); *Glinoga v. Sullivan Ent. Inc.*, No. 25-cv-707, 2025 WL 3035032 (S.D. Cal. Oct. 30, 2025); *Riley v. Zeus Networks, LLC*, No. 24-cv-13120,

sites,[12] to universities and instructional websites,[13] to every other type of defendant

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2025 WL 2793753 (D. Mass. Sept. 30, 2025); *Mull v. Gotham Distrib. Corp.*, No. 25-cv-6083, 2025 WL 2712215 (E.D. Pa. Sept. 22, 2025); *Balestrieri v. SportsEdTV, Inc.*, No. 25-cv-4046, 2025 WL 2776356 (N.D. Cal. Sept. 16, 2025); *Taino v. Bow Tie Cinemas, LLC*, No. 23-cv-5371, 2025 WL 2652730 (S.D.N.Y. Sept. 16, 2025); *Hossain v. Mediastar Ltd.*, No. 24-cv-1201, 2025 WL 2578128 (S.D.N.Y. Sept. 5, 2025); *Golden v. NBCUniversal Media, LLC*, No. 22-cv-9858, 2025 WL 2530689 (S.D.N.Y. Sept. 3, 2025), *aff'd*, No. 25-2226, 2026 WL 1098473 (2d Cir. Apr. 23, 2026); *Plotsker v. Envato Pty. Ltd.*, No. 24-cv-4412, 2025 WL 2481422 (C.D. Cal. Aug. 26, 2025); *Morrison v. Yippee Ent., Inc.*, No. 24-7235, 2025 WL 2389424 (9th Cir. Aug. 18, 2025); *Garcia v. Bandai Namco Ent. Am. Inc.*, No. 25-cv-967, 2025 WL 2451033 (C.D. Cal. Aug. 7, 2025); *Nixon v. Pond5, Inc.*, No. 24-cv-5823, 2025 WL 2030303 (S.D.N.Y. July 21, 2025); *Joseph v. IGN Ent., Inc.*, No. 24-cv-11579, 2025 WL 2597913 (D. Mass. July 10, 2025); *Archer v. NBCUniversal Media, LLC*, 794 F. Supp. 3d 716 (C.D. Cal. 2025); *Ballard v. Insomniac Holdings, LLC*, No. 25-cv-811, 2025 WL 1696558 (N.D. Cal. June 17, 2025); *Hoang To v. DirectToU, LLC*, No. 24-cv-6447, 2025 WL 1676858 (N.D. Cal. June 13, 2025); *Stark v. Patreon, Inc.*, No. 22-cv-3131, 2025 WL 1592736 (N.D. Cal. June 5, 2025); *Beagle v. Amazon.com, Inc.*, No. 24-cv-316, 2025 WL 1782958 (W.D. Wash. May 30, 2025), *appeal docketed*, No. 25-3989 (9th Cir. June 26, 2025); *Therrien v. Hearst Television, Inc.*, No. 23-cv-10998, 2025 WL 1208535 (D. Mass. Apr. 25, 2025) *appeal docketed*, No. 25-1487 (1st Cir. May 21, 2025); *N.Z. v. Fenxi Int'l Ltd.*, No. 8:24-cv-1655, 2025 WL 1122493 (C.D. Cal. Apr. 9, 2025); *Shapiro v. Peacock TV*, No. 23-cv-6345, 2025 WL 968519 (S.D.N.Y. Mar. 31, 2025); *Afriyie v. NBCUniversal Media, LLC*, 775 F. Supp. 3d 791 (S.D.N.Y. 2025); *Edwards v. MUBI, Inc.*, 773 F. Supp. 3d 868 (N.D. Cal. 2025); *Gardner v. Me-TV Nat'l Ltd. P'ship*, 132 F.4th 1022 (7th Cir. 2025); *Lee v. Plex, Inc.*, 773 F. Supp. 3d 755 (N.D. Cal. 2025); *Rodriguez v. ByteDance, Inc.*, No. 23 CV 4953, 2025 WL 672951 (N.D. Ill. Mar. 3, 2025); *Jones v. Starz Ent., LLC*, 129 F.4th 1176 (9th Cir. 2025); *Wissel v. Rural Media Grp., Inc.*, No. 24-CV-00999-P, 2025 WL 641434 (N.D. Tex. Feb. 27, 2025); *Thornton v. Mindvalley, Inc.*, No. 24-CV-00593, 2025 WL 877714 (N.D. Cal. Feb. 14, 2025).

[12] *Cole v. LinkedIn Corp.*, 807 F. Supp. 3d 959 (N.D. Cal. 2025).

[13] *Goodman v. Hillsdale Coll.*, No. 25-cv-417, 2025 WL 2941542 (W.D. Mich. Oct. 17, 2025); *Nguyen v. Elsevier Inc.*, No. 25-cv-825, 2025 WL 2901059 (N.D. Cal. Oct. 7, 2025); *Haines v. Cengage Learning, Inc.*, No. 24-cv-710, 2025 WL 2045644 (S.D. Ohio July 22, 2025); *Cochenour v. 360training.com, Inc.*, No. 25-cv-7, 2025

under the sun.

By stretching the statute, class-action plaintiffs seek to use the VPPA to end the ubiquitous practice of posting prerecorded video content, allowing viewers to engage for free, and then sharing information about the viewers with third parties. In so doing, plaintiffs take advantage of the fact that most businesses cannot afford to risk VPPA liability given its robust remedies. The VPPA provides for statutory damages of $2,500 per violation, 18 U.S.C. § 2710(c)(2)(A). Indeed, the ability to recover statutory damages when little or no actual damages exist is the reason the VPPA has been such an attractive statute for the plaintiff's bar. For large businesses that sell to many customers, liability in a VPPA class action (as most of these cases are) could be massive, as anyone who watched a video and who purchased a product could be a class member. Faced with the threat of bet-the-company liability, VPPA defendants frequently have little choice but to pay settlements and abandon their targeted advertising practices.

The de facto ban on targeted advertising sought by this litigation campaign would harm businesses and consumers. The business practice of offering content to consumers online for free, collecting some information about consumers, and then sharing that information with third parties is a cornerstone of the modern Internet

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WL 1954062 (W.D. Tex. July 8, 2025); *Lovett v. Continued.com, LLC*, No. 24-cv-590, 2025 WL 1809719 (S.D. Ohio July 1, 2025).

economy. Service providers are paid to gather and share website data with companies who then use that data to place advertisements, often via intermediaries like ad networks. *See* D. Daniel Sokol & Feng Zhu, Essay, *Harming Competition and Consumers Under the Guise of Protecting Privacy: An Analysis of Apple's iOS 14 Policy Updates*, 107 Cornell L. Rev. Online 94, 97-100 (2022) (explaining personalized advertising model in digital ecosystems). This practice has "enabled the open internet to flourish" because it subsidizes free services and content on the Internet, "supports a thriving R&D ecosystem," and "creates a high-value-added tech sector that benefits American workers." *Id.* at 98; Hadi Houalla, *Big Tech's Free Online Services Aren't Costing Consumers Their Privacy*, Info. Tech. & Innovation Found. (Sept. 20, 2023), https://itif.org/publications/2023/09/20/big-techs-free-online-services-arent-costing-consumers-their-privacy/. Removing the option of data sharing to support targeted advertising would hurt consumers and businesses alike—and especially small businesses.

Research shows that the vast majority of consumers prefer *not* to "pay a fee for [Internet] services [rather] than see advertisements" (93%) or "pay a fee rather than have the platform collect data on them and their activities" (90%). Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets*, 16 Va. L. & Bus. Rev. 217, 273–74 (2022); *see also* Interactive Advertising Bureau, *The Free and*

Open Ad-Supported Internet: Consumers, Content, and Assessing the Data Value Exchange 14, 17 (Jan. 2024), https://www.iab.com/wp-content/uploads/2024/01/IAB-Consumer-Privacy-Report-January-2024.pdf (noting that 78% of consumers would prefer to get more advertisements and pay nothing than to pay a small fee, and 69% of consumers are willing to share personal data to support advertising).

Forcing website providers to depend on revenue from sources other than targeted advertising would undermine that consumer preference and transform the Internet into something unrecognizable. Consumers would face new fees for services that were previously free, and those services may be of lower quality. *See* Ashley Johnson, *Banning Targeted Ads Would Sink the Internet Economy*, Info. Tech. & Innovation Found. (Jan. 20, 2022), https://itif.org/publications/2022/01/20/banning-targeted-ads-would-sink-internet-economy/; Houalla, *supra* (increased privacy results in lower ad effectiveness, leaving companies with less to spend on designing features for consumers). That would, in turn, create concerning inequities. "Wealthier households could bear the burden of paying for ad-free services. In contrast, households that could not afford additional subscription fees on top of their current expenses would be cut off from large swaths of the Internet." Johnson, *supra*; *see also* Houalla, *supra* ("Banning targeted ads would force companies to monetize their services with subscription fees against the wishes of

consumers and at the expense of low-income consumers."). As now-Chairman Ferguson of the Federal Trade Commission explained: "[T]argeted advertising makes much of the internet possible. The reason so much of our online activity does not require the constant exchange of money is because of targeted advertising. If regulators and lawmakers attempt to ban or seriously curtail targeted advertising, they will be undoing the balance of the online economy." Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the Social Media and Video Streaming Services Report, Fed. Trade Comm'n 4 (Sept. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-statement-social-media-6b.pdf.

Businesses, too, would suffer. Blocking targeted advertising would hurt both the websites providing data and advertising space and the businesses using that data and buying that advertising space. Targeted advertisements are crucial to businesses, particularly small businesses, seeking to find consumers and gain a foothold in highly competitive online markets. According to a recent study, 73% of small business owners agreed that losing the ability to use targeted advertising would harm their businesses. U.S. Chamber of Commerce, *Empowering Small Business: The Impact of Technology on U.S. Small Business* 31 (4th ed. 2025), https://www.uschamber.com/assets/documents/20251621-CTEC-Empowering-Small-Business-Report-2025-v1-r10-Digital-FINAL.pdf. On the provider side, Internet advertising

has become an engine of economic growth, accounting for $298 billion in total spending per year. John Deighton & Leora Kornfeld, *Measuring the Digital Economy: Advertising, Content, Commerce, and Innovation*, Interactive Advertising Bureau 22 (Apr. 2025), https://www.iab.com/wp-content/uploads/2025/04/Measuring-the-Digital-Economy_April_29.pdf. "The firms and technologies that enable this spending—ad agencies, ad networks, ad exchanges, data firms, and measurement firms, as well as publishers, platforms, self-employed web programmers, designers, writers, and digital creators—are responsible for millions of jobs in the U.S." *Id.*

"If advertisers and app developers cannot show the right ad to the right user," "developers' and publishers' revenues will plummet." Sokol & Zhu, *supra*, at 100. Indeed, according to one analysis, deprecating third-party cookies in digital advertising would decrease advertising revenues by 42%. Art Muldoon, *A Post-Cookie Revenue Risk and Revenue Replacement Playbook*, Digital Context Next (July 1, 2024), https://digitalcontentnext.org/blog/2024/07/01/a-post-cookie-revenue-risk-and-revenue-replacement-playbook/. And innovation in Internet and app development would stall. *See* Tobias Kircher & Jens Foerderer, *Ban Targeted Advertising? An Empirical Investigation of the Consequences for App Development*, 70 Mgmt. Sci. 1070, 1088-89 (2024).

Once again, it is small businesses—not the largest corporations—that would suffer most. Personalized advertising does not require a multimillion-dollar budget and so is more accessible to small businesses than, say, "foot[ing] the bill for television commercials that are irrelevant to most of the millions of viewers of an NFL game or 'The Voice.'" Sokol & Zhu, *supra*, at 99. It allows small businesses to specifically target the right audiences for their products and services in a relatively cost-effective manner; as a result, it empowers direct-to-consumer and "small, new, or niche brands" to compete with established players. *Id.* at 98-100. Taking away this business model would make it far costlier and more challenging for small businesses to find and reach audiences most likely to pay for their products and services. *Id.*

The only websites that could continue to provide this valuable consumer differentiation for advertising would be so-called "Walled Garden[s]"—the small number of digital publishers large enough that "platform data and consumer access are made exclusively available within their ecosystem." Jonathan Kaplan, Note, *Consumer Data Privacy Postmortem or: How I Learned to Stop Worrying and Love Big Tech*, 64 U. Louisville L. Rev. 347, 354 (2026); *see also* Meaghan Donahue, Note, *"Times They Are a Changin'"—Can the Ad Tech Industry Survive in a Privacy Conscious World?*, 30 Cath. U. J. L. & Tech. 193, 201 (2021) (observing that walled gardens "produce highly accurate consumer profiles that result in more efficient ad

placement without the use of traditional tracking mechanisms"). This would result in a shift of billions of dollars of advertising and ecosystem revenue away from the open web. John Deighton & Leora Kornfeld, *The Socioeconomic Impact of Internet Tracking*, Interactive Advertising Bur. 4 (Feb. 2020), https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf.

B. Pre-Internet statutes should not be retooled to regulate targeted advertising.

Plaintiff's interpretation of the VPPA is irreconcilable with its purpose and the context in which it was enacted—a red flag that the VPPA is not the right tool for the job of regulating targeted advertising. The VPPA was designed to protect people who rented VHS and Betamax videocassettes at brick-and-mortar video rental stores. *Salazar*, 133 F.4th at 645. "Congress's purpose in passing the [VPPA] was quite narrow," and it did not "intend[] for the law to cover factual circumstances far removed from those that motivated its passage." *Nickelodeon*, 827 F.3d at 284.

Yet the factual circumstances presented by this case and those like it could hardly be further removed from those that prompted Congress to enact the VPPA. "There is no doubt that the world of Roku devices, streaming video, and data analytics is a very different one from that of the physical video stores and tape rentals in which the VPPA was originally passed." *Robinson v. Disney Online*, 152 F. Supp. 3d 176, 184 (S.D.N.Y. 2015). In 1988, when the VPPA was enacted, "the Internet had not yet transformed the way that individuals and companies use consumer

data—at least not to the extent that it has today." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017). Targeted advertising supporting a wide variety of free Internet services would have been nearly unimaginable to the Congress that passed the VPPA in 1988.

Targeted advertising presents a modern, digital problem that this analog statute simply does not address. Ad hoc VPPA class-action settlements are not an appropriate substitute for updated legislation. Whether this key aspect of the Internet's basic business model impinges on users' privacy, and what restrictions should be imposed on such models, is subject to nuanced policy debate. That debate should occur in Congress. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 468, 477 (1997) (declining to address an issue because it represented "a question of economic policy for Congress and the Executive to resolve"). Congress can "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such [economic policy] decisions." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611–12 (1972). For example, Congress could consider the relevance of the fact that users can delete cookies from their computers—a fact Congress would not have considered in 1988, when a cookie was a type of snack. And, given that advertising-based business models vary considerably, Congress is in the best position to analyze these disparate services and decide what privacy regulation is appropriate for each one.

Notably, Congress has amended the VPPA to account for modern technological realities—but in a manner that does not assist the litigation program of Plaintiff and other plaintiffs. In 2013, Congress amended the VPPA to "reflect the realities of the 21st century," 158 Cong. Rec. 17,304 (2012), by "modifying those provisions of the law governing how a consumer can consent to the disclosure of personally identifiable information," *Nickelodeon*, 827 F.3d at 287. Specifically, Congress expressly clarified that "video tape service provider[s]" could obtain consumer consent to disclosure "through an electronic means using the Internet" upon meeting certain criteria, whereas previously the statute permitted disclosure with written consent. Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, § 2, 126 Stat. 2414, 2414 (2013).

Those amendments "demonstrate[] that Congress was keenly aware of how technological changes have affected the original Act." *Nickelodeon*, 827 F.3d at 288. As the Senate Report explained: "At the time of the [VPPA's] enactment, consumers rented movies from video stores. The method that Americans used to watch videos in 1988—the VHS cassette tape—is now obsolete. In its place, the Internet has revolutionized the way that American consumers rent and watch movies and television programs. Today, so-called 'on-demand' cable services and Internet streaming services allow consumers to watch movies or TV shows on televisions, laptop computers, and cell phones." *Id.* (quoting S. Rep. No. 112-258, at 2 (2012)).

Yet Congress did not amend the statutory definitions of "consumer" or "personally identifiable information," and more generally did not "change the scope of who is covered by the VPPA." *Ellis v. The Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015) (quoting 158 Cong. Rec. 17,305 (2012)). Given that "Congress has recently revisited the [VPPA] and[] … left the law almost entirely unchanged," *Nickelodeon*, 827 F.3d at 288, courts should not radically expand its coverage to prohibit conduct that was already in common practice at the time of the amendment.

In the end, whether to regulate targeted advertising is a decision for Congress. But Congress did not make that decision when it enacted the VPPA before the modern Internet even existed. The Court should decline Plaintiff's invitation to reorganize the Internet via a statute intended to regulate video stores.

CONCLUSION

The judgment of the district court dismissing Plaintiff's claims should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit set forth in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,747 words.

I further certify that this brief complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5)(A) and with the type-style requirements set forth in Federal Rule of Appellate Procedure 32(a)(6).

This brief complies with Circuit Rule 28A(h) because the files have been scanned for viruses and are virus-free.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam G. Unikowsky