No. 25-2857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TREVOR LAKES AND ALEX RAJJOUB, *on Behalf of Themselves and All Others Similarly Situated*,

Plaintiffs-Appellants,

v.

UBISOFT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of California No. 3:24-cv-06943
The Honorable Trina L. Thompson, 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: November 25, 2025 /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. The Plaintiffs here, and other plaintiffs in similar lawsuits, seek to impose

[1] No party opposes the filing of this brief. 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.

far-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 properly determined that Ubisoft's website meets the VPPA's standard for consent to share a consumer's data. In addition to being right on the law, the district court's approach serves the interests of the statute for consumers and for businesses. Requiring more—and more elaborate—notification and consent forms regarding data sharing for any prerecorded video content online would impose unnecessary burdens on Internet businesses while confusing consumers rather than enhancing their understanding of data disclosure practices.

The Court should reject even broader theories of VPPA liability advocated by *amicus curiae* supporting Plaintiffs, including that informed consent under the VPPA should be equivalent to that provided for medical procedures or attorney-client relationships, that written consent cannot be furnished through typical website tools, and that all video-related consent must be entirely separate from other privacy information.

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. This Court Should Affirm the District Court and Reject Aggressive and Unworkable Proposals to Expand the VPPA.

A. The district court's decision is right on the law and represents sound policy.

The district court correctly held that Ubisoft satisfies the VPPA's consent requirements. Ubisoft obtained valid consent through several means, including by showing a cookies banner that required users to consent to cookies prior to using the website and gave an option to change cookie consent preferences; requiring users to check a box accepting Ubisoft's (hyperlinked) privacy policy to create an account before purchasing games; and presenting users with a disclaimer at checkout linking to the privacy policy, which explicitly advised users that Ubisoft could share personal data with partners including Facebook. ER-10-11; *see* ER-168-170. The district court rightly found that these means satisfied the VPPA's requirement that notice be "distinct and separate" from other "legal or financial obligations," as the other material constituted mere disclosures and did not impose binding legal or

financial obligations on consumers. ER-16-18. The district court was also right that the consent was both "written" and "informed" within the meaning of the VPPA because the policies explained the relevant categories of cookies, stated that users could refuse cookies and adjust their preferences, and required that users take affirmative steps to actively indicate consent. ER-18. This Court should affirm for these same reasons.

In addition to being correct on the law, the district court's decision protects the interests of the statute. First, the district court's decision benefits consumers by preventing them from being bombarded with opaque disclosure banners concerning the VPPA that they will never read, much less understand. When they go online, consumers already must engage with an overwhelming volume of privacy notices, consent requests, pop-ups, click boxes, terms and conditions, and the like, on virtually every app or website they use. *See* Hana Habib et al., *"Okay, Whatever": An Evaluation of Cookie Consent Interfaces*, Chi. Conference on Human Factors in Computing Systems 17 (Apr. 2022), https://dl.acm.org/doi/pdf/10.1145/3491102.3501985.

All this hassle, in most cases, undermines the goal of providing notification and requiring consent. Studies show that when consumers are confronted with more disclosures, they have a harder time making informed decisions about their privacy. *See, e.g.*, Karl van der Schyff et al., *Online Privacy Fatigue: A Scoping Review and*

Research Agenda, Future Internet, 2023, at 9-10 (explaining that "overly complex privacy controls … significant[ly] increase" experience of "online privacy fatigue"). That effect is exacerbated by the fact that, as disclosures become more numerous due to changing regulatory requirements, they also become longer and more involved. *See* Isabel Wagner, *Privacy Policies Across the Ages: Content and Readability of Privacy Policies 1996-2021* (Jan. 2022), https://arxiv.org/pdf/2201.08739. Studies show that such a "haystack" of privacy and consent materials causes "information overload," meaning these materials "cannot be read and processed by lay people and [are] impractical for decision-making." Ella Corren, *The Consent Burden in Consumer and Digital Markets*, 36 Harv. J. L. & Tech. 551, 570 (2023) (footnote omitted). Indeed, "performance in cognitive tasks declines as attention drops," so consumers react to increased "amount[s] and complexity of information" by "choos[ing] rational ignorance over getting into the weeds of the information." *Id.* at 571.

To illustrate the point, following the adoption of the General Data Protection Regulation ("GDPR"), some European countries saw an increase of up to 45% in websites displaying cookie banners. Christine Utz et al., *(Un)informed Consent: Studying GDPR Consent Notices in the Field*, 2019 ACM SIGSAC Conf. on Comp. & Commc'ns Sec. (2019), https://arxiv.org/pdf/1909.02638. This caused users to become increasingly "fatigued with privacy notifications," prompting them to seek

browser extensions to block these banners. *Id.* at 1. Ironically, effects of the privacy law ultimately increased demand for streamlined consents across websites. *Id.*

Nor would it make practical or economic sense for consumers to spend time digesting these types of disclosures. Engaging with the already-existing notices and forms would add hours to the average person's typical day. *See* Irma Slekyte, *NordVPN Study Shows: Nine Hours to Read the Privacy Policies of the 20 Most Visited Websites in the US*, NordVPN (Oct. 23, 2023), https://perma.cc/F432-TV7S.

In short, requiring more separate disclosures under the VPPA would substantially worsen the user experience, while achieving no practical benefits in terms of promoting consumer understanding of their privacy rights. To the contrary, using the VPPA to require additional disclosures would exacerbate consumer confusion.

Reducing the number of useless but legally required consent forms also helps businesses avoid wasteful spending. Businesses spend between $5.5 million and $22 million per year on average complying with data privacy laws. *The True Cost of Compliance with Data Protection Regulations*, Ponemon Inst. 7 (2017), https://static.fortra.com/globalscape/pdfs/guides/gs-true-cost-of-compliance-data-protection-regulations-gd.pdf. With increased privacy regulation, those costs increase, as companies must hire more employees and upgrade technology to keep up. Mert Demirer et al., *Data, Privacy Laws and Firm Production: Evidence from*

the GDPR, at OA8-10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32146, 2024), https://www.nber.org/system/files/working_papers/w32146/w32146.pdf.

Small businesses bear the brunt of these burdens. Before the passage of the California Consumer Privacy Act, a report commissioned by the state Attorney General's office found that small firms would face disproportionately high compliance costs, providing a competitive advantage to larger businesses, which are more likely to be able to invest significant in-house compliance resources to adjust to new regulation. *See* Berkeley Econ. Advising & Rsch., LLC, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* (Aug. 2019). The VPPA is a case in point. Entrepreneurs starting innovative Internet businesses would have no idea that they might face class action lawsuits based on an obscure 1980s-era statute addressing movie rentals. And they would be especially surprised to learn that even if they exhaustively disclose all of their privacy practices and require affirmative consent, they might still be sued on the theory that two clicks are required rather than one. Large businesses can retain counsel to track the plaintiff's bar's ever-shifting ingenuities and adjust their never-read consent forms to withstand litigation, but small businesses investing their funds in product development rather than regulatory counsel do not have that luxury.

The Court should affirm the district court's common-sense determination that federal law does not demand that website visitors click on a pop-up about video rentals followed by a separate, similar pop-up.

B. The Court should reject EPIC's proposal for even more stringent consent requirements.

This Court should also decline the invitation of *amicus curiae* Electronic Privacy Information Center ("EPIC") to endorse even more extreme consent requirements than Plaintiffs propose. *See* Br. of EPIC as *Amicus Curiae* in Supp. of Plaintiff-Appellants and Reversal, Doc. No. 19.1 [hereinafter "EPIC Br."]. EPIC cites a study finding that 74% of users do not read privacy policies, and that actually reading them would "lead to an estimated total national cost of $781 billion annually (over $1.2 trillion today when adjusted for inflation)." *Id*. at 19 (citing Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J.L. & Pol'y for Info. Soc'y 543, 563–65 (2008)). Yet their purported solution to this problem is *more* and *more complicated* privacy policies that, by their own logic, no one will or should read. EPIC's proposals would make the existing problems even worse.

As to informed consent, EPIC argues for a standard drawn from medical consent, under which patients must be told "the nature of the operation or the extent of the harm that is necessarily involved." EPIC Br. at 12 (quoting *Restatement (Second) of Torts* § 892B cmt. i (Am. L. Inst. 1979)). But having one website share

video-watching information with another website is—it should be obvious—different from donating an organ. When bodily integrity is involved, the stakes are higher, so consent requirements should be more stringent. Likewise, contrary to EPIC's view, consent in the context of watching Internet videos should plainly differ from consent in the context of attorney-client relationships. Not only are attorneys fiduciaries, but also clients hire lawyers with the understanding that the decisions they make can be life changing. The same cannot be said for watching video game cut scenes.

EPIC's proposal is also entirely unworkable. EPIC suggests that this Court should import an informed consent standard, for example, from regulations promulgated by the Department of Health and Human Services to govern "testing on human subjects." EPIC Br. at 11. Those regulations demand a "concise and focused presentation of key information" that enables subjects to understand "reasons why one might or might not consent" to the testing. *Id.* (quoting 45 C.F.R. § 46.116(a)(5)(i)). Transposed to the context of a video game website, that standard would require online businesses to create and customers to wade through lengthy educational materials about advertising technology, consumer preference profiling, and the like before proceeding to purchase a video game. The VPPA does not require that unmanageable degree of notice and consent.

As to the VPPA's requirement that consent be "written," EPIC argues that industry-standard website designs like clickwrap, a highlighted "OK" button, or toggles to select cookie settings are insufficient. This makes little sense. EPIC seems to concede that typing information using a keyboard is sufficient to establish "consent." EPIC does not explain why courts should distinguish between tapping a keyboard and tapping a mouse. Further, EPIC's arguments ignore Congress's decision in 2012 to amend 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," *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 287 (3d Cir. 2016). Specifically, Congress clarified that "video tape service provider[s]" could obtain consumer consent to disclosure "through an electronic means using the Internet." Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, § 2, 126 Stat. 2414, 2414 (2013). Congress's clear intent was to render industry-standard means of disclosure and consent—including clickwrap, "OK" buttons, and settings toggles—compliant with the statute. EPIC's proposals would undermine the amendment by requiring cumbersome forms of consent that are inconsistent with contemporary Internet use.

Regarding the VPPA's provision requiring that consent must be "distinct and separate" from other "legal or financial obligations," EPIC asks this Court to

mandate that VPPA privacy disclosures appear alone—hermetically sealed from *any* other disclosures. EPIC Br. at 13. That is not what the statute demands. The statutory text directs that VPPA disclosures must be presented separately from "legal and financial obligations"—it does not require that they be presented as an entirely separate interface.

Not only are these proposals by EPIC incompatible with the statutory text, but also they are unmanageable in practice. EPIC would require separate consent forms for video data disclosures, non-video data disclosures, and each specific type of cookie, while preventing users from engaging in the ubiquitous practice of indicating consent via a mouse click. Requiring more written engagement by users in order to access any websites that contain any prerecorded video content (the majority of websites) would clutter the interface and make completing basic tasks online highly time-intensive.

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

Plaintiffs' suit is part of a broader, nationwide litigation campaign seeking to leverage the VPPA to fundamentally transform the Internet. These suits ask federal courts to rewrite the VPPA from a 1980s law about brick-and-mortar rentals of VHS tapes to make it a *de facto* ban on targeted advertising. This Court should not entertain this effort. This litigation program would decimate many businesses—especially small businesses—and make the Internet more expensive for companies

and less usable for consumers. Congress did not pass the VPPA to reinvent the modern Internet; the forms of targeted advertising that Plaintiffs here target did not even exist at the time the law was enacted.

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

With this lawsuit, Plaintiffs seek 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. 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

[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] *Salazar v. NBA*, No. 22-cv-7935, 2025 WL 2830939 (S.D.N.Y. Oct. 6, 2025), *appeal docketed*, No. 25-2478 (2d Cir. Oct. 9, 2025); *Joiner v. NHL Enters., Inc.*, 23-cv-2083, 2025 WL 3126106 (S.D.N.Y. Sept. 29, 2025), *appeal docketed*, No. 25-2789 (2d Cir. Nov. 3, 2025); *Hughes v. NFL*, No. 24-2656, 2025 WL 1720295 (2d Cir. June 20, 2025); *Wong v. MLB Advanced Media, L.P.,* No. 24-CV-00779, 2025 WL 2180445 (N.D. Cal. Jan. 22, 2025).

fitness websites,[5] to parenting-advice companies,[6] to chess websites,[7] to real estate companies,[8] to media and entertainment companies,[9] to professional networking

[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), *appeal docketed*, No. 25-6110 (9th Cir. Sept. 29, 2025).

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

[8] *Banks v. CoStar Realty Info., Inc.*, No. 25-cv-564, 2025 WL 2959228 (E.D. Mo. Oct. 20, 2025).

[9] *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, 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), *appeal docketed*, No. 25-2226 (2d Cir. Sept. 16, 2025); *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*, No. 24-cv-10744, 2025 WL 2601509 (C.D. Cal. July 2, 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); *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025), *petition for cert. filed*, No. 25-228 (U.S. Aug. 27, 2025); *Therrien v. Hearst Televisin, Inc.*, No. 23-cv-10998, 2025 WL 1208535 (D. Mass. Apr. 25, 2025) *appeal docketed*, No. 25-1487

sites,[10] to universities and instructional websites,[11] to every other type of defendant under the sun. And those are just examples drawn from cases decided in *2025 alone*.

These lawsuits do not merely assert the rights of people who subscribe to *videos*, as the VPPA provides. They assert the putative VPPA rights of people who buy or subscribe to *anything* from the defendant company and then, separately, watch a free video offered by that defendant—without any "factual nexus or relationship between the subscription provided by the defendant and the defendant's allegedly actionable video content." *Tawam v. Feld Ent. Inc*., 684 F. Supp. 3d 1056, 1061 (S.D. Cal. 2023); *see also, e.g.*, *Pileggi v. Wash. Newspaper Publ'g Co., LLC*,

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(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); *Salazar v. Paramount Glob.*, 133 F.4th 642 (6th Cir. 2025), *petition for cert. filed*, No. 25-459 (U.S. Oct. 15, 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).

[10] *Cole v. LinkedIn Corp.*, No. 25-cv-1097, 2025 WL 2963221 (N.D. Cal. Oct. 20, 2025).

[11] *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 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).

146 F.4th 1219, 1231 (D.C. Cir. 2025) (rejecting VPPA claims where plaintiff subscribed to newsletter, but defendant only shared information about plaintiff's interactions with videos on website, which was totally separate from newsletter).

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).

Nor is the type of personal data at issue in these cases "personally identifiable information" as the VPPA uses the term. As multiple courts of appeals have recognized, "based on the words of the statute, the specific context in which the language is used, and the broader context of the statute as a whole," the term

"personally identifiable information" as the VPPA uses it "encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so." *Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 52 (2d Cir. 2025); *see Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017), *petition for cert. filed*, No. 25-228 (U.S. Aug. 27, 2025); *In re Nickelodeon*, 827 F.3d at 267. To take one example involving recent litigation over Facebook Pixel, "[i]t is implausible that an ordinary person would look at the phrase 'title% 22% 3A% 22-% E2% 96% B7% 20The% 20Roast% 20of% - 20Ric% 20Flair' … and understand it to be a video title." *Solomon*, 136 F.4th at 54.

What's more, the companies these cases target, like Ubisoft, are not "video tape service provider[s]" as the VPPA uses the term.[12] 18 U.S.C. § 2710(a)(4). "Video tape service providers" are businesses transacting in "prerecorded video cassette tapes or similar audio visual materials." *Id.* 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" that is the

[12] Courts have also held, for example, that persons who download a free app to watch videos on their smartphones are not "subscribers" under the VPPA, *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1257 (11th Cir. 2015), and that persons are not "consumers" for purposes of the VPPA if they did not "purchase, rent, or subscribe to" the videos about which the defendant transmitted information, *Pileggi*, 146 F.4th at 1237; *see also Salazar v. Paramount Glob.*, 133 F.4th at 652-53 (similar).

hook for nearly every case cited above. *See Pileggi*, 146 F.4th at 1239 (Randolph, J., concurring) (some quotation marks omitted). That is especially true for video games, which are interactive play.

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); 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.

B. Banning targeted advertising would hurt businesses and consumers.

The litigation campaign of which Plaintiffs are a part seeks, ultimately, to use courts to ban targeted advertising. But such a ban 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 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* Yan Lau, Bur. of Econ., FTC, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising* 2 (Jan. 2020), https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf. 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." 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, 98 (2022); 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* Anna Yukhananov, *Consumers Love to Hate Ads but Won't Pay to Escape Them*, Morning Consult (Sept. 23, 2017), https://morningconsult.com/2017/09/23/consumers-love-hate-ads-wont-pay-escape/ (summarizing research showing that 67% of Americans were not willing to pay more for a service without advertisements).

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 consumers would simply pay up, while "more wealth-constrained users" would disproportionately "los[e] access" to valuable "free services." Lau, *supra*, at 11; *see also* Johnson, *supra*.

Businesses, too, would suffer. Targeted advertising is now "integral to a multi-billion-dollar economic system employing hundreds of thousands of people and contributing to entrepreneurship on a scale our economy has not seen before."

John Deighton & Leora Kornfeld, *The Socioeconomic Impact of Internet Tracking*, Interactive Advertising Bur. 3 (Feb. 2020), https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf. Blocking this practice would hurt both the websites providing data and advertising space and the businesses using that data and buying that advertising space. Without data for personalized advertising, websites "must sell their advertising space as undifferentiated audiences when they trade on the open web," requiring them to sell advertising for a lower price. *Id.* at 23. "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; Lau, *supra*, at 4 (similar). And innovation in Internet and app development will stall. *See* Tobias Kirchner & Jens Foerderer, *Ban Targeted Advertising? An Empirical Investigation of the Consequences for App Development*, Mgmt. Sci. § 8 (May 19, 2023), https://pubsonline.informs.org/doi/10.1287/mnsc.2023.4726.

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 gardens"—the "small number of very large digital publishers whose first-party relationships with consumers are so extensive that they can operate without tracking." Deighton & Kornfeld, *supra*, at 4; *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. *Id.*

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

Plaintiffs' 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 (and, specifically, was "[s]purred by the publication of Judge Robert Bork's video rental history on the eve of his confirmation hearings."). *Salazar v. Paramount Glob.*, 133 F.4th 642, 645 (6th Cir. 2025), *petition for cert. filed*, No. 25-459 (U.S. Oct. 15, 2025). "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*, 876 F.3d at 985. 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). Consider, for instance, that advertising-based business models vary significantly. Congress is best positioned to analyze the range of services and decide what privacy regulation is appropriate for each. Congress, too, is best equipped to evaluate the realities of changing technologies.

Adopting a common-sense interpretation of the VPPA's consent provision would mitigate these concerns. Ordinary Internet users who are willing to accept cookies in exchange for watching free video content can click on consent forms without a fuss. The miniscule minority of Internet users who read privacy forms closely can obtain all of the information they need in a single document. And Internet businesses who disclose their practices in good faith will not face class-action lawsuits. Yet Plaintiffs' position would exacerbate the VPPA's impact on Internet businesses by forcing them to choose between facing class-action lawsuits and degrading the consumer experience.

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 Plaintiffs' invitation to reorganize the Internet via a statute intended to regulate video stores.

CONCLUSION

The judgment of the district court dismissing Plaintiffs' 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 Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,715 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).

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth 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.

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