No. 23-1147

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL SALAZAR, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

NATIONAL BASKETBALL ASSOCIATION,
Defendant-Appellee.

Appeal from the U.S. District Court for the Southern District of New York
Case No. 1:22-cv-7935 – Judge Jennifer Louise Rochon

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

Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337
jvonbokern@uschamber.com

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Allison N. Douglis
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 891-1600
adouglis@jenner.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Salazar's Argument Conflicts with the Text and History of the VPPA. 4

II. The Court Should Reject Salazar's Effort to Transform the Internet Via the VPPA. 9

A. Salazar and other plaintiffs seek to abolish targeted advertising. 9

B. Pre-Internet statutes should not be retrofitted to regulate the Internet. 12

C. Banning targeted advertising would hurt businesses and consumers. 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Cantu v. Geico Insurance Agency, LLC, No. 23-cv-03125 (C.D. Cal.) 10

Carroll v. Chick-fil-a, Inc., No. 4:23-cv-00314 (N.D. Cal.).....10

Carroll v. General Mills, Inc., No. 23-cv-1746, 2023 WL 4361093 (C.D. Cal. June 26, 2023) 11

Carroll v. General Mills, Inc., No. 23-cv-1746, 2023 WL 6373868 (C.D. Cal. Sept. 1, 2023).....10, 11

Carter v. Scripps Network, LLC, No. 22-cv-02031, --- F. Supp. 3d ----, 2023 WL 3061858 (S.D.N.Y. Apr. 24, 2023) 7, 10

Edwards v. University Athletic Ass'n, No. 23-cv-00065 (N.D. Fla.) 10

Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015).....5, 15

Gardener v. MeTV, No. 22-cv-5963, 2023 WL 4365901 (N.D. Ill. July 6, 2023) 10

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) 13

Golden v. NBCUniversal Media, LLC, No. 22-cv-9858, 2023 WL 5434378 (S.D.N.Y. Aug. 23, 2023).....10

Harris v. Public Broadcasting Service, No. 22-cv-2456, 2023 WL 2583118 (N.D. Ga. Mar. 20, 2023).....10

Hernandez v. Container Store, Inc., No. 23-cv-05067 (C.D. Cal.) 10

Lam v. Books-A-Million, Inc., No. 22-cv-01717 (M.D. Fla.) 10

Lamb v. Forbes Media LLC, No. 22-cv-6319, 2023 WL 6318033 (S.D.N.Y. Sept. 28, 2023).....7, 10

Lebakken v. WebMD, LLC, 640 F. Supp. 3d 1335 (N.D. Ga. 2022) 10

In re Nickelodeon Consumer Privacy Litigation, 827 F.3d 262 (3d Cir. 2016) 7, 13, 14, 15

Robinson v. Disney Online, 152 F. Supp. 3d 176 (S.D.N.Y. 2015) 12

Salazar v. Paramount Global, No. 22-cv-756, 2023 WL 4611819 (M.D. Tenn. July 18, 2023), *appeal docketed*, No. 23-5748 (6th Cir. Aug. 21, 2023) 7, 10

Tawam v. Feld Entertainment Inc., No. 23-cv-357, --- F. Supp. 3d ----, 2023 WL 5599007 (S.D. Cal. July 28, 2023) 10

Tawam v. Rock & Roll Hall of Fame & Museum, Inc., No. 23-cv-00456 (S.D. Cal.) 10

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 13

Yershov v. Gannett Satellite Information Network, Inc., 820 F.3d 482 (1st Cir. 2016) 5–6

STATUTES

18 U.S.C. § 2710 4

18 U.S.C. § 2710(a)(1) 2, 4

18 U.S.C. § 2710(a)(4) 2, 4

18 U.S.C. § 2710(c)(2)(A) 12

Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 14

LEGISLATIVE MATERIALS

158 Cong. Rec. 17,304 (2012) 14

S. Rep. No. 100-599 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1 8

OTHER AUTHORITIES

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 (2022) 18

Megan Case, *Google, Big Data, & Antitrust*, 46 Del. J. Corp. L. 189 (2022).....18

John Deighton & Leora Kornfeld, *The Socioeconomic Impact of Internet Tracking*, Interactive Advertising Bur. (Feb. 2020), https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf.....16, 17

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 (2021).....17

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/.....18, 19

Yan Lau, Bur. of Econ., Fed. Trade Comm'n, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising* (Jan. 2020), https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf.....16, 17, 19

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 (2022).....15, 16, 17

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/ 18

All parties have consented to the filing of this brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America 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 at 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.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

The plaintiff here, and other plaintiffs in similar lawsuits, seek to impose 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

The district court properly determined that Plaintiff Michael Salazar is not a "consumer" under the VPPA merely because the NBA has videos on its website and Salazar happens to subscribe to an NBA email newsletter.

The district court's decision is grounded in the VPPA's text and history. The VPPA provides its protection to any "consumer," defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). A "video tape service provider" is "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4). Salazar clicked on videos on the NBA's website, but he never purchased or rented a video or subscribed to any video service. As such, he is not a "consumer" under the VPPA, regardless of whether he might have subscribed to a separate email newsletter. The VPPA's history confirms what is plain from the text: the VPPA was enacted to protect the privacy of people who rented movies from

video stores, not people who bought separate products from stores that happened to sell videos.

Salazar's claim is part of a broader litigation program that seeks to stretch the VPPA far beyond its intended scope, and that would—if successful—fundamentally transform the Internet. Salazar and other plaintiffs are attempting to use the VPPA as a means to effectively abolish targeted advertising. If Salazar's theory prevails, no business will be able to share potentially identifying information about video viewers with third parties without risking class action liability.

These plaintiffs' use of the VPPA—a statute enacted in the 1980s—as a means of regulating the Internet improperly diverts policy issues appropriately reserved for Congress to class action litigation. Congress is capable of assessing what, if any, regulation should be imposed on Internet tracking. But this nuanced inquiry should not be overridden by litigation under a thirty-five-year-old statute intended to address an entirely different technology.

Further, if plaintiffs' litigation program succeeds, many websites' business models will be destroyed, to the detriment of both businesses and the Internet users they serve. The Court should not expand the VPPA so radically beyond its intended purposes.

ARGUMENT

I. Salazar's Argument Conflicts with the Text and History of the VPPA.

Salazar watched videos on the NBA's website for free. As a result of Facebook's web analytics tools, identifying information about Salazar and the video Salazar watched were allegedly disclosed to Facebook. Salazar also subscribes to an NBA email newsletter. Based on these facts alone, Salazar contends that he should be able obtain statutory damages from the NBA under the VPPA. The district court correctly held that Salazar's contention conflicts with the VPPA's text and history.

The VPPA prohibits "video tape service provider[s]" from disclosing "personally identifiable information" of their "consumers." 18 U.S.C. § 2710. A "video tape service provider" is "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4). A "consumer" under the VPPA is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1).

As the district court correctly explained, the VPPA's plain text forecloses Salazar's claim. A "video tape service provider" provides "prerecorded video cassette tapes or similar audio visual materials." Hence, a "subscriber of … services from a video tape service provider" subscribes to a service in which he receives

"prerecorded video cassette tapes or similar audio visual materials." Salazar does not subscribe to any service in which he receives any prerecorded video cassette tapes or similar audio visual materials. Hence, Salazar's claim fails as a matter of law.

Salazar's efforts to shoehorn his allegations into the VPPA fall short. Salazar makes the remarkable claim that merely *watching* a video, without more, transforms him into a "subscriber" under the VPPA. Salazar Br. 36 (arguing that "'subscriber'" should be construed to "refer to those who accept 'delivery' of … content from a video tape service provider"). Salazar acknowledges that this argument departs from the "ordinary and common meaning" of "subscriber." *Id.* On that issue, Salazar is correct. A person does not "subscribe" to a video by watching it. As the district court correctly held, a "subscriber" relationship requires an "ongoing relationship between provider and subscriber, one generally undertaken in advance and by affirmative action on the part of the subscriber, so as to supply the provider with sufficient personal information to establish the relationship and exchange." JA.206 (quoting *Austin-Spearman v. AMC Network Ent. LLC*, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015)). Two other circuits have reached the same conclusion. *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1256 (11th Cir. 2015) (holding that "'subscription' involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity"); *Yershov v. Gannett*

Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016) (holding that a person must have "established a relationship [with the content provider] that is materially different from what would have been the case had [the website] simply remained one of millions of sites on the web that [the plaintiff] might have accessed through a web browser").

Salazar offers the equally implausible theory that if he purchases, rents, or subscribes to *anything* from the NBA—even something distinct from audiovisual content—he becomes eligible to sue under the VPPA merely because the NBA also provides free videos on its webpage. Thus, Salazar claims that his subscription to the NBA's free email newsletter is a sufficient basis to give him a cause of action under the VPPA.

There is good reason to be skeptical that signing up to receive free emails qualifies as "subscribing" under the VPPA; in 1988, when free emails did not exist, video subscriptions were services that people paid for. But even accepting the premise that Salazar "subscribes" to the NBA's email newsletter within the meaning of the VPPA, Salazar is not a "subscriber of goods or services from a *video tape service provider*" when the service to which he subscribes has nothing to do with video tape services. Once again, as the district court and other courts have held, the plain text of the VPPA forecloses Salazar's interpretation. JA.207 ("A consumer under the VPPA—and necessarily, a 'renter, purchaser, or *subscriber*' under the

VPPA—consumes (or rents, purchases, or subscribes to) audio visual materials, not just any products or services from a video tape services provider."); *Carter v. Scripps Network, LLC*, No. 22-cv-02031, --- F. Supp. 3d ----, 2023 WL 3061858, at *6 (S.D.N.Y. Apr. 24, 2023) ("[T]he scope of a 'consumer,' when read with sections 2710(b)(1) and (a)(4), is cabined by the definition of 'video tape service provider,' with its focus on the rental, sale or delivery of audio visual materials."); *accord Lamb v. Forbes Media LLC*, No. 22-cv-6319, 2023 WL 6318033, at *12 (S.D.N.Y. Sept. 28, 2023); *Salazar v. Paramount Glob.*, No. 22-cv-756, 2023 WL 4611819, at *11–12 (M.D. Tenn. July 18, 2023), *appeal docketed*, No. 23-5748 (6th Cir. Aug. 21, 2023); *see* Salazar Br. 11 n.2 (collecting cases).

Any doubt over the meaning of the VPPA's text is resolved by its history. 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. The VPPA was enacted in response to a specific incident: 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 customers—*i.e.*, "any renter, purchaser, or subscriber of goods or services from a video tape service provider."

Under Salazar's vision of the VPPA, however, the purchaser of a bag of potatoes from a grocery store could be a VPPA plaintiff merely if the grocery store happened to sell VHS movies in one of the aisles. The legislative history confirms what is already clear from the text: this is not what Congress had in mind. 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.* The district court correctly recognized that this legislative history "supports the Court's interpretation that the VPPA only applies to consumers (including subscribers) of audio visual services." JA.207.

Finally, Salazar's interpretation makes little sense. The VPPA's protections are not triggered merely because someone watched a video. Rather, the VPPA applies only to purchasers, renters, or subscribers from video providers—people who pay video providers for video content, or, at a minimum, have an ongoing

relationship with those providers. Thus, if a consumer requests content in the context of such a relationship, the provider must keep that content confidential unless the consumer consents. Under Salazar's interpretation, however, the VPPA's protections turn on whether the consumer has previously entered into a separate economic transaction with the seller. Salazar himself contends that a plaintiff who purchased a good from the NBA "entirely unrelated to the delivered video content," such as a LeBron James jersey, is a "consumer" eligible to sue the NBA under the VPPA. Salazar Br. 29. It makes little sense that a video-viewer's statutory privacy protections would turn on whether the viewer bought a distinct, non-audiovisual good at some previous time.

II. The Court Should Reject Salazar's Effort to Transform the Internet Via the VPPA.

Salazar's lawsuit is part of a broader litigation program that would, if successful, fundamentally transform the Internet by turning the VPPA into a *de facto* ban on targeted advertising. The Court should reject this effort—not only because Congress never intended for the VPPA to serve this purpose, but because the plaintiffs' litigation program would destroy the business models of countless websites and would make the Internet far more expensive and far worse.

A. Salazar and other plaintiffs seek to abolish targeted advertising.

Salazar's lawsuit is part of a wave of class-action litigation that uses the VPPA as a mechanism to seek damages for ordinary targeted advertising practices. Salazar

and other plaintiffs across the country have filed VPPA claims like this one not just against the NBA, but against businesses from every sector of the economy, ranging from media and entertainment companies,[2] to health websites,[3] to bookstores,[4] to restaurants,[5] to retail stores,[6] to insurance companies,[7] to breakfast cereal manufacturers,[8] to museums,[9] to universities,[10] to every other type of defendant under the sun. These lawsuits do not merely seek to assert the rights of people who subscribe to *videos*. Instead, they assert the putative VPPA rights of people who buy or subscribe to *anything* from the defendant and then, separately, watch a free video on the defendant's webpage.

---

[2] *Lamb*, 2023 WL 6318033; *Golden v. NBCUniversal Media, LLC*, No. 22-cv-9858, 2023 WL 5434378 (S.D.N.Y. Aug. 23, 2023); *Tawam v. Feld Ent. Inc.*, No. 23-cv-357, --- F. Supp. 3d ----, 2023 WL 5599007 (S.D. Cal. July 28, 2023); *Paramount Global*, WL 4611819; *Gardener v. MeTV*, No. 22-cv-5963, 2023 WL 4365901 (N.D. Ill. July 6, 2023); *Carter*, 2023 WL 3061858; *Harris v. Pub. Broad. Serv.*, No. 22-cv-2456, 2023 WL 2583118 (N.D. Ga. Mar. 20, 2023).

[3] *Lebakken v. WebMD, LLC*, 640 F. Supp. 3d 1335 (N.D. Ga. 2022).

[4] *Lam v. Books-A-Million, Inc.*, No. 22-cv-01717 (M.D. Fla.) (voluntarily dismissed on October 19, 2022).

[5] *Carroll v. Chick-fil-a, Inc.*, No. 23-cv-00314 (N.D. Cal.).

[6] *Hernandez v. Container Store, Inc.*, No. 23-cv-05067 (C.D. Cal.).

[7] *Cantu v. Geico Ins. Agency, LLC*, No. 23-cv-03125 (C.D. Cal.).

[8] *Carroll v. General Mills, Inc.*, No. 23-cv-1746, 2023 WL 6373868 (C.D. Cal. Sept. 1, 2023) (voluntarily dismissed on September 25, 2023).

[9] *Tawam v. Rock & Roll Hall of Fame & Museum, Inc.*, No. 23-cv-00456 (S.D. Cal.) (voluntarily dismissed on May 5, 2023).

[10] *Edwards v. Univ. Athletic Ass'n*, No. 23-cv-00065 (N.D. Fla.) (initially bringing claim against the University of Florida).

The effect of these lawsuits would be to ban the ubiquitous practice of websites posting videos, allowing viewers to view them for free, and sharing information about the viewer with a third party. In principle, this practice would remain legal with respect to viewers who never purchased or subscribed to anything from the business. But in reality, there is no possible way for a business to know whether a given viewer of a video had previously bought some separate product from the business. Consider the example of *Carroll v. General Mills, Inc.*, No. 23-cv-1746, 2023 WL 4361093 (C.D. Cal. June 26, 2023); *see also Gen. Mills*, 2023 WL 6373868 (addressing second amended complaint). The plaintiffs attested that they observed the videos "Today's Experiment, Carbonation Baking" and "LTO Excitement Lucky Cakes" on the Betty Crocker and General Mills websites, respectfully. *Gen. Mills*, 2023 WL 4361093, at *1. They further alleged that, at some unspecified point in their lives, they "have purchased and eaten Defendant's products." *Id.* at *3. This, the plaintiffs claimed, was a sufficient basis to render them VPPA plaintiffs. General Mills cannot possibly know whether particular visitors to its website previously bought Betty Crocker Brownies or Honey Nut Cheerios from a retail store at some previous point in their lives.

Thus, sharing information with respect to any viewer could transform that viewer into a class-action plaintiff—a risk that businesses cannot afford. VPPA cases are typically class actions invoking the VPPA's provision for statutory

damages of $2,500 per violation. *See* 18 U.S.C. § 2710(c)(2)(A). For large businesses that sell to many customers, liability could be massive—anyone who watched a video and who purchased a product could be a class member. If Salazar's interpretation of the VPPA prevails, the only plausible way for businesses to avoid liability is to turn off targeted advertising for *all* viewers. In this fashion, Salazar's and other plaintiffs' litigation program seeks to render targeted advertising impracticable.

B. Pre-Internet statutes should not be retrofitted to regulate the Internet.

It would be an understatement to state that Salazar's claim departs from the VPPA's original purpose. The VPPA was designed to protect people who rented VHS and Betamax videocassettes at brick-and-mortar video rental stores. The VPPA was not enacted to protect Internet users from cookies that might lead to targeted advertising if the users choose not to delete them. Indeed, at the time of the VPPA's enactment in 1988, targeted advertising would have been science fiction.

Targeted advertising should not be regulated via ad-hoc VPPA class action settlements negotiated by creative plaintiffs' lawyers. Analogizing the conduct regulated by the Act in 1988 to the modern-day Internet is "akin to placing a square peg into a round hole," *Robinson v. Disney Online*, 152 F. Supp. 3d 176, 184–85 (S.D.N.Y. 2015) (internal quotation marks and alteration omitted). Congress did not contemplate the policy issues presented by this case, and courts should not retrofit a

statute addressing a different problem—particularly where doing so has the potential to dramatically unsettle the targeted advertising model on which many Internet businesses rely. As the Third Circuit explained in *In re Nickelodeon Consumer Privacy Litigation*, "Congress's purpose in passing the Video Privacy Protection Act was quite narrow," and it did not "intend[] for the law to cover factual circumstances far removed from those that motivated its passage." 827 F.3d at 284. The VPPA applies to disclosures akin to "a video clerk leaking an individual customer's video rental history. Every step away from that 1988 paradigm will make it harder for a plaintiff to make out a successful claim." *Id.* at 290.

Whether such advertising-based business models improperly impinge on users' privacy, and what restrictions should be imposed on such models, is a nuanced policy debate. That debate should occur in Congress, not in patchwork litigation under a statute enacted before those technologies existed. *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"); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611–12 (1972) ("To 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 … the judgment of the elected representatives of the people is required."). Congress is better positioned to undertake the extensive fact-finding that would be

necessary in weighing the benefits of advertising-based business models against concerns about privacy. 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 Salazar and other plaintiffs. In 2013, Congress amended the VPPA to "reflect the realities of the 21st century," 158 Cong. Rec. 17,304 (2012); Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414, 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. Those amendments "demonstrate[] that Congress was keenly aware of how technological changes have affected the original Act." *Id.* 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*, 803 F.3d at 1253 (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, the courts should not radically expand its coverage to prohibit conduct that was already in common practice at the time of the amendment.

C. Banning targeted advertising would hurt businesses and consumers.

Not only would Salazar's position cause courts to seize policymaking authority from Congress, but Salazar's position would be *bad* policy.

The business model of sharing information for purposes of targeted advertising underlies many of the Internet's most widely used services. *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, 98 (2022) ("The ad-supported model has enabled the open internet to flourish, and impacts the financial viability of not just apps, but entire sectors."). Companies across a variety of industries contract with service

providers to enable targeted advertising. *See* Yan Lau, Bur. of Econ., Fed. Trade Comm'n, *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. Companies sharing their website data are paid by the companies placing advertisements, often via intermediaries like ad networks. *Id.* Targeted advertising is therefore "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. By one estimate, if "tracking" of customer data were to cease, billions of dollars would be shifted away from websites that presently support openly available content using that model. *See id.* at 4, 29.

Small businesses and individual consumers would lose the most. "[P]ersonalized advertising offers smaller businesses—without multimillion-dollar advertising budgets—a way to find an audience for their products and services; many advertisers can't afford to foot 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. Without data for personalized advertising, "publishers must sell their advertising space as undifferentiated audiences when they trade on the open web," requiring them to sell advertising for a lower price. Deighton & Kornfeld, *supra*, at 23; *see also* Sokol & Zhu, *supra*, at 100 ("If advertisers and app developers cannot show the right ad to the right user … developers' and publishers' revenues will plummet, and consumers will no longer receive the free apps and services that advertising makes possible."); Lau, *supra*, at 4 (similar). Personalized advertisements also benefit the company placing the advertisement, which can target its advertisement budget at those users who are most likely to purchase its products. Sokol & Zhu, *supra*, at 98–100. This allows direct-to-consumer and "small, new, or niche brands" to compete with established incumbent players. *Id.* at 99.

If targeted advertising is abolished, the only websites that could provide the consumer differentiation needed to support efficient advertising would be the small set of platforms that function as "walled gardens"—that is, 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. This would result in a shift of billions of dollars of advertising and ecosystem revenue away from the open web. *Id.*; *see* 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 so-called walled

gardens "produce highly accurate consumer profiles that result in more efficient ad placement without the use of traditional tracking mechanisms," but that "putting so much power in the hands of the few may prove to be dangerous without proper industry standards or transparency regulations in place") (collecting sources).

Consumers also stand to lose out. "Targeted advertising subsidizes free services and content on the Internet, … and has made possible the exponential growth of and innovation on the Internet." Megan Case, *Google, Big Data, & Antitrust*, 46 Del. J. Corp. L. 189, 195–96 (2022). Further, "only a very small minority of consumers would rather pay a fee for some of these services than see advertisements or pay a fee rather than have the platform collect data on them and their activities (7% or 10%, respectively)." 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). If website providers were forced to depend on revenue other than targeted advertising, consumers would face new fees for services that were previously free. *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/. In turn, this "could disproportionately affect more wealth-constrained users, who may end up losing access to those free services" altogether while wealthier consumers simply pay more. Lau, *supra*, at 11; *see also* Johnson, *supra*.

Salazar's theory is not only inconsistent with the VPPA's text and purpose, but would also be bad policy. Rather than endorse a theory that would allow class-action lawyers to reorganize the Internet via a statute intended to regulate video stores, the Court should hold that Salazar lacked a "subscriber" relationship with the NBA for purposes of the VPPA.

CONCLUSION

The judgment of the district court dismissing Salazar's complaint with prejudice should be affirmed.

December 12, 2023

Respectfully submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Allison N. Douglis
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 891-1600
adouglis@jenner.com

Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337
jvonbokern@uschamber.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 29(a)(5), and Local Rule 29.1(c), I certify that this brief complies with the type-volume limitation because this brief contains 4,430 words.

Pursuant to Fed. R. App. P. 32(a)(5) and (6), this brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second 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