No. 24-994

In the Supreme Court of the United States

NATIONAL BASKETBALL ASSOCIATION,
Petitioner,

v.

MICHAEL SALAZAR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL RETAIL FEDERATION AND INTERACTIVE ADVERTISING BUREAU AS AMICI CURIAE IN SUPPORT OF PETITIONER

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NATIONAL RETAIL FEDERATION STATEMENT OF INTEREST[1]

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association. The retail sector is the nation's largest private-sector employer, contributing $5.3 trillion to annual GDP and supporting one in four American jobs.

NRF's membership includes retailers of all sizes, formats, and channels of distribution, including many businesses that sell goods online and communicate with customers through a website. Those members include not only retailers and industry partners based in the United States, but also companies headquartered in over 45 countries abroad. NRF's members also are often targeted as defendants in class actions. NRF is thus familiar with class-action litigation, both from the perspective of individual defendants in class actions and from a more global perspective.

For over a century, NRF has been a voice for every retailer and every retail job, communicating the impact that retail has on local communities and global economies. NRF's amicus briefs have been cited by multiple courts.

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[1] No counsel for any party authored this brief in whole or in part, and no party, counsel for a party, or person or entity other than amicus curiae, its members, and its counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for the parties received timely notice of amicus's intent to file this brief.

NRF files this brief to provide the Court with the retail sector's perspective on the Second Circuit's decision below, the circuit split that followed, and the effects that the Second Circuit's expansive view of the VPPA threatens upon NRF's members. Targeted advertising of the kind virtually outlawed by the Second Circuit's decision is ubiquitous in the retail industry. NRF members that offer their goods and services online frequently create multimedia content, like videos, for their websites. Therefore, the questions presented in the Petition are significant to the retail sector, its members, and American consumers.

INTERACTIVE ADVERTISING BUREAU STATEMENT OF INTEREST

Founded in 1996, the Interactive Advertising Bureau ("IAB") empowers the media and marketing industries to thrive in the digital economy. Its membership comprises more than 700 leading media companies, brands, agencies, and the technology firms responsible for selling, delivering, and optimizing digital ad marketing campaigns. IAB sponsors and conducts critical research on interactive advertising, educates the business community on the importance of digital marketing, and promotes privacy compliance in the digital advertising industry.

IAB and its members are interested in ensuring that the digital advertising marketplace grows through technological innovation, increases efficiency through industry standardization, and promotes consumer privacy. IAB members are

often targeted as defendants in class-action lawsuits under the VPPA and state wiretapping laws. It educates members on the challenges such lawsuits pose to market participants. The Second Circuit's broad and acontextual reading of the VPPA undermines those interests. The IAB and its members thus urge the Court to grant certiorari to resolve the circuit split and reverse the Second Circuit.

SUMMARY OF ARGUMENT

The Second Circuit's broad interpretation of the Video Privacy Protection Act (the "VPPA") and the resulting circuit split, as highlighted in the National Basketball Association's Petition for Writ of Certiorari (the "Petition"), exposes retailers, publishers, and advertisers alike to massive liability for simply engaging in commonplace advertising practices. These practices, including targeted advertising through data-tracking software like Meta Pixels and posting videos on websites, were never contemplated by the Congress that enacted the VPPA to protect video-rental records.

For years, the plaintiffs' bar has utilized similarly outdated statutes, like the Telephone Consumer Protection Act and the California Invasion of Privacy Act, to target modern technologies. While in those cases courts have worked to cabin liability, the same is not true under the VPPA. As current VPPA jurisprudence stands, retailers, publishers, and advertisers could face inconsistent judgments, forum shopping by plaintiffs, and severe penalties based not on any

wrongdoing, but instead on where consumers access their websites.

The Second Circuit's expansive reading of the VPPA poses significant due-process concerns for retailers in future enforcement actions. Retailers, publishers, and advertisers cannot be expected to anticipate that engaging in common online-advertising practices could trigger liability under a statute written before the Internet existed.

The NRF and IAB urge the Court to grant certiorari and reverse the Second Circuit, resolve the circuit split, and provide due process to retailers and advertisers across the country.

ARGUMENT

I. Expansive liability under the VPPA poses a significant threat to the retail and advertising industries.

The Petition poses a simple issue—how expansive is the VPPA's reach? With a $2,500-per-violation statutory penalty, the answer matters to potential defendants. For the retail and advertising industries, the Second Circuit's broad application poses a true threat. Three factors explain why: (1) retailers' significant role in the United States economy; (2) modern retail and e-commerce advertising practices; and (3) the prevalence of class-action lawsuits against retailers and advertisers.

First, the retail industry represents a significant portion of the U.S. economy. In March 2025 alone, the United States Census Bureau reported that retail and food services totaled $734.9 billion in sales. *Advance Monthly Sales for Retail and Food Services*, U.S. Census Bureau (March 2025).[2] Online sales represent an increasing proportion of these sales. To meet consumers' demands and remain competitive, retailers must maintain an online presence. Ivan Popov, *Why Digital Presence Is Not A Matter Of 'If' But 'When' For Businesses*, Forbes (July 12, 2023).[3] In 2025, non-store and online sales are expected to grow

[2] https://www.census.gov/retail/marts/www/marts_current.pdf

[3] https://www.forbes.com/councils/forbesbusinesscouncil/2023/07/12/why-digital-presence-is-not-a-matter-of-if-but-when-for-businesses/

between 7% and 9% to a range of $1.47 trillion to $1.50 trillion. *NRF Forecasts Retail Sales to Reach at Least $5.23 Trillion in 2024*, Nat'l Retail Federation (Mar. 20, 2024).[4] In 2023, 274.7 million Americans shopped online—more than 80% of the total population. *Online Shopping Statistics*, Capital One Shopping Research (Mar. 11, 2025).[5] In 2024, internet advertising revenue reached its highest recorded level of $258.6 billion, with digital video as the fastest growing advertising format representing $62.1 billion in revenue. *Internet Advertising Report: Full year 2024 results*, IAB & PWC (April 2025).

Second, retailers, publishers, and advertisers often utilize data-tracking software, like Meta Pixels, to help deliver relevant advertisements to consumers. These technologies observe users' interests and activities as they visit a given website. The Meta Pixel is a piece of code placed on a website that records a user's activities, including page views, product views, items added to a virtual shopping cart, and purchases. When that information is connected to the user's Facebook ID, the Meta Pixel enables the website operator to better assess the effectiveness of its Facebook ad campaigns and to better target ads to users who have previously interacted with the website. As one district court described the Meta Pixel's operations:

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[4] https://nrf.com/media-center/press-releases/nrf-forecasts-retail-sales-reach-least-523-trillion-2024

[5] https://capitaloneshopping.com/research/online-shopping-statistics/

> To understand how the Meta Pixel typically works, imagine the following scenario. A shoe company wishes to gather certain information on customers and potential customers who visit its website. The shoe company first agrees to Meta's Business Tools Terms … which govern the use of data from the Pixel. The shoe company then customizes the Meta Pixel to track, say, every time a site visitor clicks on the "sale" button on its website, which is called an "Event." Every time a user accesses the website and clicks on the "sale" button (i.e., an "Event" occurs), it triggers the Meta Pixel, which then sends certain data to Meta. Meta will attempt to match the customer data that it receives to Meta users—Meta cannot match non-Meta users. The shoe company may then choose to create "Custom Audiences" (i.e., all of the customers and potential customers who clicked on the "sale" button) who will receive targeted ads on Facebook, Instagram, and publishers within Meta's Audience Network. Meta may also provide the shoe company with de-identified, aggregated information so the shoe company understands the impact of its ads by measuring what happens when people see them. Meta does not reveal the identity of the matched Meta users to the shoe company.

In re Meta Pixel Healthcare Litig., 647 F. Supp. 3d 778, 784–85 (N.D. Cal. 2022) (citations omitted).

In other words, the information that the Meta Pixel collects enables advertisers to ensure that

their Facebook advertisements reach the relevant audience. Websites that install a Meta Pixel do not distribute that information beyond the Meta/Facebook ecosystem.

The Meta Pixel and similar technologies thus offer cascading benefits to the marketplace. On the broadest level, targeted advertising helps keep the Internet free and resources available through leveraging consumer data to generate revenue efficiently. Within the retail industry and publisher platforms, consumers are not inundated with irrelevant ads, as is common in print or radio broadcast advertising, or with antiquated or low-production websites. Instead, more-efficient advertising saves retailers' money (allowing them to monetize their content without charging users directly), and lowers prices of goods, enhancing the overall consumer experience.

Third, due to retailers,' publishers,' and advertisers' inherent consumer-facing nature and enhanced online visibility, they are often the target of class actions—an issue that does not plague other intermediaries, like distributors. And while plaintiffs assert these class actions suits under any number of consumer-oriented statutes, the VPPA is rapidly becoming the plaintiffs' bar's flavor of the month. Since 2022, over 500 class-action lawsuits have been filed against various entities and retailers seeking redress for purported violations of VPPA. Jennifer A. Riley, *Trend #3 – Privacy Class Actions Continue To Proliferate As Plaintiffs Search For Winning Theories – Class Action Defense*, Duane

Morris (Jan. 13, 2025).[6] The circuit split that in the Petition predicted—and that now exists—underscores the trend of plaintiffs' lawyers dredging up VPPA claims.

These three factors highlight the importance of the issue and the need for the Court to grant the NBA's Petition. Now more than ever, retailers, publishers, and advertisers create and implement video content on their websites. At the same time, these websites utilize data-tracking software for advertising purposes. The Second Circuit's broad VPPA interpretation would effectively ban targeted advertising, transforming a billion-dollar industry while simultaneously subjecting retailers and advertisers to hundreds of millions of potential claimants who shop online in the United States.

What is more, the circuit split complicates retailers,' publishers,' and advertisers' operations. Their websites are accessible from anywhere. Yet because of the split, different laws governing VPPA liability exist in different parts of the country. Complying with the stricter regime would require retailers, publishers, and advertisers to discontinue offering multimedia video content, using targeted advertising, or both. After all, each may not be able to modify the practices as its customers or users in some circuits, but not others. The retail and

[6] https://blogs.duanemorris.com/classactiondefense/2025/01/13/trend-3-privacy-class-actions-continue-to-proliferate-as-plaintiffs-search-for-winning-theories/#:~:text=Indeed%2C%20plaintiffs%20initiated%20more%20than,alleged%20violation%20of%20the%20VPPA.

advertising industries need the Court to resolve this circuit split.

II. Class-action lawsuits utilizing repurposed statutes, like the VPPA claims here, unnecessarily burden retailers and advertisers.

For years, the plaintiffs' bar has jammed square pegs into round holes by repurposing consumer-protection statutes aimed at decades-old technology for putative class-action suits based on modern technology. These statutes create private rights of action and offer lucrative statutory-damage awards. Yet they do virtually nothing to enhance consumer wellbeing. Instead, by imposing draconian litigation costs onto retailers, publishers, and advertisers—costs that are ultimately borne by consumers—this practice of repurposing decades-old statutes makes consumers worse-off.

A. Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227

Congress enacted the TCPA in 1991 to prohibit telemarketers from using random- and sequential-number dialing systems to call, among other things, cellphone numbers. Passed at a time when cellphone users paid for service by the minute, Congress intended for the TCPA to curb robocalls made using this specific type of autodialing equipment prevalent in the 1990s.

Contravening this legislative intent and context, the plaintiffs' bar attempted to expand the TCPA's

reach to other technologies, such as social-media platforms that maintain a database of phone numbers and program equipment to send automated text messages to those numbers. These suits led to a circuit split over whether a TCPA suit must involve technology that generates random or sequential phone numbers, like the autodialing systems of the 1990s, or whether it could involve other more modern technologies.

The Court resolved that split and rid TCPA jurisprudence of the disconnect between the technology that the statute actually regulated and the technologies to which the plaintiffs' bar had subjected it. In *Facebook, Inc. v. Duguid*, the Court held that TCPA liability requires the technology in question to mirror the 1990s autodialing system. 592 U.S. 395 (2021). The Court explained that "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." *Id.* at 405. The plaintiffs' expansive reading defied the plain text and the statutory context and yielded absurd results. That is, subjecting a vast class of individuals—that Congress never intended to penalize (or, at the time, could not have predicted to exist)—to steep statutory penalties.

B. California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631(a) & 638.51

California enacted the CIPA in 1967 to prohibit unlawful wiretapping, such as the installation of pen registers or trap-and-trace devices without a court order or consent from the user. But now, the plaintiffs' bar is using the CIPA's aiding-and-abetting provisions to assert claims against websites that use third-party data-analytics software (such as, chatbots, session replay, and tracking pixels) to track or record customer communications and interactions. In fact, since 2022, over 1,000 have been filed under the CIPA on this basis. Kate Dedenbach et. al, *Tide May Be Turning in Businesses' Favor After Key California Court Decisions in Website Tracking Cases*, Fisher Phillips (Feb. 10, 2025).[7]

Almost all websites use third-party data-processing software to improve their functionality. *How Websites and Apps Collect and Use Your Information*, Fed. Trade Comm'n Consumer Advice (Sept. 2023).[8] Therefore, any company with a

[7] https://www.fisherphillips.com/en/news-insights/tide-may-be-turning-in-businesses-favor-key-california-court-decisions-website-tracking-cases.html#:~:text=The%20trend%20of%20digital%20wiretapping,affected%20is%20closer%20to%205%2C000.

[8] https://consumer.ftc.gov/articles/how-websites-and-apps-collect-and-use-your-information#:~:text=When%20a%20website%20you%20visit%20lets%20another%20company%20track%20you,your%20interests%20and%20online%20activity.

website accessible in California faces potential exposure to $5,000 in statutory penalties under a law conceived of before the Internet existed. Plaintiffs have had varied success in applying the statute to modern technology. *Compare Javier v. Assurance IQ, LLC*, No. 21-16351, 2022 WL 1744107, *2 (9th Cir. May 31, 2022) (reversing dismissal of the plaintiff's complaint and holding that CIPA applies to Internet communications); *with Licea v. Hickory Farms LLC*, No. 23STC26148, 2024 WL 1698147, *3–*4 (Cal. Sup. Ct. Mar. 31, 2024) (finding that online devices that record IP addresses cannot be pen registers and that "public policy strongly disputes" a broad reading of CIPA because it could "potentially disrupt a large swath of internet commerce").

C. Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710

VPPA suits are the latest chapter in this saga. Claims under the VPPA have become increasingly prevalent. Indeed, since the NBA filed its Petition, the circuit split it predicted has developed, as the Sixth and Seventh Circuits have issued conflicting rulings interpreting the statutory term "consumer." *See Salazar v. Paramount Global*, 133 F.4th 642, 650–53 (6th Cir. 2025) (rejecting Respondent's broad interpretation of the VPPA and holding that a "consumer" under the Act must have "subscribe[d] to 'goods or services'" in the nature of video materials); *Gardner v. MeTV Nat'l Ltd. P'ship*, 132 F.4th 1022, 1025 (7th Cir. 2025) (adopting the Second Circuit's expansive view of the VPPA and holding that any purchase or subscription from a video service

provider satisfies the definition of "consumer"). And one of these cases is a class action in which Respondent himself is the named plaintiff.

In *Paramount Global*, the Sixth Circuit read the term "consumer" narrowly by contextualizing it with the overall statutory scheme. 133 F.4th at 650–52. The court emphasized that common words like "goods or services" must be given a "more targeted reading" because "they are inordinately sensitive to context." *Id.* at 650 (cleaned up). In contrast, the Second Circuit's broad definition of consumer confuses the plain meaning of the VPPA's text with the "pure definitional meaning" of the word. *See id.* at 651, 651 n.9 (noting that the VPPA's legislative history also supports a narrow reading of "consumer"). In adopting this reading, the Sixth Circuit "merely recognize[d] a limitation that was included in the statute's plain meaning at the time it was signed into law." *Id.* at 651. Accordingly, Respondent failed to state a claim under the VPPA by failing to allege that he subscribed to an "audio visual material." *Id.* at 652.

The prevalence of VPPA claims poses a particular threat to the retail and advertising industries. Many retailers, publishers, and advertisers utilize targeted advertising and multimedia video content. This is especially true for small businesses, which use targeted advertising as a cost-effective way to get their products in front of interested buyers. Small businesses would struggle to achieve the same results without data tracking and sharing because they lack the advertising budgets of larger retailers, who could always employ

more traditional (and expensive) advertising methods.

The Second Circuit's interpretation makes it nearly impossible for any retailer to engage in targeted advertising. There is no way for the retailer to know: (1) whether that user has purchased something in the past; or (2) where in the United States that user accessed the website. Because the retailer cannot verify and, likely, could not afford the risk of whether it will be potentially subject to $2,500 in penalties for sharing that user's data, the retailer will not engage in targeted advertising.

Suits like this one threaten a windfall for plaintiffs and their lawyers. And beyond the potential recovery, litigation costs promise to increase retailers' costs, needlessly squeezing retailers' already-narrow margins. These lawsuits offer no benefit to consumers, who suffer no injury when websites use pixels to help direct advertisements to the consumer's interests. Retailers will have to offset millions of dollars in litigation costs by raising prices. In other words, under a regime of expansive VPPA liability, the plaintiffs' bar may win, but American consumers are guaranteed to lose.

Like the TCPA and CIPA, the VPPA stems from pre-Internet consumer-protection policy. "Congress's purpose in passing [the VPPA] was quite narrow"; Congress did not "intend[] for the law to cover factual circumstances far removed from those that motivated its passage." *In re Nickelodeon*

Consumer Privacy Litig., 827 F.3d 262, 284 (3d Cir. 2016). Since enactment, Congress has not altered the VPPA's definition of "consumer" to encompass people, like Respondent here, who do not exchange money to access video content. *See Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015) (discussing 158 Cong. Rec. H6849-01 (Dec. 18. 2012)).

Like the broad-reaching interpretation of the TCPA that the plaintiffs' bar advanced and this Court rejected in *Duguid*, the Second Circuit's interpretation of the VPPA would "capture virtually all" retailers, publishers, and advertisers and could have broad effects "in the course of commonplace usage" of targeted advertising and multimedia video content. *See Duguid*, 592 U.S. at 405; *see also Paramount Global*, 133 F.4th at 649–50 (quoting *Dubin v. United States*, 599 U.S. 110, 120 (2023)) (rejecting Respondent's definition of "consumer" in part because it was based "solely on the broadest imaginable definitions of its component words").

III. Repurposing outdated statutes, like the VPPA, denies retailers, publishers, and advertisers fair notice of what conduct may be considered unlawful.

Due process requires that the "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (applying the criminal law's fair-notice requirements to an agency's civil-enforcement action). This means that due process prohibits

courts from "unforeseeably and retroactively" expanding otherwise "narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). When a statute is "narrow and precise . . . it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Id.*

While the VPPA is a civil statute, its statutory-damages provision is "essentially penal" even though "the penalty . . . is to be enforced by a private and not a public suit." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919). Statutes like the VPPA must still provide fair notice to potential defendants of what is unlawful because "the standards of due process" do not turn on "the simple label [Congress] chooses to fasten upon . . . its statute." *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

As the Petition explains, the statute's text limits VPPA coverage to consumers who subscribe to or purchase audiovisual goods and services. It does not apply to consumers who purchase non-video goods or services (like products from a retailer's website) and separately view free videos (like product demonstrations or other multimedia visual content) on the same website. *See* Pet. 25–26. As described, Congress has never amended the "narrow and precise" definition of *consumer*. *Bouie*, 378 U.S. at 352. Accordingly, Congress neither intended the VPPA to serve as a comprehensive privacy law nor

could have envisioned that the law would regulate online advertising.

The Second Circuit's expansive view of who qualifies as a "consumer" creates the potential for unforeseen liability. Plaintiffs seeking to exploit that broad reading could threaten retailers' due-process rights. No retailer, publisher, or advertiser of ordinary intelligence would know that the pervasive use of targeted advertising (supported by data-tracking technology) coupled with multimedia video website content, could violate a 1980s video-cassette-rental privacy statute. Retailers deserve fair notice to conform their advertising practices to the law before being subjected to $2,500 in potential statutory penalties per VPPA violation. Denying certiorari would allow plaintiffs and plaintiffs' attorneys to forum shop for multi-million-dollar resolutions on "an ad hoc and subjective basis." *Butcher v. Knudsen*, 38 F.4th 1163, 1168–69 (9th Cir. 2022).

CONCLUSION

The Court should grant certiorari to resolve the circuit split outlined in the Petition, to correct the Second Circuit's error, and to ensure that retailers, publishers, and advertisers can operate in an environment where they have fair notice that their advertising practices could be unlawful.

Respectfully submitted,

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