

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 25-2857

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TREVOR LAKES AND ALEX RAJJOUR,
Plaintiffs-Appellants,

v.

UBISOFT, INC.
Defendant-Appellee.

**BRIEF OF AMICUS CURIAE ENTERTAINMENT SOFTWARE
ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE**

On Appeal from the U.S. District Court for the Northern District of California
Case No. 3:24-cv-06943-TLT
Hon. Trina L. Thompson

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* Entertainment Software Association states that it has no parent corporation and that no publicly held corporation or other publicly held entity owns ten percent (10%) or more of its stock.

Certificate as to Parties, Rulings Under Review, and Related Cases

Except for the entities listed herein and any *amici curiae* who have not yet entered an appearance in this Court, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Briefs for Appellants and Appellee.

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GLOSSARY

Electronic Privacy Information Center	EPIC
Entertainment Software Association	ESA
Personally Identifiable Information	PII
Ubisoft, Inc.	Ubisoft
Video Cassette Recorder	VCR
Video Privacy Protection Act	VPPA

INTEREST OF *AMICUS CURIAE*¹

The Entertainment Software Association (“ESA”) is a U.S. trade association serving companies that manufacture video game equipment and create software for game consoles, handheld devices, personal computers, and the Internet. ESA’s member companies are the innovators, creators, publishers, and business leaders that are reimagining entertainment and transforming how we interact, learn, connect, and play.²

As participants in the video game industry, ESA and its members have an interest in this case because this Court’s interpretation of the scope of the Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”) and its consent provisions will have a significant impact on privacy compliance issues for video game publishers, developers, and distributors.

SUMMARY OF ARGUMENT

Video games are America’s favorite pastime, with more than 205 million Americans playing video games regularly.³ The video game industry is also one of

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, counsel to any party, or any person other than *Amicus Curiae* ESA contributed money to fund preparation or submission of this brief.

² A list of ESA’s member companies, which includes Appellee Ubisoft, Inc., is available at <https://www.theesa.com/about-esa/>.

³ See Entertainment Software Association, *2025 Essential Facts About the U.S. Video Game Industry* at 5, 7 (July 2025), <https://www.theesa.com/wp->

America’s fastest-growing industries, making major contributions to the U.S. economy and ultimately, to consumers.

Enacted in the era of VCRs and video cassette rental stores, Congress narrowly tailored the VPPA in response to the public disclosure of the personal movie rental history of a nominee for the U.S. Supreme Court. Congress never intended the VPPA to apply to video games or video game developers and publishers, who by no stretch of the imagination are akin to “video tape service providers” under the statute. Despite this, there has been a recent surge in VPPA litigation targeting video game developers like Defendant/Appellee Ubisoft, Inc. (“Ubisoft”), whose products and services are far removed from the intended scope of the VPPA.

Although the district court – correctly – granted Ubisoft’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Plaintiffs consented to disclosure of certain personal information, Amicus ESA writes to address a more fundamental reason why Ubisoft and video game companies have no liability in a case like this: video games and video game developers like Ubisoft fall outside the narrow scope of the VPPA.⁴

<content/uploads/2025/06/2025-Essential-Facts-Booklet-05-30-25-RGB.pdf> (“2025 ESA Essential Facts”).

⁴ As Ubisoft observes in its brief, the Court can (and should) affirm the district court’s decision on this basis. See Ubisoft Br. at 44 (citing *Campbell v. State of*

The VPPA prohibits “video tape service providers” from knowingly disclosing to any person personally identifiable information (“PII”) concerning any consumer of the provider without the consumer’s informed, written consent. 18 U.S.C. § 2710(b). Importantly, video games are distinguishable from the prerecorded video cassette tapes that the VPPA was designed to address. Unlike passive prerecorded video content on a video cassette tape, video games are interactive, customizable experiences. As a result, the interactive video game experience is more akin to the provision of live video content, which courts have consistently held falls outside the scope of the VPPA. *See Stark v. Patreon, Inc.*, 635 F.Supp.3d 841, 851 (N.D. Cal. 2022) (distinguishing prerecorded video content from live video content and holding that only prerecorded video content falls within the scope of “similar audio visual materials”).

Video games existed and were available for purchase and rental when the VPPA was enacted in 1988, and yet Congress did not include them in the statute. The legislative history of the VPPA establishes that Congress specifically declined to extend the scope of the statute to other media like library and music rentals – even after thriving markets existed for such rentals. Indeed, Congress consistently disclaimed any intent to create a broad right of privacy of the type that Appellants

Washington Dep’t of Soc. & Health Servs., 671 F.3d 837, 842 n.4 (9th Cir. 2011) (“We can affirm on any ground supported by the record.”).

here seek to impose through the VPPA.⁵ And when amending the VPPA in 2013, Congress refused to expand the scope of the VPPA to cover other types of media, including video games.⁶

While some lower courts have with little analysis concluded that the VPPA applies to video games that contain so-called cutscenes, these decisions ignore current technology. Cutscenes are generally not sold or delivered separately. Neither are cutscenes always static. Instead, they are most often rendered within the game as a part of the user’s gameplay in real time, and are therefore not “prerecorded” within the meaning of the VPPA. Moreover, the dismissal of Pixel-based VPPA claims like those alleged here are increasingly being affirmed on appeal, regardless of the affected industry.⁷

In any event, the district court correctly found that Ubisoft’s cookie banner and privacy policy satisfied the specific consent provisions of the VPPA while striking an appropriate balance between providing privacy disclosures that are both

⁵ See, e.g., 134 Cong. Rec. S16312-01 (October 14, 1988) (“But privacy is not a generalized right. And it is up to the legislature to define and give meaning to privacy. As our society grows more complex, legislatures should be responsive to new technological threats to privacy. This is the role of the legislature in a democratic society. The Video Privacy Act does just that, in a narrow area. Video stores will be precluded from disclosing their customers’ names, addresses and specific video tapes rented or bought by the customers.”).

⁶ See 58 Cong. Rec. H6849-01 (Dec. 18, 2012) (“This legislation does not change the scope of who is covered by the VPPA.”).

⁷ See *Solomon v. Flipps Media, Inc.*, 136 F.4d 41 (2d Cir. 2025).

understandable and sufficiently comprehensive. To adopt Appellants’ heightened standard for VPPA consent would conflict with Congressional intent and would unduly burden businesses seeking to comply with onerous, unreasonable requirements – all to the detriment of videogame developers, and ultimately the consumer. ESA therefore urges the Court to affirm the district court’s order of dismissal.

ARGUMENT

I. THE VPPA HAS A NARROW APPLICATION; VIDEO GAMES FALL FAR OUTSIDE ITS PURVIEW

In 1987, the *Washington City Paper* leaked then Supreme Court Justice-nominee Robert Bork’s video cassette-rental history, publishing a list of 146 films that the Bork family had rented from a local video tape store. *See* S. Rep. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.A.A.N. 4342; *see also* *Osheske v. Silver Cinemas Acquisition Co.*, 132 F.4th 1110, 1112 (9th Cir. 2025) (summarizing the legislative history of the VPPA). In the wake of this incident, Congress enacted the VPPA the following year. As courts interpreting the VPPA have recognized, “the classic example” of a VPPA violation “will always be 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.” *In re: Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 290 (3rd Cir. 2016). Appellants attempt to stretch the VPPA to cover video games in a manner that is far removed

from this classic 1988 paradigm.

A. The VPPA Definition Of “Video Tape Service Provider” Is Intentionally Narrow.

The VPPA expressly defines “video tape service provider” as one engaged in the rental, sale, or delivery of “prerecorded video cassette tapes or similar audio visual materials.” 18 U.S.C. § 2710(a)(4). Plainly, video games are neither “prerecorded video cassette tapes” nor “similar audio visual materials.”

The statutory language and legislative history establish that the VPPA is narrowly tailored to include only certain types of media. The VPPA was enacted in 1988 – before the Internet even existed – to regulate a “video tape service provider,” like the old Blockbuster brick-and mortar stores that rented or sold video cassette tapes. The statute’s legislative history defines “similar audio visual materials” as other prerecorded video products like “laser discs, open-reel movies, and CDI technologies.”⁸ Significantly, neither the statute nor the legislative history of the 1988 act includes any references to video games.

The VPPA’s legislative history establishes that Congress intended that the VPPA have a narrow application to prerecorded video cassettes and close

⁸ See S. Rep. 100-599, at 12 (1988), *reprinted in* 1988 U.S.C.A.A.N. 4342; *see also Stark*, 635 F.Supp.3d at 851 (recognizing that the VPPA’s statutory language and legislative history confirms that “the adjective ‘prerecorded’ modifies both ‘video cassette tapes’ and ‘similar audio visual materials’”).

analogues and should not be extended broadly to other forms of media.

Significantly, Congress considered expanding the VPPA to cover the disclosure of library borrower records “recognizing that there is a close tie between what one views and what one reads,” but ultimately rejected that approach, instead limiting the statute’s application solely to “video tape service providers.” See S. Rep. 100-599, at 8 (1988); *reprinted in* 1988 U.S.C.A.A.N. 4342; *see also Nickelodeon*, 827 F.3d at 284-85 (discussing the VPPA’s legislative history related to the removal of the library provisions). Not surprisingly, courts have consistently cautioned against expanding the statute beyond its narrow scope and have thus declined to expand the VPPA’s definition to live or interactive media. See *Stark*, 635 F.Supp.3d at 851.

The absence of references to video games in the statute and legislative history could not have been inadvertent. In 1988, the video game market was robust—indeed, booming.⁹ Video games were readily available to consumers at that time – both for purchase and for rental. Indeed, in 1988 *The New York Times* reported that “[s]ome 10 million Nintendo ‘home video entertainment systems’ have been sold in the United States in recent years and have sparked a firestorm of

⁹ See World Economic Forum, *The History Of The Video Game Industry In One Chart* (Nov. 27, 2020), <https://www.weforum.org/stories/2020/11/gaming-games-consels-xbox-play-station-fun/>.

interest that toy industry experts – and millions of teachers and parents – say is America’s latest toy craze and a teen-age cultural phenomenon.”¹⁰ And during the 1980s, the video game rental market was thriving.¹¹ Nonetheless, as noted above, the term “video game” is conspicuously absent from statute and the legislative history – illustrating that Congress never intended the VPPA to apply to video games. *Compare Osheske*, 132 F.4th at 1114 (“Though the market for theatrical releases was in full swing in the late 1980s, movie theaters were omitted from the Act and accompanying report[.]”).

In response to the technological sea changes that had occurred since the VPPA’s enactment, Congress amended the statute in 2013. According to the legislative history:

At the time of the VPPA’s enactment, consumers rented movies from video stores. The method 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.

¹⁰ Douglas C. McGill, *Nintendo Scores Big*, *The New York Times*, Sec. 3, Page 1 (Dec. 4, 1988) (“For boys in this country between the ages of 8 and 15, not having a Nintendo is like not having a baseball bat.”).

¹¹ See Ulyana Chernyak, *The Evolution of the Video Game Market – Rentals* (Nov. 7, 2014), <https://www.gamedeveloper.com/marketing/the-evolution-of-the-video-game-market----rentals>.

S. Rep. 112-258, at 2 (2012). Yet, despite such technological change, not only did Congress retain the original definition of “video tape service provider,”¹² but it also declined to adopt a proposal by the Electronic Privacy Information Center (“EPIC”)¹³ seeking to expand the scope of the VPPA to arguably “bring within the definition of a ‘video tape service provider’ anyone who disseminates: user generated content, events such a video chat or conferencing, *video games*, cable television network content offerings, online education tools and services (which could include educational institutions themselves as the ‘providers’) and many more.” (Emphasis added.)¹⁴

Plainly, the VPPA does not regulate the disclosure of data tied to interactive software or user-driven media. Video games are materially different from video cassette tapes because video games are interactive experiences that involve user input, gameplay mechanics, and decision-making – characteristics fundamentally unlike the passive viewing of prerecorded video content. Video games are also inherently social; many involve players around the globe jointly interacting in

¹² See 58 Cong. Rec. H6849-01 (Dec. 18, 2012) (“This legislation does not change the scope of who is covered by the VPPA.”).

¹³ EPIC has filed an amicus brief in support of Appellants.

¹⁴ *The Video Privacy Protect Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Senate Judiciary Subcommittee on Privacy, Technology and the Law*, 112 Cong. 25, 78 (2012) (written response of Netflix to questions from Senator Tom Coburn) (emphasis added).

collaborative or competitive settings through Internet-connected gameplay. The difference between video games and the private home viewing of prerecorded video rentals that inspired the VPPA could hardly be more striking.

B. The Presence Of So-Called “Cutscenes” In Video Games Cannot Make Video Game Developers “Video Tape Service Providers.”

Some lower, non-binding, and out-of-circuit courts have concluded – erroneously – that the presence of so-called “cutscenes” in video games should bring this type of media within the VPPA, somehow converting video game developers and distributors into “video tape service providers.” *See Aldana v. GameStop, Inc.* 2024 WL 708589 at *6 (S.D.N.Y. Feb. 21, 2024) (defining cutscenes within video games as “prerecorded videos that the user can view in the context of playing a game”); *Mendoza v. Caesars Ent., Inc.*, 2024 WL 2316544 at *3 (D.N.J. May 22, 2024) (defining video game cutscenes as “short, prerecorded videos intercut with the games’ interactive elements”); *see also Garcia v. Bandai Namco Ent., Inc.*, 2025 WL 2451033 (C.D. Cal. Aug. 7, 2025) (following *Mendoza*). These decisions fail to understand that cutscenes in contemporary video games are distinguishable from the “prerecorded” video content contemplated by the VPPA because they are part of the players’ interactive, in-game activity.¹⁵ Moreover, unlike video cassette tapes, cutscenes are an integrated

¹⁵ *See* Anton Söderhäll, *Tracing The Past, Present, And Future Of Game Cinematics*, GamesIndustry.biz (Jan. 25, 2022),

part of the video game user’s interactive experience within the game. That is, video game cutscenes are not independently rented, sold, or delivered; rather, they are integrated components of an interactive product. As such, video games are not remotely “similar” to the type of prerecorded audiovisual content the VPPA was intended to cover.

C. Video Game Developers, Like Ubisoft, Are Not “Engaged In The Business” Of Delivering Prerecorded Video Content To Consumers.

Courts interpreting the VPPA have found that for a company to be deemed “engaged in the business” of delivering video content, its business model “must not only be *substantially involved* in the conveyance of video content to consumers but also *significantly tailored* to serve that purpose.” *See In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017) (emphasis added). The statutory term “engaged in the business” of renting, selling, or delivering video content “connotes ‘a particular field of endeavor,’ i.e., a *focus* of the defendant’s work.” *In re Vizio, Inc.*, 238 F. Supp. 3d at 1221 (citations omitted; emphasis added). Entities that are merely “*peripherally or passively* involved in video content delivery do not fall within the statutory definition of a

<https://www.gamesindustry.biz/tracing-the-past-present-and-future-of-game-cinematics> (describing some modern video game cutscenes as “adaptable narratives” affected by the user’s actions which “can have multiple storyline paths,” and describing the use of “interactivity functions during cutscenes”).

“video tape service provider.” *Id.* (emphasis added). Thus, courts have held that “peripherally or passively” “hosting and creating” prerecorded videos, for instance, for marketing purposes, does not suffice to qualify an entity as a video tape service provider. *See Cantu v. Tapestry, Inc.*, 2023 WL 4440662, at *8 (S.D. Cal. Jul. 10, 2023).

Video game developers and distributors like Ubisoft are not engaged in the business of delivering prerecorded video content to customers. Indeed, video game companies are in the business of delivering interactive *video games*, not prerecorded videos. A contrary conclusion would stretch the VPPA far beyond its statutory language and intended purpose – which this Court has in other contexts declined to do. *See Osheske*, 132 F.4th at 114 (declining to expand the VPPA definition of video tape service provider to a movie theater).

II. THE VPPA SHOULD NOT APPLY TO META PIXEL CLAIMS LIKE THOSE ALLEGED IN THIS CASE

The Meta Pixel at issue in this case is a widely used digital tool that allows websites to understand the efficacy of their Meta or Facebook advertisements. It is a piece of code that records certain data regarding user behavior on a company’s website and then transmits that data to Meta, which can run analytics and provide the company with important insights – such as understanding which

advertisements result in purchases.¹⁶ By tailoring choices, this process greatly benefits consumers by improving their user experience. Other companies also have offerings that are similar to the Meta Pixel.¹⁷ The use of such technologies for measuring insights related to advertisements is increasingly common.

Pixel-based VPPA claims, like those at issue here, should be dismissed regardless of the industry. *See Solomon*, 136 F.4d 41. In *Solomon*, the Second Circuit found that Pixel-based VPPA claims do not meet the VPPA’s definition of PII under the “ordinary person” standard adopted by this Court in *Eichenberger v. ESPN, Inc.*, 876 F.3d 979 (9th Cir. 2017). The Court held that information transmitted via pixel-tracking technology did not qualify as “PII” under the VPPA where there was no allegation that an “ordinary person” could identify his information “with little or no extra effort.” *Solomon*, 136 F.4th at 54. The Second Circuit reaffirmed this reasoning in *Hughes v. National Football League*, emphasizing that “*Solomon* effectively shut the door for Pixel-based VPPA claims.” 2025 WL 1720295 at *2 (2d Cir. June 30, 2025). This Court should similarly shut the door on these baseless VPPA claims.

¹⁶ See Meta Business Center, About Meta Pixel, available at <https://www.facebook.com/business/help/742478679120153?id=1205376682832142>.

¹⁷ See, e.g., Google Marketing Platform, Analytics, available at <https://marketingplatform.google.com/about/analytics/>.

III. COOKIE BANNERS AND PRIVACY POLICIES LIKE THOSE USED BY UBISOFT SATISFY THE VPPA'S CONSENT PROVISIONS

The VPPA permits a video tape service provider to disclose a consumer's PII with the consumer's "informed, written consent," which can be provided through "an electronic means using the Internet." 18 U.S.C. § 2710(b)(2)(B). The statute further specifies that this informed, written consent must (1) be "in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;" (2) be given at the time disclosure is sought or given in advance for a set period of time not to exceed two years; and (3) provide the consumer with the ability to opt-out from disclosures "in a clear and conspicuous manner." 18 U.S.C. § 2710(b)(2)(B)(i)-(iii).

Because, as discussed above, the VPPA plainly does not apply to video game developers, publishers, and distributors, the district court in this case did not need to address whether Ubisoft's approach to securing consent satisfied the VPPA's statutory consent requirements. However, assuming *arguendo* that consideration of VPPA consent were appropriate, Ubisoft's approach to consent satisfied the statute's requirements.

Appellants and their Amicus argue that because Ubisoft's Privacy Policy describing the sharing of users' game data with advertising partners also referred to a separate "Terms of Use" document, the policy fails the VPPA's "distinct and separate" requirement. 18 U.S.C. § 2710(b)(2)(B)(i). Amicus EPIC, for example,

argues that the court should borrow highly detailed informed-consent standards from “HHS regulations governing testing on human subjects” or “the context of attorney conflicts.” EPIC Amicus Br. 11. Yet at the same time, Appellants argue that Ubisoft’s disclosures were inadequate because they were unduly complicated – describing Ubisoft’s Q&A-formatted Privacy Policy as “cluttered and labyrinthine.” Appellants Br. 2. A decision from this Court adopting either of those arguments would leave video game companies with the nearly impossible task of navigating between “too detailed” and “not detailed enough,” inviting even more of the abusive VPPA suits that have surged over the last three years.¹⁸

Video game companies have struck a reasonable balance in providing disclosures that are sufficiently comprehensive to satisfy the VPPA, yet are also understandable. It is in consumers’ interest to have disclosures pertaining to all privacy rights presented in a single policy that can be easily accessed and do not unduly impede the user experience. Despite this, Appellants and their Amicus would require video game companies to have separate, substantively overlapping privacy disclosures. This would needlessly cause confusion and an increased

¹⁸ Anjali C. Das, *Courts Continue to Grapple With VPPA Class Actions*, Wlmer Hale (June 16, 2026), <https://www.wilsonelser.com/publications/courts-continue-to-grapple-with-vppa-class-actions> (“In 2024, an estimated 250 VPPA class actions were filed against companies – nearly double the number of similar suits filed in 2023.”).

burden on consumers and would also impose unnecessary and potentially costly burdens on the video game industry, all to the ultimate detriment of the user experience.¹⁹

In this case, as the district court found, Ubisoft’s specific disclosures satisfied the VPPA disclosure requirements. Users were required to opt-in to the collection, use, and sharing of their personally identifiable information by way of conspicuous terms (1) when they begin browsing the Ubisoft website; (2) again when creating an account; and (3) a third time while completing any purchase. Moreover, the Ubisoft website offered users the ability to withdraw consent to any information sharing, at any time, through their account or device settings. *Lakes v. Ubisoft, Inc.*, 777 F. Supp. 3d. 1047, 1051-52 (N.D. Cal 2025).

Here, the district court correctly found that Ubisoft’s three-prong consent structure satisfied the VPPA, that Appellants knowingly consented to Ubisoft’s data sharing policies under this Court’s precedent, including the use of cookies by

¹⁹ See Derrick Morton, *The Cost Of Data Privacy: How A Patchwork Regulatory Framework Impacts Video Game Creators*, Forbes (August 24, 2022), <https://www.forbes.com/councils/forbestechcouncil/2022/08/24/the-cost-of-data-privacy-how-a-patchwork-regulatory-framework-impacts-video-game-creators/> (“Patchwork privacy policies can also worsen the user experience by making it harder for game developers to cater to their audience and personalize game design. Regulations have made it mandatory for game developers to require users to accept numerous prompts and verify consent. This multistep process degrades the user experience with constant interruption[.]”).

third parties, and that a stand-alone disclosure and consent was not required. See *Lee v. Ticketmaster L.L.C.*, 817 F. App'x 393, 394 (9th Cir. 2020) (finding website users assented to terms by clicking “Place Order,” even though users were not required to check a box specifically assenting to terms); *Lakes*, 777 F. Supp. 3d. at 1056-57 (distinguishing cases). This is because Ubisoft’s cookie banner and privacy policy are not legal obligations of users, but instead “disclosures,” thereby satisfying the VPPA’s “distinct and separate” requirement. *Lakes*, 777 F. Supp. 3d. at 1059 (citing *Libman v. Apple, Inc.*, 2024 WL 43114791, at 5 (N.D. Cal. Sept. 26, 2024)).

This Court should decline Appellants’ invitation to impose a heightened consent standard on businesses that would be unduly burdensome and generate consumer confusion.

IV. APPELLANTS’ INTERPRETATION OF THE VPPA WOULD NEGATIVELY IMPACT THE VIDEO GAME INDUSTRY AND CONSUMERS

Video games are expressive, interactive works significant to the culture. In *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 790 (2011), the U.S. Supreme Court recognized that video games qualify for First Amendment protection and noted:

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music)

and through features distinctive to the medium (such as the player's interaction with the virtual world).

Id. at 790.

The video game industry has shown that it will continue to innovate and be a leader on the frontiers of new technologies through its ongoing research and development bringing gamers innovations such as voice recognition, portability, customizable characters, augmented and virtual reality, and use of artificial intelligence algorithms to create more immersive and engaging games. Moreover, video games serve an important social function: they are increasingly complex, diverse, realistic, and collaborative in nature, fostering real-world psycho-social benefits for the people who play them.²⁰ The global scope and benefits of gameplay are well documented.²¹ Recent studies demonstrate that video games enhance cognitive development, build emotional resilience, support social and mental health, and foster learning and development.²²

The video game industry is also an important contributor to the U.S. economy. The U.S. video game industry generated \$59.3 billion in revenue during

²⁰ See, e.g., Isabela Granic, *et al.*, *The Benefits of Playing Video Games*, American Psychologist (Jan. 2014), available at <https://www.apa.org/pubs/journals/releases/amp-a0034857.pdf>.

²¹ Entertainment Software Association, *Power Of Play: 2025 Global Video Games Report* at 10, <https://www.theesa.com/resources/the-global-power-of-play-report/>.

²² See *id.* at 60-63 (collecting and summarizing recent academic and scientific research on the benefits of video games to users).

2025,²³ and industry data demonstrates that the video game industry is directly or indirectly responsible for creating and supporting more than 350,000 total jobs across the U.S. economy, contributes more than \$66 billion to the U.S. GDP, and has more than \$101 billion in total economic impacts.²⁴ On average, every job within the U.S. video game industry supports at least 2.36 additional jobs in the national economy.²⁵

The video game industry recognizes the importance of consumer privacy laws, and has taken affirmative steps to provide users with transparency, choice, and control in connection with managing their personal information.²⁶ Indeed, consumer privacy laws with clear and flexible standards benefit consumers, including video game players.²⁷ But Appellants' broad, misguided interpretation of the VPPA's scope and the unduly restrictive consent standard that they advocate could have a devastating effect on the video game industry and its consumers.

First, Appellants and their Amicus would extend the VPPA to apply to any entity that disseminates audio visual content – completely disregarding Congress'

²³ 2025 ESA Essential Facts at 37.

²⁴ *See Video Games In The 21st Century: The 2024 Economic Impact Report*, at 19, https://www.theesa.com/wp-content/uploads/2024/02/EIR_ESA_2024.pdf.

²⁵ *See id.* at 20.

²⁶ *See* Entertainment Software Association, *Key Issues, Privacy*, <https://www.theesa.com/issues/privacy/>.

²⁷ *See id.*

intention that the VPPA to apply narrowly to only “video tape service providers,” and their rejection of EPIC’s proposal that would have expanded the scope of the VPPA to cover such entities in connection with the VPPA’s 2013 amendment.²⁸ But Congress, not the courts, is the appropriate body to consider whether privacy interests similar to those that motivated the VPPA justify similar regulation of the video game industry, given the inherent differences between the two types of media. Expanding the reach of the VPPA to the video game industry – contrary to Congress’ expressed intent – would impose costly compliance obligations on video game developers and distributors that would ultimately be passed on to consumers, increasing costs and discouraging industry innovation.²⁹

Second, Appellants and their Amicus’ interpretation of the VPPA’s consent provisions are unreasonable, unduly restrictive, and unworkable in practice. Indeed, their reading of the VPPA would render virtually *all* existing cookie banners and privacy policies in use by businesses today insufficient for VPPA purposes. Such an interpretation of the VPPA’s consent requirements would

²⁸ See n.7, *supra*.

²⁹ See Morton, Derrick, *The Cost Of Data Privacy: How A Patchwork Regulatory Framework Impacts Video Game Creators*, Forbes (August 24, 2022), <https://www.forbes.com/councils/forbestechcouncil/2022/08/24/the-cost-of-data-privacy-how-a-patchwork-regulatory-framework-impacts-video-game-creators/> (“App developers and video game creators are now forced to allocate a large chunk of their budget to reconfigure games and user consent policies to avoid incurring massive compliance fines. Compliance is costly.”).

subject even companies with robust privacy disclosures (like Ubisoft) to potential liability under the VPPA, which could ultimately lead to millions of dollars, or more, in statutory penalties.³⁰ This Court should decline Appellants' invitation to interpret the VPPA in a manner that would impose these unreasonable financial burdens on the video game industry and, ultimately, its consumer base.

CONCLUSION

Congress passed the VPPA in response to a narrow problem – the disclosure of U.S. Supreme Court nominee Robert Bork's video cassette tape rental history by a local video tape rental store – and explicitly stated that the statute was not intended to create a broad, general right of privacy. Applying the VPPA to video games and conditioning consent on the onerous disclosure requirements advocated by Appellants and their Amicus would not only flout the clear statutory language and Congress's expressed intent but would also increase costs that would burden consumers. ESA urges the Court to affirm the district court and reject these arguments.

³⁰ The VPPA imposes \$2,500 in statutory damages per violation. 18 U.S.C. § 2710(c)(2). Given that more than 205 million Americans play video games regularly, *see* n. 3 *supra*, this means that the video game industry could face more than \$512 billion in statutory damages if VPPA claims were brought by every video game user.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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