No. 15-1441

In the United States Court of Appeals for the Third Circuit

IN RE NICKELODEON CONSUMER PRIVACY LITIGATION

On Appeal from the United States District Court
for the District of New Jersey (Civ. No. 12-07829)
(The Honorable Stanley R. Chesler)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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The Chamber of Commerce of the United States of America has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. It represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's businesses.[1]

The Chamber has a substantial interest in the resolution of this case, which strikes at the heart of the Internet economy. Many of the Chamber's members participate in the online video market and are familiar with its economic underpinnings and technical infrastructure. The Chamber thus understands firsthand the way in which the appellants here want to

[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and no one other than the Chamber or its counsel contributed any money to fund its preparation or submission. The Chamber provided notice of its intent to file this brief, but without providing any reason, appellants have declined to consent. The Chamber therefore has filed a motion for leave to file this brief.

reengineer the Internet model that organizes much of modern personal and economic life. That sort of reorganization would affect billions of Internet users in this nation and across the globe. The Chamber respectfully submits that its views on the implications of this case shed important light on the interpretive questions presented here.

SUMMARY OF ARGUMENT

At its core, this case presents a straightforward question of statutory interpretation. The Video Privacy Protection Act of 1988 (VPPA), 18 U.S.C. § 2710, prohibits the disclosure of "information which identifies a person," and the demographic and technical data disclosed by Viacom in this case do not identify particular people. Appellants and their amicus, the Electronic Privacy Information Center (EPIC), therefore rely heavily on policy arguments that challenge the operational framework for vast portions of the Internet. That challenge is properly directed to Congress, not this Court.

A. Under the guise of the VPPA, appellants and their amicus seek to change the current configuration of much of the Internet: companies like Viacom and Google provide users with instant access to information and communication, and users provide limited data about their preferences to aid online advertising, which makes possible the provision of those otherwise

expensive services for free. That model underlies search engines, social media platforms, streaming sites, and countless content providers and aggregators. As a result, the current Internet construct provides enormous educational, communicative, social, and even political benefits to literally billions of Internet users around the world.

B. Whether to reimagine and reconfigure the Internet in the way that appellants desire is a national issue of economic and social policy—one that should be addressed, if at all, by Congress rather than courts. Congress is better equipped to conduct the necessary fact-finding and to weigh the competing values in such a complex debate. Indeed, in the last six months alone, Congress has considered no fewer than five bills that would regulate or enhance the system of video privacy and data protection available for Internet users (including a bill that would update the definition of personally identifiable information in one area). Appellants are therefore wrong to ask this Court to choke off debate in the halls of Congress, where this issue can and should be resolved.

C. Having not convinced Congress to revamp the Internet, appellants claim that the VPPA accomplishes that task with respect to video providers like Viacom. But the VPPA was designed to address the disclosure

of personal rental records by brick-and-mortar video stores. It is hardly surprising then that the VPPA's text does not extend to the sharing of cookies, IP addresses, and anonymous demographic data like gender and age. More than a quarter-century ago when Congress enacted the VPPA, it did not resolve the current debate over online data privacy (as recent legislative action suggests), and it should not be taken to have answered such an important policy question in such an oblique way.

ARGUMENT

APPELLANTS' ATTEMPT TO REWRITE THE VPPA IS PROPERLY DIRECTED TO CONGRESS, NOT THIS COURT.

As the district court recognized, the plain text of the VPPA does not permit appellants' claims, because the technical and demographic data disclosed by Viacom in this case do not "identif[y] a person." 18 U.S.C. § 2710(a)(3). Despite the absence of any textual grounding for their claims, appellants and their amicus seek to change the prevailing operational framework that affects billions of Internet users across the globe. Appellants thus urge this Court to tackle a quintessential policy question—about the appropriate balance between data privacy and access to instant information and communication—that should only be addressed, if at all, by Congress. Rather than take their policy arguments where they belong,

appellants try to shoehorn them into the VPPA, but that effort is foreclosed by the Act's plain text and purposes.

A. The Prevailing Business Model Has Resulted In Vast Benefits For Billions Of Internet Users.

The online services that individuals and businesses around the world use every day operate on an advertising-based model that depends on users providing limited data about their preferences but that enables businesses to provide valuable information and services for free. Content providers offer a host of services—search engines, email, and turn-by-turn directions, to take but a few examples—at no charge to Internet users. At the same time, those users provide data about their browsing habits, on which content providers rely to offer more effective advertising. Without the revenue generated by targeted advertising, many content providers would be deprived of their principal source of income and possibly driven out of business—thus harming the very individuals whom appellants purport to represent. *See In re Hulu Privacy Litig.*, 2014 WL 1724344, at *3 (N.D. Cal. Apr. 28, 2014) ("[Hulu's] main source of income is advertising revenue.").

This advertising-based business model has resulted in unprecedented levels of informational flow and global interconnectivity. Search engines such as Google and Yahoo! allow users to explore virtually boundless online

information. Hosting services such as YouTube and Hulu provide access to movies, music, and TV shows. Social media outlets such as Facebook and Twitter permit individuals to instantly share messages, pictures, and videos. These services provide benefits in nearly every domain of human life: they facilitate both personal and market communication, promote an educated public, enrich life by offering a vast assortment of entertainment, and even promote political discourse by enabling frictionless communication between constituents and their representatives.

These benefits are substantial and omnipresent. During the Arab Spring, activists relied on Facebook and Twitter to disseminate their message and publicize abuses of power. *See* Rasha A. Abdulla, *The Revolution* Will *Be Tweeted: The Story of Digital Activism in Egypt*, Cairo Rev. of Global Aff., Fall 2011, at 41, 49. A Republican presidential primary debate in 2012 featured questions posed via Twitter. *See The #Answer and #Dodge Results for the Fox Debate*, Twitter (Jan. 17, 2012, 2:24 AM EST), https://blog.twitter.com/2012/the-answer-and-dodge-results-for-the-fox-debate. Municipalities such as West New York, New Jersey use YouTube to post videos of board meetings, local events, and political fora. *See* West New

York, YouTube (last visited June 18, 2015), https://www.youtube.com/channel/UCrsujgOfnIaZ1WrQtzijgSw.

Whatever its relative benefits and costs, the point here is that the advertising-based business model permeates the Internet economy. It underlies search engines such as Google, Yahoo!, and Bing; social media platforms such as Facebook, Pinterest, and Twitter; streaming sites such as YouTube and Hulu; and countless websites like Viacom that provide or aggregate information and content. Indeed, video-hosting services, the sector of the Internet most directly threatened by this case, account for an astonishing 64 percent of all consumer Internet traffic. *See Cisco Visual Networking Index: Forecast and Methodology, 2014–2019* (May 27, 2015), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html. This suit therefore aims to change the predominant functional construct of the Internet.

B. Overhauling The Prevailing Business Model Is A Large-Scale Policy Question For Congress.

Whether to reconfigure the way that the Internet delivers online video content is a significant policy question—one that should be answered by Congress rather than courts. *See Dawson* v. *Chrysler Corp.*, 630 F.2d 950, 953 (3d Cir. 1980) ("The public policy questions, . . . which are beyond the

competence of this Court to resolve and with which Congress ultimately must grapple, are complex and implicate national economic and social concerns."); *see also Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 468 (1997) (declining to pass on an issue because it represented "a question of economic policy for Congress and the Executive to resolve"); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611–612 (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 current system's benefits to Internet users against concerns about privacy, and in determining whether to replace one organizing principle of the Internet with another. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (noting that Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts"). Here, the Court does not have before it a record on any of these issues, nor could this Court or any other compile the type of wide-ranging record that Congress is empowered to amass—and that would be necessary to balance all of the competing values in such a complex

economic and social debate and to implement some other system.[2] It would be difficult to think of an area less suited to case-by-case adjudication and judicial resolution than the operation of the Internet.

Moreover, Congress is well aware of appellants' concerns. In 2012, Congress amended the VPPA to clarify that Netflix could enable its users to share their viewing histories on Facebook. *See* Video Privacy Protection Act Amendments Act of 2012, Pub. L. 112-258, 126 Stat 2414. Through the first six months of the current Congress, Members from both Houses have introduced at least five bills to amend existing statutes, establish new regulatory frameworks, or otherwise modify the system of online privacy protection available for Internet users, with a particular focus on children's privacy. *See*, *e.g.*, H.R. 1053, 114th Cong. (2015); H.R. 2734, 114th Cong. (2015); S. 547, 114th Cong. (2015); S. 1563, 114th Cong. (2015). Of particular note is a bill introduced by Senator Leahy, one of the VPPA's authors, that

[2] Although they propose to abandon the current system, appellants offer no obvious alternative. Obtaining users' consent to disclosure would not address Viacom's concerns, because under appellants' theory—which renders liability dependent on the amount of information in the possession of the recipient or perhaps otherwise in the public domain—a video service provider like Viacom frequently will be unaware that it is disclosing personally identifiable information. Only blanket consent from every Internet user could safeguard providers from liability, which highlights the degree to which appellants' suit seeks to reshape the prevailing model for delivering online content.

would define personally identifiable information in the context of data breaches to include "unique electronic account identifier[s]." Consumer Privacy Protection Act of 2015, S. 1158, 114th Cong. (2015). Whatever one's views on the merits of specific pieces of legislation, this sort of legislative action and debate is exactly how this issue should be resolved, and appellants are wrong to ask this Court to choke off Congress's efforts in the field.

C. The VPPA Does Not, And Could Not Possibly Have Been Intended To, Reconfigure The Internet Economy.

Having not yet persuaded Congress to revamp the operation of the Internet, appellants claim that a 27-year-old statute already accomplishes that task in the context of online video delivery. The VPPA, however, was passed in 1988 in response to a specific incident: the publication of Judge Robert Bork's video rental history during his Supreme Court confirmation hearings. That publication included Judge Bork's actual name, a type of personally identifiable information conspicuously absent here. Given the fact that the Act was drafted to deal with a very different issue, it is hardly surprising that the VPPA's text does not extend to the sharing of cookies, IP addresses, and anonymous demographic data like gender and age. Those bits of data, standing alone or even taken in conjunction with other information, do not necessarily identify a specific person, as the VPPA's plain

text requires. At a minimum, Congress should not be taken to have resolved such a significant policy question in such an oblique way.

1. The Information At Issue Does Not Identify Particular Individuals.

The VPPA prohibits the disclosure of "personally identifiable information," a category that "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." 18 U.S.C. § 2710(a)(3). The Act's text could hardly be clearer: the "information" that is disclosed must "identif[y] a person" as having requested or obtained specific video materials. Simply put, the VPPA prohibits the disclosure of information that, standing alone, identifies a particular individual. The Act says nothing about the disclosure of information that does not itself link a particular person to specific video materials or services, but that might provide grounds for identification if combined with other data.

Appellants argue that, even if the data here do not identify particular people, such information is merely one subset of the much broader and open-ended category of "personally identifiable information." Br. 18. Of course, appellants do not explain why Congress would have specified that "personally identifiable information" includes "information which identifies a

person," if it also includes information that does *not* identify a person. Appellants rely (Br. 18) on a snippet from the Senate Report that says Section 2710(a)(3) "uses the word 'includes' to establish a minimum, but not exclusive, definition of personally identifiable information." S. Rep. 100-599 at 12. But the same passage of the same Senate Report also says that personally identifiable information "*is* information that identifies a particular person as having engaged in a specific transaction with a video tape service provider." *Id.* (emphasis added). The better reading of the legislative history is that Congress said what it meant: "personally identifiable information" must be information that identifies a person.

Other courts have adopted precisely that plain-text reading of the VPPA and held that the Act only applies to information that connects a particular person to a specific video. *See Eichenberger* v. *ESPN, Inc.*, No. 14-cv-463, Doc. No. 46, at 7 (W.D. Wash. May 7, 2015) ("The focus of this statute . . . is on whether the disclosure by itself identifies a particular person as having viewed a specific video."); *Locklear* v. *Dow Jones & Co.*, 2015 WL 1730068, at *6 (N.D. Ga. Jan. 23, 2015) (rejecting a VPPA claim because the recipient "had to take further steps" and rely on outside information in order to identify a specific individual); *Ellis* v. *Cartoon Network, Inc.*, 2014 WL

5023535, at *3 (N.D. Ga. Oct. 8, 2014) (rejecting a VPPA claim where "the disclosure by the Defendant . . . required [the recipient] to collect information from other sources" in order to identify the plaintiff).

2. The Information At Issue Does Not Necessarily Identify Particular Individuals Even When Combined With Other Data.

Even if the VPPA prohibited disclosure of any information that, when combined with other data, identifies a particular person, appellants' suit still would fail. At most, appellants have pleaded that the information disclosed by Viacom, when analyzed in combination with information already in Google's possession, *might* allow for the identification of a particular individual in some cases. There is no necessary connection between the disclosed information and personal identities, because Viacom's information does not identify individuals at all; it identifies routers or computers. Those devices may have one user or many. Viacom's information, even when coupled with Google's data, frequently will not "identif[y] a person," but rather a community of users. 18 U.S.C. § 2710(a)(3).

To take only a few examples, suppose that two children of similar age and gender both access Nickelodeon via the same household computer. Or that many different children use a computer in a school or public library. In

those cases, matching specific videos with particular individuals will be impossible. The point here is that Viacom does not disclose personal data. Rather, it provides Google with a mix of anonymized demographic data and technical specifications pertaining to devices and networks. Those bits of anonymized data, even when combined with whatever else appellants allege that Google knows, do not necessarily identify particular people—which is the concern of the VPPA. Liability under the VPPA should not turn on the happenstance of whether, at any certain point in time, a computer was used by one person or many.

Here too, courts have confirmed that when the VPPA defines personally identifiable information as information "which identifies a person," it means information that *by its nature* identifies particular people. In the Hulu case, for instance, the court held that "there is a VPPA violation only if that tracking *necessarily* reveals an identified person and his video watching." *In re Hulu Privacy Litig.*, 2014 WL 1724344, at *12 (emphasis added). Similarly in *Eichenberger*, the court reasoned that even if the recipient of the disclosure "does 'possess a wealth of information' about individual consumers, it is speculative to state that it can, and does, identify specific persons as having watched or requested specific video materials."

No. 2:14-cv-00463, Doc. No. 38, at 2. As those cases recognize, the VPPA's text requires that the disclosed information itself identify particular individuals.

3. The VPPA Should Not Be Interpreted To Reshape The Internet Economy.

Although the VPPA unambiguously precludes this suit, at a minimum any ambiguity in the Act should not be resolved in appellants' favor. Congress "does not . . . hide elephants in mouseholes," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and it defies logic that a little-used provision of a 27-year-old statute would reshape the Internet economy. That principle holds special force here, because Congress has amended the VPPA without acting to disrupt the status quo. Nearly 15 years ago, the court in *In re DoubleClick Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001), dismissed federal claims brought by consumers against an Internet advertising business that had installed cookies on their computers in order to produce targeted advertisements. *Id.* at 500, 503. Since that time, Congress has amended the VPPA, but it has not altered the current model for information delivery on the Internet.

Interpreting the VPPA to accomplish that in this case would subject the online video industry to staggering liability: the VPPA imposes statutory

damages of $2,500 *per violation*, which could easily result in massive judgments against Internet content providers. 18 U.S.C. § 2710(c)(2)(A). Ultimately, Congress remains the appropriate forum for addressing appellants' concerns, and this Court therefore should decline their invitation to wade into the current policy debate over electronic data privacy.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

RESPECTFULLY SUBMITTED,

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June 22, 2015

CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPEFACE LIMITATIONS, IDENTITY OF PAPER AND ELECTRONIC COPIES, AND VIRUS CHECK

I, Jeffrey B. Wall, counsel for amicus curiae, certify, pursuant to Local Appellate Rule 28.3(d), that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rules of Appellate Procedure 29(d), 32(a)(5)-(6), and 32(a)(7), and Local Appellate Rules 31.1(c) and 32.1(c), that the foregoing Brief of Amicus Curiae The Chamber of Commerce of the United States In Support of Appellees is proportionately spaced, has a typeface of 14 points or more, contains 3,231 words, and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that System Center Endpoint Protection, Antimalware Client Version 4.6.305.0 did not detect a virus.

S/ JEFFREY B. WALL
JEFFREY B. WALL

June 22, 2015

CERTIFICATE OF SERVICE

I, Jeffrey B. Wall, counsel for amicus curiae, certify that, on June 22, 2015, a copy of the foregoing Brief of Amicus Curiae The Chamber of Commerce of the United States In Support of Appellees was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users. As per Federal Rule of Appellate Procedure 25(a)(2)(B)(ii) and Local Rule of Appellate Procedure 25.1(a), I sent seven copies of this brief to the Clerk of the Court for delivery within three days.

S/ JEFFREY B. WALL
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June 22, 2015