No. 24-994

In the
Supreme Court of the United States

NATIONAL BASKETBALL ASSOCIATION,

Petitioner,

v.

MICHAEL SALAZAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Video Privacy Protection Act ("VPPA") prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The statute defines "consumer" to include a "subscriber of goods or services from a video tape service provider"; "personally identifiable information" to include information that links an individual to the "specific video materials and services" he "requested or obtained"; and "video tape service provider" to include those in the business of delivering audiovisual materials. *Id.* §§ 2710(a)(1), (a)(3), (a)(4).

The NBA is a "video tape service provider." It never argued otherwise. Michael Salazar subscribed to the NBA's online newsletter, which he used to view videos on NBA.com. The NBA then disclosed Mr. Salazar's Facebook ID and his video-watching history to Facebook. That information is "personally identifiable information." Again, the NBA never argued otherwise.

The questions presented are:

1. Whether the unauthorized disclosure of information one intended to keep private, and which was statutorily protected from disclosure, gives rise to a concrete injury.

2. Whether the phrase "goods or services from a video tape service provider," as used in the VPPA's definition of "consumer," refers to *all* of a video tape service provider's goods or services or only to its *audiovisual* goods or services.

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INTRODUCTION

The VPPA prohibits video tape service providers like the NBA from disclosing consumers' personally identifiable information without consent. Congress defined "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider." Mr. Salazar subscribes to the NBA's newsletter. He is thus a "subscriber of goods or services from a video tape service provider." He also watched videos on NBA.com. Without obtaining his consent, the NBA disclosed Mr. Salazar's video-watching history and Facebook ID, which the NBA agreed below is personally identifiable information, to Facebook. Mr. Salazar sued.

The district court held Mr. Salazar's injury—namely, the unauthorized disclosure of his private, statutorily protected information—was sufficiently concrete to support Article III standing. But it dismissed his claim with prejudice because it believed the phrase "goods or services from a video tape service provider" was limited to audiovisual goods or services.

On appeal, the Second Circuit agreed Mr. Salazar had standing. Indeed, every circuit court that has confronted the question—six in total—agrees on that point. But the Second Circuit disagreed with the district court about the meaning of "goods or services from a video tape service provider." It noted Congress did not qualify "goods or services" in that definition. And, because the statute used the phrase "*video* materials or services from a video tape service provider" just two definitions away, the Second Circuit held the unadorned reference to "goods or services" meant all goods or services, not just

audiovisual ones. As such, it vacated the judgment and remanded for further proceedings.

Since then, three things have happened: (1) Mr. Salazar filed two amended complaints, each materially altering the operative allegations; (2) the Seventh Circuit adopted the Second Circuit's statutory analysis; and (3) the Sixth Circuit rejected that analysis. The NBA asks this Court to review the Second Circuit's decision. Try as it might, though, it cannot manufacture a circuit split on standing. The standing issue—the NBA's first question presented—is entirely unworthy of this Court's review.

But there is an acknowledged 2–1 circuit split concerning the meaning of "goods or services" as used in the VPPA's definition of "consumer." While Mr. Salazar agrees that second question is important, this case is a poor vehicle for resolving it. As most relevant here, there is no final judgment, and the complaint both the district court and the Second Circuit analyzed is no longer operative. For those reasons, the NBA's petition should be denied.

STATEMENT OF THE CASE

A. Statutory background

After Ronald Reagan nominated Judge Robert Bork to a seat on this Court, a journalist asked Judge Bork's local video store which movies he had rented. App. 22a. The store handed over a list of 146 films. *Id.* And the journalist published "The Bork Tapes." *Id.* Congress "quickly decried the publication." *Id.*; *see also* 134 Cong. Rec. 10259 (May 10, 1988). It believed "the relationship between the right of privacy and intellectual freedom is a central part of the [F]irst [A]mendment." S. Rep. No. 100-599, at 4.

Congress was also concerned that "the computer age," which had already "revolutionized our world," gave businesses the ability "to be more intrusive than ever before." *Id.* at 6; *see also id.* at 5–6 (expressing concerns with "Big Brother" relying on computerized records and the accumulation of "vast amounts of personal information" to engage in broad surveillance); *id.* at 7 (noting "the trail of information generated by every transaction that is now recorded and stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of surveillance"); *id.* at 7–8 (crediting testimony that "advanced information technology" fostered "more intrusive data collection" and "increased demands for personal information," including by businesses hoping "to better advertise their products"); 134 Cong. Rec. at 10259–60 (describing a "much more subtle and much more pervasive form of surveillance" that "[n]ot even George Orwell anticipated").

But Congress's central concern was that Americans were losing control over their private information. S. Rep. No. 100-599, at 6–7. Privacy, after all, "goes to the deepest yearnings of all Americans." *Id.* at 6. "We want to be left alone." *Id.*

Unauthorized disclosures of video-watching histories, meanwhile, offer "a window into our loves, our likes, and dislikes." *Id.* at 7; 134 Cong. Rec. at 10259 (explaining what we watch reflects "our individuality" and who we are as people). Congress believed watching videos is an "intimate process" that "fuel[s] the growth of individual thought" and "should be protected from the disruptive intrusion of a roving eye." S. Rep. No. 100-599, at 7.

Given these concerns, Congress passed the VPPA to ensure consumers maintained the ability to control their private information. The statute achieves that end by prohibiting a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1).

The law permits such disclosures in six narrow circumstances, including—as most relevant here—with the consumer's "informed, written consent." *Id.* § 2710(b)(2)(A)–(F). Any unauthorized disclosure, however, subjects a provider to liquidated damages of $2,500, punitive damages, reasonable attorneys' fees, and equitable relief. *Id.* § 2710(c)(2).

The VPPA also defines three of the terms used in Section 2710(b)(1)'s one-sentence liability clause. It defines "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). It defines "personally identifiable information" to include "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). And it defines "video tape service provider" to mean "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).

B. Factual and procedural background

1. The initial complaint

On September 15, 2022, Mr. Salazar filed a one-count complaint against the NBA. App. 67a–90a. He

alleged the NBA disclosed his and others' personally identifiable information to Facebook without first obtaining consent. App. 67a–68a.

In particular, Mr. Salazar alleged the NBA intentionally installed the Facebook Pixel—a piece of surveillance software—on its website NBA.com. App. 68a–69a, 77a–78a, 80a, 87a–88a. This invidious bit of code tracks when users enter the website and what they do there, including when they watch videos. *Id.* Without obtaining consent, the NBA then disclosed consumers' video-watching histories, along with their Facebook IDs (*i.e.*, "a unique and persistent identifier that Facebook assigns to each user"), "as one data point to Facebook." *Id.*

And the NBA "profit[ed] handsomely from its unauthorized disclosure[s]," all at the expense of consumers' "statutorily protected privacy rights." App. 69a; *see also* App. 88a (alleging the NBA's unauthorized disclosures violated Mr. Salazar's "statutorily protected right to privacy in [his] video-watching habits" and resulted in a "loss of privacy").

Through NBA.com and an app, the NBA "delivers" and "is in the business of delivering countless hours of video content." App. 71a. Mr. Salazar has a "digital subscription to NBA.com." App. 70a, 82a–83a. To obtain it, he "sign[ed] up for an online newsletter." App. 74a. In exchange, Mr. Salazar provided certain personal information, including his e-mail address. App. 74a, 82a–83a.

Mr. Salazar "used his NBA.com digital subscription to view Video Media through NBA.com." App. 70a. As a result, the NBA disclosed his personally identifiable information—including his Facebook ID and which videos he watched—to

Facebook. App. 70a, 77a–78a, 80a, 82a, 87a–88a. The disclosures occurred automatically via the Facebook Pixel the NBA installed on its website. App. 78a–79a. The NBA never informed Mr. Salazar that it would disclose this material to third parties, nor did Mr. Salazar consent to these disclosures. App. 70a, 74a–75a, 77a, 82a–83a, 87a.

Accordingly, the NBA "knowingly disclosed to Facebook for its own personal profit the Personal Viewing Information of [its] digital subscribers," including Mr. Salazar, "together with additional sensitive personal information." App. 81a–82a. Facebook and the NBA then used this information to create and display targeted advertising, for which each "received financial remuneration." App. 79a. In short, the NBA "monetized" its consumers' private information. App. 80a. And, to be clear, the Facebook Pixel is unnecessary to NBA.com's operation; it exists and is deployed "for the sole purpose of enriching [the NBA] and Facebook." App. 82a.

2. The district court's dismissal with prejudice

The NBA filed a motion to dismiss the complaint, arguing that—as relevant here—Mr. Salazar (1) lacked Article III standing because he did not suffer a "concrete" injury, and (2) was not a "consumer" under the VPPA. On August 7, 2023, the district court denied the NBA's "motion to dismiss for lack of standing" but granted "its motion to dismiss for failure to state a claim." App. 42a.

As to standing, the district court held the harm at issue was the unauthorized disclosure of Mr. Salazar's private information. App. 52a. It explained Mr. Salazar could not "defend . . . against" the NBA's unauthorized dissemination of his private

information. *Id.* The court held this harm was sufficiently analogous to two common-law privacy torts—namely, "public disclosure of private information and intrusion upon seclusion." App. 53a (citation omitted); *see also* App. 12a (agreeing the district court's analysis was based on "two traditionally recognized common-law analogs").[1] The court agreed the unauthorized disclosures were actionable "intrusion[s] into his privacy." App. 54a.

As to the VPPA's definition of "consumer," however, the district court agreed with the NBA. App. 60a–64a. It believed a VPPA "consumer" was one who rents, purchases, or subscribes to "audio-visual goods or services," and "not just any products or services from a video tape service provider." App. 60a.

The court noted Mr. Salazar alleged he "used his digital subscription to view videos on NBA.com." App. 61a. It also noted the newsletters contained links to video content. App. 63a. But it discounted both facts because, while the newsletters may "entice or encourage recipients" to watch linked videos, "there [was] no assertion that a newsletter subscription was required to access those videos, functioned as a login, or gave newsletter subscribers extra benefits as viewers." App. 62a (citation omitted); *see also* App. 63a (holding the links in the newsletters were "insufficient" unless they gave Mr. Salazar "exclusive content or enhanced access" to videos).

Instead, in the court's view, Mr. Salazar had the same access to videos on NBA.com as "any member of the public." App. 62a. Accordingly, it held Mr. Salazar was "a subscriber to newsletters, not a subscriber to

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[1] The NBA claims the district court based its analysis solely on intrusion upon seclusion. Pet. 12. As shown above, it did not.

audio visual materials." *Id.* (internal quotation marks, alterations, and citation omitted). Finally, the court believed the only proposed amendment—concerning the newsletters' links to videos—was futile. App. 65a–66a. As a result, it dismissed Mr. Salazar's claim with prejudice. App. 66a.

3. The Second Circuit's decision

On October 15, 2024, the Second Circuit addressed the same two questions: standing and "consumer" status.[2] As to standing, it held the harm involved was that Mr. Salazar's "personal information was disclosed to a third party, without his consent, in violation of the VPPA." App. 5a; *see also* App. 14a, 21a (describing the harm as "the unauthorized disclosure of his personal viewing information"). And it agreed this harm is sufficiently similar to at least one common-law analog—namely, the public disclosure of private facts. App. 5a–6a, 14a. As such, it did not examine whether the harm was also "closely related" to an intrusion upon seclusion. App. 16a n.5.

On the merits, the Second Circuit rejected the district court's analysis. It held "[t]he VPPA's text, structure, and purpose compel the conclusion that [the] phrase ['goods or services'] is not limited to *audiovisual* 'goods or services.'" App. 6a; *see also* App. 22a, 26a, 35a (similar). Instead, the VPPA's definition of "consumer" encompasses "a renter, purchaser, or

[2] It also confirmed Mr. Salazar was a "subscriber" of the NBA's newsletter. App. 6a, 35a–40a. The NBA does not ask this Court to review that determination.

subscriber of *any* of [a video tape service] provider's 'goods or services'—audiovisual or not." App. 31a.

Here, the Second Circuit raised four critical points. *First*, Congress used "any," a term that "bespeaks breadth," in its definition of "consumer." App. 27a. *Second*, the definition of "consumer," unlike other provisions of the VPPA, "makes no mention of audiovisual materials." *Id.* *Third*, the prepositional phrase "from a video tape service provider" could not possibly limit "goods or services" in the definition of "consumer" to video goods or services without creating surplusage elsewhere in the statute. App. 29a–30a.[3] *Fourth*, the definition of "video tape service provider" does not require such entities to "deal *exclusively* in audiovisual content." App. 31a. Thus, it was natural for Congress to define the "consumer" relationship without reference to videos, while requiring a tighter connection to video materials or services in the definition of "personally identifiable information." App. 31a–33a.

To sum up, the Second Circuit said "[t]he VPPA is no dinosaur statute." App. 40a. Instead, its "privacy protections remain as robust today as they were in 1988." *Id.* Given its holdings, the Second Circuit vacated and remanded. *Id.*

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[3] In particular, Section 2710(a)(3)'s definition of "personally identifiable information" uses the same prepositional phrase *and* a video-specific modifier. App. 29a–30a. The NBA's interpretation would render that video-specific modifier superfluous. App. 30a. It would also make "goods or services from a video tape service provider," 18 U.S.C. § 2710(a)(1), mean the same thing as "*video* materials or services from a video tape service provider," *id.* § 2710(a)(3) (emphasis added).

4. Additional proceedings in the district court

On December 13, 2024—more than three months before the NBA filed its petition for certiorari—Mr. Salazar filed an amended complaint. App. 91a–137a. The amended complaint makes several relevant additions. *First*, it more clearly points out that Congress enacted the VPPA to ensure consumers "maintain control over [their] personal information." App. 97a. *Second*, it adds allegations about changes to the NBA's policies. App. 101a–114a. *Third*, it adds allegations about how the Facebook Pixel works and the information Facebook maintains. App. 117a–121a, 128a–129a. *Fourth*, it alleges that e-mails the NBA sent to subscribers contained links to videos and that Mr. Salazar "accessed video content via his subscription to [the NBA's] newsletter." App. 128a; *see also* App. 129a, 134a (similar).

On May 1, 2025, the Second Circuit decided *Solomon v. Flipps Media, Inc.*, 136 F.3d 41 (2d Cir. 2025). There, it held "personally identifiable information" includes only "information that would allow an ordinary person to identify a consumer's video-watching habits," and not "information that only a sophisticated technology company could use to do so." *Id.* at 52; *see also id.* at 54 (focusing on whether "an ordinary person" could, "with little or no extra effort," identify the plaintiff's "video-watching habits" based on the disclosures to Facebook, not whether Facebook could do so or whether the defendant knew Facebook could do so).[4]

[4] The Second Circuit acknowledged *Solomon* deepened an existing circuit split on the meaning of "personally identifiable information." *Id.* at 48–54 (rejecting the First Circuit's

In *Solomon*, the Second Circuit noted it was "undisputed" that the defendant video tape service provider had "knowingly disclosed certain information about [the plaintiff] to Facebook—namely, computer code that denoted the titles and URLs of the videos [she] accessed and her [Facebook ID]." *Id.* at 47–48. But the court concluded "an ordinary person" would not understand the underlying computer code involved in those transmissions. *Id.* at 54. Nor would "an ordinary person" understand the c_user field to represent the plaintiff's Facebook ID. *Id.* Thus, the Second Circuit held the knowing transmission of computer code that revealed the consumer's Facebook ID and the titles of videos she watched—to Facebook—did *not* constitute "personally identifiable information." *Id.* at 55.[5]

In response to *Solomon*, Mr. Salazar filed a motion to amend his complaint. The parties then stipulated that Mr. Salazar could file a second amended complaint, which he did on June 12, 2025. Supp. App. 1sa–53sa. Mr. Salazar's Second Amended Complaint repeats the new allegations from the First Amended Complaint. Supp. App. 8sa, 13sa–25sa, 28sa–35sa,

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"reasonable foreseeability" standard in favor of the "ordinary person" standard the Third and Ninth Circuits had adopted).

[5] The Second Circuit has since made clear, albeit in an unpublished summary order, that "*Solomon* effectively shut the door for Pixel-based VPPA claims." *Hughes v. Nat'l Football League*, No. 24-2656, 2025 WL 1720295, at *2 (June 20, 2025); *see also id.* at *3 (focusing on whether "an ordinary person would be able to understand the actual underlying code communication itself," without the assistance of technology, not whether an ordinary person would understand the information the way the recipient sees it on a device that translates the code automatically). *Hughes* supported, in part, the NFL's interest as amicus curiae here. NFL Amicus Br. 2.

44sa–45sa. It also adds allegations concerning whether and how an "ordinary person" would understand the NBA's disclosures to Facebook. Supp. App. 4sa, 10sa–11sa, 36sa–40sa, 43sa.

DISCUSSION

As drafted, neither of the NBA's questions presented warrants this Court's review. The first is beyond repair. There is simply no circuit split on the standing question confronted by the lower courts here. The second question, however, could be reformulated to present a discrete legal issue worthy of this Court's eventual review. And, on that reformulated question, there is an acknowledged circuit split. Still, this case—in its present posture—is a poor vehicle for resolving that reformulated question. Mr. Salazar begins his analysis there.

I. This case is a poor vehicle to resolve any questions presented.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) (collecting authorities); *see also Mount Soledad Mem. Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J.) (agreeing with a denial of certiorari where the petitions arrived "in an interlocutory posture" and where there was "no final judgment").

As a result, where—as here, App. 3a, 6a, 40a—the circuit court has vacated a judgment and remanded for additional proceedings, this Court typically denies certiorari. *See Mount Soledad*, 567 U.S. at 945; *Virginia Mil. Inst.*, 508 U.S. at 946; *Bhd. of Locomotive Firemen & Enginemen v. Bangor &*

Aroostook R.R. Co., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because, while the circuit court ruled on various legal issues, it remanded for additional proceedings, meaning the case was "not yet ripe for review by this Court").

There are at least two additional reasons to follow this practice here. *First*, the complaint the district court and the Second Circuit examined is no longer operative. Indeed, months before the NBA filed its petition for certiorari, Mr. Salazar filed his First Amended Complaint. App. 91a, 137a (showing the First Amended Complaint was filed on December 13, 2024); Pet. 36 (showing the petition was filed on March 14, 2025). After the petition was filed, and by the parties' agreement, Mr. Salazar filed his Second Amended Complaint. Supp. App. 1sa.

Not only is there no final judgment here, then, but the factual allegations have materially shifted since both courts below rendered decisions. For example, based on the initial complaint, the NBA claims Mr. Salazar watched videos "separately" from his newsletter subscription. Pet. i, 5–6, 25. The Second Amended Complaint makes clearer that this assertion is false. Supp. App. 44sa–45sa, 50sa–51sa.

That the operative allegations have shifted "complicate[s] the Court's review." Pet. 35. In fact, it likely precludes the NBA's desired reversal. Pet. 2, 8. Even if this Court were to agree with the NBA about the meaning of "consumer," it could only vacate the Second Circuit's decision and remand for further proceedings concerning the now-operative Second Amended Complaint. To do otherwise, the Court would need to examine the Second Amended Complaint's allegations in the first instance. But this

Court is one "of review, not of first view." *Smith v. Arizona*, 602 U.S. 779, 801 (2024).

Second, although the Second Circuit—in this case—held the VPPA was "no dinosaur statute," App. 40a, it subsequently delivered an asteroid that renders the statute's protections virtually extinct. *See Solomon*, 136 F.4th at 52–55 (holding that knowing, computer-code-based disclosures to "a sophisticated technology company" are statutorily permitted even if they are understood, and are known to be understood, to contain a consumer's video-watching history, so long as an "ordinary person"—who did not receive the disclosures—would not understand them); *Hughes*, 2025 WL 1720295, at *2 ("*Solomon* effectively shut the door for Pixel-based VPPA claims.").

Solomon contravenes at least three unanimous intervening decisions from this Court. *See A.J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, No. 24-249, 605 U.S. ----, 2025 WL 1657415, at *3, *5–6 (June 12, 2025) (rejecting the atextual "bad faith or gross misjudgment" standard the Eighth Circuit imposed for suits concerning educational services under the ADA and holding the phrase "any person"—as exists in Section 2710(b)(1)—is "expansive and unqualified," meaning it applies to every person, "without distinction or limitation"); *Ames v. Ohio Dep't of Youth Servs.*, No. 23-1039, 605 U.S. ----, 2025 WL 1583264, at *4–5 (June 5, 2025) (rejecting the atextual "background circumstances" test five circuits imposed on "majority-group plaintiffs"); *id.* at *6–12 (Thomas, J., concurring) (noting atextual rules "have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for the courts," all with no principled way to resolve uncertainties caused by the judge-made test

itself); *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, No. 23-1201, 605 U.S. ----, 2025 WL 1583292, at *2 (June 5, 2025) (rejecting a minimum-contacts standard that went "beyond the [statutory] text" and declining "to add in what Congress left out").

Unless the Second Circuit reconsiders *Solomon* or *Hughes*, it is difficult to see how Mr. Salazar's claim can survive. As a result, this Court may not need to wait long. Still, given the current absence of a final judgment and because the complaint examined below is no longer operative, the NBA's petition for certiorari should be denied. This case is far from an "ideal" or "perfect vehicle." Pet. 15, 31, 33–35.

II. The Second Circuit correctly decided Article III standing, and there is no circuit split on the point.

When assessing whether an intangible harm is sufficiently concrete to support standing, there are two inputs. *First*, a harm with "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts" is sufficiently concrete. *TransUnion v. Ramirez*, 594 U.S. 413, 424 (2021) (internal quotation marks and citation omitted); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016) (similar). Although "history and tradition offer a meaningful guide," this analysis "does not require an exact duplicate." *TransUnion*, 594 U.S. at 424; *see also United States v. Rahimi*, 602 U.S. 680, 692 (2024) (noting, in a different context, analogous reasoning does not require "a 'dead ringer' or a 'historical twin'").

Second, "Congress's views" are also "instructive." *TransUnion*, 594 U.S. at 425; *Spokeo*, 578 U.S. at 341. Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that

were previously inadequate at law." *TransUnion*, 594 U.S. at 425 (quoting *Spokeo*, 578 U.S. at 341). Thus, courts "must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *Id.* (citing *Spokeo*, 578 U.S. at 340–41).

Here, historical practice and congressional judgment point in the same direction. As this Court has held, "disclosure of private information" and "intrusion upon seclusion" are "[c]hief among" the "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* It is likewise clear that, in the VPPA, Congress sought to prevent unauthorized disclosures of consumers' personally identifiable information, even just to one person. 18 U.S.C. § 2710(b)(1). On both fronts, the loss of an individual's right to control his private information is harmful. S. Rep. No. 100-599, at 6–7. Thus, Mr. Salazar has standing. The NBA's efforts to confuse the issue fall flat.

A. The NBA's first question presented must be reformulated to match the record and the issues decided below.

In the petition's first question, the NBA asks "[w]hether a consumer claiming that he was harmed by disclosure of his personal information must plead that his information was revealed to the public to establish Article III standing," or "need only plead that his information was disclosed to any third party without his consent." Pet. i. There are several problems with the formulation of this question.

First, the question is overbroad. It is not aimed, for example, at any particular common-law analog. Indeed, without any guiding context, the NBA's overbroad formulation presents a question this Court has already answered. *See TransUnion*, 594 U.S. at 417, 432–33, 442 (holding those whose information was disclosed "to third-party businesses," but not to the public at large, in a "misleading" way suffered a concrete harm and "ha[d] Article III standing").

For similar reasons, the NBA's repeated references to "business-to-business" disclosures, Pet. 1, 3–4, 12–13, 15, 22, do not change the calculus for this overbroad question. There is nothing special about business-to-business disclosures, writ large, when it comes to concrete harm. *See TransUnion*, 594 U.S. at 417, 432–33, 442.

Second, the question does not identify the harm at issue in this case. Instead, it simply refers to "a consumer claiming he was harmed by disclosure of his personal information," Pet. i, without explaining *how* such a consumer claims he was harmed. But one whose "personal information," *id.*, was disclosed in a misleading (or false) way suffers a different kind of harm than one whose personal information, which he intended to keep private and which was statutorily protected from disclosure, was disclosed without his consent. Because this Court has twice noted the importance of comparing "harms," one must identify the relevant harm with precision. *See TransUnion*, 594 U.S. at 425, 433; *Spokeo*, 578 U.S. at 340–41.

Third, the NBA's question seems to cut out the second "instructive" and "important" consideration here—namely, Congress's judgment. *TransUnion*, 594 U.S. at 425; *Spokeo*, 578 U.S. at 341. This Court

has made clear that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements" and can elevate "concrete, *de facto* injuries that were previously inadequate at law." *Spokeo*, 578 U.S. at 341 (citation omitted).

In some circumstances, then, the violation of a right "granted by statute can be sufficient to constitute injury in fact," such that a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* at 342. Such is the case where Congress "impose[s] a statutory prohibition or obligation on a defendant" and "grant[s] a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation," at least where the harm involved exists "in the real world." *TransUnion*, 594 U.S. at 425–26.

Fourth, the NBA's claimed "4–1 circuit split" on this question, Pet. 13, 15, concerns materially different factual scenarios. In particular, it involves four cases where the disclosure was limited to a single mail vendor and one case (*i.e.*, this one) where the disclosure did *not* go to a mail vendor. Given these divergent facts, it is far from "clear" that the Second Circuit "reached a result those [four other] circuits reject." Pet. 13–14; *see also* Pet. 15, 34 (similar).

The NBA argues the Third, Seventh, Tenth, and Eleventh Circuits have held "private, business-to-business" disclosures "*like those [Mr.] Salazar challenges here*" do not "cause concrete harm sufficient for Article III standing." Pet. 3 (emphasis added); *see also* Pet. 3–4 (citing *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 145 (3d Cir. 2024); *Nabozny v. Optio Sols. LLC*, 84 F.4th 731, 733 (7th Cir. 2023); *Shields v. Pro. Bureau of Collections of*

Md., Inc., 55 F.4th 823, 827 (10th Cir. 2022); *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc)).

But those circuits did nothing of the sort. The underlying cases did not broadly concern all disclosures to "businesses," as the NBA suggests. Pet. 3–4. Nor did they involve disclosures "like those [Mr.] Salazar challenges here." Pet. 3. Instead, as the NBA elsewhere admits, these cases focused narrowly on disclosures to "mail processing vendor[s]." Pet. 16 (describing *Hunstein*'s holding); Pet. 17 (describing *Nabozny*'s holding); Pet. 18 (describing *Shields*'s and *Barclift*'s holdings); Pet. 20 (admitting all four cases "involv[ed] disclosures to mail vendors").

Disclosures to those *particular* businesses—for the narrow purpose of populating forms and sending them to the consumer—are "functionally internal" and may not implicate harms traditionally associated with privacy torts. Pet. 19. In other words, those cases involved something more akin to *non*-disclosures than to the unauthorized disclosures at issue here.

Right or wrong, those holdings say nothing about this case or the harms it involves precisely because the disclosures they examined bear no resemblance to the disclosures here. To start, the disclosures here went to Facebook, not to "ministerial intermediaries." App. 20a. Moreover, the disclosures here were made for the express purpose of creating targeted ads that would enrich the NBA, Facebook, and their business partners. App. 79a–80a, 82a. They were not made for limited purpose of "bounc[ing]" the information "back to [Mr. Salazar] on behalf of the entity that properly possessed the information." App. 20a.

But the NBA's first question collapses all these factual distinctions, contrasting a disclosure to a single third party—whether a mail vendor or a newspaper or Facebook—with a disclosure to the public at large. But even the NBA's best case disagrees with this approach. *See Hunstein*, 48 F.4th at 1247 (agreeing "a disclosure to a single person may very well qualify as publicity—depending on who the person is" (*e.g.*, "an online personality or a reporter")—because the disclosure's "*effect*" matters, "not the number of people to whom it is made").

Given these considerations, the first question presented should be reformulated. The issue here is: Whether the unauthorized disclosure of information one intended to keep private, and which was statutorily protected from disclosure, gives rise to a concrete injury—at least, perhaps, where the recipient is not a mail vendor.

B. Once the question is properly reformulated, the six circuits that have squarely addressed the issue speak with a single voice.

1. *Before the Second Circuit's decision, four circuits held unauthorized disclosures of private, statutorily protected information give rise to concrete injuries.*

Upon reading the NBA's petition, one may be surprised to learn that the Second Circuit was *not* the first to address whether VPPA plaintiffs whose private information was disclosed without their consent suffer concrete injuries. In fact, four circuits had addressed that question before the Second Circuit picked up its pen.

All four agree those whose private information was disclosed without their consent suffer concrete injuries. *See Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982–84 (9th Cir. 2017) (holding "*every*" unauthorized "disclosure of an individual's 'personally identifiable information' and video-viewing history" offends the substantive privacy interests the VPPA protects and erodes consumers' ability to "retain control over their personal information"); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1339–41 (11th Cir. 2017) (holding unauthorized disclosures of video-viewing histories give rise to concrete harms akin to traditional privacy-based torts); *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 274 (3d Cir. 2016) (explaining such cases involve "a clear, *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information"); *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (similar).

The NBA's discussion of a supposedly "clear" "4–1 circuit split," Pet. 13–14, wherein the Second Circuit's approach is a so-called "outlier," Pet. 22, curiously omits any mention of these four cases. While all four predate *TransUnion*, three—*Eichenberger*, *Perry*, and *Nickelodeon*—post-date *Spokeo*, which *TransUnion* reaffirmed. *See TransUnion*, 594 U.S. at 424–26 (endorsing *Spokeo*'s focus on both historical analogs and congressional judgment).

And, for at least those three cases, the analyses align with what this Court directed lower courts to do in *TransUnion* as well. *See Eichenberger*, 876 F.3d at 982–84 (assessing the harms at issue by reference to both historical privacy-based causes of action and congressional judgment); *Perry*, 854 F.3d at 1340–41 (similar); *Nickelodeon*, 827 F.3d at 273–74 (similar).

In addition, the Eleventh Circuit has reaffirmed *Perry* even after *TransUnion*. *See Davis v. Pro. Mgmt. Corp.*, No. 22-14026, 2023 WL 4542690, at *3 (11th Cir. July 14, 2023) (holding "*Perry* properly followed this Circuit's and the Supreme Court's precedent by inquiring whether a statutory violation had a common-law analogue").

The NBA does not bother to argue these holdings are somehow inconsistent with *TransUnion*. Nor could it. Instead, it simply ignores the cases entirely.

2. The Second and Sixth Circuits have joined the chorus.

In this case, the Second Circuit became the fifth to hold that unauthorized disclosures of private information give rise to concrete injuries. App. 14a–17a. On April 3, 2025, the Sixth Circuit fittingly became the sixth. *See Salazar v. Paramount Glob.*, 133 F.4th 642, 647–48 (6th Cir. 2025).

As a result, there is no circuit split on the question the courts below confronted. Instead, it is 6–0 in favor of standing for those whose private, statutorily protected information was disclosed without their consent. No circuit has addressed this question, in this context, and reached the opposite conclusion. Nor has any circuit confronted whether a different result might obtain, in a VPPA context, if the disclosures went solely to a mail vendor. Because this case does not involve such a disclosure, however, how that hypothetical case might be resolved is irrelevant.

3. These unanimous holdings align with this Court's precedents and with historical understandings of privacy rights.

The VPPA protects a consumer's ability to control private information about the videos he requests and obtains. As this Court has explained, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 762–63 (1989). As such, individuals have long been understood to have a valid "interest in avoiding disclosure[s] of personal matters." *Id.* at 762.

And information remains "private" where, as here, it is restricted and "not freely available to the public." *Id.* at 763–64; *see also Carpenter v. United States*, 585 U.S. 296, 304–05 (2018) (holding one may have "a legitimate privacy interest" even "in records held by a third party"); *U.S. Dep't of Defense v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 500 (1994) (similar).

Although the discussion above centers on common-law comparators, privacy reverberates throughout the Constitution. *See, e.g.*, *Carpenter*, 585 U.S. at 304–05 (holding the Fourth Amendment's "basic purpose" is to "secure the privacies of life" (internal quotation marks and citation omitted)); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting the First, Third, Fourth, and Fifth Amendments create protected "zones of privacy"); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (holding the "right to privacy" is "no less important than any other right carefully and particularly reserved to the people").

Indeed, privacy protections implicate core notions of human dignity. *See, e.g.*, *Sorrell v. IMS Health Inc.*,

564 U.S. 552, 579–80 (2011) (noting personal privacy protections "secure" dignity and "are too integral to the person" and "too essential to freedom" to be cast aside casually). Privacy speaks to a "man's spiritual nature, of his feelings and his intellect." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). It reflects a fundamental "right to be let alone." *Id.* This "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). It is not just a right to prevent an "inaccurate portrayal of private life, but to prevent its being depicted at all." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. at 218.

Against this backdrop, the NBA's efforts to downplay the significance of its privacy intrusions ring hollow. Pet. 1 (describing such intrusions as "trivialities"); Pet. 7 (claiming those harmed by such intrusions "have no business clogging federal dockets"); Pet. 14–15, 31 (describing those individuals as "unharmed"); Pet. 32 (claiming unauthorized disclosures implicate only "manufactured and meaningless technicalities" and "trivial disputes").

C. The NBA's alternative approach to standing—whereby harms must be similar in degree, not just kind—has been uniformly rejected by all nine circuit courts that have addressed the issue.

Perhaps sensing its illusory 4–1 circuit split is likely doomed, the NBA also asks this Court to adopt a new standing rule—namely, "intangible harms don't count as concrete if they lack an element 'essential to liability' at common law." Pet. 5; *see also*

Pet. 14 (similar). The NBA even claims, based on its citation to a *Hunstein* concurrence, that *TransUnion* already adopted this approach. Pet. 22 (quoting *Hunstein*, 48 F.4th at 1252 (Pryor, C.J., concurring)).

It did not. In fact, as the Third Circuit recognized, "the word 'element' does not appear once in the body of the *TransUnion* opinion." *Barclift*, 93 F.4th at 145. Nor did *TransUnion* fundamentally transform standing jurisprudence by requiring a statutory claim to replicate a common-law analog element-for-element, or else be deemed insufficiently concrete. *But see* Pet. 22–24 (arguing the Second Circuit's decision "contravenes *TransUnion*" by permitting Mr. Salazar's claim to proceed even without an element supposedly "essential to liability" for common-law privacy torts). In fact, *TransUnion* did the opposite, specifically holding that the harm involved in the new statutory claim need not find "an exact duplicate in American history and tradition." *TransUnion*, 594 U.S. at 424.

The NBA's element-for-element approach would permit only exact duplicates. Ignoring this glaring defect, the NBA insists the Seventh and Eleventh Circuits endorse its element-based approach. Pet. 15 (agreeing the Third and Tenth Circuits "reject" the focus on the comparator tort's "formal elements"); App. 18a n.6 (the Second Circuit rejecting it here). But even this more modest claim is wrong.

Both the Seventh and Eleventh Circuits expressly noted that "exact duplicates" are not required. *See Nabozny*, 84 F.4th at 735; *Hunstein*, 48 F.4th at 1242. And both focused on a comparison of *harms*, not elements. *See Nabozny*, 84 F.4th at 735 (holding the harm caused by a disclosure to a "third-party mail

vendor" is not "analogous to the harm caused by a tortious invasion of privacy"); *Hunstein*, 48 F.4th at 1242 (concluding the "new harm" alleged "is not similar to the old harm cited"); *id.* at 1244 (noting the court "do[es] not look at tort elements in a vacuum," but instead "with an eye toward evaluating commonalities between the harms").

Indeed, the Eleventh Circuit, again sitting en banc, clarified its approach nearly two years before the NBA filed its petition. *See Drazen v. Pinto*, 74 F.4th 1336, 1343–44 (11th Cir. 2023) (en banc). In that case, it again confirmed that the focus must be on "whether the harms share 'a close relationship.'" *Id.* at 1343 (reiterating "the new harm need only be 'similar to' the old harm"; "we do not require carbon copies"). And it explained the question is whether harms are similar "in kind, not degree." *Id.* at 1343–44. For this critical point, it cited a Seventh Circuit opinion written by then-Judge (and now-Justice) Barrett. *Id.* (citing *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)).

The Eleventh Circuit also noted it was, at worst, the eighth circuit (but probably the ninth) to endorse this "kind, not degree" approach. *See id.* at 1344 (collecting cases from the Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, all focusing on whether the alleged harm resembles "the *kind* of harm" associated with a common-law analog without comparing the degrees of the harms); *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 693 (5th Cir. 2021) (agreeing the focus is on the "types of harms protected at common law, not the precise point at which they become actionable" or the "substantiality of an alleged harm"). After all, "the Constitution empowers Congress to decide what degree of harm is

enough so long as that harm is similar in kind to a traditional harm." *Drazen*, 74 F.4th at 1345.

As far as Mr. Salazar is aware, no circuit has adopted the NBA's approach. None would compare the degree of the harm caused by a disclosure of one's private information to a single third party to the degree of harm caused by a broader or more "public" disclosure. Put simply, the NBA's approach requires a comparison *no* circuit court is willing to make. Pet. 1, 4 (contrasting an unauthorized disclosure to one business, Facebook, with an unauthorized disclosure to the public at large).

To be sure, four circuits have held that disclosures to mail vendors that send letters back to the consumers involve an entirely different *kind* of harm. *See supra* at 18–19. But those holdings, right or wrong, do not create a circuit split. Nor do they have anything to do with the disclosures at issue in this case. They simply concern a materially different factual scenario.

III. The Second Circuit correctly decided the meaning of "goods or services from a video tape service provider," but there is a circuit split on that question.

The NBA's second question, like its first, needs to be reformulated. On the reformulated second question, though, there is an acknowledged circuit split, and Mr. Salazar agrees the question is important. Still, those vehicle problems linger. *See supra* at 12–15. And, on this question too, the Second Circuit is right, and the NBA is wrong.

A. The NBA's second question must be reformulated to avoid sweeping in an issue the courts below did not resolve.

In the petition's second question, the NBA asks "[w]hether the VPPA bars a business from disclosing information about consumers who do not subscribe to its audiovisual goods or services." Pet. i. There are at least three problems with this formulation.

First, by asking whether "a business" (rather than a "video tape service provider") can disclose unspecified "information" (rather than "personally identifiable information"), *id.*, the question strays from the VPPA's language. It also seems to open one issue the NBA never contested (*i.e.*, whether it is a video tape service provider) and another issue neither court below resolved (*i.e.*, what counts as personally identifiable information). As the NBA admits, this Court should take up only those questions that were "litigated and squarely decided below." Pet. 15. These two issues fall outside that category.

Second, and perhaps worse, by including the "information" issue, the NBA's formulation inadvertently implicates the Second Circuit's newly minted, and entirely atextual, "ordinary person" gloss on "personally identifiable information." *See supra* at 10–12. But neither court below has addressed that test, its implications, or whether it can survive this Court's unanimous decisions in *Ames*, *Antrix*, and *A.J.T.*—at least in this case. *See supra* at 14–15.

Third, the question appears to assume those "who do not subscribe" to a video tape service provider's "audiovisual goods or services" are nonetheless "consumers." But whether such individuals are

"consumers" under the VPPA is precisely the question to be answered. 18 U.S.C. §§ 2710(a)(1), (b)(1).

As such, the second question presented should also be reformulated. The issue here is: Whether the phrase "goods or services from a video tape service provider," as used in the VPPA's definition of "consumer," refers to *all* of a video tape service provider's goods or services or only to its *audiovisual* goods or services.

The NBA claims its second question is "exceptionally" and "critically important." Pet. 1, 14, 31. The NFL agrees. NFL Amicus Br. 10–14. Setting aside the vehicle problems previously outlined, *see supra* at 12–15, Mr. Salazar agrees the second question—if properly reformulated—is important.

B. The circuit courts have divided on the reformulated second question.

The Second Circuit, in this very case, was the first circuit to decide the meaning of the phrase "goods or services from a video tape service provider" in Section 2710(a)(1)'s definition of "consumer." And it held the language encompasses "*any* of [a video tape service] provider's 'goods or services'—audiovisual or not." App. 31a; *see also* App. 6a, 22a, 26a, 35a (similar).

On March 28, 2025, the Seventh Circuit—in an opinion authored by Judge Easterbrook—agreed with the Second Circuit's analysis. *See Gardner v. Me-TV Nat'l Ltd. P'ship*, 132 F.4th 1022 (7th Cir. 2025). After all, "[n]othing in the Act says that the goods or services must be video tapes or streams." *Id.* at 1025. And any manner of goods—"a Flintstones sweatshirt or a Scooby Doo coffee mug or a Superman action figure or a Bugs Bunny puzzle"—may be "'goods' from

a 'video tape service provider.'" *Id.* Put simply, "[a]ny purchase or subscription from a 'video tape service provider' satisfies the definition of 'consumer,' even if the thing purchased is clothing or the thing subscribed to is a newsletter." *Id.*

On April 3, 2025, a divided panel of the Sixth Circuit reached the opposite conclusion. *See Salazar v. Paramount Glob.*, 133 F.4th 642 (6th Cir. 2025), *reh'g denied*, 2025 WL 1409343 (6th Cir. May 13, 2025). The majority held "the expression 'goods or services' is limited to audiovisual ones." *Id.* at 651. It acknowledged it was creating a circuit split on "virtually indistinguishable" and "almost identical" facts. *Id.* at 651–52.

Judge Bloomekatz offered the first—and, so far, only—dissent on the question. She believed the majority's approach "read in extratextual limitations" and "contravene[d] the plain language of the statute." *Id.* at 653 (Bloomekatz, J., dissenting). She noted that "[n]either Paramount nor the majority disputes that the phrase 'goods or services,' in common parlance, includes newsletters." *Id.* at 655. And she believed Mr. Salazar was "a 'subscriber' (a registered, regular recipient) of 'goods or services' (the newsletter) from a 'video tape service provider' (Paramount)." *Id.* at 656. Thus, he was a consumer. *Id.*

She also explained how the majority rewrote the statute. To start, it supplied an atextual limitation, adding "the limiting words 'audio visual' before 'goods or services' in the statutory text." *Id.* But "it's far from the most 'natural' reading of the phrase to say that 'goods or services from a video tape service provider' can only be *some particular* 'goods or services' from that entity." *Id.* at 657.

Moreover, she believed "the statutory context reinforces [Mr.] Salazar's plain-language interpretation." *Id.* For example, Section 2710(a)(3)'s definition of "personally identifiable information" includes information "identif[ying] a person as having requested or obtained *specific video materials or services* from a video tape service provider." *Id.* This passage implicates the meaningful-variation canon because the "video" modifier "is notably absent from the 'goods or services' referenced in the definition of 'consumer.'" *Id.* Similarly, the passage implicates the surplusage canon, as the majority's approach renders Section 2710(a)(3)'s video-specific modifier "superfluous." *Id.* at 658.

At present, there is a 2–1 circuit split on the meaning of the phrase "goods or services from a video tape service provider." And, as Coach Norman Dale emphasized with measuring tape in Hoosiers, the rules are supposed to be the same in every court in the country—a principle that applies equally in basketball and in the federal judiciary.

C. The Second Circuit correctly interpreted the phrase "goods or services from a video tape service provider."

Mr. Salazar will not belabor the point here, but the Sixth Circuit is wrong. As discussed above, the Second Circuit, the Seventh Circuit, and Judge Bloomekatz all effectively lay out why—namely, the ordinary-meaning canon, the general-terms canon, the surplusage canon, and, perhaps most clearly, the meaningful-variation canon. Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 69–77, 101–06, 170–79.

But there are still more reasons to reject the Sixth Circuit's approach. Consider, for example, the presumption of consistent usage. *Id.* at 170–73. The VPPA uses nearly identical terms in Sections 2710(a)(1) and 2710(b)(2)(D)(ii)—"goods or services" and "goods and services," respectively. The Second and Seventh Circuits ensure these two phrases mean the same thing. The Sixth Circuit does not.

Consider, too, that the VPPA's one-sentence liability clause refers to "*any* consumer of such provider." 18 U.S.C. § 2710(b)(1) (emphasis added). This "expansive" word refers broadly to "every" consumer of a video tape service provider. *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 362–63 (2018); *see also A.J.T.*, 2025 WL 1657415, at *3, *5 (holding the phrase "any person" means every person, "without distinction or limitation"). Indeed, it would be quite the "textual oddity" to hold the phrase "any consumer of such provider" describes only a narrow subset of the provider's consumers. *FDA v. R.J. Reynolds Vapor Co.*, No. 23-1187, 606 U.S. ----, 2025 WL 1716135, at *6–7 (June 20, 2025).

In addition, because "an entirely artificial definition is rare, the meaning of the definition is almost always closely related to the ordinary meaning of the word being defined." *Delligatti v. United States*, 145 S. Ct. 797, 810 (2025) (quoting Scalia & Garner, *Reading Law* 228). If the meaning of some constituent part of a definition (*e.g.*, "goods or services") is unclear, "the ordinary meaning of the term [being defined] is one of 'the most important' factors [the Court] can consider." *Id.*

But the ordinary meaning of "consumer" is not limited to those who transact in videos. Those who

bought candy or keychains or posters at Blockbuster were its "consumers." The NBA tacitly admits as much, repeatedly referring to those who do *not* rent, purchase, or subscribe to audiovisual goods or services as "consumers." Pet. i (mentioning "consumers who do not subscribe to . . . audiovisual goods or services"); Pet. 5 (describing those who "subscribe to a non-audiovisual service" as "consumers"); Pet. 5–6 (similar); Pet. 14 (referring to "consumers" who "buy milk and eggs"); Pet. 24 (referring to "consumers who do not subscribe to audiovisual goods or services"); Pet. 25, 34 (similar).

The NBA's last gasp is an argument that the terms "renter" and "subscriber" refer specifically "to consumers of audiovisual goods." Pet. 6, 26. It believes the inclusion of these terms in Section 2710(a)(1) "strongly suggests that the 'goods or services' [Congress] had in mind were audiovisual ones." *Id.*

This argument is hard to square with reality. One can "rent" all sorts of goods and services. For example, one might rent a house, an apartment, or a hotel room; a car or a moving truck; a storage unit; tools; a tuxedo for a wedding; a cap and gown for graduation; ski gear; furniture and art to stage a house; textbooks during a college semester; and, although it is becoming increasingly uncommon, a VHS or DVD. There is even a Broadway show (and movie) called "Rent." In a twist that will surprise only the NBA, it does not tell the tale of starving artists in New York City scraping together the cash to rent a movie. The point is: Nothing about "renting" is unique to audiovisual goods or services. One can be a "renter" of practically any good or service.

Likewise, one can "subscribe" to any manner of goods or services. For example, one might subscribe to a newspaper or magazine, a house-cleaning or meal-kit service, various apps (for music, exercise, or education), a video-streaming service (*e.g.*, Netflix, Hulu, or NBA League Pass), or even—as Christmas Vacation reminds us each year—a jelly-of-the-month club. Nothing about "subscribing" is unique to audiovisual goods or services.

There is simply no basis to rewrite the VPPA's definition of "consumer" to impose a limitation that appears nowhere in the text. *See Antrix*, 2025 WL 1583292, at *2 (declining "to add in what Congress left out"). The Second Circuit got it right.

CONCLUSION

The NBA's first question presented, even when reformulated, does not implicate a circuit split or otherwise merit this Court's review. Mr. Salazar agrees the second question, if properly reformulated, presents an important question. But vehicle problems counsel against taking it up here. The NBA's petition should be denied.

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