No. 24-994

In the Supreme Court of the United States

NATIONAL BASKETBALL ASSOCIATION, PETITIONER

v.

MICHAEL SALAZAR

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION AND STATUTES

INTRODUCTION

The courts of appeals have split 2–1 over whether the Video Privacy Protection Act (VPPA) applies to consumers like Salazar who do not subscribe to audiovisual goods or services. After the petition was filed, the Seventh Circuit agreed with the Second Circuit's decision here that the VPPA covers any person who rents, purchases, or subscribes to any of a business's goods or services. *See Gardner v. Me TV National Limited Partnership*, 132 F.4th 1022, 1025 (7th Cir. 2025). But the Sixth Circuit then rejected those decisions in affirming dismissal of "a virtually indistinguishable complaint filed by [Salazar]," holding that "a person is a 'consumer'" under the VPPA "only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials.'" *Salazar v. Paramount Global*, 133 F.4th 642, 650-51 (6th Cir. 2025). The Sixth Circuit denied rehearing en banc, cementing the split.

Salazar concedes the split. He concedes the question's importance. And he concedes that the Court should intervene. Opp. 29-31. He just doesn't want the Court to do so *here*. But his vehicle arguments fail.

First, Salazar observes that there is no final judgment in this case. Opp. 12-13. But the Court regularly grants certiorari to review legal issues decided when, as here, a court of appeals reverses a district court's dismissal order. *See, e.g.*, *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1565 (2025). The parties aren't litigating anything in the lower courts that would affect the Court's review, and Salazar doesn't contend otherwise. To the contrary, if this Court reverses, the decision will end this litigation. That makes this case an excellent vehicle.

Second, Salazar argues that he would win under the correct legal standard based on allegations he added to his complaint on remand. Opp. 13-14. That contention lacks merit. The district court already rejected Salazar's supposedly "new" allegations as a basis for avoiding dismissal when it assumed Salazar had adequately pleaded them. App. 62a-63a; *see* App. 13a. And Salazar doesn't even try to explain why that ruling was wrong.

Third, Salazar argues (Opp. 14-15) that the Court shouldn't grant review because he might lose under the Second Circuit's recent decision in *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025), which held that the Meta Pixel does not convey "personally identifiable information" protected by the VPPA. But that contention gets vehicle arguments exactly backwards. Salazar isn't claiming that he *wins* no matter how the Court might resolve the question presented. Instead, he is saying he might lose for another reason entirely—all to try to avoid this Court's review of what he admits is a certworthy question over which the courts of appeals have split.

But that's not what Salazar is telling the lower courts. Those courts haven't decided whether *Solomon* bars Salazar's claims—and Salazar recently filed an amended complaint to support his argument that it doesn't. What's more, *Solomon* deepened a circuit split and is the subject of a pending en banc rehearing petition, and Salazar all but promises to challenge it before this Court if necessary. Put simply, Salazar has told the lower courts that he should win despite *Solomon*, and when a litigant "speaks out of both sides of [his] mouth, no one should be surprised if [his] latest utterance isn't the most convincing one." *Bittner v. United States*, 598 U.S. 85, 97 n.5 (2023).

The parties agree that the petition presents an important, certworthy VPPA question. This case is an excellent vehicle to resolve that question and whether Salazar has Article III standing. The Second Circuit's decision on both questions was wrong, and it threatens widespread damage to the modern Internet economy. The Court should intervene.

ARGUMENT

I. Salazar concedes that the circuits have split 2–1 over whether the VPPA applies to consumers who do not purchase, rent, or subscribe to audiovisual goods or services, and that the question is certworthy.

A. 1. Since the petition was filed, the courts of appeals have split over whether the VPPA covers consumers, like Salazar, who rent, purchase, or subscribe to a video tape service provider's non-audiovisual goods and services. The Second Circuit below, now joined by the Seventh Circuit, held that it does. App. 39a-40a; *Gardner*, 132 F.4th at 1025. By contrast, the Sixth Circuit, rejecting "a virtually indistinguishable complaint filed by [Salazar]," held that "a person is a 'consumer' only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials.'" *Paramount*, 133 F.4th at 650-51.

The split is acknowledged and entrenched. The Sixth Circuit squarely rejected the Second and Seventh Circuits' interpretation of the VPPA, *id.* at 651-52, and denied Salzar's petition for rehearing en banc, No. 23-5748, 2025 WL 1409343 (6th Cir. May 13, 2025). Only this Court can resolve the split.

2. This issue is critically important. Many businesses offer free audiovisual content to consumers on

their websites and provide information about consumers' video viewing history to advertisers, who then use that information to send the consumer ads targeted to their interests. Amicus Br. of National Retail Federation & Interactive Advertising Bureau 5-9. The model benefits consumers by expanding the amount of free content on the web, and advertisers by allowing businesses to locate potential customers at affordable rates. Pet. 33; CA2 Chamber of Commerce Amicus Br. 15-19 (Doc. 56) (CA2 Chamber Br.).

The Second and Seventh Circuits' decisions endanger this widespread information-sharing and advertising model. Typically, "there is no possible way for a business to know whether a given viewer of a video had previously bought some separate product from the business." CA2 Chamber Br. 11. Thus, under the Second and Seventh Circuits' view, any business that shares information about users who watch its free videos could face minimum statutory liability of $2,500 per consumer. Amicus Br. of National Football League 12. "Faced with such significant potential liability, online content providers would likely be forced to abandon" information-sharing altogether, meaning "that consumers may 'no longer receive the free apps and services that targeted advertising makes possible.'" *Id.* at 13 (alteration adopted). Unless the Court intervenes, a novel interpretation of a nearly four-decade-old statute about video rentals could upend the Internet advertising economy.

B. Salazar doesn't dispute any of this. He concedes that "there is a 2–1 circuit split on the meaning of the phrase 'goods or services from a video tape service provider'" in the VPPA. Opp. 31. He "agrees" that this question "is important." Opp. 29. And he agrees that the Court should resolve it, since federal law is

"supposed to be the same in every court in the country." Opp. 31. He thus concedes that the petition's VPPA issue is certworthy.

To be sure, Salazar takes issue (Opp. 28-29) with the phrasing of the question presented. But he concedes that the question encompasses the issue on which the courts of appeals have split. And his objections present no reason to deny review. Just the opposite. His first objection simply attacks the merits, reinforcing the entrenched disagreement (*e.g.*, "the question strays from the VPPA's language," Opp. 28). His second claims that the question presented encompasses the *Solomon* issue, but that argument only makes clear that *Solomon*—which he claims "contravenes at least three unanimous intervening decisions from this Court," Opp. 14-15—presents no vehicle problem. And his third objection just restates the question presented while quibbling with the petition's use of the word "consumer" in its ordinary rather than its defined sense. The bottom line is that the parties agree that the petition presents the certworthy question whether the VPPA applies to consumers of a business's non-audiovisual goods and services.

II. This case is an excellent vehicle to resolve the questions presented.

A. This case is an excellent vehicle for addressing both the VPPA split and whether Salazar had standing to begin with. Pet. 33-35. Both issues were litigated and decided below, and because this case is at the pleading stage, there are no factual disputes that could complicate the Court's review.

B. Salazar's vehicle arguments lack merit.

1. Salazar first argues (Opp. 12-13) that review before final judgment is premature. Not so. The Court

routinely grants certiorari to review legal questions decided when a court of appeals reverses a district court's grant of a motion to dismiss. *See, e.g.*, *Smith & Wesson*, 145 S. Ct. at 1565; *Becerra v. San Carlos Apache Tribe*, 602 U.S. 222, 230 (2024); *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 47 (2024); *Arizona v. Navajo Nation*, 599 U.S. 555, 563 (2023). It should take the same approach here. The district court dismissed Salazar's complaint because it concluded that he isn't a "consumer" under the VPPA. App. 11a. The Second Circuit reversed, holding that Salazar adequately alleged that he is a "consumer" and that he has Article III standing. App. 21a, 26a. Nothing in the Second Circuit's decision turns on further proceedings on remand. The questions presented are thus sufficiently final to merit the Court's review.

And there is good reason to review them now. As Justice Alito recently explained, "in modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery. Defendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued." *Cunningham v. Cornell University*, 145 S. Ct. 1020, 1033 (2025) (Alito, J., joined by Thomas & Kavanaugh, JJ., concurring). This Court's cert grants reflect that recognition.

The cases Salazar cites don't suggest otherwise. Those decisions explain that the Court sometimes denies review when the lower courts haven't made a final decision on an issue material to the question presented. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) (per curiam) (denying review of

contempt order when lower courts hadn't finally determined whether contempt had occurred); *Mount Soledad Memorial Association v. Trunk*, 567 U.S. 944, 944-45 (2012) (statement of Alito, J.) (denying review where lower courts hadn't decided remedy for alleged constitutional violation); *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (statement of Scalia, J.) (similar). That's not this case.

2. Salazar next suggests (Opp. 13-14) that this case is a bad vehicle because after the Second Circuit revived his claims, he filed amended complaints alleging that the NBA's free email newsletter contains hyperlinks to videos on NBA.com. Although Salazar never says so explicitly, his implication seems to be that the newsletter is an audiovisual good even under the Sixth Circuit's approach.

That's wrong. As Salazar concedes (Opp. 13-14), the Second Circuit didn't decide whether Salazar qualifies as a consumer of audiovisual goods and services. But the district court assumed that Salazar had adequately alleged that the newsletter contained hyperlinks to videos and nonetheless held that theory did not make Salazar a consumer of audiovisual goods. App. 62a-63a; *see* App. 13a. Salazar doesn't even try to explain why that ruling was wrong, or, more generally, why he should win if this Court sides with the Sixth Circuit. At most, Salazar's amended complaints present an issue for remand, after the Court has resolved what Salazar concedes is an important and certworthy question.

3. Salazar next argues (Opp. 14-15) that the Second Circuit's recent decision in *Solomon* is a reason to delay review. *Solomon* held that the Meta Pixel doesn't implicate the sort of "personally identifiable

information" protected by the VPPA because an ordinary person cannot read Meta Pixel disclosures without specialized software. 136 F.4th at 54-55. Salazar suggests that *Solomon* may bar his Meta Pixel–based claims, so whether he counts as a "consumer" under the VPPA no longer matters.

The possibility that Salazar might eventually lose on another ground is not a reason to delay reviewing what Salazar concedes is an important and certworthy question. Salazar's backwards vehicle argument is that the Court should wait, despite the entrenched 2–1 split—because he could lose under *Solomon*—all so he can turn around and keep telling the lower courts that his complaint *survives Solomon*. Neither the district court nor the Second Circuit has decided whether Salazar can win despite *Solomon*, and Salazar's most recent amended complaint argues that he should prevail despite *Solomon* because the Meta Pixel discloses a consumer's Facebook ID, allowing any person to connect individual Facebook users with the videos they have viewed. Opp. App. 36sa-40sa; *see* Opp. 11-12. Further, the Second Circuit is currently considering whether to grant en banc rehearing in *Solomon*, which deepened a circuit split about "personally identifiable information," as Salazar notes. Opp. 14; *see Solomon v. Flipps Media, Inc.*, No. 23-7597, Doc. 54 (2d Cir. June 11, 2025) (petition for rehearing en banc); *see also Hughes v. National Football League*, No. 24-2656, Doc. 52 (2d Cir. June 30, 2025) (order granting Salazar's counsel additional time to seek rehearing en banc on the *Solomon* issue). Salazar's doublespeak only confirms that this case is an excellent vehicle for settling the question presented—which the Second Circuit decided, which Salazar acknowledges is

certworthy, and which would decisively resolve this case and many others.

4. Finally, Salazar contends (Opp. 15-24) that the Court shouldn't consider whether he has standing. As the petition explains (at 15-24), the courts of appeals have divided over whether consumers alleging that they were harmed by disclosures of personal information must allege that their information was disclosed to the public at large, rather than one private business. *Compare, e.g.*, *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236, 1247 (11th Cir. 2022) (en banc) (allegation that defendant gave consumer's information to "'an unauthorized third-party'" insufficient), *with* App. 17a ("allegation … that [Salazar's] personally identifiable information was exposed to an unauthorized third party" sufficient). That question has important implications for the separation of powers and is thus independently certworthy. Pet. 31-32.

Salazar's arguments about the standing question's independent certworthiness miss the point. He concedes that the VPPA question is certworthy. And the Court of course has "an independent obligation to assure that standing exists," *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), and thus that Salazar's complaint satisfies *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). But Salazar doesn't even try to explain why a future case would avoid the standing question or otherwise be a better vehicle. By flagging the issue, the NBA has shown that it is prepared to help the Court resolve that important threshold question. That, too, makes this case an ideal vehicle for resolving the concededly certworthy VPPA question presented.

III. The Second Circuit erred by extending the VPPA to subscribers to non-audiovisual goods and services.

A. The VPPA's text, structure, and legislative history make clear that it applies only to those who rent, purchase, or subscribe to audiovisual goods and services. Pet. 24-27. The VPPA defines a covered "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider," 18 U.S.C. § 2710(a)(1), which the statute defines in turn as a person "engaged in the business … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials," *id.* § 2710(a)(4). The "goods and services" in the VPPA's definition of "consumer" are the same "audio visual" goods and services that make a business "a video tape service provider." Pet. 25. Congress reinforced that reading by referring to "rent[ing]," "purchas[ing]," and "subscrib[ing]" in the "consumer" definition—that is, the ways that consumers obtain audiovisual goods and services. Pet. 26. And the VPPA's legislative history confirms that Congress carefully drafted the VPPA so that a consumer's non-audiovisual transactions would not trigger liability. Pet. 27.

B. Salazar's responses lack merit.

1. Salazar first argues (Opp. 33) that the plain meaning of "goods and services" isn't limited to audiovisual goods and services. But words must be understood in context. And as explained, Congress incorporated the definition of "video tape service provider"—including its reference to "audio visual materials"—into the definition of "consumer," making clear that the statute applies only to consumers of such audiovisual materials. Pet. 25. Salazar can't

avoid "a limitation that was included in the statute's plain meaning at the time it was signed into law" by "atomistically" "chopping … up" the VPPA's "consumer" definition "and giving each word the broadest possible meaning." *Paramount*, 133 F.4th at 650-51.

2. Salazar notes (Opp. 31) that the VPPA references audiovisual materials in defining "personally identifiable information," but not in defining "consumer." *Compare* 18 U.S.C. § 2710(a)(1), *with id.* § 2710(a)(3). He claims the variation shows that Congress intended "consumer" to reach beyond consumers of audiovisual goods and services. But, again, Congress incorporated the audiovisual limitation into the definition of "consumer" by referencing "video tape service provider[s]." Pet. 25. Congress didn't need to repeat itself to make that limitation clear.

3. Salazar next points to § 2710(b)(2)(D)(ii), a VPPA provision allowing a video tape service provider to disclose a consumer's name and address "if the disclosure is for the exclusive use of marketing goods and services directly to the consumer." Salazar argues (Opp. 32) that limiting the "consumer" definition to consumers of audiovisual materials would violate the presumption of consistent usage by making the term "goods and services" mean different things in § 2710(a)(1) and § 2710(b)(2)(D)(ii). But the "consumer" definition contains an audiovisual limitation by incorporating the definition of "video tape service provider," while § 2710(b)(2)(D)(ii) does not. There is nothing inconsistent about using definitions and context to modify the meaning of similar phrases in different provisions.

4. Finally, Salazar argues (Opp. 32) that the VPPA's definition of "consumer" should be read

broadly because the statute's liability clause, 18 U.S.C. § 2710(b)(1), is broadly written. But as explained (at 10-11), Congress expressly limited the VPPA to consumers of audiovisual goods and services. The VPPA may provide broad protections for *those* consumers, but Salazar isn't one of them.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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