

APPENDIX

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APPENDIX A

23-1147

Salazar v. NBA

In the
United States Court of Appeals
for the Second Circuit

August Term, 2023

(Argued April 2, 2024 Decided: October 15, 2024)

Docket No. 23-1147

MICHAEL SALAZAR, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATION,

Plaintiff-Appellant,

—v.—

NATIONAL BASKETBALL ASSOCIATION,

Defendant-Appellee.

Before: RAGGI, LEE, and ROBINSON, *Circuit Judges*

Plaintiff-Appellant Michael Salazar appeals from
an August 8, 2023 judgment of the United States
District Court for the Southern District of New York

(Rochon, *J.*) dismissing his putative class action complaint against Defendant-Appellee the National Basketball Association (NBA) for alleged violations of the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The VPPA makes it unlawful for a “video tape service provider” to “knowingly disclose[], to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1). The statute defines “consumer” to mean “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” *Id.* § 2710(a)(1). It does not define the terms “goods or services” and “subscriber.”

Salazar alleges that (1) he signed up for the NBA’s free online newsletter, meaning he exchanged information including his email address in return for periodic emails from the NBA; (2) he visited the NBA’s website, NBA.com, where he watched videos; and (3) the NBA violated the VPPA by knowingly disclosing, without Salazar’s permission, certain information about Salazar and the videos he watched.

We must answer two questions on appeal. First, has Salazar pled that he suffered a sufficiently “concrete” injury to confer Article III standing under *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021)? Second, did the district court err in holding that Salazar is not a “subscriber of goods or services” based on its reasoning that the online newsletter is not an *audiovisual* “good or service,” and that signing up for the newsletter did not make Salazar a VPPA “subscriber”?

We answer both questions in the affirmative. Salazar’s alleged injuries are sufficiently concrete to confer Article III standing. And the district court

erred by holding that Salazar is not a “subscriber of goods or services” from the NBA. Accordingly, we **VACATE** the district court’s judgment and **REMAND** for further proceedings.

JOSHUA I. HAMMACK (Michael L. Murphy, *on the brief*), Bailey & Glasser, LLP, Washington, D.C., *for Plaintiff-Appellant*.

MATTHEW X. ETCHEMENDY, Vinson & Elkins LLP, Washington, D.C. (Hilary L. Preston, Marisa Antonelli, Vinson & Elkins LLP, New York, NY, *on the brief*), *for Defendant-Appellee*.

Jordan L. Von Bokern, U.S. Chamber Litigation Center, Washington, D.C.; Adam G. Unikowsky, Jenner & Block LLP, Washington, D.C.; Allison N. Douglis, Jenner & Block LLP, New York, NY, *for Amicus Curiae* The Chamber of Commerce of the United States of America, *in Support of Defendant-Appellee*.

ROBINSON, *Circuit Judge*:

The Video Privacy Protection Act (VPPA) makes it unlawful for a “video tape service provider” to “knowingly disclose[], to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1). Enacted in

1988, the VPPA includes language like “video tape service provider” and “prerecorded video cassette tapes”—terms that invoke a bygone era of video technology. In this case, we must grapple with how the language of this statute applies in today’s increasingly online world.

Plaintiff-Appellant Michael Salazar says he signed up for an online email newsletter offered by Defendant-Appellee the National Basketball Association (NBA). He further alleges he visited the NBA’s website, NBA.com, where he watched videos. After he watched those videos, his video-watching history and “Facebook ID” (we describe both below) were disclosed to Meta Platforms, Inc. (Meta) without his permission. Those disclosures, Salazar contends, violated the VPPA.

The central question in this appeal is whether Salazar is a “consumer” under the VPPA so that the knowing disclosure by a video tape service provider of his video viewing history violates that statute. The VPPA defines “consumer” to mean “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” *Id.* § 2710(a)(1). But the Act doesn’t define most of the words within that definition, including “goods or services” and “subscriber.” We must construe both these terms for the first time in this Circuit.

Salazar contends that when he signed up for the NBA’s online newsletter through NBA.com, he exchanged personal information in return for emailed NBA-related updates, thereby making him a “subscriber of goods or services,” and, accordingly, a VPPA “consumer.” And by offering videos on NBA.com, the NBA became a “video tape service

provider” prohibited by the VPPA from disclosing the personally identifiable information of consumers like Salazar. So, Salazar submits, when he watched NBA.com videos, and when the NBA then disclosed his Facebook ID and video-watching history to Meta without his consent, the NBA violated the VPPA.

The NBA counters that Salazar is not a VPPA “consumer” because the online newsletter he signed up for is not an *audiovisual* “good or service,” and signing up for the newsletter did not in any event make him a “subscriber” under the statute. It also asserts that Salazar has not pled a sufficiently “concrete” injury to confer Article III standing under the standards set forth by the Supreme Court in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021).

The United States District Court for the Southern District of New York (Rochon, *J.*) dismissed Salazar’s suit in an August 8, 2023 judgment. Although it concluded that Salazar had standing to sue, it ruled for the NBA on the merits, holding that Salazar had not plausibly pled that he is a “consumer” under the VPPA. The court held that the phrase “goods or services” within the VPPA’s definition of “consumer” is limited to audiovisual “goods or services”—which the online newsletter is not—and that signing up for an online newsletter did not make Salazar a VPPA “subscriber.” *See generally Salazar v. National Basketball Association*, 685 F. Supp. 3d 232 (S.D.N.Y. 2023).

As a threshold matter, we hold that Salazar has pled an injury that confers Article III standing. His core alleged harm—that his personal information was disclosed to a third party, without his consent, in violation of the VPPA—“has a ‘close relationship’ to a

harm traditionally recognized as providing a basis for a lawsuit in American courts”: public disclosure of private facts. *TransUnion*, 594 U.S. at 417. Salazar’s injury therefore satisfies Article III standing’s concreteness requirement.

On the merits, we hold that the district court erred in determining that Salazar failed to plausibly plead that he is a “consumer” under the VPPA because we conclude that he satisfactorily alleged he was a “subscriber of goods or services” from the NBA. The VPPA’s text, structure, and purpose compel the conclusion that that phrase is not limited to *audiovisual* “goods or services,” and the NBA’s online newsletter falls within the plain meaning of that phrase. And by trading personal information like his email and IP addresses in return for receiving the online newsletter, Salazar became a “subscriber of” that newsletter. Accordingly, we **VACATE** the district court’s judgment and **REMAND** for further proceedings.

BACKGROUND¹**I. The NBA, NBA.com, the “Facebook Pixel,” and the NBA’s Online Newsletter.**

The NBA is a professional sports league headquartered in New York. It owns the website NBA.com, on which people can watch “a broad selection of video content.” Jt. App’x at 10.² The NBA says these videos are free.

Salazar doesn’t allege that he had to pay any *money* to watch the videos. But he does plead that the NBA, using certain bits of code, extracts information from NBA.com video-watchers like him.

The code most relevant to this case is a “tracking pixel”—a piece of code embedded on a website someone visits. As its name suggests, a tracking pixel

¹ Unless otherwise indicated, we draw this account from the allegations in Salazar’s Class Action Complaint. Since we are evaluating the NBA’s motion to dismiss for failure to state a claim, we presume these allegations to be true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

² Salazar also alleges that people can watch these videos through a smartphone application (app). The district court concluded that Salazar “does not allege he downloaded any such application, or even specify what application he is referring to,” so “no such claim [based on use of the app] has been adequately pleaded.” *Salazar v. National Basketball Association*, 685 F. Supp. 3d 232, 246 n.4 (S.D.N.Y. 2023). Beyond cursorily noting that the NBA delivers video content “[t]hrough NBA.com and an app,” Salazar doesn’t challenge that conclusion on appeal. Appellant’s Br. at 5. He therefore has abandoned any challenges based on the allegations concerning a smartphone application as opposed to a website. *See United States v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994) (“It is well established that an argument not raised on appeal is deemed abandoned[.]” (internal quotation marks omitted)).

tracks users as they navigate the website, reporting back to the pixel's owner. The information tracked depends on the tracking pixel's configuration.

Here, Salazar alleges that Meta owns a tracking pixel, which we call the "Facebook Pixel." The NBA has installed the Facebook Pixel on NBA.com. Meta coded that pixel to collect and send to it (1) the title of the NBA.com video a user watched, (2) that video's URL, and (3) the user's "Facebook ID" (FID)—a number unique to each individual Facebook account. *Id.* at 15. We call this disclosed information "personal viewing information."

By possessing the video title and URL of watched videos associated with a given FID, Meta can link a given Facebook profile to those watched videos. And with that information, Meta can send a user targeted advertisements. The NBA receives financial remuneration from this arrangement.

The NBA also allows people to sign up for an "online newsletter." *Id.* at 12. Here too, Salazar doesn't contend that he had to pay any money to sign up for the newsletter. Instead, he alleges that he gave the NBA certain personal information, and in return, the NBA sent him "emails and other communications." *Id.* at 12, 19.

II. Salazar's Allegations

Salazar's VPPA claim rests on three primary allegations: (1) he has a Facebook account; (2) he signed up for the NBA's online newsletter; and (3) he watched NBA.com videos while logged into his Facebook account.

First, since 2010, Salazar “has had a Facebook account.” *Id.* at 10, 20. He therefore has an FID associated with that account.

Second, starting in 2022, Salazar “signed up for a digital subscription to NBA.com.” *Salazar*, 685 F. Supp. 3d at 237; *see also* Jt. App’x at 10, 19–20. In doing so, he gave NBA.com information including his email address, IP address, “and any cookies associated with his device” in return for “emails and other communications” from the NBA. Jt. App’x at 19.

An IP address is “the numeric address of a computer on the Internet” that typically consists of “four parts separated by dots and containing up to three digits in each part.” *IP Address*, Merriam-Webster’s Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/ip%20address> [<https://perma.cc/8DK2-U6F9>] (last visited Sept. 4, 2024). Salazar alleges that his IP address “informs Defendant as to the city and zip code he resides in as well as his physical location.” Jt. App’x at 19.

A “cookie” is “a small file or part of a file that is stored on the computer of a World Wide Web user, that is created and subsequently read by a website server, and that contains personal user information (such as a user identification code, customized preferences, or a record of pages visited).” *Cookie*, Merriam-Webster’s Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/cookie> [<https://perma.cc/GFE3-ALB9>] (last visited Sept. 4, 2024).

There are presently no allegations in Salazar’s complaint that he watched or accessed NBA.com videos through the online newsletter. He has,

however, submitted that he could amend his complaint to plausibly allege that “the NBA’s online newsletter gave subscribers ‘exclusive content or enhanced access’ to video content.” Appellant’s Br. at 34–35 (quoting Jt. App’x at 210).

Third, also starting in 2022, Salazar has watched NBA.com videos through NBA.com “while logged into his Facebook account.” Jt. App’x at 10. Watching videos while logged into his Facebook account caused his personal viewing information to be transmitted to Meta.³ *See id.* Salazar alleges that the NBA didn’t give him notice that it was disclosing his personal viewing information; nor did it ask for his consent.

Putting the pieces together, Salazar alleges that signing up for the online newsletter made him a “subscriber of goods or services,” and, therefore, a “consumer” under the VPPA. And watching videos on NBA.com caused his “personally identifiable information”—his personal viewing information—to be disclosed to Meta without his consent. So, Salazar says, the NBA violated the VPPA.

III. District Court Proceedings

Salazar filed his putative class action complaint in September 2022, purporting to represent “[a]ll

³ 3 Salazar’s complaint specifies that when he watched NBA.com videos “while logged into his Facebook account,” his personal viewing information was disclosed to Meta due to the website’s use of the Facebook Pixel. Jt. App’x at 10, 15–16. For purposes of this appeal, we need not delve into the technical mechanics of that disclosure. It is enough to presume that what Salazar alleges is true—when he (1) was logged into his Facebook account and (2) watched a video on NBA.com, his personal viewing information was transmitted to Meta because the NBA had installed the Facebook Pixel on its website.

persons in the United States with a digital subscription to an online website owned and/or operated by [the NBA] that had their Personal Viewing Information disclosed to [Meta] by [the NBA].” *Id.* at 20. He raised a single cause of action: violation of the VPPA.

The NBA moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It sought dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction because Salazar did not allege a sufficiently concrete injury to confer Article III standing, and alternatively under Rule 12(b)(6) because Salazar failed to state a claim upon which relief can be granted.

On the merits, the NBA primarily argued that Salazar was not a “consumer” under the VPPA since he was not a “renter, purchaser, or subscriber of goods or services from a video tape service provider.” *Id.* at 49 (quoting 18 U.S.C. § 2710(a)(1)). It stressed that the online newsletter was not an *audiovisual* good or service, and thus did not qualify as “goods or services” under the VPPA. And it argued that, in any event, signing up for the newsletter did not make him a VPPA “subscriber.” The NBA also argued in the alternative that it did not “knowingly disclose” any personally identifiable information to Meta.⁴

⁴ We express no view on whether the NBA’s disclosure, as alleged by Salazar, constitutes a “knowing[]” disclosure by the NBA. 18 U.S.C. § 2710(b)(1).

The NBA also argued in the alternative to the district court that Salazar had consented to disclosure of his personally identifiable information by assenting to the NBA’s privacy policy. Salazar concedes that NBA.com’s privacy policy states that it collects certain “Personal Information” from site visitors. But he contends

In an August 2023 opinion, 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. *See Salazar*, 685 F. Supp. 3d at 247.

With respect to Article III standing, the court explained that Salazar’s alleged harm—deprivation of privacy rights based on the NBA’s non-consensual disclosure of his personal viewing information—was closely related to two traditionally recognized common-law analogs: disclosure of private facts and intrusion upon seclusion. *See id.* at 239–42. Accordingly, the court held that Salazar pled a concrete Article III injury under *TransUnion*. *Id.* at 242.

On the merits, the court concluded that Salazar failed to plead a VPPA claim because he had not plausibly alleged that he was a VPPA “consumer.” *Id.* at 246. It rejected Salazar’s argument that his signing

that this policy doesn’t say that the NBA “will share digital subscribers’ private and protected Personal Viewing Information with third parties, including [Meta].” Jt. App’x at 14–15. As a result, he alleges, the NBA failed to satisfy the VPPA’s consent requirements. The NBA does not raise this argument on appeal and concedes the argument should be left for the district court to address in the first instance given that its resolution will require “detailed examination of the NBA’s Privacy Policy and Mr. Salazar’s factual allegations showing his acceptance of that policy.” Appellee’s Br. at 52 n.16. We agree.

The NBA also argued before the district court that it should dismiss Salazar’s class allegations because the NBA’s Terms of Use provision, to which it says Salazar agreed, includes an enforceable class action waiver. The NBA concedes here that this “argument is not an alternative basis for affirming the” court’s dismissal “of the entire complaint,” so “it is not properly resolved on this appeal.” *Id.* Accordingly, this argument is not before us in this appeal.

up for the online newsletter made him a “subscriber” under the VPPA, reasoning that “the VPPA only applies to consumers (including subscribers) of audio video services.” *Id.* at 244. The court also rejected Salazar’s argument that the newsletter’s links to videos available on NBA.com affect the calculus. It reasoned that the newsletter’s inclusion of links to content otherwise “generally accessible on the NBA.com website” did not constitute a sufficient exchange of value to create a subscriber relationship “given the lack of allegations regarding exclusive content or enhanced access” to audiovisual services through the newsletter. *Id.* at 245–46.

Because the court concluded that Salazar had not plausibly alleged that he was a VPPA “consumer,” it did not address the NBA’s remaining arguments. *Id.* at 246. It further denied Salazar’s “blanket request for leave to amend his Complaint ‘to address any issues the Court raises in its Order’” since Salazar had the opportunity to view the NBA’s arguments for dismissal and didn’t describe the substance of a proposed amendment. *Id.* at 246–47. The court therefore entered judgment dismissing the case, which Salazar timely appealed.

DISCUSSION

The NBA argues that the district court erred by concluding that Salazar has Article III standing to sue. Salazar contends that the court erred on the merits by holding that he is not a “consumer” as defined in the VPPA.

We hold that Salazar sufficiently pled that he has Article III standing and that he is a “subscriber of goods or services from a video tape service provider”

and therefore a “consumer” under the VPPA. 28 U.S.C. § 2710(a)(1). We elaborate below.

I. Standing

We start by evaluating whether Salazar has adequately pled injury as necessary to demonstrate Article III standing to sue for a violation of the VPPA. He has. Salazar’s alleged injury stems from the unauthorized disclosure of his personal viewing information, which is closely related to at least one common-law analog traditionally recognized as providing a basis for a lawsuit in American courts: public disclosure of private facts.

Since “standing is challenged on the basis of the pleadings, we accept as true all material allegations of the complaint,” which we construe “in favor of the complaining party.” *Bohnak v. Marsh & McLennan Companies, Inc.*, 79 F.4th 276, 283 (2d Cir. 2023) (internal quotation marks omitted). We do so in this context without deferring to the district court. *Id.*

A federal court lacks subject matter jurisdiction—and therefore cannot consider a lawsuit’s merits—unless three constitutional standing requirements are met. First, the plaintiff must have suffered an “injury in fact that is concrete, particularized, and actual or imminent.” *TransUnion*, 594 U.S. at 423. Second, that injury must be traceable to the defendant’s challenged conduct—it must have been “likely caused by the defendant.” *Id.* And third, it must be likely that the injury would “be redressed by judicial relief.” *Id.* As “[t]he party invoking federal jurisdiction,” Salazar bears the burden of establishing Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The NBA argues that Salazar has not alleged that he has suffered a “concrete” injury in fact. We disagree.

Article III standing requires that “[o]nly those plaintiffs who have been *concretely harmed* by a defendant’s statutory violation may sue that private defendant over that violation in federal court.” *TransUnion*, 594 U.S. at 427; *see also Bohnak*, 79 F.4th at 283 (explaining that “*TransUnion* is the touchstone for” assessing the concreteness requirement). To allege a concrete harm, a plaintiff must point to “a close historical or common-law analogue for their asserted injury.” *TransUnion*, 594 U.S. at 424. But they need not present an “exact duplicate.” *Id.* at 433. Rather, “what matters is ‘whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.’” *Packer on behalf of 1-800-Flowers.Com, Inc. v. Raging Capital Management, LLC*, 105 F.4th 46, 52 (2d Cir. 2024) (quoting *TransUnion*, 594 U.S. at 424).

Both tangible and intangible harms can satisfy the concreteness requirement. “[T]raditional tangible harms” like physical and monetary harms “readily qualify as concrete.” *TransUnion*, 594 U.S. at 425. So do “[v]arious intangible harms” closely related to a traditionally recognized harm. *Id.*

One intangible harm that readily qualifies as concrete is the public disclosure of private facts. *Id.* This “well-established common-law analog,” *Bohnak*, 79 F.4th at 285, is triggered when one “gives publicity to a matter concerning the private life of another, ... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not

of legitimate concern to the public,” *id.* (quoting Restatement (Second) Torts § 652D).⁵

Our conclusion that Salazar has pled that he suffered an injury closely related to the public disclosure of private facts analog is guided by our recent decision in *Bohnak*. There, Bohnak had sued her former employer for failing to adequately protect and warn her about the vulnerability of personal information including her social security number, driver’s license, and passport information. That information was stolen when her employer was targeted in a data breach. *Id.* at 280–82.

We had “no trouble” concluding that “Bohnak’s alleged harm [wa]s sufficiently concrete to support her claims for damages” because her core alleged injury—exposure of her personally identifiable information to unauthorized third parties—“bears some relationship to a well-established common-law analog: public disclosure of private facts.” *Id.* at 285. In reaching this conclusion, we stressed that “[i]n *TransUnion* itself, the Supreme Court specifically recognized that ‘disclosure of private information’ was an intangible harm ‘traditionally recognized as providing a basis for lawsuits in American courts.’” *Id.* at 286 (quoting *TransUnion*, 594 U.S. at 425). And because Bohnak’s alleged harm was closely related to a common-law analog, it did not matter whether she had “assert[ed]

⁵ Because we hold that Salazar’s alleged harm is closely related to the public disclosure of private facts analog, we need not examine whether it is closely related to the other analog the district court identifies: the “intrusion upon seclusion” tort. *Cf. Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983–84 (9th Cir. 2017) (holding, pre-*TransUnion*, that an alleged VPPA violation was related to the intrusion upon seclusion tort); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340–41 (11th Cir. 2017) (same).

a common law claim for public disclosure of private facts” against her employer or whether the relevant “common law recognize[d] a tort relating to publication of private facts.” *Id.* at 286.

For these reasons, we similarly have “no trouble” holding here that Salazar’s alleged harm is sufficiently concrete to withstand dismissal. *Id.* at 285. Like *Bohnak*, Salazar’s core allegation is that his personally identifiable information was exposed to an unauthorized third party. *Jt. App’x* at 24. And Salazar doesn’t just allege that his data was *exposed* to a third party; rather, he asserts that it was *disclosed* as a result of an arrangement between the NBA and Meta pursuant to which the NBA deliberately uses the Facebook Pixel. This alleged harm is closely related to the public disclosure of private facts analog.

The NBA’s arguments to the contrary are unpersuasive. To the NBA, the disclosure in *Bohnak*—to hackers through a data breach—is quite different from “limited disclosures to a single legitimate business” like Meta because hackers have a “known penchant for trading illegally acquired [personally identifiable information] ‘through the dark web,’” thereby making the disclosure in *Bohnak* more analogous to a *public* disclosure of private facts than the disclosure of Salazar’s information to Meta. Appellee’s Br. at 24 n.7 (quoting *Bohnak*, 79 F.4th at 281).

Based on this asserted lack of publicity, the NBA insists that Salazar’s allegations of injury are more like those held insufficient in cases from other circuits involving mail vendor corporations and a different statute: the Fair Debt Collection Practices Act (FDCPA). In those cases, plaintiffs sued debt

collection agencies for violating the FDCPA by giving their personal information to mail vendors, which then used the disclosed information to send the plaintiffs prewritten letters notifying them about their outstanding debts. *See* Appellee’s Br. at 21–25 (citing *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc); *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 827 (10th Cir. 2022); *Nabozny v. Optio Solutions LLC*, 84 F.4th 731, 733 (7th Cir. 2023).⁶ These courts concluded that

⁶ The NBA also cites some of these cases to suggest that an alleged harm isn’t closely related to a common-law analog if the plaintiff doesn’t plead a required *element* of that analog. *See, e.g., Hunstein v. Preferred Collection and Management Services, Inc.*, 48 F.4th 1236, 1242 (11th Cir. 2022) (en banc) (holding that Hunstein’s alleged harm wasn’t closely related to the public disclosure of private facts tort because his allegations were “missing an element essential to liability”: “disclosure to the public”) (internal quotation marks omitted). Not every circuit has adopted that approach. *See, e.g., Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022) (“Shields did not have to plead and prove the tort’s elements to prevail. But to proceed, she had to at least allege a similar harm.”); *Barclift v. Keystone Credit Services, LLC*, 93 F.4th 136, 145 (3d Cir. 2024) (“We believe that if the Court wanted us to compare elements, it would have simply said so. So when asking whether a plaintiff’s intangible injury is ‘concrete,’ we will examine the kind of harm at issue.”), *petition for cert. filed*, No. 23-1327 (June 20, 2024).

Nor have we. This Court has applied *TransUnion* in at least four published opinions to determine whether an alleged harm satisfies Article III standing’s concreteness requirement. We did not, in any of those cases, hold that *TransUnion* demands that a plaintiff adequately plead every element of a common-law analog to satisfy the concreteness requirement. *See Maddox v. Bank of New York Mellon Trust Company, N.A.*, 19 F.4th 58, 62–66 (2d Cir. 2021); *Bohnak v. Marsh & McLennan Companies, Inc.*, 79

any harm from such limited disclosures—to mail vendors who then sent the information back to its owner—was not closely related to harm from the public disclosure of private facts analog. *See Hunstein*, 48 F.4th at 1245–49; *Shields*, 55 F.4th at 828–29; *Nabozny*, 84 F.4th at 735–38.

Glossing over the numerous factual and legal distinctions between the mail vendor cases and Salazar’s allegations, the NBA submits that the mail vendor “cases are on all fours” with this one because they all involve “limited disclosures to a single

F.4th 276, 283–87 (2d Cir. 2023); *Saba Capital Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 114–17 (2d Cir. 2023); *Packer on behalf of 1-800 Flowers.Com, Inc. v. Raging Capital Management, LLC*, 105 F.4th 46, 51–56 (2d Cir. 2024); *see also Stafford v. International Business Machines Corporation*, 78 F.4th 62, 67–69 (2d Cir. 2023) (applying *TransUnion* to the mootness doctrine, which “is standing set in a time frame”) (internal quotation marks omitted). Instead, we followed the Supreme Court’s directive in *TransUnion* that the concrete injury requirement for standing does not demand that a plaintiff alleging intangible harm identify and establish an “exact duplicate” in common law, but asks “whether a plaintiff’s asserted harm has a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 433–34 (2021) (stating that “publication is essential to liability” in explaining why “mere presence of an inaccuracy in an internal credit file” that was not disclosed to third-party was not analogous to harm from defamatory statement, without suggesting that plaintiff must satisfy *all* elements of defamation to show “close relationship” to defamation analog (internal quotation marks omitted)); *see id.* at 433 (holding dissemination of misleading credit reports is analogous to harm from defamation even though defendant asserted reports were “only misleading and not literally false,” because harm from misleading statement of “being labeled a ‘potential terrorist’ . . . bears a sufficiently close relationship to the harm from a false and defamatory statement”).

legitimate business.” Appellee’s Br. at 23, 24 n.7. The analogy is inapt. Meta isn’t a “ministerial intermediary” like a mail vendor, *Nabozny*, 84 F.4th at 736—it’s one of the world’s largest companies, employing more than 67,000 people, with 2024 revenues exceeding \$142 billion, *see Forbes, Profile, Meta Platforms*, <https://www.forbes.com/companies/meta-platforms/?list=global2000> [<https://perma.cc/8S94-9M7A>] (last visited Sept. 4, 2024).

More to the point, Meta’s use of the disclosed data is very different from that of the mail vendor. Unlike in the mail vendor cases, Salazar doesn’t allege that his personal viewing information was disclosed to an intermediary so that it could be bounced back to him on behalf of the entity that properly possessed the information. One of Salazar’s allegations is that the NBA discloses users’ personal viewing information to Meta, which then harnesses that information “to show the user targeted ads”—ads that Meta chooses for its own commercial purposes, not the NBA’s or the user’s purposes. Jt. App’x at 15 (emphasis added). Moreover, nothing in the complaint suggests that Meta can’t sell, disclose, or otherwise use Salazar’s data for additional purposes. In addition, Salazar alleges that Meta “cross-referenc[es]” “this highly sought-after information” “to the data it already has in [its] own detailed profiles.” *Id.* at 16–17. And the information is being used for digital advertising, *id.* at 15–16, an industry that “underlies many of the Internet’s most widely used services,” Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Defendant-Appellee at 15.

Given the nature of the companies involved, intended and potential uses of the disclosed

information, and resulting enhanced disclosure risks, we see little daylight between the nature of the harm Salazar alleges and the harm flowing from the public disclosure of private facts common-law analog. Therefore, Salazar has satisfactorily pled a concrete injury sufficient to confer Article III standing and to withstand dismissal under Rule 12(b)(1).

The NBA does not argue that Salazar has otherwise failed to plead that his alleged injury satisfies Article III standing requirements at the motion to dismiss stage. That makes sense. His alleged injury in fact is particularized and actual—his personal viewing information was disclosed without his consent to a third party. That alleged harm is traceable to the NBA’s installation of the Facebook Pixel on NBA.com. And Salazar’s requested relief—declaratory, injunctive, and monetary relief for violating the VPPA—would likely redress his injury. Accordingly, Salazar has alleged a sufficient harm to confer Article III standing, and the district court correctly denied the NBA’s motion to dismiss for lack of subject matter jurisdiction.

II. Merits

To survive Rule 12(b)(6) dismissal, a complaint’s factual allegations must “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On appeal, we review the complaint without deference to the district court’s assessment, accepting as true all its factual allegations and drawing all inferences in the plaintiff’s favor. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016); *Peretti v. Authentic Brands Group LLC*, 33 F.4th 131, 137 (2d Cir. 2022). That means the plaintiff’s allegations must enable the

court to reasonably infer that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Applying these standards, we must determine whether Salazar plausibly pled that he was a “subscriber of goods or services” as understood in the VPPA. For the reasons set forth below, we conclude that he did. The phrase “goods or services” in the VPPA is not cabined to audiovisual goods or services, but also reaches the NBA’s online newsletter. By alleging that he exchanged personal information in return for periodically receiving the online newsletter, Salazar plausibly pled that he is a “subscriber of” that newsletter.

A. *The VPPA*

In 1987, a newspaper published an article called *The Bork Tapes*, see Michael Doland, *The Bork Tapes*, Washington City Paper (Sept. 25, 1987), which identified 146 films that Judge Robert Bork and his family had rented from a video store. At the time of publication, the Senate Judiciary Committee was holding hearings on Judge Bork’s nomination to the Supreme Court. See S. Rep. No. 100-599, at 5 (1988); *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1252–53 (11th Cir. 2015); *Yershov v. Gannett Satellite Information Network, Inc.*, 820 F.3d 482, 485 (1st Cir. 2016).

Senators quickly decried the publication. As Senator Patrick Leahy commented during the nomination hearings:

It is nobody’s business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy watch on television or read or think about when they are home. ... In an era of

interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. ... I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against. ...

Privacy is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans that we are free and we cherish our freedom and we want our freedom. We want to be left alone.

S. Rep. No. 100-599, at 5–6 (quoting *Hearings on Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary*, 100th Cong. 1374 (1987)) (alterations adopted).

The Bork Tapes was the catalyst for the VPPA. See *id.* at 5; S. Rep. No. 112- 258, at 2 (2012); *Ellis*, 803 F.3d at 1252–53. A bipartisan group of Senators, including Senator Leahy, introduced legislation in May 1988 “to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials.” S. 2361, 100th Cong. (1988); see also S. Rep. No. 100-599, at 1 (same). That bill became the VPPA. See Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195.

The VPPA prohibits a “video tape service provider” from “knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider,” subject to certain enumerated exceptions, such as in cases where the provider has obtained a consumer’s “informed, written consent.” 18 U.S.C. § 2710(b). The Act thereby “reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual’s consent.” S. Rep. No. 100-599, at 8.

By 2012, Congress recognized that “the Internet ha[d] revolutionized the way that American consumers rent and watch movies and television programs,” such that the way “Americans used to watch videos in 1998—the VHS cassette tape—[wa]s now obsolete.” S. Rep. 112-258, at 2. These new technologies had created a problem: Americans couldn’t “share information about their video preferences on social media sites on an ongoing basis” without violating the 1988 VPPA, which required obtaining consent from the consumer for each disclosure of viewing information. *Id.* at 2–3. The solution? Amend the statute “to clarify that a video tape service provider may obtain a consumer’s informed, written consent on an ongoing basis and that consent may be obtained through the Internet.” Video Privacy Protection Act Amendments Act of 2012, Pub. L. 112-258, 126 Stat. 2414; *see* 18 U.S.C. § 2710(b)(2)(B) (authorizing a video tape service provider to disclose consumers’ personally identifiable information “to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer” provided either “at the time the disclosure is sought” or “in advance for a set

period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner”).

Otherwise, much of the 1988 VPPA’s text remains unchanged. Like the original version, the current VPPA holds liable “[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1). And the Act provides consumers with a private right of action for violations of the statute. *Id.* § 2710(c) (authorizing award of “actual damages but not less than liquidated damages in an amount of \$2,500,” punitive damages, reasonable attorneys’ fees and litigation costs, and appropriate “preliminary and equitable relief”).

Central to this case is the VPPA’s “Definitions” section. *See id.* § 2710(a). The VPPA defines the term “consumer” to mean “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” *Id.* § 2710(a)(1). But the phrase “subscriber of goods or services” is not explicitly defined in the statute. Our task here is to construe that phrase. The parties have focused their arguments on two questions: Is the digital newsletter a “good or service”? And is Salazar a subscriber? We consider each in turn.

B. “Goods or Services”

The parties contest whether the online newsletter Salazar signed up for qualifies as “goods or services” as that phrase is used in the VPPA. The NBA doesn’t contend that the newsletter is not a good or service generally; rather, it insists that statutory context compels the conclusion that a consumer under the VPPA must specifically rent, purchase, or subscribe to *audiovisual* “goods or services.” The NBA reasons that

because the VPPA defines a “consumer” as one who rents, purchases, or subscribes to services “*from a video tape service provider,*” *id.* at § 2710(a)(1) (emphasis added), those services must, by definition, be audiovisual services. Salazar disagrees and argues that nothing in the statute limits the definition of “consumer” to those who rent, purchase, or subscribe to a particular class of services—namely, audiovisual content.

Considering the text, structure, and purpose of the VPAA, we agree with Salazar. And we conclude that the NBA’s policy based counterarguments are unpersuasive.

i. Text, Structure and Purpose

When interpreting a statutory provision, we start with the text. *See Wisconsin Central Limited v. United States*, 585 U.S. 274, 277 (2018). Because the VPPA does not define the phrase “goods or services,” we presume that its plain meaning applies. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”). In assessing the words’ plain meaning, we consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Applying this guidance, we conclude that the plain language of the “consumer” definition, the VPAA’s terminology in other sections, and the structure of the statute as a whole support Salazar’s view. And his read is entirely consistent with the statute’s purpose.

Congress defined “consumer” as “*any* renter, purchaser, *or* subscriber of goods or services from a video tape service provider.” 18 U.S.C. § 2710(a)(1) (emphasis added). “[R]ead naturally, the word ‘any’ has an expansive meaning.” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (internal quotation marks omitted). And a statute’s use of the word “*or*” is ‘almost always disjunctive.’” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). So by using expansive words like “any” and “or,” Congress codified a “consumer” definition that “bespeaks breadth.” *Id.*

Comparing this language to other definitions in the statute reinforces this conclusion. Congress deployed similarly broad language in the “video tape service provider” definition. That definition classifies “*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” as a “video tape service provider.” 18 U.S.C. § 2710(a)(4) (emphasis added). But while the “consumer” and “video tape service provider” definitions share similarly expansive language, there is also a critical distinction between the two provisions: Unlike the “consumer” definition, which makes no mention of audiovisual materials, the “video tape service provider” definition requires the provider to deal in “audio visual materials.” *Id.* This meaningful variation shows that Congress knew to include an audiovisual limitation in the VPPA when it wanted one to apply. In fact, Congress twice deploys the term “audio visual material” (or materials) in the VPAA—first in the “video tape service provider” definition, and next in a provision establishing when a video tape service provider may lawfully disclose

personally identifiable information. See *id.* § 2710(a)(4), (b)(2)(D)(ii).⁷ As the Supreme Court has instructed, we should not “lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply,” especially when it “has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005); see also *Yale New Haven Hospital v. Becerra*, 56 F.4th 9, 21 (2d Cir. 2022) (explaining principle of meaningful variation, *i.e.*, “where a statutory scheme has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea” (quoting *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)) (alterations adopted)).

This textual divergence highlights the flaw in the NBA’s argument that the “consumer” and “video tape service provider” definitions share “a suggestively parallel structure” that supports reading an audiovisual limitation into the definition of “goods or services.” Appellee’s Br. at 31. To the NBA, the phrase “renter, purchaser, or subscriber” in the “consumer” definition is parallel to the “rental, sale, or delivery” language in the “video tape service provider” definition. That means, the NBA says, the term “goods or services” must be parallel to “prerecorded video cassette tapes or similar audio visual materials,” with

⁷ In the “video tape service provider” definition, the relevant text is plural: “audio visual materials.” 18 U.S.C. § 2710(a)(4). In the provision enumerating when a video tape service provider may lawfully disclose personally identifiable information, the language is singular: “audio visual material.” *Id.* § 2710(b)(2)(D)(ii).

a similarly cabined scope. *Compare* 18 U.S.C. § 2710(a)(1), *with id.* § 2710(a)(4).

We need not decide whether the phrase “renter, purchaser, or subscriber” in the definition of “consumer” is intended to mirror the phrase “rental, sale or delivery” in the definition of “video tape service provider.”⁸ Even if that were correct, it would not support the NBA’s conclusion that the term “goods or services” in the definition of “consumer” mirrors the term “prerecorded video cassette tapes or similar audio visual materials” in the “video tape service provider” definition. Tellingly, Congress chose to *deviate* from any parallelism by using the terms “goods or services” in the “consumer” definition and “prerecorded video cassette tapes or similar audio-visual materials” in the “video tape service provider” definition. Again, Congress’s decision to use different words in different definitions strongly signals its intent to convey different meanings. *See Jama*, 543 U.S. at 341.

In addition, the NBA’s interpretation is hard to harmonize with other language in the statute. The definition of “personally identifiable information” includes “information which identifies a person as having requested or obtained *specific video materials or services* from a video tape service provider.” *Id.* § 2710(a)(4) (emphasis added). But if “goods or

⁸ Salazar actually relies on the same parallelism to make a different argument—one we also need not reach. He argues that “renter” in the definition of “consumer” mirrors “rental” in the definition of “video tape service provider,” and “purchaser” mirrors “sale,” so “subscriber” must mirror “delivery.” Following this logic, a “subscriber” is someone who *receives* goods or services. Under that interpretation, someone who simply watches online videos could be considered a VPPA “consumer.”

services” are, by definition, audiovisual materials, then Congress’s express restriction in the definition of “personally identifiable information” to information about “*video* materials or services” would be superfluous. *See generally Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that a “statute should be construed ... so that no part will be inoperative or superfluous” (internal quotation marks omitted)).

We are likewise unpersuaded by the NBA’s reliance on the title of the VPAA’s liability provision: “Video Tape Rental and Sale Records.” 18 U.S.C. § 2710(b). The NBA argues that by explicitly tying “video” to “rental and sale records” in that title, Congress showed that the relationship between consumers and providers is restricted to those who rent, purchase, or subscribe to videos.

There are at least two problems with this argument. First, headings and titles in statutes “cannot limit the plain meaning of the text.” *Rajah v. Mukasey*, 544 F.3d 427, 436 (2d Cir. 2008) (internal quotation marks omitted). Second, the title of the *liability provision* tells us little about the meaning of “consumer” in the VPPA. The parties agree that sharing information that is not about video materials or services is beyond the scope of the statute. But as explained further below, it’s the definition of “personally identifiable information” that limits what can be shared, not the definition of “consumer.”

Nor are we persuaded by the NBA’s argument that the phrase “from a video tape service provider” somehow cabins “goods or services” to *audiovisual* goods or services.” The definition of “video tape service provider” is broad, encompassing “*any person[] engaged in the business ... of rental, sale, or delivery*

of prerecorded video cassette tapes or similar audio visual materials.” 18 U.S.C. § 2710(a)(4) (emphasis added). That definition is not limited to entities that deal *exclusively* in audiovisual content; rather, audiovisual content need only be *part* of the provider’s book of business. 18 U.S.C. § 2710(a)(4). Thus, by its plain terms, the statute applies equally to a business dealing primarily in audiovisual materials (think Blockbuster) and one dealing in primarily *non*-audiovisual materials (think a general store that rents out a few movies). Congress cast a wide net in defining “video tape service provider,” to ensure that businesses dealing in audiovisual goods or services satisfy the definition even if they *also* deal in non-audiovisual goods or services.⁹

Given that “video tape service provider” is defined broadly to include even those businesses that dabble in video rentals, it makes sense that “consumer” should be understood to encompass a renter, purchaser, or subscriber of *any* of the provider’s “goods or services”—audiovisual or not. Under the VPPA’s expansive language, such a business may not disclose “personally identifiable information” pertaining to its consumers regardless of the particular goods or services rented, purchased, or subscribed to.

This is not to say the VPPA’s reach is boundless. As noted above, the statute only prohibits video tape service providers from “knowingly disclos[ing] *personally identifiable information*.” 18 U.S.C. § 2710(b)(1) (emphasis added). And the “personally

⁹ We express no view on whether the VPPA applies only to businesses dealing in “prerecorded” audiovisual goods or services as opposed to “live” video services, an issue not presented in this appeal.

identifiable information” definition “includes 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) (emphasis added). That means the general store owner who also rented out a few movies wouldn’t be liable under the VPPA for disclosing particular customers’ bread-buying habits; that information, which does not relate to video materials or services, is not “personally identifiable information” under the VPAA.¹⁰

Our read of the statute not only reflects the language and structure of the VPAA; it’s also “consistent with Congress’s intended purpose.” *Bustamante v. Napolitano*, 582 F.3d 403, 410 (2d Cir.

¹⁰ True, the “personally identifiable information” definition uses the word “include.” Some of the legislative history suggests that Congress intentionally used that word to help keep the “personally identifiable information” term broad, too. *See* S. Rep. No. 100-599, at 12 (1988) (“[P]aragraph (a)(3) uses the word ‘includes’ to establish a minimum, but not exclusive, definition of personally identifiable information.”) But that Senate report also stresses that the VPPA’s definition of “personally identifiable information” contains the word “video” to make clear that only audiovisual information is protected. *See id.* (“[T]he definition of personally identifiable information includes the term ‘video’ to make clear that simply because a business is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill. For example, a department store that sells video tapes would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products.”). So while there may be breathing room in the statute to explore what exactly is “personally identifiable information”—we need not and do not explore that argument in this appeal—the VPPA’s text, structure and purpose make clear that the disclosed information must still be related to audiovisual materials or services.

2009). As we explained above, Senate Judiciary Committee members understood the VPPA to “prohibit[] video service providers from disclosing personally identifiable information except in certain, limited circumstances.” S. Rep. No. 100-599, at 5; *see also* S. Rep. No. 112-258, at 2 (same). Grafting unstated limitations on the broad definition of “consumer,” and by extension, “goods or services,” would be inconsistent with Congress’s purpose here.

ii. NBA’s Policy Arguments

Given the clear meaning of the VPPA evidenced by its statutory text and context, we are unpersuaded by the NBA’s policy arguments for a different construction. The NBA insists that failing to cabin “goods or services” to *audiovisual* goods or services would produce anomalous results. It contends that under a broad construction of the term, someone who just watches a video on a website “with no other relationship to the company would not receive VPPA privacy protections *vis-à-vis* their viewing of these videos, because they have no ‘renter,’ ‘purchaser,’ or ‘subscriber’ relationship to the company,” but someone who “previously and unrelatedly bought a hammer at one of the company’s brick-and-mortar stores, and *then* watched a free video on the website” would be a VPPA consumer. Appellee’s Br. at 40. To the NBA, it makes no sense that the VPPA can be triggered by a consumer interaction unrelated to videos.

Even presuming that merely watching a free video—and giving up personal information in the process—does not make someone a VPPA

“consumer,”¹¹ the purportedly anomalous results identified by the NBA do not justify artificially cabinning the statute’s scope in a way that is inconsistent with its plain meaning and purpose.

For starters, the statute’s express terms control. *See Bostock v. Clayton County, Georgia*, 590 U.S. 644, 653 (2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (internal quotation marks omitted)).

We’re also unconvinced that broadly defining “goods or services” produces anomalous results. Take the NBA’s hypothetical: a consumer buys a hammer, then watches free videos on the vendor’s website. The NBA suggests that it is anomalous that this consumer is subject to privacy protections under the VPPA. But considering the privacy protective goals of the VPPA with respect to individuals’ video viewing information, this scenario does not strike us as anomalous. Especially given the broad definition of consumer in the VPPA, *allowing* disclosure of the consumer’s video

¹¹ Salazar does not contend that, independent of his registering for the newsletter, simply watching videos on NBA.com—thereby intentionally or unintentionally providing his personal viewing information to the NBA—makes him a “renter, purchaser, or subscriber of goods or services from a video tape service provider.” We therefore express no view on this question.

viewing information would be out of sync with the statute's goals.

To summarize: The phrase “goods or services” in the VPPA’s definition of “consumer” is not cabined to only audiovisual “goods or services.” The NBA’s online newsletter therefore is a qualifying good or service.

C. “Subscriber”

Even if the NBA digital newsletter is a “good or service,” we still must decide whether Salazar is a *subscriber* of that good or service such that he is a “consumer” within the VPPA. Salazar alleges that he “became a digital subscriber of NBA.com by providing, among other information, email address and IP address, ... and any cookies associated with his device.” Jt. App’x at 19. The NBA contends these actions do not signify a sufficient relationship between Salazar and the NBA, and therefore don’t make Salazar a “subscriber” under the VPPA.¹²

Two other circuits have tackled this question. In *Ellis*, the Eleventh Circuit confronted a case in which a plaintiff downloaded an Android application to watch video clips. 803 F.3d at 1254. Although the

¹² Salazar insists that “everyone agrees Mr. Salazar subscribes to the NBA’s newsletter.” Reply Br. at 3; *see also* Appellant’s Br. at 17 n.3 (arguing that “this appeal does not concern the meaning” of the “subscriber” term). We disagree. The NBA concedes only that Salazar himself alleges “he signed up for a free NBA email newsletter.” Appellee’s Br. at 3. It also argued before the district court that Salazar’s allegations “at most” supported an argument that he subscribed to the online newsletter, which the NBA contended was not an audiovisual good or service. *See id.* at 11 (quoting Jt. App’x at 50). We don’t read the NBA’s alternative argument as a concession that signing up for that newsletter made Salazar a “subscriber” of that newsletter as understood under the VPPA.

plaintiff didn't pay any money, the application recorded and shared his device-unique "Android ID" and video-viewing information with a third-party data analytics company. *Id.* The Eleventh Circuit held that "payment is not a necessary element of subscription," but "subscription' involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity," which "involve[s] either payment, registration, commitment, delivery, ... or access to restricted content." *Id.* at 1256 (internal quotation marks omitted). That plaintiff, however, had not made any payments, an account, or a profile; "provide[d] any personal information"; "sign[ed] up for any periodic services or transmissions"; or otherwise "ma[d]e any commitment or establish[ed] any relationship that would allow him to have access to exclusive or restricted content." *Id.* at 1257. All he did was download a free app and use it to view content. So, the court concluded, he was not a VPPA "subscriber." *Id.* at 1258.

The First Circuit faced a similar set of facts in *Yershov*. There, someone also downloaded an app in order to, among other things, watch videos. 820 F.3d at 484. Each time the plaintiff used the app to watch videos, the video's title, his device's GPS coordinates, and his device's unique Android ID were sent to a thirdparty data analytics company, which used the information for, among other things, targeted advertising. *Id.* at 484–85. The First Circuit agreed with the Eleventh Circuit that someone does not have to pay money to be a VPPA subscriber. *Id.* at 487–88. But unlike the Eleventh Circuit, the First Circuit held that the *Yershov* plaintiff was a VPPA subscriber. *Id.* at 487. It explained:

To use the App, Yershov did indeed have to provide Gannett with personal information, such as his Android ID and his mobile device's GPS location at the time he viewed a video, each linked to his viewing selections. While he paid no money, access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett. And by installing the App on his phone, thereby establishing seamless access to an electronic version of *USA Today*, Yershov established a relationship with Gannett that is materially different from what would have been the case had *USA Today* simply remained one of millions of sites on the web that Yershov might have accessed through a web browser.

Id. at 489.

We agree with both the Eleventh and First Circuits that someone doesn't have to spend money to be a VPPA "subscriber." Otherwise, the term "subscriber" would be rendered superfluous by the terms "purchaser" and "renter" in the definition of "consumer." Someone in 1988 (or 2012, for that matter) who paid money for permanent access to audiovisual material would be a "purchaser," and someone who exchanged money for temporary access would be a "renter." If the payment of money was an essential condition of being a "subscriber," then anyone who was a "subscriber" would also be either a "renter" or "purchaser." *See id.* at 487–88.¹³

¹³ Although some dictionary definitions in circulation around the time the VPPA was enacted, and later amended, suggest that a someone must pay money to be a subscriber, other definitions

It's also easy to imagine subscriptions that don't require monetary payment. Someone can, for example, subscribe to a YouTube channel by signing into a YouTube account (which requires no monetary payment) and clicking the "subscribe" icon on a content creator's channel. YouTube Help, *Subscribe to YouTube channels*, <https://support.google.com/youtube/answer/4489286> [<https://perma.cc/RM2E-FMX8>] (last visited Sept. 4, 2024). Subscribing causes YouTube to "automatically send ... notifications about the highlights from that channel." *Id.*

These types of subscriptions aren't only a feature of the modern internet. As the First Circuit explained, they existed in the 1980s through "the reasonably common retailing practice of introductory enticements":

Suppose a customer in 1988 obtained several videos from a new commercial supplier at no charge, or with money back. We can discern no reason why Congress would have wanted different disclosure rules to apply to those transactions than to ones where a monetary payment is made. And because we think that Congress cast such a broadly inclusive net in the brick-and-mortar world, we see no reason to construe its words as casting a less inclusive net in the electronic world when the language does not compel that we do so. *See Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant

don't. *See, e.g., Yershov*, 820 F.3d at 487 (comparing dictionary definitions).

that the particular application may not have been contemplated by the legislators.”).

Yershov, 820 F.3d at 488.

Here, although Salazar does not allege that he paid the NBA money, he does allege that he provided the NBA with his personal information when he signed up for the newsletter. In return for receiving periodic NBA-related updates, Salazar exchanged, at a minimum, (1) his email address, (2) his IP address, and (3) cookies associated with his device. He further alleges that through his IP address, the NBA can identify “the city and zip code he resides in as well as his physical location.” Jt. App’x at 19.

That information is not insignificant. By receiving it, the NBA learned how to directly reach out to Salazar. It discovered where his device was. It gained access to additional information stored in any cookies on his device. These tools increased the NBA’s potential to urge Salazar to visit NBA.com and watch videos on it, making the NBA’s relationship with him distinct from its relationship with casual NBA.com video-watchers who had not signed up for the newsletter.¹⁴ Accepting these allegations as true and drawing all reasonable inferences in Salazar’s favor, as we must at the pleadings stage, Salazar plausibly alleged that he gave the NBA valuable personal information in exchange for access to the online newsletter. *Cf. Yershov*, 820 F.3d at 489 (reasoning

¹⁴ That is not to say that a NBA.com video-watcher who does not sign up for the online newsletter is not also a VPPA “subscriber.” Salazar does not argue that he was a subscriber merely by virtue of any information acquired by the NBA based solely on his viewing the videos on NBA.com. We therefore leave that question for another day.

that the plaintiff provided “consideration in the form of” “personal information” including his Android ID and device’s GPS location). This is sufficient at the pleadings stage to satisfy the requirement that Salazar allege that he became a “subscriber of” the NBA’s online newsletter.

CONCLUSION

Our ruling is narrow: We hold on the merits only that Salazar has plausibly pled that he is a “subscriber of goods or services” and that the district court therefore erred in dismissing his complaint pursuant to Fed. R. Civ. P. 12(b)(6). We leave the district court to address the NBA’s alternative arguments in the first instance. And, of course, our conclusions are conditioned on the necessary pleading-stage presumption that Salazar’s allegations are true. Further factual developments may ultimately paint a different picture.

The VPPA is no dinosaur statute. Congress deployed broad language in defining the term “consumer,” showing it did not intend for the VPPA to gather dust next to our VHS tapes. Our modern means of consuming content may be different, but the VPPA’s privacy protections remain as robust today as they were in 1988.

The district court’s judgment is **VACATED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL SALAZAR,

Plaintiff,

-against-

NATIONAL
BASKETBALL
ASSOCIATION,

Defendant.

No. 1: 22-cv-07935
(JLR)

**OPINION AND
ORDER**

JENNIFER L. ROCHON, United States District
Judge:

Plaintiff Michael Salazar (“Plaintiff”) brings this putative class action alleging that Defendant National Basketball Association (“Defendant” or the “NBA”) violated the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710. *See generally* ECF No. 1 (“Compl.”). Plaintiff contends that he has digitally subscribed to NBA.com since 2022 and has had a Facebook account since about 2010. *Id.* ¶ 12. In this lawsuit, Plaintiff brings one claim alleging that his personal viewing information from the NBA.com site (along with his Facebook ID, which he alleges is personally identifiable information) was disclosed to third party Facebook without his knowledge or consent in violation of the VPPA. *Id.* at ¶¶ 12, 49, 66. Plaintiff brings this action individually and on behalf of hundreds of thousands of similarly situated

individuals throughout the country. *Id.* ¶ 52. Defendant moves to dismiss the Complaint in its entirety arguing that Plaintiff does not have standing, the Complaint fails to state a claim, and Plaintiff expressly waived his right to bring a class action. *See generally*, ECF No. 20 (“Mot.”); ECF No. 21 (“Br.”). For the reasons stated below, Defendant’s motion to dismiss for lack of standing under Federal Rule of Civil Procedure (“Rule”) 12(b)(1) is DENIED, but its motion to dismiss for failure to state a claim under Rule 12(b)(6) is GRANTED.

BACKGROUND¹

I. Factual Background

The NBA’s Website and App

Defendant NBA is a major American sports league headquartered in New York, New York. Compl. ¶ 13. The NBA maintains a website called NBA.com that has approximately 14.5 million unique monthly visitors. *Id.* ¶¶ 13, 21. On NBA.com, viewers can watch video content under a section of the website fittingly titled, “Videos.” *Id.* ¶ 13. The NBA also has a phone application (“App”) that is downloadable on Android and iPhone devices. *Id.* ¶ 21.

An individual may register on NBA.com by signing up for an online newsletter. *Id.* ¶ 20. To sign up, an individual provides personal information, including an email address. *Id.* When individuals sign up for this digital subscription, they provide the NBA with their IP address, which is an individualized number

¹ Unless otherwise noted, the facts stated herein are taken from the Complaint, which the Court accepts as true, and material referenced in the Complaint. *See In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 176 (2d Cir. 2013).

assigned to “all information technology connected devices.” *Id.* ¶ 22. The IP address provides the NBA with the user’s city, zip code, and physical location. *Id.*

The NBA’s Data Policies

NBA.com has a Privacy Policy that states the website collects “Personal Information” from users. *Id.* ¶ 27. The relevant part of the policy lists the types of data collected as follows:

This data will vary, but typically consists of name, email address, postal address, phone number and other similar contact data. We also receive data from the communications you send to us, such as customer service inquiries, product reviews and other feedback regarding the Services.

User credentials, such as username, password, password hints and similar security information used to create an account and authenticate users of the Services.

Demographic data, such as age, gender, country and language preference.

Payment data, such as credit card information and billing address.

Device data, such as type of device, operating system and other software installed on the device, device settings, IP address, device identifiers and error reports.

Usage data, such as the programs and features you access, items you purchase, and the timing, frequency and duration of your interactions through the Services.

Location data, such as IP addresses received from your device.

Information about your interests and preferences, such as your favorite teams and players, your home city or your communications preferences. In addition to what you provide directly, we may infer your interests and preferences from other data we collect, such as the content and advertisements you interact with while using the Services.

Id. Plaintiff alleges that when an individual creates an account with NBA.com, Defendant does not disclose in the Privacy Policy (or Terms of Service) that it will share personal data with third parties, nor are parties asked to consent to this practice. *Id.* ¶¶ 24, 26, 29.

Defendant’s Data Collection and Disclosure

Plaintiff alleges that Defendant collects and shares data and personal information of its users with third parties through cookies, software development kits (“SDKs”), and tracking pixels. *Id.* ¶ 3. Specifically here, Plaintiff claims that the NBA installed Facebook’s tracking pixel on NBA.com. *Id.* ¶ 32. Therefore, when a digital subscriber uses NBA.com and watches videos, “the website sends to Facebook certain information about the viewer, including, but not limited to, their identity and the media content the digital subscriber watched.” *Id.* This Personal Viewing Information (“PVI”) is comprised of two sources of data: (1) personally identifiable information including a Facebook ID (“FID”); and (2) “Video Media” meaning “the computer file containing video and its corresponding URL viewed.” *Id.* at p. 1. An FID is “a unique and persistent identifier that Facebook assigns to each user.” *Id.* ¶ 33. Using an FID, anyone can locate a user’s Facebook profile and name. *Id.* ¶¶ 33-34.

NBA.com, “through its website code, causes the digital subscriber’s identity and viewed Video Media to be transmitted to Facebook by the user’s browser.” *Id.* ¶ 33. Facebook, in turn, uses the data to show the user targeted ads. *Id.* ¶ 30.

Defendant purposefully used Facebook’s pixel code on NBA.com and the App, knew that PVI would be disclosed to Facebook, and financially benefited from it. *Id.* ¶¶ 33, 35. Plaintiff alleges that the pixel “enabled NBA.com and accompanying app to show targeted advertising to its digital subscribers based on the products those digital subscriber’s [sic] had previously viewed on the website or app, including Video Media consumption for which Defendant received financial remuneration.” *Id.* ¶ 35. The PVI is not anonymized and therefore Facebook can either add the data to the information it already has for specific users or use the data to generate new user profiles. *Id.* ¶ 38.

Plaintiff’s Use of NBA.com

Plaintiff, a resident of California, signed up for a digital subscription to NBA.com in 2022. *Id.* ¶¶ 12, 46. To become a digital subscriber, Plaintiff provided NBA.com with his email address, his IP address, and cookies associated with his device. *Id.* ¶ 46. As a digital subscriber, Plaintiff receives emails and other communications from NBA.com. *Id.* Plaintiff also currently uses a Facebook account that he has had since 2010. *Id.* ¶¶ 12, 47. Since 2022, Plaintiff has watched videos “through NBA.com and/or the App” while logged into his Facebook account. *Id.* By doing so, Plaintiff alleges that his PVI was disclosed to Facebook through the aforementioned process. *Id.* ¶¶ 12, 48. Plaintiff contends that he “never consented,

agreed, authorized, or otherwise permitted Defendant to disclose his Personal Viewing Information to Facebook.” *Id.* ¶ 48. Plaintiff alleges he was never provided written notice that his PVI would be disclosed, nor did Plaintiff receive any written notice that he could opt out of the disclosure of his PVI. *Id.* “Plaintiff did not discover that Defendant disclosed his [PVI] to Facebook until August 2022.” *Id.* ¶ 49.

II. Procedural Background

Plaintiff initiated this putative class action on September 16, 2022. *See* Compl. Defendant moved to dismiss the action on December 2, 2022. *See* Mot. In support of the Motion to Dismiss, Defendant filed a Memorandum of Law (“Br.”), and a declaration with accompanying exhibits (ECF No. 22 (“Preston Decl.”)). Plaintiff filed his opposition to the Motion to Dismiss on December 23, 2022 (ECF No. 27 (“Opp.”)), along with a declaration and exhibits (ECF No. 29 (“Murphy Decl.”)). Defendant filed its reply brief on January 13, 2023. ECF No. 32 (“Reply”).

The parties then periodically sent the Court supplemental authority, and responses to those submissions, seemingly whenever a new VPPA decision was issued anywhere in the country. Specifically, on March 13, 2023, Plaintiff filed a letter containing supplemental authority. ECF No. 41. Defendant responded to that authority on March 17, 2023. ECF No. 42. Defendant filed two additional letters with supplemental authority on April 28, 2023 (ECF No. 42) and June 29, 2023 (ECF No. 44). Plaintiff responded to the June 29, 2023 letter on July 5, 2023. ECF No. 45. On July 14, 2023, Defendant filed another supplemental letter to which Plaintiff filed a response on July 19, 2023. ECF Nos. 46, 47. Additional submissions were

provided on July 20, 2023 and July 24, 2023. ECF Nos. 48, 49. Defendant submitted an additional letter on August 4, 2023. ECF No. 50.

LEGAL STANDARD

I. Motion to Dismiss Standard

Defendant moves to dismiss under Rules 12(b)(1) and 12(b)(6). “A district court properly dismisses an action under [Rule] 12(b)(1) for lack of subject matter jurisdiction if the court ‘lacks the statutory or constitutional power to adjudicate it’” *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). “A motion to dismiss for lack of Article III standing challenges the subject-matter jurisdiction of a federal court, and, accordingly, is properly brought under [Rule] 12(b)(1).” *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 210 (2d Cir. 2020) (citing *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016)).

“A Rule 12(b)(1) motion challenging subject matter jurisdiction may be either facial or fact-based.” *Carter*, 822 F.3d at 56. A motion “based solely on the allegations of the complaint or the complaint and exhibits attached to it” is a facial challenge. *Id.* On a facial challenge, the court must accept as true all material allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Id.* at 56-57. Defendants have raised a facial challenge here.

“When a defendant moves to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, and also moves to dismiss on other grounds, the Court must consider the Rule 12(b)(1) motion first.” *Bellocchio v. Garland*, 614 F. Supp. 3d 11, 17 (S.D.N.Y. 2022); see *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59,

62 (2d Cir. 2012) (noting that standing is a “threshold question in every federal case” (citation omitted)).

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). That is, the facts must be sufficient to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* On a Rule 12(b)(6) motion, the court must “accept all factual allegations as true, and draw all reasonable inferences in the plaintiff’s favor.” *Di-Folco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110-11 (2d Cir. 2010) (quoting *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009)) (internal brackets omitted). The court shall not “accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Determining whether a complaint states a claim is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. “[T]he court’s task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side.” *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020).

“In considering a motion to dismiss for failure to state a claim under [Rule]12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.” *Newman &*

Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 662 (2d Cir. 1996) (internal citation and quotation marks omitted). “Where a document is referenced in a complaint, ‘the documents control and this Court need not accept as true the allegations in the ... complaint.’” *Tongue v. Sanofi*, 816 F.3d 199, 206 n.6 (2d Cir. 2016) (quoting *Rapoport v. Asia Elecs. Holding Co.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000)).

II. Video Privacy Protection Act

The Video Privacy Protection Act (“VPPA”) was passed in 1988 in response to the *Washington City Paper’s* publication of a list of 146 films that the family of Supreme Court nominee Robert Bork had rented from a video store. See *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 278 (3d Cir. 2016). The VPPA “creates a private right of action for plaintiffs to sue persons who disclose information about their video-watching habits.” *Id.* The VPPA states that “[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person” 18 U.S.C. § 2710(b)(1). “To state a claim under § 2710(b), a plaintiff must allege that (1) a defendant is a ‘video tape service provider,’ (2) the defendant disclosed ‘personally identifiable information concerning any consumer’ to ‘any person,’ (3) the disclosure was made knowingly, and (4) the disclosure was not authorized by another part of the statute.” *Martin v. Meredith Corp.*, No. 22-cv-04776 (DLC), 2023 WL 2118074, at *3 (S.D.N.Y. Feb. 17, 2023) (quoting *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1066 (9th Cir. 2015)).

DISCUSSION

I. Standing

Before reaching the merits of the VPPA claim, the Court will address Defendant’s argument that Plaintiff lacks standing because he has not suffered an injury in fact. Br. at 9. Article III of the U.S. Constitution states that “[t]he judicial Power of the United States’ extends only to certain ‘Cases’ and ‘Controversies.’” *Lacewell v. Off. of Comptroller of Currency*, 999 F.3d 130, 141 (2d Cir. 2021) (quoting U.S. Const. art. III §§ 1-2). “One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (internal citation and quotation marks omitted). Satisfying the cases and controversies requirement, including standing, is a “threshold question in every federal case.” *Mahon*, 683 F.3d at 62 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish standing a plaintiff must demonstrate “(1) an ‘injury in fact’, (2) a ‘causal connection’ between that injury and the conduct at issue, and (3) a likelihood ‘that the injury will be redressed by a favorable decision.’” *Maddox v. Bank of N.Y. Mellon Tr. Co.*, N.A., 19 F.4th 58, 62 (2d Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)) (internal quotation marks omitted).

The burden lies with a plaintiff to demonstrate standing since the plaintiff is the party “invoking federal jurisdiction.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). Importantly, in the context of statutory violations, the Supreme Court clarified in *TransUnion* that a plaintiff does not have standing unless the plaintiff has suffered concrete harm pursuant to Article III. 141 S. Ct. at 2205. The Supreme

Court held that while Congress may create statutory causes of action, “under Article III, an injury in law is not an injury in fact” and “[o]nly those plaintiffs who have been *concretely harmed* by a defendant’s statutory violation may sue that private defendant over that violation in federal court.” *Id.* To allege a concrete harm, the plaintiff must set forth an injury that “has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.” *Id.* at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U. S. 330, 341 (2016)). An “exact duplicate in American history and tradition” is not required. *Id.* at 2204. Traditional harms include “traditional tangible harms, such as physical harms and monetary harms” and “various intangible harms” such as “reputational harms, disclosure of private information, and intrusion upon seclusion.” *Id.*

Here, the parties dispute whether Plaintiff has established the first element of the standing test: injury in fact. Defendant argues that Plaintiff lacks standing in light of *TransUnion LLC*, 141 S. Ct. at 2203-07. Br. at 9-10. According to Defendant, Plaintiff is pleading only a statutory injury, but has not articulated an actual injury in fact. *Id.* Defendant contends that Plaintiff has not articulated any tangible harm, such as monetary loss, nor any credible theory of intangible harm such as reputational harm or embarrassment given that the allegations state that Facebook was simply provided with truthful information that was not alleged to be harmful to Plaintiff’s reputation. *Id.* at 11.

Plaintiff responds that he was harmed and has standing because he has pleaded that the NBA disclosed Plaintiff’s private PVI to third parties, without

his consent, and the plaintiff class cannot “defend themselves against the highly personal ways NBA.com has used and continues to use data.” Opp. at 3. Plaintiff alleges that this disclosure of personal information to third parties in contravention of the VPPA allegedly violated Plaintiff’s privacy rights, which has long been sufficient for alleged concrete, particularized injury under Article III. *Id.*

The Court agrees that prior to *TransUnion*, courts have consistently found that plaintiffs satisfy the concreteness requirement of Article III standing where they allege a deprivation of their privacy rights under the VPPA. See *Austin-Spearman v. AMC Network Entm’t LLC*, 98 F. Supp. 3d 662, 666-67 (S.D.N.Y. 2015) (“[E]very court to have addressed this question has reached the same conclusion, affirming that the VPPA establishes a privacy right sufficient to confer standing through its deprivation[.]”) (collecting cases). The question is whether *TransUnion* now requires a different conclusion. The Court holds that it does not.

Under *TransUnion*, the Court must ask whether Plaintiff suffered a concrete harm by looking to traditionally recognized injuries. See 141 S. Ct. at 2203-07. Here, Plaintiff alleges that NBA.com shared private information about, among other things, his video viewership to a third party without his consent or knowledge, resulting in targeted advertisements being sent to him. Compl. ¶¶ 5-8, 30, 35; see Opp. at 3. Several courts have held these allegations to be sufficient to establish concrete injury (and standing) post-*TransUnion* because the “disclosure of private information is a harm that courts have traditionally considered to be redressable.” *Carter v. Scripps Networks, LLC*, --- F.Supp.3d ----, No. 22-cv-02031 (PKC),

2023 WL 3061858, at *3 (S.D.N.Y. Apr. 24, 2023); see *Martin*, 2023 WL 2118074, at *2 (“[Plaintiff’s] allegations that the defendants disclosed his private information to a third party without his consent are sufficient to confer standing.”); *Salazar v. Glob.*, No. 3:22-cv-00756, 2023 WL 4611819, at *7 (M.D. Tenn. July 18, 2023) (recognizing concrete harm of involving “a clear *de facto* injury, i.e., the unlawful disclosure of legally protected information”). In fact, *TransUnion* specifically mentioned “disclosure of private information” as one of the intangible harms that was historically recognized as a legal injury. *TransUnion LLC*, 141 S. Ct. at 2204; *Bohnak v. Marsh & McLennan Cos., Inc.*, 580 F. Supp. 3d 21, 29 (S.D.N.Y. 2022) (noting that among the traditionally recognized privacy torts are public disclosure of private information and intrusion upon seclusion).

Defendant avers that the Court should find that there is no standing here notwithstanding these cases because Plaintiff has not alleged the disclosure of private information *to the public*. Br. at 11. The Court does not agree. Whether the information that was transmitted to Facebook was disseminated publicly or not, the *TransUnion* Court also referenced “intrusion upon seclusion” as an injury “with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts” that could form a basis for Article III standing. *TransUnion*, 141 S. Ct. at 2204. Intrusion upon seclusion occurs when an individual “intentionally intrudes, physically or otherwise, upon the solicitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person.” Restatement (Second) of Torts § 652B (1977). An example highlighted in the Restatement (Second) was

an intrusion into someone’s privacy “by opening [a plaintiff’s] private and personal mail.” *Id.* cmt. b. “The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the ... information outlined.” *Id.* Plaintiff’s claim that Defendant purposefully shared his private viewing information with a third party without Plaintiff’s knowledge or consent is akin to that type of intrusion into his privacy. *See Feldman v. Star Trib. Media Co. LLC*, No. 22-cv-01731 (ECT) (TNL), 2023 WL 2388381, at *4 (D. Minn. Mar. 7, 2023) (finding that the plaintiff’s claims mirrored the tort of intrusion upon seclusion because the plaintiff “alleges that his video viewing history was his private concern, that the Star Tribune intruded by sharing this history with Facebook, and that this sharing would be offensive to a reasonable person”).

In a supplemental letter, Defendant argues that a comparison to the tort of intrusion upon seclusion is inappropriate because Plaintiff failed to plead that the conduct in question would be “highly offensive to a reasonable person.” ECF No. 42 at 1-2. At the pleading stage, Plaintiff has set forth enough to allege that was offensive to a reasonable person. *See Lujan*, 504 U.S. at 561 (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss [courts] ‘presume that general allegations embrace those specific facts that are necessary to support the claim.’” (quotation marks and alteration omitted)). For example, Plaintiff alleges that he never consented to nor was provided with any written notice that Defendant was sharing his PVI (Compl. ¶ 48); Plaintiff takes issue with the “automatic and invisible” dissemination of his personal information that prevents him

and the class from “defend[ing] themselves against the highly personal ways” that the Defendant is using the data to “make money for itself” (*id.* ¶ 7); and finally, Plaintiff alleges that the tracking pixel functionality is not necessary for the functioning of the NBA website but instead was employed without his consent “sole[ly for the] purpose of enriching Defendant and Facebook” (*id.* ¶ 44). A reasonable person could find it offensive that private and personal details of their viewing preferences were shared with a third party without their consent so that commercial parties could profit from targeted advertisements that were then sent to them.²

² The Court does not find the Fair Debt Collection Practices Act (“FDCPA”) cases outside of this Circuit cited by Defendant to be persuasive here with respect to the historic analogue of the tort of intrusion upon seclusion. Not only do they examine injury under a different statute and different factual circumstances, but most do not concern intrusion upon seclusion or an analogue, like here. See *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1240 (11th Cir. 2022) (holding that the plaintiff did not allege a concrete harm because the harm alleged did not resemble the common law analogue plaintiff identified: the tort of public disclosure); *Glick v. CMRE Fin. Servs., Inc.*, No. 21-cv-07456 (NSR), 2022 WL 2475690, at *1, *3 (S.D.N.Y. July 6, 2022) (finding the plaintiff lacked standing because the injury was not comparable to the common law tort of disclosure of private information since the defendant did not disclose information to the public); *Sputz v. Alltran Fin., LP*, No. 21-cv-04663 (CS), 2021 WL 5772033, at *3 (S.D.N.Y. Dec. 5, 2021) (same). Finally, *Shields v. Pro. Bureau of Collections of Maryland, Inc.*, also examined the tort of public disclosure, and rejected a link to the tort of intrusion upon seclusion in a single sentence (without analysis) because the plaintiff never alleged any intrusion in her “private solitude.” 55 F.4th 823, 829 (10th Cir. 2022). Indeed, the same court earlier concluded there was standing for an FDCPA claim based on an intrusion upon seclusion analysis. See *Lupia v. Mediacredit, Inc.*, 8 F.4th 1184, 1191 (10th Cir. 2021).

Defendant next contends that Plaintiff's injury amounts only to Facebook "learning something truthful about him" and there is no injury in fact where someone communicates truthful information about another. Br. at 11. Not so. The privacy claims outlined in the Restatement such as invasion of privacy, intrusion upon seclusion, and appropriation of another's likeness, do not hinge on the dissemination of false information, but rather the intrusion into the claimant's privacy even if truthful information is gathered or disseminated. See Restatement 2d Torts § 652A (1977).

Finally, Defendant claims that Plaintiff invokes the "empty labels" of "right to privacy" or "loss of privacy" without identifying a concrete injury, akin to a blanket claim of a "right to travel free from discrimination" that was found to be insufficient in *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443-44 (2d Cir. 2022). Br. at 12. *Harty* is inapposite here. In *Harty*, the plaintiff sued for a violation of the Americans with Disabilities Act (ADA) because he visited a hotel's website only to discover that the hotel and its website were noncompliant with the ADA. *Harty*, 28 F.4th at 440. The Second Circuit held that the plaintiff did not plead a concrete injury for purposes of standing because, despite a "right to travel free from discrimination," the plaintiff had no plans to actually travel to the location in question. *Id.* at 443. In comparison, here, Plaintiff's alleged injury has occurred: Plaintiff's private and personal information was disseminated to a third party for purposes of targeted advertising without Plaintiff's consent or knowledge.

Therefore, Plaintiff has adequately pleaded standing and Defendant's motion to dismiss pursuant to Rule 12(b)(1) is denied.

II. Failure to State a Claim

Defendant next contends that Plaintiff has failed to plead a plausible claim under the VPPA because “he fails to allege facts that qualify him as a protected consumer; ... he fails to allege facts showing the NBA disclosed PII; ... or did so knowingly; and even if it did, the facts alleged indicate the disclosures were subject ... to a consent exception.” Br. at 13.

A. VPPA “Consumer”

The parties disagree as to whether Plaintiff qualifies as a consumer receiving the protections of the VPPA. The VPPA defines consumer as “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” 18 U.S.C. § 2710(a)(1). Neither party asserts that Plaintiff is a “renter” or “purchaser,” but they instead focus on whether Plaintiff qualifies as a “subscriber.” Br. at 13-16; Opp. at 7-9. Defendant argues that Plaintiff does not qualify as a “subscriber” of goods or services from a video tape service provider because Plaintiff only signed up for email newsletters – newsletters which were not alleged to contain video content and were not necessary to view the videos on the NBA website. Br. at 13-16. Plaintiff argues that he has adequately alleged that he is a subscriber of a “good or service” under the VPPA. Opp. at 7. Specifically, Plaintiff argues that he has sufficiently pleaded a VPPA claim as a consumer given that he subscribed to NBA.com newsletters, he provided personal information to do so, and NBA.com provides video services. *Id.* at 7-9. This is sufficient to qualify as a “subscriber” under the VPPA, according to Plaintiff. *Id.* The Court does not agree with Plaintiff based on the language of the VPPA.

“When interpreting the meaning of a statute ... the starting point of inquiry is of course the language of the statute itself.” *Panjiva, Inc. v. U.S. Customs & Border Prot.*, 975 F.3d 171, 176 (2d Cir. 2020) (quoting *In re Edelman*, 295 F.3d 171, 177 (2d Cir. 2002)). “If the statutory language is unambiguous, we construe the statute according to the plain meaning of its words.” *Ray v. Ray*, 22 F.4th 69, 73 (2d Cir. 2021). The plain meaning is determined by “looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.” *U.S. ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 171 (2d Cir. 2018) (internal citation omitted). Only if the terms are ambiguous or unclear does a court look to “legislative history and other tools of statutory interpretation.” *Panjiva, Inc.*, 975 F.3d at 176 (internal citation omitted).

To understand the plain meaning of the disputed term “subscriber,” the Court begins with dictionary definitions. The verb form of subscriber – “subscribe” – is defined as “to enter one’s name for a publication or service” or “to receive or have access to something (such as a periodical or service) as part of an arrangement to receive a certain number of regular deliveries or a certain period of continuous access especially by prepayment.” *Subscribe*, Merriam-Webster.com, <http://www.merriamwebster.com/dictionary/subscribe> (last visited August 4, 2023). Other courts have looked to dictionary definitions for “subscriber,” which include a person who “registered to pay for and receive a periodical, service, theater tickets, etc. for a specified period of time.” *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1255-56 (11th Cir. 2015) (internal citations omitted); see *Austin-Spearman v. AMC Network Ent.*

LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (collecting definitions).

At least one court in this district has summarized “subscriber” as requiring an “ongoing relationship between provider and subscriber, one generally undertaken in advance and by affirmative action on the part of the subscriber, so as to supply the provider with sufficient personal information to establish the relationship and exchange.” *Austin-Spearman*, 98 F. Supp. 3d at 669. The Eleventh Circuit has similarly stated that a “common thread is that ‘subscription’ involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity.” *Ellis*, 803 F.3d at 1256.

The Court also considers how the term “subscriber” is contextualized within the statute, taking care “not to construe each phrase literally or in isolation.” *Fed. Hous. Fin. Agency v. UBS Americas Inc.*, 712 F.3d 136, 141 (2d Cir. 2013) (internal citation and quotation marks omitted). A “subscriber” is one type of “consumer,” a statutorily defined term. *See* 18 U.S.C. § 2710(a)(1) (defining “consumer” as “any renter, purchaser, or subscriber of goods or services from a video tape service provider”). Importantly, the definition of “consumer” relies on the key phrase “video tape service provider.” *Id.* In addition, the liability clause of the VPPA also uses the term “video tape service provider.” *See* 18 U.S.C. § 2710(b)(1) (“[A] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person....”). And a video tape service provider is defined under the VPPA as “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....*” 18 U.S.C. § 2710(a)(4) (emphasis added). A consumer under the VPPA – and necessarily, a “renter, purchaser, or *subscriber*” under the VPPA – consumes (or rents, purchases, or subscribes to) audio visual materials, not just any products or services from a video tape services provider.

This is consistent with the ruling of another court in this district. In *Carter*, the court found that “[i]n the statute’s full context, a reasonable reader would understand the definition of ‘consumer’ to apply to a renter, purchaser or subscriber of audio-visual goods or services, and not goods or services writ large.” *Carter*, 2023 WL 3061858, at *6. This is because “the scope of a ‘consumer’ ... is cabined by the definition of ‘video tape service provider,’ with its focus on the rental, sale or delivery of audio visual materials.” *Id.* In turn, the VPPA “provides for an action by a renter, purchaser or subscriber of audio visual materials, and not a broader category of consumers.” *Id.*

In light of this interpretation, the Court does not find the statutory language, or the term “subscriber,” ambiguous, but if it had, legislative history supports this reading. As the *Carter* court noted:

The 1988 Senate Report notes that the definition of PII at section 2710(a)(3) is drafted “to make clear that simply because a business is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill. For example, a department store that sells video tapes would be required to extend privacy protection to only those

transactions involving the purchase of video tapes and not other products.”

Id. (quoting S. Rep. No. 100-599, 12). This supports the Court’s interpretation that the VPPA only applies to consumers (including subscribers) of audio video services.

In light of the statutory framework, the Court agrees with Defendant’s argument that Plaintiff does not plausibly allege that he was a subscriber of Defendant’s video services. Br. 13- 16. Plaintiff alleges he had a digital subscription to NBA.com in 2022. Compl. ¶ 12. Registering for NBA.com requires a user to sign up for an online newsletter and provide an email address. *Id.* ¶ 20. As part of the subscription, Plaintiff alleges that he received “emails and other communications from NBA.com.” *Id.* ¶ 46. Plaintiff alleges that he “used his digital subscription to view videos on NBA.com or on the NBA app,” *id.* ¶ 12, and that “[a]fter becoming a digital subscriber, viewers have access to a variety of NBA.com Video Media on Defendant’s digital platform,” *id.* ¶ 25, but he does not allege that the newsletters contained videos. Rather, the Complaint includes screenshots of how an individual can watch videos on NBA.com. *Id.* ¶ 39. The screenshot of NBA.com shows an option to “Sign In,” located on the top right corner of the screen, demonstrating that viewing the video does not require a viewer to be a subscriber or have an account to see the videos. *Id.* ¶¶ 39-40. Plaintiff further describes the objectionable process in the Complaint as a process whereby a user “clicks on and watches the video in the article” and then “NBA.com sends the content name of the video digital subscriber watched, the URL, and the digital subscriber’s FID to Facebook.” *Id.* ¶ 40.

There is no allegation that a user must log in to watch the video, and Plaintiff does not allege that the video content he accessed was exclusive to a subscribership.

Again, the Court agrees with the *Carter* court's analysis that reviewed a similar newsletter arrangement with a website. There, the court observed that "[t]he newsletters may entice or encourage recipients to view hgtv.com videos, but there is no assertion that a newsletter subscription was required to access those videos, functioned as a login, or gave newsletter subscribers extra benefits as viewers." *Carter*, 2023 WL 3061858, at *6. Thus, because the complaint did not support a claim that the "the plaintiffs acted as 'subscribers' when they viewed the videos on the hgtv.com, it d[id] not plausibly allege they were 'consumers' under the VPPA." *Id.* at *7. The same result holds here. Plaintiff had the same access to videos on the NBA.com site as any other visitor to the site. *See id.* at *6 ("Plaintiffs were free to watch or not watch hgtv.com videos without any type of obligation, no different than any of the other 9.9 million monthly visitors to the site.").

Because Plaintiff does not allege that his newsletter subscription allowed him access to the videos on the NBA.com site that any member of the public would not otherwise have, Plaintiff has alleged that he was a "subscriber[] to newsletters, not [a] subscriber[] to audio visual materials." *Id.* at *6; *cf. Austin-Spearman*, 98 F. Supp. 3d at 669 (concluding that subscriber relationship implies a mutual "exchange" of value). Several other courts are in accord, including one that recently rejected a similar VPPA claim brought by the same Plaintiff here. *See Salazar*, 2023 WL 4611819, at *11 (adopting *Carter* analysis in

support of holding that the plaintiff who signed up for a website newsletter was not a subscriber under the VPPA); *see also Gardener v. MeTV*, No. 22-cv-05963, 2023 WL 4365901, at *4 (N.D. Ill. July 6, 2023) (finding that the plaintiffs were not subscribers under the VPPA because the plaintiffs’ subscription to a newsletter was “unconnected to their ability to access video content” that was otherwise available on the website); *Tawam v. Feld Ent., Inc.*, No. 23-cv-00357 (S.D. Cal. July 28, 2023), ECF No. 21 at 9 (holding that the plaintiffs were not subscribers because they “signed up for an email mailing list provided by defendant and separately viewed videos on defendant’s website”).

Plaintiff asserts in a supplemental letter filed on July 24, 2023, that the Complaint alleges that the NBA newsletters contain video content, citing to paragraphs 20-26 and 33-35 of the Complaint. ECF No. 49 at 1. However, these paragraphs do not plead that the newsletters contained videos. Even if the Complaint did allege that the newsletter contained *links* to videos on the NBA.com website as Plaintiff asserts in a supplemental letter, *see* ECF No. 49 at 1 (“[D]iscovery in this matter will demonstrate that the NBA’s newsletters direct its subscribers to video content[.]”), links to video content which is generally accessible on the NBA.com website are insufficient to create a subscribership relationship (or exchange of value) vis-à-vis video services given the lack of allegations regarding exclusive content or enhanced access. *See Carter*, 2023 WL 3061858, at *6 (rejecting VPPA claim because “the Complaint does not include facts that plausibly allege that their status as newsletter subscribers was a condition to accessing the site’s videos,

or that it enhanced or in any way affected their viewing experience”).³

In conclusion, the Court does not find that Plaintiff’s subscription to Defendant’s newsletter rendered him a consumer of goods or services from a video tape service provider under the VPPA.⁴ As such, Plaintiff’s claim under the VPPA is dismissed.

B. Remaining Pleading Arguments

Defendant also urges the Court to dismiss the Complaint because the NBA did not “knowingly disclose” any personally identifiable information and Plaintiff consented to any disclosures. Br. at 16-23. Given that Plaintiff has not pleaded that he is a “consumer” under the VPPA, the Court need not reach Defendant’s alternative arguments.

³ Plaintiff relies heavily on *Lebakken v. WebMD, LLC*, --- F. Supp. 3d ---, No. 22-cv-00644 (TWT), 2022 WL 16716151, at *3 (N.D. Ga. Nov. 4, 2022). Opp. Br. at 8-9. The Court does not find *Lebakken* persuasive because its subscribership analysis was not sufficiently tethered to video services. *See Salazar*, 2023 WL 4611819, at *12 (declining to follow *Lebakken* because “[u]nlike the court in *Carter*, the court in [*Lebakken*] did not engage in any meaningful statutory interpretation of the VPPA nor did it consider ... the ramifications of allowing VPPA claims based on ‘goods or services’ that are not audio-visual in nature”).

⁴ With respect to Plaintiff’s passing allegations regarding an “App” (Compl. ¶ 12, 47), Defendant points out that “Mr. Salazar does not allege he downloaded any such application, or even specify what application he is referring to.” Br. at 13 n. 7. The Court agrees, and Plaintiff’s brief in opposition to the motion to dismiss does not address any mobile application nor clarify or defend any claims related to an App. Thus, the Court finds, without opposition from Plaintiff, that no such claim has been adequately pleaded.

III. Leave to Amend

Without providing any specificity whatsoever in his opposition brief, Plaintiff includes a blanket request for leave to amend his Complaint “to address any issues the Court raises in its Order.” Opp. at 25 n.19. Leave to amend “shall be freely given when justice so requires.” Rule 15(a). However, “a district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Plaintiff had the opportunity to view Defendant’s detailed motion to dismiss and numerous letters to the Court with supplemental authority and argument, and has provided no basis for a proposed amendment. To seek leave to amend, a plaintiff must at least “provide some indication of the substance of the contemplated amendment before a court could entertain the request.” *Mariah Re Ltd. v. Am. Family Mut. Ins. Co.*, 52 F. Supp. 3d 601, 624 (S.D.N.Y. 2014); see *Techno-Marine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (“A plaintiff need not be given leave to amend if it fails to specify ... how amendment would cure the pleading deficiencies in its complaint.”). In reviewing the aforementioned materials, the only basis that the Court can discern as a potential proposed amendment is the reference in Plaintiff’s July 24, 2023 letter stating that “discovery in this matter will demonstrate that the NBA’s newsletters direct its subscribers to video content.” ECF No. 49 at 1. But even if the Court were to construe this letter as a request to amend the Complaint to include an allegation that the newsletter included a link to video content on the NBA.com website, amendment would be futile because Plaintiff still

66a

would not state a claim under the VPPA. *See supra* at 19-20.

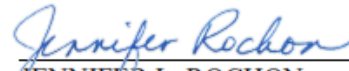
CONCLUSION

For the reasons stated above, Defendant's motion to dismiss the Complaint under Rule 12(b)(1) is denied, but the motion to dismiss for failure to state a claim under Rule 12(b)(6) is GRANTED. The Clerk of Court is respectfully requested to close this case.

Dated: August, 7, 2023

New York, New York

SO ORDERED



JENNIFER L. ROCHON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

MICHAEL SALAZAR,
*Individually and on
behalf of all others
similarly situated,*

Plaintiff,

v.

NATIONAL
BASKETBALL
ASSOCIATION

Defendant.

Case No:

Judge:

**JURY TRIAL RE-
QUESTED**

CLASS ACTION COMPLAINT

Plaintiff Michael Salazar, individually and on behalf of all others similarly situated, files this Class Action Complaint against Defendant National Basketball Association (“Defendant”) for violations of the federal Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”). Plaintiff’s claims arise from Defendant’s practice of knowingly disclosing to a third party, Meta Platforms, Inc. (“Facebook”), data containing Plaintiff’s and other digital-subscribers Class Members’ (i) personally identifiable information or Facebook ID (“FID”) and (ii) the computer file containing video and its corresponding URL viewed (“Video Media”)

(collectively, “Personal Viewing Information”). Plaintiff’s allegations are made on personal knowledge as to Plaintiff and Plaintiff’s own acts and upon information and belief as to all other matters.

NATURE OF THE ACTION

1. This is a consumer digital privacy class action complaint against National Basketball Association, as the owner of NBA.com, for violating the VPPA by disclosing its digital subscribers’ identities and Video Media to Facebook without the proper consent.

2. The VPPA prohibits “video tape service providers,” such as NBA.com, from knowingly disclosing consumers’ personally identifiable information, including “information which identifies a person as having requested or obtained specific video materials or services from a video tape provider,” without express consent in a stand-alone consent form.

3. Like other businesses with an online presence, Defendant collects and shares the personal information of visitors to its website and mobile application (“App”) with third parties. Defendant does this through cookies, software development kits (“SDK”), and pixels. In other words, digital subscribers to NBA.com have their personal information disclosed to Defendant’s third-party business partners.

4. The Facebook pixel is a code Defendant installed on NBA.com allowing it to collect users’ data. More specifically, it tracks when digital subscribers enter NBA.com or NBA.com’s accompanying App and view Video Media. NBA.com tracks and discloses to Facebook the digital subscribers’ viewed Video Media, and most notably, the digital subscribers’ FID. This

occurs even when the digital subscriber has not shared (nor consented to share) such information.

5. Importantly, Defendant shares the Personal Viewing Information – *i.e.*, digital subscribers’ unique FID and video content viewed – together as one data point to Facebook. Because the digital subscriber’s FID uniquely identifies an individual’s Facebook user account, Facebook—or any other ordinary person—can use it to quickly and easily locate, access, and view digital subscribers’ corresponding Facebook profile. Put simply, the pixel allows Facebook to know what Video Media one of its users viewed on NBA.com.

6. Thus, without telling its digital subscribers, Defendant profits handsomely from its unauthorized disclosure of its digital subscribers’ Personal Viewing Information to Facebook. It does so at the expense of its digital subscribers’ privacy and their statutory rights under the VPPA.

7. Because NBA.com digital subscribers are not informed about this dissemination of their Personal Viewing Information – indeed, it is automatic and invisible – they cannot exercise reasonable judgment to defend themselves against the highly personal ways NBA.com has used and continues to use data it has about them to make money for itself.

8. Defendant chose to disregard Plaintiff’s and hundreds of thousands of other NBA.com digital subscribers’ statutorily protected privacy rights by releasing their sensitive data to Facebook. Accordingly, Plaintiff brings this class action for legal and equitable remedies to redress and put a stop to Defendant’s practices of intentionally disclosing its digital subscribers’ Personal Viewing Information to Facebook in knowing violation of VPPA.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 over the claims that arise under the Video Privacy Protection Act, 18 U.S.C. § 2710.

10. This Court also has jurisdiction under 28 U.S.C. § 1332(d) because this action is a class action in which the aggregate amount in controversy for the proposed Class (defined below) exceeds \$5,000,000, and at least one member of the Class is a citizen of a state different from that of Defendant.

11. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391 because Defendant does business in and is subject to personal jurisdiction in this District. Venue is also proper because a substantial part of the events or omissions giving rise to the claim occurred in or emanated from this District.

THE PARTIES

12. Plaintiff Michael Salazar is an adult citizen of the State of California and is domiciled in the State of California. Plaintiff began a digital subscription to NBA.com in 2022 which continues to this day. Plaintiff has had a Facebook account from approximately 2010 to the present. During the relevant time period he has used his NBA.com digital subscription to view Video Media through NBA.com and/or App while logged into his Facebook account. By doing so, Plaintiff's Personal Viewing Information was disclosed to Facebook pursuant to the systematic process described herein. Plaintiff never gave Defendant express written consent to disclose his Personal Viewing Information.

13. Defendant National Basketball Association:

- a. Is a private major American sports league headquartered in New York, New York.
- b. Is one of the most-watched sports in the United States, averaging 1.6 million viewers per regular season game across the 2021-2022 season.¹
- c. Had an annual revenue of \$10 billion for the 2021-2022 season.²
- d. NBA.com has approximately 14.5 million unique monthly visitors.³
- e. NBA.com includes a Videos section which provides a broad selection of video content.
- f. Combined, the National Basketball Association and NBA.com are used by numerous U.S. digital media viewers.
- g. Through NBA.com and App, Defendant delivers and, indeed, is in the business of delivering countless hours of video content to its digital subscribers.

¹ See SportsMediaWatch “NBA Season is most-watched in three years”, *available at* <https://www.sportsmediawatch.com/2022/04/nba-ratings-most-watched-regular-season-threeyears/> (Last Accessed: September 7, 2022)

² See “NBA reveals US\$10bn revenue for 2022/23 season”, *available at* [https://www.sportspromedia.com/news/nba-revenue-2021-22-season-adamsilver/#:~:text=The%20National%20Basketball%20Association's%20\(NBA,%248.9%20billion%20marking%20another%20record.](https://www.sportspromedia.com/news/nba-revenue-2021-22-season-adamsilver/#:~:text=The%20National%20Basketball%20Association's%20(NBA,%248.9%20billion%20marking%20another%20record.) (Last Accessed: September 7, 2022)

³ See similarweb.com, nba.com, *available at* <https://www.similarweb.com/website/nba.com/#overview> (Last Accessed: September 7, 2022)

FACTUAL ALLEGATIONS

A. Background of the Video Privacy Protection Act

14. The VPPA generally prohibits the knowing disclosure of a customer's video rental or sale records without the informed, written consent of the customer in a form "distinct and separate from any form setting forth other legal or financial obligations." Under the statute, the Court may award actual damages (but not less than liquidated damages of \$2,500.00 per person), punitive damages, equitable relief, and attorney's fees.

15. The VPPA was initially passed in 1988 for the explicit purpose of protecting the privacy of individuals' and their families' video rental, purchase and viewing data. Leading up to its enactment, members of the United States Senate warned that "[e]very day Americans are forced to provide to businesses and others personal information without having any control over where that information goes." S. Rep. No. 100-599 at 7-8 (1988).

16. Senators at the time were particularly troubled by disclosures of records that reveal consumers' purchases and rentals of videos and other audiovisual materials. As Senator Patrick Leahy and the late Senator Paul Simon recognized, records of this nature offer "a window into our loves, likes, and dislikes," such that "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." S. Rep. No. 100-599 at 7-8 (1988) (statements of Sens. Simon and Leahy, respectively).

17. In proposing the Video and Library Privacy Protection Act (later codified as the VPPA), Senator Leahy stated that “[i]n practical terms our right to privacy protects the choice of movies that we watch with our family in our own homes. And it protects the selection of books that we choose to read.” 134 Cong. Rec. S5399 (May 10, 1988). Thus, the personal nature of such information, and the need to protect it from disclosure, is the inspiration of the statute: “[t]hese activities are at the core of any definition of personhood. They reveal our likes and dislikes, our interests and our whims. They say a great deal about our dreams and ambitions, our fears and our hopes. They reflect our individuality, and they describe us as people.” *Id.*

18. While these statements rang true in 1988 when the VPPA was passed, the importance of legislation like the VPPA in the modern era of data mining from online activities is more pronounced than ever before. During a recent Senate Judiciary Committee meeting, “The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century,” Senator Leahy emphasized the point by stating: “While it is true that technology has changed over the years, we must stay faithful to our fundamental right to privacy and freedom. Today, social networking, video streaming, the ‘cloud,’ mobile apps and other new technologies have revolutionized the availability of Americans’ information.”⁴

⁴ See Committee on the Judiciary, Subcommittee on Privacy, Technology and the Law, The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century, Senate Judiciary Committee Subcommittee on Privacy, Technology and the Law, <https://www.judiciary.senate.gov/meetings/the-video-privacy->

19. In this case, Defendant chose to deprive Plaintiff and the Class members of that right by knowingly and systematically disclosing their Personal Viewing Information to Facebook, without providing notice to (let alone obtaining consent from) anyone, as explained herein.

B. NBA.com's Digital Subscriptions

20. To register for NBA.com, users sign up for an online newsletter. NBA.com users provide their personal information, including their email address.

21. National Basketball Association operates a website in the U.S. accessible from a desktop and mobile device at NBA.com. It also offers an App available for download on Android and iPhone devices.

22. On information and belief, all digital subscribers provide Defendant with their IP address, which is a unique number assigned to all information technology connected devices, that informs Defendant as to subscribers' city, zip code and physical location.

23. Digital subscribers may provide to Defendant the identifier on their mobile devices and/or cookies stored on their devices.

24. When opening an account, Defendant does not disclose to its digital subscribers that it will share their Personal Viewing Information with third parties, such as Facebook. Digital subscribers are also not asked to consent to such information sharing upon opening an account.

25. After becoming a digital subscriber, viewers have access to a variety of NBA.com Video Media on Defendant's digital platform.

26. Notably, once a digital subscriber signs in and watches NBA.com Video Media, the digital subscriber is not provided with any notification that their Personal Viewing Information is being shared. Similarly, Defendant also fails to obtain digital subscribers' written consent to collect their Personal Viewing Information "in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer," as the VPPA requires.

C. Defendant Admits It Collects and Discloses Certain Personal Information of Digital Subscribers to Third Parties But Fails to Advise It Discloses Personal Viewing Information, as Required Under the VPPA.

27. The operative Privacy Policy for NBA.com states that it collects "Personal Information" from its users:

"...the data we collect includes:

Data that you provide directly when you register for, or use, the Services. This data will vary, but typically consists of name, email address, postal address, phone number and other similar contact data. We also receive data from the communications you send to us, such as customer service inquiries, product reviews and other feedback regarding the Services.

User credentials, such as username, password, password hints and similar security information used to create an account and authenticate users of the Services.

Demographic data, such as age, gender, country and language preference.

Payment data, such as credit card information and billing address.

Device data, such as type of device, operating system and other software installed on the device, device settings, IP address, device identifiers and error reports.

Usage data, such as the programs and features you access, items you purchase, and the timing, frequency and duration of your interactions through the Services.

Location data, such as IP addresses received from your device.

Information about your interests and preferences, such as your favorite teams and players, your home city or your communications preferences. In addition to what you provide directly, we may infer your interests and preferences from other data we collect, such as the content and advertisements you interact with while using the Services.

Third party integrations. If you connect your use of the Services through a third party service (e.g., a social media platform), the third party may share certain information from your third party account with us.

Other third party data, such as data from our affiliates, partners or vendors, data brokers or public sources.”⁵

28. NBA.com discloses in its Privacy Policy that it automatically collects “Usage data, such as the programs and features you access.”⁶

29. Importantly, nowhere in NBA.com’s Terms of Service or Privacy Policy is it disclosed that Defendant will share digital subscribers’ private and protected Personal Viewing Information with third parties, including Facebook.

D. How NBA.com Disseminates Digital Subscribers’ Personal Viewing Information

1. Tracking Pixels

30. Websites and apps use Facebook’s pixel and SDK to collect information about user’s devices and activities and send that to Facebook. Facebook then uses that information to show the user targeted ads.

31. The Facebook tracking pixel, also known as a “tag” or “web beacon” among other names, is an invisible tool that tracks consumers’ actions on Facebook advertisers’ websites and reports them to Facebook. It is a version of the social plugin that gets “rendered” with code from Facebook. To obtain the code for the pixel, the website advertiser tells Facebook which website events it wants to track (*e.g.*, Video Media) and Facebook returns corresponding

⁵ See NBA.com Privacy Policy, available at https://www.nba.com/privacypolicy#Data_We_Collect (Last Accessed: September 7, 2022)

⁶ See *Id.*

Facebook pixel code for the advertiser to incorporate into its website.

32. Defendant installed the Facebook tracking pixel, which enables it to disclose Plaintiff's and Class Members' Personal Viewing Information to Facebook, because it benefits financially from the advertising and information services that stem from use of the pixel. When a NBA.com digital subscriber enters the website and watches Video Media on the website, the website sends to Facebook certain information about the viewer, including, but not limited to, their identity and the media content the digital subscriber watched. Specifically, NBA.com sends to Facebook the video content name, its URL, and, most notably, the viewers' Facebook ID.

E. Facebook ID (“FID”)

33. An FID is a unique and persistent identifier that Facebook assigns to each user. With it, anyone ordinary person can look up the user's Facebook profile and name. When a Facebook user with one or more personally identifiable FID cookies on their browser views Video Media from NBA.com on the website or app, NBA.com, through its website code, causes the digital subscribers identity and viewed Video Media to be transmitted to Facebook by the user's browser. This transmission is not the digital subscribers decision, but results from Defendant's purposeful use of its Facebook tracking pixel by incorporation of that pixel and code into NBA.com's website or App. Defendant could easily program the website and app so that this information is not automatically transmitted to Facebook when a subscriber views Video Media. However, it is not Defendant's financial interest to do

so because it benefits financially by providing this highly sought-after information.

34. Notably, while Facebook can easily identify any individual on its Facebook platform with only their unique FID, so too can any ordinary person who comes into possession of an FID. Facebook admits as much on its website. Indeed, ordinary persons who come into possession of the FID can connect to any Facebook profile. Simply put, with only an FID and the video content name and URL – all of which Defendant knowingly and readily provides to Facebook without any consent from the digital subscribers – any ordinary person could learn the identity of the digital subscriber and the specific video or media content they requested on NBA.com.

35. At all relevant times, Defendant knew that the Facebook pixel disclosed Personal Viewing Information to Facebook. This was evidenced from, among other things, the functionality of the pixel, including that it enabled NBA.com and accompanying app to show targeted advertising to its digital subscribers based on the products those digital subscriber's had previously viewed on the website or app, including Video Media consumption, for which Defendant received financial remuneration.

F. NBA.com Unlawfully Discloses Its Digital Subscribers' Personal Viewing Information to Facebook

36. Defendant maintains a vast digital database comprised of its digital subscribers' Personal Viewing Information, including the names and e-mail addresses of each digital subscriber and information reflecting the Video Media that each of its digital subscribers viewed.

37. Defendant is not sharing anonymized, non-personally identifiable data with Facebook. To the contrary, the data it discloses is tied to unique identifiers that track specific Facebook users. Importantly, the recipient of the Personal Viewing Information – Facebook – receives the Personal Viewing Information as one data point. Defendant has thus monetized its database by disclosing its digital subscribers’ Personal Viewing Information to Facebook in a manner allowing it to make a direct connection – without the consent of its digital subscribers and to the detriment of their legally protected privacy rights.

38. Critically, the Personal Viewing Information Defendant discloses to Facebook allows Facebook to build from scratch or cross-reference and add to the data it already has in their own detailed profiles for its own users, adding to its trove of personally identifiable data.

39. These factual allegations are corroborated by publicly available evidence. For instance, as shown in the screenshot below, a user visits NBA.com and clicks on an article titled “How will pieces come together for the Lakers?” and watches the video in the article.

Personal Viewing Information of Defendant's digital subscribers, together with additional sensitive personal information.

42. Defendant does not seek its digital subscribers' prior written consent to the disclosure of their Personal Viewing Information (in writing or otherwise) and its customers remain unaware that their Personal Viewing Information and other sensitive data is being disclosed to Facebook.

43. By disclosing its digital subscribers Personal Viewing Information to Facebook – which undeniably reveals their identity and the specific video materials they requested from Defendant's website – Defendant has intentionally and knowingly violated the VPPA.

G. Disclosing Personal Viewing Information is Not Necessary

44. Tracking pixels are not necessary for Defendant to operate NBA.com's digital news publications and sign-up digital subscriptions. They are deployed on Defendant's website for the sole purpose of enriching Defendant and Facebook.

45. Even if an on-line news publication found it useful to integrate Facebook tracking pixels, Defendant is not required to disclose Personal Viewing Information to Facebook. In any event, if Defendant wanted to do so, it must first comply with the strict requirements of VPPA, which it failed to do.

H. Plaintiff's Experiences

46. Plaintiff Michael Salazar has been a digital subscriber of NBA.com from 2022 to the present. Plaintiff became a digital subscriber of NBA.com by providing, among other information, email address and IP address, (which informs Defendant as to the

city and zip code he resides in as well as his physical location), and any cookies associated with his device. As part of his subscription, he receives emails and other communications from NBA.com.

47. Plaintiff has had a Facebook account since approximately 2010. From 2022 to the present, Plaintiff viewed Video Media via NBA.com website and App.

48. Plaintiff never consented, agreed, authorized, or otherwise permitted Defendant to disclose his Personal Viewing Information to Facebook. Plaintiff has never been provided any written notice that Defendant discloses its digital subscribers' Personal Viewing Information, or any means of opting out of such disclosures of his Personal Viewing Information. Defendant nonetheless knowingly disclosed Plaintiff's Personal Viewing Information to Facebook.

49. Because Plaintiff is entitled by law to privacy in his Personal Viewing Information, Defendant's disclosure of his Personal Viewing Information deprived Plaintiff of the full set of benefits to which he is entitled. Plaintiff did not discover that Defendant disclosed his Personal Viewing Information to Facebook until August 2022.

CLASS ACTION ALLEGATIONS

50. Plaintiff brings this action individually and on behalf of all others similarly situated as a class action under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of the following class (the "Class"):

All persons in the United States with a digital subscription to an online website owned and/or operated by Defendant

that had their Personal Viewing Information disclosed to Facebook by Defendant.

51. Excluded from the Class are Defendant, their past or current officers, directors, affiliates, legal representatives, predecessors, successors, assigns and any entity in which any of them have a controlling interest, as well as all judicial officers assigned to this case as defined in 28 USC § 455(b) and their immediate families.

52. Numerosity. Members of the Class are so numerous and geographically dispersed that joinder of all members of the Class is impracticable. Plaintiff believes that there are hundreds of thousands of members of the Class widely dispersed throughout the United States. Class members can be identified from Defendant's records and non-party Facebook's records.

53. Typicality. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff and members of the Class were harmed by the same wrongful conduct by Defendant in that Defendant caused Personal Viewing Information to be disclosed to Facebook without obtaining express written consent. his claims are based on the same legal theories as the claims of other Class members.

54. Adequacy. Plaintiff will fairly and adequately protect and represent the interests of the members of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of the members of the Class. Plaintiff is represented by counsel with experience in the prosecution of class action litigation generally and in the emerging field of digital privacy litigation specifically.

55. Commonality. Questions of law and fact common to the members of the Class predominate over questions that may affect only individual members of the Class because Defendant has acted on grounds generally applicable to the Class. Such generally applicable conduct is inherent in Defendant's wrongful conduct. Questions of law and fact common to the Classes include:

- a. Whether Defendant knowingly disclosed Class members' Personal Viewing Information to Facebook;
- b. Whether the information disclosed to Facebook concerning Class members' Personal Viewing Information constitutes personally identifiable information under the VPPA;
- c. Whether Defendant's disclosure of Class members' Personal Viewing Information to Facebook was knowing under the VPPA;
- d. Whether Class members consented to Defendant's disclosure of their Personal Viewing Information to Facebook in the manner required by 18 U.S.C. § 2710(b)(2)(B); and
- e. Whether the Class is entitled to damages as a result of Defendant's conduct.

56. Superiority. Class action treatment is a superior method for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including

providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweighs potential difficulties in management of this class action. Plaintiff knows of no special difficulty to be encountered in litigating this action that would preclude its maintenance as a class action.

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF

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

57. Plaintiff incorporates the preceding paragraphs by reference as if fully set forth herein.

58. The VPPA prohibits a "video tape service provider" from knowingly disclosing "personally-identifying information" concerning any consumer to a third-party without the "informed, written consent (including through an electronic means using the Internet) of the consumer." 18 U.S.C § 2710.

59. As defined in 18 U.S.C. § 2710(a)(4), a "video tape service provider" is "any person, engaged in the business, in or affecting interstate commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audiovisual materials."

60. Defendant is a "video tape service provider" as defined in 18 U.S.C. § 2710(a)(4) because it engaged in the business of delivering audiovisual materials that are similar to prerecorded video cassette tapes and those sales affect interstate or foreign commerce.

61. . As defined in 18 U.S.C. § 2710(a)(3), "personally-identifiable information" is defined to include "information which identifies a person as having

requested or obtained specific video materials or services from a video tape service provider.”

62. Defendant knowingly caused Personal Viewing Information, including FIDs, concerning Plaintiff and Class members to be disclosed to Facebook. This information constitutes personally identifiable information under 18 U.S.C. § 2710(a)(3) because it identified each Plaintiff and Class member to Facebook as an individual who viewed NBA.com Video Media, including the specific video materials requested from the website.

63. As defined in 18 U.S.C. § 2710(a)(1), a “consumer” means “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” As alleged in the preceding paragraphs, Plaintiff subscribed to a digital NBA.com plan that provides Video Media content to the digital subscriber’s desktop, tablet, and mobile device. Plaintiff is thus a “consumer” under this definition.

64. As set forth in 18 U.S.C. § 27109(b)(2)(B), “informed, written consent” must be (1) in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer; and (2) at the election of the consumer, is either given at the time the disclosure is sought or given in advance for a set period of time not to exceed two years or until consent is withdrawn by the consumer, whichever is sooner.” Defendant failed to obtain informed, written consent under this definition.

65. In addition, the VPPA creates an opt-out right for consumers in 18 U.S.C. § 2710(2)(B)(iii). It requires video tape service providers to also “provide[] an opportunity for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing

disclosures, at the consumer's election." Defendant failed to provide an opportunity to opt out as required by the VPPA.

66. Defendant knew that these disclosures identified Plaintiff and Class members to Facebook. Defendant also knew that Plaintiff's and Class members' Personal Viewing Information was disclosed to Facebook because, *inter alia*, Defendant chose, programmed, and intended for Facebook to receive the video content name, its URL, and, most notably, the digital subscribers' FID.

67. By disclosing Plaintiff's and the Class's Personal Viewing Information, Defendant violated Plaintiff's and the Class members' statutorily protected right to privacy in their video-watching habits. See 18 U.S.C. § 2710(c).

68. As a result of the above violations, Defendant is liable to the Plaintiff and other Class members for actual damages related to their loss of privacy in an amount to be determined at trial or alternatively for "liquidated damages not less than \$2,500 per plaintiff." Under the statute, Defendant is also liable for reasonable attorney's fees, and other litigation costs, injunctive and declaratory relief, and punitive damages in an amount to be determined by a jury, but sufficient to prevent the same or similar conduct by the Defendant in the future.

VII. RELIEF REQUESTED

69. Accordingly, Plaintiff, individually and on behalf of the proposed Class, respectfully requests that this court:

- a. Determine that this action may be maintained as a class action pursuant

- to Fed R. Civ. P. 23(a), (b)(2), and (b)(3) and declare Plaintiff as the representative of the Class and Plaintiff's Counsel as Class Counsel;
- b. For an order declaring that Defendant's conduct as described herein violates the federal VPPA, 18 U.S.C. § 2710(c)(2)(D);
 - c. For Defendant to pay \$2,500.00 to Plaintiff and each Class member, as provided by the VPPA, 18 U.S.C. § 2710(c)(2)(A);
 - d. For punitive damages, as warranted, in an amount to be determined at trial, 18 U.S.C. § 2710(c)(2)(B);
 - e. For prejudgment interest on all amounts awarded;
 - f. For an order of restitution and all other forms of equitable monetary relief;
 - g. For injunctive relief as pleaded or as the Court may deem proper; and
 - h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit, 18 U.S.C. § 2710(c)(2)(C).

JURY DEMAND

70. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff, individually and on behalf of the proposed Class, demands a trial by jury on all issues so triable.

90a

Dated:
September 15,
2022

Respectfully Submitted:
By: /s/ Michael L. Murphy
Michael L. Murphy (NY
5084397)
BAILEY & GLASSER LLP
1055 Thomas Jefferson
Street NW
Suite 540
Washington, DC 20007
T: 202.494.3531
mmurphy@baileyglasser.com

Brandon M. Wise – IL Bar #
6319580*
Adam Florek – IL Bar #
6320615*
PEIFFER WOLF CARR
KANE CONWAY & WISE, LLP
73 W. Monroe, 5th Floor
Chicago, IL 60604
T: 312-444-0734
bwise@peifferwolf.com
aflorek@peifferwolf.com

** to seek admission pro hac
vice*

*Counsel for Plaintiff and the
Putative Class*

APPENDIX D

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK**

<p>MICHAEL SALAZAR, Individually and on behalf of all others similarly situated, Plaintiff, v. NATIONAL BASKETBALL ASSOCIATION Defendant.</p>	<p>Case No: 1:22-cv-7935- JLR Judge: Jennifer L. Rochon JURY TRIAL REQUESTED</p>
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**FIRST AMENDED CLASS ACTION
COMPLAINT**

Plaintiff Michael Salazar, individually and on behalf of all others similarly situated, bring this Class Action Complaint against Defendant National Basketball Association (“Defendant”) for violations of the federal Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”). Plaintiff’s claims arise from Defendant’s practice of knowingly disclosing to a third party, Meta Platforms, Inc. (owner of Facebook and Instagram, as well as other applications), data containing Plaintiff’s and other digital-subscriber Class Members’ (i) personally identifiable information or Facebook ID (“FID”) and (ii) the computer file containing video and

its corresponding URL viewed (“Video Media”) (collectively, “Personal Viewing Information”). For the sake of clarity and to alleviate any doubt, and as was previously and appropriately inferred respect to the Complaint (ECF No. 1) throughout the motion to dismiss phase, any allegations related to Plaintiff’s viewing of Video Media and the sharing of Personal Viewing Information herein are limited to pre-recorded audiovisual material and *do not* include the watching of live content. Plaintiff’s allegations are made on personal knowledge as to Plaintiff and Plaintiff’s own acts and upon information and belief as to all other matters.

Nature of the Action

1. This is a consumer digital privacy class action complaint against National Basketball Association, as the owner of NBA.com, for violating the VPPA by disclosing its digital subscribers’ identities and Video Media they have watched to Facebook without obtaining their digital subscribers’ “written consent” “in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710(b)(2)(B).

2. Digital subscribers of the NBA’s newsletters are “consumers” under the VPPA.

3. The VPPA prohibits “video tape service providers,” such as the NBA which controls and operates NBA.com, from knowingly disclosing consumers’ personally identifiable information (“PII”), including “information which identifies a person as having requested or obtained specific video materials or services from a video tape provider,” without express consent in a “distinct and separate” form that “is given at the time the disclosure is sought” or “is given in

advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner[.]” 18 U.S.C. § 2710(b)(2)(B)(ii)(I)-(II).

4. During time periods relevant to this matter, Defendant has collected and shared the personally identifying information of visitors to its website and mobile application (“App”) with third parties.

5. Defendant does this through tracking cookies, software development kits (“SDK”), and tracking pixels.

6. In other words, digital subscribers to NBA.com have their personally identifying information disclosed to Defendant’s third-party business partners.

7. The Facebook pixel is functional software code Defendant has chosen to install on NBA.com allowing it to collect users’ data. More specifically, the Facebook pixel tracks when digital subscribers visit NBA.com and when digital subscribers view Video Media. NBA.com tracks and discloses to Facebook the digital subscribers’ viewed Video Media, and most notably, the digital subscribers’ FID which provides any reasonable person access to a person’s Facebook (and Instagram) page and/or account which in turn provides that person with access to information such as the person’s name, location of residence, work history, educational history, date of birth, photographs of the user that include metadata sufficient to demonstrate location, gender, and likes. This occurs even when the digital subscriber has not shared (nor consented to share) such information.

8. Importantly, Defendant packages personally identifiable information and video viewing information together and shares this Personal Viewing

Information with Facebook. Because the digital subscriber's FID uniquely identifies an individual's Facebook user account, Facebook—or any other ordinary person—can use it to quickly and easily locate, access, and view digital subscribers' corresponding Facebook profile. Put simply, the pixel allows Facebook to know what Video Media one of its users viewed on NBA.com.

9. Thus, without telling or obtaining the express consent of its digital subscribers in a “distinct and separate form” or otherwise, Defendant profits handsomely from its unauthorized disclosure of its digital subscribers' Personal Viewing Information to Facebook. It does so at the expense of its digital subscribers' privacy and their statutory rights under the VPPA.

10. Because NBA.com digital subscribers are not properly informed about this dissemination of their Personal Viewing Information – indeed, it is automatic and invisible – they cannot exercise reasonable judgment to defend themselves against the highly personal ways NBA.com has used and continues to use data it has about them to make money for itself at the expense of consumers.

11. Defendant chose to disregard Plaintiff's and, upon information and belief, hundreds of thousands of other NBA.com digital subscribers' statutorily protected privacy rights by releasing their sensitive data to Facebook.¹ Accordingly, Plaintiff brings this class

¹ Given discovery has been stayed for the entirety of this matter, Plaintiff has been unable to seek discovery about the size of the putative class. Order, ECF No. 26 (Dec. 22, 2022). *See also* ECF No. 25 (noting Plaintiff took the position seeking only limited

action for legal and equitable remedies to redress Defendant's practices of intentionally disclosing its digital subscribers' Personal Viewing Information to Facebook in knowing and direct violation of the VPPA.

12. For the sake of clarity and to alleviate any doubt, any allegations related to Plaintiff's viewing of Video Media and the sharing of Personal Viewing Information herein are limited to pre-recorded audiovisual material and *do not* include the watching of live content.

Jurisdiction & Venue

13. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 over the claims that arise under the Video Privacy Protection Act, 18 U.S.C. § 2710.

14. This Court also has jurisdiction under 28 U.S.C. § 1332(d) because this action is a class action in which the aggregate amount in controversy for the proposed Class (defined below) exceeds \$5,000,000, and at least one member of the Class is a citizen of a state different from that of Defendant.

15. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391 because Defendant does business in and is subject to personal jurisdiction in this District. Venue is also proper because a substantial part of the events or omissions giving rise to the claim occurred in or emanated from this District.

The Parties

16. Plaintiff Michael Salazar is an adult citizen of the State of California and is domiciled in the State

discovery about size of the class and the existence of any insurance policies).

of California. Plaintiff began a digital subscription to NBA.com in 2022 which continues to this day. Plaintiff has had a Facebook account from approximately 2010 to the present. During the relevant time period he has been a subscriber to NBA.com's digital newsletter and has viewed Video Media on Defendant's website. Plaintiff did so while logged into his Facebook account or having been recently logged into his Facebook account. By doing so, Plaintiff's Personal Viewing Information was disclosed to Facebook pursuant to the systematic process described herein. Plaintiff never gave Defendant express written consent to disclose his Personal Viewing Information to unauthorized third parties.

17. Defendant National Basketball Association:
 - a. Is a private major American sports league headquartered in New York, New York.
 - b. Is one of the most-watched sports in the United States, averaging 1.6 million viewers per regular season game across the 2021-2022 season.²
 - c. Had an annual revenue of \$10 billion for the 2021-2022 season.³

² See SportsMediaWatch "NBA Season is most-watched in three years," available at <https://www.sportsmediawatch.com/2022/04/nba-ratings-most-watched-regular-season-threeyears/> (last visited Dec. 12, 2024).

³ See "NBA reveals US\$10bn revenue for 2022/23 season," available at [https://www.sportspromedia.com/news/nba-revenue-2021-22-season-adam-silver/#:~:text=The%20National%20Basketball%20Association's%20\(NBA.%248.9%20billion%2C%20marking%20another%20record](https://www.sportspromedia.com/news/nba-revenue-2021-22-season-adam-silver/#:~:text=The%20National%20Basketball%20Association's%20(NBA.%248.9%20billion%2C%20marking%20another%20record) (last visited Dec. 12, 2024).

- d. NBA.com has approximately 14.5 million unique monthly visitors.⁴
- e. NBA.com includes a Videos section which provides a broad selection of video content.
- f. Combined, the National Basketball Association and NBA.com are used by numerous U.S. digital media viewers.
- g. Through NBA.com and App, Defendant delivers and, indeed, is in the business of delivering countless hours of video content to its digital subscribers.

Factual Allegations

A. Background of the Video Privacy Protection Act

18. The United States Congress passed the VPPA in 1988, seeking to confer onto consumers the power to “maintain control over personal information divulged and generated in exchange for receiving services from video tape service providers.” S. Rep. No. 100-599, at 8. “The Act reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual’s consent.” *Id.*

19. The impetus for the VPPA was President Ronald Reagan’s nomination of Judge Robert Bork to the United States Supreme Court. During the confirmation process, a movie rental store disclosed the nominee’s rental history to the Washington City

⁴ See similarweb.com, nba.com, available at <https://www.similarweb.com/website/nba.com/#overview> (last visited Dec. 12, 2024).

Paper which then published that record. Congress responded by passing the VPPA, with an eye toward the digital future. As Senator Patrick Leahy, who introduced the Act, explained:

It is nobody's business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy watch on television or read or think about when they are home. In an area of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. I think that is wrong.

Id. at 5-6 (internal ellipses and brackets omitted).

20. In 2012, Congress amended the VPPA, and in doing so, reiterated the Act's applicability to "so-called 'on-demand' cable services and Internet streaming services [that] allow consumers to watch movies or TV shows on televisions, laptop computers, and cell phones." S. Rep. 112-258, at 2.

21. The 2012 amendments clarified that statute "that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet." Video Privacy Protection Act Amendments Act of 2012, Pub. L. 112-258, 126 Stat. 2414; *see also* 18 U.S.C. § 2710(b)(2)(B) (authorizing a video tape service provider to disclose consumers' personally identifiable information "to any person with the informed, written consent (including through an

electronic means using the Internet) of the consumer” provided either “at the time the disclosure is sought” or “in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner”).

22. The consent, however, must be “in a *form distinct and separate* from any form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710(a)(4) (emphasis added).

23. The VPPA prohibits “[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1).

24. The VPPA defines “consumer” as any “renter, purchase, or subscriber of goods or services from a video tape service provider.” 18 U.S.C. § 2710(a)(1).

25. Under the VPPA, a consumer does not have to spend money for a good or service to be a “subscriber.” *Salazar v. Nat’l Basketball Ass’n*, 118 F.4th 533, 551 (2d Cir. 2024).

26. The VPPA defines personally identifiable information (“PII”) as “information which identifies a person as having requested or obtained specific video materials or services from a video service provider.” 18 U.S.C. § 2710(a)(3).

27. A video tape service provider is “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.” 18 U.S.C. § 2710(a)(4).

28. Under the VPPA, “[a]ny person aggrieved by any act of a person in violation of this section may

bring a civil action in a United States district court.” 18 U.S.C. § 2710(c)(1).

29. Under the VPPA, “[t]he court may award— (A) actual damages but not less than liquidated damages in an amount of \$2,500; (B) punitive damages; (C) reasonable attorneys’ fees and other litigation costs reasonably incurred; and (D) such other preliminary and equitable relief as the court determines to be appropriate.” 18 U.S.C. § 2710(c)(2).

30. The VPPA itself requires video tape service providers like Defendant to “destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected.” 18 U.S.C. § 2710(e).

31. This would mean, for instance, that when a user deletes their account, Defendant no longer has a use for the information and should delete it as soon as practicable. But Defendant’s policies indicate it does not delete said information after no longer having a use for it, let alone the third parties to whom it discloses PII.

B. NBA.com’s Digital Subscriptions

32. To register for NBA.com, users sign up for an online newsletter. NBA.com users provide their personal information, including their email address.

33. Defendant operates a website in the U.S. accessible from a desktop and mobile device at NBA.com.

34. All digital subscribers provide Defendant with their IP address, which is a unique number assigned to all information technology connected

devices, that informs Defendant as to subscribers' city, zip code and physical location.

35. Because of how Defendant configured its website and tracking technologies, digital subscribers also provided at least one device identification number, and, upon information and belief, a network identifier.

36. When signing up for a digital newsletter, Defendant does not disclose to its digital subscribers that it will share Personal Viewing Information with third parties, such as Meta. Digital subscribers, during the relevant time period, did not consent to such information sharing.

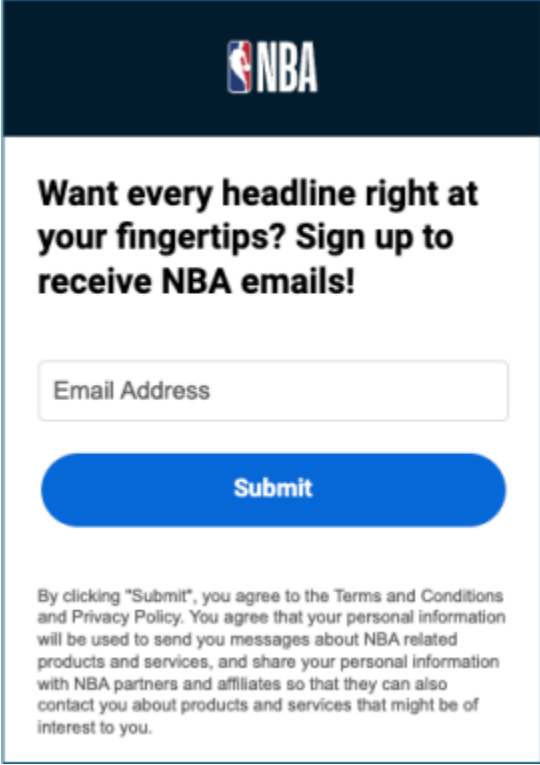
37. After becoming a digital subscriber, viewers have access to a variety of NBA.com Video Media on Defendant's digital platform.

38. Notably, digital subscriber who watch NBA.com Video Media, the digital subscriber is not provided with any notification that his or her Personal Viewing Information is being shared.

39. Similarly, Defendant also fails to obtain digital subscribers' written consent to collect their Personal Viewing Information "in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer," as the VPPA requires.

Changes to Email Sign-Up Widget Made During the Pendency of this Matter

40. In the relevant time period before this matter was commenced, the newsletter sign-up widget appeared as follows:



The image shows a screenshot of an NBA email sign-up form. At the top, there is a dark blue header with the NBA logo. Below the header, the text reads: "Want every headline right at your fingertips? Sign up to receive NBA emails!". Underneath this text is a white input field with the placeholder text "Email Address". Below the input field is a blue button with the text "Submit". At the bottom of the form, there is a small, light grey text block containing a disclaimer: "By clicking 'Submit', you agree to the Terms and Conditions and Privacy Policy. You agree that your personal information will be used to send you messages about NBA related products and services, and share your personal information with NBA partners and affiliates so that they can also contact you about products and services that might be of interest to you."

See Internet Archive, nba.com, Sept. 1, 2022, at 05:27:09 a.m., <https://web.archive.org/web/20220901052709/https://www.nba.com/> (last visited Dec. 11, 2024).

41. The NBA knowingly chose to present the text of its alleged disclosure entirely in small light grey text against a white background with none of the words in the entire passage appearing in bold text, different colored text, or bearing an underline.

42. The block of text beginning with “By clicking” is presented as the smallest text in the email sign-up widget, and, upon information and belief, is the smallest text featured on the entire web page.

43. Further, the reference to “Terms and Conditions” and “Privacy Policy” are not highlighted in any fashion (*i.e.*, do not appear in bold or blue text). While the newsletter sign-up widget contains a hyperlink for “Terms and Conditions,” clicking on that link appears to redirect the user back to the homepage. *See* Internet Archive, nba.com, Sept. 1, 2022, at 05:27:09 a.m. (redirecting back to homepage), *available at* <https://web.archive.org/web/20220901052709/https://www.nba.com/> (last visited Dec. 11, 2024).

44. Even more concerning, the reference to “Privacy Policy” in the newsletter sign-up widget is not hyperlinked at all. *Id.*

45. The NBA’s September 1, 2022 “block text” makes no reference to the Video Protection Privacy Act, 18 U.S.C. § 2710.

46. Defendant did much more with users’ data than share it with “partners and affiliates” so that “partners and affiliates” could “contact [users] about products and services that might interest [the users].”

47. Moreover, the NBA’s September 1, 2022 block of small gray text does not appear “in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710(b)(2)(B).

48. Plaintiff was not, and no reasonable consumer would be, put on notice that small light gray text with no indicia of functioning as a hyperlink led to other webpages.

49. The February 24, 2022⁵ version of the NBA’s Privacy Policy makes no reference to the Video Privacy Protection Act or even contains the word “video.”

50. The June 28, 2021 version of the NBA’s “Terms and Conditions” in effect on September 1, 2022 makes no reference to the Video Privacy Protection Act or even contains the word “video.”

51. On November 9, 2022, after the Court entered the briefing schedule on November 3, 2022 (ECF No. 17), Defendant chose to *materially alter* the appearance of the newsletter signup widget text:

The image shows a screenshot of the NBA's newsletter signup widget. At the top, there is a dark blue header with the NBA logo. Below the header, the text reads: "WANT EVERY HEADLINE RIGHT AT YOUR FINGERTIPS? SIGN UP TO RECEIVE NBA EMAILS!". Underneath this text is a light gray input field labeled "Email Address" and a dark blue "Submit" button. Below the button, there is a small disclaimer: "By clicking \"Submit\", you agree to the Terms and Conditions and Privacy Policy. You agree that your personal information will be used to send you messages about NBA related products and services, and share your personal information with NBA partners and affiliates so that they can also contact you about products and services that might be of interest to you." At the bottom of the widget, there is a dark blue navigation menu with white text and downward-pointing chevrons for each item: "NBA ORGANIZATION", "NBA INITIATIVES", "ACROSS THE LEAGUE", "SHOP", and "SUBSCRIPTIONS".

⁵ The “Privacy Policy” hyperlink at the bottom of www.nba.com on September 1, 2022 took users to the February 24, 2022. See Internet Archive, nba.com, available at <https://web.archive.org/web/20220828171325/https://www.nba.com/privacy-policy?> (last visited Dec. 12, 2024).

See Internet Archive, nba.com, Nov. 9, 2022, at 10:22:19 p.m., available at <https://web.archive.org/web/20221109222220/https://www.nba.com/> (last visited Dec. 12, 2024).

52. Specifically, for the first time, the NBA changed the textual appearance of “Terms and Conditions” and “Privacy Policy” from light grey text to bolded blue text.

53. For the first time, these phrases showed some indicia of being a hyperlink (and, for “Privacy Policy” actually became a hyperlink).

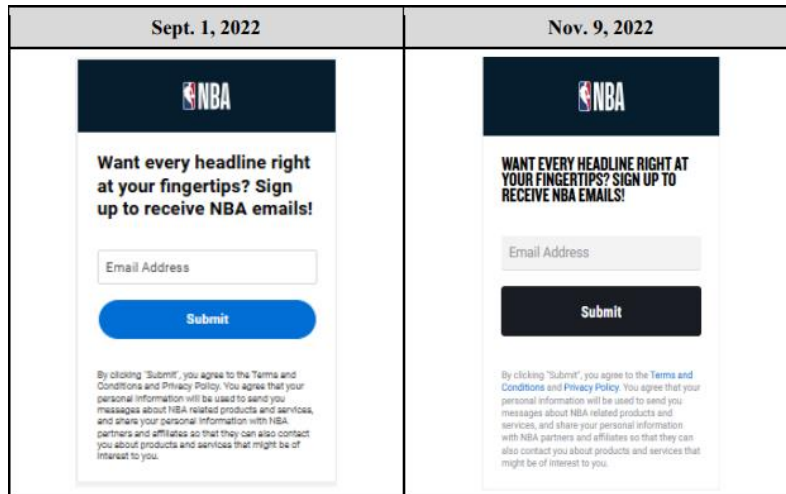
54. The NBA chose not to increase the size of the text in the “By clicking” language that is still small compared to the text immediately surrounding the “By clicking” language.

55. The NBA’s November 9, 2022 disclosure makes no reference to the Video Protection Privacy Act, 18 U.S.C. § 2710.

56. The NBA’s November 9, 2022 “By clicking” purposely avoids using the term “third parties” or reference Meta when discussing how it would handle Plaintiff’s and putative Class Members’ Personally Identifiable Information, but instead uses the inward-looking term “NBA partners and affiliates.”

57. The NBA’s November 9, 2022 disclosure does not appear “in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710(b)(2)(B).

58. As a side-by-side comparison, the two disclosures appear as follows:



59. The differences between the two disclosures cannot be understated. Plaintiff did not, and no reasonable consumer would, recognize pre-November 9, 2022 language as conspicuous notice of the “Terms of Service” and “Privacy Policy” phrases linking to other web pages. In fact, pre-November 9, 2022, “Privacy Policy” *was not* a hyperlink. Moreover, the banner language November 9 version appears in “ALL CAPS” as opposed to “Sentence case,” which is designed to draw the user’s eye to the upper portion of the sign-up widget.

60. Without reasonably conspicuous notice, neither Plaintiff nor any putative Class Member can be bound by the email sign-up widget.

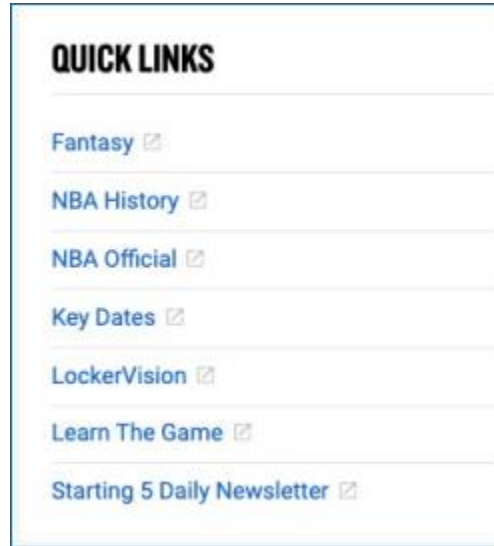
61. While the November 9, 2022 alteration occurred prior to the NBA moving to dismiss the Complaint filed on December 2, 2024 (ECF No. 21), the NBA chose to minimize the extent of its changes by presenting no graphical representation of the email sign-up widget (as opposed to how it presented its “cookie banner”). Instead, Defendant provided only a

textual description and requested judicial notice, proclaiming its “*authenticity is not in question.*” See Def.’s Mem., ECF No. 21, at 4, 8 (emphasis added). Defendant’s motion to dismiss described the email sign-up widget as it appeared on nba.com on November 30, 2022 (after the November 9 change).

62. It appears, based on plaintiff’s counsels’ investigation using publicly available tools, that Defendant dropped its “email sign-up widget” from the home screen of www.nba.com on or about February 20, 2023. Compare Internet Archive, nba.com, Feb. 22, 2023, at 3:28:40 p.m. (containing email sign-up widget), available at <https://web.archive.org/web/20230222184640/https://www.nba.com/> (last visited Dec. 12, 2024) with Internet Archive, nba.com, Feb. 22, 2023, at 6:46:40 p.m. (dropping email sign-up widget, available at <https://web.archive.org/web/20230222184640/https://www.nba.com/> (last visited Dec. 12, 2024)).

63. It appears that the NBA chose to keep the email sign-up widget off of the home screen of www.nba.com until about October 6, 2023. Compare Internet Archive, nba.com, Oct. 5, 2023, at 3:39:40 p.m., available at <https://web.archive.org/web/20231005153940/https://www.nba.com/> (last visited Dec. 12, 2024) with Internet Archive, nba.com, Oct. 6, 2023, at 11:48:45 p.m., available at <https://web.archive.org/web/20231006234845/https://www.nba.com/> (last visited Dec. 12, 2024).

64. On or about October 6, 2024, the NBA appears to have relaunched and rebranded its digital newsletter as “The Starting 5 Daily Newsletter” and added a hyperlink to the right column of homepage:



See Internet Archive, nba.com, Oct. 6, 2023, at 11:48:45 p.m., *available at* <https://web.archive.org/web/20231006234845/https://www.nba.com/> (last visited Dec. 12, 2024).

65. On or about October 7, 2023, the “Starting 5 Daily Newsletter” hyperlink directs the user to the following sign-up screen:

SIGN UP

Sign Up

First Name *

Last Name *

Email *

Favorite Team

Password *

Phone

Please use my personal information so that the NBA can send me messages and communications about products and initiatives of the NBA and NBA partners.

By submitting this form you agree to the NBA's [Privacy Policy](#) and [Terms of Use](#)

SIGN UP NOW **SIGN IN**

By accepting the aforementioned terms, you are consenting to have your personal information collected, stored and processed in the United States by NBA Properties, INC. Details on how to revoke your consent are available in the [Privacy Policy](#).

See Internet Archive, nba.com, Oct. 7, 2023, at 6:03:54 p.m., available at <https://web.archive.org/web/20231007180354/https://www.nba.com/starting5> (last visited Dec. 12, 2024).

66. This version of the sign-up widget requires the user to provide (a) first name; (b) last name; (c) email address; and (d) to set up a password for the account.

67. This October 7, 2023 version of the sign-up widget also optionally asks the user (a) to identify “Favorite Team;” and (b) to provide a phone number.

68. The October 7, 2023 version of the sign-up widget also contains a checkbox stating that “[b]y

submitting this form you agree to the NBA's Privacy Policy and Terms of Use." *Id.* (colored text in original).

69. The NBA's October 7, 2023 disclosure makes no reference to the Video Protection Privacy Act, 18 U.S.C. § 2710.

70. The NBA's November 9 disclosure does not appear "in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer." 18 U.S.C. § 2710(b)(2)(B).

71. The August 2023 version of the NBA's Privacy Policy in effect on October 6, 2023 makes no reference to the Video Privacy Protection Act or even contains the word "video."

72. The February 20, 2023 version of the NBA's "Terms of Use" in effect on October 6, 2023 makes no reference to the Video Privacy Protection Act or even contains the word "video."

73. On or about October 17, 2023, the NBA chose to make its "Starting 5 Daily Newsletter" available on its website. See nba.com, Starting 5 Daily Newsletter, available at <https://www.nba.com/news/category/starting-5-daily-newsletter> (last visited Dec. 12, 2024). The "Starting 5 Daily Newsletter" archive contains the email sign-up widget:

Screenshot of the NBA website's "Starting 5" daily newsletter sign-up page. The page features a navigation bar with "NEWS" and various links. Below the navigation is a "STARTING 5" banner. A Chevrolet Lyriq advertisement is visible. The main content area is titled "STARTING 5 DAILY NEWSLETTER" and contains two news items: "STARTING 5: JOKIĆ & CP3 MAKE HISTORY" and "STARTING 5, DEC. 8: THE JOKER'S HISTORIC 50-PIECE". At the bottom, there is a sign-up form with the text "GET MORE FROM THE LEAGUE YOU LOVE" and a "Sign Up" button. The sign-up form includes a text input field for an email address and a "Sign Up" button. Below the button, there is a small disclaimer: "Click Sign Up to agree to our Terms of Use and to sign up for emails about the latest news and products from the NBA and its partners. By clicking submit, you also acknowledge our Privacy Policy."

Id.

74. In this version of the email sign-up widget, the hyperlinks to "Terms of Use" and "Privacy Policy" appear in white text on a black background and are the same color and size as the surrounding text. *Id.*

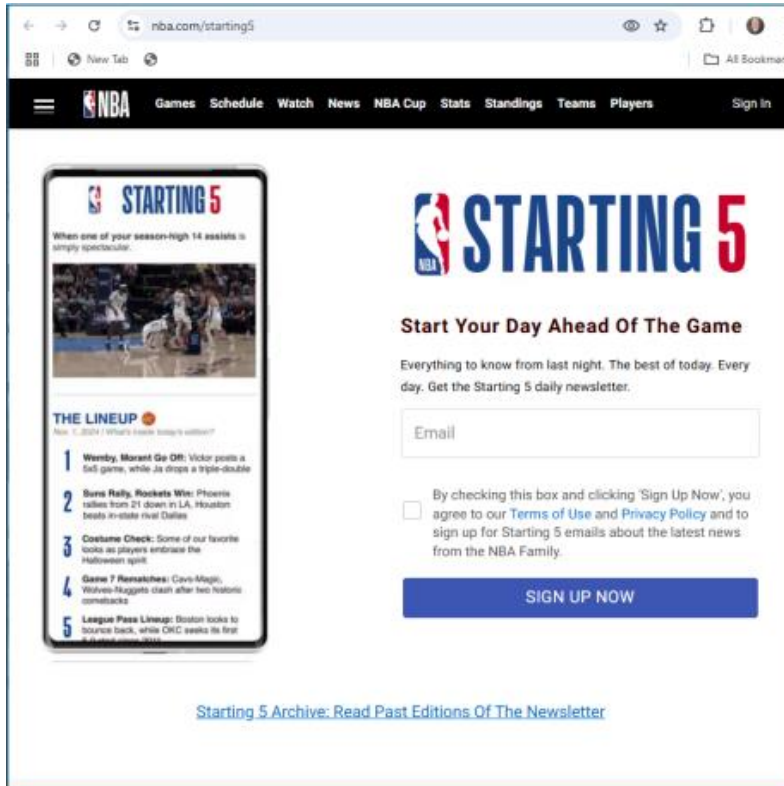
75. The NBA's disclosure as of the time of this filing makes no reference to the Video Protection Privacy Act, 18 U.S.C. § 2710.

76. The NBA's disclosure as of the time of this filing does not appear "in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer." 18 U.S.C. § 2710(b)(2)(B).

77. The February 20, 2023 version of the NBA's "Terms of Use" in effect as of the time of this filing makes no reference to the Video Privacy Protection Act or even contains the word "video."

78. The August 2023 version of the NBA's Privacy Policy in effect as of the time of this filing makes no reference to the Video Privacy Protection Act or even contains the word "video."

79. The "Starting 5" link also contains the following email sign-up widget:



See NBA, *Starting 5*, available at <https://www.nba.com/starting5> (last visited Dec. 12, 2024).

80. In this version of the email sign-up widget, the hyperlinks to “Terms of Use” and “Privacy Policy” appear in blue text on a white background and are the same size as the surrounding text. *Id.*

81. The NBA’s “Starting 5” disclosure as of the time of this filing makes no reference to the Video Protection Privacy Act, 18 U.S.C. § 2710.

82. The NBA’s “Starting 5” disclosure as of the time of this filing does not appear “in a form distinct and separate from any other form setting forth other

legal or financial obligations of the consumer.” 18 U.S.C. § 2710(b)(2)(B).

83. The February 20, 2023 version of the NBA’s “Terms of Use” in effect as of the time of this filing makes no reference to the Video Privacy Protection Act or even contains the word “video.”

84. The August 2023 version of the NBA’s Privacy Policy in effect as of the time of this filing makes no reference to the Video Privacy Protection Act or even contains the word “video.”

C. Defendant’s Policies Fail to Comply with the VPPA and Do Not Reference the VPPA or Even Contain the Word “Video”

85. The NBA’s “Privacy Policy” does not reference the Video Privacy Protection Act, 18 U.S.C. § 2710.

86. The Privacy Policy for NBA.com in effect at the time this matter was commenced stated that the NBA collects “Personal Information” from its users:

“...the data we collect includes:

Data that you provide directly when you register for, or use, the Services. This data will vary, but typically consists of name, email address, postal address, phone number and other similar contact data. We also receive data from the communications you send to us, such as customer service inquiries, product reviews and other feedback regarding the Services.

User credentials, such as username, password, password hints and similar security information used to create an account and authenticate users of the Services.

Demographic data, such as age, gender, country and language preference. Payment data, such as credit card information and billing address.

Device data, such as type of device, operating system and other software installed on the device, device settings, IP address, device identifiers and error reports.

Usage data, such as the programs and features you access, items you purchase, and the timing, frequency and duration of your interactions through the Services.

Location data, such as IP addresses received from your device.

Information about your interests and preferences, such as your favorite teams and players, your home city or your communications preferences. In addition to what you provide directly, we may infer your interests and preferences from other data we collect, such as the content and advertisements you interact with while using the Services.

Third party integrations. If you connect your use of the Services through a third party service (e.g., a social media platform), the third party may share certain information from your third party account with us.

Other third party data, such as data from our affiliates, partners or vendors, data brokers or public sources.”

See Internet Archive, nba.com, Sept. 16, 2022, at 08:39:47 a.m., *available at* <https://web.archive.org/>

[web/20220916083947/https://www.nba.com/](https://www.nba.com/) (last visited Dec. 11, 2024).

87. NBA.com discloses in its Privacy Policy that it automatically collects “Usage data, such as the programs and features you access.” *Id.*

88. Importantly, however, neither NBA.com’s Terms of Service nor Privacy Policy disclosed that Defendant would share digital subscribers’ private and protected Personal Viewing Information with third parties, including Meta.

89. The NBA modified its Privacy Policy in August 2023, which also fails to make mention of the Video Privacy Protection Act, 18 U.S.C. § 2710.

D. How NBA.com Disseminates Digital Subscribers’ Personal Viewing Information

1. Tracking Pixels

90. Approximately seven-in-ten U.S. citizens have a Facebook profile⁶ – all of whom provided the same personal information to Meta when creating their Facebook profiles.

91. Meta promotes its ability to allow businesses to target their ads to specific audiences using these types of identifying information⁷ as well as

⁶ Schaeffer, Katherine, Pew Research Center, *5 Facts about how Americans use Facebook, two decades after its launch* (Feb. 2, 2024), available at <https://www.pewresearch.org/short-reads/2024/02/02/5-facts-about-howamericans-use-facebook-two-decades-after-its-launch/> (last visited Dec. 12, 2024).

⁷ Meta Business Help Center, Age and gender, Meta, available at <https://www.facebook.com/business/help/151999381652364> (last visited Dec. 12, 2024); see also Meta Business Help Center, About specific targeting, Meta, available at

information about actions specific users have taken on the businesses' websites.⁸

92. Facebook introduced its Pixel tracking tool in 2013 to allow online businesses like Defendant to track the actions of their users, subscribers, and customers on their websites, and importantly, to build detailed, valuable profiles about their website users.⁹ *See* Meta, *Meta Pixel*, available at <https://developers.facebook.com/docs/meta-pixel/> (last visited Dec. 12, 2024).

93. Meta describes the Meta Pixel as “a snippet of JavaScript code that allows you to track visitor activity on your website. It works by loading a small library of functions which you can use whenever a site visitor takes an action (called an event) that you want to track (called a conversion). Tracked conversions appear in the Ads Manager where they can be used to measure the effectiveness of your ads, to define custom audiences for ad targeting, for Advantage+ catalog ads campaigns, and to analyze that effectiveness of your website’s conversion funnels.” *See* Meta, *Meta Pixel*, available at <https://developers.facebook.com/docs/meta-pixel/> (last visited Dec. 12, 2024).

94. Once activated, the Meta Pixel “tracks the people and type of actions they take,”¹⁰ including each

<https://www.facebook.com/business/help/121933141221852?id=176276233019487> (last visited Dec. 12, 2024).

⁸ Meta Business Help Center, Options to create a website custom audience, Meta, available at <https://www.facebook.com/business/help/2539962959620307> (last visited Oct. 15, 2024).

⁹ Meta, *Meta Pixel*, available at <https://developers.facebook.com/docs/meta-pixel/> (last visited Dec. 12, 2024).

¹⁰ Meta, *Overview*, available at <https://www.facebook.com/business/goals/retargeting> (last visited Dec. 12, 2024).

page users' visit, what buttons they click, as well as specific information that users input into a website.¹¹

95. Meta explains that installing the Pixel allows them to “track Facebook ad-driven visitor activity on [their] website” and enables Facebook “to match ... website visitors to their respective Facebook User accounts.”¹²

96. In its “Get Started” page, Meta explains “[b]y default, the Pixel will track URLs visited, domains visited, and the devices your visitors use.”¹³ In addition, website operators can also program their Pixel to track “conversions” (website visitor actions) which are sent to the Facebook Ads Manager and the Facebook Events Manager to be used to analyze the effectiveness of ad campaigns and to define custom audiences to adjust and create new campaigns¹⁴

97. Meta’s “Get Started” page further explains how it can identify website visitors and match them to their Facebook pages: “[The Meta Pixel] relies on Facebook cookies, which enable us to match your website visitors to their respective Facebook User accounts. Once matched, we can tally their actions in the Facebook Ads Manager so you can use the data to analyze

¹¹ Meta, About Meta Pixel, *available at* <https://www.facebook.com/business/help/742478679120153?id=1205376682832142> (last visited Dec. 12, 2024).

¹² Meta, Get Started, *available at* <https://developers.facebook.com/docs/meta-pixel/get-started> (last visited Dec. 12, 2024).

¹³ Meta for Developers, Get Started, Meta (2024), *available at* <https://developers.facebook.com/docs/meta-pixel/get-started> (last visited Dec 12, 2024)

¹⁴ Meta for Developers, Conversion Tracking, Meta (2024) *available at* <https://developers.facebook.com/docs/meta-pixel/implementation/conversion-tracking/> (last visited Dec 12, 2024)

your website's conversion flows and optimize your ad campaigns.”

98. Facebook maintains vast amounts of data on each of its users', like Plaintiff and the putative members of the Class.

99. This data is not limited to only what a person does on Facebook, but also includes all records relating to when a user is tracked on off-Facebook websites – such as Plaintiff's interactions with www.nba.com.

100. Facebook Pixels continuously add data from new interactions to the historical profiles Meta maintains on individuals with Facebook profiles.

101. Each interaction sent to Meta via the Pixel (including interactions sent by www.nba.com), is linked to all of the other personal information Meta possesses about the user, such that Defendant has access to and can leverage a user's personal data.

102. In addition to the information every user is required to provide to Meta when creating an account (including First and Last name, date of birth, gender, email address and/or mobile number, and password), Meta also possesses and has access to all of the information every user has ever posted on his or her Facebook profile, profile views, likes, comments, shares and/or re-posts, event invitations, event R.S.V.P.'s, Facebook messages, “check-ins,” and much, much more. Further, as explained above, Facebook maintains a record of each user's Off-Facebook Activity – all Facebook Pixel events that “fire” on non-Facebook websites, including www.nba.com.

103. Crucial to the Pixel's effectiveness is its ability to associate a user's interactions on websites across the internet with that specific user's unique Facebook

profile. The Pixel’s fundamental purpose is to continuously add data from new interactions to the historical profiles Meta maintains on individuals with Facebook profiles (and even for a time after users delete their Facebook profiles).

104. Each interaction sent to Meta via the Pixel (including by the NBA from www.nba.com), is linked to all of the other personal information Meta possesses about the user, and this constant addition of data aids Meta – one of the worst data-privacy actors of this generation...if not ever – in targeting users.

105. NBA also benefits by being able to build “Custom Audiences” of users who interact with www.nba.com in different ways.

106. Thus, for each of Plaintiff’s interactions on the Website, the Pixel transmitted those interactions to Meta, who was able to instantaneously associate that interaction with Plaintiff’s personal information that he submitted when creating her account, and any personal information ever available on his Facebook profile.

107. Facebook also creates “shadow profiles,” of users and at least one court has recognized that a pixel’s ability to track comprehensive browsing history is important. *See, e.g., Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1078-79 (N.D. Cal. 2021) (finding a reasonable expectation of privacy where Google combined the unique identifier of the user it collects from websites and Google Cookies that it collects across the internet on the same user).¹⁵

¹⁵ *See* Facebook Shadow Profiles (Feb. 2022), *available at* https://www.cesifo.org/DocDL/cesifo1_wp9571.pdf (last visited Dec. 12, 2024)

108. Once a company or organization has installed the Meta Pixel on its website, the Pixel tracks users as they navigate through the website and logs a variety of information designated for tracking by the company, including pages visited, any website “buttons” they click, the specific information entered in forms (including personal information), as well as “optional values.”¹⁶

109. Websites and apps use Facebook’s pixel and SDK to collect information about user’s devices and activities and send that to Facebook. Facebook then uses that information to show the user targeted ads.

110. To obtain the code for the Pixel, the website advertiser tells Facebook which website events it wants to track (*e.g.*, Video Media) and Facebook returns corresponding Facebook pixel code for the advertiser to incorporate into its website.

111. Defendant installed the Facebook tracking pixel, which enables it to disclose Plaintiff’s and Class Members’ Personal Viewing Information to Facebook, because it benefits financially from the advertising and information services that stem from use of the Pixel.

112. When a digital subscriber enters the website www.nba.com, navigates to, and then watches Video Media on the website, the website sends to Facebook information about the viewer, including, but not limited to, their identity and the media content the digital subscriber watched.

¹⁶ Meta, Meta Pixel, *available at* <https://developers.facebook.com/docs/meta-pixel/> (last visited Dec. 12, 2024).

113. Specifically, www.nba.com sends to Facebook the video content name, its URL, and, most notably, the viewers' Facebook ID.

114. Defendant's website does this because Defendant made the knowing choice to configure the tracking technologies on its site to function in this manner.

115. At all relevant times, the Defendant was aware that the Pixel transmits PII to Meta. This awareness is demonstrated by several factors, including: (a) the fundamental purpose and functionality of the Pixel, which is designed to collect data on user interactions with a website, (b) the widespread public information and media coverage regarding Meta's advertising practices, making these practices widely known, and (c) the resources and documentation provided by Meta on its website, where users like the Defendant can access information about the Pixel's capabilities and obtain the necessary code to implement it on their own websites.

116. The Defendant's awareness of the Pixel is further demonstrated by the benefits it derived from the Pixel's functionality.

117. By installing the Pixel, the Defendant was able to target digital advertising to its subscribers, as well as potential subscribers, based on the content those individuals had previously accessed or requested from the website, including prerecorded audiovisual materials.¹⁷

¹⁷ Meta for Developers, Conversion Tracking, Meta for Developers (2024), available at <https://developers.facebook.com/docs/meta-pixel/implementation/conversiontracking/> (last visited Dec. 12, 2024).

118. Defendant specifically benefited from its installation of the Pixels because Defendant maintains a Facebook page (www.facebook.com/nba) and advertises on Facebook, meaning its disclosure of users' interactions to Meta ensured its ads were shown to the right individuals on Facebook at exactly the right time.

119. Defendant is the sole operator of the Website, and Defendant is solely responsible for the decisions it makes about what technology to include within its Website. Defendant made the affirmative decision to knowingly include the Meta Pixel on its website.

120. Defendant knew and understood what the Pixel was, how it functioned, and what data it would collect and share with Meta because Defendant installed the Pixel on its site and configured its functionality.

E. Facebook ID (“FID”)

121. An FID is a unique and persistent identifier that Facebook assigns to each user. With it, any ordinary person can look up the user's Facebook profile and name with the execution of one simple command within an internet browser. In short, an FID is a link to the user's Facebook profile. When a Facebook user with one or more personally identifiable FID cookies on their browser views Video Media from NBA.com on the website or app, NBA.com, through its website code, causes the digital subscriber's identity and viewed Video Media to be transmitted to Facebook by the user's browser. This transmission is not the digital subscriber's decision, but results from Defendant's purposeful use of its Facebook tracking pixel by incorporation of that pixel and code into NBA.com's website

or App. Defendant could easily program the website and app so that this information is not automatically transmitted to Facebook when a subscriber views Video Media. However, it is not Defendant's financial interest to do so because it benefits financially by providing this highly sought-after information.

122. Notably, while Facebook can easily identify any individual on its Facebook platform with only their unique FID, so too can any ordinary person who comes into possession of an FID. Facebook admits as much on its website. Indeed, ordinary persons who come into possession of the FID can connect to any Facebook profile. Simply put, with only an FID and the video content name and URL – all of which Defendant knowingly and readily provides to Facebook without any consent from the digital subscribers – any ordinary person could learn the identity of the digital subscriber and the specific video or media content they requested on NBA.com.

123. At all relevant times, Defendant knew that the Facebook pixel disclosed Personal Viewing Information to Facebook. This was evidenced from, among other things, the functionality of the pixel, including that it enabled NBA.com and accompanying app to show targeted advertising to its digital subscribers based on the products those digital subscribers had previously viewed on the website or app, including Video Media consumption, for which Defendant received financial remuneration.

F. NBA.com Unlawfully Discloses Its Digital Subscribers' Personal Viewing Information to Facebook

124. Defendant maintains a vast digital database comprised of its digital subscribers' Personal Viewing

Information, including the names and e-mail addresses of each digital subscriber and information reflecting the Video Media that each of its digital subscribers viewed.

125. Defendant is not sharing anonymized, non-personally identifiable data with Facebook. To the contrary, the data it discloses is tied to unique identifiers that track specific Facebook users. Importantly, the recipient of the Personal Viewing Information – Facebook – receives the Personal Viewing Information as one data point. Defendant has thus monetized its database by disclosing its digital subscribers' Personal Viewing Information to Facebook in a manner allowing it to make a direct connection – without the consent of its digital subscribers and to the detriment of their legally protected privacy rights.

126. Critically, the Personal Viewing Information Defendant discloses to Facebook allows Facebook to build from scratch or cross-reference and add to the data it already has in their own detailed profiles for its own users, adding to its trove of personally identifiable data.

127. These factual allegations are corroborated by publicly available evidence. For instance, as shown in the screenshot below, a user visits NBA.com and clicks on an article titled “How will pieces come together for the Lakers?” and watches the video in the article.

disclosed to Facebook for its own personal gain the Personal Viewing Information of Defendant's digital subscribers, together with additional sensitive personal information.

130. Defendant produces exclusive content that promotes via email newsletter, and makes available on its website, www.nba.com.

131. Defendant does not seek its digital subscribers' prior written consent to the disclosure of their Personal Viewing Information (in writing or otherwise) and its customers remain unaware that their Personal Viewing Information and other sensitive data is being disclosed to Facebook.

132. By disclosing its digital subscribers Personal Viewing Information to Facebook – which undeniably reveals their identity and the specific video materials they requested from Defendant's website – Defendant has intentionally and knowingly violated the VPPA.

G. Disclosing Personal Viewing Information is Not Necessary

133. . Tracking pixels are not necessary for Defendant to operate NBA.com's digital news publications and sign-up digital subscriptions. They are deployed on Defendant's website for the sole purpose of enriching Defendant and Facebook.

134. Even if an on-line news publication found it useful to integrate Facebook tracking pixels, Defendant is not required to disclose Personal Viewing Information to Facebook. In any event, if Defendant wanted to do so, it must first comply with the strict requirements of VPPA, which it failed to do.

H. Plaintiff's Experiences

135. Plaintiff Michael Salazar has been a digital subscriber of www.nba.com from 2022 to the present. Plaintiff became a digital subscriber of www.nba.com by providing, among other information, email address and IP address, (which informs Defendant as to the city and zip code he resides in as well as his physical location), and any cookies associated with his device. As part of his subscription, he receives emails and other communications from NBA.com. Included in at least some of these emails are videos, sent to Plaintiff via hyperlink or embedded hyperlink. Plaintiff accessed video content via his subscription to Defendant's newsletter.

136. Plaintiff has had a Facebook account since approximately 2010.

137. When he created his Facebook profile, Plaintiff provided Meta with the required information to create his profile: his name, date of birth, gender, contact information, and password.

138. From 2022 to the present, Plaintiff viewed Video Media via www.nba.com.

139. Additionally, Plaintiff has an Instagram account.

140. During the relevant period, Plaintiff's Facebook profile included publicly-available information specifically and uniquely identifying him, including but not limited to his full name, personal photographs that contain location and other information, and likes and follows of certain commercial establishments in his hometown. Plaintiff's Facebook profile was accessible to any person in possession of his unique FID (which Facebook maintains for every user). Any person (or corporation) could use his FID to load Plaintiff's Facebook page directly and see this

publicly-available information that specifically and uniquely identifies him.

141. Additionally, Facebook, sitting in possession of Plaintiff's entire Facebook profile and account history, was in a special position. It could not only directly identify Plaintiff, but it could also access his entire historical Facebook dataset, including his visits to www.nba.com and information disclosing that he had viewed specific video content.

142. Plaintiff was a subscriber to www.nba.com and is therefore a "consumer" under the VPPA.

143. Plaintiff requested, obtained, and/or watched prerecorded audio visual material on www.nba.com and through his digital subscription to Defendant's services.

144. During the period when Plaintiff was a subscriber to the Defendant's services, he maintained a Facebook profile. Defendant knowingly shared his Facebook ID (FID) with Meta, along with the titles of the prerecorded audiovisual materials he accessed or requested (frankly, Defendant went one step further and denoted a "watch" in its URLs, which it shared with Facebook) and the URLs for those videos.

145. Plaintiff never consented, agreed, authorized, or otherwise permitted Defendant to disclose his Personal Viewing Information and PII to Facebook.

146. Defendant nonetheless knowingly disclosed Plaintiff's Personal Viewing Information (his identity and the videos he watched) and PII to Facebook.

147. Because Plaintiff is entitled by law to privacy in his Personal Viewing Information, Defendant's disclosure of his Personal Viewing Information deprived Plaintiff of the full set of benefits to which he is

entitled. Plaintiff did not discover that Defendant disclosed his Personal Viewing Information to Facebook until August 2022.

Class Action Allegations

148. Plaintiff brings this action individually and on behalf of all others similarly situated as a class action under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of the following class (the “Class”):

All persons in the United States with a digital subscription to an online website owned and/or operated by Defendant that had their Personal Viewing Information [of pre-recorded videos] disclosed to Facebook by Defendant.

149. The “Class Period” is from September 16, 2020, two years preceding the initial filing of this matter, to the present.

150. Excluded from the Class are Defendant, their past or current officers, directors, affiliates, legal representatives, predecessors, successors, assigns and any entity in which any of them have a controlling interest, as well as all judicial officers assigned to this case as defined in 28 USC § 455(b) and their immediate families.

151. Numerosity. Members of the Class are so numerous and geographically dispersed that joinder of all members of the Class is impracticable. Plaintiff believes that there are hundreds of thousands, if not millions, of members of the Class widely dispersed throughout the United States. Class members can be identified from Defendant’s records and non-party Meta’s records. At a minimum, the combination of Defendant’s email subscriber list with Meta’s

identification of users who have Off-Facebook Activity from www.nba.com will identify members of the Class.

152. Typicality. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff and members of the Class were harmed by the same wrongful conduct by Defendant in that Defendant caused Personal Viewing Information to be disclosed to Facebook without obtaining express written consent. his claims are based on the same legal theories as the claims of other Class members.

153. Adequacy. Plaintiff will fairly and adequately protect and represent the interests of the members of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of the members of the Class. Plaintiff is represented by counsel with experience in the prosecution of class action litigation generally and in the emerging field of digital privacy litigation specifically.

154. Commonality. Questions of law and fact common to the members of the Class predominate over questions that may affect only individual members of the Class because Defendant has acted on grounds generally applicable to the Class. Such generally applicable conduct is inherent in Defendant's wrongful conduct. Questions of law and fact common to the Classes include:

- a. Whether Defendant knowingly disclosed Class members' Personal Viewing Information to Facebook;
- b. Whether the information disclosed to Facebook concerning Class members' Personal Viewing Information constitutes personally identifiable information under the VPPA;

- c. Whether Defendant's disclosure of Class members' Personal Viewing Information to Facebook was knowing under the VPPA;
- d. Whether Class members consented to Defendant's disclosure of their Personal Viewing Information to Facebook in the manner required by 18 U.S.C. § 2710(b)(2)(B); and
- e. Whether the Class is entitled to damages as a result of Defendant's conduct.

155. Superiority. Class action treatment is a superior method for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweighs potential difficulties in management of this class action. Plaintiff knows of no special difficulty to be encountered in litigating this action that would preclude its maintenance as a class action.

156. Injunctive Relief. Plaintiff also satisfies the requirements for maintaining a class under Rule 23(b)(2). Defendant acted on grounds that apply generally to the proposed Class, making final declaratory or injunctive relief appropriate with respect to the proposed Class as a whole. Notably, as detailed above, Defendant, after the filing of this action, removed the Facebook Pixel from its website. Plaintiff

has received no assurance that Defendant will not re-install the Facebook Pixel, making declaratory and/or injunctive relief necessary to protect the rights of Plaintiff and the proposed Class.

**CLAIM FOR RELIEF FIRST CLAIM FOR
RELIEF**

**Count I: Violation of the Video Privacy
Protection Act (“VPPA”), 18 U.S.C. § 2710**

157. Plaintiff incorporates the allegations contained in paragraphs 1 through 154 as if fully set forth herein.

158. The VPPA prohibits a “video tape service provider” from knowingly disclosing “personally-identifying information” concerning any consumer to a third-party without the “informed, written consent (including through an electronic means using the Internet) of the consumer.” 18 U.S.C § 2710.

159. As defined in 18 U.S.C. § 2710(a)(4), a “video tape service provider” is “any person, engaged in the business, in or affecting interstate commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audiovisual materials.”

160. Defendant is a “video tape service provider” as defined in 18 U.S.C. § 2710(a)(4) because it engaged in the business of delivering audiovisual materials that are similar to prerecorded video cassette tapes and those sales affect interstate or foreign commerce.

161. As defined in 18 U.S.C. § 2710(a)(3), “personally-identifiable information” is defined to include “information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.”

162. Defendant knowingly, as it affirmatively programmed the Pixel into the code for nba.com, caused Personal Viewing Information, including FIDs, concerning Plaintiff and Class members to be disclosed to Facebook. This information constitutes personally identifiable information under 18 U.S.C. § 2710(a)(3) because it identified each Plaintiff and Class member to Facebook as an individual who viewed NBA.com Video Media, including the specific video materials requested from the website.

163. As defined in 18 U.S.C. § 2710(a)(1), a “consumer” means “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” As alleged in the preceding paragraphs, Plaintiff subscribed to a digital NBA.com plan that provides Video Media content to the digital subscriber’s desktop, tablet, and mobile device. Plaintiff is thus a “consumer” under this definition.

164. As set forth in 18 U.S.C. § 2710(b)(2)(B), “informed, written consent” must be in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer; and (2) at the election of the consumer, is either given at the time the disclosure is sought or given in advance for a set period of time not to exceed two years or until consent is withdrawn by the consumer, whichever is sooner.” Defendant failed to obtain informed, written consent under this definition.

165. In addition, the VPPA creates an opt-out right for consumers in 18 U.S.C. § 2710(2)(B)(iii). It requires video tape service providers to also “provide[] an opportunity for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer’s election.” Defendant failed to

provide an opportunity to opt out as required by the VPPA.

166. Defendant knew that these disclosures identified Plaintiff and Class members to Facebook. Defendant also knew that Plaintiff's and Class members' Personal Viewing Information was disclosed to Facebook because, inter alia, Defendant chose, programmed, and intended for Facebook to receive the video content name, its URL, and, most notably, the digital subscribers' FID.

167. By disclosing Plaintiff's and the Class's Personal Viewing Information, Defendant violated Plaintiff's and the Class members' statutorily protected right to privacy in their video-watching habits. *See* 18 U.S.C. § 2710(c).

168. As a result of the above violations, Defendant is liable to the Plaintiff and other Class members for actual damages related to their loss of privacy in an amount to be determined at trial or alternatively for "liquidated damages not less than \$2,500 per plaintiff." Under the statute, Defendant is also liable for reasonable attorney's fees, and other litigation costs, injunctive and declaratory relief, and punitive damages in an amount to be determined by a jury, but sufficient to prevent the same or similar conduct by the Defendant in the future.

Relief Requested

169. Accordingly, Plaintiff, individually and on behalf of the proposed Class, respectfully requests that this court:

- a. Determine that this action may be maintained as a class action pursuant to Fed R. Civ. P. 23(a), (b)(2), and (b)(3) and declare

Plaintiff as the representative of the Class and Plaintiff's Counsel as Class Counsel;

- b. For an order declaring that Defendant's conduct as described herein violates the federal VPPA, 18 U.S.C. § 2710(c)(2)(D);
- c. For Defendant to pay \$2,500.00 to Plaintiff and each Class member, as provided by the VPPA, 18 U.S.C. § 2710(c)(2)(A);
- d. For punitive damages, as warranted, in an amount to be determined at trial, 18 U.S.C. § 2710(c)(2)(B);
- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For injunctive relief as pleaded or as the Court may deem proper; and
- h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit, 18 U.S.C. § 2710(c)(2)(C).

Jury Demand

170. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff, individually and on behalf of the proposed Class, demands a trial by jury on all issues so triable.

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Dated: December 13, 2024 Respectfully Submitted:

By: /s/ Michael L. Murphy
Michael L. Murphy (NY
5084397)
BAILEY & GLASSER LLP
1055 Thomas Jefferson Street
NW Suite 540
Washington, DC 20007
T: 202.494.3531
mmurphy@baileyglasser.com

Brandon M. Wise – IL Bar #
6319580*
PEIFFER WOLF CARR
KANE CONWAY & WISE, LLP
One US Bank Plaza, Suite
1950
St. Louis, MO 63101
T: 314.833.4827
bwise@peifferwolf.com

** admitted pro hac vice*

APPENDIX E**18 U.S.C. § 2710. Wrongful disclosure of video tape rental or sale records**

(a) DEFINITIONS.—For purposes of this section—

(1) the term “consumer” means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term “ordinary course of business” means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term “personally identifiable information” includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term “video tape service provider” means 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, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) VIDEO TAPE RENTAL AND SALE RECORDS.—(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that—

(i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;

(ii) at the election of the consumer—

(I) is given at the time the disclosure is sought; or

(II) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

(i) the video tape service provider has provided the consumer with the opportunity, in a

clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall

not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) CIVIL ACTION.—(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of \$2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) PERSONALLY IDENTIFIABLE INFORMATION.—Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) DESTRUCTION OF OLD RECORDS.—A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) PREEMPTION.—The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

(Added Pub. L. 100–618, §2(a)(2), Nov. 5, 1988, 102 Stat. 3195; amended Pub. L. 112–258, §2, Jan. 10, 2013, 126 Stat. 2414.)