No. 24-994

In the Supreme Court of the United States

NATIONAL BASKETBALL ASSOCIATION, PETITIONER

v.

MICHAEL SALAZAR

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

BRIEF FOR AMICUS CURIAE NATIONAL FOOTBALL LEAGUE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae National Football League (NFL) is the world's premier professional football league.* Structured as an unincorporated membership association consisting of 32 member clubs, amicus has hundreds of millions of

* Pursuant to Rule 37.6 of the Rules of this Court, amicus affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than amicus or its counsel made such a monetary contribution. In accordance with Rule 37.2, counsel for amicus notified counsel for petitioner and respondent of amicus's intent to file this brief on April 22, 2025.

fans around the world. Those fans interact with amicus and its member clubs in numerous ways, including by purchasing tickets to live games; viewing television broadcasts of games; and watching highlight videos and other NFL content made available on the websites and mobile applications offered by amicus and its member clubs.

The questions presented in this case concerning the standing of plaintiffs to bring lawsuits under the Video Privacy Protection Act (VPPA), 18 U.S.C. 2710, and the scope of liability under that statute are of significant importance to amicus. On its digital platforms, amicus offers freely available video content to visitors which does not require any subscription or sign-up to access. In cases similar to this one, plaintiffs have alleged that, because of a tracking pixel installed on amicus's platforms, when a visitor navigated to amicus's platforms while logged into the social-media platform Facebook, certain data about the user's engagement—including information identifying the videos accessed—were sent to Facebook's owner, Meta. See, *e.g.*, *Alex* v. *NFL Enterprises, LLC*, Civ. No. 22-9239, 2023 WL 6294260 (S.D.N.Y. Sept. 27, 2023), appeal pending, No. 23-7455 (2d Cir.); *Hughes* v. *National Football League*, Civ. No. 22-10743, 2024 WL 4063740 (S.D.N.Y. Sept. 5, 2024), appeal pending, No. 24-2656 (2d Cir.); *Louth* v. *NFL Enterprises*, Civ. No. 21-0405 (D.R.I.); *Serra* v. *New England Patriots LLC*, Civ. No. 24-40022 (D. Mass.). Plaintiffs also allege that such information was shared with Meta so that Meta could serve more targeted advertisements to Facebook users. That practice is common online, particularly for content providers that provide a significant amount of their content for free.

In recent years, plaintiffs have initiated a wave of class actions under the VPPA, attempting to shoehorn such routine modern business practices into a statute designed

to protect the patrons of brick-and-mortar video stores from public disclosure of their video rental histories. The novel interpretation of the VPPA advanced in those actions attempts radically to expand the scope of liability far beyond what the statutory text and context can bear. And the proliferation of those actions threatens to impose enormous liability on online content providers far beyond any conceivable harm to consumers from the alleged routine data transfers.

For those reasons, the questions presented by the petition in this case have broad ramifications for online content providers, including amicus and other sports leagues like petitioner. Amicus thus has a substantial interest in the resolution of this case.

SUMMARY OF ARGUMENT

In recent years, class actions against online video content providers alleging violations of the VPPA have proliferated. Most of those actions have taken a strikingly similar form: the plaintiff alleges that he viewed video content on a website while logged into Facebook and that the website violated the VPPA when his viewing information was shared with Meta through what is known as a tracking pixel. Plaintiffs have argued that, as long as they purchase or subscribe to some good or service from the website's operator—even if that good or service had nothing to do with audiovisual content—they are "consumer[s]" within the meaning of the VPPA and authorized to sue for a minimum of $2,500 in statutory damages per plaintiff. Plaintiffs have used that novel theory of liability to target a broad array of companies with an online presence, including media companies, universities, and sports leagues such as amicus and petitioner.

Since the filing of this petition, a conflict has arisen among the courts of appeals on the second question presented, which concerns who qualifies as a "consumer" within the meaning of the VPPA. The Seventh Circuit agreed with the Second Circuit's decision in this case that a plaintiff need not have rented, purchased, or subscribed to the defendant's audiovisual goods or services in order to qualify as a "consumer" under the VPPA, but the Sixth Circuit reached the contrary conclusion. The resulting conflict makes this case indisputably ripe for the Court's review.

The questions presented by the petition are also exceptionally important. The recent onslaught of VPPA cases seeks to transform a statute designed to prohibit the public disclosure of customers' video rental histories by brick-and-mortar stores into a sweeping tool for regulating routine data transfers that are widely used by online content providers to facilitate Internet-based advertising and that contribute significantly to the amount of free video content available on the Internet. The statutory penalties imposed by the VPPA take on outsized importance when combined with the class-action mechanism, which exposes providers to massive potential liability without any showing of actual real-world harm suffered by any users.

The Second Circuit's decision is particularly problematic for sports leagues such as amicus and petitioner that offer a variety of goods and services to customers other than videos, including tickets, apparel, and memorabilia. Under the decision below, sports leagues may become liable under the VPPA if fans purchase such items and subsequently visit the league's website to watch highlights and other videos about their favorite teams. In light of the conflicts in the lower courts and the importance of the

questions presented, the petition for a writ of certiorari should be granted.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO RESOLVE THE QUESTIONS OF STANDING AND LIABILITY ARISING OUT OF THE WAVE OF CLASS ACTIONS UNDER THE VIDEO PRIVACY PROTECTION ACT

A. Class Actions Under The VPPA Against Online Video Content Providers Have Proliferated In Recent Years

In recent years, plaintiffs have filed hundreds of class actions under the VPPA against online platforms that use pixel tools—technologies that, in effect, allow a third party to collect data on users' online activities for the purpose of using the data to serve more targeted advertising and content. The plaintiffs claim that the VPPA, which bars a "video tape service provider" from disclosing information about a "subscriber of goods or services," prohibits that practice. 18 U.S.C. 2710(a)(1), (b)(1). The decision below arose from one such lawsuit, and both questions presented by the petition pertain to the growing body of VPPA cases.

1. The last few years "ha[ve] seen a tremendous spike in the number of cases alleging violations" of the VPPA. Proskauer Rose LLP, *The Return of the Video Privacy Protection Act* (Oct. 2, 2023) <tinyurl.com/proskauer-vppa>. In 2024, plaintiffs initiated more than 250 class actions under the VPPA—a marked increase from 2017, when only a handful of VPPA actions were filed. Duane Morris LLP, *Privacy Class Actions Continue to Proliferate as Plaintiffs Search for Winning Theories* (Jan. 13, 2025) <tinyurl.com/duanemorrisvppa>.

The wave of new VPPA litigation has "nothing to do with video rental stores." Seyfarth, *A Recent Surge of Consumer Privacy Litigation Asserting Violations of the*

Video Privacy Protection Act (VPPA) Seeks to Hold Companies Liable for Data Sharing in Context of Marketing Analytics (Jan. 25, 2023) <tinyurl.com/seyfarthvppa>. Instead, the lawsuits attempt to proceed "under the theory that an entity's use of pixels violates the VPPA by tracking an individual's viewing history and collecting other personal information." WilmerHale, *2024 Year in Review: Video Privacy Protection Act Litigation Trends* (Feb. 12, 2025) <tinyurl.com/wilmervppa>. Plaintiffs have used the VPPA to bring class actions that "challenge the use of pixel technology across a variety of websites that provide online video content." K&L Gates, *Litigation Minute: Pixel Tools and the Video Privacy Protection Act* (Aug. 29, 2023) <tinyurl.com/klvppa>.

The complaints in the VPPA lawsuits follow a remarkably similar pattern. First, a plaintiff alleges that he subscribed to a non-audiovisual offering from a digital platform that uses an advertising pixel, most often the Meta pixel. The plaintiff asserts that he watched a video on the platform while simultaneously logged into Facebook and that, as a result of the platform's use of the pixel, his data were shared with Meta. The plaintiff finally alleges that the digital platform is a "video tape service provider" that the VPPA prohibits from disclosing video viewing information about a "subscriber" of any "goods or services" offered by the platform. 18 U.S.C. 2710(b)(1)-(2).

2. Plaintiffs have applied that novel theory of liability to a variety of different types of digital content providers.

Many of the lawsuits have targeted media companies. See, *e.g.*, *Shapiro* v. *Peacock TV*, Civ. No. 23-6345, 2025 WL 968519 (S.D.N.Y. Mar. 31, 2025); *Golden* v. *NBCUniversal Media, LLC*, Civ. No. 22-9858, 2024 WL 4149219 (S.D.N.Y. Sept. 11, 2024); *Nino* v. *CNBC LLC*, Civ. No. 23-5025, 2024 WL 3988827 (S.D.N.Y. Aug. 29, 2024); *Frawley* v. *Nexstar Media Group Inc.*, Civ. No. 23-2197,

2024 WL 3798073 (N.D. Tex. July 22, 2024); *Martinez* v. *D2C, LLC*, Civ. No. 23-21394, 2023 WL 6587308 (S.D. Fla. Oct. 10, 2023).

Plaintiffs have also sued universities. See, *e.g.*, *Edwards* v. *Learfield Communications, LLC*, 697 F. Supp. 3d 1297 (N.D. Fla. 2023) (University of Florida); *Brown* v. *Learfield Communications, LLC*, Civ. No. 23-374, 2024 WL 3676709 (W.D. Tex. June 27, 2024) (University of Texas); *Peterson* v. *Learfield Communications LLC*, Civ. No. 23-146, 2023 WL 9106244 (D. Neb. Dec. 8, 2023) (University of Nebraska).

Lawsuits have been filed against other businesses as well. See, *e.g.*, *Mata* v. *Zillow Group, Inc.*, Civ. No. 24-1095, 2024 WL 5161955 (S.D. Cal. Dec. 18, 2024); *Mendoza* v. *Caesars Entertainment, Inc.*, Civ. No. 23-3591, 2024 WL 2316544 (D.N.J. May 22, 2024); *Lee* v. *Springer Nature America, Inc.*, Civ. No. 24-4493, 2025 WL 692152 (S.D.N.Y. Mar. 4, 2025).

Of particular relevance to amicus and petitioner, sports leagues have become popular targets, too. In this case, for example, respondent is a subscriber to petitioner's online newsletter and watched freely available videos on petitioner's website while simultaneously logged into his Facebook account. See Pet. App. 9a-10a. He argues that petitioner shared his personal viewing information with Facebook via the Meta pixel, which petitioner had installed on its website. *See id.* at 10a. Respondent contends that, by signing up for the newsletter, he became a "subscriber of goods or services" from petitioner and therefore a "consumer" under the VPPA. *Ibid.*

With respect to amicus: in *Alex* v. *NFL Enterprises, LLC*, Civ. No. 22-9239, 2023 WL 6294260 (S.D.N.Y. Sept. 27, 2023), a group of subscribers to free e-newsletters of amicus's member clubs who also watched publicly avail-

able videos on the clubs' websites argue that amicus unlawfully shared their information with Meta. See *id.* at *1. Similarly, in *Hughes* v. *National Football League*, Civ. No. 22-10743, 2024 WL 4063740 (S.D.N.Y. Sept. 5, 2024), the plaintiff is attempting to proceed on the theory (among others) that he was a "digital subscriber" to amicus's newsletter and that amicus violated the VPPA when data concerning videos he viewed on amicus's web or mobile platforms were allegedly disclosed to Meta as a result of the pixel. *Id.* at *2. And in *Serra* v. *New England Patriots LLC*, Civ. No. 24-40022 (D. Mass.), a plaintiff filed a putative class action against one of amicus's member clubs based on his purported use of the club's mobile application. See Dkt. 1, at 1-2.

Other sports leagues have likewise been subject to VPPA class actions. See, *e.g.*, *Myers* v. *National Association for Stock Car Auto Racing, Inc.*, Civ. No. 23-8888, 2024 WL 3648106 (W.D.N.C. July 31, 2024); *Joiner* v. *NHL Enterprises, Inc.*, Civ. No. 23-2083, 2024 WL 639422 (S.D.N.Y. Feb. 15, 2024); *Henry* v. *Major League Baseball Advanced Media, L.P.*, Civ. No. 24-1446 (S.D.N.Y. Feb. 26, 2024).

B. A Conflict On The Second Question Presented Has Arisen Since The Petition Was Filed

The second question presented by the petition is "[w]hether the VPPA bars a business from disclosing information about consumers who do not subscribe to its audiovisual goods or services." Pet. i. In the decision below, the Second Circuit held that respondent was a "consumer" under the VPPA because he subscribed to petitioner's online newsletter. See Pet. App. 26a-40a. The court reasoned that an individual need not rent, purchase, or subscribe to an audiovisual "good or service" in order

to qualify as a "consumer" under the VPPA; instead, renting, purchasing, or subscribing to *any* good or service will suffice. See *id.* at 26a-33a.

Since the petition was filed, two additional courts of appeals have addressed that issue. And, as petitioner predicted (Pet. 30), a conflict has arisen. The Court's intervention is necessary to bring clarity to this area of the law.

1. In *Gardner* v. *Me-TV National Limited Partnership*, 132 F.4th 1022 (2025), the Seventh Circuit agreed with the Second Circuit regarding the scope of liability under the VPPA. There, the plaintiffs filed suit against the operator of a website that streams classic television shows. See *id.* at 1023-1024. The plaintiffs alleged that they signed up for the website, watched programming while signed into Facebook, and had their viewing information transmitted to Meta. See *ibid.* The Seventh Circuit held that the plaintiffs qualified as "consumer[s]" under the VPPA even if they did not rent, purchase, or subscribe to audiovisual goods or services from the defendant; "[n]othing in the Act," the court reasoned, "says that the goods or services must be video tapes or streams." *Id.* at 1025.

2. The Sixth Circuit reached the opposite conclusion in *Salazar* v. *Paramount Global*, 133 F.4th 642 (2025). There, the plaintiff—who is also respondent here—brought a class action against the owner of a sports website. See *id.* at 645-646. In a "virtually indistinguishable complaint" from the one filed here, *id.* at 651, respondent alleged that he subscribed to an online newsletter offered by the website, watched videos on the website while logged into his Facebook account, and had his viewing history transmitted to Meta via the Meta pixel. See *id.* at 645.

The Sixth Circuit held that respondent did not qualify as a "consumer" under the VPPA. See *Salazar*, 133 F.4th

at 649-653. The Court explained that, under a proper "textualist interpretation," the "pure definitional meaning of words in isolation shouldn't be confused with the plain meaning of the text." *Id.* at 651. Instead, "the plain meaning of any word is informed by its surrounding context and the other words in the statute." *Ibid.* (internal quotation marks and citation omitted). Applying that approach, the court reasoned that "the full definition of 'consumer' in the statute does not encompass consumers of all 'goods or services' imaginable, but only those 'from a video tape service provider.'" *Id.* at 650 (quoting 18 U.S.C. 2710(a)(1)). The Sixth Circuit thus concluded that the "most natural reading" of the statute is that "a person is a 'consumer' only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials.'" *Id.* at 651 (quoting 18 U.S.C. 2710(a)(1), (a)(4)).

3. In light of the recent decisions from the Sixth and Seventh Circuits, there is now a 2-1 conflict among the courts of appeals on the second question presented. The Court's intervention is necessary to bring clarity to this area of the law—particularly given that "a considerable number of suits are pending in the lower courts" that "turn on the resolution of the[] issues" presented by the petition. *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 237 (1964).

C. The Questions Presented Are Exceptionally Important And Warrant The Court's Review

The explosion of VPPA class actions presents a pressing issue for online content providers across the Nation. The decision below threatens such providers with massive liability unforeseen by Congress and incommensurate with any conceivable harm suffered by consumers. The Court's intervention is necessary to stem the swelling tide of meritless lawsuits under the VPPA.

1. The VPPA was not designed to regulate tracking pixels used to facilitate advertising on the Internet. Congress enacted the VPPA in 1988 after a newspaper obtained and publicly reported on the rental history of Judge Robert Bork and his family from a video store during his hearing for confirmation as a Justice of this Court. See, *e.g.*, Pet. App. 22a-23a. The publication of Judge Bork's rental history in the newspaper sparked widespread disapproval in Congress, which led to the VPPA's passage. See *ibid.*

Unsurprisingly in light of its origins, the VPPA is primarily directed toward brick-and-mortar video rental stores and the rental of physical video tapes. The VPPA's prohibitions apply to any "video tape service provider," and the section of the United States Code in which the Act is codified is entitled, "Wrongful disclosure of video tape rental or sale records." 18 U.S.C. 2710(b) & title. The legislative history confirms that Congress drafted the definitions in the VPPA 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 this bill." S. Rep. No. 159, 100th Cong., 2d Sess. 12 (1988). Although Congress amended the VPPA in 2012, it did not change the definition of "consumer" or "the scope of who is covered by the VPPA." *Ellis* v. *Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015) (citation omitted).

The decision below seeks to expand the VPPA to regulate the use of tracking pixels in connection with the provision of online video content. The use of tracking pixels is ubiquitous and "makes much of the content on the Web free" by allowing advertisers to reach consumers who are more likely to be interested in their products. Interactive Advertising Bureau, *The Socioeconomic Impact of Internet Tracking* 3-4 (Feb. 2020) <tinyurl.

com/iabfeb2020>; see generally Chamber of Commerce C.A. Br. 15-19. The use of tracking pixels is also not a secret. Respondent admits that he could have seen that the petitioner was using the Meta pixel by viewing the publicly visible code on petitioner's website. Pet. App. 126a. Meta also informs its users that it may receive information from "[w]ebsites and apps provided by other companies" that "incorporate Meta technologies into their websites and apps." Meta, Cookies Policy (Dec. 12, 2023) <tinyurl.com/metacookies>.

The purported harm that respondent and other plaintiffs identify—the disclosure of data concerning their viewing history to Meta, an entity with which respondent admittedly holds an account—is no real harm at all. Consumers are well aware that enabling the use of cookies permits personalized advertising, and they recognize that much of the content they view on the Internet is free as a result. See, *e.g.*, Interactive Advertising Bureau, *Nearly 8 in 10 Consumers Would Rather Receive More Ads than Pay for Digital Content and Services* (Jan. 29, 2024) <tinyurl.com/iabstudy2024>. That exchange is overwhelmingly popular: in a recent survey, nearly 90% of respondents said they preferred personalized advertisements, and nearly 80% would choose to see more advertisements rather than pay for content that is currently free. See *ibid.*

Under the Second Circuit's decision, online content providers risk massive liability for engaging in the standard use of tracking pixels to help facilitate such targeted advertising. The VPPA provides for actual damages or minimum statutory damages of $2,500 per plaintiff, as well as potential punitive damages and fee shifting. See 18 U.S.C. 2710(c)(2). As this Court has explained, statutory damages "can add up quickly in a class action." *Barr* v. *American Association of Political Consultants, Inc.*,

591 U.S. 610, 616 (2020). It is thus no surprise that reported settlements of VPPA litigation have involved significant amounts of money—as high as $92 million, according to one source. See Julia Bond, Note, *A Round Peg in a Square Hole: How Ambiguity in the VPPA Hinders Its Applicability Amid Technological Advancements*, 20 Rutgers Bus. L. Rev. 126, 129 (2024).

Faced with such significant potential liability, online content providers would likely be forced to abandon the use of tracking pixels. While some content providers would be able to continue offering free online content to consumers, many content providers would be forced to pursue alternative sources of revenue as a result of the reduction in targeted advertising revenues. The result would be that consumers may "no longer receive the free apps and services that [targeted] advertising makes possible." D. Daniel Sokol & Feng Zhu, Essay, *Harming Competition and Consumers Under the Guise of Protecting Privacy: An Analysis of Apple's iOS 14 Policy Updates*, 107 Cornell L. Rev. Online 94, 100 (2022).

The VPPA was not designed to have such a significant effect on the provision and availability of content on the Internet, which of course did not exist in its modern form in 1988. It was instead designed to prevent video stores, which rented physical video tapes to consumers for a fee, from publicizing the titles of videos rented by an individual. As one judge put it, plaintiffs' attempt to regulate tracking pixels through the VPPA is thus "akin to placing a square peg in a round hole." *Robinson* v. *Disney Online*, 152 F. Supp. 3d 176, 184 (S.D.N.Y. 2015) (ellipsis and citation omitted).

2. Application of the VPPA to the use of tracking pixels is particularly problematic for organizations like professional sports leagues. Such leagues often have hundreds of millions of fans, and many of them purchase, rent,

or otherwise acquire non-audiovisual goods and services offered by the leagues. Those goods and services include tickets, apparel and memorabilia, newsletters, and various mobile offerings. Many professional sports leagues also offer free video content on their websites and mobile applications; for example, amicus provides game highlights that can be viewed without purchasing any video-subscription service. See National Football League, *NFL Game Highlights* <tinyurl.com/nflgamehighlights>.

The Second Circuit's expansive interpretation of the VPPA would exacerbate those negative consequences. For example, the VPPA would apply to any consumer who rented, purchased, or subscribed to any good or service offered, not just video content. Accordingly, a fan who bought tickets to a professional sporting event or purchased official league apparel before watching a free video on the league's website could become a class-action plaintiff seeking $2,500 in statutory damages per class member from the league simply because data about the sports-related videos he viewed were transmitted to Meta to facilitate targeted advertising.

Absent the Court's intervention, sports leagues and other online content providers will continue to face a slew of class actions under the VPPA. After all, "[w]hat makes these statutory damages class actions so attractive to plaintiff's lawyers is simple mathematics: these suits multiply a minimum [] statutory award * * * by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009). To avoid that outcome, the Court should grant review and, on the merits, hold that the recent wave of VPPA lawsuits cannot proceed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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