No. 24-994

IN THE

Supreme Court of the United States

NATIONAL BASKETBALL ASSOCIATION,

Petitioner,

v.

MICHAEL SALAZAR,

Respondent.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Yesterday, the D.C. Circuit weighed in on both questions fairly presented in this case.[1] As to the first question—concerning whether the unauthorized disclosure of information one intended to keep private, and which was statutorily protected from disclosure, gives rise to a concrete injury—the D.C. Circuit joined every other circuit to address the issue and held it does. *Pileggi v. Washington Newspaper Publ'g Co.*, No. 24-7022, — F.4th —, 2025 WL 2319550, at *3–7 (D.C. Cir. Aug. 12, 2025) (applying this Court's precedents in *Spokeo* and *TransUnion* to conclude that "having one's private viewing history provided without consent to a third party is a concrete injury" and that this "injury is closely analogous to the harm of intrusion upon seclusion" and to "the longstanding tort of publicity given to private life"). No circuit has confronted that question and reached a different result. *See* Brief in Opposition 20–22. The circuits are now 7–0 in favor of standing. There remains no basis to grant the NBA's petition for certiorari on the first question presented.

As to the second question—concerning whether the phrase "goods or services from a video tape service provider," as used in the VPPA's definition of "consumer," refers to *all* of a video tape service provider's goods or services or only to its *audiovisual* goods or services—the D.C. Circuit joined the Sixth in choosing the latter, wholly atextual, interpretation. *Pileggi*, 2025 WL 2319550, at

1. Mr. Salazar already explained how both questions presented by the NBA should be reformulated if the Court grants review. *See* Brief in Opposition 16–20, 28–29.

*8–12. But, like the Sixth Circuit, the D.C. Circuit openly rewrote the statute to reach this result.

For example, its opinion begins by proclaiming one is a statutory "consumer" only if "she purchased, rented, or subscribed to a *video cassette tape or similar audio-visual* good or service." *Id.* at *1 (emphasis added). But the statutory definition of "consumer" does not contain this limitation. 18 U.S.C. § 2710(a)(1) (providing "the term 'consumer' means any renter, purchaser, or subscriber of goods or services from a video tape service provider"). The D.C. Circuit simply read this requirement into the statutory definition, even though Congress did not include it. *But see CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 145 S. Ct. 1572, 1580 (2025) ("[W]e decline to add in what Congress left out[.]").

The D.C. Circuit also worried that, because of the practical difficulties video tape service providers might have in distinguishing between their consumers and non-consumers over time, they might simply "assume that all visitors to their websites are consumers." *Pileggi*, 2025 WL 2319550, at *10. In the D.C. Circuit's view, this practical possibility "would leave the term 'consumer' 'no work to do' in the statute." *Id.* (citations omitted). There are at least two problems with this logic.

First, the claim is false. A provider's *assumption* that an individual is a consumer—say, for the purpose of deciding whether to obtain his consent—does not somehow make a non-consumer a consumer under the statute. Consider a situation where the provider disclosed a non-consumer's video-watching history after obtaining defective consent (*e.g.*, oral consent, *see*

18 U.S.C. § 2710(b)(2)(B)). The non-consumer would not have a valid VPPA claim merely because the provider had previously *assumed* he was a consumer. That he did not rent, purchase, or subscribe to any good or service from the provider would remain dispositive. Thus, no matter what a provider might assume, the term "consumer" continues to do real work in the statutory scheme.

Second, even if the claim were true, it would remain irrelevant. As this Court recently explained, "the surplusage canon is primarily a tool of *linguistic* interpretation, reflecting an assumption applicable to all sensible writing: Whenever a reading arbitrarily ignores *linguistic* components or inadequately accounts for them, the reading may be presumed improbable." *Feliciano v. Dep't of Transportation*, 145 S. Ct. 1284, 1294 (2025) (internal quotation marks and citation omitted; emphases added). But the D.C. Circuit's "practical (not linguistic) superfluity" analysis "depends on a contingent factual assumption," *id.* at 1295—namely, that providers will not simply develop a way to sort their consumers from the rest of the world. If they someday do so, of course, even the D.C. Circuit must admit that the term "consumer" will have meaningful work to do. The court's unsupported assumption that "prevailing factual conditions will never change" is no basis to rewrite the statute. *Id.* ("What is a present fact of the world is not necessarily a permanent one.").

The D.C. Circuit also makes a hash of the meaningful-variation canon. It begins by asserting that, when "[r]ead as a whole, there is no meaningful or material change in textual focus" between Section (a)(1)'s "goods or services from a video tape service provider" and Section (a)(3)'s

"*video* materials or services from a video tape service provider." *Pileggi*, 2025 WL 2319550, at *10. It would have been far more accurate to say the presence or absence of the modifier "video" in two provisions that feature identical prepositional phrases and refer to the same business entity *exemplifies* a "material change in textual focus."

The D.C. Circuit then proclaims the word "from" does all the heavy lifting. *Id.* It insists Congress's requirement that Section (a)(1)'s "goods or services" come "from a video tape service provider" means those goods or services must really be *audiovisual* goods or services. *Id.* ("The named source 'from' which the product must derive gives meaning to the scope of the regulated goods and services.").

But the court does not explain why Congress would have believed the exact same preposition (*i.e.*, "from") in the exact same prepositional phrase (*i.e.*, "from a video tape service provider") was insufficient to yield that same result in Section (a)(3). There, of course, Congress included a video-specific modifier before the phrase "materials or services from a video tape service provider." 18 U.S.C. § 2710(a)(3). Notwithstanding the presence of that same prepositional phrase, the D.C. Circuit insists "Congress had every reason to add 'video' in front of 'materials or services'" in Section (a)(3). *Pileggi*, 2025 WL 2319550, at *12.

Perhaps most confusingly, it even suggests the inclusion of the "video" modifier in Section (a)(3) gives "the phrase 'personally identifiable information' a *specialized* meaning in the Video Privacy Protection Act that includes video-viewing choices." *Id.* (emphasis added). But this

meaning is not "specialized" at all. Indeed, according to the D.C. Circuit, the word "from" gives "goods or services" the *same* meaning in Section (a)(1) that "video" bestows on "materials or services" in Section (a)(3). Put otherwise, the court's interpretation of "from"—which appears identically in both provisions—renders "video" surplusage in Section (a)(3).

And the D.C. Circuit's opinion confirms this result. It openly holds a single transaction must result in both "consumer" status and "personally identifiable information." *Pileggi*, 2025 WL 2319550, at *1 (explaining that, to have a valid VPPA claim, one must rent, purchase, or subscribe to an "audio-visual good or service" and that the personally identifiable information at issue must concern "that [same] good or service"). But, if Congress was referring to the same underlying subject matter across these two statutory provisions, it is exceedingly odd that it required two very different relationships to it. *Compare* 18 U.S.C. § 2710(a)(1) (requiring one to be a "renter, purchaser, or subscriber" of subject matter "from a video tape service provider"), *with id.* § 2710(a)(3) requiring one merely to have "requested or obtained" subject matter "from a video tape service provider"). The D.C. Circuit offers no explanation for this textual divergence either. That Congress required two different relationships to differently described content from a single source strongly suggests it had different materials in mind across the two provisions.

The D.C. Circuit's interpretation also creates surplusage elsewhere. For example, it leaves the term "requested" in Section (a)(3) with no work to do. If an individual merely "requested" a video good or service,

for example, he necessarily did not rent, purchase, or subscribe to it. According to the D.C. Circuit, the latter fact means he is not a "consumer," and his free-standing request receives no protection as a result. Congress plainly did not intend this result. Indeed, it unambiguously expressed its intention to extend the statute's protections to consumers' free-standing requests for video materials or services by including those requests, by name, in the definition of "personally identifiable information." 18 U.S.C. § 2710(a)(3).

But the opinion's surplusage problem may be even worse still. If—as the D.C. Circuit held—every transaction that gives rise to "consumer" status *necessarily* results in "personally identifiable information" as well, it is unclear why Congress bothered to break apart and define the two elements at all. If one element invariably leads to the other, the two do no independent work, and one is surplusage.

Given this new decision, the circuits are now split 2–2 on the meaning of "goods or services from a video tape service provider" in 18 U.S.C. § 2710(a)(1)'s definition of "consumer." And the Ninth Circuit is poised to break the tie. *See Heather v. Healthline Media, Inc.*, No. 24-4168 (9th Cir.) (oral argument heard on August 12, 2025). In any event, the split is real, acknowledged, and deepening. Still, this case has vehicle problems. *See* Brief in Opposition 12–15 (pointing to the absence of a final judgment and the two amended complaints filed since the Second Circuit rendered its opinion in this case, meaning no court has examined the issues presented here on the allegations contained in the now-operative complaint). As a result, this Court should deny the NBA's petition and await a petition in a case that involves a final judgment.

Respectfully submitted,

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