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, at the NBA's urging, the district court dismissed Mr. Salazar's Second Amended Complaint with prejudice. To do so, it relied on a recent Second Circuit decision that held that information linking a person to his video-watching history counts as "personally identifiable information" only if an "ordinary person" would understand it. *See Solomon v. Flipps Media, Inc.*, 136 F.3d 41, 52–54 (2d Cir. 2025) (adopting an atextual "ordinary person" standard that does not count information as "personally identifiable information" if only "a sophisticated technology company" would understand it, even if the disclosure in fact went to a sophisticated technology company that did understand it).

In the proceedings below, Mr. Salazar pointed out that, just over a month after the Second Circuit's decision in *Solomon*, this Court expressly rejected judge-made atextual tests in three separate, and unanimous, opinions. *See A.J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, 605 U.S. 335, 338, 343–45 (2025) (rejecting the atextual "bad faith or gross misjudgment" standard the Eighth Circuit imposed for suits concerning educational services under the Americans with Disabilities Act and holding the phrase "any person"—as exists in 18 U.S.C. § 2710(b)(1)—is "expansive and unqualified," meaning it applies to every person, "without distinction or limitation"); *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 305–06, 308–11 (2025) (rejecting the atextual "background circumstances" test five circuits imposed on "majority-group plaintiffs"); *id.* at 313–19 (Thomas, J., concurring) (noting atextual rules "have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause

confusion for the courts," all with no principled way to resolve uncertainties caused by the judge-made test itself); *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 145 S. Ct. 1572, 1576, 1579–81 (2025) (rejecting a minimum-contacts standard that went "beyond the [statutory] text" and declining "to add in what Congress left out").

But the district court held the Second Circuit's atextual "ordinary person" standard survives for two reasons. *First*, it noted that *A.J.T.*, *Ames*, and *Antrix* "dealt with unrelated and distinct statutes," not the Video Privacy Protection Act ("VPPA"). *Salazar v. Nat'l Basketball Ass'n*, No. 1:22-cv-07935, 2025 WL 2830939, at *4 (S.D.N.Y. October 6, 2025). But judges are not permitted to engraft atextual standards onto any federal statutes. There is no reason to think judge-made atextual tests are off limits for Title VII, the Foreign Sovereign Immunities Act, and the Americans with Disabilities Act, but are somehow permissible for the VPPA.

Second, the district court did not believe the "ordinary person" standard "runs afoul" of the VPPA's language. *Id.* It was wrong here as well. To start, the VPPA nowhere mentions an "ordinary person." That phrase is not included in the definition of "personally identifiable information." 18 U.S.C. § 2710(a)(3). It does not appear in the liability provision. *Id.* § 2710(b)(1). And it is not mentioned alongside the six specifically enumerated exceptions to the VPPA's ban on knowing disclosures of personally identifiable information. *Id.* §§ 2710(b)(2)(A)–(F). It is a judicial invention untethered to the statutory text.

And, as often occurs with atextual tests, the "ordinary person" standard distorts the underlying statutory text.

The statute plainly prohibits knowing disclosures of information that "identifies a person as having requested or obtained specific video materials or services from a video tape service provider," *id.* § 2710(a)(3), to "*any* person," *id.* § 2710(b)(1) (emphasis added). This expansive and unqualified language naturally includes knowing disclosures to ordinary persons and to technologically sophisticated persons and to all other persons, without distinction or limitation. Meanwhile, the "ordinary person" test permits knowing disclosures of this same statutorily protected information to anyone and everyone, so long as a hypothetical ordinary person would not understand it.

This judge-made allowance applies even where, as here, the "ordinary person" was never intended to receive the disclosures and did not, in fact, receive them. And it applies even where, as here, the video tape service provider knew the intended and actual recipient would understand the disclosed information. There is no doubt that the Second Circuit's "ordinary person" standard operates as an unwritten exception to the VPPA's broad prohibition. Indeed, the Second Circuit has admitted as much. *See Hughes v. Nat'l Football League*, No. 24-2656, 2025 WL 1720295, at *2 (2d Cir. June 20, 2025) ("*Solomon* effectively shut the door for Pixel-based VPPA claims.").

Mr. Salazar has already filed a notice of appeal from this latest dismissal. Hopefully, the Second Circuit will soon confront whether its atextual "ordinary person" standard can survive this Court's intervening precedent. But this Court cannot reach the lower court's independent basis for dismissal in this posture. Once again, this fact underscores this case's vehicle problems. At the very least, simultaneous appeals here and at the Second Circuit

on distinct legal questions—each of which involves a circuit split and each of which is potentially outcome-determinative—"might complicate the Court's review" in this case. Pet. 35.

As a result, this Court should deny the NBA's petition.

Respectfully submitted,

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