No. 25-

IN THE

Supreme Court of the United States

NICOLE PILEGGI,

Petitioner,

v.

WASHINGTON NEWSPAPER PUBLISHING COMPANY, LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Video Privacy Protection Act ("VPPA") prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The statute unambiguously defines "consumer" to include a "subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1).

The courts below assumed Washington Newspaper was a "video tape service provider." Ms. Pileggi subscribed to a newsletter from Washington Newspaper, which subsequently disclosed her video-watching history to Facebook. Yet both lower courts dismissed Ms. Pileggi's VPPA claim. They did so because, in their view, she did not subscribe to an audiovisual good or service from Washington Newspaper and, thus, was not a statutory "consumer."

The question here—which this Court has already agreed to answer in *Salazar v. Paramount Global*, No. 25-459—is 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.

PARTIES TO THE PROCEEDING

Petitioner Nicole Pileggi was the plaintiff in the district court and the appellant in the D.C. Circuit. Respondent Washington Newspaper Publishing Company, LLC, was the defendant and appellee in the proceedings below.

RELATED PROCEEDINGS

- *Pileggi v. Washington Newspaper Publishing Company, LLC*, No. 24-7022, U.S. Court of Appeals for the D.C. Circuit. Judgment entered August 12, 2025. Rehearing denied September 30, 2025.

- *Pileggi v. Washington Newspaper Publishing Company, LLC*, No. 1:23-cv-00345, U.S. District Court for the District of Columbia. Judgment entered January 29, 2024.

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INTRODUCTION

The Court has already agreed to resolve the exact question presented in this case. *See Salazar v. Paramount Glob.*, No. 25-459 (petition granted January 26, 2026). In the interest of judicial economy and to ensure similar outcomes in similar cases, the Court should hold this petition pending the outcome of that case. If appropriate, it should then grant the petition, vacate the D.C. Circuit's decision, and remand for further proceedings in light of its decision in *Salazar*.

OPINIONS BELOW

The D.C. Circuit's opinion (App. 1a–39a) is reported at 146 F.4th 1219. The district court's opinion (App. 40a–71a) is not reported but may be found at 2024 WL 324121.

JURISDICTION

The court of appeals entered its opinion and judgment on August 12, 2025. App. 1a. It denied Ms. Pileggi's petition for rehearing en banc on September 30, 2025. App. 72a–73a. Chief Justice Roberts's order of December 10, 2025, extended the time to file a petition for a writ of certiorari to February 27, 2026. *See* 28 U.S.C. § 2101(c). This petition is timely filed on February 27, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Video Privacy Protection Act, 18 U.S.C. § 2710, is reprinted in the appendix to this petition. App. 74a–78a.

STATEMENT OF THE CASE

A. Statutory background

After Ronald Reagan nominated Judge Robert Bork to serve on this Court, a journalist visited Judge Bork's local video store and asked which movies he had rented. *Salazar v. Nat'l Basketball Ass'n*, 118 F.4th 533, 544 (2d Cir. 2024). The store handed over a list of 146 specific films. *Id.* The journalist published "The Bork Tapes." *Id.* Congress "quickly decried the publication." *Id.*; 134 Cong. Rec. 10259 (May 10, 1988). It believed "the relationship between the right of privacy and intellectual freedom is a central part of the [F]irst [A]mendment." S. Rep. No. 100-599, at 4.

Congress was also concerned that "the computer age," which had already "revolutionized our world," gave businesses the ability "to be more intrusive than ever before." *Id.* at 6; *see also id.* at 5–6 (expressing concerns with "Big Brother" relying on computerized records and the accumulation of "vast amounts of personal information" to engage in broad surveillance); *id.* at 7 (noting "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"); *id.* at 7–8 (crediting testimony that "advanced information technology" fostered "more intrusive data collection" and "increased demands for personal information," including by businesses hoping "to better advertise their products"); 134 Cong. Rec. 10259–60 (describing a "much more subtle and much more pervasive form of surveillance" that "[n]ot even George Orwell anticipated").

But Congress's central concern was that Americans were losing control over their private information. S. Rep. No. 100-599, at 6–7. Privacy, after all, "goes to the deepest yearnings of all Americans." *Id.* at 6. "We want to be left alone." *Id.*

Unauthorized disclosures of video-watching histories, meanwhile, offer "a window into our loves, our likes, and dislikes." *Id.* at 7; 134 Cong. Rec. 10259 (explaining what we watch reflects "our individuality" and who we are as people). Congress believed watching films is an "intimate process" that "fuel[s] the growth of individual thought" and "should be protected from the disruptive intrusion of a roving eye." S. Rep. No. 100-599, at 7.

Given these concerns, Congress passed the VPPA. The law ensures consumers maintain control over their private information by prohibiting a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1).

The law permits such disclosures in six narrow circumstances, including—as most relevant here—with the consumer's "informed, written consent." *Id.* § 2710(b)(2)(A)–(F). Any unauthorized disclosure of personally identifiable information, however, subjects a provider to liquidated damages of $2,500, punitive damages, reasonable attorneys' fees, and equitable relief. *Id.* § 2710(c)(2).

The VPPA also defines three of the terms used in Section 2710(b)(1)'s one-sentence liability clause. It defines "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.*

§ 2710(a)(1). It defines "personally identifiable information" to include 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). And it defines "video tape service provider" to mean "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." *Id.* § 2710(a)(4).

B. Factual and procedural background

1. The complaint

In this lawsuit, Nicole Pileggi alleged Washington Newspaper Publishing Company—which owns, operates, and publishes Washington Examiner—violated the VPPA by disclosing her personally identifiable information to Facebook without consent. App. 5a, 79a–82a, 85a, 91a, 95a, 97a–98a, 102a. Through Washington Examiner, Washington Newspaper is "in the business of delivering video services over the internet." App. 89a. Indeed, it "offers a wide variety of video content on its website." *Id.*; *see also* App. 109a.

Ms. Pileggi, meanwhile, obtained a digital subscription to Washington Examiner's online newsletter. App. 84a. This process required her to provide, among other things, her e-mail address. App. 84a, 90a. The newsletters "regularly included information about audio visual materials on Washington Examiner's website and hyperlinks to this video content." App. 84a. In addition, the newsletters "contained embedded videos." *Id.*

Ms. Pileggi then watched videos on Washington Examiner's website. *Id.* These videos "concerned political topics," sometimes including "controversial issues and opinions that are unpopular among certain people." *Id.* Ms. Pileggi "never consented to any sharing of her personal information or video watching history with any third party." App. 85a. But Washington Examiner disclosed that exact information, including the titles of the videos she watched online, to Facebook on at least twenty-four occasions. *Id.*

Washington Examiner made these disclosures via its website, which contains a bit of surveillance software known as a "tracking pixel" that (1) "is purposely designed to be invisible to users," and (2) "tracks and reports [users'] video watching histor[ies] to third parties, including Facebook." App. 91a (explaining the disclosures contained consumers' website activities, including which videos they watched, along with their Facebook IDs—unique numerical identifiers Facebook assigns to all users, App. 96a—"and other information that allows Facebook to identify the specific individual" who watched a particular video); *see also* App. 95a, 97a (explaining "[t]he Meta Pixel is a snippet of code that, when embedded in a third-party website, tracks users' activities" and then "sends it to Facebook").

Critically, Washington Newspaper knew the pixel shared highly valuable information about which videos its consumers requested or obtained on the website. App. 96a, 98a–99a, 103a–05a. And Facebook and Washington Newspaper then used this information to create and display targeted advertising. App. 98a.

2. The district court's decision

Washington Newspaper filed a motion to dismiss, arguing Ms. Pileggi did not adequately allege she was a "consumer." App. 46a, 60a. The district court granted that motion. App. 40a–41a, 71a. It assumed Washington Newspaper was a video tape service provider. App. 60a & n.7. It also noted that the newsletter at issue "provide[d] audio visual content," "regularly included information about audio visual materials on Washington Examiner's website," and had both "hyperlinks to [that] video content" and "embedded videos." App. 64a–65a.

The problem, the district court held, was that Ms. Pileggi did not allege that her newsletter subscription "had any connection to the audio-visual content she accessed on the separate Washington Examiner website." App. 65a. The court believed "the 'goods or services' [Ms. Pileggi] received as a result of her newsletter subscription were entirely independent of the audio-visual content that she consumed on Washington Examiner's website." *Id.* (repeating that the subscription was "wholly separate" from her watching videos on the website). Accordingly, it held Ms. Pileggi was not a statutory "consumer." App. 70a.

3. The D.C. Circuit deepens the circuit split

Ms. Pileggi appealed. But, before the D.C. Circuit rendered a decision, three other circuits answered the dispositive question—namely, whether a subscription to a newsletter from a video tape service provider makes one a statutory "consumer." On virtually identical facts, the Second and Seventh Circuits both said "yes." But the Sixth Circuit said "no."

The Second Circuit moved first. *Salazar v. Nat'l Basketball Ass'n*, 118 F.4th 533 (2d Cir. 2024). In October 2024, it held "[t]he VPPA's text, structure, and purpose compel the conclusion that the phrase ['goods or services from a video tape service provider'] is not limited to *audiovisual* 'goods or services.'" *Id.* at 537. It explained the counterargument was "hard to harmonize with other language in the statute." *Id.* at 548. It noted:

> 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." But if "goods or 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.

Id. (citations omitted).

The Second Circuit explained the prepositional phrase "from a video tape service provider" could not "cabin[]" the broadly phrased "goods or services" in Section 2710(a)(1) for another reason—namely, the definition of "video tape service provider" "is not limited to entities that deal *exclusively* in audiovisual content." *Id.* Instead, "audiovisual content need only be *part* of the provider's book of business." *Id.*; *see also id.* at 549 n.10 (noting department stores are covered). Accordingly, the Second Circuit held the term "'consumer' should be understood to encompass a renter, purchaser, or subscriber of *any* of [a video tape service] provider's 'goods or services'—audiovisual or not." *Id.* at 549.

In March 2025, the Seventh Circuit reached an identical conclusion. *Gardner v. Me-TV Nat'l Ltd. P'ship*, 132 F.4th 1022 (7th Cir. 2025). There, in an opinion by Judge Easterbrook, the Seventh Circuit held "[a]ny purchase or subscription from a 'video tape service provider' satisfies the definition of 'consumer,' even if the thing purchased is clothing or the thing subscribed to is a newsletter." *Id.* at 1025. When it comes to the definition of "consumer," the court explained, the decisive factor is whether "the entity on the other side of the transaction is a 'video tape service provider,'" *not* whether the "good or service" involved is a video or a stream. *Id.*

A few days later, a divided panel of the Sixth Circuit reached the opposite conclusion. *Salazar v. Paramount Glob.*, 133 F.4th 642 (6th Cir. 2025). To start, the majority there assumed the defendant was a video tape service provider. *Id.* at 649 n.7. It noted the plaintiff subscribed to the defendant's newsletter. *Id.* at 645, 646 n.3, 649. And it observed the Second and Seventh Circuits had already held these facts made the plaintiff a statutory "consumer." *Id.* at 651–52. Still, the majority disagreed. *Id.*

The majority agreed the term "goods or services," standing alone, "is not limited." *Id.* at 650. But it held the phrase "goods or services" in Section 2710(a)(1)'s definition of "consumer" has "an association" with the phrase "audio visual materials" in Section 2710(a)(4)'s definition of "video tape service provider." *Id.* It explained that, in its view, Section 2710(a)'s definition of "consumer" includes only those "goods or services provided by a company when it is acting as a 'video tape service provider'—namely, 'audio visual materials.'" *Id.* at 651. Given the "association" between these two phrases, the majority believed "the

most natural reading" of Section 2710(a)(1) shows one "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 650–51.

Judge Bloomekatz dissented, explaining that, by Section 2710(a)(1)'s "plain text," the plaintiff in that case was a "consumer." *Id.* at 654 (Bloomekatz, J., dissenting). Indeed, in her view, the majority reached the opposite conclusion "only by rewriting the plain language of the VPPA," *id.* at 656, and by imposing an "extratextual" video-specific limitation on the unmodified phrase "goods or services" in Section 2710(a)(1), *id.* at 653.

Like the Second Circuit, Judge Bloomekatz also noted Congress's definition of "video tape service provider" would "include department stores, supermarkets, and other entities that rent, sell, or deliver the requisite audiovisual materials." *Id.* at 655. Accordingly, Congress "knew" video tape service providers "could rent, sell, or deliver other types of 'goods or services' too." *Id.* at 657. Judge Bloomekatz believed it was "far from the most 'natural' reading of the phrase to say that 'goods or services from a video tape service provider' can only be *some particular* 'goods or services' from that entity." *Id.*

With this 2–1 split in place, the D.C. Circuit weighed in. App. 1a–39a. Like the Sixth Circuit majority, the D.C. Circuit held one is a statutory "consumer" only if she "purchased, rented, or subscribed to a video cassette tape or similar audio-visual good or service." App. 3a; *see also* App. 19a, 21a (similar). To do so, the court held there was "no meaningful or material change in textual focus between Section 2710(a)(1)'s "renter, purchaser, or

subscriber of goods or services from a video tape service provider" language and Section 2710(a)(3)'s "requested or obtained specific video materials or services from a video tape service provider" language. App. 28a. In both places, it said, "[t]he named source 'from' which the product must derive gives meaning to the scope of the regulated goods or services." App. 28a–29a.

Still, the court held "Congress had every reason to add 'video' in front of 'materials or services'" in Section 2710(a)(3). App. 31a. That section contains the same "from a video tape service provider" formulation the court held restricted the unmodified term "goods or services" to audiovisual goods or services in Section 2710(a)(1). App. 28a–29a. But the D.C. Circuit held Congress's decision to add "video" in Section 2710(a)(3), despite using the same prepositional formulation, somehow gave "'personally identifiable information' a specialized meaning in the Video Privacy [Protection] Act that includes video-viewing choices." App. 31a–32a.

Next, even though the newsletter to which she subscribed "include[d] videos and video links," the D.C. Circuit held that Ms. Pileggi's newsletter subscription did not make her a "consumer" because she watched videos on Washington Examiner's website "independently of the newsletter." App. 33a. It explained that, to render one a "consumer," "the videos for which viewing history is disclosed must be the same video materials or services that the individual purchased, rented, or subscribed to." *Id.* Although the newsletter contained videos and links to videos, then, the newsletter did not, "by itself," "connect[] Ms. Pileggi to a relevant video." *Id.* As a result, she was not a statutory "consumer." *Id.*

Ms. Pileggi sought en banc review, which the D.C. Circuit denied. App. 72a–73a.

REASONS FOR GRANTING THE PETITION

The VPPA defines a "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). There is now a clear, acknowledged, and entrenched 2–2 circuit split concerning the meaning of the unmodified phrase "goods or services from a video tape service provider." The Second and Seventh Circuits hold that it includes *all* goods or services from those entities. But the Sixth and D.C. Circuits hold that it includes only the narrow category of *video* goods or services from those entities.

This Court has already granted certiorari to resolve the exact question presented here. *See Salazar v. Paramount Glob.*, No. 25-459 (petition granted January 26, 2026). And this Court routinely holds petitions that implicate a question it has already agreed to answer. *See, e.g.*, *Growth Energy v. Calumet Shreveport Refin., LLC*, 145 S. Ct. 2838 (2025) (holding a petition—in Case No. 23-1230—for several months before granting it and vacating the underlying decision in light of *EPA v. Calumet Shreveport Refin., LLC*, 605 U.S. 627 (2025)); *Nuclear Regul. Comm'n v. Fasken Land & Mins., Ltd.*, 145 S. Ct. 2834 (2025) (holding a petition—in Case No. 23-1341—for several months before granting it and vacating the underlying decision in light of *Nuclear Regulatory Commission v. Texas*, 605 U.S. 665 (2025)); *Folwell v. Kadel*, 145 S. Ct. 2838 (2025) (holding a petition—in Case No. 24-99—for several months before granting it and vacating the underlying decision in light of *United States v. Skrmetti*, 605 U.S. 495 (2025)).

Indeed, as Justice Scalia explained, this Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be [granted, vacated, and remanded—or GVRed] when the case is decided." *Stutson v. United States*, 516 U.S. 163, 180–81 (1996) (Scalia, J., dissenting) (explaining that "the largest category of 'GVRs' that now exists" involves cases where "an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court"); *see also Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996) (collecting cases regarding the "wide range of developments, including [the Court's] own decisions," that have resulted in GVRs).

The Court should adhere to the same practice here. This petition presents the exact same "consumer" question the Court has already agreed to answer. But this case would add nothing to the Court's consideration of the question presented in *Salazar*. Thus, the Court should simply hold the petition pending the outcome of *Salazar* and, if appropriate, GVR this case in light of its decision in that one.

CONCLUSION

For the foregoing reasons, the Court should hold this petition pending a decision in *Salazar v. Paramount Global*, No. 25-459, and then—if appropriate—grant, vacate, and remand this case in light of its resolution in that one.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-7022

NICOLE PILEGGI, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

APPELLANT,

v.

WASHINGTON NEWSPAPER PUBLISHING COMPANY, LLC,

APPELLEE.

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-00345)

Argued February 27, 2025 Decided August 12, 2025

Before: MILLETT and WILKINS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* MILLETT.

Concurring opinion filed by *Senior Circuit Judge* RANDOLPH.

Appendix A

MILLETT, *Circuit Judge*: The Video Privacy Protection Act was passed in 1988 to deter the disclosure to any person of private video tape rental records. Thirty-seven years later, the question before this court is how that statute applies to online videos.

After signing up to receive the *Washington Examiner's* newsletter, Ms. Pileggi chose to visit the *Washington Examiner's* website. Unbeknownst to Ms. Pileggi, a piece of computer code called the "Meta Pixel" transmitted to Meta information about the videos she watched on the website. She sued the *Washington Examiner's* owner, Washington Newspaper Publishing Company, for violating the Video Privacy Protection Act.

The Video Privacy Protection Act defines a consumer protected by the statute as "any renter, purchaser, or subscriber of goods or services from a video tape service provider[.]" 18 U.S.C. § 2710(a)(1). The district court held that Ms. Pileggi is not a "consumer" within the meaning of the Act because she did not sufficiently allege the requisite connection between the newsletter for which she had registered and the private information transmitted to Meta. Ms. Pileggi's choice of videos to view on the website was the only information disclosed to Meta, and she did not use the newsletter to access the website or its videos.

On appeal, Ms. Pileggi argues that a plaintiff does not need to subscribe to a video to have a cause of action under the Video Privacy Protection Act. According to Ms. Pileggi, any plaintiff who purchases, rents, or buys any "good or service" from a third party and then later

watches an unrelated video provided by that party has a cause of action under the Act. Ms. Pileggi also renews her argument that the newsletter constitutes a sufficient connection to the videos on the website for her to be a consumer.

We affirm the district court's dismissal of Ms. Pileggi's complaint. To state a claim under the Video Privacy Protection Act, a plaintiff must allege that: (1) she purchased, rented, or subscribed to a video cassette tape or similar audio-visual good or service, (2) the video tape service provider collected personally identifiable information about that audio-visual good or service, and (3) that private information was disseminated to a third party without her consent.

I

A

The Video Privacy Protection Act ("Video Privacy Act") traces its origins to the 1987 nomination of Judge Robert Bork of the United States Court of Appeals for the District of Columbia Circuit to the Supreme Court. During the confirmation process, a journalist obtained records of Judge Bork's video rentals and published details about them. Michael Dolan, *The Bork Tapes*, WASHINGTON CITY PAPER (Sep. 25, 1987), https://perma.cc/37V2-T2ZD.

While Judge Bork's rental history contained only innocuous titles like Hitchcock classics and James Bond thrillers, Members of Congress from both parties reacted

strongly to this disclosure. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 2819 (1987) *("Judiciary Hearing")* (statement of Sen. Biden) ("Quite frankly, I think it is reprehensible * * * that a Supreme Court nominee would have someone going down and looking at what videos he or she rented."); 134 Cong. Rec. 31842 (1988) (statement of Rep. Moorhead) ("Both the Democrats and the Republicans deciding upon Judge Bork's judgeship became outraged and called for legislation.").

Congress quickly responded with the Video Privacy Act. The Act's purpose is to "preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials[.]" S. REP. NO. 100-599, at 1 (1988). To that end, the statute renders civilly liable any "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). The Video Privacy Act defines a "video tape service provider" as any person engaged in the "rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials[.]" *Id.* § 2710(a)(4). Personally identifiable information "includes information which identifies a person as having requested or obtained specific video materials or services[.]" *Id.* § 2710(a)(3). A "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider[.]" *Id.* § 2710(a)(1).

Remedies under the Video Privacy Act are robust. For "any act" in violation of the law, 18 U.S.C. § 2710(c)(1),

a court may award actual damages "not less" than $2,500, punitive damages, attorneys' fees, and equitable relief, *id.* § 2710(c)(2).[1]

Lastly, the Video Privacy Act allows a video tape service provider to disclose personally identifiable information only if it first obtains the consumer's "informed, written consent[.]" 18 U.S.C. § 2710(b)(2)(B). The Act was amended in 2013 to allow consent "through an electronic means using the Internet" for up to "2 years or until consent is withdrawn by the consumer[.]" *Id.* § 2710(b)(2)(B), (ii)(II); *see* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013).

B

1

Washington Newspaper Publishing Company ("Washington Newspaper") owns the *Washington Examiner*, a news publication that has both print and online offerings.

Ms. Pileggi is an Illinois resident who regularly visits the *Washington Examiner's* website. According to her complaint, she began receiving the *Washington Examiner's* email newsletter after she provided it with her name and contact information. The newsletters she has

1. Although located in Title Eighteen of the United States Code, the Video Privacy Act creates only civil, not criminal, liability. 18 U.S.C. § 2710(c).

received have embedded news videos and hyperlinks to the *Washington Examiner's* website. Ms. Pileggi, though, does not allege that she ever visited the *Washington Examiner's* website by way of a link in her newsletter.

According to Ms. Pileggi, the *Washington Examiner's* webpages automatically played videos when the webpages loaded. Access to the webpages was not restricted to newsletter recipients. Anyone who wanted to visit the *Washington Examiner's* website and watch the videos could do so regardless of whether that person also received the email newsletter. Ms. Pileggi says that, wholly apart from the newsletter, she independently navigated to the *Washington Examiner's* website and watched videos there.

Ms. Pileggi maintains that the *Washington Examiner's* website contains the "Meta Pixel," a "snippet of code that, when embedded on a third-party website, tracks users[]" and information about their use of the website. Am. Compl. ¶ 46. The Meta Pixel then transmits information to Meta (Facebook's owner) to help Washington Newspaper target advertisements at Facebook users like Ms. Pileggi. That information details, among other things, which videos a person watched while visiting the website. The Meta Pixel also identifies website visitors by matching their IP addresses and other data to information associated with their Facebook accounts. Ms. Pileggi does not allege that the Meta Pixel was embedded in the email newsletters or that any information about any videos she watched in the newsletters was transmitted to Meta.

2

Ms. Pileggi sued Washington Newspaper under the Video Privacy Act in the United States District Court for the District of Columbia. Her complaint alleges that the company transmitted information about the videos she watched to Meta without her consent.

The district court dismissed Ms. Pileggi's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Pileggi v. Washington Newspaper Publishing Co., LLC*, No. 23-CV-345, 2024 U.S. Dist. LEXIS 14895, 2024 WL 324121, at *11 (D.D.C. Jan. 29, 2024). The court held that a plaintiff must purchase, rent, or subscribe to a video or similar audio-visual material to be a "consumer" under the Video Privacy Act. 2024 U.S. Dist. LEXIS 14895, [WL] at *10-11. The court also held that the personally identifiable information protected by the Act must concern the video that the plaintiff purchased, rented, or subscribed to. *Id.* Because the only information transmitted to Meta concerned the videos that Ms. Pileggi watched on the website, not the videos embedded in the newsletters, and because the newsletters were not the means by which Ms. Pileggi accessed the videos on the website, the court held that Ms. Pileggi was not a consumer under the Act. *Id.*

Appendix A

II

A

This court reviews *de novo* a district court's decision granting a motion to dismiss for failure to state a claim. *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 619, 461 U.S. App. D.C. 91 (D.C. Cir. 2023). In doing so, the court takes as true the complaint's plausible factual allegations and all reasonable inferences from those facts. *Id.*

B

The district court had jurisdiction under 28 U.S.C. § 1331. This court has jurisdiction under 28 U.S.C. § 1291.

The district court ruled that Ms. Pileggi has standing, *Pileggi*, 2024 U.S. Dist. LEXIS 14895, 2024 WL 324121, at *4-8, and Washington Newspaper does not contest her standing on appeal. Nonetheless, "we have an independent obligation to assure ourselves of our jurisdiction." *Sierra Club v. United States DOT*, 125 F.4th 1170, 1179 (2025) (quoting *Waterkeeper Alliance, Inc. v. Regan*, 41 F.4th 654, 659, 458 U.S. App. D.C. 229 (D.C. Cir. 2022)). To demonstrate standing, a plaintiff must show that (1) she "suffered an injury in fact that is concrete, particularized, and actual or imminent"; (2) "the injury was likely caused by the defendant"; and (3) "the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

Appendix A

Ms. Pileggi has shown standing because the harm she alleges—having one's private video viewing history given to another without consent—is analogous to two types of privacy harms cognizable at common law. In addition, this harm is traceable to Washington Newspaper and could be remedied by the court.

1

To satisfy Article III, the intrusion on Ms. Pileggi's privacy must be, among other things, a "concrete" injury. Whether an injury is "concrete" does not turn on whether the injury is tangible or intangible. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-341, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). Instead, for Article III purposes, an injury is "concrete" if it is similar to a type of harm cognizable at common law. *See TransUnion*, 594 U.S. at 424. Said another way, an injury is concrete if it has "a close historical or common-law analogue[.]" *Id.* As the word "analogue" indicates, Article III does not require "an exact duplicate in American history and tradition." *Id.* Rather, Article III looks for a "close relationship" between the harm remedied by courts in the past and the harm that the plaintiff wants remedied by a court today. *Id.* at 425.

When assessing whether an alleged injury is historically analogous, congressional judgment matters but is not dispositive. *Spokeo*, 578 U.S. at 341. In particular, Congress may elevate certain harms "to the status of legally cognizable injuries" that "were previously inadequate in law." *TransUnion*, 594 U.S. at 425-426 (quoting *Spokeo*, 578 U.S. at 341).

One way Congress can render a traditionally non-cognizable injury concrete is by giving legal effect to "chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 578 U.S. at 341 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). For example, a harm like global warming would generally be non-cognizable given the many causal links involved were it not for congressional recognition of that harm, as the Supreme Court concluded in *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). The same is true for suits against corporations that do not use forced labor, but conduct business with companies that do. *See Doe 1 v. Apple Inc.*, 96 F.4th 403, 409, 464 U.S. App. D.C. 426 (D.C. Cir. 2024). In each instance, the defendant is only liable because Congress determined that liability should extend further back on the causal chain than the common law would otherwise allow.

Another way Congress can render a non-cognizable injury concrete is by providing a private right of action to remedy a harm that is a lesser form of a harm recognized at common law. For example, to prove defamation under the common law, a plaintiff must show that the information told to others about her is false. Restatement (Second) Of Torts § 558 (A.L.I. 1977) ("Second Restatement"). It is not enough to prove that the information is misleading. Yet Congress can render concrete the lesser harm of defamation through misleading information by creating a private right of action to remedy that injury. *TransUnion*, 594 U.S. at 433.

Similarly, a fleeting disturbance of one's peace and quiet by a single telephone call may be insufficient to sustain a common law claim for intrusion upon seclusion. SECOND RESTATEMENT § 652B cmt. d. But courts have concluded that Congress may render uninvited, unwanted, and intrusive text messages or phone calls a concrete harm by enacting a private right of action. *See Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (7th Cir. 2020); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021). So long as Congress alters the degree of harm and not the kind of harm, congressional action can make an injury concrete.

2

Applying those principles here, having one's private viewing history provided without consent to a third party is a concrete injury. *Salazar v. National Basketball Ass'n*, 118 F.4th 533, 540-544 (2d Cir. 2024); *Salazar v. Paramount Global*, 133 F.4th 642, 647 (6th Cir. 2025); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982-984 (9th Cir. 2017); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1339-1341 (11th Cir. 2017).[2]

2. Since *Perry*, the Eleventh Circuit has ruled *en banc* that plaintiffs must demonstrate an exact match between the elements of their private cause of action and a common law claim to demonstrate that their injury is concrete. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1245-1246 (11th Cir. 2022) (en banc). We do not agree that a plaintiff must "plead *every* element of a common-law analog to satisfy the concreteness requirement." *National Basketball Ass'n*, 118 F.4th at 542 n.6; *see Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 145 (3d Cir.) ("We believe that if the Court wanted us to compare elements, it would have simply

Ms. Pileggi asserts a violation of her right to privacy under the Video Privacy Act concerning her personal decisions about what to watch and not to watch. Washington Newspaper violated that right, Ms. Pileggi asserts, by transmitting her video-viewing history to Meta without her knowledge or consent. Am. Compl. ¶ 20.

An individual's choices about media consumption can communicate sensitive and historically private interests. For example, viewing history can indicate religious beliefs, personal interests, sexual preferences, medical concerns, relationship problems, obsessions, phobias, prejudices, or political likes and dislikes. Because the unconsented-to and unknowing disclosure of such personal information corresponds to the common law torts of "intrusion upon seclusion" and "disclosure of private information," *TransUnion*, 594 U.S. at 425, Ms. Pileggi's asserted injury is concrete.

a

Ms. Pileggi's injury is closely analogous to the harm of intrusion upon seclusion. *See Eichenberger*, 876 F.3d at 983; *Perry*, 854 F.3d at 1341; *Paramount Global*, 133 F.4th at 647 & n.4. Traditionally, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy,

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said so."), *cert. denied*, 145 S. Ct. 169, 220 L. Ed. 2d 28 (2024); *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022) (holding that the plaintiff need not "plead and prove the tort's elements to prevail").

if the intrusion would be highly offensive to a reasonable person." SECOND RESTATEMENT § 652B. "The invasion may be by * * * investigation or examination into his private concerns, as by opening his private and personal mail[.]" Id. § 625B cmt. b. "[I]nvasion of privacy * * * does not depend upon any publicity given to the person whose interest is invaded or to his affairs." *Id.* § 652B cmt. a.

The Video Privacy Act remedies the kind of harm addressed by the intrusion-upon-seclusion tort. The complaint alleges that Washington Newspaper intruded upon Ms. Pileggi's seclusion by disclosing her private video viewing history to a third party (Meta) without her knowledge or consent. Such an intrusion is offensive to a reasonable person. It is as if a magazine seller nosed around in someone's mailbox to learn what periodicals to press the owner to buy. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (recognizing an individual's "right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home"; "He is asserting the right to be free from state inquiry into the contents of his library."); *see Judiciary Hearing* at 2820-2821 (statement of Sen. Leahy) ("It is nobody's business what [someone] * * * watch[es] on television. * * * [T]hat is something that is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans[.]"); *see also* Mary Madden & Lee Rainie, Pew Research Center, *Americans' Attitudes About Privacy, Security and Surveillance* 42-43 (May 20, 2015), https://perma.cc/7RY7-B2HV (finding that 44% of Americans think "online video sites" "shouldn't save

any information" about the videos they watch) (emphasis added).

Historically, intrusion upon seclusion only gives a plaintiff the right to sue the party that intruded upon her seclusion. Yet Ms. Pileggi is suing Washington Newspaper, not Meta, even though Meta was the entity that Ms. Pileggi did not consent to receiving her video viewing records. But that makes no difference as to the concreteness of her injury. Washington Newspaper allegedly collected and handed off Ms. Pileggi's private information to Meta for its own benefit. Holding a party liable for contributing to a tort is a well-established common law principle. *See* SECOND RESTATEMENT § 876. And Congress may render liable the party that made the privacy intrusion possible. *See Spokeo*, 578 U.S. at 341. As alleged, Washington Newspaper effectively "aided and abetted" Meta's intrusion upon Ms. Pileggi's private affairs by giving Meta access to her private information without her consent.

As for whether the disclosure of private video records is "*highly* offensive," SECOND RESTATEMENT § 652B, that question goes to the degree of harm, not the injury's recognition at common law, and so does not affect the concreteness of the Video Privacy Act injury under Article III. *See Melito v. Experian Mktg. Solutions, Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-352 (3d Cir. 2017); *Krakauer v. Dish Network L.L.C.*, 925 F.3d 643, 653 (4th Cir. 2019); *Gadelhak*, 950 F.3d at 462-463; *Ward v. NPAS, Inc.*, 63 F.4th 576, 581 (6th Cir. 2023); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *Lupia*, 8 F.4th at 1192;

Drazen v. Pinto, 74 F.4th 1336, 1344 (11th Cir. 2023) (en banc). As the adverb "highly" suggests, the offensiveness inquiry involves drawing lines between intrusions upon seclusion that are severe enough to warrant liability and those that are insufficient. Although the Constitution limits Congress to the kinds of harm that lead to liability at common law, drawing lines between degrees of harm implicates policy judgments that fall more naturally in Congress's wheelhouse. *See TransUnion*, 594 U.S. at 425. Because the disclosure of private video records parallels the offensive intrusions into privacy recognized at common law, Congress here simply gave protection to a common law injury cloaked in more modern garb.

b

Ms. Pileggi's claim also parallels the longstanding tort of publicity given to private life. At common law, "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, 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." SECOND RESTATEMENT § 652D. Publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* § 652D cmt. a. The Washington Newspaper's alleged disclosure of video records to Meta corresponds to those elements.

First, as already discussed, the disclosure of Ms. Pileggi's video viewing records is highly offensive to a reasonable person. Handing out a person's individual

viewing preferences to others without their knowledge or consent can reveal intimate facts about that person's life, putting their likes and dislikes on display.

Keep in mind that Meta did not simply store Ms. Pileggi's private information in a "desk drawer." *TransUnion*, 594 U.S. at 434. Washington Newspaper gave the information to Meta, which used the information to help Washington Newspaper target Ms. Pileggi with unwanted advertisements. Am. Compl. 7 53-58. If Washington Newspaper had sent Ms. Pileggi's video viewing history to a stranger, and that stranger repeatedly approached Ms. Pileggi asking her to buy things based on the videos she had viewed, most would agree that Ms. Pileggi's privacy had been invaded.

To be sure, Ms. Pileggi does not claim to have suffered public stigma or embarrassment because of the disclosure, which are harms that not uncommonly accompany the publicity of private life injury. But stigma and embarrassment are not elements of the tort. And Ms. Pileggi suffered analogous hurt because of the loss of control over what, at bottom, is *her* private and personal information, as well as a loss of security from being spied on and having private and sensitive information unwillingly transmitted to a stranger for profit. Am. Compl. ¶¶ 40-51.

In short, the form in which an injury may manifest does not change the fact of the common law injury itself—namely, the unconsented prying into private details. While embarrassment and stigma may increase the damages

recoverable for the violation, that does not mean that more modem types of intrusion on privacy are any less injurious. After all, Judge Bork's penchant for Alfred Hitchcock films was hardly embarrassing or stigmatizing. *See* Dolan, *The Bork Tapes*. That did not diminish the broad social judgment that his privacy had been intruded upon.

Second, Ms. Pileggi's video viewing history is not of any legitimate concern to the public, and Washington Newspaper does not argue otherwise.

Third, that leaves the element of publicity. Some circuits have held that a plaintiff only suffers the kind of harm remedied by the publicity of private life tort if the plaintiffs private information is disclosed to the public at large. *See Nabozny v. Optio Solutions LLC*, 84 F.4th 731, 736 (7th Cir. 2023); *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1246 (11th Cir. 2022) (en banc); *Shields v. Professional Bureau of Collections of Maryland, Inc.*, 55 F.4th 823, 829 (10th Cir. 2022).

The complaint alleges, though, that Meta commonly provides or sells the data it collects to third parties, which may well amount to public release. *See* Am. Compl. ¶ 50 (noting that Meta tends to sell video viewing data that it receives through the Meta Pixel).

Plus, even if Meta is treated as a private individual who is unlikely to disclose Ms. Pileggi's viewing records to anyone else, the kind of harm protected and remedied by the tort is the disclosure of one's private information without consent. *See National Basketball Ass'n*, 118 F.4th

at 541-542 (holding that "unauthorized" disclosure is analogous to the common law tort). After all, the injury arising from a disclosure of private video viewing records to someone like a family member could exceed that from disclosure of private information to disinterested members of the public. Congress's adjustment of how and to how many people a disclosure of private information must be made for the disclosure to be wrongful simply recognizes a remediable injury that captures further degrees of common law harm. That falls within Congress's constitutional bailiwick. *TransUnion*, 594 U.S. at 425-426.

Finally, "[m]any American courts did not traditionally recognize intra-company disclosures" or disclosures to "vendors" that were paid to handle private information as privacy harms. *TransUnion*, 594 U.S. at 434 n.6; *see also Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 146 (3d Cir.) (a disclosure to an "intermediary" is not sufficiently concrete), *cert. denied*, 145 S. Ct. 169, 220 L. Ed. 2d 28 (2024); *Nabozny*, 84 F.4th at 736 (same).

But that line of cases has no bearing here because Meta did not act as an intermediary in this case, and Washington Newspaper has never suggested otherwise. *See National Basketball Ass'n*, 118 F.4th at 543 ("Meta isn't a 'ministerial intermediary,' and "Meta's use of the disclosed data is very different" from that of an intermediary.). Unlike the employees of a credit reporting agency, *TransUnion*, 594 U.S. at 434 n.6, or a mailing company that distributes debt letters, *Shields*, 55 F.4th at 826-827, Meta was the intended *recipient* of Ms. Pileggi's private information. Meta agreed with Washington

Newspaper to track Ms. Pileggi's video viewing records and match that information with her Facebook data so that Washington Newspaper could send her targeted advertisements, and so that Meta could further use that information for its own commercial purposes. Am. Compl. ¶¶ 50-58. So Meta did not simply convey information between parties. Meta and Washington Newspaper exchanged information about Ms. Pileggi because knowing what videos Ms. Pileggi (and others) watch is valuable to both of them.

3

In sum, Ms. Pileggi's injury is concrete twice over because it is closely analogous to harms remedied by two different common law torts. Ms. Pileggi also adequately alleges that Washington Newspaper caused that harm by transmitting her video viewing history to Meta without her consent. And that intrusion on privacy is judicially remediable through damages. For those reasons, Ms. Pileggi has shown standing.

III

The Video Privacy Act protects the privacy of those who rent, purchase, or subscribe to a video cassette tape or similar audio-visual material. A plaintiff has a cause of action if private information about the video or similar audio-visual material that she rented, purchased, or subscribed to is disclosed to a third party without consent. 18 U.S.C. § 2710(b).

Although Ms. Pileggi received videos and video links from Washington Newspaper in a newsletter email for which she registered, the complaint does not allege that Washington Newspaper collected or transmitted information about her viewing of any newsletter videos. Instead, Ms. Pileggi's claims focus exclusively on the transmittal of information to Meta about videos Ms. Pileggi watched on the *Washington Examiner's* website, separate and apart from the newsletter. But Ms. Pileggi did not rent, purchase, or subscribe to the videos on the website. So Ms. Pileggi has not stated a claim against Washington Newspaper under the Video Privacy Act.

A

Ms. Pileggi's primary argument on appeal is that a plaintiff need not subscribe to a video good or service to be a consumer under the Video Privacy Act. Ms. Pileggi did not present this argument to the district court. Ordinarily, that would result in forfeiture. *Keepseagle v. Perdue*, 856 F.3d 1039, 1053, 429 U.S. App. D.C. 37 (D.C. Cir. 2017).

Forfeiture, however, "does not apply where 'the district court nevertheless' heard and 'addressed the merits of the issue.'" *Campaign Legal Center v. Federal Election Comm'n*, 106 F.4th 1175, 1190, 466 U.S. App. D.C. 473 (D.C. Cir. 2024) (quoting *Blackmon-Malloy v. United States Capitol Police Bd*, 575 F.3d 699, 707, 388 U.S. App. D.C. 1 (D.C. Cir. 2009)). Here, the district court held that Ms. Pileggi failed to state a claim because the statute requires the consumer to purchase, rent, or subscribe

to "audio-visual goods or services," and the information transmitted to a third party must concern the audio-visual goods or services that the plaintiff acquired to violate the Video Privacy Act. *Pileggi*, 2024 U.S. Dist. LEXIS 14895, 2024 WL 324121, at *11. The district court's premise that the goods or services must be audio-visual goods or services was a stated basis for the district court's holding. For that reason, Ms. Pileggi may challenge it on appeal.

B

The district court was correct that Ms. Pileggi is not a "consumer" protected by the Video Privacy Act because, in visiting the *Washington Examiner's* website, she did not subscribe to a video or similar audio-visual good or service. As a result, Washington Newspaper did not violate the Video Privacy Act when it gathered information about her viewing history on the website and gave it to Meta.

1

The Video Privacy Act's cause of action applies to "consumer[s]" whose viewing histories have been disclosed without their consent. 18 U.S.C. § 2710(b)(1). And only those who rent, purchase, or subscribe to a video are "consumer[s]" under the statute. *Id.* § 2710(a)(1). As a result, there are five reasons why it is not enough, as Ms. Pileggi argues, just to obtain some other good or service furnished by a person who also happens to provide videos or audio-visual materials. Pileggi Br. 16-27; Pileggi Reply Br. 3-5.

First, the statutory text tells us that only a "consumer" has a cause of action under the Video Privacy Act. 18 U.S.C. § 2710(b)(1). The Act defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider[.]" *Id.* § 2710(a)(1). A video tape service provider is a person who supplies "video cassette tapes or similar audio visual materials[.]" *Id.* § 2710(a)(4). Putting the words together, a "consumer" of a "video tape service provider" is someone who "rent[s], purchase[s], or subscribe[s]" to the "good or service" that a "video tape service provider" offers—that is, "video cassette tapes or similar audio visual materials." *Id.* § 2710(a).

Second, "useful clue[s]" in the statute and its structure, *Dubin v. United States*, 599 U.S. 110, 121, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (2023), confirm that to be a "consumer," the plaintiff must have obtained a "video or audio visual service" from the defendant, and not just any good or service.

To start, "the title of a statute and the heading of a section" can help determine a statute's "meaning." *Dubin*, 599 U.S. at 120-121 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)); *see also United States v. Burwell*, 122 F.4th 984, 991 (D.C. Cir. 2024); *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 727, 456 U.S. App. D.C. 101 (D.C. Cir. 2022). Here, the statute's title and the liability section's heading "point to a narrow[] reading" that is "centered around" videos and those who market them. *Dubin*, 599 U.S. at 120. After all, Congress named the law the "*Video* Privacy Protection Act of 1988." Pub. L. No. 100-618, § 1, 102 Stat. 3195 (1988)

(emphasis added). The Act's title is "Wrongful disclosure of *video* tape rental or sale records." 18 U.S.C. § 2710 (emphasis added); *see* Pub. L. No. 100-618, § 2, 102 Stat. at 3195. And the liability section's heading is "*Video* Tape Rental and Sale Records." 18 U.S.C. § 2710(b) (emphasis added); *see* Pub. L. No. 100-618, § 2, 102 Stat. at 3195.

A statute's title "is 'especially valuable [when] it reinforces what the text's nouns * * * independently suggest." *Dubin*, 599 U.S. at 121 (quoting *Yates v. United States*, 574 U.S. 528, 552, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (Alito, J., concurring in judgment)). Here, the noun "video" suffuses the statute, independently indicating that the relevant good that a consumer subscribes to must be a video, not just any good or service provided by someone who also happens to offer video or audio-visual services.

For example, the "personally identifiable information" protected by the Act refers to information that "identifies a person as having requested or obtained specific *video materials*[.]" 18 U.S.C. § 2710(a)(3) (emphasis added). A "*video* tape service provider" distributes "*video* cassette tapes or similar audio visual materials[.]" *Id.* § 2710(a)(4) (emphases added). And no liability attaches if the information disclosed does not identify the "title, description, or subject matter of any *video* tapes or other audio visual material" acquired by a consumer. *Id.* § 2710(b)(2)(D)(ii) (emphasis added).

Third, the statute's substantial penalty provision weighs in favor of enforcing the textual linkage between a consumer and a video. The statute provides that "[a]ny

person aggrieved by any act"—note the singular "act"—"in violation of this section may bring a civil action[.]" 18 U.S.C. § 2710(c)(1). And the penalty for each and every single "act" in violation of the statute: "[N]ot less than liquidated damages in an amount of $2,500[.]" *Id.* § 2710(c)(2)(A).

So each time a defendant transmits information about a single video that one plaintiff watched to a single third party, the court *must* award *at least* $2,500, even if the plaintiff's actual damages are less. 18 U.S.C. § 2710(c)(2)(A). This means that a defendant with a website that has 100 visitors who watch five videos apiece would be liable for at least $1.25 million in damages if it disclosed their video choices. The statutory text and purpose demonstrate Congress's desire to protect consumers of actual video services with such remedies. But the stringency of the remedy weighs against judicial expansion of the text to cover harms further removed from commerce in videos or similar audio-visual services.

Fourth, the Video Privacy Act's authorization of punitive damages, 18 U.S.C. § 2710(c)(2)(B), requires that the statutory text be construed against the expansive liability that Ms. Pileggi proposes. The Act's punitive damages are "intended to punish the defendant and to deter future wrongdoing[,]" not to make the plaintiff whole. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Liability provisions in statutes with civil penalties that punish and deter must be construed narrowly, ensuring fair notice to regulated parties. *Cf. Bittner v.*

United States, 598 U.S. 85, 102, 143 S. Ct. 713, 215 L. Ed. 2d 1 (2023) ("The law is settled that *penal statutes* are to be construed strictly[.]") (quoting *Commissioner v. Acker*, 361 U.S. 87, 91, 80 S. Ct. 144, 4 L. Ed. 2d 127 (1959)).

Finally, the Video Privacy Act could not effectively serve its purpose of insulating video-viewing records from disclosure if Ms. Pileggi's view prevailed. If acquiring any good or service sufficed to convey a cause of action with such expansive remedies, a plaintiff could purchase a single ticket at a baseball game and then sue the baseball team's owner after watching a free video on the team's website years later. Simply "purchas[ing]" a "good[] or service[]" in the form of a ticket would entitle people not to have their separate website visits tracked. 18 U.S.C. § 2710(a)(1). At the same time, those who just visit the website without first buying a ticket or another good or service would not enjoy the Video Privacy Act's protections, even though their video-viewing history would be tracked in the exact same manner as that of the ticket purchaser. Nothing in the Act's language, structure, or purpose warrants such haphazard and unreasoned line-drawing.

In fact, distinguishing website visitors based on whether they also happened to purchase another good or service offered by the business could well prove unadministrable. By creating liability only for the transmission of a consumer's personally identifiable video information, the statute presumes that video tape service providers know whether someone is a "consumer" of their goods or services. But if *any* good or service suffices to make someone a statutorily protected consumer, a

video tape service provider would have to determine and differentiate between those who just visit the website and those who visit the website after having at some unknown prior time purchased some different good or service. That would be a daunting task under any circumstances. Doubly so because usernames employed by those visiting websites do not always, or even often, match credit or debit card names. *See* Mary Madden, Pew Research Center, *Public Perceptions of Privacy and Security in the Post-Snowden Era* 41 (Nov. 12 2014), https://perma.cc/TUM9-B74B (finding that 42% of Americans report accessing websites with an anonymous username). And those buying tickets with cash will leave the provider no ability to carve their website traffic out from that of others. *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (courts should not read statutes to be "unworkable").

At the end of the day, under Ms. Pileggi's position, video tape service providers would just have to assume that all visitors to their websites are consumers. But that interpretation would leave the term "consumer" "no work to do" in the statute. *Fischer v. United States*, 603 U.S. 480, 490, 144 S. Ct. 2176, 219 L. Ed. 2d 911 (2024); *see also Pulsifer v. United States*, 601 U.S. 124, 143, 144 S. Ct. 718, 218 L. Ed. 2d 77 (2024) (rejecting an interpretation that rendered "an entire subparagraph meaningless") (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128, 138 S. Ct. 617, 199 L. Ed. 2d 501 (2018)).[3]

3. The Video Privacy Act's consent provision insulates video tape service providers from liability for disclosures if they obtain the consumer's "informed, written consent" in advance. 18 U.S.C.

Ms. Pileggi argues that the statutory text indicates that a person need not purchase, rent, or subscribe to a video good or service to be a "consumer" under the Video Privacy Act. She relies on the meaningful-variation canon of statutory construction. That canon reasons that if "[a] document 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[.]" *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458, 142 S. Ct. 1783, 213 L. Ed. 2d 27 (2022) (first alteration in original) (quoting A. Scalia & B. Garner, Reading Law 170 (2012)). Specifically, Ms. Pileggi points out that, in defining "consumer," Congress omitted the adjective "video" before the phrase "goods or services[.]" 18 U.S.C. § 2710 (a)(1). Yet in defining "personally identifiable information," the word "video" appears before the words "materials or services[.]" *Id.* § 2710(a)(3). From that comparison, Ms. Pileggi concludes that the Act focuses the cause of action on a specific kind of harm—the transmittal of video viewing records—regardless of whether the product consumed was a video.

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§ 2710(b)(2); *see id.* § 2710(b)(2)(B), (b)(2)(B)(ii)(II) & (iii). While the consent provision may be workable for customers directly acquiring videos, the statutory text does not suggest that Congress meant to require every video tape service provider to obtain a waiver from every t-shirt purchaser on the chance that the same person might sometime in the ensuing years visit the business's website and watch a video on it.

The point of statutory canons, however, is to aid in resolving ambiguous statutory terms or phrases, not to cause a court to miss the forest for a single tree.

To start, Ms. Pileggi's argument disregards the rest of the sentence. The definition of "consumer" in full is:

> any renter, purchaser, or subscriber of goods or services from a video tape service provider[.]

18 U.S.C. § 2710(a)(1).

Read as a whole, there is no meaningful or material change in textual focus. Congress confined a "consumer" protected by the Video Privacy Act to someone who is a "renter, purchaser, or subscriber of goods or services" that come "*from* a *video* tape service provider." 18 U.S.C. § 2710(a)(1) (emphasis added). The logical meaning of the sentence as a whole is that a consumer is a person who obtains the products or services that one seeks from a video tape service provider—that is, videos. *See Paramount Global*, 133 F.4th at 650 (The definition of video tape service provider is "tether[ed] [to] the definition of 'consumer' and "pinpoints the relevant 'goods or services[.]'"). After all, if Congress sought to protect the consumers of "goods or services from a medical provider," the natural reading would be that consumers are those who received medical services, not those who only bought a coffee in the foyer. The named source "from" which the product must derive gives meaning to the scope of the regulated goods and services.

To that point, the Supreme Court has been explicit that the word 'from' necessarily draws its meaning from context," *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 178, 140 S. Ct. 1462, 206 L. Ed. 2d 640 (2020), and that "context often imposes limitations" on what a phrase beginning with "from" means, *id.* at 172. *See also National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1128, 407 U.S. App. D.C. 73 (D.C. Cir. 2013) ("' [F]rom' is susceptible to different meanings" and requires statutory context to interpret.).

To illustrate, in *County of Maui*, the Supreme Court relied on context to interpret the word "from" in a definitional phrase in the Clean Water Act. 590 U.S. at 172. The statute defines the term "discharge of a pollutant" as the "addition of any pollutant to navigable waters *from* any point source[.]" 33 U.S.C. § 1362(12) (emphasis added). The Court relied on context to reject the plaintiffs broad interpretation that no matter how "long and far" a pollutant traveled before reaching a navigable water, a pollutant was "from" a point source if it could be traced to that source. *County of Maui*, 590 U.S. at 173, 183. Because the plaintiffs interpretation would extend the Act's coverage broadly when the statute's structure evinced Congress's more narrow regulatory purpose, the Court read the definitional "from" phrase as limiting, not broadening, the defined statutory term. *Id.* at 174-176.

Like the plaintiff in *County of Maui*, Ms. Pileggi's interpretation of the Video Privacy Act uses the "from" phrase in the definition of "consumer" to broaden the statute beyond what the statutory structure and purpose

can support. *See Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859, 1961-2 C.B. 254 (1961) (Courts must "avoid" giving "unintended breadth to the Acts of Congress[.]"). Here, given that the term "video" already appears in the title, five times in the definitional section, and thirteen times in the statute as a whole—and keeping in mind the statute's animating purpose—Congress could reasonably have assumed that its regulatory focus was clear. The placement of "video" at the end rather than the beginning of the definition of "consumer" is a frail excuse for reading the Video Privacy Act to reach far beyond its textual "metes and bounds[.]" *United States v. Aguilar*, 515 U.S. 593, 599, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995).

Another flaw in Ms. Pileggi's reading is that courts cannot put undue weight on a single omission of a word. Instead, courts must adopt "the reading to which 'the provisions of the whole law' point." *Thaler v. Perlmutter*, 130 F.4th 1039, 1046 (D.C. Cir. 2025) (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993)).

Here, too many statutory provisions cut against Ms. Pileggi's siloed reading of one part of one definitional provision. Her argument once again takes no account of the Video Privacy Act's name, Pub. L. No. 100-618, § 1, 102 Stat. 3195 (1988), its title, 18 U.S.C. § 2710, the definition of personally identifiable information, *id.* § 2710(a)(3), the definition of video tape service provider, *id §* 2710(a)(4), the liability provision's title, *id.* § 2710(b), and the consent provision, *id.* § 2710(b)(2)(D). The focus

on videos, video tape service providers, and the disclosure of information about video-viewing or purchasing history pervades the Video Privacy Act. That makes it both textually strained and logically improbable that Congress meant for an omitted adjective in the first half of the definition of "consumer" to transmogrify the Act into a much more sweeping and unadministrable website privacy statute that inexplicably turns on purchasing *something—anything—at* some however-distant point in time before viewing a video. *See Paramount Global*, 133 F.4th at 650 ("The statutory phrase 'goods or services' in the Video Privacy Act cannot be walled "off from the meaning imputed by the rest of the statute's text."); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995) (Courts must "construe statutes, not isolated provisions[.]"). In other words, in statutory construction as elsewhere, it is best not to let a canon's tail wag the dog.

Ms. Pileggi argues that adopting her reading of "consumer" is necessary to avoid rendering the word "video" surplusage when it appears in the "personally identifiable information" definition. 18 U.S.C. § 2710(a)(3).

Not so. Congress had every reason to add "video" in front of "materials or services." In 1988, "personally identifiable information" referred broadly to things like names, addresses, social security numbers, and the like. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 631(a)(2), 98 Stat. 2779, 2794 (1984) (defining "personally identifiable information" as information that "identiffies] particular persons"). So "video" was added

to give the phrase "personally identifiable information" a specialized meaning in the Video Privacy Act that includes video-viewing choices.[4]

Anyhow, even if Ms. Pileggi's interpretation would prevent surplusage, the analysis would not change. The surplusage canon is a tool to effectuate congressional meaning, not to override contrary textual indicia. *See Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) ("[O]ur preference for avoiding surplusage constructions is not absolute."); *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).[5]

3

Ms. Pileggi offers one last argument for consumer status: She signed up for the *Washington Examiner*'s email newsletter, which included embedded videos as well as links that connected to videos on the *Washington Examiner's* website.

But Ms. Pileggi does not allege that any of the videos in the newsletter contained the Meta Pixel that

4. This appeal does not present any question about the meaning of "personally identifiable information." *Cf. Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 48-55 (2d Cir. 2025).

5. For these reasons, we read the statute differently from the Second and Seventh Circuits. *National Basketball Ass 'n*, 118 F.4th at 550; *Gardner v. Me-Tv Nat'l Ltd. P'ship*, 132 F.4th 1022, 1025 (7th Cir. 2025).

tracks viewing selections. Neither does she claim that Washington Newspaper tracked, let alone disclosed to a third party, any video viewing selections she made within the newsletter. *Pileggi*, 2024 U.S. Dist. LEXIS 14895, 2024 WL 324121, at *10. Nor does she claim that she clicked on any website links in the newsletter that took her to the *Washington Examiner's* website. Ms. Pileggi's complaint says only that she went to the *Washington Examiner's* website, independently of the newsletter, and while there, had her viewing information tracked and disclosed. Only those disclosures are the basis for her lawsuit. Am. Compl. ¶¶ 13-24.

Subscribing to an e-newsletter that includes videos and video links, by itself, is not enough to make someone a "consumer" under the Video Privacy Act. Instead, the videos for which viewing history is disclosed must be the same video materials or services that the individual purchased, rented, or subscribed to. Congress, in other words, did not protect every person who sees a video somehow. Only those who purchase, rent, or subscribe to a video service are protected, and it is only to those same videos that the statute's privacy protections attach. *See* 18 U.S.C. § 2710(a)(2), (a)(3) & (b). Because the newsletter in no way connected Ms. Pileggi to a relevant video, we have no opportunity to address what kinds of connections are required between a product like a newsletter and a video for a cause of action under the Video Privacy Act to arise.

C

Washington Newspaper advances three additional arguments for why Ms. Pileggi has failed to state a claim: (1) Washington Newspaper is not a "video tape service provider" because its short online videos are not "similar" to the longer content of most video cassette tapes in 1988; (2) Ms. Pileggi is not a "subscriber" because she did not pay for the e-newsletter; and (3) Washington Newspaper did not knowingly disclose Ms. Pileggi's private information to Meta.

Because Ms. Pileggi's complaint does not plausibly allege that she is a "consumer" protected by the Video Privacy Act, the district court properly dismissed the complaint for failure to state a claim. Given that, we need not address Washington Newspaper's additional arguments.

IV

For the foregoing reasons, the district court's judgment dismissing Ms. Pileggi's complaint for failure to state a claim is affirmed.

So ordered.

Appendix A

RANDOLPH, *Senior Circuit Judge*, concurring:

The Video Privacy Protection Act, 18 U.S.C. § 2710, is a 1988 law "prohibit[ing] video stores" from divulging their customers' "video tape" viewing histories.[1] S. Rep. No. 100-599, at 6-7 (1988). The VPPA is expressly limited to "consumer[s]" of a "video tape service provider." 18 U.S.C. § 2710(b)(1). My colleagues hold that plaintiff Nicole Pileggi is not such a "consumer," and therefore cannot recover damages from the *Washington Examiner*. I join their opinion.

But there is also a straighter path to the same ultimate result: the *Washington Examiner* is not a "video tape service provider." Technology has overtaken this federal statute and has rendered it largely obsolete. The VPPA addressed a different problem in a different time. If the statute needs updating, that is Congress's work to do, not ours.

The VPPA imposes liability on "video tape service provider[s]," defined as businesses transacting in "prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4). These terms are not further

1. As the majority notes, *see* Majority Op. 3, the VPPA was a response to an article in the *City Paper* summarizing then-Supreme Court nominee Judge Robert H. Bork's video tape rental history. The summary showed that Judge Bork had a weakness for Hitchcock movies and other classics. For a retrospective on the controversy by the reporter who first published Judge Bork's movie habits—and who claims he still has the full and unpublished movie list—see Michael Dolan, *Borking Around*, The New Republic (Dec. 20, 2012).

explained, but since the *Examiner's* short online videos are unambiguously not "prerecorded video cassette tapes," Pileggi can succeed only if the videos are "similar audio visual materials." And since the *Examiner's* videos are certainly "audio visual materials," the key question is whether they are "similar" to "prerecorded video cassette tapes."

"Similar" cannot mean "other." The VPPA's use of "similar" requires something more than a vague resemblance between the videos at issue in this case and a "prerecorded video cassette tape[]." *See, e.g., Similar, Webster's New World Dictionary* (3d ed. 1988) (defining "similar" as "nearly but not exactly the same or alike; having a resemblance"); *Similar, Black's Law Dictionary* (5th ed. 1979) (defining similar as "[n]early corresponding; resembling in many respects"). A related section of the VPPA, § 2710(b)(2)(D)(ii), highlights this difference. That section specifically limits the use of marketing data relating to "*any* video tapes or *other* audio visual material." *Id.* (emphasis added). Note the contrast between § 2710(b)(2)(D)(ii)'s expansive phraseology of "any" and "other," compared with § 2710(a)(4)'s more circumscribed language of "prerecorded video cassette tapes or similar audio visual materials." Had Congress also said "*other* audio visual materials" in § 2710(a)(4), *id.* (emphasis added), "other" would serve as a catch-all for every potential type of video content. In that world, the *Examiner's* video clips would be covered. But Congress did not enact that statute.

Two years ago, the Supreme Court faced an analogous problem in *Delaware v. Pennsylvania*, 598 U.S. 115,

143 S. Ct. 696, 215 L. Ed. 2d 24 (2023), a case about the meaning of the phrase "money order . . . or other *similar* written instrument." *Id.* at 123 (emphasis added) (quoting 12 U.S.C. § 2503(1)). The unanimous Court "determine[d] what 'similar' entail[ed] in light of the [statute's] 'text and context,' not in the abstract." *Id.* (citation omitted) (second excerpt quoting *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 459, 142 S. Ct. 1783, 213 L. Ed. 2d 27 (2022)). The Court then identified the relevant "text and context" by looking to the principal term ("money order")—not Congress's catch-all language ("similar written instrument")—and explained that "similar" was defined by reference to the "function and operation" of money orders. *Id.* at 128.

Applying that methodology to the VPPA, the *Examiner* is not a "video tape service provider." The "function and operation" of a "prerecorded video cassette tape[]" bear little similarity to those of a short online video clip. Pre-Internet users obtained a physical object when they purchased or rented a video cassette tape; modern audiences click on a link and receive a stream of ones and zeros in response. The two formats plainly do not "operate in the same manner." *Id.* at 127. Moreover, the "function[s]" of a brief informational clip and a feature-length movie are entirely different. An online news clip and a VHS rental may both be videos at some high level of generality, but the VPPA's statutory language forecloses such a broad-brush approach.

Statutory context also weighs in favor of limiting the VPPA to physical materials. As the majority notes, "the heading of a section" can shed light on the "meaning" of a statute. Majority Op. 20 (quoting *Dubin v. United*

States, 599 U.S. 110, 121, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (2023)). The heading of § 2710 is "Wrongful disclosure of video tape rental or sale records"; likewise, the heading of § 2710(b) is "Video Tape Rental and Sale Records." While the majority emphasizes the word "video," these titles also demonstrate Congress's focus on "video tape[s]," tangible objects which can be "rent[ed]" or put up for "sale."

This reading is further supported by contemporaneous evidence from Congress. In the only discussion of the term "video tape service provider" anywhere in the legislative history, the VPPA's Senate committee report explains that the phrase encompasses "similar audio visual materials, *such as laser disks, open-reel movies, or CDI [compact disc] technology.*" S. Rep. No. 100-599, at 12 (emphasis added). All three listed examples of "similar" materials are physical objects: laser and compact discs encode data in an optical disc, and "open-reel movies" use magnetic tape for data storage. They are tangible objects which can be held, stored, rented, or sold. And that makes sense, because the VPPA was principally designed to target "video stores" like the one that leaked Judge Bork's rental history. *Id.* at 7.

Limiting "video tape service provider" in this fashion would avoid the parade of horribles the majority offers and would allay the majority's fear that the VPPA would sweep in all websites. *See* Majority Op. 21-23. Unless those websites engage in the specific conduct at the heart of the VPPA—transactions in physical audio visual media—they face no risk of liability.

Appendix A

The Internet was in its infancy in 1988, and Congress would have needed remarkable oracular powers to have included language about online videos in the VPPA. Congress's failure to foresee technological change, however, is not a reason to extend the statute by judicial fiat. Instead, the proper inference is that "similar[ity]" to a "prerecorded video cassette tape[]" entails the type of audio visual materials that Congress did contemplate: physical data formats like cassette tapes, laser discs, compact discs, and magnetic tape machines. In today's digital world, those analog mediums have no analogue medium.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JANUARY 29, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23-345 (BAH)
Chief Judge Beryl A. Howell

NICOLE PILEGGI,

Plaintiff,

v.

WASHINGTON NEWSPAPER PUBLISHING COMPANY, LLC,

Defendant.

MEMORANDUM OPINION

Plaintiff Nicole Pileggi brings this putative class action against defendant Washington Newspaper Publishing Company, LLC, publisher of the Washington Examiner, seeking statutory damages and declaratory and injunctive relief for alleged violation of the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA"), due to defendant's alleged knowing and unconsented-to disclosure to Facebook, the social media platform operated by Meta Platforms, Inc. ("Meta"), of plaintiff's personally identifiable information ("PII") associated with information regarding her online viewing of audio visual material. Defendant now moves to dismiss plaintiff's amended complaint for lack of subject matter jurisdiction and for failure to state a claim, pursuant to Federal Rules

of Civil Procedure 12(b)(1) and 12(b)(6). *See* Def.'s Mot. & Mem. Supp. Mot. Dismiss ("Def.'s Mem."), ECF No. 21. For the reasons below, defendant's motion is granted and plaintiff's Amended Complaint, ECF No. 20, is dismissed for failure to state a claim.

I. BACKGROUND

The relevant statutory, factual, and procedural background necessary to resolving defendant's instant motion to dismiss is summarized below.

A. Video Privacy Protection Act

The VPPA was enacted in 1988, long before the advent of streaming audio visual content over the internet, following a local weekly newspaper's publication of a profile of then Supreme Court nominee "Robert H. Bork based on the titles of 146 films his family had rented from a video store," with the aim "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials." Video Privacy Protection Act of 1988, S. Rep. 100-599, at 1, 5 (1988).[1] To this end, the VPPA prohibits "[a] video tape service provider [from] knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). Enumerated exceptions are provided to this prohibition,

1. The article that triggered congressional focus on this issue was "The Bork Tapes" by Michael Dolan, Wash. City Paper (Sept. 25-Oct. 1, 1987), which was intended to highlight the nominee's strict constructionist view that the U.S. Constitution affords no penumbral guarantee of privacy.

allowing, for example, disclosure when the consumer has provided "informed, written consent," *id.* § 2710(b)(2)(B), which is expressly prescribed to be "(i) [] 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 . . . given at the time the disclosure is sought; or . . . in advance for a set period of time"; 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," *id.* § 2710(b)(2)(B)(i)-(iii).

The VPPA sets out several key definitions relevant here. First, a "consumer" protected by the nondisclosure prohibition is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). Second, "personally identifiable information" subject to the nondisclosure prohibition is defined as "includ[ing] 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). Finally, a "video tape service provider" required to comply with the nondisclosure prohibition is defined as "any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, . . ." *Id.* § 2710(a)(4). Enforcement is facilitated by authorizing "[a]ny person aggrieved by any act of a person in violation of" the VPPA to "bring a civil action in a United States district court," *id.* § 2710(c)(1), to recover actual damages not less than liquidated damages of $2,500, punitive damages, attorney's fees and costs, and "such other preliminary and

equitable relief as the court determines to be appropriate," *id.* § 2710(c)(2).

B. Factual Background

Defendant operates Washington Examiner, "a conservative media company that, along with publishing internet news articles and a weekly magazine, delivers online video content to consumers on its website." Am. Compl. ¶ 4. Washington Examiner also offers a "free email newsletter" that "regularly include[s] information about audio visual materials on [its] website[,] hyperlinks to this video content," and "embedded videos." *Id.* ¶¶ 4, 15. Users may "subscribe to its content by signing up for its newsletter and/or paying for [a] digital subscription[]" by "provid[ing] personal information, including their email addresses and ZIP codes." *Id.* ¶ 34.

Washington Examiner uses on its website a tracking tool, called Meta Pixel, which is "a snippet of code that, when embedded on a third-party website, tracks users' activities as users navigate through the website." *Id.* ¶¶ 36-37, 46 (citing *Meta Pixel*, Meta for Developers, https://developers.facebook.com/docs/meta-pixel/ (last visited Jan. 25, 2024)). Meta Pixel "tracks and reports [] video watching history to third parties, including Facebook," which is "operated by Meta." *Id.* ¶ 36. To perform this function, Meta Pixel "collect[s] interactions website visitors have with the site," and sends the data to Facebook, "along with . . . information" that "enables Facebook to match [] website visitors to their respective Facebook User accounts." *Id.* ¶¶ 37, 49 (quotation marks omitted) (citing *Get Started*, Meta for Developers, https://

developers.facebook.com/docs/meta-pixel/get-started (last visited Jan. 25, 2024)). "Meta Pixel tracks this data regardless of whether a user is logged into Facebook." *Id.* ¶ 49. "To obtain the code for the pixel, a website owner must . . . tell Facebook what kind of events the site wants to track," and "Facebook then returns the pixel code for the site administrator to embed into the website." *Id.* ¶ 52.

Washington Examiner "chose to configure the Meta Pixel" so that "Facebook receive[s] the URL of each page consumers . . . visited, including information indicating that the page contained a video and the title of that video, together with the consumer's Facebook ID," all "without Class members' knowledge or consent." *Id.* ¶ 56. According to plaintiff, Washington Examiner benefits from "disclosing private information about its subscribers," in the form of "enhanced online advertising services" from Facebook and by "selling to advertisers the opportunity to market to its subscribers." *Id.* ¶¶ 67-68.

Plaintiff "has visited the Washington Examiner website and watched videos on the site since at least 2018," *id.* ¶ 17, and also maintained a Facebook account since "approximately 2017," *id.* ¶¶ 16-17. When plaintiff "clicked on pages containing videos" on Washington Examiner's website, "the videos were generally displayed at the top of the page, above the text of any article, and the videos began to play automatically." *Id.* ¶ 17. On an unspecified date, plaintiff subscribed to Washington Examiner's newsletter by "provid[ing] [] her personal information, including her email address and ZIP code." *Id.* ¶ 14.

Although plaintiff "never consented to any sharing of her personal information or video watching history with

any third party," Washington Examiner "sent information regarding [her] activity on Washington Examiner's site to Facebook on at least 24 occasions," *id.* ¶¶ 19-20, and this information "allowed Facebook to identify [plaintiff] and learn the internet addresses or [URLs] of the pages she had visited" on Washington Examiner's website, including "the titles of videos [plaintiff] had watched," *id.* ¶ 21. These videos "concerned political topics, including controversial issues and opinions that are unpopular among certain people with more liberal political views." *Id.* ¶ 18.

Plaintiff alleges that these disclosures to Facebook "violated [her] privacy interests" and "deprived [her] of the economic value of [her] private video watching history." *Id.* ¶¶ 63, 69. Since "discover[ing]" Washington Examiner's "disclos[ure] [of] her private video watching information" in 2022, *id.* ¶ 23, plaintiff has "continue[d] to desire to watch videos on Washington Examiner's website" and "will continue to suffer harm if the website is not redesigned," *id.* ¶ 24.

C. Procedural Background

Plaintiff sued defendant in February 2023, and filed the operative Amended Complaint in May 2023, on behalf of herself and a putative class comprising "[a]ll Facebook account holders in the United States who subscribed to Washington Examiner's newsletter and/or paid digital subscription and viewed video content on the Washington Examiner website from February 7, 2021 to the present." Am. Compl. ¶ 70; Compl., ECF No. 1. She alleges, in a single claim, that Washington Examiner violated the VPPA by "knowingly disclos[ing] personally identifiable

information" to Meta that "identified Plaintiff" and members of the putative class "as having requested or obtained specific video materials and/or services from Washington Examiner" "without their consent." Am. Compl. ¶ 81. Plaintiff, on behalf of herself and the putative class, seeks damages "not less than $2,500 per person," punitive damages, attorney's fees and costs, injunctive and declaratory relief, and "such other relief as this Court may deem just and proper." *Id.* at 23-24.

Defendant's pending motion to dismiss the Amended Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), is now ripe for resolution. *See* Pl.'s Resp. Def.'s Mot. Dismiss ("Pl.'s Opp'n"), ECF No. 22; Def.'s Reply Supp. Mot. Dismiss ("Def.'s Reply"), ECF No. 23.

II. LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of demonstrating the court's subject-matter jurisdiction over the claim at issue. *Air Excursions LLC v. Yellen*, 66 F.4th 272, 277, 460 U.S. App. D.C. 447 (D.C. Cir. 2023) (citing *Kareem v. Haspel*, 986 F.3d 859, 865, 451 U.S. App. D.C. 1 (D.C. Cir. 2021)); *see also Dep't of Educ. v. Brown*, 600 U.S. 551, 561, 143 S. Ct. 2343, 216 L. Ed. 2d 1116 (2023) (Federal courts' "authority under the Constitution is limited to resolving 'Cases' or 'Controversies[,]' Art. III, § 2."). When considering a motion to dismiss under Rule 12(b)(1), the court must determine jurisdictional questions by accepting as true all uncontroverted material factual allegations contained in the complaint and "construe[ing]

the complaint liberally, granting plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *Hemp Indus. Ass'n v. DEA*, 36 F.4th 278, 281, 457 U.S. App. D.C. 126 (D.C. Cir. 2022) (second alteration in original) (quoting *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011)). Absent subject-matter jurisdiction, the court must dismiss the case. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (citing *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)).

To survive a Rule 12(b)(6) motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 572 U.S. 744, 757-58, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when the plaintiff pleads factual content that is more than "'merely consistent with' a defendant's liability" and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129, 418 U.S. App. D.C. 398 (D.C. Cir. 2015) ("Plausibility requires 'more than a sheer possibility that a defendant has acted unlawfully.'" (quoting *Iqbal*, 556 U.S. at 678)).

In deciding a motion under Rule 12(b)(6), a court must consider the whole complaint, accepting all factual allegations in the complaint as true, "even if doubtful

in fact," and construing all reasonable inferences in the plaintiff's favor, *Twombly*, 550 U.S. at 555-56; *see also Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 210, 455 U.S. App. D.C. 228 (D.C. Cir. 2022), unless "such inferences are unsupported by the facts set out in the complaint," *Nurriddin v. Bolden*, 818 F.3d 751, 756, 422 U.S. App. D.C. 83 (D.C. Cir. 2016) (citation omitted); *see also Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). In determining whether a complaint fails to state a claim, a court may consider only the facts alleged in the complaint and "any documents either attached to or incorporated in the complaint and matters of which the court may take judicial notice." *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249, 450 U.S. App. D.C. 20 (D.C. Cir. 2020) (alterations in original accepted and citation omitted).

III. DISCUSSION

Defendant raises two grounds for dismissal, arguing, first, that subject matter jurisdiction is lacking because plaintiff lacks standing by failing to allege a "'concrete harm' from a purported statutory violation," Def.'s Mem. at 8 (citations omitted), and, second, that plaintiff's "allegations . . . do not state a claim under the VPPA" for several independent reasons, *id.* at 1-2. District courts should be assured of their jurisdiction before considering the merits and thus the jurisdictional issue is addressed first. *See Hancock v. Urb. Outfitters, Inc.*, 830 F.3d 511, 513, 424 U.S. App. D.C. 251 (D.C. Cir. 2016) ("The district court erred at the outset when it bypassed the jurisdictional question of [plaintiffs'] standing and dove

into the merits of this case. In doing so, the district court stepped where the Constitution forbade it to tread.").

For the reasons set out below, while plaintiff has Article III standing to raise her VPPA claim, she has failed to state a claim under the VPPA, and defendant's Rule 12(b)(6) motion to dismiss is accordingly granted.

A. Standing

To establish Article III standing, plaintiff must plausibly plead and, ultimately, prove three elements: (1) that plaintiff suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quotation marks and citations omitted); (2) that plaintiff's injury is "fairly [] trace[able] to the challenged action of the defendant," meaning that "there must be a causal connection between the injury and the conduct complained of," *id.* (quotation marks and citation omitted); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision," *id.* (quotation marks and citation omitted); *see also Brown*, 600 U.S. at 561; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). As the Supreme Court clarified in *TransUnion LLC v. Ramirez*, violation of a statutory prohibition on certain conduct does not automatically produce an injury sufficient to satisfy Article III's standing requirement because "an injury in law is not an injury in fact." 594 U.S. 413, 427, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021). To determine whether a statutory infraction amounts to a

concrete injury under Article III, *TransUnion* instructs that the harm must bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *id.* at 425 (citing *Spokeo*, 578 U.S. at 340-41), such as "reputational harms, disclosure of private information, and intrusion upon seclusion," *id.* (collecting cases).

Defendant argues that plaintiff fails to satisfy the first prong of the standing test by insufficiently pleading any injury-in-fact since plaintiff has alleged neither tangible economic harm nor any cognizable intangible harm. Def.'s Mem. at 8-12. In defendant's view, plaintiff's alleged harm of the "disclos[ure] [of] private [] information," Am. Compl. ¶¶ 23, 63, is "at most a statutory injury and lack[s] a close relationship to a traditional tort," Def.'s Mem. at 9. Plaintiff analogizes the violation of the VPPA's statutory disclosure prohibition to the common-law torts of invasion of privacy and intrusion upon seclusion, Pl.'s Opp'n at 12-13, and contends that such "disclosure of her information to a third party in violation of a federal statute [] [was] the same injury that the Supreme Court held [was] a 'concrete harm'" in *TransUnion, id.* at 6 (citing *TransUnion LLC*, 594 U.S. at 442). In fact, "[c]onsistent with [*TransUnion*], every federal court that has considered this question has held that consumers whose private information is disclosed to third parties in violation of the VPPA have Article III standing." *Id.* at 6-7 (collecting cases). Plaintiff is correct.

Prior to *TransUnion*, courts "consistently found that plaintiffs satisf[ied] the concreteness requirement of Article III standing where they allege[d] a deprivation of their privacy rights under the VPPA," even where no harm beyond the disclosure itself was alleged. *Salazar*, 685 F.

Supp. 3d 232, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *5 (citing *Austin-Spearman v. AMC Network Ent. LLC*, 98 F. Supp. 3d 662, 666-67 (S.D.N.Y. 2015) (collecting cases)); *see also Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984 (9th Cir. 2017) ("[E]very 18 U.S.C. § 2710 (b)(1) violation present[s] the precise harm and infringe[s] the same privacy interests Congress sought to protect by enacting the VPPA" and "Plaintiff need not allege any further harm to have standing." (quotation marks and citations omitted)); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017) ("[Plaintiff] has satisfied the concreteness requirement of Article III standing, where the plaintiff alleges a violation of the VPPA for a wrongful disclosure."); *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 274 (3d Cir. 2016) (concluding "the harm is [] concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information[,]" and "Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private"); *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) ("By alleging that [defendant] disclosed their personal information in violation of the VPPA, [plaintiffs] have met their burden of demonstrating that they suffered an injury in fact that success in this suit would redress.").

TransUnion does not mandate a different conclusion, as many courts to consider the issue have held.[2] These

2. *See, e.g., Lamb v. Forbes Media LLC*, No. 22-cv-6319 (ALC), 2023 U.S. Dist. LEXIS 175909, 2023 WL 6318033, at *8 (S.D.N.Y. Sept. 28, 2023) ("'[A]t the pleading stage, [defendant's] alleged disclosure of plaintiffs' personal information and viewing activities

describes [a] traditionally recognized harm' that is enough to confer standing." (quoting *Carter v. Scripps Networks, LLC*, No. 22-cv-2031 (PKC), 670 F. Supp. 3d 90, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *3 (S.D.N.Y. Apr. 24, 2023))); *Alex v. NFL Enterprises LLC*, No. 22-cv-09239 (ALC), 2023 U.S. Dist. LEXIS 172991, 2023 WL 6294260, at *3 (S.D.N.Y. Sept. 27, 2023) ("Plaintiffs have sufficiently alleged they were injured when Defendants shared their private information and video watching data with Facebook without consent."), *appeal docketed*, No. 23-7455 (2d Cir. Oct. 20, 2023); *Salazar v. Nat'l Basketball Ass'n*, No. 22-cv-7935 (JLR), 685 F. Supp. 3d 232, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *6-7 (S.D.N.Y. Aug. 7, 2023) ("Here, Plaintiff alleges that NBA.com shared private information about . . . his video viewership to a third party without his consent or knowledge . . . . [T]hese allegations [are] 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.'" (citations omitted)), *appeal docketed*, No. 23-1147 (2d Cir. Aug. 10, 2023); *Salazar v. Paramount Glob.*, No. 22-cv-756, 2023 U.S. Dist. LEXIS 123413, 2023 WL 4611819, at *7 (M.D. Tenn. July 18, 2023) ("Although Defendant attempts to make hay out of the Supreme Court's decision in *TransUnion* . . . in *TransUnion*, the "Supreme Court concluded that plaintiffs whose information was disclosed to a third party suffered a concrete harm[.]" (citation omitted)), *appeal docketed*, No. 23-5748 (6th Cir. Aug. 21, 2023); *Adams v. Am.'s Test Kitchen, LP*, No. 22-cv-11309 (AK), 680 F. Supp. 3d 31, 2023 U.S. Dist. LEXIS 113127, 2023 WL 4304675, at *5-6 (D. Mass. June 30, 2023) ("[Plaintiff] alleges Defendants have violated her privacy rights under the VPPA by disclosing her [Facebook ID] . . . and the video content name and its URL though their use of Pixel while she was a website subscriber. . . . Such allegations are sufficient to establish an injury in fact." (quotation marks and citation omitted)), *appeal docketed*, No. 23-1592 (1st Cir. July 24, 2023); *Martin v. Meredith Corp.*, 657 F. Supp. 3d 277, 283 (S.D.N.Y. 2023) ("[Plaintiff's] allegations that the defendants disclosed his private information to a third party without his consent are sufficient to confer standing." (citing *TransUnion LLC*, 594 U.S. at 425)), *appeal withdrawn*, No.

courts have reasoned that the alleged unlawful "disclosure of [a plaintiff's] information to a third party," Pl.'s Opp'n at 6, bears "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *TransUnion LLC*, 594 U.S. at 425 (citation omitted), including the common-law tort of intrusion upon seclusion that the Supreme Court in *TransUnion* expressly identified as among the "intangible harms" "qualify[ing] as concrete injuries under Article III," *id.; see Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *5 (collecting cases); *accord Eichenberger*, 876 F.3d at 983 (in pre-*TransUnio*n case, recognizing that "privacy torts do not always require additional consequences to be actionable" and "[t]he VPPA functions in the same way" (citing RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b)); *Perry*, 854 F.3d at 1340-41 (in pre-*TransUnion* case, finding alleged "violation of the VPPA for a wrongful disclosure" "similar" to the tort of intrusion upon seclusion, where "[t]he intrusion itself makes the defendant subject to liability, even though there is no publication or other use," and plaintiff "has satisfied the concreteness requirement of Article III standing" (citation omitted)). This reasoning is persuasive.[3]

23-412, 2023 U.S. App. LEXIS 15101, 2023 WL 4013900 (2d Cir. May 24, 2023); *Feldman v. Star Trib. Media Co. LLC*, 659 F. Supp. 3d 1006, 1014-16 (D. Minn. 2023) (finding "this common law tradition" of intrusion upon seclusion "bears a close relationship to [plaintiff's] injury allegations" and "[t]hat seems enough at the motion-to-dismiss stage").

3. This finding that plaintiff's alleged privacy harms are sufficient at the pleading stage for standing renders addressing defendant's additional arguments regarding whether Washington Examiner also injured plaintiff's property and economic interests

Defendant makes two counter arguments, both of which are easily dispatched. First, defendant contends that plaintiff's claimed injury of "disclosure of private information" without reputational harm, Def.'s Reply at 3, "arises only from the *public* disclosure of private information," while plaintiff alleges "only that Facebook's computers learned information," Def.'s Reply at 3 (emphasis in original) (citations omitted). This narrow construction of plaintiff's claimed injury under the VPPA does not square with the statutory text of the VPPA's disclosure prohibition, which bars disclosure of relevant PII "to any person," 18 U.S.C. § 2710(b)(1), without also requiring that such disclosure be "public" or in some way broadly disseminated or accessible.

This reading of the statutory text is consistent with the intended purpose of the statute "to preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials," S. Rep. 100-599, at 1, and is consistent with recognized parameters of the tort of intrusion upon seclusion, which subjects to liability for invasion of privacy, a person "who intentionally intrudes . . . upon the solitude 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. Such invasion of privacy may include "opening [] private and personal mail . . . even though there is no publication," *id.*, cmt. b, and thus "does not depend upon any publicity given to the person whose

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by profiting from disclosure of her private information, *see* Def.'s Mem. at 11; Def.'s Reply at 6, unnecessary.

interest is invaded," *id.*, cmt. a; *see also Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *6 (finding plaintiff's VPPA "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" "'even though there is no publication or other use of any kind of the . . . information outlined'" (quoting RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b, and citing *Feldman*, 659 F. Supp. 3d at 1015-16 (similar)).[4]

4. Defendant cites two non-VPPA cases—*Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1246 (11th Cir. 2022) (en banc), and *Crane v. Am. Bar Ass'n*, 663 F. Supp. 3d 747, 753 (E.D. Mich. 2023)—as support to argue that the injury of "disclosure of private information" requires "*public* disclosure," Def.'s Reply at 2-3 & n.2 (emphasis in original), but those cases, implicating distinct statutory schemes and common-law comparator torts, have no application here. *Hunstein* held that a debt collector's disclosure in alleged violation of the Fair Debt Collection Practices Act was not similar to the common-law tort of public disclosure as to constitute a concrete injury, where "the disclosure alleged [] lack[ed] the fundamental element of publicity," *Hunstein*, 48 F.4th at 1240, 1245-48, and the Eleventh Circuit later distinguished *Hunstein* on this basis, *see Drazen v. Pinto*, 74 F.4th 1336, 1345 (11th Cir. 2023) (whereas "the element of publicity was 'completely missing'" in *Hunstein*, "[h]ere [] none of the elements for the common-law comparator tort [of intrusion upon seclusion] are completely missing" (quoting *Hunstein*, 48 F.4th at 1245)). In *Crane*, the court held that the American Bar Association's disclosure of information in alleged violation of Michigan's Privacy Act was not sufficiently analogous to the common-law tort of invasion of privacy, where plaintiff "publicly advertised" the information. *Crane*, 663 F. Supp. 3d at 749, 752-53. Neither *Hunstein* nor *Crane* analogized the claimed statutory injury to the common-law tort at-issue here—*i.e.*, intrusion upon seclusion, for which "the 'intrusion itself' makes the defendant

Second, while acknowledging that "other courts have" found Article III standing by analogizing a plaintiff's alleged harm of disclosure of private information to the tort of intrusion upon seclusion, Def.'s Reply at 3, defendant nonetheless strains to distinguish these cases because none "addressed the effect of a website's privacy policy disclosures on such an alleged injury," *id.; see also* Def.'s Mem. at 9-11. In this regard, defendant describes its privacy policies, in effect from September 2018 to April 2023 and posted and accessible on Washington Examiner's website, as making clear "that the Washington Examiner and certain third parties employ cookies and similar technologies—like the Meta Pixel—for targeted advertising and other promotional activities." Def.'s Mem., Christopher Reen Decl. ¶¶ 2-5, ECF No. 21-1. Pointing to the absence of any allegations that plaintiff "was unaware of [the policies], that the Washington Examiner's alleged conduct conflicted with their terms, or that she attempted to express her lack of consent by exercising the opt-out rights those policies describe," Def.'s Reply at 4, defendant argues that plaintiff consented to "the disclosure of personal information" by continuing to visit Washington Examiner's website, *id.* at 5 (citation omitted). At the same time, defendant concedes that a finding of implicit consent by plaintiff due to the affirmative disclosures

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liable," *Eichenberger*, 876 F.3d at 983, 986 (quoting RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b) (finding plaintiff "has Article III standing to bring his [VPPA] claim because 18 U.S.C. § 2710(b)(1) is a substantive provision protecting consumers' concrete interest in their privacy"); *see also* RESTATEMENT (SECOND) OF TORTS § 652B, cmt. a ("[Intrusion upon seclusion] does not depend upon any publicity given to the person whose interest is invaded or to his affairs.").

in Washington Examiner's privacy policies "would not also satisfy the VPPA's unusual consent requirement." Def.'s Mem. at 10; *see also* Def.'s Reply at 5. Nonetheless, characterizing the VPPA's "unusual consent provision" as "not the normal standard for consent on the internet," Def.'s Mem. at 9, defendant discounts a statutory violation of the VPPA, in the context of the posted privacy policies, as "not alleg[ing] the type of 'sufficiently offensive conduct'" required to plead the tort of intrusion upon seclusion, Def.'s Reply at 3. Put another way, defendant's reasoning is that so long as a provider of online audio-visual materials also posts a privacy policy, even one providing only a limited opt-out for certain PII disclosures that is far less protective than the consumer's "informed, written consent" opt-in requirement under the VPPA, the consumer lacks standing as an aggrieved party to invoke the private right of action set out in this statute. *See* 18 U.SC. §§ 2710(b)(2)(B), (c).

Defendant cites no authority for the novel proposal that the VPPA's explicit opt-in consent requirement be disregarded, and other courts considering a plaintiff's alleged implicit consent due to posted privacy policies in the context of a VPPA standing inquiry have properly analyzed the issue using the statutory requirements for consent under the VPPA. *See, e.g., Salazar*, 685 F. Supp. 3d 232, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *6 (concluding that "[a]t the pleading stage, Plaintiff has set forth enough to allege that was offensive to a reasonable person," where "Plaintiff alleges that he never consented to nor was provided with any written notice that Defendant was sharing his" information, and "the

tracking pixel functionality [was] 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" (internal quotation marks and citations omitted) (last alteration in original)).[5]

This reasoning accords with Congress's 2012 amendment to the statute, which "clarif[ied] that video tape service providers may obtain informed, written consent of consumers on an ongoing basis via the Internet." *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015) ("Congress amended the VPPA in 2012 'to reflect the realities of the 21st century.'" (quoting 158 Cong. Rec. H6849-01 (Dec. 18, 2012))). With this recent amendment, Congress had the opportunity but did not alter the requirements for such consent. *See* VPPA Amendments Act of 2012, 126 Stat. 2414, Pub. L. 112-258 (2013); *see also Golden v. NBCUniversal Media, LLC*, No.

5. Defendant's reliance on two non-VPPA cases, *see* Def.'s Mem. at 12-13; Def.'s Reply at 3-4, that dismissed common-law intrusion upon seclusion claims for failure to allege "sufficiently offensive conduct" where plaintiffs were afforded notice of defendants' privacy policies, are inapposite, since neither case implicated the VPPA, let alone its consent provision. *See Manigault-Johnson v. Google, LLC*, No. 18-cv-1032 (BHH), 2019 U.S. Dist. LEXIS 59892, 2019 WL 3006646, at *6 (D.S.C. Mar. 31, 2019) (dismissing common-law intrusion upon seclusion claim where plaintiffs failed to "allege that Defendants' conduct violated Defendants' privacy policies"); *Deering v. CenturyTel, Inc.*, No. 10-cv-63 (BLG) (RFC), 2011 U.S. Dist. LEXIS 51930, 2011 WL 1842859, at *2-3 (D. Mont. May 16, 2011) (dismissing intrusion upon seclusion claim where plaintiff "ha[d] been notified" via defendant's privacy policy "that his Internet activity may be forwarded to a third party" (citation omitted)).

22-cv-9858 (PAE), 688 F. Supp. 3d 150, 2023 U.S. Dist. LEXIS 150622, 2023 WL 5434378, at *4 n.5 (S.D.N.Y. Aug. 23, 2023) (noting the amendment "clarif[ied] 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" (citation omitted) (alteration in original)). As plaintiff correctly argues, accepting defendant's reasoning would "undo the balance Congress struck" by "effectively negat[ing] the VPPA's consent requirement" for purposes of the standing inquiry. Pl.'s Opp'n at 10-11.[6]

In sum, plaintiff has sufficiently alleged that defendant "disclosed [her] personally identifiable information" without her consent, *see* Am. Compl. ¶¶ 19, 20, 56, 60, 62, 69, 81, and that Meta Pixel, as deployed by defendant, was "not necessary to a website's function" but "solely benefit[ed] website owners and their third-party partners," *id.* ¶ 52. As another court recently found on similar facts, at this pleading stage, plaintiff has "set forth enough to allege that [such disclosure] was offensive to a reasonable person," where 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." *Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023

6. Defendant urges that judicial notice be taken of its privacy policies, *see* Def.'s Reply at 4-5, but even if such notice were taken, those policies would be immaterial to the standing inquiry, where—as is uncontested, *see* Def.'s Mem. at 11—plaintiff has alleged defendant's failure to satisfy the VPPA's consent requirement.

WL 5016968, at *6. This sufficiently alleges a concrete injury to establish standing. *See TransUnion LLC*, 594 U.S. at 429-30.

B. Sufficiency of VPPA Claim

Defendant contends that plaintiff fails to establish the threshold element for any VPPA claim, namely: that plaintiff qualifies as a "consumer" authorized to bring an action for violation of this statute. Def.'s Mem. at 13. As noted, *see supra*, Part I.A, the VPPA creates a private right of action for a "consumer"—defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider," 18 U.S.C. § 2710(a)(1)—to bring suit against a "video tape service provider"—defined as "any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials," *id.* § 2710(a)(4)," for "knowingly disclos[ing]" the consumer's "personally identifiable information," *id.* § 2710(b)(1), which includes information "identif[ying] a person as having requested or obtained specific video materials or services from a video tape service provider," *id.* § 2710(a)(3). In resolving the instant motion, defendant's status as a "video tape service provider" is assumed, without deciding.[7]

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7. Plaintiff alleges that Washington Examiner is a "'video tape service provider' . . . because it engaged in the business of delivering audio visual materials similar to prerecorded video cassette tapes," Am. Compl. ¶ 79 (quoting 18 U.S.C. § 2710(a)(4)), but defendant vigorously challenges whether the business of delivering news, including in the form of "video clips," fairly falls within this definition, *see* Def.'s Mem. at 13, 23-25 ("[T]he allegation that the Washington

Examiner provides news through video clips, as well as text, does not make it a 'video tape service provider' under the VPPA because the video clips are not 'similar audio visual materials' to 'prerecorded video cassette tapes.'" (quoting 18 U.S.C. § 2710(a)(4)); Def.'s Reply at 14 ("[Plaintiff's] argument [] that the popularity of short-form videos today supports expanding the VPPA to cover *all* prerecorded videos reads 'similar' out of the statute and wrests the VPPA from its historical moorings." (emphasis in original)). This issue has not been addressed in this Circuit. Although the phrase "similar audio visual materials" has been interpreted as "medium-neutral," *In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017) (citation omitted), and "to include new technologies for pre-recorded video content," *In re Hulu Priv. Litig.*, No. 11-cv-3764 (LB), 2012 U.S. Dist. LEXIS 112916, 2012 WL 3282960, at *5-6 (N.D. Cal. Aug. 10, 2012) (citation omitted), treatment of the audio visual content available on Washington Examiner's website as "similar audio visual materials" to "prerecorded video cassette tapes," is an expansion from the statute's historical context, *see, e.g.*, S. Rep. 100-599, at 12 (identifying "laser discs, open-reel movies, or CDI technology" as examples of "similar audio visual materials"), and possibly beyond the scope of the textual tie requiring such content to be "similar" to a video cassette tape. Moreover, to qualify as a "video tape service provider" requires a defendant "to be engaged in the business of delivering video content" such that "the defendant's product must [be] . . . significantly tailored to serve that purpose." *Sellers v. Bleacher Rep., Inc.*, No. 23-cv-368 (SI), 2023 U.S. Dist. LEXIS 131579, 2023 WL 4850180, at *6 (N.D. Cal. July 28, 2023) (citation omitted). Based on the definitional prerequisite of "engaged in the business" of "delivery" of "similar audio visual materials," courts have rejected attempts to characterize "any company that creates its own video content, however ancillary to the company's purpose, [as] 'engaged in the business of' delivering audio visual content." *Markels v. AARP*, No. 22-cv-5499 (YGR), 2023 U.S. Dist. LEXIS 180538, 2023 WL 6411720, at *3 (N.D. Cal. Aug. 29, 2023); *see also Sellers*, 2023 U.S. Dist. LEXIS 131579, 2023 WL 4850180, at *6 (collecting cases). In any event, whether Washington Examiner, as a

Plaintiff, indisputably, is neither a "renter" nor "purchaser" of "goods or services from a video tape service provider" and thus to qualify as a "consumer" under the VPPA, she contends that she is a "subscriber"—a term not further defined in the statute. *See* 18 U.S.C. § 2710 (a)(1). Plaintiff does not dispute that to be a "subscriber," the VPPA requires subscribing to "audio-visual goods or services, and not goods or services writ large," Pl.'s Opp'n at 19 (quoting *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6); *see* Def.'s Mem. at 16-18; Def.'s Reply at 8-9. Defendant contends that plaintiff's subscription to its newsletter fails to satisfy this standard, absent allegations that plaintiff's "status as a newsletter subscriber was a condition to accessing the site's videos, or that it enhanced or in any way affected [her] viewing experience." Def.'s Reply at 8 (quoting *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6 (cleaned up)); Def.'s Mem. at 16-18. Plaintiff responds that she has sufficiently alleged that "Washington Examiner's newsletter had a strong connection to its video services," and that by subscribing to its newsletter, she "was asking Washington Examiner to regularly deliver audio-visual content directly to her." Pl.'s Opp'n at 19. The ubiquity of the concomitant delivery of audio-visual material with written word news and commentary, and the First Amendment implications of tracking such information identified to a particular user, as recognized in the crafting of the VPPA, *see* S. Rep. 100-599, at 4 (noting that "[p]rotecting an individual's

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"media company that operates a news website and publishes a weekly magazine," Am. Compl. ¶ 31, meets this definitional prerequisite by making audio-visual content accessible on its website, need not be decided here, as this case is resolved on other grounds.

choice of books and films is a second pillar of intellectual freedom under the [F]irst [A]mendment"), underscores the importance of this question. For the reasons explained in more detail below, however, defendant has the better of the argument.[8]

While the D.C. Circuit has not had an opportunity to consider the issue, the meaning of "subscriber" in the VPPA has been considered by two other courts of appeals, in the context of determining whether the downloading and use of a free mobile app is sufficient to allege subscriber status. Although diverging in their holdings on this issue, the First and Eleventh Circuits recognized that "one can be a 'subscriber' without making a monetary payment," *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 488 (1st Cir. 2016); *Ellis*, 803 F.3d at 1256, and that subscription requires a distinct relationship with a video tape service provider, *see Ellis*, 803 F.3d at 1257-58 (holding that "downloading an app for free and using it to view content at no cost is not enough to make a user of the app a 'subscriber,'" absent an "ongoing commitment or relationship between the user and the entity which owns and operates the app"); *Yershov*, 820 F.3d at 489 (finding

8. Given this conclusion, defendant's alternative bases for dismissal, namely: that (1) plaintiff is not a "consumer" because "[o]nly paying customers are consumers," Def.'s Mem. at 18-19; (2) defendant is not a "video tape service provider," *id.* at 13, 23; (3) defendant did not disclose "personally identifiable information" because plaintiff was not identified as "having requested or obtained specific video materials,'" *id.* at 4, 14-16 (quoting 18 U.S.C. § 2710(a)(3)) (emphasis omitted); and (4) defendant did not "knowingly disclose[]" the information of a consumer, *id.* at 13, 22-23, need not be resolved.

plaintiff qualified as a VPPA subscriber, but recognizing that subscription requires "a relationship [with the video tape service provider] 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 [plaintiff] might have accessed through a web browser"). The Eleventh Circuit offered additional guideposts, "based on the ordinary meaning of the term 'subscriber,'" *Ellis*, 803 F.3d at 1256, interpreting the term to "involve[] some type of commitment, relationship, or association (financial or otherwise) between a person and an entity," *id.*, and identifying a non-exclusive list of factors indicative of "subscriber" status: "payment, registration, commitment, delivery, expressed association, and/or access to restricted content," *id.* (citations and brackets omitted). Likewise, courts have generally found that "subscriber" requires "a factual nexus or relationship between the subscription provided by the defendant and the defendant's allegedly actionable video content." *Tawam v. Feld Ent. Inc.*, No. 23-cv-357 (WQH) (JLB), 684 F. Supp. 3d 1056, 2023 U.S. Dist. LEXIS 154778, 2023 WL 5599007, at *5 (S.D. Cal. July 28, 2023) (collecting cases); *see also Gardener v. MeTV*, No. 22-cv-5963, 681 F. Supp. 3d 864, 2023 U.S. Dist. LEXIS 115810, 2023 WL 4365901, at *4 (N.D. Ill. July 6, 2023) ("The Court does not agree . . . that the allegations that [plaintiffs] opened an account separate and apart from viewing video content on MeTV's website is sufficient to render them 'subscribers' under the Act." (citation omitted)). Plaintiff has failed to allege these indicia of a subscriber relationship.

While plaintiff alleges that she subscribed to Washington Examiner's newsletter—which provides

audio visual content but without use of the website tracking tool Meta Pixel—nowhere does she allege that this subscription had any connection to the audio-visual content she accessed on the separate Washington Examiner website, nor does she claim that, as a result of her newsletter subscription, she received "access to restricted [audio-visual] content," *Ellis*, 803 F.3d at 1256, that would establish her "commitment, relationship, or association," *id.*, to Washington Examiner's "audio-visual goods or services, and not [its] goods or services writ large," *Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *8 (quoting *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6). Simply put, the "goods or services" plaintiff received as a result of her newsletter subscription were entirely independent of the audio-visual content that she consumed on Washington Examiner's website, which allegedly functioned with the Meta Pixel tracking tool.

Close examination of plaintiff's allegations reveals that she provided her email address and ZIP code only for her subscription to Washington Examiner's newsletter, Am. Compl. ¶ 14, and though the newsletter "regularly included information about audio visual materials on Washington Examiner's website[,] [] hyperlinks to this video content[,]" and "embedded videos," *id.* ¶ 15; *see also* Pl.'s Opp'n at 18-20, nowhere does plaintiff allege "that she ever clicked [] a link" to the video content included in the newsletter, or "watched any of" the embedded videos, Def.'s Mem. at 16-17. Merely alleging that she "visited the Washington Examiner website and watched videos on the site," Am. Compl. ¶ 17, wholly separate from her newsletter subscription, breaks the link between the

service to which she was a subscriber and her accessing of audio-visual content, and that is fatal to her standing as a VPPA "subscriber." *See Golden*, 2023 U.S. Dist. LEXIS 150622, 2023 WL 5434378, at *9 (plaintiff not a "subscriber" where "there is no connection between the emails from Today.com for which [plaintiff] signed up and the website and mobile app through which the [complaint] alleges she accessed the videos"); *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6-7 (holding the "[c]omplaint does not plausibly allege that plaintiffs acted as 'subscribers' when they viewed videos on the hgtv.com" where "[p]laintiffs do not assert that they watched videos embedded in the newsletters themselves"); *Paramount Glob.*, 2023 U.S. Dist. LEXIS 123413, 2023 WL 4611819, at *12 (similar).

Moreover, plaintiff fails to allege that her "status as newsletter subscriber[] was a condition to accessing the [Washington Examiner] site's videos, or that it enhanced or in any way affected [her] viewing experience." *Lamb*, 2023 U.S. Dist. LEXIS 175909, 2023 WL 6318033, at *12 (quoting *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6); *see also Ellis*, 803 F.3d at 1253 (identifying "access to restricted content" as among the "factors" indicative of "subscription[]" (citations omitted)). Again, assuming as true plaintiff's allegations that "video is central to Washington Examiner's website and business" because "when [plaintiff] visited pages on the site, 'videos were generally displayed at the top of the page, above the text of any article'" and "consumers must take affirmative steps to stop the video playback and scroll the window downward if they prefer to read instead of watch," Pl.'s

Opp'n at 19-20 (quoting Am. Compl. ¶ 17), does not help make a VPPA claim since these allegations are insufficient to establish a link between what plaintiff subscribed to, *i.e.*, the newsletter, and defendant's audio-visualal content on its website. Indeed, plaintiff does not claim "that a newsletter subscription was required to access those videos, functioned as a login, or gave newsletter subscribers extra benefits as viewers." *Carter*,2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6. Rather, plaintiff "had the same access to videos on the [] site as any other visitor" without a subscription. *Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *9 (citation omitted); *see also Kuzenski v. Uproxx LLC*, No. 23-cv-945 (WLH) (AGR), 2023 U.S. Dist. LEXIS 211822, 2023 WL 8251590, at *5 (C.D. Cal. Nov. 27, 2023) ("[A] link to a video from Defendant's Website does not create a subscription relationship because any user can access the video on the Website"); *Alex*, 2023 U.S. Dist. LEXIS 172991, 2023 WL 6294260, at *4 ("Plaintiffs are no different than other visitors to the [] Websites as they did not gain access to exclusive content or receive extra benefits through their subscription").[9]

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9. Plaintiff cites two cases for the proposition that plaintiff's "Washington Examiner newsletter subscription places her within the class of video-content consumers that the VPPA protects," Pl.'s Opp'n at 20 (citing *Harris v. Pub. Broad. Serv.*, 662 F. Supp. 3d 1327, 1333 (N.D. Ga. 2023), and *Goldstein v. Fandango Media, LLC*, No. 22-cv-80569, 2023 U.S. Dist. LEXIS 71415, 2023 WL 3025111, at *4 (S.D. Fla. Mar. 7, 2023)), but these cases are factually distinguishable. In *Harris*, the plaintiff "registered for a PBS account" and received "'restricted content' in the form of newsletters and email updates," *Harris*, 662 F. Supp. 3d at 1332, but, in contrast here, plaintiff "does

not allege that she established an account or that she took any action that gave her privileged access to [] the videos," Def.'s Reply at 9. In *Goldstein*, plaintiffs "had downloaded the Fandango App on their phones to purchase movie tickets," but as plaintiff acknowledges, *see* Pl.'s Opp'n at 20, no decision was rendered on "whether Plaintiffs [were] 'consumers' as defined in the VPPA," upon finding the factual record insufficient to resolve that issue, *Goldstein*, 2023 U.S. Dist. LEXIS 71415, 2023 WL 3025111, at *4.

Though not cited by the parties, other decisions have found VPPA "subscriber" status adequately alleged where plaintiffs subscribed to a defendant's newsletter, consistent with plaintiff's position urged here. *See, e.g., Buechler v. Gannett Co. Inc.*, No. 22-cv-1464 (CFC), 2023 U.S. Dist. LEXIS 176817, 2023 WL 6389447, at *2 (D. Del. Oct. 2, 2023) (rejecting argument that "because Plaintiffs' purported [newsletter] 'subscription' bears no connection to the video content available on *The Tennessean* website, it does not fall within the VPPA's ambit" (citation omitted)); *Lebakken v. WebMD, LLC*, 640 F. Supp. 3d 1335, 1340 (N.D. Ga. 2022) (finding plaintiff a "subscriber" where she "exchanged her email address to receive the WebMD e-newsletter and [] also created her own WebMD account"). The reasoning of these decisions that a plaintiff's subscription to one part of defendant's business—a newsletter—may establish plaintiff's subscription to another business component, *i.e.*, defendant's website providing audio-visual content generally accessible without a newsletter subscription, is difficult to square with the VPPA's text requiring a "consumer" to be a "subscriber of goods or services," 18 U.S.C. § 2710(a)(1), obtained from a provider "engaged in the business . . . of rental, sale, or delivery of ... similar audio visual materials," *id.* § 2710(a)(4) This text, as explained *supra*, Part III.B, strongly indicates the necessity of "a factual nexus or relationship between the subscription provided by the defendant and the defendant's allegedly actionable video content," *Tawam*, 2023 U.S. Dist. LEXIS 154778, 2023 WL 5599007, at *5 (citations omitted). Thus, by contrast to plaintiff here, in cases where plaintiffs subscribed to or created an account for access to a defendant's website, providing access to videos

These allegations, without more, fall short of establishing that plaintiff's subscription to Washington Examiner's email newsletter—consisting of written text along with "hyperlinks to [] video content" and "embedded videos," Am. Compl. ¶ 15—made plaintiff a subscriber to Washington Examiner's "audio-visual goods or services," Pl.'s Opp'n at 19 (citation omitted), rather than merely a subscriber to its other, "predominantly written, not video, good or service" that fall "outside the purview of the VPPA," *Heather v. Healthline Media, Inc.*, No. 22-cv-5059 (JD), 2023 U.S. Dist. LEXIS 225991, 2023 WL 8788760, at *2 (N.D. Cal. Dec. 19, 2023); *see, e.g., Tawam*, 2023 U.S. Dist. LEXIS 154778, 2023 WL 5599007, at *5 (allegations that plaintiff "signed up for an email mailing list . . . and separately viewed videos on Defendant's website" "are not sufficient to plausibly support the existence of a nexus between the alleged subscription and the video content at issue"); *Gardener*, 2023 U.S. Dist. LEXIS 115810, 2023 WL 4365901, at *4-5 (similar).

By failing to link her newsletter subscription to the "viewing of [Washington Examiner's] video offerings," *Golden*, 2023 U.S. Dist. LEXIS 150622, 2023 WL 5434378,

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with Meta Pixel embedded, courts have found a connection between the provision of plaintiffs' PII and the "goods or services" plaintiffs consumed sufficient to support the conclusion that the plaintiffs qualify as VPPA "subscribers." S*ee, e.g., Ghanaat v. Numerade Labs, Inc.*, No. 4:23-cv--833 (YGR), 2023 U.S. Dist. LEXIS 157378, 2023 WL 5738391, at *5 (N.D. Cal. Aug. 28, 2023); *Jackson v. Fandom, Inc.*, No. 22-cv-4423 (JST), 2023 U.S. Dist. LEXIS 125531, 2023 WL 4670285, at *3-4 (N.D. Cal. July 20, 2023).

at *11, or to allege that the "subscription allowed [] access to the videos on the [Washington Examiner] site that any member of the public would not otherwise have," *Salazar*, 2023 U.S. Dist. LEXIS 137982, 2023 WL 5016968, at *9 (citations omitted), plaintiff has alleged only that she was a subscriber to Washington Examiner's newsletter, not to "audio-visual goods or services" provided by Washington Examiner, Pl.'s Opp'n at 19 (quoting *Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *6). This is insufficient to make plaintiff a "'consumer' . . . of goods or services from a video tape service provider" entitled to bring a cause of action under the VPPA. 18 U.S.C. § 2710(a)(1).[10]

10. Plaintiff requests an opportunity to amend her complaint a second time in the event "any deficiencies" are found. Pl.'s Opp'n at 24 n.6. To be sure, courts "should freely give leave when justice so requires," FED. R. CIV. P. 15(a)(2), but "Rule 15(a)—even as liberally construed—applies only when the plaintiff actually has moved for leave to amend the complaint; absent a motion, there is nothing to be freely given," *Schmidt v. United States*, 749 F.3d 1064, 1069, 409 U.S. App. D.C. 339 (D.C. Cir. 2014) (quoting *Belizan v. Hershon*, 434 F.3d 579, 582, 369 U.S. App. D.C. 160 (D.C. Cir. 2006)); *see also* Def.'s Reply at 14. Without a motion for leave to amend, plaintiff's VPPA claim must be dismissed. Defendant urges that dismissal with prejudice is warranted, *see* Def.'s Reply at 15, because "plaintiff could not possibly cure the deficiency by alleging new or additional facts," *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 936, 430 U.S. App. D.C. 353 (D.C. Cir. 2017) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209, 316 U.S. App. D.C. 152 (D.C. Cir. 1996) (quotation marks omitted)), but that conclusion seems premature on this record and therefore dismissal is without prejudice.

IV. CONCLUSION

For the reasons stated above, plaintiff's Amended Complaint is dismissed, without prejudice, for failure to state a claim.

An order consistent with this Memorandum Opinion will be filed contemporaneously.

Date: January 29, 2024

/s/ Beryl A. Howell
BERYL A. HOWELL
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-7022

September Term, 2025
1:23-cv-00345-BAH

Filed On: September 30, 2025

NICOLE PILEGGI, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Appellant,

v.

WASHINGTON NEWSPAPER PUBLISHING COMPANY, LLC,

Appellee.

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Randolph, Senior Circuit Judge

Appendix C

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX D — 18 U.S.C. § 2710

18 U.S.C. § 2710

§ 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.

Appendix D

(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.

APPENDIX E — PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MAY 5, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:23-cv-00345-BAH

NICOLE PILEGGI
3022 Euclid Avenue
Berwyn, Illinois 60402,

individually and on behalf of others similarly situated,

Plaintiff,

v.

WASHINGTON NEWSPAPER PUBLISHING COMPANY, LLC
1152 15th Street, NW
Suite 200
Washington, DC 20005-1799

Defendant.

PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff Nicole Pileggi files this First Amended Class Action Complaint against Defendant Washington Newspaper Publishing Company, LLC ("Washington Examiner"). Through its website, Washington Examiner

is sharing consumers' private video viewing information without obtaining the legally required consent. Plaintiff accordingly brings this action to recover damages on behalf of herself and all similarly situated individuals under the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA").

Introduction

1. The VPPA protects consumers' privacy when they buy, rent, or subscribe to video content. In passing the VPPA, Congress recognized that the choice of what video content to watch, like the choice of which books to read, bears on important intellectual privacy interests. Like the rights of free speech and free association protected by the First Amendment, the VPPA's statutory privacy rights protect individuals' interests in determining their own opinions and affiliations.

2. First passed in the wake of public disclosures of then-Supreme-Court nominee Robert Bork's private video rentals, the VPPA protects information "which identifies a person as having requested or obtained specific video materials or services." 18 U.S.C. § 2710(a)(3). To enforce consumers' rights to keep their video viewing histories private, Congress created a civil cause of action against any video content provider who knowingly discloses consumers' personally identifying information. 18 U.S.C. § 2710(b). Remedies for violating the statute include actual damages, punitive damages, and/or liquidated damages of not less than $2,500.

3. Courts have recognized that the VPPA, although passed in 1988 in the age of physical video cassette tape rentals, continues to apply with equal force in the online video streaming age. Because Congress defined "video tape service provider" broadly "to ensure that VPPA's protections would retain their force even as technologies evolve,"[1] companies that deliver videos online to subscribers are equally subject to its strictures.

4. Washington Examiner is a conservative media company which, along with publishing internet news articles and a weekly magazine, delivers online video content to consumers on its website. These consumers include both persons who choose to subscribe to Washington Examiner's free email newsletter and paid digital subscribers.

5. When consumers visit Washington Examiner's website, they can choose to visit pages with videos they find relevant or interesting and stream the videos, which are featured prominently above related articles and at least often set to play automatically without user input, using their internet browsers. These videos include politically charged content, usually with a conservative bent. Unbeknownst to the consumers, however, their video viewing is not private.

6. In violation of the VPPA, since at least 2020, Washington Examiner has partnered with Meta

1. *In re Hulu Privacy Litig.*, No. 11-cv-03764, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012).

Platforms, Inc. ("Meta") and its "Facebook" social media platform to collect personally identifiable information each time a consumer views a video on Washington Examiner's website. Simultaneously, as soon as a consumer decides to visit a video page on Washington Examiner's website, a tiny, invisible piece of computer code called the "Meta Pixel" collects the page's address, including the video's title, and sends the information directly to Facebook, together with a digital ID that allows Facebook to match the information to the consumer's Facebook profile and all of the other information Facebook may have about that consumer's demographics, affiliations, and tastes.

7. Washington Examiner benefits from this unauthorized disclosure by receiving enhanced analytics and advertising services, and Meta benefits by adding consumers' valuable information to its marketing databases, which it can then use to sell targeted advertisements. The only losers are the unwitting consumers. Without even realizing what is happening, they have valuable information about their opinions, tastes, affiliations, and private media consumption appropriated to fuel Facebook's multi-billion dollar advertising machine. Plaintiff brings this action to vindicate these consumers' rights.

Parties

8. Plaintiff Nicole Pileggi is an individual who during the relevant time period resided in Cook County, Illinois.

9. Defendant Washington Newspaper Publishing Company, LLC ("Washington Examiner") is a Delaware

LLC that does business in the District of Columbia, with its principal place of business at 1152 15th St. NW, Suite 200, Washington, DC 20005-1799. It may be served by service of process on its registered agent CT Corporation System 4701 Cox Road, Suite 285, Glen Allen, Virginia 23060-6808.

Jurisdiction and Venue

10. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because Plaintiff brings claims under the federal Video Privacy Protection Act, 18 U.S.C. § 2710.

11. The 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 Class exceeds $5 million, and at least one member of the Class is a citizen of a state different from the Defendant's state of citizenship.

12. The Court has jurisdiction over Washington Examiner, and the venue is proper under 28 U.S.C. § 1391(b), because Defendant does business in and is subject to personal jurisdiction in this district and because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in the District of Columbia.

Statement of Facts

13. Plaintiff Nicole Pileggi takes a keen interest in politics. She regularly reads books and internet articles and watches video content about political topics. Since approximately 2016, she has been a regular visitor

to Washington Examiner's website at https://www.washingtonexaminer.com/. Ms. Pileggi's choices regarding the political media content she consumes are personal and not rightly the concern of anyone but herself and those with whom she chooses to share such information.

14. Ms. Pileggi subscribed to Washington Examiner's newsletter. In order to subscribe, Ms. Pileggi was required to provide Washington Examiner with her personal information, including her email address and ZIP code.

15. Washington Examiner's newsletter regularly included information about audio visual materials on Washington Examiner's website and hyperlinks to this video content. The newsletters also contained embedded videos.

16. Ms. Pileggi has also had a Facebook account from approximately 2017 to the present.

17. Ms. Pileggi has visited the Washington Examiner website and watched videos on the site since at least 2018. When she clicked on pages containing videos, the videos were generally displayed at the top of the page, above the text of any article, and the videos began to play automatically, without Ms. Pileggi being required to click or take any other action to initiate playback.

18. The videos Ms. Pileggi watched on the Washington Examiner website concerned political topics, including controversial issues and opinions that are unpopular among certain people with more liberal political views.

19. Ms. Pileggi never consented to any sharing of her personal information or video watching history with any third party.

20. Notwithstanding her lack of consent and unbeknownst to her, Washington Examiner sent information regarding Ms. Pileggi's activity on Washington Examiner's site to Facebook on at least 24 occasions.

21. The private information Washington Examiner disclosed allowed Facebook to identify Ms. Pileggi and learn the internet addresses or universal resource locators ("URLs") of the pages she had visited on The Washington Examiner. These URLs included the titles of videos Ms. Pileggi had watched.

22. As a result of Washington Examiner's unauthorized disclosure of her video watching history, Ms. Pileggi has suffered harm to her privacy interests and has been deprived of the economic value of her private information.

23. Ms. Pileggi did not discover that Washington Examiner had disclosed her private video watching information to Facebook until 2022.

24. Ms. Pileggi continues to desire to watch videos on Washington Examiner's website. She will continue to suffer harm if the website is not redesigned. If the website were redesigned to comply with the VPPA, she would use the Washington Examiner site to view videos in the future.

Appendix E

Class Allegations

A. The VPPA protects Americans from unauthorized disclosure of their video viewing history.

25. Congress passed the VPPA in response to a newspaper profile of then-Supreme Court nominee Judge Robert H. Bork, containing a list of 146 films that Judge Bork and his family had rented from a video store. *See Yershov v. Gannett Satellite Info. Network*, Inc., 820 F.3d 482, 485 (1st Cir. 2016). The VPPA prohibits any disclosure of video records without the watcher's informed, written consent. Concerned that video watching history could be used to discover an individual's private tastes, affiliations, and opinions, Congress prohibited any "video tape service provider" from knowingly disclosing consumers' personally identifiable information to "any person." 18 U.S.C. § 2710(b).

26. Under the VPPA, consumers who view video content have the right to keep their identities and video viewing histories private. To enforce this right, Congress created a civil cause of action allowing consumers to recover actual damages, liquidated damages not less than $2,500, punitive damages, attorney's fees, and equitable relief for VPPA violations. 18 U.S.C. § 2710(c).

27. The VPPA's legislative history notes that its authors were particularly concerned with protecting video-watching information because choosing what videos to watch is a core component of each person's intellectual privacy:

> There's a gut feeling that people ought to be able to read books and watch films without the whole world knowing. Books and films are the intellectual vitamins that fuel the growth of individual thought. The whole process of intellectual growth is one of privacy—of quiet, and reflection. This intimate process should be protected from the disruptive intrusion of a roving eye.

S. Rep. No. 100-599 (1988).

28. With remarkable prescience, Congress foresaw in 1988 that computer technology would create dangerous new privacy threats:

> The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide to businesses and others personal information without having any control over where that information goes.... These records are a window into our loves, likes, and dislikes.

S. Rep. No. 100-599 (statement of Sen. Simon). Anticipating the consumer marketing databases that are so prevalent in the 21st century, Senator Leahy warned against "information pools" and the new privacy threat they posed. *Id.* (statement of Sen. Leahy). He noted 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." *Id.*

29. Congress was particularly concerned with protecting the privacy of expressive activities, like choosing what video content to watch, because these activities implicate First Amendment rights and "directly affect the ability of people to express their opinions to join in association with others, and to enjoy the freedom and independence that the Constitution was established to safeguard." S. Rep. No. 100-599 (statement of Sen. Leahy).

30. Consistent with Congress's privacy-protection goals, the VPPA defines "video tape service provider" broadly to encompass "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). By adding "or similar audio visual materials," Congress ensured that this definition, despite having been drafted in the days of brick-and-mortar video cassette rental stores, continues to be just as vital now that video providers more often deliver audio visual materials by other means, such as by streaming online video. See In re Hulu Privacy Litig., No. 11-cv-03764, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012) (holding that "Congress used 'similar audio video materials' to ensure that VPPA's protections would retain their force even as technologies evolve").

Appendix E

B. Washington Examiner is subject to the VPPA.

31. Washington Examiner is a conservative media company that operates a news website and publishes a weekly magazine. Washington Examiner offers a wide variety of video content on its website. For example:

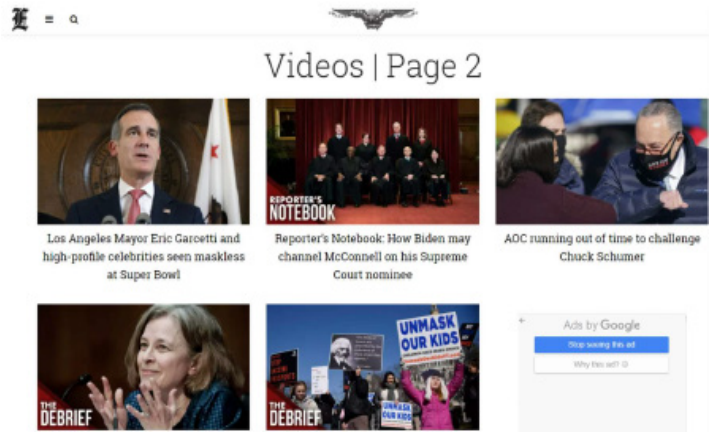

Figure 1: Washington Examiner Website Videos

32. Video content is important to Washington Examiner's business. Video advertising is seen by advertisers as more effective than static display advertising and, as a result, commands a premium price.

33. Because it regularly engages in the business of delivering video services over the internet, Washington Examiner is a "videotape service provider" subject to the VPPA. Much of this content concerns opinions that may be controversial or unpopular with people who hold

more liberal views. The views expressed in these videos bear on individuals' First Amendment rights to freedom of association and freedom of speech.

34. Washington Examiner's website invites consumers to subscribe to its content by signing up for its newsletter and/or paying for digital subscriptions. Both newsletter and paid digital subscribers must provide personal information, including their email addresses and ZIP codes. Paid digital subscribers must also provide their full names, addresses, and telephone numbers.

Figure 2: Newsletter Subscribers Must Provide Their Email Addresses and ZIP Codes

35. Both newsletter and paid digital subscribers are "consumers" under the VPPA, because they provided personally identifiable information to Washington Examiner and requested that Washington Examiner send them content on a regular basis.

36. Unbeknownst to the subscribers, Washington Examiner has knowingly deployed computer code on its website which tracks and reports their video watching history to third parties, including Facebook, the social media and advertising platform operated by Meta. Washington Examiner knew that by embedding the Meta Pixel on its website, it was allowing Facebook to collect and use its subscribers' private video viewing information when those subscribers requested or obtained videos on Washington Examiner's website.

37. This computer code, called a "tracking pixel" occupies only a single 1x1 pixel on a user's screen and is purposely designed to be invisible to users. The tracking pixel is a kind of analytics tool which allows website owners to track visitors' actions on their websites and measure the effectiveness of their advertising. Tracking pixels can collect interactions website visitors have with the site, including searches, form entries, and URLs viewed. Facebook's tracking pixel, called the "Meta Pixel," not only tracks and logs such website activity, but also sends it to Facebook, along with Internet Protocol ("IP") addresses, Facebook ID's, and other information that allows Facebook to identify the specific individual visiting the tracked website.

C. Facebook's Meta Pixel tool allows Facebook to track the personal data of individuals across a broad range of third-party websites.

38. Facebook, a social media platform founded in 2004 and today operated by Meta Platforms, Inc., was originally designed as a social networking website for college students.

39. Facebook describes itself as a "real identity" platform. Sam Schechner & Bruce Horowitz, *How Many Users Does Facebook Have? The Company Struggles to Figure It Out*, The Wall Street Journal, Oct. 21, 2021, https://www.wsj.com/articles/how-many-users-doesfacebook-have-the-company-struggles-to-figure-it-out-11634846701 (last visited May 4, 2023). This means that users are permitted only one account and must share "the name they go by in everyday life." Meta, *Account Integrity and Authentic Identity*, https://transparency.fb.com/ policies/community-standards/account-integrity-and-authentic-identity/ (last visited May 4, 2023). To that end, Facebook requires users to provide their first and last names, along with their birthdays, telephone numbers and/or email addresses, and genders, when creating an account. Facebook, *Signing Up*, https://www.facebook.com/help/406644739431633 (last visited May 4, 2023).

40. In 2007, realizing the value of having direct access to millions of consumers, Facebook began monetizing its platform by launching "Facebook Ads," proclaiming this service to be a "completely new way of advertising online," that would allow "advertisers to

deliver more tailored and relevant ads." Meta, *Facebook Unveils Facebook Ads*, (Nov. 6, 2007) https://about.fb.com/news/2007/11/facebook-unveils-facebook-ads/ (last visited May 4, 2023). Facebook has since evolved into one of the largest advertising companies in the world. John Gramlich, 10 Facts About Americans and Facebook. PEW RESEARCH CENTER (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/ (last visited May 4, 2023). Facebook can target users so effectively because it surveils user activity both on and off its website through the use of tracking pixels. Meta, *About Meta Pixel*, https://www.facebook.com/business/help/742478679120153?id=1205376682832142 (last visited May 4, 2023).This allows Facebook to make inferences about users based on their interests, behavior, and connections. Meta, *Audience Ad Targeting: How to Find People Most Likely to Respond to Your Ad*, https://www.facebook.com/business/ads/ad-targeting (last visited May 4, 2023).

41. Today, Facebook provides advertising on its own social media platforms, as well as other websites through its Facebook Audience Network. Facebook has more than 2.9 billion users. Statistica, *Number of monthly active Facebook users worldwide*, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-usersworldwide/ (last visited May 4,2023).

42. Facebook maintains profiles on users that include users' real names, locations, email addresses, friends, likes, and communications. These profiles are associated with personal identifiers, including IP addresses, cookies, and other device identifiers. Facebook also tracks non-

users across the web through its internet marketing products and source code.

43. Facebook offers several advertising options based on the type of audience that an advertiser wants to target. Those options include targeting "Core Audiences," "Custom Audiences," "Look Alike Audiences," and even more granulated approaches within audiences called "Detailed Targeting." Each of Facebook's advertising tools allows an advertiser to target users based on, among other things, their personal data, including geographic location, demographics (*e.g.*, age, gender, education, job title, etc.), interests, (*e.g.*, preferred food, movies), connections (*e.g.*, particular events or Facebook pages), and behaviors (*e.g.*, purchases, device usage, and pages visited). This audience can be created by Facebook, the advertiser, or both working in conjunction.

44. Ad Targeting has been extremely successful due to Facebook's ability to target individuals at a granular level. For example, among many possible target audiences, "Facebook offers advertisers 1.5 million people 'whose activity on Facebook suggests that they're more likely to engage with/distribute liberal political content' and nearly seven million Facebook users who 'prefer high-value goods in Mexico.'" Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, New York Times (Apr. 11, 2018), https://www.nytimes.com/ 2018/04/11/ technology/facebook-privacy-hearings.html (last visited May 4, 2023). Aided by highly granular data used to target specific users, Facebook's advertising segment quickly became Facebook's most successful business unit, with

millions of companies and individuals utilizing Facebook's advertising services.

45. To power its advertising business, Facebook uses a variety of tracking tools to collect data about individuals, which it can then share with advertisers. The Meta Pixel that Washington Examiner used on its website is one of Facebook's most powerful tools.

46. The Meta Pixel is a snippet of code that, when embedded on a third-party website, tracks users' activities as users navigate through the website. Meta for Developers, *Meta Pixel*, https://developers.facebook.com/docs/meta-pixel/ (last visited May 4, 2023). Once activated, the Meta Pixel "tracks the people and type of actions they take." Meta, *Retargeting: Inspire people to rediscover what they love about your business*, https://www.facebook.com/business/goals/retargeting (last visited May 4, 2023). Meta Pixel can track and log each page users visit, what buttons they click, as well as specific information that users input into a website. Meta, *About Meta Pixel*, https://www.facebook.com/business/help/ 742478679120153?id=1205376682832142 (last visited May 4, 2023). The analytics provided by the Meta Pixel tool allow website developers to improve "website operability" by giving developers insight into how customers use and interact with companies' websites. Annie Burky, *Advocate Aurora says 3M patients' health data possibly exposed through tracking technologies* (Oct. 20, 2022), https://www.fiercehealthcare.com/health-tech/advocate-aurora-health-databreach-revealed-pixels-protected-health-information-3 (last visited May 4, 2023).

47. In connection with the Meta Pixel, Facebook also places "cookies" on visitors' computers. Cookies are small text files that web servers can place on a user's computer when the user's internet browser interacts with a website server. Cookies are designed to help website owners and third parties identify individual website visitors. Facebook's "c_user" cookie contains the individual's Facebook ID, which allows Facebook (or anyone) to identify the Facebook account associated with the cookie.

48. The Facebook ID is a short, unique string of numbers assigned to each user by Facebook. Anyone who has access to the Facebook ID can use this identifier to quickly and easily locate, access, and view a user's corresponding Facebook profile. One simply needs to log into Facebook and then type "www.facebook.com/#," with the Facebook ID in place of the "#." For example, the Facebook ID for Mark Zuckerberg is 4. Logging into Facebook and typing "www.facebook.com/4" in any web browser retrieves Mark Zuckerberg's Facebook page: www.facebook.com/zuck (last visited May 4, 2023).

49. Facebook warns web developers that its Pixel is a personal identifier because it enables Facebook "to match your website visitors to their respective Facebook User accounts." Meta for Developers, *Get Started*, https://developers.facebook.com/docs/meta-pixel/get-started (last visited May 4, 2023). When Meta Pixel is incorporated on a website, it can log what searches users perform, which items they click on, which pages they view, and any other actions users take on the site. In the case of the Washington Examiner, the URLs sent to Facebook identifying the pages consumers viewed also included the word "video," showing that the page contained a

video, as well as the title of the video. Along with this data, Facebook collects identifying information like IP addresses, Facebook IDs, and other data that allow Facebook to identify users. Meta Pixel tracks this data regardless of whether a user is logged into Facebook. Grace Oldham & Dhruv Mehrotra, *Facebook and Anti-Abortion Clinics Are Collecting Highly Sensitive Info on Would-Be Patients*, THE MARKUP (June 15, 2022), https://themarkup.org/pixelhunt/ 2022/06/15/ facebook-and-anti-abortion-clinics-are-collecting-highly-sensitive-info-on-would-be-patients (last visited May 4, 2023).

50. Meta Pixel takes the information it harvests and sends it to Facebook. Facebook uses the Facebook ID not only to readily identify individuals, but also to retrieve all of the other information Facebook has regarding that individual, including his or her friends, likes and dislikes, other websites visited, and demographic profile. Facebook then shares analytic metrics with the website host. Facebook also processes and analyzes the information to assimilate it into datasets like Facebook's Core Audiences and Custom Audiences. The consumers' information then becomes available for Facebook's advertisers to use when Facebook sells them targeted advertising services.

51. Facebook stores this information on its servers, and, in some instances, maintains this information for years. See Todd Feathers et al., *Facebook is Receiving Sensitive Medical Information from Hospital Websites*, THE MARKUP (June 16, 2022), https://themarkup.org/pixelhunt/ 2022/06/16/facebook-is-receiving-sensitive-medical-information-from-hospital-websites (last visited May 4, 2023).

D. Washington Examiner knowingly collected subscribers' video viewing information and disclosed this information to Facebook without consent.

52. Tracking pixels are not necessary to a website's function. They do not enhance the users' experience, but rather solely benefit website owners and their third-party partners by providing them with valuable analytics and information that can be sold to advertisers. To obtain the code for the pixel, a website owner must contact Facebook and tell Facebook what kind of events the site wants to track, such as pages or videos viewed. Facebook then returns the pixel code for the site administrator to embed into the website.

53. Washington Examiner, following Facebook's instructions, has embedded Facebook's Meta Pixel code throughout its website. Washington Examiner thus knowingly embedded the Meta Pixel on its website understanding that it would cause consumers' personally identifiable information to be sent to Facebook, including on the website pages subscribers used to view video content, together with the fact that the page contained a video and the title of that video.

54. A third-party website like Washington Examiner that chooses to incorporate the Meta Pixel benefits from the ability to analyze a user's experience and activity on the website to assess the website's functionality and traffic. The third-party website also gains information from its customers through Meta Pixel that can be used to target them with advertisements, as well as to measure the results of advertising efforts.

Appendix E

55. Facebook provides websites using Meta Pixel with the data it captures in the "Meta Pixel page" in Events Manager, as well as tools and analytics to reach these individuals through future Facebook ads. Meta, *About Meta Pixel*, https://www.facebook.com/business/help/ 742478679120153?id=1205376682832142 (last visited May 4, 2023). For example, websites can use this data to create "custom audiences" to target the specific Facebook user, as well as other Facebook users who match "custom audience's" criteria. Meta for Developers, *Custom Audience*, https://developers.facebook.com/docs/marketing-api/reference/custom-audience/ (last visited May 4, 2023). Businesses that use Meta Pixel can also search through Meta Pixel data to find specific types of users to target, such as men over a certain age. In essence, these businesses, like Washington Examiner, have chosen to barter their users' private information for access to Facebook's most advanced advertising tools.

56. Washington Examiner chose to configure the Meta Pixel in such a way and intended that Facebook receive the URL of each page consumers, including its newsletter and paid digital subscribers, visited, including information indicating that the page contained a video and the title of that video, together with the consumer's Facebook ID. Washington Examiner thus knew that by installing the Meta Pixel, it was disclosing personally identifiable information to Facebook. Because Washington Examiner chose to use the Meta Pixel, whenever Class members visited pages on Washington Examiner's website to view videos, the website's code automatically, simultaneously, and without Class members' knowledge or consent, caused their personally identifiable information,

including the titles of the videos they requested or obtained, to be disclosed to Facebook.

57. For example, the screenshot below shows information sent by Washington Examiner's website to Facebook. To protect privacy, the individual's Facebook ID (the contents of the "c_user cookie" highlighted in the first red box) has been redacted:

Figure 3: Washington Examiner Sends Facebook ID and Title of Video Watched to Facebook

58. As shown in Figure 3, the information sent to Facebook shows that the individual requested and obtained a webpage containing a video and included the title of that video. See 18 U.S.C. § 2710 (prohibiting disclosure of information identifying person as having "requested or obtained specific video materials or services"). While the VPPA does not require that the individual must also

be identified as having actually watched the video in order for liability to attach, it is notable that the archived version of this website shows that the video was embedded prominently at the top of the page and that it played automatically, without the individual being required to click or take any other action to initiate playback.[2]

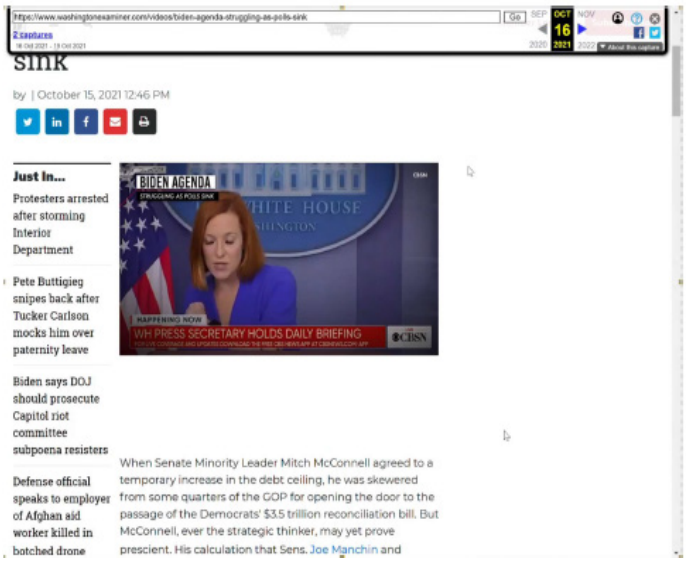

Figure 4: Archived Page Showing Automatic Video Playback, Biden Agenda Struggling as Polls Sink, Internet Archive Wayback Machine (April 27, 2023) https://www.washingtonexaminer.com/videos/biden-agenda-struggling-as-polls-sink (attached as Ex. A)

2. The video referenced in Figure 4 is attached as Exhibit A to this First Amended Complaint. Because the .pdf format of this pleading does not support video playback, Plaintiff is also filing and serving a DVD containing a playable video version of Exhibit A. Please note that the archived version of this video did not include audio.

59. Washington Examiner could easily redesign its website to provide all of the services its subscribers use and enjoy without disclosing this private information to Facebook. Washington Examiner's use of the Meta Pixel does not enhance subscribers' experience on the website, but is instead a deliberate decision by Washington Examiner to benefit itself at the expense of subscribers' privacy.

60. At no point did subscribers consent to the sharing of this information, nor were they even informed that their video viewing information was being shared with Facebook.

61. This disclosure was not incident to Washington Examiner's ordinary course of business, because it did not occur as part of Washington Examiner's debt collection activities, order fulfillment, request processing, or a transfer of ownership. See 18 U.S.C. § 2710(a)(2).

62. Washington Examiner thus knowingly and without Plaintiff's and the Class members' consent disclosed their video watching history and personally identifying information to third parties in violation of the VPPA.

E. Washington Examiner's unauthorized disclosures harmed Class members' privacy and deprived them of the value of their personal information.

63. This unauthorized disclosure of Plaintiff's and the Class members' personally identifiable information and video watching history violated their privacy interests, which Congress sought to protect by enacting the VPPA.

64. The private information Washington Examiner disclosed also has economic value. As *The Economist* recognized in 2017, the "world's most valuable resource is no longer oil, but data." *The World's Most Valuable Resource Is No Longer Oil, But Data*, The Economist (May 6, 2017), https://www.economist.com/leaders/2017/05/06/theworlds-most-valuable-resource-isno-longeroil-but-data (last visited May 4, 2023). In 2013, the *Financial Times* reported that the data-broker industry profits from the trade of thousands of details about individuals, and that within that context, "age, gender and location information" were being sold for approximately "$0.50 per 1,000 people." Emily Steel, et al., *How much is your personal data worth?*, Financial Times (June 12, 2013), https://ig.ft.com/how-much-is-your-personal-data-worth/ (last visited May 4, 2023). In 2015, *TechCrunch* reported that "Data has become a strategic asset that allows companies to acquire or maintain a competitive edge" and that the value of a single user's data can vary from $15 to more than $40 per user. Pauline Glikman & Nicolas Glady, *What's the Value of Your Data?*, TechCrunch (Oct. 13, 2015), https://techcrunch.com/2015/10/13/whatsthe-value-of-your-data/ (last visited May 4, 2023).

65. Further, individuals can sell or monetize their own data if they so choose. For example, Facebook has offered to pay individuals for their voice recordings[3] and has paid teenagers and adults up to $20 a month plus referral fees

3. Jay Peters, *Facebook will now pay for your voice recordings*, The Verge (Feb. 20, 2020), https://www.theverge.com/2020/2/20/21145584/facebook-pay-record-voice-speech-recognitionviewpoints-prounciations-app (last visited May 4, 2023).

to install an app that allows Facebook to collect data on how individuals use their smart phones. Saheli Chaudhry & Ryan Brown, *Facebook pays teens to install an app that could collect all kinds of data*, CNBC (Jan. 29, 2019), https://www.cnbc.com/2019/01/29/facebook-paying-users-to-install-app-to-collect-datatechcrunch. html (last visited May 4, 2023). A myriad of other companies and apps such as DataCoup, Nielsen Computer, Killi, and UpVoice also offer consumers money in exchange for access to their personal data. Sam Hawrylack, *Apps That Pay You for Data Collection*, CreditDonkey (June 12, 2021), *https://www.creditdonkey.com/best-apps-data-collection.html*, (last visited May 4, 2023); *see also* Illia Lahunou, *Can You Earn Money From Your Data? Yes, You Can. And Here's How!*, Monetha, *https://www.monetha.io/blog/rewards/earn-money-fromyour-data* (last visited May 4, 2023).

66. In a 2021 Washington Post article, the legal scholar Dina Srinivasan said that consumers "should think of Facebook's cost as [their] data and scrutinize the power it has to set its own price." Geoffrey Fowler, *There's no escape from Facebook, even if you don't use it*, The Washington Post (Aug. 20, 2021), https://www.washingtonpost.com/technology/2021/08/29/facebook-privacy-monopoly/ (last visited May 4, 2023). This price is only increasing. According to Facebook's own financial statements, the value of the average American's data in advertising sales rose from $19 to $164 per year between 2013 and 2020. *Id.*

67. In exchange for disclosing private information about its subscribers, Washington Examiner is compensated

by Facebook with enhanced online advertising services, including but not limited to retargeting and enhanced analytics functions.

68. Washington Examiner also monetizes this information by selling to advertisers the opportunity to market to its subscribers. In a 2021 Media Kit, Washington Examiner promoted itself to advertisers, touting that its website received 22 million unique visitors per month and served 20 million monthly video streams.

Figure 5: Washington Examiner Promotes Itself to Advertisers

69. By disclosing this valuable information without Plaintiff's and the Class members' consent, Washington Examiner has deprived them of the economic value of their private video watching history. Many Class members, however, may not know that their privacy has been violated or may not have the ability to hire counsel and pursue their own claims. Plaintiff therefore brings this action on behalf of the Class to stop Washington Examiner's privacy violations and recover compensation for Class members.

F. The Class

70. Plaintiff brings this action on her own behalf and as a class action pursuant to Federal Rule of Civil Procedure 23 for the following Class:

> All Facebook account holders in the United States who subscribed to Washington Examiner's newsletter and/or paid digital subscription and viewed video content on the Washington Examiner website from February 7, 2021 to the present.

Excluded from the Class are any employees, officers, or directors of Washington Newspaper Publishing Company, LLC, any attorneys appearing in this case, and any judges or jurors assigned to hear this case as well as their immediate family and staff.

71. **Ascertainability**. The Class is ascertainable in that it is comprised of individuals who can be identified

by reference to purely objective criteria, including information from Washington Examiner's and Facebook/Meta's business records. Notice may be mailed to Class members using the information in Washington Examiner's files, as updated through the National Change of Address Registry and other commercially available means.

72. **Numerosity. Fed. R. Civ. P. 23(a)(1)**. The Class is so numerous that joinder of all members is impracticable. Although the precise number of Class members is not currently known, the fact that Washington Examiner has more than 22 million unique visitors and 20 million monthly video streams shows that the Class likely consists of at least thousands of persons and, therefore, it would be impracticable to bring all these persons before the Court as individual plaintiffs.

73. **Typicality**. **Fed. R. Civ. P. 23(a)(3)**. Plaintiff's claims are typical of each member of the Class she seeks to represent. These claims all arise from the same operative facts and are based on the same legal theories.

74. **Adequacy of Representation**. **Fed. R. Civ. P. 23(a)(4)**. Plaintiff will fairly and adequately protect the interest of the Class. Plaintiff is committed to vigorously litigating this matter, and her interests are aligned with those of the Class. Plaintiff has retained counsel experienced in handling consumer privacy class actions.

75. **Commonality and Predominance**. **Fed. R. Civ. P. 23(a)(2) & (b)(3)**. Common issues of law and fact exist regarding Plaintiff's and the Class members' claims and

predominate over any individual issues. These common issues include:

(a) Whether Washington Examiner disclosed Class members' personally identifiable information to a third party;

(b) Whether Washington Examiner's disclosures of personally identifiable information were knowing;

(c) Whether Class members consented to Washington Examiner's disclosures of their personally identifiable information;

(d) Whether the Class is entitled to damages; and

(e) Whether injunctive relief is appropriate to prevent further illegal disclosures of personally identifiable information.

76. **Superiority. Fed. R. Civ. P. 23(b)(3).** A class action is a superior method for the fair and efficient adjudication of this controversy. Class members' interests in individually controlling the prosecution of separate claims against Washington Examiner is small, as the maximum statutory damages recoverable by any one Class member is limited to $2,500 under the VPPA. Management of the Class's claims in a single proceeding will avoid inconsistent judgments and result in a more efficient use of judicial resources than resolving these same issues in many individual actions.

77. **Injunctive Relief Appropriate to the Class. Fed. R. Civ. P. 23(b)(2).** This action should also be maintained as a class action because Washington Examiner has acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole.

Claim

Count One – Video Privacy Protection Act, 18 U.S.C. § 2710

(On behalf of the Class)

78. Plaintiff incorporates the preceding paragraphs as though fully set forth here.

79. Defendant Washington Examiner is a "video tape service provider" as defined in 18 U.S.C. § 2710(a)(4) because it engaged in the business of delivering audio visual materials similar to prerecorded video cassette tapes in interstate commerce.

80. Plaintiff and the Class members are consumers under the VPPA, 18 U.S.C. § 2710(a)(1), because they subscribed to Washington Examiner's services.

81. Washington Examiner knowingly disclosed personally identifiable information which identified Plaintiff and the Class members as having requested or obtained specific video materials and/or services from Washington Examiner to a third party, Meta Platforms, Inc., without their consent.

82. By disclosing Plaintiff's and the Class members' personally identifiable information, Washington Examiner violated their statutorily protected privacy rights and deprived them of the value of their private information.

83. As a result of these violations, Washington Examiner is liable to Plaintiff and the Class members for liquidated damages not less than $2,500 per person, as well as punitive damages, costs, and attorney's fees.

84. Injunctive relief and declaratory relief is also appropriate to prevent Washington Examiner from continuing its illegal conduct.

Conclusion and Prayer

WHEREFORE, Plaintiff, individually and on behalf the Class, respectfully requests that the Court enter judgment ordering relief as follows:

(a) certifying the Class pursuant to Federal Rule of Civil Procedure 23(b)(3) and/or (b)(2);

(b) appointing Plaintiff to represent the Class;

(c) appointing Plaintiff's counsel as Class Counsel;

(d) declaring that Washington Examiner is financially responsible for notifying all Class members about this suit;

(e) enjoining Washington Examiner from further violations of the Video Privacy Protection Act;

(f) awarding Plaintiff and the Class members liquidated damages of not less than $2,500 each and punitive damages pursuant to 18 U.S.C. § 2710(c)(2);

(g) awarding Plaintiff and the Class members reasonable attorneys' fees, expenses, and costs of suit, pursuant to 18 U.S.C. § 2710 (c)(2), the common fund theory, or any other applicable statute, theory, or contract;

(h) granting leave to amend the Complaint to conform to the evidence produced at trial; and

(i) awarding such other relief as this Court may deem just and proper.

Appendix E

Demand for Jury Trial

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury on all claims so triable.

Dated: May 5, 2023

Respectfully submitted,

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