No. 25-1040

IN THE
Supreme Court of the United States

NICOLE PILEGGI,
Petitioner,

v.

THE 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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that, to bring a claim under the Video Privacy Protection Act of 1988, a plaintiff must allege that she purchased, rented, or subscribed to a video cassette tape or similar audio-visual good or service from a video tape service provider.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent The Washington Newspaper Publishing Company, LLC states the following:

The Washington Newspaper Publishing Company, LLC is a wholly owned subsidiary of Clarity Media Group, Inc., which in turn is a wholly owned subsidiary of The Anschutz Corporation. No publicly held corporation owns 10 percent or more stock in The Anschutz Corporation, Clarity Media Group, Inc., or The Washington Newspaper Publishing Company, LLC.

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INTRODUCTION

Nicole Pileggi alleges that, because she agreed to receive free email newsletters from the *Washington Examiner*, the federal Video Privacy Protection Act of 1988 ("VPPA") safeguarded her when she visited *Washington Examiner* website pages containing short videos. She alleges further that the *Washington Examiner* violated that Act because code on those webpages (a tracking pixel) told Facebook that she visited them. The court of appeals below, like the Sixth Circuit in *Salazar v. Paramount Global*, 133 F.4th 642 (6th Cir. 2025), *cert. granted*, No. 25-459 (U.S. Jan. 26, 2026), and dozens of district courts around the country, rejected this attempt to transform the Act into a general internet privacy statute. The D.C. Circuit correctly affirmed the dismissal of her claim because, even read in the light most favorable to her, the Amended Complaint alleged no connection between the free email newsletters she received and the website videos the *Washington Examiner* allegedly disclosed in violation of the Act. She thus was not a protected "consumer" under the Act.

The D.C. Circuit's decision widened the circuit split that Pileggi highlights in her petition. *See* Pet. 6-8. This Court already granted certiorari in *Salazar v. Paramount Global*, No. 25-459, to resolve that split. The *Washington Examiner* agrees that the Court should hold this petition. If the Court rules for Paramount Global, the Court should then deny the petition. In contrast, if the Court rules for Salazar, it should grant Pileggi's petition, vacate the D.C. Circuit's decision, and remand for further proceedings so that court can consider in the first instance the *Washington Examiner*'s additional, independent reasons to affirm the district court's judgment.

STATEMENT

1. The *Washington Examiner* is a media organization that offers conservative viewpoints on current events. Am. Compl. ¶¶ 4-5 (App. 81a).[1] It publishes news articles online and enhances many of these articles with short video clips that anyone can watch for free. *Id.* ¶¶ 4-5, 17, 31-34 (App. 81a, 84a, 89a-90a). The *Washington Examiner* also offers free email newsletters on various topics. *Id.* ¶¶ 4, 34 (App. 81a, 90a).

The Video Privacy Protection Act creates a private right of action, with statutory damages, against a "video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1), (c)(2). The statute defines various terms. A "video tape service provider" is "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). "'[P]ersonally identifiable information' includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). And a "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1).

2. Pileggi brought this case against the *Washington Examiner* as a class action. Am. Compl. ¶ 70 (App. 106a). She alleged that she "subscribed to Washington Examiner's newsletter" and "was required to provide Washington Examiner with her personal information, including her email address and ZIP code." *Id.* ¶ 14

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[1] Because the district court resolved this case on a motion to dismiss, we take Pileggi's factual allegations as true. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452 (2012). Discovery would have shown that many of those allegations are not.

(App. 84a). She also alleged that those email newsletters contained embedded videos, as well as hyperlinks to videos on the *Washington Examiner*'s website. *Id.* ¶ 15 (App. 84a).

Pileggi alleged further that the *Washington Examiner* placed the "Meta Pixel" — a string of computer code — on its webpages. *Id.* ¶¶ 36-37 (App. 91a). She did not, however, allege that the Meta Pixel was included in the email newsletters. According to Pileggi, this code sent to Facebook "the URL of each [website] page" that individuals visited. *Id.* ¶ 56 (App. 99a). She alleged that the URL often "include[d] the titles of the videos" on that page. *Id.* (App. 99a-100a). And if the visitor was a Facebook user, the code also allegedly sent "the individual's Facebook ID" — "a short, unique string of numbers assigned to each user" that allows anyone to identify the "user's corresponding Facebook profile." *Id.* ¶¶ 48, 57 (App. 96a, 100a).

Pileggi alleged that she "visited the Washington Examiner website and watched videos on the site since at least 2018" while also possessing a Facebook account. *Id.* ¶¶ 16-17 (App. 84a). She claimed that disclosing the URLs of the webpages containing videos that she visited along with her Facebook ID violates the Act. *Id.* ¶ 82 (App. 110a).

3. The *Washington Examiner* moved to dismiss Pileggi's Amended Complaint on multiple grounds. The district court concluded that Pileggi alleged sufficient facts for Article III standing but granted the motion to dismiss for failure to state a claim. App. 49a-71a. The court started with the *Washington Examiner*'s argument that Pileggi's allegations failed to show that she is a consumer the Act protects. App. 62a. The court explained that Pileggi alleged that she is a consumer because she is a subscriber and that she

"d[id] not dispute that to be a 'subscriber'" under the Act, she had to "subscrib[e] to 'audio-visual goods or services, and not goods or services writ large.'" *Id.* (quoting Pl.'s Resp. to Mot. To Dismiss at 19, No. 1:23-cv-00345-BAH, ECF No. 22 (June 2, 2023)). Therefore, for the email newsletter to make Pileggi a subscriber, signing up for the newsletter had to enhance or otherwise affect her ability to view videos on the *Washington Examiner*'s website. *See* App. 63a-67a.

The court held that Pileggi's allegations failed to make that showing: Pileggi "nowhere . . . allege[d]" that signing up for the *Washington Examiner*'s email newsletter "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." App. 64a-65a (cleaned up). Instead, "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." App. 65a. Indeed, "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" allegedly contained in the email newsletters.[2] *Id.* (cleaned up). This lack of a "link between the service to which she was a subscriber and her accessing of

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[2] Although Pileggi alleged that videos were embedded in the email newsletters — implying that she could have played videos from within the email itself (though she did not allege she ever did so) — few, if any, email clients have that capability. *See* James Christensen, *How to Embed Video in Email: What Actually Works in 2026*, Swarmify (Mar. 27, 2025), https://swarmify.com/blog/how-to-embed-video-in-email/. As a result, the *Washington Examiner*, like nearly all newsletter senders, does not embed videos in its email newsletters.

audio-visual content" was "fatal" to her claim. App. 65a-66a.

As the court concluded:

> By failing to link her newsletter subscription to the "viewing of Washington Examiner's video offerings," 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," 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. 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.

App. 69a-70a (cleaned up; citations omitted).

Because the court dismissed Pileggi's claim on this basis, it did not reach the *Washington Examiner*'s other grounds for dismissal. But the court noted that, while it assumed for the purposes of its decision that Pileggi adequately alleged that the *Washington Examiner* is a video tape service provider, treating the short news videos "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 and possibly beyond the scope of the textual tie requiring such content to be 'similar' to a video cassette tape." App. 61a n.7 (citation omitted).

4. Pileggi appealed, renewing her argument "that a plaintiff does not need to subscribe to a video to have a cause of action under" the Act and that the *Washington Examiner*'s "newsletter constitutes a sufficient

connection to the videos on the website for her to be a consumer." App. 2a-3a. The D.C. Circuit unanimously rejected her argument and held that the Act requires "a plaintiff [to] 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." App. 3a.

The court identified five reasons why it is insufficient for liability under the Act "just to obtain some other good or service furnished by a person who also happens to provide videos or audio-visual materials." App. 21a.

First, the court put together the statute's definitions and liability clause: "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.'" App. 22a (quoting 18 U.S.C. § 2710(a)) (brackets in original).

Second, the court looked at the statute's structure and concluded that "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." *Id.* (quoting *Dubin v. United States*, 599 U.S. 110, 120 (2023)) (brackets in original). "[T]he 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." App. 23a.

Third, "the statute's substantial penalty provision weighs in favor of enforcing the textual linkage

between a consumer and a video." *Id.* "[E]ach 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." App. 24a (citing 18 U.S.C. § 2710(c)(2)(A)). The court concluded that "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." *Id.*

Fourth (and relatedly), the court reasoned that "the [Act's] authorization of punitive damages requires that the statutory text be construed against the expansive liability that Ms. Pileggi's proposes." *Id.* (citing 18 U.S.C. § 2710(b)(2)(B)).

Fifth, the court concluded that Pileggi's position created "haphazard and unreasoned line-drawing" and was possibly "unadministrable." App. 25a. The court explained that "the statute presumes that video tape service providers know whether someone is a 'consumer' of their goods or services." *Id.* Yet if the purchase or rental of, or subscription to, "*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" obtained any good or service from that provider. App. 25a-26a. The court noted the impossibility of a provider doing so when, for example, someone purchases "tickets with cash." App. 26a.

After canvassing those reasons, the court rejected Pileggi's argument that the meaningful variation canon compelled her interpretation of the Act. App. 27a. The court explained that Pileggi's argument ignored the language "'*from a video* tape service provider'" that

appears after "goods or services." App. 28a (quoting 18 U.S.C. § 2710(a)(1)). Thus, "[t]he 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." *Id.* "The named source 'from' which the product must derive gives meaning to the scope of the regulated goods and services." *Id.* The court concluded that "too many statutory provisions cut against Ms. Pileggi's siloed reading of one part of one definitional provision" to accept her interpretation of the statute. App. 30a.

The court also rejected Pileggi's argument that the videos allegedly embedded in the *Washington Examiner*'s email newsletters Pileggi received were sufficient to make Pileggi a consumer under the Act. *See* App. 32a-33a. The court explained that this argument failed because "Pileggi does not allege that any of the videos in the newsletter contained the Meta Pixel that tracks viewing selections," that the *Washington Examiner* "tracked, let alone disclosed to a third party, any video viewing selections she made within the newsletter," or that "she clicked on any website links in the newsletter that took her to the *Washington Examiner's* website." *Id.* The court said that "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.*

The court declined to reach the *Washington Examiner*'s alternative arguments: (1) that it is not a video tape service provider because its short news clips are not similar to the long-form content of 1980s video tapes; (2) Pileggi is not a subscriber to the *Washington Examiner*'s email newsletter because she did not pay for it; and (3) the *Washington Examiner* did not know that it was Pileggi (or even that it was a newsletter

recipient) visiting its site when Pileggi's browsing triggered the Meta Pixel, so the *Washington Examiner* could not have knowingly disclosed personally identifiable information of a consumer to Meta. App. 34a.

Judge Randolph, concurring, explained that he would also have held that "the *Washington Examiner* is not a 'video tape service provider.'" App. 35a. He focused on the definition of "video tape service provider": "businesses transacting in 'prerecorded video cassette tapes or similar audio visual materials.'" *Id.* (quoting 18 U.S.C. § 2710(a)(4)). Judge Randolph concluded that, because "the *Examiner's* short online videos are unambiguously not 'prerecorded video cassette tapes,'" they must be "similar audio visual materials" for Pileggi to succeed. App. 36a.

He further explained that "similar" is not the same as "other." *Id.* (citing *Webster's New World Dictionary* and *Black's Law Dictionary*). Judge Randolph contrasted § 2710(a)(4)'s use of "similar audio visual materials" with § 2710(b)(2)(D)(ii)'s use of "*other* audio visual material." *Id.* "Had Congress also said '*other* audio visual materials' in § 2710(a)(4), 'other' would serve as a catch-all for every potential type of video content." *Id.* (citation omitted). He noted that "Congress did not enact that statute." *Id.*

Citing *Delaware v. Pennsylvania*, 598 U.S. 115 (2023), Judge Randolph opined that "similar" was "defined by reference to the 'function and operation' of" the principal term. App. 36a-37a (quoting *Delaware*, 598 U.S. at 128). He applied this definition to the VPPA and concluded that "[t]he 'function and operation' of a 'prerecorded video cassette tape' bear little similarity to those of a short online video clip" because "[t]he two formats plainly do not 'operate in the same manner'" when the former is "a physical

object" and the latter is "a stream of ones and zeros in response" to "click[ing] on a link" and because "the 'functions' of a brief informational clip and a feature-length movie are entirely different." *Id.* (quoting *Delaware*, 598 U.S. at 127-28, and 18 U.S.C. § 2710(a)(4)) (cleaned up).

He added that other evidence supported this limited reading of "video tape service provider." Judge Randolph explained that the section and subsection headings "demonstrate Congress's focus on 'video tape[s],' tangible objects which can be 'rent[ed]' or put up for 'sale.'" App. 38a (brackets in original). And he pointed to "contemporaneous evidence from Congress" in the form of the Act's "Senate committee report," which lists three "examples of 'similar' materials" — "'*laser disks, open-reel movies, or CDI [compact disc] technology*'" — that "are physical objects" as evidence that "similar" requires physical media. *Id.* (quoting S. Rep. No. 100-599, at 12 (1988)) (brackets in Judge Randolph's concurring opinion).

Finally, Judge Randolph noted that "[l]imiting '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." *Id.*

5. On February 27, 2026, Pileggi petitioned this Court for a writ of certiorari and requested disposition of her case consistent with *Salazar v. Paramount Global*, No. 25-459.

ARGUMENT

The Court should hold Pileggi's petition pending its resolution of *Salazar* because, as Pileggi correctly notes, this case raises the same question, in the same posture, as that case. *See* Pet. 12-13. Therefore, if the Court affirms the Sixth Circuit, it should deny Pileggi's petition. If the Court instead reverses the Sixth Circuit, the Court should grant Pileggi's petition, vacate the D.C. Circuit's decision, and remand the case for further proceedings in which the D.C. Circuit can consider in the first instance the other arguments that the *Washington Examiner* raised below, including the one Judge Randolph identified in his concurrence.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Salazar v. Paramount Global*, No. 25-549, and then disposed of accordingly.

Respectfully submitted,

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