No. 25-228

IN THE

Supreme Court of the United States

DETRINA SOLOMON,

Petitioner,

v.

FLIPPS MEDIA, INC., DBA FITE, DBA FITE TV,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Video Privacy Protection Act of 1988 ("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 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." *Id.* § 2710(a)(3).

The question presented is whether the transmission of computer code, which conveys in programming syntax a video title and a string of numbers that potentially can be used to look up a Facebook profile, is a disclosure of "personally identifiable information" under the VPPA.

RULE 29.6 STATEMENT

Respondent Flipps Media, Inc. dba FITE, dba FITE TV is a wholly owned subsidiary of Triller Hold Co. LLC. No publicly held corporation owns 10% or more of Respondent's stock.

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INTRODUCTION

This case concerns the VPPA—a 1988 statute passed after Robert Bork's video rental history was publicly disclosed. The VPPA protects the privacy of consumers who rent or purchase "prerecorded video cassette tapes" and "similar audio visual materials." 18 U.S.C. § 2710(a)(4). Under the VPPA, a "video tape service provider" cannot knowingly disclose its customer's "personally identifiable information." *Id.* § 2710(b)(1). 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." *Id.* § 2710(a)(3).

The VPPA has generated "extensive" class action litigation in recent years. Pet. App. 5a. Internet users (like Petitioner) have sought damages under the VPPA, claiming that information revealing their identities and their viewed content was wrongly disclosed to technology companies that generate targeted Internet advertisements.

Respondent Flipps Media, Inc. is a digital streaming company that provides subscribers an array of live and prerecorded sports, entertainment, and music-video content, including live broadcasts of wrestling, martial arts, and other combat sporting events.

Petitioner Detrina Solomon filed a putative class action alleging that Respondent's use of "Pixel," an advertising technology developed by Facebook, Inc., violates the VPPA. *See* Pet. App. 29a. Petitioner alleged that when a subscriber accessed a video on Respondent's website, Pixel would transmit

computer code to Facebook containing (i) a string of numbers that could be used to look up the subscriber's Facebook profile and (ii) the title and URL of the viewed content. *Id.* at 30a. Petitioner claimed that those transmissions were knowing disclosures of "personally identifiable information" in violation of the VPPA. 18 U.S.C. § 2710(b)(1).

The U.S. District Court for the Eastern District of New York dismissed Petitioner's VPPA claim on two independent grounds. The court held, first, that Petitioner failed to plausibly allege that Respondent disclosed her "personally identifiable information," Pet. App. 32a–35a, and, second, that Petitioner failed to plausibly allege that she accessed prerecorded videos (as opposed to live broadcasts), Pet. App. 35a–39a; *see* 18 U.S.C. § 2710(a)(4).

The U.S. Court of Appeals for the Second Circuit affirmed. The Second Circuit agreed that Petitioner failed to plausibly allege that Respondent disclosed her personally identifiable information. Notably, Petitioner did *not* appeal—and the Second Circuit did not disturb—the district court's alternative holding that Petitioner failed to plausibly allege that she accessed prerecorded videos. Pet. App. 3a & n.4; Brief in Opposition ("BIO") App. 2a, 4a, 7a–9a & n.3. Instead, Petitioner appealed the district court's denial of leave to amend to add the required allegations, which the Second Circuit affirmed. Pet. App. 3a.

Petitioner now seeks certiorari on the question whether Respondent disclosed her "personally identifiable information" and claims the circuits are divided over the meaning of "personally identifiable

information." The Court should deny the petition for several reasons.

At the outset, the claimed split is illusory, indeed is merely semantic. Petitioner concedes that the Second Circuit's interpretation of "personally identifiable information" is consistent with the Third and Ninth Circuits' interpretation: all three courts ask whether an "ordinary person" could use the disclosed information to identify the viewer. *See* Pet. 12; Pet. App. 19a. According to Petitioner, the First Circuit has adopted a different interpretation that focuses on foreseeability—but in reality, the First Circuit looks to whether "most people" could use the information to identify the viewer. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016). There is no meaningful distinction between the "ordinary person" and "most people" tests—both seek to determine whether the average person could use the information to identify the content's viewer.

The different outcome in the First Circuit's VPPA case is entirely explained by the facts in that case, not the court's legal test. The courts of appeals uniformly agree that whether a disclosure includes "personally identifiable information" is a highly fact-bound inquiry. In the supposedly conflicting First Circuit decision, the viewer's *location* was disclosed—a disclosure the court viewed as akin to an address disclosure. No other circuit court in the illusory split has considered that fact pattern. Thus, the Third and Ninth Circuit expressly disclaimed any conflict with the First Circuit.

Separately, the petition suffers a fatal procedural defect, because Petitioner has not sought review of the district court's alternative ground for dismissal (that she did not adequately allege viewing a prerecorded video). Indeed, Petitioner cannot seek review of this holding because she has waived any challenge to it twice over—first on appeal and then in the petition. Nor has Petitioner sought further review of the district court's and Second Circuit's rulings regarding leave to amend.

As a result, even if Petitioner were to prevail in this Court, the judgment below would stand. Petitioner's complaint would remain dismissed for failure to plausibly allege that she viewed prerecorded videos. That alone should foreclose this Court's review.

There are other vehicle problems, too. Petitioner failed to allege that she—as opposed to other unnamed class members—suffered an Article III injury in fact. *See* Pet. App. 26a n.15 (declining to reach this argument). In addition, the factual context here—namely, the Pixel technology—is a poor one for deciding the question presented because of how the technology works; even Petitioner admits Pixel makes the legal analysis "confusing." Pet. 17. And, the petition does not present a key preliminary question that could obviate the need for this Court's review—namely, whether the VPPA applies to online videos at all.

The question presented is also of dwindling importance. Online video providers have responded to the onslaught of VPPA class actions with consent forms that satisfy the VPPA's disclosure

requirements. Because the VPPA has a two-year statute of limitations, *see* 18 U.S.C. § 2710(c)(3), this kind of litigation should end soon.

Finally, the decision below is correct. The Second Circuit's test tracks the statutory text and the VPPA's history.

The petition should accordingly be denied.

STATEMENT OF THE CASE

A. Legal Background

1. In 1987, a newspaper article identified 146 films that Supreme Court nominee Robert Bork and his family had rented from a local video store. In response, Congress enacted the VPPA to protect the privacy of consumers who rented or purchased "prerecorded video cassette tapes" and "similar audio visual materials." 18 U.S.C. § 2710(a)(4).

2. The VPPA generally prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider" without the consumer's consent. *Id.* § 2710(b)(1). A "video tape service provider" includes "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). The statute defines "personally identifiable information" ("PII") to "include[] 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). For each improper PII disclosure, the VPPA authorizes damages "not less" than "$2,500." *Id.* § 2710(c)(2)(A).

The VPPA permits PII disclosures with the "written consent (including through an electronic means using the Internet) of the consumer," so long as consent is obtained "in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer." *Id.* § 2710(b)(2)(B). The VPPA has a two-year statute of limitations. *Id.* § 2710(c)(3).

B. Factual Background

1. Respondent is a digital streaming company that provides subscribers an array of live and prerecorded sports, entertainment, and music-video content. Pet. App. 29a–30a. Subscribers can access 1000+ live broadcasts per year, including wrestling, martial arts, and other combat sporting events. *Id.* at 53a ¶ 34.

2. Petitioner alleges that she has a paid subscription to Respondent's website, from which she purportedly streamed unspecified content at some point within two years of filing her complaint. *Id.* at 48a ¶ 12. Petitioner further alleges that Respondent's website uses Pixel, a technology developed by Facebook, Inc. *Id.* at 55a–60a ¶¶ 42–57. Pixel is a string of computer code that causes information about a user's interactions with a website, along with that user's Facebook ID ("FID"), to be sent to Facebook. *Id.* at 47a ¶¶ 5–6.[1] A FID is

[1] Notably, the Complaint is vague about how exactly Pixel causes information to be sent to Facebook. For instance, the Complaint alleges that the information is sent to Facebook via "cookies," Pet. App. 59a ¶ 55, which are "small text file[s] . . . created and placed by Facebook on the Facebook users' browsers," *id.* at 7a. So the Complaint suggests that Pixel triggers the user's *web browser* (e.g., Google Chrome or

a unique string of numbers that can be used to look up a user's Facebook profile. *Id.* at 47a ¶ 7. Facebook profiles vary significantly, as each Facebook user chooses what (if any) personal information to include. *See id.* at 33a–35a.

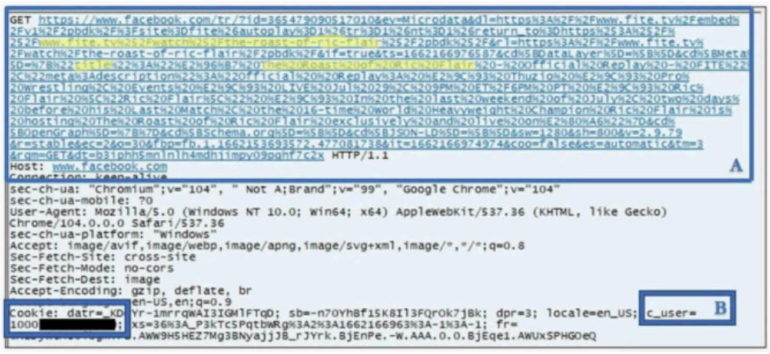
3. According to Petitioner, website operators use Pixel for targeted advertising. *Id.* at 47a ¶ 5. Petitioner concedes that data sharing is "common online," and that "nearly half of [all] retail websites share data with social-media platforms." Pet. 8. (citation omitted). Petitioner further states that "there is nothing wrong with this," so long as "website operators get their users' consent." *Id.*

C. Procedural Background

1. Petitioner filed a putative class action in federal district court, alleging Respondent disclosed PII to Facebook in violation of the VPPA. *See* Pet. App. 29a–30a. Petitioner alleged that every time a user accessed content on Respondent's website, Pixel sent Facebook a block of computer code that communicated (i) the title and URL of the viewed material and (ii) the user's FID. *Id.* at 60a ¶¶ 57–58.

The complaint included an "exemplar screenshot excerpt" of a Pixel transmission, with highlighting and annotations by Petitioner. *Id.* at 60a ¶ 57. The "exemplar excerpt" transmission consists of letters, numbers, symbols, and other programming syntax surrounding and interspersed among the alleged PII:

Microsoft Edge) to send information to Facebook—which, as Respondent argued in the court below, further attenuates the allegation that Respondent itself disclosed any information to Facebook. *See* BIO App. 12a, 16a–19a.



According to Petitioner, the highlighted text in Box A conveys the title and URL of a video, and the numbers following "c_user=" in Box B convey a user's FID. *Id.* at 60a ¶ 58.

Petitioner further alleged that the FID can be used to look up a user's Facebook profile. The complaint included an "exemplar" screenshot of Mark Zuckerberg's Facebook profile, which displays his full name and photograph. *Id.* at 62a ¶ 63. But the complaint alleged nothing about what, if any, PII was displayed on Petitioner's own Facebook profile. *Id.* at 33a.

Petitioner concedes that Respondent obtained Petitioner's "general consent" to "automatically record information that your device sends" and "use this information for advertising and other marketing purposes." Pet. 9 (citation omitted). However, Petitioner alleged that Respondent did not obtain her consent specifically for its Pixel use. *See* Pet. App. 56a ¶ 49; *id.* at 68a ¶ 79.

2. Respondent moved to dismiss the complaint. Among other things, Respondent argued that: (i) the computer code at issue would be unintelligible to an ordinary person; (ii) the complaint failed to allege

that Petitioner's own Facebook profile could be used to identify her personally; and (iii) Petitioner never specified whether she used Respondent's website to watch prerecorded videos or live broadcasts. BIO App. 20a–24a.

3. The district court dismissed Petitioner's complaint with prejudice, holding that the VPPA claim failed on two independent grounds. *First*, the district court held that Petitioner had not plausibly alleged a PII disclosure. In the court's view, PII had to be identifiable to an "ordinary person," and Petitioner failed to plausibly allege that an "ordinary person" could identify her from the transmitted data. Pet. App. 32a–35a. The district court found that Petitioner "needed to allege that her public Facebook profile page contained identifying information about her in order to state a plausible claim," and she had failed to do so. *Id.* at 35a.

Second, the district court held that Petitioner's VPPA claim failed because she had not "plausibly allege[d] that she accessed any 'prerecorded' video." *Id.* at 36a. The district court reasoned that the VPPA "is inapplicable to 'live' video." *Id.* Petitioner alleged only that she viewed "video content" on Respondent's website, without specifying whether the content was live or prerecorded. *Id.* at 70a ¶ 87. The district court found Petitioner's allegations "insufficient—particularly given the preference of many viewers to watch sporting events 'live.'" *Id.* at 39a.

Finally, the district court denied Petitioner leave to amend her complaint. The court explained that Petitioner "had multiple opportunities to propose

amendments that would address the content of her public Facebook profile page and any prerecorded video she accessed," but had "simply elected not to do so." *Id.* at 42a.

4. Petitioner raised two arguments on appeal. *First*, Petitioner argued that the district court misconstrued the VPPA's statutory definition of PII, although she "did not advocate for a particular standard on this issue" before the district court. BIO App. 5a. Petitioner principally urged the Second Circuit to break from its sister circuits and adopt a novel PII definition of her own creation. *Id.* at 3a, 5a–6a. Petitioner also argued that she plausibly alleged a PII disclosure under any articulated standard. *Id.* at 3a. *Second*, Petitioner argued that the district court abused its discretion by denying her leave to amend her complaint. *Id.* at 4a, 7a.

Petitioner did *not* appeal the district court's alternative holding that her VPPA claim failed because she had not adequately alleged that she watched prerecorded videos. *Id.* at 2a, 4a, 7a–9a & n.3. Instead, Petitioner stated that she was "ready and willing" to make such an allegation if given leave to amend. *Id.* at 9a.

5. The Second Circuit affirmed. The court held that the term "'personally identifiable information' encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so." Pet. App. 20a. The court further held that—without Petitioner's highlighting and annotations—it was "implausible" that an ordinary person would

understand the Pixel transmission to convey a video title and FID. *Id.* at 24a–25a. Therefore, the court concluded that Petitioner failed to plausibly allege that Respondent disclosed PII under the VPPA. *Id.* at 26a.

In addition, the Second Circuit found "no abuse of discretion in the district court's decision to deny [Petitioner] leave to amend the Complaint." *Id.* The Second Circuit thus did not disturb the district court's holding that Petitioner "did not plausibly allege that she accessed prerecorded videos as required under the VPPA." *Id.* at 3a n.4. The Second Circuit denied Petitioner's request for rehearing en banc. *Id.* at 43a–44a.

REASONS FOR DENYING THE PETITION

Petitioner urges this Court to grant certiorari to determine the meaning of "personally identifiable information" under the VPPA. Petitioner claims that the Court's intervention is necessary to resolve a 3-1 circuit split, in which the Second, Third and Ninth Circuits have interpreted PII in a manner that supposedly conflicts with the First Circuit's interpretation. The split, however, is illusory and fact-bound; the petition is riddled with vehicle problems; and the question presented is of dwindling importance. Accordingly, the Court should deny the petition.

I. There Is No Circuit Split.

1. The petition fails first and foremost because the supposed 3-1 circuit split is illusory. While the First Circuit, on one hand, and the Second, Third, and Ninth Circuits, on the other, use different language to describe the test for PII, the courts' standards are

effectively the same. All agree that disclosure of the consumer's name and address is disclosure of PII. All agree that PII includes information that can be *used* to identify a person, even if the information does not *itself* identify someone. All agree that the definition of PII is limited to the kind of information that "identifies a person as having requested or obtained specific video materials or services." § 2710(a)(3).

No circuit court, moreover, has purported to establish a bright-line definition of PII. Rather, all agree that whether particular information is PII is a highly fact-specific inquiry. And in conducting that fact-specific inquiry, all ask—albeit in different terms—whether the average person could use the information to identify the video viewer.

2. In *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3d Cir. 2016), the Third Circuit held that an IP address—which is "a number assigned to each device that is connected to the Internet," *id.* at 281—was not PII. The court reasoned that PII "means the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior." *Id.* at 290. But to "an average person, an IP address . . . would likely be of little help in trying to identify an actual person," because linking an IP address to an actual person typically requires "a subpoena directed to an Internet service provider." *Id.* at 283. The Third Circuit acknowledged that "our interpretation of the phrase 'personally identifiable information' has not resulted in a single-sentence holding capable of mechanistically deciding future cases." *Id.* at 290. "We have not endeavored to craft

such a rule, nor do we think, given the rapid pace of technological change in our digital era, such a rule would even be advisable." *Id.*

The Ninth Circuit and Second Circuit have since adopted the Third Circuit's framework. In *Eichenberger v. ESPN, Inc.*, 876 F.3d 979 (9th Cir. 2017), the Ninth Circuit held that a Roku device serial number, without more, was not PII, because an "ordinary person could not use" a device serial number "to identify an individual." *Id.* at 986. Citing *In re Nickelodeon*, the court reasoned that the serial number would not permit an ordinary person to narrow down past "a sizable 'pool' of possible" people—that is, all "Roku users." *Id.* at 985.

Likewise, in the opinion below, the Second Circuit held that a block of computer code that allegedly transmitted a FID and a video title was not PII. Citing *In re Nickelodeon*, the court found it "implausible that an ordinary person would look at [the computer code] . . . and understand it to be a video title" and "a person's FID." Pet. App. 24a–25a.

3. In the purportedly conflicting authority (which preceded the three aforementioned decisions), *Yershov*, 820 F.3d 482, the First Circuit held that the disclosure of "Yershov's unique Android ID" together with "the GPS coordinates of Yershov's device at the time the video was viewed" constituted PII disclosure. *Id.* at 485.[2] The First Circuit reasoned

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[2] Petitioner suggests that *Yershov* held that a transmission of computer code can constitute PII. *See* Pet. 14. But *Yershov* held that "most people" can recognize and read GPS coordinates. 820 F.3d at 486. *Yershov* did not say the same for computer code.

that locating GPS coordinates on a street map is simple. Thus, "this disclosure would enable *most people* to identify what are likely the home and work addresses of the viewer." *Id.* at 486 (emphasis added). The court viewed the disclosure as no different than giving out the viewer's home and work addresses—a disclosure that is "reasonably and foreseeably likely to reveal" the viewer's identity. *Id.* The First Circuit concluded that "[w]hile there is certainly a point at which the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work, here the linkage, as plausibly alleged, is both firm and readily foreseeable." *Id.*

Like the Third Circuit in *In re Nickelodeon*, the First Circuit emphasized the narrow nature of its decision. The court explained: "Our actual holding, in the end, need not be quite as broad as our reasoning suggests." *Id.* at 489. "We need simply hold, and do hold, only that the transaction described in the complaint—whereby Yershov used the mobile device application that Gannett provided to him, which gave Gannett the GPS location of Yershov's mobile device at the time he viewed a video, his device identifier, and the titles of the videos he viewed in return for access to Gannett's video content—plausibly pleads a case that the VPPA's prohibition on disclosure applies." *Id.*

4. Petitioner seizes on the First Circuit's language that the link between the disclosure and the customer's identity was "foreseeable," *id.* at 486, to argue that the court adopted a foreseeability test that the other circuits subsequently departed from with their "ordinary person" test. Pet. 13–14. In

doing so, Petitioner ignores the First Circuit's actual analysis. The link between the disclosed information and the viewer's identity was "firm and reasonably foreseeable" *because* "*most people*" could use the disclosed GPS coordinates "to identify what are likely the home and work addresses of the viewer." *Yershov*, 820 F.3d at 486 (emphasis added). The critical factor to the court was the ease with which the average person could identify the plaintiff from the disclosed GPS coordinates. *Id.* Thus, the court emphasized that its holding was narrow and limited to the particular facts alleged. *Id.* at 486, 489. The First Circuit never endorsed a broad foreseeability test that would construe PII to sweep in large swaths of complex information that few people could understand.

Properly read, the First Circuit's test is indistinguishable from the Second, Third and Ninth Circuit's test. There is no meaningful difference between "most people" and an "ordinary person." Both tests are trained on whether the average person could derive the viewer's identity from the disclosed information. Thus, district courts in the First Circuit interpret *Yershov* as consistent with the "ordinary person" test. *See Therrien v. Hearst Television, Inc.*, 2025 WL 1208535, at *3 (D. Mass. Apr. 25, 2025) (disclosure of "the location of a church" the plaintiff attended "with at least 75 other congregants" was not PII under *Yershov* because that "simple shard of information would not 'enable most persons to identify'" the plaintiff); *Saunders v. Hearst Television, Inc.*, 711 F. Supp. 3d 24, 31 (D. Mass. 2024) (citing both *Yershov* and *In re Nickelodeon* and finding "it was reasonably and foreseeably likely that

an ordinary person would be able to both identify the specific videos that plaintiffs watched and know that it was likely plaintiffs who watched them"); *Louth v. NFL Enters. LLC*, 2022 WL 4130866, at *2 (D.R.I. Sept. 12, 2022) (finding *Yershov*'s "reasonably and foreseeably likely" test satisfied because the "disclosure would enable most people to identify" the video viewer).[3]

5. The different result in *Yershov* is entirely explained by the unique facts in that case, not some supposedly different legal standard. *Yershov* is the *only* circuit decision involving the disclosure of GPS coordinates, which are readily understandable and akin to the disclosure of a physical address. For that reason, the Third Circuit has recognized that *In re Nickelodeon* did not "create a split with our colleagues in the First Circuit." *In re Nickelodeon*, 827 F.3d at 289. The court explained that "in *Yershov*, the First Circuit focused on the fact that the defendant there allegedly disclosed not only what videos a person watched on his or her smartphone, but also the GPS coordinates of the phone's location at the time the videos were watched." *Id.* According to the Third Circuit, *Yershov* "merely demonstrates that GPS coordinates contain more power to identify a *specific person* than, in our view, an IP address, a

[3] While at least one district court in the First Circuit has focused more on *Yershov*'s foreseeability language, *see Joseph v. IGN Ent., Inc.*, 2025 WL 2597913, at *3 (D. Mass. July 10, 2025) ("Plaintiff plausibly alleges that [defendant] is aware that [the information recipient] has the capabilities to identify individual customers."), that merely suggests that this Court should wait for the First Circuit to clarify *Yershov* before concluding that a circuit split exists.

device identifier, or a browser fingerprint." *Id.* The Third Circuit cited *Yershov*'s acknowledgment that there comes "a point at which the linkage of information to identity" becomes too attenuated, and concluded that—consistent with *Yershov*—IP addresses simply fell "on that side of the divide." *Id.* (quoting *Yershov*, 820 F.3d at 486).

Likewise, the Ninth Circuit stated in *Eichenberger* that its decision "does not necessarily conflict with *Yershov*." 876 F.3d at 986. "The First Circuit's *holding* in that case was quite narrow." *Id.* The Ninth Circuit noted that *Yershov* "relied, in part, on the nature of GPS location data," and emphasized the First Circuit's assessment that "*most people*" could use GPS coordinates to identify someone. *Id.* (quoting *Yershov*, 820 F.3d at 486) (emphasis in *Eichenberger*). The court stated that its holding about Roku device serial numbers fell into *Yershov*'s category of cases where "'the linkage of information to identity becomes too uncertain' to trigger liability under the VPPA." *Id.* And the court signaled its agreement with *Yershov* that "GPS coordinates" "may also count" as PII under the VPPA. *Id.*

In the opinion below, the Second Circuit noted that both *In re Nickelodeon* and *Eichenberger* had "distinguished" *Yershov* on its facts and "did not necessarily conflict with *Yershov*." Pet. App. 16a n.11; 17a n.12.

6. In all events, the Second Circuit's decision is a poor vehicle to evaluate any conflict, because (as every circuit court has recognized) what constitutes PII is a highly fact-sensitive question. *See Eichenberger*, 876 F.3d at 986; *In re Nickelodeon*, 827

F.3d at 290; *Yershov*, 820 F.3d at 486; Pet. App. 16a n.11, 17a n.12. No other court of appeals has analyzed Pixel and the information it transmits. Contrary to Petitioner's assertions, it is far from clear that Petitioner would prevail in the First Circuit. The First Circuit could easily view this case as one where "the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work." *Yershov*, 820 F.3d at 486.

* * *

In short, there is no conflict among the circuit courts, only different outcomes driven by different facts. This Court's review is accordingly unwarranted.

II. This Case Has Multiple, Fatal Vehicle Problems.

Notwithstanding the illusory split, the Court should also deny this petition because it is riddled with vehicle problems. Namely, any opinion of this Court would be advisory, because Petitioner failed to appeal an independent ground for her complaint's dismissal. In addition, this Court would need to resolve a fact-bound Article III standing question before entertaining any merits argument. And, if it gets to the merits, the Court would have to decide the question presented in the idiosyncratic context of Pixel technology. Finally, this petition does not present a critical preliminary question under the VPPA—whether it applies to online videos at all—which could obviate the need for this Court's review.

A. Petitioner Failed To Appeal The District Court's Alternative Ground For Dismissal.

The petition is unfit for this Court's review because the Court cannot change the outcome below. Regardless of how this Court might answer the question presented, Petitioner's complaint will be dismissed given the district court's alternative holding, which Petitioner did not appeal nor include in the question presented.

1. Specifically, the district court dismissed the complaint on two independent grounds—the complaint failed to allege a PII disclosure, *and* it contained insufficient allegations that Petitioner viewed prerecorded video content. Pet. App. 32a, 35a, 39a. Under the VPPA, a defendant qualifies as a "video tape service provider" if the defendant is "engaged in the business . . . of rental, sale, or delivery of *prerecorded* video cassette tapes or *similar* audio visual materials." 18 U.S.C. § 2710(a)(4) (emphases added). The district court reasoned, citing numerous other federal court decisions, that "VPPA claims only apply to 'prerecorded' video content and do not cover 'live' video content." Pet. App. 36a (citing cases). Here, Petitioner alleged that Respondent hosts a "vast array of live and on-demand video content." *Id.* at 46a ¶ 2. Petitioner then alleged that she had accessed Respondent's "video content," without specifying whether the videos were prerecorded or live. *See id.* at 70a ¶ 87. "[G]iven the preference of many viewers to watch sporting events 'live,'" the district court held that Petitioner failed to plausibly

allege that she accessed "prerecorded" content. *Id.* at 39a.[4]

2. Petitioner *did not appeal* the district court's holding that the Complaint failed to allege that she viewed prerecorded videos. Instead, Petitioner argued that the district court abused its discretion by denying her leave to amend to cure the pleading defect. *See* BIO App. 2a, 4a, 7a–9a & n.3 (arguing that Petitioner was "ready and willing" to amend her complaint). Putting all her eggs in the amendment basket, Petitioner argued that the Second Circuit "d[id] not need to reach the issue of whether the current version of the complaint plausibly alleges this element of [Petitioner's] claim." *Id.* at 8a n.3.

The Second Circuit affirmed the district court's denial of leave to amend. Pet. App. 26a. It thus left undisturbed the district court's holding that Petitioner failed to allege that she viewed prerecorded videos. *Id.* at 3a n.4. And Petitioner does not (and, at this point, cannot) raise either issue in this Court.

3. The district court's alternative holding is fatal to this petition. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (holding that Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them") (citation omitted); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465 n.5 (1962) (dismissing writ of

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[4] The district court also rejected Petitioner's argument that all live-streamed video content is "technically" prerecorded, in the sense that it is recorded milliseconds before online transmission. Pet. App. 36a–39a. Petitioner abandoned that argument on appeal. *See* BIO App. 2a, 4a, 7a–9a.

certiorari as to respondent where the "Court of Appeals affirmed the dismissal as to [respondent] on both grounds and the petitioner did not seek certiorari as to the second and independent ground"); *see also, e.g.*, *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 456 (6th Cir. 2021) (Thapar, J.) ("When a district court provides two alternative grounds for its decision, the losing party must challenge each ground on appeal to change the outcome."). Any decision by this Court would be advisory, with no impact on Petitioner's rights in this case. *Cf. Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (opinion of Ginsburg, J., respecting the denial of certiorari) (stating that this Court "reviews judgments, not opinions") (citation omitted); *Heller v. Quovadx, Inc.*, 245 F. App'x 839, 841 (10th Cir. 2007) (unpublished opinion) (Gorsuch, J.) (affirming because appellant "fail[ed] to appeal the district court's second, independent ground" for decision). That alone is grounds for denying the petition.

B. Petitioner Failed To Allege That Her PII Was Disclosed And Thus Failed To Plead An Article III Injury In Fact.

Separately, the Court would need to resolve a fact-bound Article III standing issue before it could reach the merits.

1. "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element" of Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Even "named plaintiffs who represent a class must allege and show that *they personally* have been

injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Id.* at 338 n.6 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976) (internal quotation marks omitted and emphasis added)).

2. Here, Petitioner failed to plead that *she* suffered an injury in fact. As the district court found, Petitioner failed to plead that *her own* PII was disclosed. Rather, Petitioner alleged that *in general*, a FID can be used "to locate, access, and view a particular user's Facebook profile," and that *in general*, a Facebook profile page may contain "detailed and personal information." Pet. App. 33a. Petitioner's "complaint include[d] an exemplar screenshot of Mark Zuckerberg's Facebook page, which includes his name, photographs of him, and other personal information." *Id.* But the "complaint [did] not say anything about the information or photos found on [Petitioner's own] public Facebook profile page." *Id.* In other words, Petitioner never alleged that *her own* Facebook profile contained her real name, photographs, or any other PII—as opposed to a pseudonym, a photo of a pet, or other anonymous content. The district court concluded that Petitioner failed to "allege that her public Facebook profile page contained identifying information about her." *Id.* at 35a. And the district court specifically denied Petitioner leave to amend on this issue, noting that Petitioner had "more than ample" notice that her complaint "failed to identify

what, if any personal information, her Facebook profile contained." *Id.* at 40a.[5]

3. On appeal, Petitioner conceded that she had failed to allege that her Facebook profile contained *even her name*, and that she had merely pled "that Facebook profiles, as a general matter, contain 'detailed and personal information.'" BIO App. 6a, 8a. Petitioner argued only that the district court erred by denying her leave to add new allegations regarding "her public Facebook profile." *Id.* at 7a–9a. But, again, the Second Circuit affirmed the denial of leave to amend, Pet. App. 26a, and Petitioner has not sought certiorari on that issue.

Notably, the Second Circuit flagged that the omission could raise a potential standing problem. The court cited *Spokeo* when explaining that "'plaintiffs who represent a class must allege and show that they personally have been injured,'" and it then noted Respondent's argument that "the Complaint fails to allege any harm suffered by [Petitioner] herself." Pet. App. 26a n.15 (quoting *Spokeo*, 578 U.S. at 338 n.6). The court declined to decide the issue, given its holding that Petitioner's claim failed on the merits. *Id.* But of course, this Court has an "obligation" to assure itself of "litigants' standing under Article III before proceeding to the

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[5] Petitioner asserts that "there is no dispute here that [Respondent] disclosed information" that Facebook "could use to identify [Petitioner] as having watched specific videos," Pet. 4, and that "Facebook used this information to identify [Petitioner] as having watched specific videos," *id.* at 9. But these points *are* disputed, and the district court found that Petitioner failed to allege that she had provided Facebook with any PII.

merits of a case." *Dep't of Educ. v. Brown*, 600 U.S. 551, 560 (2023) (internal quotation marks omitted).[6]

4. Here, too, this vehicle problem sinks the petition. When a "complaint alleges what sort of information could be included on a user's profile," but "contains no allegation as to what information was actually included on [the plaintiff's] profile," the complaint does not state a VPPA claim regardless of how one construes the PII definition. *Wilson v. Triller, Inc.*, 598 F. Supp. 3d 82, 92 (S.D.N.Y. 2022). In short, Petitioner either lacks standing or her complaint fails to state a claim due to the pleading problem.

C. Pixel Is A Poor Context For Deciding The Question Presented.

The particular technology at issue here—Pixel—provides a poor factual context to decide the question presented.

1. When a user watches a video, Pixel causes a transmission to Facebook of more than "twenty-nine lines of computer code," including a "string of numbers" comprising the user's FID. Pet. App. at 8a, 24a–25a. According to Petitioner, "[e]ntering 'facebook.com/[an individual's FID]' into any web

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[6] Nor does this standing problem depend on the standing question presented in *National Basketball Association v. Salazar*, No. 24-994. The question in *Salazar* is whether Article III requires that a VPPA plaintiff allege that her information was disclosed *to the public*, or merely *to a third-party business*. Here, Petitioner cannot satisfy Article III under either standard, because she has failed to allege that *her own* information was disclosed at all. Accordingly, there is no reason to hold this petition for *Salazar*. *See infra* Part V.

browser provides access to a specific individual's Facebook profile." *Id.* at 8a–9a.

2. These facts render the question presented ambiguous. Is the question whether the *transmission of code* amounts to PII disclosure? Or is the question whether the *FID itself* is PII? Or is the question whether the *Facebook profile* linked to the FID *contains* PII? These different framings have caused courts and litigants to talk past one another when analyzing Pixel under the VPPA.

Indeed, even the courts below differed on how to frame the question. The district court's PII analysis turned on the contents of Petitioner's Facebook profile, not on the difficulty of reading computer code. *See* Pet. App. 33a, 35a (concluding that "it cannot be said that the FID would identify [Petitioner]," because Petitioner failed "to allege that her public Facebook profile page contained identifying information"). By contrast, the Second Circuit focused solely on the complexity of the computer code. *Id.* at 25a. Thus, even Petitioner concedes that the fact pattern here presents a "confusing" additional layer involving "encoded information." Pet. 17.[7]

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[7] To the extent this Court focuses on whether the transmission of code amounts to PII disclosure, that also implicates the question of *who is responsible* for the transmission. As the court below explained, Pixel triggers the transmission of information via a "cookie," which is a "small text file . . . created and placed by Facebook on the Facebook users' *browsers*." Pet. App. 7a (emphasis added). That suggests the user's own web browser (e.g., Google Chrome or Microsoft Edge)—not Respondent's website, or even Pixel itself—is responsible for transmitting information to Facebook. This is yet another

3. To the extent this Court focuses on whether the FID or a Facebook profile constitute PII, it would be wading into an issue dividing the district courts but undecided by the circuit courts. Some district courts have held that the FID is PII because "an ordinary person could readily identify a specific Facebook user on the basis of a Facebook Profile ID." *Jackson v. Fandom, Inc.*, 2023 WL 4670285, at *4 (N.D. Cal. July 20, 2023) (denying motion to dismiss in Pixel case under the "ordinary person" test). Others have held that the "FID can constitute PII," but only "where it leads to a Facebook page that discloses personal and identifying information about the consumer." *Ghanaat v. Numerade Labs, Inc.*, 689 F. Supp. 3d 714, 720 (N.D. Cal. 2023) (granting motion to dismiss in Pixel case under the "ordinary person" test). Still others have held that disclosure of the FID amounts to PII only if the user's Facebook profile "includes sufficient identifying information" *and* the user has opted to make their Facebook profile "public" rather than private. *Smith v. Trinity Broad. of Texas, Inc.*, 2024 WL 4394557, at *3 (C.D. Cal. Sept. 27, 2024) (granting motion to dismiss in Pixel case under the "ordinary person" test).

Notably, in each of those three cases, the district court purported to analyze Pixel under *the ordinary person test*—yet each court arrived at a different result.[8] This divergence confirms that Pixel is a

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wrinkle this Court would have to contend with if it takes up the VPPA question in the Pixel context.

[8] Indeed, the briefing below suggests that what Petitioner really wants is fact-bound error correction under the ordinary person test. Petitioner claims that she "conceded below" that her claim fails under the ordinary person test. Pet. 4. But in the district

uniquely "confusing" and unhelpful lens through which to decide this statutory interpretation issue. Pet. 17. If the Court wishes to determine the question presented, it should do so in a simpler factual context. *See, e.g.*, *In re Nickelodeon*, 827 F.3d 262 (IP address); *Eichenberger*, 876 F.3d 979 (device serial number); *Yershov*, 820 F.3d 482 (GPS coordinates). At a minimum, the Court should wait for further appellate VPPA decisions regarding Pixel, which could shed more light on the question presented in this unique factual context.

D. The Court Should Wait And Determine The More Fundamental Question Of Whether The VPPA Applies To Online Videos At All.

Separate and apart from the petition's vehicle problems, the Court should not grant this petition because a more fundamental question (which is *not* presented here) is currently percolating in the courts of appeals: whether the VPPA applies to online videos at all.

1. As Judge Randolph recently explained, the "VPPA imposes liability on 'video tape service provider[s],' defined as businesses transacting in

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court, Petitioner argued that Respondent's disclosure of her FID "satisfies the ordinary person test," and that "[w]hatever standard the Court applies, [Petitioner's] allegations satisfy it." BIO App. 25a, 28a. Likewise, Petitioner argued on appeal that Respondent's "disclosure would readily permit an ordinary person to identify her." *Id*. at 3a. Petitioner now seeks to distance herself from her previous arguments, in an effort to persuade this Court that resolution of the purported "split" is outcome-determinative, but she cannot so easily jettison her previous positions.

'prerecorded video cassette tapes or *similar* audio visual materials.'" *Pileggi v. Washington Newspaper Publ'g Co.*, 146 F.4th 1219, 1238 (D.C. Cir. 2025) (Randolph, J., concurring) (emphasis added). "'Similar' cannot mean 'other,'" and the "VPPA's use of 'similar' requires something more than a vague resemblance between the videos at issue . . . and a 'prerecorded video cassette tape.'" *Id.* Online videos "bear little similarity" to physical video cassettes—both in how they function and how users engage with them. *Id.* at 1239. As Judge Randolph concluded, the "VPPA addressed a different problem in a different time." *Id.* at 1238. "Technology has overtaken this federal statute and has rendered it largely obsolete." *Id.* Properly limiting the VPPA to the outdated technology it concerns "would avoid the parade of horribles" courts encounter in applying the VPPA to "websites," *id.* at 1239—for example, interpreting "PII" in the context of Pixel.

2. This issue was neither briefed nor decided in the proceedings below—but it has the potential to moot the question presented and all sorts of other thorny questions about how the VPPA applies to modern technologies. *See id.* at 1238 (noting there is "a straighter path to the same ultimate result"). If the Court wants to clarify the meaning of the VPPA, it should do so in a case that presents this more fundamental issue.

III. The Question Presented Is Not Sufficiently Important To Warrant The Court's Review.

In any event, the question presented is of limited and diminishing significance, because the technology industry can moot it through consent forms.

1. As the Second Circuit observed, "the VPPA has generated extensive litigation" in "recent years," as "numerous class actions have been filed against a wide variety of entities." Pet. App. 5a–6a (citing, *e.g.*, R. Joe & L. O'Reilly, *A Blockbuster-Era Video Law Is Being Used to Ding Big-Name Brands Like General Mills, Geico, and Chick-Fil-A With Privacy Lawsuits*, BUS. INSIDER (Sept. 7, 2023), https://perma.cc/DU3K-SQJX).

2. But the VPPA itself provides an easy way to avoid litigation. It permits PII disclosures so long as the video content provider obtains the consumer's "informed, written consent" in a distinct form. 18 U.S.C. § 2710(b)(2)(B). In response to the slew of class action suits, online video content providers are now implementing consent forms that satisfy the VPPA. *See, e.g.*, *$8M Viki Privacy Class Action Settlement*, TOP CLASS ACTIONS (July 23, 2025) https://tinyurl.com/5yz5hbk3 (reporting that the Viki streaming service will now seek "consent" under the VPPA before using web tracking tools). These new measures have already defeated a recently filed VPPA claim. *See Lakes v. Ubisoft, Inc.*, 777 F. Supp. 3d 1047, 1059–60 (N.D. Cal. 2025) (dismissing VPPA claim because the defendant's website's "Cookies Banner, account creation, and checkout consent flow satisfy all of the requirements of VPPA's consent provision"). And because the VPPA has a two-year statute of limitations, *see* 18 U.S.C. § 2710(c)(3), consent forms may soon moot this issue entirely. Accordingly, the question presented is of rapidly diminishing importance.

IV. The Decision Below Is Correct.

Finally, this Court's review is unwarranted because the Second Circuit's decision is correct. The "ordinary person" approach follows from both the VPPA's statutory text and statutory history.

1. The VPPA provides that "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." 18 U.S.C. § 2710(a)(3). The circuits have described that statutory definition as "not straightforward," *In re Nickelodeon*, 827 F.3d at 284, and "awkward and unclear," *Yershov*, 820 F.3d at 486. But all agree that the statutory definition encompasses "more than just information that identifies an individual," like a name, but also some "information that can be *used* to identify an individual." Pet. App. 12a.

2. The statutory text supports the general consensus that PII "encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so." Pet. App. 20a; *see also Yershov*, 820 F.3d at 486 (PII where the information "would enable most people to identify" the plaintiff). In context, the VPPA's focus on disclosures of PII "to any person" means disclosures understandable by a *natural person*—as opposed to information that only a sophisticated technology company can decode. 18 U.S.C. § 2710(b)(1); *see Rowland v. California Men's Colony*, 506 U.S. 194, 200–03 (1993) (explaining that the word "person" does not include

artificial entities where "context" indicates that "Congress was thinking in terms . . . of natural persons only").

To start, the VPPA's use of the terms "*personally* identifiable information" and "aggrieved *person*" are most naturally read to refer only to natural persons, *i.e.*, humans who watch video cassettes. 18 U.S.C. § 2710(a)(3) (emphasis added) ("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"); *id.* § 2710(b)(1) (emphasis added) (a "video tape service provider who knowingly discloses" PII "shall be liable to the aggrieved person"). To that end, the VPPA explicitly distinguishes between a "person" and an "entity"—referring in some instances just to "any person," and in other instances to "any person or other entity." *See id.* at § 2710(a)(4) ("video tape service provider" includes "any person" engaged in the video cassette business, as well as "any person *or other entity*" to whom certain disclosures are made) (emphasis added). That further indicates that when the VPPA refers to a "person," it means natural persons—i.e., ordinary persons—only.

Furthermore, the circuits have observed that the "VPPA imposes liability on a 'video tape service provider' that '*knowingly* discloses' a consumer's information to a third party." Pet. App. 21a (citing 18 U.S.C. § 2710(b)(1)). "In other words, the statute views disclosure from the perspective of the disclosing party." *Id.* Therefore, a recipient-dependent test does not make sense; liability should not "turn on . . . the level of sophistication of the

third party," a fact that may be outside of the discloser's knowledge or control. *Id.* Similarly, the VPPA also establishes "requirements regarding the handling of PII that do not implicate the disclosure of such information to a recipient" at all—for instance, an obligation to "destroy [PII] as soon as practicable." *Wilson*, 598 F. Supp. 3d. at 91 (Rakoff, J.) (quoting 18 U.S.C. § 2710(e)). "It would make little sense for the scope of PII to be recipient-dependent where the conduct at issue does not involve disclosure to a third-party." *Id.* at 91–92.

3. The "ordinary person" approach is also consistent with the VPPA's statutory history, which confirms that Congress did not intend for PII to include information that only a sophisticated technology company could understand. When the statute was first enacted in 1988, the "paradigm" violation was "a video clerk leaking an individual customer's video rental history"—information an ordinary person could readily understand. Pet. App. 24a. (citation omitted).

Twenty-five years later, in 2013, Congress amended the VPPA in recognition that "the Internet had revolutionized the way that American consumers rent and watch movies and television programs." *Id.* at 22a (citation and bracket omitted). But Congress "declined to amend the definition of personally identifiable information, even in the face of testimony asking for an expansion of the definition to include IP addresses." *Id.* In short, Congress was expressly invited to expand the statutory definition to include disclosures that only a sophisticated

technology company could understand—but Congress did not do so.[9]

Congress knows how to draft a broad definition of PII when it wants to. *Id.* at 23a (contrasting the VPPA's definition of PII with the broad definition of "personal information" in the 1998 Children's Online Privacy Protection Act). Thus, as the Second Circuit reasoned below, the "decision to not amend the VPPA suggests that Congress believed that the VPPA 'serves different purposes, and protects different constituencies, than other, broader privacy laws.'" *Id.* (quoting *In re Nickelodeon*, 827 F.3d at 288).

For all of those reasons, the "ordinary person standard" is consistent with the statute's text and history and properly "informs video service providers of their obligations under the VPPA." *Id.* at 21a (quoting *Eichenberger*, 876 F.3d at 985).

V. There Is No Need To Hold This Case For *Salazar*.

Finally, there is no need to hold this case for *National Basketball Association v. Salazar*, No. 24-994—and certainly no basis to "GVR" this case, as Salazar suggests in his Supplemental Brief. Nothing

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[9] In discussing the 2013 amendments, Petitioner asserts that "the Act explicitly includes all 'audio visual materials.'" Pet. 5. That is a misstatement. The VPPA applies only to "*prerecorded* video cassette tapes" and "*similar* audio visual materials." 18 U.S.C. § 2710(a)(4) (emphases added). Petitioner also asserts that "there is no question" that the VPPA applies to "online viewing." Pet. 5. But that issue is anything but settled. *See Pileggi*, 146 F.4th at 1239 (Randolph, J., concurring) (explaining that the VPPA, by its text, should not apply to certain "online video" providers at all).

in this case turns on either question presented in *Salazar*.

1. The first question presented in *Salazar* is whether a consumer suffers an Article III injury in fact "when one business discloses his personal information to another," or if instead Article III requires a disclosure "to the public." *Salazar*, No. 24-994, Pet. 1. To start, there is no world in which resolution of that question can change the outcome of this case. The courts below assumed without deciding that Petitioner had Article III standing, and she lost on the merits. Moreover, as explained in Section II.B above, Petitioner has failed to plead an Article III injury in fact *under either standard*, because she failed to plead that *her own* personal information was disclosed—to a business, to the public, or to anyone else. *See Spokeo*, 578 U.S at 338 n.6 (holding that "plaintiffs who represent a class must allege and show that *they personally* have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong" (emphasis added)). So there is no reason to hold this petition pending the Court's consideration of *Salazar*'s first question presented.

2. The second question presented in *Salazar* is whether the VPPA's definition of "consumer" extends to a plaintiff who subscribes only to a defendant's "free email newsletter," rather than to the defendant's "audiovisual goods and services." *Salazar*, No. 24-994, Pet. 25. That fact pattern is irrelevant to this case: Here, Petitioner alleged that she had a "paid subscription" to Respondent's "digital video streaming service," which is an audiovisual service. Pet. App. 70a ¶ 86; *id.* at 48a ¶ 12. So

nothing in this case turns on *Salazar*'s second question presented, either.

Therefore, the Court should deny this petition without delay, regardless of its disposition of *Salazar*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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