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 Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

This Court should grant this Petition because the circuits are split on the meaning of "personally identifiable information"; several circuits have wrongly departed from the statutory definition of the relevant phrase; and this case presents an ideal vehicle to resolve this important question.

I. There Is A Clear Circuit Split

Respondent argues that "there is no circuit split" on the question presented because the circuits merely "use different language" to describe the same concept. BIO 12. Not so.

A. *Yershov* And *Solomon* Are Irreconcilable

The crucial distinction between the First Circuit's "reasonable foreseeability" test and the other circuits' "ordinary person" test is that in the First Circuit the recipient's knowledge matters and in the other circuits it does not. *Compare Yershov v. Gannett Satellite Info. Net., Inc.*, 820 F.3d 482, 486 (1st Cir. 2016) (using the metaphor of "a football referee announc[ing] a violation by 'No. 12 on the offense,'" which is incomprehensible to the ordinary listener but "everyone with a game program knows the name of the player who was flagged"), *with* Pet. App. 21a (holding that the VPPA "'looks to what information a video tape service provider discloses, not to what the recipient of the information decides to do with it'").

Respondent seizes on one sentence in the First Circuit's opinion dealing with GPS coordinates, arguing that the tests are the same because "most people" can use GPS coordinates "'to identify what are likely the home and work addresses of the viewer.'" BIO 15 (quoting *Yershov*,

820 F.3d at 486). But *Yershov* used that example to show that *the recipient* of the information, who was at least as sophisticated as "most people" are, could use it to identify the viewer. *Yershov* turns on whether the information is readable by the recipient, which depends on whether the recipient has "the game program," *id.*; the decision below turns on whether the information is useful to the "ordinary person" regardless whether that person can read the identifying information. Pet. App. 25a. These tests cannot be squared.

B. *Solomon* "Shut The Door" On Pixel-based VPPA Claims And That Door Remains Open Elsewhere

The evidence of a circuit split in the lower courts is clear: In the Second Circuit after this case, Pixel-case plaintiffs always lose on the question of personally identifiable information; in the First Circuit, and in other courts that agree with *Yershov*, they often win. *Compare*, *e.g.*, *Hughes v. Nat'l Football League*, No. 24-2656, 2025 WL 1720295, at *2 (2d Cir. June 20, 2025) ("*Solomon* effectively shut the door for Pixel-based VPPA claims."), *with Joseph v. IGN Ent., Inc.*, 2025 WL 2597913, at *3 (D. Mass. July 10, 2025) (Pixel-based claim viable); *Adams v. Am.'s Test Kitchen, LP*, 680 F. Supp. 3d 31, 42 (D. Mass. 2023) (same); *Manza v. Pesi, Inc.*, 784 F. Supp. 3d 1110, 1123 (W.D. Wis. 2025) (same); *Lebakken v. WebMD, LLC*, 640 F. Supp. 3d 1335, 1342 (N.D. Ga. 2022) (same).

Sometimes plaintiffs in the First Circuit lose on Pixel-based VPPA claims. *See* BIO 15 (citing cases). But when they do, it is because the information disclosed was insufficiently precise, not because the recipient needed to decode it to read it. *Therrien v. Hearst Television, Inc.*, 2025 WL 1208535, at *3 (D. Mass. Apr. 25, 2025)

(disclosure of "the location of a church" plaintiff attended was not PII because plaintiff could not be uniquely identified).

Finally, there is nothing "highly fact-sensitive" about any of this, contrary to Respondent's argument, BIO 17: identical disclosures lead to different results in different circuits. *Compare Hughes*, 2025 WL 1720295, at *2 (affirming grant of motion to dismiss because Pixel-based claims are not viable after *Solomon*), *with Belozerov v. Gannett Co.*, 646 F. Supp. 3d 310, 314 (D. Mass. 2022) (denying motion to dismiss where argument for disclosure of PII via Pixel was materially identical).

II. The Second Circuit's Test is Wrong

This Court should grant certiorari so that it can reverse the Second Circuit's atextual "ordinary person" test. Respondent's two principal arguments defending that test run afoul of the statute's plain text and instead rely on the same core mistake: Respondent confuses whether a piece of information links one person to one video (and is thus "identifiable" with respect to that person) with whether most people could decode the information. BIO 31–32.

1. The Petition explained that "personally identifiable information" can be understood only by considering who receives it. Pet. 18. In response, Respondent argues that because the VPPA includes some requirements for personally identifiable information that govern even when no one receives it, "personally identifiable information" must be defined without regard to who receives it. BIO 32.

But information that links one specific person with one specific video is "personally identifiable" even when no one sees it: It is *capable* of identifying a person as having watched a video, and so a videotape service provider must

destroy it as soon as practicable. 18 U.S.C. § 2710(e). Encoding that information so that an "ordinary person" could not understand it does not change that conclusion. As the Petition explained, and as Respondent cannot dispute, an encoded statement about one specific person's video watching contains personally identifiable information when it is written on a sticky note in the back of a Blockbuster Video, *see* Pet 19; by contrast, the unencoded sentence "a federal judge watched *Citizen Kane*" does not contain personally identifiable information even if it is on a billboard in Times Square because no recipient could use it to identify a *specific* person as having watched a *specific* video. Pet 18. The question is whether the information is "identifiable" of a specific person by narrowing the universe of possible viewers to *that one person*. The Second Circuit's alternative test is atextual and should be reversed.

2. Respondent next argues that because the VPPA distinguishes between "persons" and "other entities," it must mean "natural persons" when it forbids a video-tape service provider to "knowingly disclos[e] personally identifiable information *to any person*" and, therefore, that "personally identifiable information" much be such that a "natural person" could read it. BIO 30. But Respondent's premise that there is some category of information that only legal entities can decipher makes no sense. *Id.* Natural persons generate codes and keys, and they create mutually unintelligible languages. And natural persons work at corporations and use those codes, keys, and languages to communicate. So even if the statute is limited in the way Respondent suggests, the question remains whether the disclosure is intelligible to the recipient and, if so, whether it contains information

sufficient to connect one person with one video. If it does, the disclosure is illegal absent consent.

III. This Case Is an Ideal Vehicle

This case is an ideal vehicle to resolve the Question Presented, which is case-dispositive in all VPPA cases involving online video viewing. Pet. 24–28. There is nothing preventing this Court from granting the Petition, reaching the Question Presented, and leaving other remaining issues to the lower courts, as is this Court's typical practice.

A. The So-Called "Alternative Ground" For Dismissal Below Will Not Impact This Court's Ability To Consider The Question Presented.

Respondent's argument that this Petition is "unfit for this Court's review" because there was an "alternative ground" for dismissal below does not provide a reason to deny this Petition even on its own terms. BIO 19. Respondent does not argue that this "alternative ground" is encompassed by the Question Presented or that Respondent could or would argue for affirmance by asking this Court to avoid addressing whether the Second Circuit's rule was correct and instead reaching the alternative ground, and its right to so argue is now waived. S. Ct. R. 15(2). Accordingly, if the Petition is granted, there will be no obstacle to the Court reaching the Question Presented. Respondent does not argue otherwise.

Instead, Respondent is really urging this Court to deny review because Respondent thinks it will win this case anyway on remand. BIO 19–20. That is far from inevitable because the Second Circuit's decision to adhere to its denial of leave to amend on remand will be impacted by this Court's guidance on the core statutory interpretation

issue. *See* Pet. App. 26a–28a. That is especially likely here because, contrary to Respondent's contention, the Second Circuit explicitly declined to reach the core of Respondent's alternative argument that the Complaint's allegations of harm were insufficiently specific, Pet. App. 26a n.15, and it thus likely would reach that issue on remand if this Court reversed on the PII question.

But what will happen on remand is unrelated to the decision to grant or deny certiorari anyway. Even if Respondent prevails on remand, that would not impact the validity of this Court's decision on the Question Presented. Indeed, if Respondent were correct that the Court's decisions to grant certiorari should take into account the merits of unrelated arguments that will be addressed exclusively on remand, then this Court's entire system of limiting grants to specific questions presented and letting lower courts handle other issues would be fatally undermined. This argument is a red herring.

B. There Is No Article III Standing Issue

Respondent also argues that this Court should be wary of granting the Petition because Petitioner supposedly "failed to allege that her PII was disclosed" and so allegedly lacks Article III standing. BIO 21. Respondent makes this argument even though both the Second Circuit and the District Court reached the merits of the Question Presented without even identifying Article III standing as at issue. That is because there is no colorable standing issue.

The Complaint plausibly pleads a concrete injury. It states that each time a subscriber streamed a video on FITE's platform, FITE transmitted to Facebook the titles of videos users watch and their unique FID, which links to a personal profile. Pet. App. 55a–68a, ¶¶ 42—78. And the

Complaint pleads that Petitioner had a "paid subscription" to Respondent's video service, Pet. App. 70, ¶ 86; that Petitioner "had a Facebook account" with an FID, *id.*, Pet. App. 47a, ¶ 7; that "[Respondent] disclosed to Facebook [Petitioner's] unencrypted FID along with the title and URLs of the videos she accessed on Defendant's website," Pet. App. 70a, ¶ 88; and that Respondent "disclose[d] the PII of Plaintiff" without her valid consent, Pet. App. 48a ¶ 8–9. These allegations sufficiently allege a concrete injury through disclosure of both Plaintiff's FID and other PII. *See, e.g.*, *Perry v. CNN, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017) ("[A] plaintiff . . . has satisfied the concreteness requirement of Article III standing where the plaintiff alleges a violation of the VPPA for a wrongful disclosure.").

Respondent's contention that the Second Circuit "flagged" the Complaint as containing a "potential standing problem," BIO 23, is incorrect. In fact, the Second Circuit mentioned Respondent's distinct argument (mentioned above as the "alternative ground" for affirmance) that the Complaint's "generalized claims are insufficient to support a plausible cause of action," but it did not couch the argument in terms of standing. Pet. App. 26a n.15. Rather, the Circuit decided not to reach the argument because its holding on the meaning of PII disposed of the case—something it could not do if the issue impacted Article III standing and the Court's jurisdiction. Pet. App. 26a n.15; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96 (1998) (rejecting practice of assuming jurisdiction). This Court has subject matter jurisdiction to reach the question presented and will not need to address standing should it grant the Petition.

C. Pixel Cases Are The Primary "Context" For Modern VPPA Litigation.

Respondent next argues that "[t]he particular technology at issue here—Pixel—provides a poor factual context to decide the question presented." BIO 24. This has things backwards because, as Respondent acknowledges, many websites use Pixel and related technologies to share information with Facebook and other social media and advertising websites. *See* Pet. 24–25. The courts refer to these cases as presenting "Pixel-based VPPA claims." *Hughes*, 2025 WL 1720295, at *2. If Respondent would have this Court wait for a non-Pixel based claim, it will wait forever: Americans no longer rent videos from physical stores, Pet. 25 n.1, and so Pixel is the only practical context in which to decide the Question Presented.

Respondent also cautions that accepting a Pixel case would have this Court "wad[e] into an issue dividing the district courts," BIO 26, but the fact that this case would resolve subsidiary splits is a reason to grant certiorari, not to deny it, *see* S. Ct. R. 10(a). And the decisions that Respondent identifies (at BIO 26) would be resolved by this Court's decision on the Question Presented: after this Court provides a definitive interpretation of the meaning of "personally identifying information" in the statute, the lower courts would then know whether Pixel-based claims are viable at all, and, if so, how the statute should be interpreted.

D. There Is No Separate Question Whether The VPPA Applies Online

Respondent also cites a recent concurrence in the D.C. Circuit suggesting that the VPPA should not apply to online videos because the "'VPPA addressed a different

problem in a different time,'" and so Respondent urges this Court to wait for a case presenting whether the VPPA applies online at all. BIO 28 (quoting *Pileggi v. Washington Newspaper Publ'g Co.*, 146 F.4th 1219, 1238 (D.C. Cir. 2025) (Randolph, J., concurring)). But this case does present that question: under the Second Circuit's reasoning, the VPPA can never apply to online video viewing because the technology at issue involves the transmission of computer code. Pet. App. 26a. Moreover, there is no reason to wait for a case explicitly presenting the policy question whether the VPPA *should* apply to online video viewing because that question has already been answered by this Court. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Bostock v. Clayton County*, 590 U.S. 644, 652 (2020). The only thing this Court needs to resolve the issue of online videos is a case presenting interpretation of the relevant statutory language. That is this case.

IV. The Question Presented Is Important

Respondent acknowledges recent "extensive litigation" in VPPA cases. BIO 26, 29. Nonetheless, citing one news report and one district court decision, it claims that "online video content providers" may soon reduce the flow of litigation by implementing new consent forms and so this Court need not reconcile the conflicting decisions. BIO 29. Respondent's speculation provides no reason to delay.

There is no dispute that hundreds of cases already filed are not covered by a potential consent defense. Pet. 24. And because the consent requirements under the VPPA are strict, there is no indication that most websites will seek proper consent or that consumers would agree. *See* 18 U.S.C. § 2710(b)(2)(B) (VPPA consent requirements).

For these reasons, the single case Respondent cites in support of this consent practice, *Lakes v. Ubisoft, Inc.*, 777 F. Supp. 3d 1047 (N.D. Cal. 2025)—which is now on appeal, *see* 9th Cir. No. 25-2857 (filed Apr. 30, 2025)—is an outlier because most courts have (correctly) held that the issue of consent is not appropriate for resolution on a motion to dismiss, and that anyway all-purpose cookie consent banners do not satisfy the VPPA's strict requirement for "distinct and separate" consent, *e.g.*, *Feldman v. Star Tribune Media Co. LLC*, 659 F. Supp. 3d 1006, 1023 (D. Minn. 2023) (denying motion to dismiss on these grounds). All evidence is that VPPA litigation remains alive and well—at least in those circuits that have not prematurely shut it down, like the Second Circuit did below.

V. The Question Presented Here Is Most Efficiently Decided Before *Salazar*

Finally, this Court is now considering another petition in a Pixel-based VPPA case, *NBA v. Salazar*, No. 24-994, which presents different questions to those here. Recent developments have confirmed the Petition's analysis that it might be most efficient to grant this case and hold *Salazar*. Pet. 25–28. As the *Salazar* Respondent noted in a supplemental brief, the district court there, on remand from the Second Circuit, dismissed that Complaint under the Second Circuit's *Solomon* rule. *Salazar* Resp. Supp. Br. of Oct. 7, 2025 at 1. This illustrates that even where a plaintiff is a "subscriber" under *Salazar*, a court must still decide whether PII has been shared for VPPA purposes through Pixel transmission.

The Petitioner in *Salazar* nonetheless believes that granting on the "subscriber" question before addressing the Question Presented here is appropriate because the two cases present "distinct and independent questions." *Salazar* Pet'r Supp. Br. of Aug. 29, 2025 at 2. That is true

but not the whole story. If Respondent prevails here, then *no* Pixel-based VPPA claims are viable, which renders the issues in *Salazar* moot. But the converse is not true: no matter the definition of "subscriber," *some* plaintiffs will meet it, as Petitioner concededly has, so the question whether Pixel-based disclosures violate the VPPA will remain open. Accordingly, although Petitioner has no dog in the statutory fight in *Salazar* (because it is uncontested that Petitioner counts as a "subscriber" to Respondent's services), Petitioner respectfully suggests that, given this Court's limited resources, it would be most efficient to grant here and hold *Salazar* if this Court were inclined to clarify some of the important, unresolved splits in interpretation of the VPPA.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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