No. 25-

IN THE

Supreme Court of the United States

MICHAEL SALAZAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

PARAMOUNT GLOBAL, DBA 247SPORTS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOSHUA I. HAMMACK
Counsel of Record
BAILEY & GLASSER, LLP
1055 Thomas Jefferson Street NW,
Suite 540
Washington, DC 20007
(202) 463-2101
jhammack@baileyglasser.com

Counsel for Petitioner

384068

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Video Privacy Protection Act ("VPPA") contains a one-sentence liability clause. It prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The statute defines "consumer" broadly to include a "subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). It defines "personally identifiable information" to include information that "identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). And it defines "video tape service provider" to include those in the business of delivering audiovisual materials. *Id.* § 2710(a)(4).

Paramount is a "video tape service provider." Both courts below assumed as much. Michael Salazar subscribed to Paramount's online newsletter, which he used to view videos. Paramount then disclosed Mr. Salazar's Facebook ID and his video-watching history to Facebook. That information counts as "personally identifiable information." Again, both courts below assumed as much.

The question here is whether the phrase "goods or services from a video tape service provider," as used in the VPPA's definition of "consumer," refers to *all* of a video tape service provider's goods or services or only to its *audiovisual* goods or services.

PARTIES TO THE PROCEEDING

Petitioner Michael Salazar was the plaintiff in the district court and the appellant in the Sixth Circuit. Respondent Paramount Global dba 247Sports ("Paramount") was the defendant and appellee in the proceedings below.

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir):

Salazar v. Paramount Global, No. 23-5748, 133 F.4th 642 (April 3, 2025), *reh'g denied*, 2025 WL 1409343 (May 13, 2025).

United States District Court (M.D. Tenn.):

Salazar v. Paramount Global, No. 3:22-cv-00756, 683 F. Supp. 3d 727 (July 18, 2023).

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Constitutional Provisions

Page

Statutes, Regulations and Rules

Other Authorities

Page

INTRODUCTION

In the classic film Hoosiers, a small-town basketball team makes it all the way to the Indiana state championship game. But Coach Norman Dale worries his players might be intimidated by the atmosphere in the newer, nicer, and much larger (and louder) gym in Indianapolis. His solution is simple. Before game day, he summons the team into the empty gym and has his players measure the distance from the backboard to the free-throw line, and then from the floor to the rim. Predictably, the results are fifteen feet and ten feet, respectively. Coach Dale says: "I think you'll find it's the exact same measurements as our gym back in Hickory." The point is simple: The venue is different; the rules are not.[1]

Applying a federal statute in a federal court is a bit like that. Congress enacts a law that must be applied across the country. Like the height of the rim and the distance to the free-throw line, the rules provided in that federal statute should be the same in every court. In this case, however, they are not. In the Second and Seventh Circuits, Michael Salazar's VPPA claim would have survived. In those courts, Mr. Salazar would be a statutory "consumer" because he subscribes to a good or service from a video tape service provider, which is all the VPPA requires. 18 U.S.C. § 2710(a)(1). In short, in the Second and Seventh Circuits, VPPA plaintiffs shoot standard free throws on a ten-foot rim.

But this case arose in the Sixth Circuit. And the Sixth Circuit, in this very case, chose to impose a different rule.

---

1. HOOSIERS (Orion Pictures 1986).

A few months ago, the D.C. Circuit followed suit. Rather than applying the VPPA's text, these two courts hold that, to count as "consumers," VPPA plaintiffs must subscribe to *audiovisual* goods or services from a video tape service provider. Never mind that the statutory definition does not contain this limitation. In effect, these courts have raised the rim to fifteen feet, and then demanded that plaintiffs shoot "free throws" from midcourt.

Put simply, the circuit courts have divided 2–2 over how to interpret the statutory phrase "goods or services from a video tape service provider." As a result, there is a 2–2 circuit split concerning what it takes to become a "consumer" under the VPPA. Indeed, the lower courts themselves—including the Sixth Circuit here—have acknowledged this circuit split. And that intractable conflict requires this Court's intervention.

In addition, the Sixth Circuit's approach, which imposes a limitation that appears nowhere in the relevant statutory text, is wrong. The VPPA's text, context, and structure all show that, when Congress used the unmodified phrase "goods or services" in Section 2710(a)(1)'s definition of "consumer," it said what it meant and meant what it said. In addition to flouting the ordinary meaning of "goods or services," the Sixth Circuit's analysis ignores that the VPPA broadly prohibits a video tape service provider—like Paramount here—from knowingly disclosing "personally identifiable information concerning *any* consumer of such provider." *Id.* § 2710(b)(1) (emphasis added). It proceeds to violate both the meaningful-variation canon and the consistent-usage canon. And, at the same time, it renders several words—and perhaps an entire subsection—surplusage. There is simply no salvaging the Sixth Circuit's statutory rewrite.

The question presented here implicates the same circuit split involved in a currently pending petition for certiorari. *See Nat'l Basketball Ass'n*, No. 24-994. The question is just as important here as it is there. But this case is a superior vehicle for resolving this exceptionally important question. That case would arrive at this Court without a final judgment. It has had multiple amended pleadings since the lower courts decided the question, meaning the Court could not answer the question based on the now-operative allegations. And that case now involves a second dismissal, and a second appeal to the Second Circuit, on an independent legal issue that has divided the lower courts. This case, on the other hand, has no such complexity. It arrives with a final judgment, can be reviewed on the same record the lower courts considered, and does not have any ongoing proceedings below.

The Court should grant review here and reverse.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a–38a) is reported at 133 F.4th 642. The district court's opinion (App. 39a–71a) is reported at 683 F. Supp. 3d 727.

JURISDICTION

The court of appeals entered its opinion and judgment on April 3, 2025. App. 1a. It denied Mr. Salazar's petition for rehearing en banc on May 13, 2025. App. 72a. Justice Kavanaugh's order of August 5, 2025, extended the time to file a petition for a writ of certiorari to October 10, 2025. *See* 28 U.S.C. § 2101(c). This petition is timely filed on October 10, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Video Privacy Protection Act, 18 U.S.C. § 2710, is reprinted in the appendix to this petition. App. 74a–79a.

STATEMENT OF THE CASE

A. Statutory background

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

Congress was also concerned that "the computer age," which had already "revolutionized our world," gave businesses the ability "to be more intrusive than ever before." *Id.* at 6; *see also id.* at 5–6 (expressing concerns with "Big Brother" relying on computerized records and the accumulation of "vast amounts of personal information" to engage in broad surveillance); *id.* at 7 (noting "the trail of information generated by every transaction that is now recorded and stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of surveillance"); *id.* at 7–8 (crediting testimony that "advanced information technology" fostered "more intrusive data collection" and "increased demands for personal information," including by businesses hoping

"to better advertise their products"); 134 Cong. Rec. 10259–60 (describing a "much more subtle and much more pervasive form of surveillance" that "[n]ot even George Orwell anticipated").

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

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

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

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

damages, reasonable attorneys' fees, and equitable relief. *Id.* § 2710(c)(2).

The VPPA also defines three of the terms used in Section 2710(b)(1)'s one-sentence liability clause. It defines "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). It defines "personally identifiable information" to include information that "identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). And it defines "video tape service provider" to mean "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4).

B. Factual and procedural background

1. The complaint

In this lawsuit, Michael Salazar alleged Paramount—which owns and operates 247Sports.com—violated the VPPA by disclosing his personally identifiable information to Facebook without consent. App. 80a–81a, 84a. Through 247Sports.com, Paramount "is in the business of delivering countless hours of video content." App. 85a. Mr. Salazar, meanwhile, obtained a digital subscription to 247Sports.com by signing up for its online newsletter. App. 88a–89a, 97a. This process required him to provide, among other things, his e-mail address. *Id.*

Mr. Salazar then "used his 247Sports.com digital subscription to view Video Media through 247Sports.com,"

"while logged into his Facebook account." App. 84a. As a result, Paramount disclosed his personally identifiable information—including his Facebook ID and which videos he watched—to Facebook. App. 81a–82a, 84a, 88a, 91a–96a, 103a. The disclosures occurred automatically because of the Facebook Pixel Paramount installed on its website. *Id.* Facebook and Paramount then used this information to create and display targeted advertising, which increased their revenues. App. 82a, 92a–93.

2. The district court's decision

Paramount filed a motion to dismiss, arguing Mr. Salazar did not adequately allege he was a "consumer." And the district court granted Paramount's motion with prejudice. App. 40a, 71a. It held that, to be a "consumer," Mr. Salazar needed to subscribe to "audio visual materials" or "video-tape related goods or services." App. 67a–68a & n.23. It concluded the newsletter did not meet this standard because Mr. Salazar did not allege he "accessed audio visual content through the newsletter." App. 69a. The lower court did not address the allegation that Mr. Salazar "used his 247Sports.com digital subscription" (*i.e.*, the newsletter) "to view Video Media." App. 84a; *see also* App. 43a–44a n.9 (elsewhere quoting this allegation).

3. The Sixth Circuit creates a circuit split

Mr. Salazar appealed. But, before the Sixth Circuit rendered a decision, two other circuits weighed in on the dispositive issue—namely, whether a subscription to a newsletter from a video tape service provider makes one a "consumer." On virtually identical facts, the Second and Seventh Circuits both said "yes."

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

> The definition of "personally identifiable information" includes "information which identifies a person as having requested or obtained *specific video materials or services* from a video tape service provider." But if "goods or services" are, by definition, audiovisual materials, then Congress's express restriction in the definition of "personally identifiable information" to information about "*video* materials or services" would be superfluous.

Id. (citations omitted).

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

of [a video tape service] provider's 'goods or services'—audiovisual or not." *Id.* at 549.

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

A few days later, a divided panel of the Sixth Circuit—in this case—reached the opposite conclusion, App. 1a–38a, putting Mr. Salazar on both sides of a circuit split regarding the meaning of the term "consumer." To start, the majority assumed Paramount was a video tape service provider. App. 11a n.7. It noted Mr. Salazar subscribed to Paramount's newsletter. App. 2a, 4a n.3, 11a. And it observed the Second and Seventh Circuits had already held these facts made him a statutory "consumer." App. 17a. Still, the majority disagreed. *Id.*

The majority agreed the term "goods or services," standing alone, "is not limited." App. 14a. But it held the phrase "goods or services" in Section 2710(a)(1)'s definition of "consumer" has "an association" with the phrase "audio visual materials" in Section 2710(a)(4)'s definition of "video tape service provider." *Id.* It explained that, in its view, the statute reaches only those "goods or services

provided by a company when it is acting as a 'video tape service provider'—namely, 'audio visual materials.'" App. 16a. Given the "association" between these two phrases, the majority believed "the most natural reading" of Section 2710(a)(1) shows one "is a 'consumer' only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials." App. 15a.

And the majority then held Paramount's newsletter did not meet this test. App. 19a. Like the district court, though, it did not address Mr. Salazar's allegation that he "used his 247Sports.com digital subscription" (*i.e.*, the newsletter) "to view Video Media." App. 84a.

In her dissent, Judge Bloomekatz explained that, by Section 2710(a)(1)'s "plain text, [Mr.] Salazar is a 'consumer.'" App. 24a (Bloomekatz, J., dissenting); *see also* App. 27a (showing how he met all the statutory requirements). Indeed, in her view, the majority reached the opposite conclusion "only by rewriting the plain language of the VPPA." App. 27a.

Judge Bloomekatz noted Congress's definition of "video tape service provider" would "include department stores, supermarkets, and other entities that rent, sell, or deliver the requisite audiovisual materials." App. 30a. Accordingly, Congress "knew" video tape service providers "could rent, sell, or deliver other types of 'goods or services' too." *Id.* Judge Bloomekatz believed it was "far from the most 'natural' reading of the phrase to say that 'goods or services from a video tape service provider' can only be *some particular* 'goods or services' from that entity." *Id.*

On May 13, 2025, the Sixth Circuit denied Mr. Salazar's petition for rehearing en banc. App. 72a–73a. Since then, the D.C. Circuit has taken the Sixth Circuit's side. *See Pileggi v. Washington Newspaper Publ'g Co.*, 146 F.4th 1219, 1224 (D.C. Cir. 2025) (requiring one to rent, purchase, or subscribe to "a video cassette tape or similar audio-visual good or service" to gain "consumer" status). Like the Sixth Circuit here, it also denied a petition for rehearing en banc. *Pileggi v. Washington Newspaper Publ'g Co.*, No. 24-7022, 2025 WL 2784620, at *1 (D.C. Cir. Sep. 30, 2025).

REASONS FOR GRANTING THE PETITION

The VPPA defines a "consumer" as one who rents, purchases, or subscribes to "goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). There is now a clear, acknowledged, and entrenched circuit split concerning the meaning of the unmodified phrase "goods or services from a video tape service provider." The Second and Seventh Circuits hold that it includes *all* goods or services from those entities. But the Sixth and D.C. Circuits hold that it includes only the narrow category of *audiovisual* goods or services from those entities. The Ninth Circuit has heard oral argument on the question, meaning the existing split will soon deepen.

The same circuit split is at issue in *National Basketball Association v. Salazar*, No. 24-994.[2] And the question is

2. The question here is framed slightly differently than the question there. There, in its second question presented, the NBA asked "[w]hether the VPPA bars a business from disclosing information about consumers who do not subscribe to its audiovisual goods or services." *Nat'l Basketball Ass'n*, No. 24-994,

just as important here as it is there. *See Nat'l Basketball Ass'n*, No. 24-994, Pet. 1, 7, 14, 31 (describing the statutory question as "critically" and "exceptionally important"); NFL Amicus Br. 14–16 (similarly highlighting the question's importance). But this case is the superior vehicle for resolving this important question.

To start, this case involves a final judgment. Because the Second Circuit vacated the district court's order, the NBA's petition arises from case without a final judgment. Relatedly, unlike the NBA case, this one has no intervening amended pleadings and, accordingly, will permit the Court to answer the question presented based on the same record the lower courts reviewed. Finally, the district court in the NBA case recently granted a motion to dismiss on an independent ground that implicates a second circuit split (and also conflicts with this Court's precedents). That order has already been appealed to the Second Circuit. As a result, granting review in that case will lead to simultaneous appeals in two separate

---

Pet. i. The NBA's formulation strays from the statutory language by referring generically to a "business," rather than a video tape service provider, and "information" instead of personally identifiable information. And, by including those terms, it seems to sweep in—perhaps inadvertently—two questions that were not presented or resolved below. That formulation also appears to assume those "who do not subscribe" to a video tape service provider's "audiovisual goods or services" are nonetheless its "consumers." But whether such individuals are "consumers" under the VPPA is precisely the question to be answered. 18 U.S.C. §§ 2710(a)(1), (b)(1). In both cases, Mr. Salazar has attempted to identify the question concisely and without unnecessary detail. And, as he argued in his brief in opposition in that case, there is no reason to take up the NBA's first question presented.

courts on two distinct legal issues, both of which could be dispositive. This case avoids that complexity as well.[3]

As a final point, the Sixth Circuit majority is wrong. To reach its conclusion, it contradicted the ordinary meaning of the undefined term "goods or services." It discounted at least two meaningful variations between Section 2710(a)(1) and Section 2710(a)(3), as well as the surplusage its reasoning created. It disregarded the consistent usage of "goods," which Congress never modified in the VPPA, and "materials," which Congress always modified with "video" or "audio visual." It overlooked Congress's repeated use of "any," including—critically—in the liability clause's reference to "*any* consumer of such provider." 18 U.S.C. § 2710(b)(1) (emphasis added). And it ignored that Congress's definition of "consumer" largely matches the term's ordinary meaning, opting instead for an idiosyncratic interpretation the statutory language does not support. Put simply, as the dissent forcefully argued, the Sixth Circuit majority reached its conclusion only by rewriting the statute. App. 27a.

This Court should grant review.

I. There is an acknowledged and entrenched circuit split on the meaning of "goods or services from a video tape service provider" as used in the VPPA's definition of "consumer."

To date, four circuit courts have definitively interpreted the phrase "goods or services from a video tape service

3. Of course, if the Court grants the petition in *National Basketball Association v. Salazar*, it should simply hold this petition pending the outcome of that appeal.

provider" as used in Section 2710(a)(1). In all four cases, either the defendant conceded it was a video tape service provider or the court assumed as much. *See Pileggi*, 146 F.4th at 1237 (declining to address the argument that Washington Newspaper was not a video tape service provider); *Gardner*, 132 F.4th at 1025 ("The complaint adequately alleges that MeTV is a video tape service provider."); *Salazar*, 118 F.4th at 548–49 (noting Congress's definition of "video tape service provider" includes "even those businesses that dabble" in video delivery and "*also* deal in non-audiovisual goods or services"); App. 11a n.7 (assuming Paramount is a video tape service provider, like the district court had, because Paramount did not ask the Sixth Circuit to revisit that assumption on appeal).

As a result, in all four cases, the plaintiff subscribed to *some* good or service from an entity the court believed or assumed was a video tape service provider. Indeed, across all four cases, the particular good or service at issue was exactly the same—namely, an online newsletter. *See Pileggi*, 146 F.4th at 1223, 1225 (noting Ms. Pileggi had "sign[ed] up to receive the *Washington Examiner*'s newsletter" via e-mail); *Gardner*, 132 F.4th at 1024–25 (agreeing plaintiffs subscribed to Me-TV's "information service[s]" like "TV schedules and newsletters"); *Salazar*, 118 F.4th at 536 (noting Mr. Salazar "signed up for an online email newsletter" from the NBA); App. 2a (noting Mr. Salazar had a "subscription to a 247Sports e-newsletter"). In all four cases, then, the plaintiff subscribed to an online newsletter from a video tape service provider.

Faced with practically identical factual scenarios, these four circuit courts have split 2–2. The Second and Seventh Circuits hold that the unmodified phrase "goods

or services from a video tape service provider" includes any good or service from such an entity. *See Gardner*, 132 F.4th at 1025 ("Any purchase or subscription from a 'video tape service provider' satisfies the definition of 'consumer,' even if the thing purchased is clothing or the thing subscribed to is a newsletter."); *Salazar*, 118 F.4th at 549 (holding that, to become a statutory consumer, one must be "a renter, purchaser, or subscriber of *any* of [a video tape service] provider's 'goods or services'—audiovisual or not"). In these courts, then, one can become a statutory "consumer" without renting, purchasing, or subscribing to a *video* good or service. *See Gardner*, 132 F.4th at 1025 ("Nothing in the Act says that the goods or services must be video tapes or streams."); *Salazar*, 118 F.4th at 537 (holding "[t]he VPPA's text, structure, and purpose compel the conclusion that [the phrase 'goods or services from a video tape service provider'] is not limited to *audiovisual* 'goods or services").

The Sixth and D.C. Circuits, on the other hand, hold that the phrase "goods or services from a video tape service provider" includes only *audiovisual* goods or services, and not all goods or services one might receive from such providers. *See Pileggi*, 146 F.4th at 1224 (holding that, to become a "consumer," one must have "purchased, rented, or subscribed to a video cassette tape or similar audio-visual good or service"); App. 14a (holding "the most natural reading" of the statute shows "a person is a 'consumer' only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audio visual materials" and that, as used in Section 2710(a)(1), "the expression 'goods or services' is limited to audiovisual ones").

And these latter courts acknowledged the split they created. The Sixth Circuit majority noted it was reviewing a "virtually indistinguishable complaint" and an "almost identical" case, and yet it was still "break[ing] with the Second and Seventh Circuits' approach to this issue." App. 17a. The dissent echoed the point. App. 22a (noting the majority's reasoning "conflicts with the reasoning of our sister circuits"). The D.C. Circuit likewise agreed it "read the statute differently from the Second and Seventh Circuits." *Pileggi*, 146 F.4th at 1237 n.5. Despite these acknowledgements, neither court agreed to consider the question en banc. *Pileggi v. Washington Newspaper Publ'g Co.*, No. 24-7022, 2025 WL 2784620, at *1 (D.C. Cir. Sept. 30, 2025); App. 72a–73a.

As a result, there is a clear, acknowledged, and entrenched 2–2 circuit split on the meaning of "goods or services from a video tape service provider" and, consequently, on the meaning of "consumer" in the VPPA. And the Ninth Circuit is already poised to break the tie. *See Heather v. Healthline Media, Inc.*, No. 24-4168 (9th Cir.) (oral argument heard on August 12, 2025).

The split is outcome-determinative. As both the majority and the dissent acknowledged, if the Sixth Circuit had followed the Second and Seventh Circuits' lead, it would not have affirmed the district court's dismissal here. App. 17a, 22a. As things stand now, however, litigants must rent, purchase, or subscribe to different things, depending on where they bring their claims, to gain "consumer" status. In the Second and Seventh Circuits, any good or service from a video tape service provider will do. In the Sixth and D.C. Circuits, only audiovisual goods or services will suffice.

Only this Court can resolve the split and bring uniformity to this important area of federal law. This Court should grant review to resolve the conflict, and it should reject the Sixth Circuit's misguided approach to statutory interpretation.

II. This case is the superior vehicle for resolving this important question.

As noted above, this case involves the same circuit split at issue in *National Basketball Association v. Salazar*, No. 24-994. But that case has multiple vehicle problems. This case has none. As such, the Court should grant review here.

To start, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) (collecting authorities); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J.) (agreeing with a denial of certiorari where the petitions arrived "in an interlocutory posture" and where there was "no final judgment").

As a result, where the circuit court has vacated a judgment and remanded for additional proceedings, this Court typically denies certiorari. *See Mount Soledad*, 567 U.S. at 945; *Virginia Mil. Inst.*, 508 U.S. at 946; *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because, while the circuit court ruled on various legal issues, it remanded for additional proceedings, meaning the case was "not yet ripe for review by this Court").

This fact alone is enough to prefer this petition over the NBA's petition. Because the Second Circuit vacated and remanded for further proceedings in that case, *see Salazar*, 118 F.4th at 553, the NBA's petition arises in a posture that lacks a final judgment. By contrast, this case arises from a final judgment. App. 71a ("This is the final order in the case. All relief being denied, the Clerk shall enter judgment."); *see also* App. 2a (affirming that final order).

Moreover, on remand in the NBA case, Mr. Salazar twice amended his complaint, including in ways that materially shifted the allegations relevant to the question presented. In that case, then, this Court cannot answer the question presented based on the now-operative complaint. After all, this Court is one "of review, not of first view." *Smith v. Arizona*, 602 U.S. 779, 801 (2024). Nor would it make much sense for this Court to answer the question on the older, and now inoperative, record the lower courts considered.

To make matters worse, the district court in that case just granted the NBA's motion to dismiss the Second Amended Complaint based on an entirely different question that implicates a separate circuit split. *See Salazar v. Nat'l Basketball Ass'n*, No. 1:22-cv-07935, 2025 WL 2830939 (S.D.N.Y. Oct. 6, 2025). In this latest dismissal, the district court relied on a recent Second Circuit decision that held that information linking a person to his video-watching history counts as "personally identifiable information" only if an "ordinary person" would understand it. *See Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 52–54 (2d Cir. 2025) (adopting an atextual "ordinary person" standard that does not count information as "personally identifiable

information" if it would take "a sophisticated technology company" to understand it, even if the disclosure in fact went to a sophisticated technology company that did understand it).

There is already a petition for certiorari pending from the Second Circuit's decision in *Solomon*. *See Solomon v. Flipps Media, Inc.*, No. 25-228. And that petition highlights a circuit split concerning the "reasonably foreseeable" and "ordinary person" tests various circuit courts apply to the term "personally identifiable information" in the VPPA. 18 U.S.C. § 2710(a)(3).

In addition, just over a month after the Second Circuit's decision in *Solomon*, this Court expressly rejected judge-made atextual tests in three separate, and unanimous, opinions. *See A.J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, 605 U.S. 335, 338, 343–45 (2025); *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 305–06, 308–11 (2025); *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 145 S. Ct. 1572, 1576, 1579–81 (2025).

The latest dismissal in the NBA case has already been appealed back to the Second Circuit. And that court will hopefully confront whether its atextual "ordinary person" standard can survive this Court's intervening precedent. If this Court were to grant the NBA's petition, though, that single case would have simultaneous appeals before two different courts concerning two independent, and potentially dispositive, legal questions that implicate two separate circuit splits.

Put simply, the lack of a final judgment, the multiple amended pleadings, and the ongoing proceedings below

would complicate the Court's review in that case. But this case comes without any of that baggage. It involves a final judgment. There are no ongoing proceedings below. And, here, the Court can consider the question presented on the same record the lower courts examined.

Because this case is an ideal vehicle for resolving the acknowledged circuit split, the Court should grant review here.

III. The Sixth Circuit's interpretation of the phrase "goods or services from a video tape service provider" is wrong.

It is axiomatic that statutory interpretation begins "with the language of the statute." *Dean v. United States*, 556 U.S. 568, 572 (2009). When that language is unambiguous, the Court's inquiry also ends with the text. *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal quotation marks and citation omitted)).

"The plainness or ambiguity of statutory language" must be "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*,

519 U.S. at 341. Critically, though, the Court must review the language actually present in the statute, not previous versions of the statute or language Congress might have used but did not. *See*, *e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534–36 (2004) (focusing on "the existing statutory text" to conclude that the statute was not ambiguous).

This interpretative methodology flows from the "preeminent canon of statutory interpretation"—namely, that Congress "says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC*, 541 U.S. at 183; *see also Ct. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (describing this interpretive presumption as the "cardinal canon" courts must "always turn . . . to . . . before all others"). When the statutory language is plain, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

But, here, the Sixth Circuit majority openly reworked Section 2710(a)(1)'s definition of "consumer," even though it never held that any term was ambiguous or that the provision produced an absurd result. Instead, its decision simply assumes Congress did not mean what it said. There are at least six additional reasons to reject the Sixth Circuit majority's interpretation.

A. The Sixth Circuit failed to give "goods or services" its ordinary meaning.

The VPPA unambiguously defines "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). But the VPPA does not define "goods" or

"services." As a result, those terms must be given their common, everyday meaning. *See*, *e.g.*, *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (explaining that, when interpreting a statutory phrase, a court's "job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute'" (omission in original)); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (holding that, when statutory terms are undefined, they "will be interpreted as taking their ordinary, contemporary, common meaning"). The point is simple: "Interpreters should not be required to divine arcane nuances or to discover hidden meanings." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012).

"Goods" and "services" are hardly obscure words. It is not as if Congress blurted out a made-up word like "transpondster"[4] or "supercalifragilisticexpialidocious"[5] here. Ordinary English speakers frequently use both the individual words "goods" and "services" and the combined phrase "goods or services" in their everyday lives. And it is difficult to imagine any context in which they might use those unmodified terms to refer only to audiovisual goods or services.

Dictionaries only confirm the point. At the time of the VPPA's passage, the unmodified word "goods" was commonly understood to mean "all tangible items." Black's Law Dictionary (5th ed. 1979); *see also* The Oxford English Dictionary (2d ed. 1989) (defining

4. Friends: *The One with the Embryos* (NBC television broadcast, aired Jan. 15, 1998).

5. Mary Poppins (Walt Disney 1964).

"goods" broadly as "property or possessions" and, slightly more particularly, as "movable property"). Likewise, the term "services" has long been understood to mean "the section of the economy that supplies needs of the consumer but produces no tangible goods." THE OXFORD ENGLISH DICTIONARY (3d ed. 2014). The combination of the two terms, then, as exists in the VPPA, necessarily refers to society's entire economic output.

But the Sixth Circuit majority did not accord "goods or services" its common, everyday meaning. Indeed, it openly admitted as much. App. 14a (noting the phrase, by itself, "is not limited"). Instead, it read "goods or services" to mean only audiovisual goods or services. App. 15a. This reading is highly idiosyncratic, and not at all the way people commonly understand the unmodified phrase. That reality is likely why the majority justified its conclusion by repeatedly adding a modifier that does not appear in Section 2710(a)(1)'s definition of "consumer." *See*, *e.g.*, App. 2a (asking whether the phrase "goods or services" is "limited to *audio-visual* content" (emphasis added)); App. 15a (holding "the expression 'goods or services' is limited to *audiovisual* ones" (emphasis added)); App. 18a (holding "[t]he better reading remains that 'goods or services' relates to *audio-visual* materials" (emphasis added)).

The fact that the Sixth Circuit's interpretation fails to afford "goods or services" its common, everyday meaning is not itself dispositive. After all, sometimes a word's surrounding context shifts its meaning. App. 13a. But it isn't nothing, either. And, as discussed below, the VPPA's larger context—in that specific provision and elsewhere—only bolsters the conclusion that the unmodified phrase "goods or services" should be accorded its common,

everyday meaning, and not the far narrower one the Sixth Circuit supplied.

B. The Sixth Circuit overlooked multiple meaningful variations between Section 2710(a)(1) and Section 2710(a)(3).

"In a given statute, . . . different terms usually have different meanings." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024); *see also Wis. Cent. Ltd.*, 585 U.S. at 279 (similar); *Barnhart*, 534 U.S. at 453–54 (similar). This meaningful-variation canon reflects the "intuitive" presumption that a "different term denotes a different idea." Scalia & Garner, *Reading Law* 170. And, once again, ordinary English speakers apply this canon in their everyday lives. It is how we know that 28 DAYS and 28 DAYS LATER are two separate films and that "regional manager," "*assistant* regional manager," and "assistant *to the* regional manager" are three very different positions.[6]

Here, Congress employed several meaningful variations across the definition of "consumer" and the definition of "personally identifiable information." To start, Section 2710(a)(1) refers to "*goods or services* from a video tape service provider," while Section 2710(a)(3) refers to "*video materials or services* from a video tape service provider." 18 U.S.C. §§ 2710(a)(1), (a)(3) (emphases added). And, critically, these different terms—one with a video-specific modifier and one without—appear in contextually aligned passages. For each provision, the referenced subject matter must identically come "from a video tape service provider." *Id.*

6. THE OFFICE: *The Fight* (NBC television broadcast, aired Nov. 1, 2005).

The meaningful variation within this parallelism suggests that, in Section 2710(a)(1) and Section 2710(a)(3), Congress was indeed referring to different subject matters. The term "video materials" is narrower than "goods," and "video . . . services" is narrower than "services." In both definitions, the preposition "from" identifies the *source* of the subject matter. And the two provisions share a single source (*i.e.*, "a video tape service provider"). But the specification of the source from which the subject matter must come does not identify or alter the *scope* of the referenced subject matter in either definition.

In this respect, then, the Sixth Circuit majority's reliance on the associated-words canon to link "goods or services" in the definition of "consumer" to "audio visual materials" in the definition of "video tape service provider," App. 13a–15a, is wildly misplaced. In fact, in this context, it "is like using a hammer to pound in a screw—it looks like it might work, but using it botches the job." *Fischer v. United States*, 603 U.S. 480, 509 (2024) (Barrett, J., dissenting). Referencing the canon might give the majority's opinion the veneer of textualism "because the limit comes from a related provision rather than thin air." *Id.* at 508. "But snipping words from one subsection and grafting them onto another violates [this Court's] normal interpretative principles." *Id.* The preposition "from"—which identically links differently described subject matters to a single specified source in both Section 2710(a)(1) and Section 2710(a)(3)—simply cannot bear the immense weight the majority placed on it.

And there is every reason to think Congress's use of different terms in these two provisions was intentional. Indeed, there is little reason to think Congress might have

used even "goods" and "materials" interchangeably. It used "goods" twice in the VPPA, *never* modifying it with "video" or any other word. 18 U.S.C. §§ 2710(a)(1), 2710(b)(2)(D)(ii). It used "materials" four times in the statute, *always* with some video-specific modifier. *Id.* § 2710(a)(3) (referring to "video materials"); *id.* § 2710(a)(4) (referring to "audio visual materials"); *id.* § 2710(b)(2)(D)(ii) (referring to "audio visual material" and then to "such materials").

Of course, there is even less reason to think Congress might have used "goods" and "video materials"—or "services" and "video . . . services," for that matter—interchangeably in the VPPA. After all, the term "video" is no insignificant word in this statute. It could more accurately be described as the VPPA's "key word." *Milner v. Dep't of Navy*, 562 U.S. 562, 578 (2011). For that reason, it should do work where it appears. *Id.* And its absence should be respected as well.

Still, the Sixth Circuit majority read these two different phrases—"goods or services" and "video materials or services"—to mean the same thing. App. 15a. This holding, by itself, runs afoul of the meaningful-variation canon.

But the presence or absence of "video" is not the only meaningful variation the Sixth Circuit majority paved over. The definition of "consumer" refers to "any *renter, purchaser, or subscriber* of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1) (emphasis added). Meanwhile, the definition of "personally identifiable information" refers to those who have "*requested or obtained* specific video materials or services from a video

tape service provider." *Id.* § 2710(a)(3) (emphasis added). One can obviously "request" items without renting, purchasing, or subscribing to them (*e.g.*, an unfulfilled request). Likewise, one can "obtain" items without renting, purchasing, or subscribing to them (*e.g.*, a promotional giveaway).

Put simply, Congress required two different relationships to the underlying subject matters from a single source. But the majority ignored this second meaningful variation as well. It made no attempt to explain why Congress would have required, in neighboring provisions, two different relationships to the same material from a single entity. Nor could it.

Congress's use of different language—as to both the kind of relationship involved and the subject matter included—has consequences courts ought to respect. By the statute's plain terms, one can be a "consumer" without having "personally identifiable information." Likewise, a video tape service provider might collect "personally identifiable information" about one who is not its "consumer." The Sixth Circuit majority's opinion does not respect Congress's textual choices.

C. The Sixth Circuit's decision renders multiple words, and perhaps an entire statutory provision, surplusage.

That the majority read "goods or services" in Section 2710(a)(1) to mean the same thing as "video materials or services" in Section 2710(a)(3) renders the video-specific modifier in the latter provision superfluous. Both the Second Circuit and the dissent acknowledged this point.

App. 32a (Bloomekatz, J., dissenting) (explaining the majority's reading renders Section 2710(a)(3)'s video-specific modifier "superfluous" because that provision "has the same limiting context the majority emphasizes" to conclude that an unmodified term refers only to video materials); *Salazar*, 118 F.4th at 548 (similar). Thus, the majority's analysis runs afoul of a "cardinal principle of statutory interpretation"—namely, the rule against surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding courts must "give effect, if possible, to every clause and word of a statute" and should hesitate "to treat statutory terms as surplusage in any setting" (internal quotation marks and citations omitted)).

Because the majority required one to rent, purchase, or subscribe to audiovisual goods or services to become a "consumer," its analysis also leaves "requested or obtained" in Section 2710(a)(3) with no independent work to do. While one might request or obtain something without renting, purchasing, or subscribing to it, the opposite is not true. If one rents, purchases, or subscribes to something, he must have either requested or obtained it as well. As a result, the majority rendered "requested or obtained" in Section 2710(a)(3) surplusage.

More troublingly, under the majority's approach, every transaction that gives rise to "consumer" status necessarily results in "personally identifiable information" as well. But, if that is true, it is unclear why Congress bothered to separate and define the two elements at all. If one element invariably leads to the other, the two provisions do no independent work, and one is surplusage *in its entirety*.

It is far simpler to assume Congress meant what it said. By referencing different content in Sections 2710(a)(1) and 2710(a)(3), Congress confirmed a single video tape service provider could provide *both* "video materials and services" *and* other "goods or services" more generally. 18 U.S.C. §§ 2710(a)(1), (a)(3). That Congress specified two different relationships to those underlying subject matters (from a single source) reinforces the conclusion that Sections 2710(a)(1) and 2710(a)(3) do *not* refer to the same content. The Sixth Circuit was wrong to conclude otherwise.

D. The Sixth Circuit interpreted materially identical terms to mean different things.

The flipside of the meaningful-variation canon is the consistent-usage canon. There, an interpreter must assume that, "[i]n a given statute, the same term usually has the same meaning." *Pulsifer*, 601 U.S. at 149; *see also Azar v. Allina Health Servs.*, 587 U.S. 566, 575–76 (2019) (rejecting an interpretation that would make "the same word . . . mean two different things in the same statute" based on the "normal presumption that, when Congress uses a term in multiple places within a single statute, the term bears a consistent meaning"); Scalia & Garner, *Reading Law* 170 ("A word or phrase is presumed to bear the same meaning throughout a text[.]").

Here, however, the Sixth Circuit majority's reading makes a single statutory term—namely, "goods or services" and "goods and services"—mean two different things. 18 U.S.C. §§ 2710(a)(1), (b)(2)(D)(ii). Per the majority, in Section 2710(a)(1), the unmodified phrase is limited to audiovisual goods or services. But there is no reason to think the majority would apply that limitation in

Section 2710(b)(2)(D)(ii). And, as discussed above, Section 2710(a)(1)'s context—namely, the prepositional phrase "from a video tape service provider"—cannot account for this difference in meaning.

E. The Sixth Circuit ignored the presence of "any."

This Court has repeatedly held the word "any" "has an expansive meaning." *Patel v. Garland*, 596 U.S. 328, 338 (2022). For example, if a statute refers to "any judgment," it "applies to judgments of whatever kind." *Id.* Likewise, if a statute refers to "any" person, it means "every" person, "without distinction or limitation." *A.J.T.*, 605 U.S. at 345; *see also Ames*, 605 U.S. at 309–10 (similar); *SAS Inst. Inc. v. Iancu*, 584 U.S. 357, 359–60 (2018) (similar). Put simply, "any" means "every." It does not mean "some."

But the Sixth Circuit majority did not account for the VPPA's repeated use of "any." 18 U.S.C. §§ 2710(a)(1), (b)(1), (c)(1). As most relevant here, the statute's liability clause provides that a video tape service provider "who knowingly discloses, to any person, personally identifiable information concerning *any consumer* of such provider shall be liable to the aggrieved person." *Id.* § 2710(b)(1) (emphasis added). This reference to "any consumer of such provider" shows Congress was referring generally to all of a provider's consumers, not narrowly to some specific subset of its consumers. Scalia & Garner, *Reading Law* 101–03 (discussing the general-terms canon, with applications like "all persons," "any person," and "any property").

Given the liability clause's plain language, as well as this Court's binding precedent about the meaning of "any," the Sixth Circuit should have read this provision to apply to "any consumer"—"of whatever kind," "without distinction or limitation"—of a video tape service provider. In this context, it makes no difference whether the consumer subscribed to a newsletter, bought bubblegum, or rented a movie from the video tape service provider. Indeed, this reading is consistent with Section 2710(a)(1)'s broad language, which contains no limitation on the kinds of "goods or services" that might render one a "consumer."

Instead, the Sixth Circuit majority interpreted and cross-referenced the definitions in isolation. While the liability clause contains three of the four terms Congress chose to define, the majority never placed any defined term into *that* context. Ignoring that the liability clause used a word with "expansive meaning" right before "consumer," the majority searched for ways to narrow the statutory definition. And its insertion of limiting language in Section 2710(a)(1) means "any consumer of such provider" in Section 2710(b)(1) does *not* include a consumer "of whatever kind," "without distinction or limitation," but instead includes only a particular subcategory of consumers that transacted with a provider concerning a narrow subject matter.

F. The Sixth Circuit failed to consider the ordinary meaning of "consumer."

Because "an entirely artificial definition is rare, the meaning of the definition is almost always closely related to the ordinary meaning of the word being defined." *Delligatti v. United States*, 604 U.S. 423, 438 (2025)

(quoting Scalia & Garner, *Reading Law* 228). In fact, if the meaning of some constituent part of a definition (*e.g.*, "goods or services") is unclear, "the ordinary meaning of the term [being defined] is one of 'the most important' factors [the Court] can consider." *Id.*

But the ordinary meaning of "consumer" is not limited to those who transact in videos. Common sense probably suffices for that proposition, but consulting a dictionary quickly confirms it. At the time the VPPA was enacted, the word "consumers" broadly included individuals "who purchase, use, maintain, and dispose of products and services." Black's Law Dictionary (5th ed. 1979).

Congress's definition of "consumer" in the VPPA is slightly narrower than the ordinary definition in two respects. First, it includes only those who rent, purchase, or subscribe to goods or services, not necessarily those who use, maintain, or dispose of them. 18 U.S.C. § 2710(a)(1). Second, it specifies the source of the goods or services (*i.e.*, "from a video tape service provider"). *Id.* But, like the more common, everyday understanding, Congress's definition does *not* restrict "consumer" status to those who receive only a particular kind of goods or services.

An example may help show the consistency. Consider Blockbuster, which remains the quintessential example of a video tape service provider. *See Salazar*, 118 F.4th at 548 (asking readers to think about Blockbuster). Exactly one Blockbuster remains in operation today. As expected, it offers movie rentals. But it also sells t-shirts, hats, sweatshirts, sunglasses, magnets, pens, pins, bags, playing cards, pint glasses, mousepads, and even dog

bandanas.[7] In normal, everyday language, one who bought any of those items would be described as Blockbuster's "consumer." One who saw an individual leaving the last Blockbuster store with a branded bag, for example, would not need to look inside that bag to determine whether the individual was Blockbuster's "consumer."

Because Congress mirrored that normal linguistic expectation, the same is true under the VPPA. Blockbuster remains a video tape service provider because it continues to rent audiovisual materials. 18 U.S.C. § 2710(a)(4).[8] Thus, someone who buys a dog bandana from Blockbuster is a "purchaser" of a "good[] . . . from a video tape service provider." *Id.* § 2710(a)(1). Even though a dog bandana is not audiovisual material, and even though purchasing a dog bandana—standing alone—does not give rise to "personally identifiable information," that purchase renders the individual Blockbuster's "consumer" under the VPPA. If this same consumer then asks for, but does not receive, a DVD copy of Hoosiers, information about his request is protected personally identifiable information. That is how the statute is written. And nothing about its application is absurd.

---

7. Blockbuster, https://bendblockbuster.com/shop (last visited Oct. 9, 2025).

8. It bears mentioning here that Blockbuster is not sometimes a video tape service provider and sometimes not. *But see* App. 16a (suggesting a company might sometimes "act[] as a 'video tape service provider'" and other times not, depending on what is included in each individual transaction). Instead, Blockbuster is *always* a video tape service provider because it is "engaged in the business" of renting videos. 18 U.S.C. § 2710(a)(4).

There is simply no basis to rewrite the VPPA's definition of "consumer" to impose a limitation that appears nowhere in the text. *See Antrix Corp.*, 145 S. Ct. at 1580 (declining "to add in what Congress left out"). The Second and Seventh Circuits got it right. The Sixth Circuit got it wrong.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

Joshua I. Hammack
Counsel of Record
Bailey & Glasser, LLP
1055 Thomas Jefferson Street NW,
Suite 540
Washington, DC 20007
(202) 463-2101
jhammack@baileyglasser.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 3, 2025

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 23-5748

MICHAEL SALAZAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

PARAMOUNT GLOBAL, DBA 247SPORTS,

Defendant-Appellee.

Argued: June 18, 2024
Decided and Filed: April 3, 2025

OPINION

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 3:22-cv-00756—Eli J. Richardson, District Judge

Before: BATCHELDER, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

NALBANDIAN, Circuit Judge. The Video Privacy Protection Act—as the name suggests—arose out of a desire to protect personal privacy in the records of the rental, purchase, or delivery of "audio visual materials." Spurred by the publication of Judge Robert Bork's video rental history on the eve of his confirmation hearings, Congress imposed stiff penalties on any "video tape service provider" who discloses personal information that identifies one of their "consumers" as having requested specific "audio visual materials."

This case is about what "goods or services" a person must rent, purchase, or subscribe to in order to qualify as a "consumer" under the Act. Is "goods or services" limited to audio-visual content—or does it extend to any and all products or services that a store could provide? Michael Salazar claims that his subscription to a 247Sports e-newsletter qualifies him as a "consumer." But since he did not subscribe to "audio visual materials," the district court held that he was not a "consumer" and dismissed the complaint. We agree and so AFFIRM.

I.

In September 2022, Michael Salazar brought this class action against Paramount Global, claiming a violation of the Video Privacy Protection Act (VPPA). Salazar claims he used 247Sports.com, a website owned by Paramount that covers college sports recruiting. Salazar alleged that he "began a digital subscription to 247Sports.com in 2022" and that he watched videos on 247Sports.com "while logged into his Facebook account." R.1, Compl. p.4, PageID 4.

Salazar claims that, by then, Paramount had installed Facebook's tracking Pixel on 247Sports.com.[1] The Pixel enabled Paramount to track and disclose to Facebook Salazar's 247Sports.com video viewing history, linked to his Facebook ID, without Salazar's consent. Based on these allegations, Salazar asserted a single claim for relief under the VPPA, seeking actual or statutory liquidated damages. Paramount moved to dismiss the complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Rule 12(b)(6).

In July 2023, the district court issued an order denying Paramount's request to dismiss the complaint under Rule 12(b)(1) and granting Paramount's request to dismiss the complaint under Rule 12(b)(6). The district court first rejected Paramount's claim that Salazar lacked standing. The court concluded that Salazar's alleged injury—the disclosure of his 247Sports.com video viewing history to Facebook—was an injury in fact because disclosure of personally identifying information to a third party is a concrete harm. And this injury was fairly traceable to Paramount because Salazar alleged that Paramount had installed the Facebook tracking Pixel on 247Sports.com, allowing it to transmit Salazar's video viewing history to Facebook.

---

1. The Pixel "is a code that allows Facebook to collect the data" of website users "who also have a Facebook account." *Salazar v. Paramount Glob.,* 683 F. Supp. 3d 727, 733 (M.D. Tenn. 2023). If a user watches videos on a website with the Pixel while logged into his Facebook account, the Pixel sends Facebook "the video content name, its URL, and, most notably, the [user]'s Facebook ID." *Id.*

Yet the district court dismissed Salazar's complaint for failing to state a claim under the VPPA, concluding he was not a "consumer" under the Act. Salazar claimed that he was a "consumer" under the VPPA because he became a 247Sports.com subscriber (and thus a VPPA "subscriber")[2] when he signed up for an online newsletter.[3] But the court rejected this approach as reading the term "subscriber" "in the abstract." *Salazar v. Paramount Glob.*, 683 F. Supp. 3d 727, 742 n.22 (M.D. Tenn. 2023). Looking to the statutory context, the court noted that the proper question was to ask "whether someone falls within the term 'subscriber of goods or service[s] of a video tape service provide[r]' as properly defined for purposes of the VPPA." *Id.* (quoting 18 U.S.C. § 2710(a)(1)). Reading this provision "as a whole" revealed that the definition of "subscriber" was "cabined by the definition of 'video tape service provider.'" *Id.* at 743-44 (quoting *Carter v. Scripps Networks, LLC*, 670 F. Supp. 3d 90, 98-99 (S.D.N.Y. 2023)). So incorporating the VPPA's definition of "video tape service provider," 18 U.S.C. § 2710(a)(4), the court

2. The court properly noted that it did not need to address whether Salazar was a "renter" or "purchaser" under the VPPA because Salazar claimed only that he was a "subscriber" under the Act.

3. The court treated Salazar's allegation that he was a "digital subscriber" as a claim that he subscribed to 247Sports.com's newsletter, rather than registering for a 247Sports.com account or otherwise securing exclusive access to 247Sports.com content. Salazar's briefing concedes as much. *See* Appellant Br. at 18 ("The only remaining question, then, is whether Paramount's online newsletter counts as a 'good or service.'"); *id.* ("Salazar subscribes to an online newsletter."); *id.* at 38 ("Salazar qualifies as a 'consumer' because the newsletters are 'audio visual materials.'").

concluded that, to qualify as a "consumer," a "plaintiff must be a subscriber of goods and services *in the nature of audio-video* content." *Id.* at 743 n.23.

Turning to the particulars of Salazar's complaint, the court noted that he failed to "allege that an individual can only access the video content from 247Sports.com through signing up for the newsletter." *Id.* at 744. Or even that he "accessed audio visual content through the newsletter." *Id.* Since there was no sign that the newsletter was "audio visual content," the court found that Salazar "necessarily" was not a "subscriber" under the VPPA. *Id.* So the court dismissed Salazar's complaint for failing to state a claim. Salazar appealed.

II.

On appeal, Paramount abandons its challenge to Salazar's standing. But inherent to our jurisdiction is the limitation that "any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry,* 570 U.S. 693, 704, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). And standing remains a constitutional minimum that "cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill,* 587 U.S. 658, 139 S. Ct. 1945, 1951, 204 L.Ed.2d 305 (2019). So we have an independent obligation to confirm the plaintiff 's standing before exercising our jurisdiction. *See Kanuszewski v. Mich. Dep't of Health & Hum. Servs.,* 927 F.3d 396, 405 (6th Cir. 2019).

We review standing de novo. *Sullivan v. Benningfield,* 920 F.3d 401, 407 (6th Cir. 2019). A plaintiff must

demonstrate that they have standing "with the manner and degree of evidence required at the successive stages of the litigation." *Murthy v. Missouri,* 603 U.S. 43, 144 S. Ct. 1972, 1986, 219 L.Ed.2d 604 (2024) (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). So what the plaintiff must show is calibrated to the stage of the case—and here we review the grant of a motion to dismiss. To establish Article III standing at this initial stage, "a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court." *Tyler v. Hennepin County,* 598 U.S. 631, 143 S. Ct. 1369, 1374, 215 L.Ed.2d 564 (2023).

General allegations of harm will not do since injury in fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). Physical injury and monetary loss easily satisfy the injury-in-fact requirement. *TransUnion, LLC v. Ramirez,* 594 U.S. 413, 141 S. Ct. 2190, 2204, 210 L.Ed.2d 568 (2021). Some intangible harms also constitute concrete injuries—"[c]hief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* But this "close relationship" to a traditional harm does not require "an exact duplicate in American history or tradition." *Id.* We are analyzing whether the asserted harm is sufficiently analogous to a traditional harm recognized by law—not whether the plaintiff has pleaded an element-by-element match to a historical tort. *See Spokeo, Inc. v. Robins,* 578 U.S. 330, 341-42, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *Ward v. NPAS, Inc.,* 63 F.4th

576, 581 (6th Cir. 2023) (noting that the inquiry focuses on whether the harm alleged is closely related "to the *kind* of harm that the common law sought to protect").

So we address whether Salazar's alleged injury—the disclosure of his 247Sports.com private video-viewing history to Facebook—bears a "close relationship" to intangible harms "traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion,* 141 S. Ct. at 2204. To be sure, no common-law tort specifically protects against the disclosure of a person's video-viewing history. But the Supreme Court has recognized that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press,* 489 U.S. 749, 763, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). Indeed, *TransUnion* expressly states that at least a couple of invasions of privacy cause sufficiently concrete injuries—such as "disclosure of private information" and "intrusion upon seclusion."[4] 141 S. Ct. at 2204. Salazar's asserted injury resembles the harms addressed by these torts because he alleges that Paramount disclosed his private information

4. The common-law tort of public disclosure of private facts prohibited anyone from "giv[ing] publicity to a matter concerning the private life of another." Restatement (Second) of Torts § 652D (Am. L. Inst. 1977). Similarly, the tort of intrusion upon seclusion protects against "intentional intru[sion], physically or otherwise, upon the solitude or seclusion of another or his private affairs of concerns." *Id.* § 652B. Under this tort, the victim was harmed even if "there is no publication or other use of any kind of the" information obtained. *Id.* § 652B cmt. b.

to Facebook without his knowledge or consent. So Salazar can show that he suffered a concrete injury by reference to well-established privacy harms.[5] *See Ward,* 63 F.4th at 579-81. And because Salazar's complaint alleges that Paramount installed the tracking Pixel on 247Sports.com, the claimed harm is also traceable to Paramount's conduct. Finally, an award of damages against Paramount would redress Salazar's injury.

So the district court correctly found that Salazar has standing.[6] Next, we turn to whether it correctly dismissed Salazar's suit for failure to state a claim.

---

5. Indeed, every other circuit to consider the issue agrees that a similar alleged violation of the VPPA confers standing. *See In re Nickelodeon Consumer Priv. Litig.,* 827 F.3d 262, 274 (3d Cir. 2016); *Sterk v. Redbox Automated Retail, LLC,* 770 F.3d 618, 623 (7th Cir. 2014); *Eichenberger v. ESPN, Inc.,* 876 F.3d 979, 982-84 (9th Cir. 2017); *Perry v. Cable News Network, Inc.,* 854 F.3d 1336, 1339-41 (11th Cir. 2017). Although these circuit opinions predate *TransUnion,* several analogized the injury redressed by the VPPA to the same traditional harms discussed by *TransUnion*: invasion of privacy or intrusion upon seclusion. *See, e.g., Eichenberger,* 876 F.3d at 983 (comparing the VPPA to common-law privacy torts); *Perry,* 854 F.3d at 1340-41 (same).

6. In a case closely related to this one, *Salazar v. NBA,* the Second Circuit recently concluded that Salazar had alleged a concrete injury, analogizing his alleged harm to the common law tort of unauthorized public disclosure of private facts. 118 F.4th 533, 541-44 (2d Cir. 2024). Although the panel majority disagrees with the ultimate outcome in that case, we all agree with its decision to reach the merits. We acknowledge that another circuit has distinguished information disclosure to a single company from disclosure to the "public." *See Hunstein v. Preferred Collection & Mgmt. Servs., Inc.,* 48 F.4th 1236, 1249 (11th Cir. 2022) (en banc) (holding that a plaintiff lacked Article III standing for their Fair Debt Collection Practices

III.

On appeal, Salazar claims that the district court erred in granting Paramount's motion to dismiss under Rule 12(b)(6).

Act claim because disclosure to a mail vendor was not sufficiently public to be analogous to the tort of public disclosure of private facts.) Still, *Hunstein* dealt with disclosures to mail processors, rather than the world's largest social media conglomerate—a company that aggregates, uses, and monetizes personal data. *See* R.1, Compl. p.11, PageID 11.

More importantly, finding "a close historical or common-law analogue" for the modern injury or harm does not require an exact match for each element of the common-law tort. *See TransUnion LLC v. Ramirez,* 594 U.S. 413, 141 S. Ct. 2190, 2204, 210 L.Ed.2d 568 (2021); *Ward v. NPAS, Inc.,* 63 F.4th 576, 580-81 (6th Cir. 2023); *see also Gadelhak v. AT&T Servs., Inc.,* 950 F.3d 458, 462-63 (7th Cir. 2020) (Barrett, J.) ("[W]hile the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy."); *Cranor v. 5 Star Nutrition, L.L.C.,* 998 F.3d 686, 693 (5th Cir. 2021) ("[O]ur inquiry is focused on the types of harms protected at common law, not the precise point at which those harms become actionable." (quoting *Krakauer v. Dish Network, L.L.C.,* 925 F.3d 643, 654 (4th Cir. 2019)); *Lupia v. Medicredit, Inc.,* 8 F.4th 1184, 1192 (10th Cir. 2021) ("Though a single phone call may not intrude to the degree required at common law, that phone call poses the same *kind* of harm recognized at common law.") As the Supreme Court pointed out, there is "an important difference" between the elements of the cause of action and the concrete harm. *TransUnion,* 141 S. Ct. at 2205. So "disclosure of private information" remains one of "those traditional harms" that "is sufficiently concrete to qualify as an injury in fact," even when it fails to meet all of the elements of the common law tort of public disclosure of private facts. *Id.* at 2204.

When a district court grants a motion to dismiss under Rule 12(b)(6), we review de novo. *Luis v. Zang,* 833 F.3d 619, 625 (6th Cir. 2016). We "accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff 's favor." *Id.* at 626. The complaint's allegations can overcome a Rule 12(b)(6) motion only when they contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

A.

To see if Salazar made out a claim under the VPPA, we first consider the Act's structure. The VPPA, first enacted in 1988, creates civil liability for any "video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). A "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1). And a "video tape service provider" is "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).

So to state a claim under the VPPA, Salazar must allege that (1) Paramount is a regulated entity (a "video tape service provider"), (2) he is a protected party (Paramount's "consumer"), and (3) Paramount engaged

in prohibited conduct (knowingly disclosing Salazar's "personally identifiable information" to a third party). The district court dismissed Salazar's claim solely because he failed to plausibly allege the second element: that he is a protected "consumer." So we turn to that issue next.

B.

To answer whether Salazar plausibly pleaded that he was a "consumer," we ask whether he was a "subscriber of goods or services from a video tape service provider." *Id.* § 2710(a)(1).[7] In his complaint, Salazar alleged that he was a "consumer" under the VPPA because he "subscribed to a digital 247Sports.com plan that provides Video Media content to the digital subscriber's desktop, tablet, and mobile device." R.1, Compl., p.17, PageID 17. The complaint elsewhere makes clear that this was a *newsletter* subscription: "To register for 247Sports.com, users sign up for an online newsletter." *Id.* at p.6, PageID 6.

Salazar claims that the "broad statutory phrase 'goods or services' plainly includes Paramount's online newsletter." Appellant Br. at 24 (quoting 18 U.S.C.

7. Of course, Salazar cannot claim that he is a "consumer" unless Paramount is a "video tape service provider" in the first place. But we assume without deciding that Paramount is one. After all, the district court did the same—an assumption that Paramount does not ask us to revisit. *Cf. Osheske v. Silver Cinemas Acquisition Co.,* No. 23-3882, 2024 WL 5487091, at *2 (9th Cir. Mar. 27, 2025) (holding that traditional movie theaters are not "video tape service providers").

§ 2710(a)(1)). To reach that conclusion, Salazar breaks down the VPPA's definition of "consumer" into two separate parts, claiming that it covers anyone who (1) subscribes to "goods or services" from (2) a "video tape service provider." Assuming Paramount is a "video tape service provider," Salazar isolates the meaning of "goods or services." Pointing to dictionary definitions of "goods" and "services," Salazar argues that the "combination of the two terms . . . necessarily refers to society's entire economic output." *Id.* at 26. So he concludes that this "all-inclusive" phrase means that the 247Sports.com newsletter is "unquestionably a 'good or service'" from Paramount—a "video tape service provider." *Id.* at 26, 24.

But Salazar errs by reading the terms "goods or services" "in isolation," yielding a definition of "consumer" based "solely on the broadest imaginable definitions of its component words." *Dubin v. United States,* 599 U.S. 110, 143 S. Ct. 1557, 1566, 216 L.Ed.2d 136 (2023) (quoting *Epic Sys. Corp. v. Lewis,* 584 U.S. 497, 138 S. Ct. 1612, 1631, 200 L.Ed.2d 889 (2018)). Learned jurists have long cautioned against making this very mistake. *See Helvering v. Gregory,* 69 F.2d 809, 810-11 (2d Cir. 1934) (L. Hand, J.) ("[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."); *FCC v. AT&T, Inc.,* 562 U.S. 397, 406, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation.").

We don't scrutinize a statute atomistically—chopping it up and giving each word the broadest possible meaning. "Our duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell,* 576 U.S. 473, 486, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) (internal quotation marks omitted). And often the meaning of a word or phrase "may only become evident when placed in context." *Sackett v. EPA,* 598 U.S. 651, 143 S. Ct. 1322, 1338, 215 L.Ed.2d 579 (2023) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

So it remains "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. EPA,* 597 U.S. 697, 142 S. Ct. 2587, 2607, 213 L.Ed.2d 896 (2022) (quoting *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)). And "[t]his bedrock principle has especial force for 'common words' like [goods or services] because they are 'inordinately sensitive to context.'" *See United States v. Hill,* 963 F.3d 528, 533 (6th Cir. 2020) (quoting *Smith v. United States,* 508 U.S. 223, 245, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (Scalia, J., dissenting)). The statutory phrase "goods or services" "cannot be construed in a vacuum" to wall it off from the meaning imputed by the rest of the statute's text. *Home Depot U.S.A., Inc. v. Jackson,* 587 U.S. 435, 139 S. Ct. 1743, 1748, 204 L.Ed.2d 34 (2019) (quoting *Davis,* 489 U.S. at 809, 109 S.Ct. 1500).

Indeed, other interpretive canons—such as *noscitur a sociis* or the associated-words canon—reflect the "common

sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Fischer v. United States,* 603 U.S. 480, 144 S. Ct. 2176, 2184, 219 L.Ed.2d 911 (2024). The associated-words canon instructs interpreters to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States,* 574 U.S. 528, 543-44, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (internal quotation marks omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 197 (2012) ("Although most associated-words cases involve listings—usually a parallel series of nouns and noun phrases, or verbs and verb phrases—a listing is not prerequisite. An 'association' is all that is required.") So despite its overly technical name, the word-association canon embodies a simple fact of everyday communication: a general word can be limited by its connection to other words in the same text.

Here, there is an association between the terms "goods or services" and "audio visual materials." So viewing the provision as a whole reveals "a more targeted reading" than the one Salazar proposes. *See Dubin,* 143 S. Ct. at 1565. Even though—standing alone—the expression "goods or services" is not limited, its association with surrounding words cabins its meaning. The full definition of "consumer" in the statute does *not* encompass consumers of all "goods or services" imaginable, but only those "from a video tape service provider." 18 U.S.C. § 2710(a)(1). This proviso tethers the definition of "consumer" to that of "video tape service provider." And that definition pinpoints the relevant "goods or services": those involved in the "rental,

sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4). So the most natural reading, which accounts for the context of both definitions, shows that a person is a "consumer" only when he subscribes to "goods or services" in the nature of "video cassette tapes or similar audio visual materials."[8] *Id.* § 2710(a)(1), (a)(4) Together, "text and context point to the same place:" the expression "goods or services" is limited to audiovisual ones. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 142 S. Ct. 1783, 1790, 213 L.Ed.2d 27 (2022).

Some might resist this conclusion, arguing that it adds an unexpressed limitation to the text. Not so. Our approach is not just consonant with textualist interpretation, it is required by it. The pure definitional meaning of words in isolation shouldn't be confused with

8. Salazar contends that Congress "thrice used different language to focus narrowly on audio-visual content" elsewhere in the VPPA, suggesting it "intended 'goods or services' to cover more than just audio-visual content." Appellant Br. at 28. At first glance, Salazar appears to have a point, since "[d]ifferences in language usually lead to differences in meaning." *United States v. Dowl*, 956 F.3d 904, 907 (6th Cir. 2020). But it turns out that one of the three uses of "different language to focus narrowly on audio-visual content" that Salazar references comes in the definition of "video tape service provider." Appellant Br. at 28 ("[I]n the definition of 'video tape service provider,' Congress deployed the term 'prerecorded video cassette tapes or similar audio visual materials.'") (quoting 18 U.S.C. § 2710(a)(4)). And since the VPPA's definition of "consumer" covers only "goods or services from a *video tape service provider*," Congress incorporated the latter provision's express narrowing reference to "audio visual materials." 18 U.S.C. § 2710(a)(1), (4).

the plain meaning of the text. *See Hill,* 963 F.3d at 536-37. Instead, the plain meaning of any word "is informed by its surrounding context" and the other words in the statute. *Diaz v. United States,* 602 U.S. 526, 144 S. Ct. 1727, 1735, 219 L.Ed.2d 240 (2024). This "[c]ontext also includes common sense" such that "[c]ase reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short." *Biden v. Nebraska,* 600 U.S. 477, 143 S. Ct. 2355, 2379, 216 L.Ed.2d 1063 (2023) (Barrett, J., concurring). And "[c]ontext from the time of [the VPPA's] enactment . . . confirms that the statute does not reach" all possible goods and services. *See Thompson v. United States,* No. 23-1095, — U.S. —, 145 S.Ct. 821, 827-28, — L.Ed.2d — (U.S. Mar. 21, 2025).

As discussed, the terms "goods or services" are linked to those goods and services provided by a company when it is acting as a "video tape service provider"—namely "audio visual materials." So "in construing [the VPPA], we must also take into account the broader statutory scheme," which focuses on privacy protections for records of transactions related to audio-visual goods and services. *See City & County of San Francisco v. EPA,* — U.S. —, 145 S. Ct. 704, 717, — L.Ed.2d — (2025). Adopting this best reading of the statute is not adding a new limitation where one did not exist. Instead, we merely recognize a limitation that was included in the statute's plain meaning at the time it was signed into law.[9]

---

9. For those persuaded by such evidence, the VPPA's legislative history bolsters this reading:

In doing so, we break with the Second and Seventh Circuits' approach to this issue. Considering a virtually indistinguishable complaint filed by the same plaintiff, the Second Circuit held that the statutory term "'consumer' should be understood to encompass a renter, purchaser, or subscriber of *any* of the provider's 'goods or services'—audiovisual or not." *Salazar v. NBA,* 118 F.4th 533, 549 (2d Cir. 2024). So the court concluded that "it's the definition of 'personally identifiable information' that limits what can be shared, not the definition of 'consumer.'" *Id.* at 548. And the Seventh Circuit echoed this conclusion in an "almost identical" case. *Gardner v. Me-TV Nat. Ltd. P'ship,* 24-1290, 132 F.4th 1022, 1025 (7th Cir. Mar. 28, 2025).

Respectfully, we disagree. It's far from the most natural reading to see the term "personally identifiable information" as limiting because the statute defines it with the term "includes"—unlike the other definitions which use the word "means." 18 U.S.C § 2710(a)(3). And when a "definition is introduced with the verb 'includes' instead of 'means' . . . it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive." *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 162, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012);

> [S]imply because a business is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill. For example, a department store that sells video tapes would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products.

S. Rep. No. 100-599, at 12.

see also Scalia & Garner, *supra,* at 132-33 (describing this as "the rule both in good English usage and in textualist decision-making"). So it's not clear that "personally identifiable information" always has to "identif[y] a person as having requested or obtained specific video materials or services." 18 U.S.C § 2710(a)(3).

Yet the Second Circuit sees this definition of "personally identifiable information" as the floodgate preventing VPPA liability for "the general store owner who . . . disclos[es] particular customers' bread-buying habits." *Salazar v. NBA,* 118 F.4th at 549. Indeed, that court viewed this definition as making clear that the terms "goods or services" should be construed broadly to prevent redundancy in the statute. *Id.* But if that is true, it seems odd that Congress would put such a pivotal limitation in a nonexclusive definition. The Second Circuit acknowledges that fact—though only in a footnote. *Id.* at 549 n.10. And since the definition is illustrative rather than exhaustive, it's not clear how interpreting "goods or services" to be audio-visual materials would render that definition's reference to videos "superfluous." *Id.* at 548. The better reading remains that "goods or services" relates to audio-visual materials and the definition of "personally identifiable information" merely provides an example of what information a "video tape service provider" can't disclose to others.[10]

---

10. The First Circuit has also suggested that subscribers to non-video materials (specifically, apps) can be "consumers" under the VPPA. *See Yershov v. Gannett Satellite Info. Network, Inc.,* 820 F.3d 482, 487-90 (1st Cir. 2016) (finding that plaintiff plausibly pleaded he was a "consumer" by alleging that he

Turning to how this applies to Salazar's case, we ask whether the 247Sports.com newsletter is a "video cassette tape or similar audio visual material." Salazar claims it is because it "contained links to videos, directed subscribers to video content, and otherwise enticed or encouraged them to watch Paramount's videos." Appellant Br. at 36. But Salazar's complaint failed to allege that the newsletter did any of these or that he had accessed videos through the newsletter. If anything, the complaint suggested that the relevant videos were accessible to anyone, even those without a newsletter subscription, by going directly on 247Sports.com. *See* R.1, Compl., p.11, PageID 11 ("[A] user visits 247Sports.com and clicks on an article . . . and watches the video in the article."). So Salazar did not plausibly allege that the newsletter itself was an "audio visual material."

Standing alone, Salazar's allegation that he subscribed to 247Sports.com's newsletter was not enough to render him a "consumer" under the VPPA—making the district court's dismissal of his suit proper.

---

downloaded and watched videos on the *USA Today* App). But the case is readily distinguishable on the facts because the *Yershov* plaintiff at least pleaded that he used his subscription to access audio-visual materials. *Id.* at 485. (noting that the plaintiff "used the App to read news articles and watch numerous video clips"). And the application disclosed the plaintiff's personal information and viewing history "at the time he viewed a video" through the application. *Id.* at 489. By contrast, Salazar's complaint failed to allege that he watched videos on the newsletter's emails or through hyperlinks included in them.

IV.

But that is not the end of the case. Salazar claims that, even if dismissal were proper, the district court erred "as a matter of law" by refusing to grant him "leave to amend his complaint to add allegations to establish that the online newsletters were 'audio-visual materials.'" Appellant Br. at 40.

When a district court dismisses a complaint with prejudice, we review for abuse of discretion. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 342 F.3d 634, 644 (6th Cir. 2003). Generally, district courts "should freely give leave" to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). But when "a party does not file a motion to amend or a proposed amended complaint in the district court, it is not an abuse of discretion for the district court to dismiss the claims with prejudice." *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC,* 700 F.3d 829, 844 (6th Cir. 2012) (internal quotation marks omitted); *see also Crosby v. Twitter, Inc.,* 921 F.3d 617, 627-28 (6th Cir. 2019) (affirming dismissal with prejudice because plaintiff failed to file a formal motion to amend).

Salazar filed neither a motion to amend nor a proposed amended complaint. Instead, he requested leave to amend his complaint only in a single cursory footnote at the end of his response to Paramount's motion to dismiss: "To the extent the Court grants Defendant's motion, Plaintiff respectfully requests that he be permitted to amend his complaint to address any issues the Court raises in its

Order." R.24, Opp'n to Mot. to Dismiss, p.21 n.17, PageID 146. This "cursory request" did not "explain how a second amended complaint would resolve the problems in the first." *Crosby,* 921 F.3d at 628. So the district court did not abuse its discretion in dismissing Salazar's complaint with prejudice.

V.

For these reasons, we AFFIRM.

CONCURRENCE/DISSENT/DISSENT FROM JUDGMENT

BLOOMEKATZ, Circuit Judge, concurring in part, dissenting in part, and dissenting from the judgment. The majority opinion holds that Michael Salazar is not a "consumer" under the Video Privacy Protection Act (VPPA) because he did not subscribe to "'goods or services' *in the nature of* 'video cassette tapes or similar audio visual materials'" from 247Sports.com. Maj. Op. at 650-51 (emphasis added) (quoting 18 U.S.C. § 2710(a)(1), (a)(4)). But the statute doesn't say that. And where, as here, a straightforward reading of the statute's plain language does not lead to absurd or anomalous results, we're not allowed to read in extratextual limitations. I agree that we have jurisdiction to resolve Salazar's claim, so I concur in Part II of the majority opinion. On the merits, however, the majority's reading of the VPPA contravenes the plain language of the statute and, thus—perhaps unsurprisingly—conflicts with the reasoning of our sister circuits. I respectfully dissent.

ANALYSIS

Michael Salazar signed up for a newsletter from Paramount Global, doing business as 247Sports.com, a website that provides news coverage of college sports. To sign up, Salazar provided his email address and his IP address, the latter of which reveals information about his physical location. After he signed up, Paramount sent him a daily newsletter with links to articles (many of which contained videos), photographs, and other content. Salazar

alleges that, through the Facebook Pixel that Paramount installed on the 247Sports.com website, Paramount collected data about his identity and the videos he watched and then disclosed that information to Facebook without his consent.

Salazar sued Paramount under the VPPA. Congress passed the VPPA, also known as the "Bork bill," to increase video privacy after a newspaper published a profile about then-Supreme Court nominee Judge Robert Bork based on almost 150 movies he and his family had rented from a video store. S. Rep. No. 100-599, at 5 (1988). The VPPA provides a cause of action against a "video tape service provider" that "knowingly discloses" a "consumer['s]" "personally identifiable information," which includes information about the "specific video materials or services" the consumer has "requested or obtained." 18 U.S.C. § 2710(a)(3), (b)(1). That's a lot of defined terms to apply. Luckily, they're not all in dispute. As the majority explains, this case turns on whether Salazar is a "consumer" within the VPPA's definition. *See* Maj. Op. at 648-49.

In my view, he is.

I. Plain Text Reading of "Consumer"

The plain text is all that is necessary to resolve this case.

To determine whether Salazar is a "consumer" within the meaning of the VPPA, we start with the plain text of

the statute. *Twitter, Inc. v. Taamneh,* 598 U.S. 471, 484, 143 S.Ct. 1206, 215 L.Ed.2d 444 (2023). Unless terms are specifically defined, we look to their ordinary meaning. *Keen v. Helson,* 930 F.3d 799, 802 (6th Cir. 2019). This includes how the terms are used in their surrounding context. *See United States v. Hill,* 963 F.3d 528, 533-34 (6th Cir. 2020). When the "text is clear, 'this first step of the interpretive inquiry is our last.'" *United States v. Stewart,* 73 F.4th 423, 425 (6th Cir. 2023) (quoting *Rotkiske v. Klemm,* 589 U.S. 8, 13, 140 S.Ct. 355, 205 L.Ed.2d 291 (2019)).

The VPPA defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). By this provision's plain text, Salazar is a "consumer" under the VPPA.

Some of the words in the definition of "consumer" are undefined, so I afford them their plain meaning. *See Keen,* 930 F.3d at 802. Relevant here, Salazar contends that he is a consumer because he is a "subscriber" of "goods or services" from Paramount. Congress did not define either of those statutory terms. In determining the meaning of those terms, "contemporaneous dictionaries are the best place to start." *Id.* To "subscribe" is "to put one's name down as a purchaser of shares, a periodical, newspaper, or book, etc." *Subscribe,* 17 *Oxford English Dictionary* 54 (2d ed. 1989). As several of our sister circuits have held, the "purchase[ ]" need not be monetary—providing personal information suffices. *Salazar v. Nat'l Basketball Ass'n,* 118 F.4th 533, 552 (2d Cir. 2024); *Ellis v. Cartoon Network,*

Inc., 803 F.3d 1251, 1256-57 (11th Cir. 2015); *Yershov v. Gannett Satellite Info. Network, Inc.,* 820 F.3d 482, 487-89 (1st Cir. 2016); *Gardner v. Me-TV Nat'l Ltd. P'Ship,* 132 F.4th 1022, 1024-25 (7th Cir. 2025). So, a "subscriber" generally refers to a person who, by providing some sort of consideration, opts in advance to receive "goods or services" of a continuing or periodic nature from the provider. *See Ellis,* 803 F.3d at 1255-56; *Yershov,* 820 F.3d at 487 (collecting dictionary definitions). In turn, "goods" ordinarily refers to "movable property," and "services" refers to "[t]he section of the economy that supplies needs of the consumer but produces no tangible goods." *Good,* 6 *Oxford English Dictionary* 673 (2d ed. 1989); *Service,* 15 *Oxford English Dictionary* 37 (2d ed. 1989).

Under the statute, those "goods or services" must be "from a video tape service provider." 18 U.S.C. § 2710(a)(1). The VPPA defines that phrase in relevant part as "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).[1] Based on this language, a "video tape service provider" need not be exclusively, or even primarily, engaged in the "rental, sale, or delivery of prerecorded cassette tapes or similar

1. The full definition is, "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure." 18 U.S.C. § 2710(a)(4).

audio visual materials." *See id.*; *NBA,* 118 F.4th at 548. Congress included "any person engaged in" the business of renting, selling, or delivering audio visual materials akin to video cassette tapes, capturing department stores, supermarkets, or other companies that are "engaged" in many commercial pursuits, including the "rental, sale, or delivery" of video tapes and the like. *See* S. Rep. No. 100-599, at 12 (explaining how the VPPA would apply to a department store); *NBA,* 118 F.4th at 548. Indeed, while Judge Bork rented videos from a local video store, the disclosure of his viewing history would not have been any less invasive had he rented from a supermarket that had a video rental department. (I remember when some did.) The VPPA, by its plain text, counts both stores as "video tape service providers" and would have prohibited either from disclosing his rental history.

So how does this definition of "consumer" match up to Salazar's allegations? Salazar is a "subscriber" under the VPPA. He gave his personal information—his email address and IP address—in exchange for receiving a periodic (daily) newsletter from 247Sports.com via email.[2] The newsletter is a "good[ ] or service[ ] from [Paramount]." Neither Paramount nor the majority disputes that the phrase "goods or services," in common parlance, includes newsletters. *See* Maj. Op. at 650-51 (discussing the "relevant 'goods or services'" covered by the VPPA); Appellee Br. at 27 (arguing that Congress did not intend for the VPPA "to cover all the goods and

2. Tellingly, if Salazar does not want to receive the newsletter anymore, Paramount allows him to "unsubscribe." Ex. A, R. 17-1, PageID 100.

services offered by a video tape service provider"); *see also* Op. & Order, R. 33, PageID 281 n.19 (declining to address whether the newsletter is a "good[ ] or service[ ]," instead holding only that Salazar is not a "subscriber of goods or services from a video tape service provider"). And finally, Paramount is a "video tape service provider," as it "engage[s] in the business" of delivering video content. 18 U.S.C. § 2710(a)(4).[3] Putting these terms together, it's not hard to see that Salazar qualifies as a "consumer" under the VPPA: he is a "subscriber" (a registered, regular recipient) of "goods or services" (the newsletter) from a "video tape service provider" (Paramount). This straightforward application of the statute's plain meaning follows the two other circuits to reach this issue. *See NBA,* 118 F.4th at 537 (2d. Cir.) (holding that, according to the provision's "plain meaning," a subscriber to the NBA's online newsletter is a "consumer" under the VPPA); *Gardner,* 132 F.4th at 1025 (7th Cir.) (holding that "[a] ny purchase or subscription from a 'video tape service provider' satisfies the definition of 'consumer', even if . . . the thing subscribed to is a newsletter.").

The majority reaches a different conclusion—but only by rewriting the plain language of the VPPA.

---

3. Paramount does not dispute in this appeal that it is a "video tape service provider." The majority, like the district court, assumes that it is. Maj. Op. at 649 n.7.

II. The majority's atextual reading of "goods or services from a video tape service provider."

In holding that Salazar is not a "consumer," the majority focuses on the fact that the VPPA's definition requires a plaintiff to be a consumer of not just any "goods or services," but "goods or services from a video tape service provider." Maj. Op at 650-51. It holds that the "most natural reading" of this full phrase is that "a person is a 'consumer' only when he subscribes to 'goods or services' *in the nature of* 'video cassette tapes or similar audio visual materials.'" *Id.* at 651 (emphasis added) (quoting 18 U.S.C. § 2710(a)(1), (a)(4)). But the statute doesn't have this limitation. The majority has written it in. As noted, the VPPA states that a consumer is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *See* 18 U.S.C. § 2710(a)(1). The majority's reading effectively adds the limiting words "audio visual" before "goods or services" in the statutory text: now, a consumer is "any renter, purchaser, or subscriber of [audio visual] goods or services from a video tape service provider." I don't think we can insert those words into the statute. *Borden v. United States*, 593 U.S. 420, 436, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) (plurality opinion).

The majority's defense of this edit does not persuade me. At the heart of the majority's interpretation is the principle that courts must read statutory language in context. The majority appears to acknowledge that the plain meaning of "goods or services" includes the online newsletter, but it stresses that we cannot read "goods

or services" in isolation. *See* Maj. Op. at 649-50. I agree, of course. It is a well-established and common-sense rule that courts can't isolate words in a statute and give them a meaning that would not make sense in context, as "words together may assume a more particular meaning than those words in isolation." *Id.* at 649 (quoting *FCC v. AT&T, Inc.*, 562 U.S. 397, 406, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011)). Take a different example from the same VPPA provision—the word "subscriber." In isolation, the word "subscriber" could mean a person who subscribes to the tenets of a religion or other beliefs, where there is no need for registration, an exchange, or a relationship between two people or entities. *Subscriber*, 17 *Oxford English Dictionary* 54 (2d ed. 1989). But the statute says "subscriber of goods or services," so it is most naturally read as referring to a different definition of subscriber.

Following the basic rule that courts look at words in context, the majority concludes: "The full definition of 'consumer' does *not* encompass all 'goods or services' imaginable, but only those 'from a video tape service provider.'" Maj. Op. at 650 (quoting 18 U.S.C. § 2710(a)(1)). Again, I agree. The "good or service" must be "from a video tape service provider." But here, it is. The newsletter is from Paramount, undisputedly a "video tape service provider." As the Seventh Circuit aptly asked, "What more is required?" *Gardner*, 132 F.4th at 1025. Purchasing any good—such as "a Flintstones sweatshirt or a Scooby Doo coffee mug or a Superman action figure or a Bugs Bunny puzzle"—from a video tape service provider like Paramount will do. *Id.* Thus, Salazar satisfies the definition of "consumer."

Not so, the majority says, because context limits the statutory language even further. It holds that the "goods or services" must not only be "from a video tape service provider," as the statute dictates—they must be "audio visual" in nature. Maj. Op. at 650-52. That's because, the majority reasons, by specifying that the "goods or services" must be "from a video tape service provider," the provision "pinpoints the relevant 'goods or services'" as "video cassette tapes or similar audio visual materials." *Id.* at 650-51 (quoting 18 U.S.C. § 2710(a)(1), (a)(4)). But how? Sure, to be a "video tape service provider," a company must engage 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). But Congress knew that "video tape service providers" could rent, sell, or deliver other types of "goods or services" too. Remember that the definition was drafted to include department stores, supermarkets, and other entities that rent, sell, or deliver the requisite audiovisual materials. *See* S. Rep. No. 100-599, at 12. The majority acknowledges as much, albeit in a footnote. *See* Maj. Op. at 651 n.9. So, when Congress provided that a "consumer" must get "goods or services from a video tape service provider," I wouldn't assume it meant only a subset of all the "goods or services" Congress knew "video tape service providers" do business in. And it's far from the most "natural" reading of the phrase to say that "goods or services from a video tape service provider" can only be *some particular* "goods or services" from that entity. *Id.* at 650-51.

If anything, the statutory context statute reinforces Salazar's plain-language interpretation. "[V]iewing the

provision as a whole," *id.* at 650, reveals that Congress knew how to limit "goods or services" to those of an audiovisual nature when it wanted to, *see Sw. Airlines Co. v. Saxon,* 596 U.S. 450, 457-58, 142 S.Ct. 1783, 213 L.Ed.2d 27 (2022) (citing the "meaningful-variation canon"). For example, the statute defines "personally identifiable information" as information "identif[ying] 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) (emphasis added). That "specific video" modifier is notably absent from the "goods or services" referenced in the definition of "consumer." *See id.* § 2710(a)(1). I don't think we should override Congress's choice not to similarly modify the phrase "goods or services" in that definition. *See Saxon,* 596 U.S. at 458, 142 S.Ct. 1783 (respecting the distinction Congress made in using "more open-ended formulations" in some places, and a "narrower" phrase in another (citation omitted)); *Jama v. Immigr. & Customs Enf't,* 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

The absence of the "specific video" modifier is particularly telling given the other similarities between the definitions of "personally identifiable information" and "consumer." Recall that the majority focuses on the fact that the definition of "consumer," 18 U.S.C. § 2710(a)(1), says "goods or services *from a video tape service*

provider," Maj. Op. at 650-51. And the majority concludes that, in context, "*from a video tape service provider*" means the goods or services must be audiovisual ones. *Id.* at 650-51 (emphasis added). The statutory definition of "personally identifiable information," 18 U.S.C. § 2710(a)(3), has the same limiting context the majority emphasizes: it says that the "materials or services" must be "from a video tape service provider," *id.* Yet it *also* says that they must be "*specific video* materials or services from a video tape service provider." *Id.* (emphasis added). If the majority were correct that "goods or services," when followed by the phrase "from a video tape service provider," covers only audiovisual materials, Congress would not have needed to limit the scope of "materials or services from a video tape services provider" in its definition of "personally identifiable information." *See Crump v. Blue,* 121 F.4th 1108, 1111 (6th Cir. 2024) (noting that Congress's decision to vary language "is telling"). Its reference to "specific video" materials or services would be superfluous. Reading the VPPA as the majority does runs counter to the "cardinal principle" that we should give meaning to every "clause, sentence, or word" in the statute. *United States v. Malone,* 889 F.3d 310, 312 (6th Cir. 2018) (quoting *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)); *see also NBA,* 118 F.4th at 548.

The majority's reliance on *noscitur a sociis* doesn't help either. Maj. Op. at 650-52. As the majority explains, *noscitur a sociis* tells us that a term's meaning is affected by the words with which it is "associated." *Id.* at 650-51. The canon "instructs interpreters to 'avoid ascribing to

one word a meaning so broad that it is inconsistent with its accompanying words.'" *Id.* (quoting *Yates v. United States,* 574 U.S. 528, 543-44, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015)). For instance, the Supreme Court recently applied this canon in *Fischer v. United States*—a case the majority relies on—to clarify the scope of 18 U.S.C. § 1512, a criminal obstruction statute. 603 U.S. 480, 144 S.Ct. 2176, 219 L.Ed.2d 911 (2024). The Court held that § 1512(c)(2), which extends liability to one who "otherwise obstructs, influences, or impedes any official proceeding," is limited by the immediately preceding clause, § 1512(c)(1), which imposes liability on one who "alters, destroys, mutilates, or conceals a *record, document, or other object*" intended for use in an official proceeding. *Id.* at 497-98, 144 S.Ct. 2176, 2184. In applying both the *noscitur* canon and the canon against superfluity, the Court followed the "common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Id.* at 487, 144 S.Ct. 2176, 2184. So, it held that the "otherwise" clause is limited to offenses involving the "records, documents, and objects" referenced in § 1512(c)(1). *Id.* at 498, 144 S. Ct. 2176, 2184. And the Court reasoned that the "history of the provision" bolstered its conclusion because the statute was intended to respond to a "loophole" that made it difficult to prosecute people for obstructive document destruction during the Enron scandal. *Id.* at 491-92, 144 S. Ct. 2176, 2184. The Court concluded: "It would be peculiar to conclude that in closing the Enron gap, Congress actually hid away in the second part of the third subsection . . . a catchall provision that reaches far beyond the document shredding and similar scenarios that

prompted the legislation in the first place." *Id.* at 492, 144 S. Ct. 2176, 2184.

Does reading the definition of "goods or services" according to its plain language make the provision "inconsistent with its accompanying words," "render meaningless" other parts of the statute, or depart from the statute's purpose, thereby triggering this limiting construction? I don't think so. The majority doesn't even contend that it does or identify any such examples. That's telling.

Paramount tries to identify an inconsistency between the plain-text interpretation and the VPPA's purpose to justify its limiting construction, but it fails. It argues that the phrase "goods or services" in the definition of "consumer" cannot extend to "the whole economy writ large" because the purpose of the statute was narrow—protecting privacy over audiovisual materials only. Appellee Br. at 22. As the legislative history demonstrates, Congress enacted the VPPA "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials." Act of Nov. 5, 1988, Pub. L. 100-618, 102 Stat. 3195. But giving the phrase "goods or services" a broader meaning than "specific video materials or services" fits comfortably with that purpose. It brings consumers within the statute's reach if they have engaged in any transaction regarding "goods or services from a video tape service provider," because any transaction could give a provider the data it needs to connect a person with their video consumption activity. And that information about video consumption is then protected from disclosure.

True, under this interpretation "a consumer who buys a hammer"—or any other nonvideo material—"then watches free videos on the vendor's website" enjoys the privacy protections of the VPPA. *NBA,* 118 F.4th at 550 (using the defendant's proposed hypothetical). But, as the Second Circuit held, "considering the privacy protective goals of the VPPA with respect to individuals' video viewing information," that's not "anomalous." *Id.* Instead, "*allowing* disclosure of the consumer's video viewing information [in this scenario] would be out of sync with the statute's goals." *Id.*

Nor is applying the definition of "consumer" to purchasers of nonvideo goods "nonsensical," as the district court reasoned. Op. & Order, R. 33, PageID 285. Consider the same hypothetical. When purchasing a hammer on the "video tape service provider's" website, an individual provides personal information. And the video tape service provider can link that personal information with the free videos the individual later watches on its website. If a video tape service provider can link a person's personal information to their video preferences, Congress would have wanted to prohibit disclosure, regardless of whether the information came from the precise transaction involving the video material or got "stitched together" with other non-video transactions. Reply Br. at 17. It makes no difference for achieving the statute's privacy goals. Accordingly, the VPPA's purpose does not compel a narrower interpretation of "goods or services" in the definition of "consumer"; it confirms the plain-language interpretation I would adopt. *See Fischer,* 603 U.S. at 491-92, 144 S.Ct. 2176 (considering what "prompted the

legislation in the first place" to confirm its reading of the text).

Lastly, Paramount's amicus presents a consequentialist argument against a plain-language reading of the statute. Amicus cautions us not to "retrofit[ ]" a statute "designed to protect people who rented VHS and Betamax videocassettes at brick-and-mortar video rental stores" to regulate the internet, and it fears that reading the VPPA in accordance with its terms' plain language would "fundamentally transform the Internet." Amicus Br. at 3, 13. Consequentialist reasoning cannot change the meaning of clear text, *see Niz-Chavez v. Garland*, 593 U.S. 155, 171, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021), yet even on its own terms I am unpersuaded by the amicus's warnings. The legislative history of the VPPA contravenes amicus's narrative and quiets the sound of its alarm. That's for two reasons.

First, Congress acknowledged the ever-progressing advancement of information technology when it initially passed the VPPA and intended the VPPA's protections to continue with those advances. *See* S. Rep. No. 100-599, at 6-7. Rather than designing a statute for a bygone era, Congress recognized that the "computer age" would bring "technological innovations" with "the ability to be more intrusive than ever before." *See id.* at 6. And while it may not have anticipated all those innovations precisely—like the growth of targeted advertising on which amicus focuses—the VPPA was meant to protect consumers' privacy in the face of those advances, not become obsolete. *See id.* at 6-8. Based on the legislative history, then, the

amicus is wrong in saying that Congress did not mean for the VPPA to apply in the internet era.

Second, in 2013, Congress specifically amended the VPPA, recognizing that the internet had "revolutionized" how Americans watch video content and "share information." S. Rep. No. 112-258, at 2 (2012); Video Privacy Protection Act Amendments Act of 2012, sec. 2, § 2710(b)(2), 126 Stat. 2414 (2013). Specifically, Congress wanted to enable "consumers to share information about their video preferences through social media sites on an ongoing basis," but that wasn't possible because the original VPPA required consent for each disclosure. *See* S. Rep. No. 112-258, at 2-3. Congress amended the VPPA so it now provides that a consumer can give "informed, written consent (including through an electronic means using the Internet)" for a video tape service provider to share their information on an ongoing basis. 18 U.S.C. § 2710(b)(2)(B). Far from the doomsday scenario amicus predicts, video tape service providers need only receive the consumer's consent to disclose data, and they can carry on. Many websites already ask for various forms of consent. Hana Habib, et al., *"Okay, Whatever": An Evaluation of Cookie Consent Interfaces* 1, CHI '22: Conf. on Hum. Factors in Computing Sys. (2022), https://perma.cc/DNZ9-X67N. Therefore, I can't say that "the plain language of the statute would lead to patently absurd consequences that Congress could not possibly have intended." *Pub. Citizen v. U.S. Dep't of Just.,* 491 U.S. 440, 470, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring) (cleaned up).

Given the VPPA's "text, structure, and purpose," I—like the Second and Seventh Circuits—do not read the statute's definition of "consumer" to be limited to subscribers of "*audiovisual* 'goods or services.'" *NBA*, 118 F.4th at 537; *see also Gardner*, 132 F.4th at 1024-25. I therefore respectfully part ways with the majority opinion in interpreting what constitutes "goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1).[4]

CONCLUSION

Because Salazar has stated a claim for relief under the plain text of the VPPA, I respectfully dissent.

---

4. Because I would conclude that Salazar is a consumer based on the plain meaning of "goods or services from a video tape service provider," I do not reach the question of whether the newsletter is "audiovisual" in nature. Both the majority and the district court conclude that Salazar did not sufficiently allege that the newsletter is audiovisual primarily because he did not allege that he "accessed videos through the newsletter." Maj. Op. at 652; *see also* Op. & Order, R. 33, PageID 286. This is curious reasoning. For example, if a person purchases a video cassette tape or DVD but does not actually watch the movie, does it cease to be an audiovisual good? I doubt it. Even so, all that is required to remedy this problem is for Salazar or another plaintiff to allege that he clicked on the link. I would hesitate to adopt a definition of audiovisual material that turns on a click.

The district court did not address whether Salazar should be granted leave to amend his complaint to further allege that the newsletter is audiovisual material—perhaps because Salazar only mentioned amending in a footnote. And the majority concludes that Salazar's failure to move more substantively for leave to amend precludes his asking for it now. Fair enough. Doubtless, that will be the next case.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED JULY 18, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:22-cv-00756

MICHAEL SALAZAR, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

PARAMOUNT GLOBAL D/B/A/ 247SPORTS,

Defendant.

Filed: July 18, 2023

JUDGE RICHARDSON

MEMORANDUM OPINON AND ORDER

Plaintiff, Michael Salazar, has filed a putative class action complaint against Defendant, Paramount Global d/b/a/ 247Sports, alleging a violation of the Video Privacy

Protection Act ("VPPA"). (Doc. No. 1). Defendant has moved to dismiss the complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and on the grounds that the complaint fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 16, "Motion"). Plaintiff filed a response (Doc. No. 24), and Defendant filed a reply (Doc. No. 26). For the reasons stated herein, Defendant's request to dismiss the complaint under Rule 12(b)(1) will be denied, and Defendant's request for dismissal under Rule 12(b)(6) will be granted.

BACKGROUND[1]

This case is a putative class action, in which Plaintiff[2] alleges that Defendant Paramount Global, through its ownership of 247Sports.com, has violated the Video Protection Privacy Act ("VPPA"). (Doc. No. 1). Via the Motion, Defendant now moves to dismiss the complaint on the grounds that: (i) the Court lacks subject-matter

1. Most of the facts contained in this section are taken from the complaint at Doc. No. 1. As noted below, where the complaint is entirely unclear as to the meaning of terms contained in the complaint, the Court is forced to rely on details provided in the parties' briefs. The Court takes the facts contained in this section as true for the purposes of Defendant's argument that the complaint should be dismissed under Rule 12(b)(6). However, the Court does not take as true any such facts for purposes of Defendant's argument that the complaint should be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1).

2. By "Plaintiff," the Court refers to Michael Salazar, who is currently the lead plaintiff in this action.

jurisdiction because (according to Defendant) Plaintiff lacks Article III standing; and (ii) the complaint fails to state a claim under the VPPA.

Plaintiff's claim revolves around his activity on a website named "247Sports.com." Strangely, the complaint does not explain what type of website 247Sports.com is. Defendant claims in its memorandum in support of the Motion that "247Sports.com is 'the industry leader in recruiting content' for college sports, delivering team-specific news through 'online news feeds, social platforms, daily newsletters, podcasts, vibrant communities, text alerts and mobile apps.'" (Doc. No. 17 at 5[3] (quoting *About 247Sports*, 247Sports.com, https://247sports.com/Article/About-247Sports-116092/.)).[4]

---

3. When citing herein to a page in a document filed by one of the parties, it endeavors to cite to the page number ("Page—of—") added by the Clerk's Office as part of the pagination process associated with Electronic Case Filing if such page number differs from the page number originally provided by the author/filer of the document.

4. As noted above, despite repeatedly citing to 247Sports.com in the complaint, Plaintiff does not provide any background information about 247Sports.com that would provide helpful context for the allegations contained in the complaint and the arguments raised by the parties. Generally, a court must rely on the facts contained in the four-corners of the complaint in resolving a motion to dismiss. However, the Sixth Circuit has recognized that "if extrinsic materials merely fill in the contours and details of a complaint, they add nothing new and may be considered without converting the motion to one for summary judgment." *See Armengau v. Cline*, 7 F. App'x 336, 345 (6th Cir. 2001). Insofar as the Court relies on aspects of 247Sports.com not discussed in

To register for 247Sports.com,[5] an individual signs up for an online newsletter by providing personal information, including but not limited to an email address. (Doc. No. 1 at 6). Herein after, the Court refers to those individuals who sign up for 247Sports.com's online newsletter as

---

the complaint, it does so only to "fill in the contours and details" of the complaint. *See id.*

5. The Court notes that the complaint is not clear as to what it means when it refers to "register[ing]" for 247Sports.com or to Plaintiff being a "digital subscriber." The complaint does not suggest that to become a "digital subscriber," Plaintiff did anything more than subscribe to 247Sports.com's newsletter. Furthermore, the complaint does not suggest that an individual can access 247Sports.com's content only by registering or signing up for the newsletter. Instead, the complaint suggests—without spelling it out explicitly—that all of 247Sports.com's content (meaning content on the website) is available to all individuals regardless of whether they "register," sign up for the newsletter, or otherwise complete some type of sign-up process. Therefore, the Court interprets "digital subscriber" as contained in the complaint to mean an individual who registers or signs up for 247Sports.com's newsletter.

This reading of the complaint is supported by the parties' briefs. (Doc. No. 24 at 8 ("Plaintiff Michael Salazar was a 247's [sic] newsletter subscriber and, during that time, was also a Facebook user [*i.e.*, digital subscriber]."), 13 ("As part of his subscription, [Plaintiff] receives emails and other communications from 247Sports.com."); (Doc. No. 17 at 5-6 ("[W]ebsite visitors can watch videos on 247Sports.com regardless of whether they sign up for the Newsletter.")). Therefore, the Court construes the facts in the complaint to mean that all individuals may view 247Sports.com's content, irrespective of whether they have not chosen to subscribe to the newsletter by "registering" or signing up for the newsletter.

"digital subscribers."[6] All digital subscribers provide Defendant with their IP address also. (*Id.* at 7). Those who subscribe have access to a variety of 247Sports.com video media that is available on the website. (*Id.*).[7]

Defendant installed on 247Sports.com the Facebook[8] tracking pixel ("Facebook pixel"), which is a code that allows Facebook to collect the data of digital subscribers to 247Sports.com who also have a Facebook account. (*Id.* at 2). The Facebook pixel discloses to Facebook the digital subscribers' viewed video media including a subscribers' Facebook ID ("FID"). (*Id.*). An FID identifies a digital subscriber's Facebook account. (*Id.*).

If a digital subscriber of 247Sports.com is logged into his or her Facebook account[9] while watching video

---

6. The Court notes that the parties should be conscious of the importance of clarity regarding the (alleged) facts in the complaint.

7. As indicated below, the complaint makes no effort to define "digital subscribers" or elucidate the distinctions (if any exist) between those individuals who register for the newsletter versus those individuals who are digital subscribers. The complaint also uses the term "user" and "digital subscriber" interchangeably. The Court herein uses the term "digital scriber" in lieu of "user" for consistency.

8. As Facebook is a popular social media website (as likely would be known by anyone who knows what a "social media website" is).

9. The complaint lacks clarity as to whether a digital subscriber must be logged-in to his or her Facebook account in order for the Facebook pixel to transmit personally identifying information to Facebook. But the complaint does allege that

content on 247Sports.com, then 247Sports.com sends to Facebook (through the Facebook pixel) the video content name, its URL, and, most notably, the digital subscriber's Facebook ID. (*Id.* at 9).

Plaintiff, Michael Salazar, has been a digital subscriber of 247Sports.com from 2022 to present (which the Court infers means that Plaintiff began subscribing to 247Sports.com's newsletter in 2022). (*Id.* at 13). Plaintiff became a digital subscriber of 247Sports.com by providing, among other information, his email address and IP address, as well as any cookies associated with his device. (*Id.*). Plaintiff has had a Facebook account since approximately 2021. (*Id.*). As part of his subscription, Plaintiff receives emails and other communications from 247Sports.com. (*Id.*). Curiously, Plaintiff does not allege that he has in fact accessed any video content from 247Sports.com.

The complaint, filed by Plaintiff on behalf of himself and others who are similarly situated, contains a single claim for relief.[10] (*Id.* at 15). Plaintiff alleges that Defendant

---

"[d]uring the relevant time period [Plaintiff] has used his 247Sports.com digital subscription to view Video Media through 247Sports.com and/or App while logged into his Facebook account. By doing so, Plaintiff's Personal Viewing Information was disclosed to Facebook pursuant to the systematic process described herein." (Doc. No. 1 at 4). From these allegations, the Court finds it reasonable to infer that a digital subscriber must in fact be so logged-in for the Facebook pixel to make the referenced transmission.

10. Plaintiff should be commended for conciseness and clarity as to the number and nature of his causes of action.

violated the Video Protection Privacy Act ("VPPA") when it installed the Facebook pixel, which in turn has led to the disclosure to Facebook of Plaintiff's personally identifying information. (*Id.* at 16).

As noted, Defendant has moved to dismiss the complaint under Rule 12(b)(1) based on a purported lack of subject-matter jurisdiction and, alternatively, under Rule 12(b)(2) based on Plaintiff's alleged failure to state a claim. (Doc. No. 16). The Court cannot grant a Rule 12(b)(6) motion, even if it were otherwise inclined to do so, unless it has subject-matter jurisdiction, and so the Court will address the Rule 12(b)(1) motion first. *See Prop. Mgmt. Connection, LLC v. Consumer Fin. Prot. Bureau*, No. 3:21-CV-00359, 2021 U.S. Dist. LEXIS 219041, 2021 WL 5282075, at *4 (M.D. Tenn. Nov. 10, 2021) (noting that when confronted with these two alternative motions, "the Court must start with an analysis of subject-matter jurisdiction pursuant to 12(b)(1), because if a court does not have subject-matter jurisdiction, any 12(b)(6) defense (of failure to state a claim) would become moot if the court lacks subject-matter jurisdiction in the first place").

LEGAL STANDARD

Rule 12(b)(1) "provides for the dismissal of an action for lack of subject-matter jurisdiction." *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). "Subject matter jurisdiction is always a threshold determination." *Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 537 (6th Cir. 2007). "The presumption of correctness that we accord to a complaint's allegations falls away on the

jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question. At that point, a court need not close its eyes to demonstrated jurisdictional deficiencies in a plaintiff's case and accord a plaintiff's unproven allegations greater weight than substantive evidence to the contrary." *Commodity Trend Service, Inc. v. Commodity Futures Trading Com'n*, 149 F.3d 679, 685 (7th Cir. 1998).

For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must take all of the factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 679. A legal conclusion, including one couched as a factual allegation, need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of a cause of action sufficient. *Id.; Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010), *cited in Abriq v. Hall*, 295 F. Supp. 3d 874, 877 (M.D. Tenn. 2018). Moreover, factual allegations that are merely *consistent* with the defendant's liability do not satisfy the

claimant's burden, as mere consistency does not establish *plausibility* of entitlement to relief even if it supports the *possibility* of relief. *Iqbal*, 556 U.S. at 678.

In determining whether a complaint is sufficient under the standards of *Iqbal* and its predecessor and complementary case, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), it may be appropriate to "begin [the] analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. This can be crucial, as no such allegations count toward the plaintiff's goal of reaching plausibility of relief. To reiterate, such allegations include "bare assertions," formulaic recitation of the elements, and "conclusory" or "bold" allegations. *Id.* at 681. The question is whether the remaining allegations—factual allegations, *i.e.*, allegations of factual matter—plausibly suggest an entitlement to relief. *Id.* If not, the pleading fails to meet the standard of Federal Rule of Civil Procedure 8 and thus must be dismissed pursuant to Rule 12(b)(6). *Id.* at 683.

As a general rule, matters outside the pleadings may not be considered in ruling on a motion to dismiss under Rule 12(b)(6) unless the motion is converted to one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). When a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment. *Doe v. Ohio State Univ.*, 219 F.Supp.3d 645, 652-53 (S.D. Ohio 2016); *Blanch v. Trans Union, LLC*, 333 F. Supp. 3d 789, 791-92 (M.D. Tenn. 2018).

On a Rule 12(b)(6) motion to dismiss, "[t]he moving party has the burden of proving that no claim exists." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 433 (6th Cir.2008). That is not to say that the movant has some *evidentiary* burden; as should be clear from the discussion above, evidence (as opposed to *allegations* as construed in light of any allowable matters outside the pleadings) is not involved on a Rule 12(b)(6) motion. The movant's burden, rather, is a burden of *explanation*; since the movant is the one seeking dismissal, it is the one that bears the burden of explaining—with whatever degree of thoroughness is required under the circumstances—why dismissal is appropriate for failure to state a claim.

DISCUSSION

"The VPPA prohibits a 'video tape service provider' from 'knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider.'" *Robinson v. Disney Online*, 152 F. Supp. 3d 176, 179 (S.D.N.Y. 2015) (quoting 18 U.S.C. § 2710(b)(1)). "Its impetus was the publication in a weekly newspaper in Washington of a profile of Judge Robert H. Bork based on the titles of 146 films his family had rented from a video store." *Id.* (internal quotations marks omitted).

Under the VPPA, a "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *See* 18 U.S.C. § 2710(a)(1). 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. . . ." *See id.* at § 2710(a)(4).[11] Finally, "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." *See id.* § 2710(a)(3).

Defendant seeks dismissal on several grounds. First, Defendant argues that the complaint should be dismissed under Rule 12(b)(1) because Plaintiff lacks standing. Second, Defendant argues that the complaint should be dismissed under Rule 12(b)(6) because the complaint fails to state a claim upon which relief can be granted. Specifically, Defendant argues that the complaint does not plausibly allege that (1) 247Sports.com is a "video tape service provider," (2) Plaintiff is a "consumer" (and therefore, in turn, a "subscriber"); (3) the newsletters are "goods" or "services"; (4) Defendant itself disclosed identifying information; and (5) Defendant knowingly disclosed such information.

Defendant's request for dismissal under 12(b)(1) will be denied because the Court finds that Plaintiff has standing. However, Defendant's request for dismissal under 12(b)(6) will be granted because the Court finds that the complaint does not plausibly allege that Plaintiff

11. The definition of "video tape service provider" also includes "any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure." The parties do not contend that this portion of the definition is relevant to this action.

is a "subscriber of goods or services from a video tape service provider" under the VPPA.

1. Plaintiff Has Standing for His VPPA Claim[12]

Defendant argues that Plaintiff does not have standing because (according to Defendant) Plaintiff has failed to adequately allege either a concrete injury in fact or the traceability of the injury to Defendant's conduct. "To satisfy Article III's standing requirements, a plaintiff must show: "(1) [he] has suffered an 'injury-in-fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Soehnlen*

12. Courts should resolve the issue of standing even when a court believes that dismissal on alternative grounds is warranted. *See*, *e.g.*, *Halaburda v. Bauer Publ. Co., LP*, 12-CV-12831, 2013 U.S. Dist. LEXIS 109954, 2013 WL 4012827, at *3 (E.D. Mich. Aug. 6, 2013); *Austin-Spearman v. AMC Network Entertainment LLC*, 98 F. Supp. 3d 662, 665 (S.D.N.Y. 2015) (resolving standing dispute before addressing argument that plaintiff failed to state a claim under the VPPA); *James v. Marshall*, 1-22-cv-241, 2022 U.S. Dist. LEXIS 126900, 2022 WL 2809857, at *8 (S.D. Ala. Jul. 18, 2022) (resolving argument that the plaintiff did not have standing before determining whether the complaint failed to state a claim). This is because a lack of standing means that the court lacks subject-matter jurisdiction, in which case it typically should not even be addressing whether dismissal on alternative grounds is warranted; accordingly, the court should resolve the issue of standing (subject-matter jurisdiction) first, and then proceed to address the alternative grounds if (but only if) it concludes that it does have subject-matter jurisdiction.

v. Fleet Owners Insurance Fund, 844 F.3d 576, 581 (6th Cir. 2016) (internal quotation marks omitted).

Though not addressed by Defendant, there are two ways to challenge subject-matter jurisdiction: facial and factual attacks. *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack questions merely the sufficiency of the pleading. When reviewing a facial attack, a district court takes the allegations in the complaint as true. *Id.* If those allegations establish federally-cognizable claims, jurisdiction exists. *Id.* A factual attack instead raises a factual controversy concerning whether subject-matter jurisdiction exists. *Id.*

Where there is a factual attack on the subject-matter jurisdiction of the court under Fed. R. Civ. P. 12(b)(1), no presumptive truthfulness applies to the complaint's allegations; instead, the court must weigh the conflicting evidence to arrive at the factual predicate that subject-matter jurisdiction does or does not exist. *See id.* "[T]he district court has considerable discretion in devising procedures for resolving questions going to subject matter jurisdiction[.]" *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 327 (6th Cir. 1990). The Sixth Circuit has noted that:

> The factual attack, however, differs greatly [from a facial attack] for here the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. Pro. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—

> there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 890 (3d Cir. 1977)). Notably, "the fact that the court takes evidence for the purpose of deciding the jurisdictional issue does not mean that factual findings are therefore binding in future proceedings." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

In making its decision, the district court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts. *Gentek Bldg. Products, Inc.*, 491 F.3d at 330; *see also Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) ("In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits."). As always, the party invoking federal jurisdiction has the burden to prove that jurisdiction. *Global Technology, Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015); *Golden v. Gorno Bros.*, 410 F.3d 879, 881 (6th Cir. 2005).

With respect to whether Plaintiff has pled a concrete injury, Defendant makes a facial attack. In other words, Defendant argues that the facts alleged in the complaint do not demonstrate a concrete injury. However, with respect to the issue of traceability, Defendant makes a factual attack. That is, Defendant argues that based on the actual facts as they should be found by the Court, Plaintiff's alleged injury actually is not traceable to Defendant. The Court therefore applies the legal standard for a facial attack and a factual attack respectively below.

A. Concrete-Injury Requirement

Defendant argues that the alleged disclosure of Plaintiff's information to Facebook does not constitute a concrete injury. (Doc. No. 17 at 20). As Defendant points out, an intangible harm can suffice as a concrete injury for standing purposes if it has a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *See Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2204, 210 L. Ed. 2d 568 (2021). Defendant's argument that disclosure of information does not meet this standard misses the mark. The issue is not whether mere disclosure of information constitutes a concrete injury, but instead whether disclosure of *personally identifying information* to a third-party constitutes a concrete injury.

The court in *Austin-Spearman v. AMC Network Entertainment LLC*, 98 F. Supp. 3d 662 (S.D.N.Y. 2015), confronted an argument as to standing under the VPPA that was similar to the one now posed by Defendant. In *Austin-Spearman*, the defendant argued that the plaintiff lacked standing because he alleged only a violation of the

VPPA as his injury and did not otherwise plead a "harm resulting from disclosure. . . ." *See id.* at 666. The court was unpersuaded by this argument. As the court explained, Congress, via the VPPA, created "a right to privacy of one's video-watching history, the deprivation of which—through wrongful disclosure, or statutory violation, alone—constitutes an injury sufficient to confer Article III standing."[13] *See id.* Therefore, the court found that, in light

13. The alert reader may wonder whether such a holding survives the Supreme Court's subsequent decision in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) ["*Spokeo I*"], *as revised* (May 24, 2016). In *Spokeo*, Justice Alito's majority opinion explained:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. at 341. Cases like *Austin-Spearman* are not saying that a plaintiff has standing merely by virtue of having alleged a violation of a statutory right created by Congress in a statute (here, the VPPA). They are saying that the violation of that statutory right entails the kind of injury that is sufficient to confer standing under Article III. So they are not inconsistent with *Spoke I*. The Court notes additionally that the majority opinion in *Spokeo* observed that "we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo I*, 578 U.S. 330 at 340

of the VPPA, the disclosure of this information constituted an injury for standing purposes, even if the plaintiff had not alleged a harm suffered beyond the disclosure. *See id.* And as the court noted, "every court to have addressed this question had reached the same conclusion, affirming that the VPPA establishes a privacy right sufficient to confer standing through its deprivation." *See id.* at 666-667 (collecting cases).

The reasoning of the court in *Austin-Spearman* is persuasive. The right created by the VPPA is not merely a right to not have information transmitted to third parties, as Defendant contends. It is instead a statutory right to have personally identifiable information remain private by proscribing disclosure of that information to third parties. *See id.* 666. Indeed, as the court in *Carter v. Scripps Networks, LLC*, 22-cv-2031, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858 (S.D.N.Y. Apr. 24, 2023), recently explained, "disclosure of private information is a harm that courts have traditionally considered to be redressable." *Id.* at *3. And as the Third Circuit noted in a case in which the plaintiffs sued under the VPPA, "[t]he purported injury here is clearly particularized, as each plaintiff complains about the disclosure of information relating to his or her online behavior. While perhaps 'intangible,' the harm is also concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information." *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 274 (3d Cir. 2016). More recently, the Ninth Circuit explained:

> [T]he VPPA identifies a substantive right to privacy that suffers any time a video service provider discloses otherwise private information. As a result, every 18 U.S.C. § 2710(b)(1) violation "present[s] the precise harm and infringe[s] the same privacy interests Congress sought to protect" by enacting the VPPA. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (so holding with respect to the Telephone Consumer Protection Act of 1991). Accordingly, *Spokeo I* and *Spokeo II* are distinguishable from this VPPA claim, and Plaintiff need not allege any further harm to have standing. *Id.* We therefore join the two other circuits that, after *Spokeo I*, have found Article III standing in similar cases arising under the VPPA. *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d [at 274].

Eichenberger v. ESPN, Inc., 876 F.3d 979, 983-84 (9th Cir. 2017) (italics and footnote omitted).[14] The instant case is of the same ilk.

Although Defendant attempts to make hay out of the Supreme Court's decision in *Transunion* and the applicability of it to this case, Defendant somehow fails to

14. The reference to "*Spokeo II*" is a reference to the Ninth Circuit's opinion *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), issued after the Supreme Court's post-*Spokeo I* remand of the case to the Ninth Circuit.

reckon with the fact that in *TransUnion*, the "Supreme Court concluded that plaintiffs whose information was disclosed to a third party suffered a concrete harm, but plaintiffs whose negative information was never disclosed to a third party did not suffer a concrete harm and therefore lacked standing." *See id.* (citing *TransUnion*, 141 S. Ct. at 2209-13). The Court's finding in *Transunion* is therefore plainly supportive of Plaintiff's argument that he suffered a concrete harm when his personally identifiable information was disclosed to Facebook. Defendant's arguments that Plaintiff has not asserted a concrete injury in light of *Transunion* is thus unavailing. In summary, the Court finds that Plaintiff's allegation that his personally identifiable information was transmitted to Facebook in violation of the VPPA identifies a concrete harm for standing purposes.[15]

B. Fairly Traceable Requirement

Next, Defendant argues that Plaintiff does not have standing under Article III because (again, according to Defendant) his injury is not fairly traceable to Defendant's conduct. (Doc. No. 17 at 23). "At the pleading stage, the plaintiff's burden of alleging that [its] injury is fairly traceable to the defendant's challenged conduct is

15. Defendant's reliance on privacy torts to demonstrate that Plaintiff has not suffered a concrete injury is unpersuasive. *Transunion* plainly supports the conclusion that Plaintiff suffered a concrete injury when his personally identifiable information was purportedly transmitted to Facebook. The Court need not consider whether Plaintiff's injury would meet the standards of privacy torts as Defendant would have the Court do.

relatively modest[.]" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) (internal quotation marks omitted). "Thus, harms that flow indirectly from the action in question can be said to be fairly traceable to that action for standing purposes." *Id.* (internal quotation marks omitted).

Defendant asserts that the complaint specifically identifies only the "c_user cookie" in alleging that [Plaintiff's] FID was disclosed to Facebook."[16] (Doc. Nos. 17 at 23, 26 at 12). Defendant explains that *Facebook* places this cookie on a digital subscriber's browser when he or she is logged in to his or her Facebook account. (Doc. No. 26 at 12). Defendant therefore argues that if Plaintiff had simply logged out of Facebook, the "c_user cookie" would not have transmitted the personally identifiable information, and therefore it is *Plaintiff*'s actions that caused the injury rather than Defendant's. (Doc. No. 17 at 24).

Though Defendant does not characterize its argument on traceability as either "facial" or "factual," the Court construes the argument as "factual attack" on subject-matter jurisdiction. After all, Defendant does not argue

16. Neither the complaint nor the parties' brief make clear the distinction between the Facebook Pixel and cookies such as the "c_user cookie." The complaint states that Defendant collects and shares the personal information with visitors to its website with third parties "through cookies, software development kits ('SDK'), and pixels." (Doc. No. 1 at 2). From this, the Court gleans that the "c_user cookie" is a method by which personally identifiable information is transmitted to Facebook that is separate from the Facebook pixel.

that the allegations in the complaint are insufficient to meet the traceability requirement of Article III standing. Instead, Defendant challenges the truth (the factual veracity) of particular allegations in the complaint supporting the notion that Defendant's actions caused the alleged disclosure of Plaintiff's personally identifiable information to Facebook, which in turn could affect the Court's analysis of the traceability requirement.[17] It is true that a court, in assessing a factual attack, may "consider extrinsic evidence and, if disputed, weigh the evidence to determine whether the facts support subject matter jurisdiction without converting the motion to dismiss into a motion for summary judgment." *See Marquez v. Arcp UO Portfolio IV, LP*, cv-19-03851, 2019 U.S. Dist. LEXIS 228256, 2019 WL 8105334 (C.D. Cal. Jul. 18, 2019). But Defendant has provided no extrinsic evidence in support of its factual claim in its Motion regarding the "c_user cookie." *See Jaiyeola v. Toyota Motor Corp.*, 1-17-cv-562, 2019 U.S. Dist. LEXIS 229942, 2019 WL 8351525, at *2 (W.D. Mich. Dec. 6, 2019) ("[S]tatements in a party's brief are not evidence.") (citing *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006)). In failing to either attack the sufficiency of the allegations in the complaint without resort to extrinsic evidence (*i.e.*, launching a facial attack) or providing a scintilla of extrinsic evidence in order to raise a factual controversy regarding an allegation in the

17. For example, the complaint states that the disclosure of a subscriber of 247sports.com's personally identifying information to Facebook is not the subscriber's "decision, but rather the result of Defendant's purposeful use of its Facebook tracking pixel by incorporation of that pixel and code into 247Sports.com's website or app." (Doc. No. 1 at 9).

complaint (*i.e.*, launching a factual attack), Defendant has not properly raised any legally cognizable challenge as to the traceability requirement of Article III standing.[18]

Perhaps the Court could end its standing analysis here. But given that Defendant has drawn the Court's attention to a potential traceability problem, the Court feels compelled to satisfy itself that Plaintiff has alleged factual matter plausibly suggesting that his injury is fairly traceable to Defendant's conduct. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it."). The complaint alleges that Defendant installed the Facebook pixel on 247Sports.com, which allowed the pixel to collect digital subscribers' data and transmit it to Facebook. (Doc. No. 1 at 2). This allegation is neither novel nor implausible. *See Czarnionka v. Epoch Times Assoc., Inc.*, 22 Civ. 6348, 2022 U.S. Dist.

18. The Court cannot consider Defendant's bald factual assertion (Doc. No. 17 at 3, 24) that the "c_user cookie" is placed on the browser by Facebook and that it could be avoided by a digital subscriber if that subscriber logs out of Facebook. *See Jaiyeola v. Toyota Motor Corp.*, 1-17-cv-562, 2019 U.S. Dist. LEXIS 229942, 2019 WL 8351525, at *2 (W.D. Mich. Dec. 6, 2019) ("[S]tatements in a party's brief are not evidence.") (citing *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006)). Defendant also asserts that these facts are judicially noticeable and are incorporated by reference in the complaint. (Doc. No. 17 at 3, 24). Defendant does not point to a source containing these facts of which the Court could take judicial notice. The Court is also not persuaded that these facts are incorporated by reference in the complaint.

LEXIS 209067, 2022 WL 17069810, at *3 (S.D.N.Y. Nov. 17, 2022) ("By installing the Pixel, Defendant opened a digital door and invited Facebook to enter that door and extract information from within."). The complaint further states that "[t]his transmission is not the digital subscribers [sic] decision, but results from Defendant's purposeful use of its Facebook tracking pixel by incorporation of that pixel and code into 247Sports.com's website or App." (Doc. No. 1 at 9). The Court finds that these allegations are sufficient to fulfill the standing requirement that Plaintiff's injury be fairly traceable to Defendant's conduct.

Therefore, the Court finds that Plaintiff has established a concrete injury that is fairly traceable to Defendant's conduct. Defendant does not challenge the redressability requirement, and the Court does not regard there be a basis on which to address this requirement *sua sponte*. The Court thus finds that Plaintiff has Article III standing.

2. Plaintiff Has Failed to State a Claim under the VPPA Because He is Not a "subscriber of goods or services from a video tape service provider"[19]

As explained above, Defendant asserts several grounds as to why Plaintiff has not stated a claim under

19. The Court acknowledges that although the Court determined that Plaintiff has failed to state a claim under the VPPA because he is not a "subscriber of goods or services from a video tape service provider," the Court alternatively could find a failure to state a claim were it to determine, more discretely, that Defendant's newsletters do not constitute "goods or services" within the meaning of the VPPA. A "video service tape provider" is liable under 18 U.S.C. § 2710(b)(1) only if it knowingly discloses personally identifiable information "concerning any *consumer*." *See* 18 U.S.C. § 2710(b)(1). An individual is a "consumer" under the VPPA only if he or she is a "renter, purchaser, or subscriber of goods or services from a video tape service provider." *See* 18 U.S.C. § 2710(a)(1). Therefore, if Defendant's newsletters—the only thing of which Plaintiff is a subscriber from Defendant—are not "goods" or "services," then Defendant cannot be held liable under this provision of the VPPA.

The Court declines to address whether that is the case, but it finds the liability under the VPPA is precluded because—even if Defendant's newsletters are "goods or services" within the meaning of the VPPA—Plaintiff nevertheless is not a "subscriber of goods or services from a video tape service provider" by virtue of having a subscription to the newsletter. This approach is consistent with the approach of the Court in *Carter*, which as discussed below, the Court finds persuasive. It is also noteworthy that a large part of Defendant's 12(b)(6) argument suggests that Plaintiff is not a "subscriber" under the VPPA because he is not a "subscriber of *goods or services* from a video tape service provider." (Doc. No. 17 at 11) (emphases added). The Court rejects this suggestion; a person may be a "subscriber" (to something, from someone) even if they are not a subscriber "of *goods or services from a video tape service provider*"—and what matters here is that Plaintiff (even assuming he is a "subscriber" to the newsletter by virtue of having signed up for it) is not "a subscriber *of goods or services from a video tape service provider*." Despite Defendant's unfortunate framing of the issue here, in substance its argument is not actually that Plaintiff is not a "subscriber" at all, but rather that he is not a subscriber *of goods or services from a video tape service provider*."

the VPPA. The second is grounded in the fact that Plaintiff has no claim under the VPPA unless he is a "consumer," meaning "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *See* 18 U.S.C. § 2710(a)(1). Defendant asserts that Plaintiff is not a "consumer" within the meaning of the VPPA, because (according to Defendant) he is not a "subscriber of goods or services from a video tape service provider." Under this theory, Defendant would not be liable under the VPPA for its alleged conduct because the statute only protects individuals who are "consumers" under the statute.[20] *See id.* The Court agrees, and therefore it need not reach the additional grounds for dismissal under Rule 12(b)(6) set forth by Defendant.[21]

The court in *Carter v. Scripps Networks, LLC* recently resolved a motion to dismiss involving (alleged) facts materially indistinguishable from those presently before the Court. 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858. In *Carter*, the plaintiffs filed a putative class action against HGTV for an alleged violation of the VPPA. *Id.* at *1. HGTV owned hgtv.com, which is a website that "hosts hundreds of videos featuring home and lifestyle

20. In the complaint, Defendant identifies himself as a "subscriber" under the VPPA but does not assert that he could be considered a "renter" or "purchaser." (Doc. No. 1 at 17). The Court therefore does not address whether Plaintiff could be considered a "renter " or "purchaser" (of goods or services from a video tape service provider) under the VPPA.

21. For the purposes of its analysis, the Court assumes without deciding that Defendant is a "video service provider" under the VPPA.

content." *See id.* The plaintiffs each subscribed to hgtv.com's newsletter, and each plaintiff also had a Facebook account. *See id.* The complaint did not allege that the video content of hgtv.com was available only through subscription to the newsletter. *See id.* The plaintiffs alleged that HGTV transmitted personally identifiable information to Facebook through the Facebook pixel and the "c_user cookie." *See id.* The defendant moved to dismiss the complaint on the grounds that the plaintiffs lacked standing, and in the alternative, that they failed to state a claim. *See id.* at 2.

After finding that the plaintiffs had standing, the court turned to the issue of whether plaintiffs were "subscribers of goods or services from a video tape service provider" under the VPPA.[22] Like Plaintiff in this case, the plaintiffs

22. Though the court's analysis in *Carter* is persuasive, the court was not always precise in its use of terminology. As reflected by the court's discussion, whether an individual is a "subscriber" in the abstract requires an inquiry into the relationship between the individual and the entity or thing to which the individual allegedly subscribes. *See Carter*, 2023 U.S. Dist. LEXIS 71150, 2023 WL 3061858, at *4 (discussing dictionary definitions of "subscriber" relied on by other courts). Under the VPPA, however, the issue is not merely whether the plaintiff falls within the term "subscriber;" properly defined; instead, it is whether someone falls within the term "subscriber of goods or service of a video tape service provide" as properly defined for purposes of the VPPA. That is, for an individual to be protected by the VPPA, it is not enough for him or her merely to be a subscriber; he or she must subscribe to (be a subscriber of) particular materials—specifically, "goods or services of a video tape service provider." Though the court in *Carter* frames much of its discussion on whether the plaintiff in that case was a "subscriber," the analysis reflects that the court

in *Carter* alleged that they were "subscribers of good or services from a video tape service provider" under the statute. The issue for the court was therefore whether the plaintiffs' subscription to hgtv.com's newsletter rendered them "subscribers" within meaning of the VPPA (*i.e.*, that they subscribed to "goods or services of a video tape service provider").

The court began by recognizing that the VPPA does not define "subscriber," but that dictionary definitions indicate that "subscriber" is a person who "imparts money and/or personal information in order to receive a future and recurrent benefit. . . ." *See id.* at *4 (internal quotation marks omitted). Although the plaintiffs contended that their subscriptions to hgtv.com's newsletter rendered them "subscribers," the court found that this "broad interpretation" was only plausible if the definition of "consumer" was read in isolation (contrary to canons of statutory interpretation). *See id.* at *5. The court went on to explain:

> In the statute's full context, a reasonable reader would understand the definition of "consumer" to apply to a renter, purchaser or subscriber of audio-visual goods or services, and not goods or services writ large. The VPPA makes it unlawful for a "video tape service provider" to "knowingly disclose[], to any person, personally identifiable information

---

was in fact discussing whether the plaintiffs were "subscriber[s] of goods or services of a video tape service provider."

> concerning any consumer of such provider. . . ." 18 U.S.C. § 2710(b)(1) (emphasis added). A "video tape service provider" is defined as a person "engaged in the business . . . of rental, sale or delivery of prerecorded video cassette tapes or similar audio visual materials. . . ." *Id.* § 2710(a)(4). Thus, subsection (b)(1) provides a right of action to a "consumer" (e.g., "renter, purchaser, or subscriber") of "such provider" (e.g., one engaged in "the business . . . of rental, sale or delivery of . . . audio visual materials"). The definitions of "consumer" and "video tape service provider" are paired to some degree: renter with rental, purchaser with sale, and subscriber with delivery, all of which subsection (a)(4) applies to audio visual materials. Thus, the scope of a "consumer," when read with sections 2710(b)(1) and (a)(4), is cabined by the definition of "video tape service provider," with its focus on the rental, sale or delivery of audio visual materials. Section 2710(b)(1) provides for an action by a renter, purchaser of subscriber of audio visual materials, and not a broader category of consumers.

See id. at *6. The court further noted that the legislative history of the VPPA supported this conclusion. *See id.* Specifically, the court noted that

> The 1988 Senate Report notes that the definition of PII at section 2710(a)(3) is drafted "to make clear that simply because a business

> is engaged in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill. For example, a department store that sells video tapes would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products." Senate Report 100-599, at 12.

See id. Based on its reading of the statutory text, which was bolstered by the legislative history, the court found that the plaintiffs were not "subscribers of goods or services of a video tape service provider" under the VPPA, because subscription to the newsletter was not sufficient to establish that the plaintiffs had subscribed to audio visual materials. *See id.* As explained by the court, the complaint did not "include facts that plausibly allege[d] that [the plaintiffs'] status as newsletter subscribers was a condition to accessing the site's videos, or that it enhanced or in any way affected their viewing experience. They were subscribers to newsletters, not subscribers to audio visual materials." *See id.*

The Court agrees with and incorporates the statutory interpretation of the court in *Carter*. Not only does the § 2710 (when read as a whole)[23] support the conclusion that

---

23. The Court agrees with *Carter* that it is vital to read the VPPA *as a whole*. And when it is properly interpreted as a whole, it becomes clear that a plaintiff is not necessarily "a subscriber of video-tape related goods or services" *even if* the plaintiff can be considered a 1) subscriber, 2) of goods or services (of some kind); (3) from a video tape service provider. Instead, the plaintiff must

a "consumer" is a "subscriber" under the statute only when they subscribe to audio visual materials, but to conclude otherwise would lead to an unreasonable interpretation of the statute. Indeed, imagine a situation in which a website that provides video content on the stock market also permits individuals to subscribe to a newsletter regarding savvy investing. The newsletter, though created and disseminated by the same website that hosts the video content, does not itself include video content and instead provides tips on investing decisions in written form. It would be unreasonable to permit a plaintiff who subscribes to the newsletter in that situation to pursue a claim under the VPPA—the plaintiff's interaction with the website in that situation has nothing to do with video content and is ill suited for a claim under the *Video* Privacy Protection Act.

The court in *Carter* provided a similar and hypothetical scenario whereby application of the VPPA would be nonsensical and yet required by interpretations of the VPPA like the one offered by Plaintiff herein. In *Carter*, the court explained that hgtv.com also had an online shop that recommended "links to third-party-home-and-garden products," and that the hgtv.com disclosed on the website that it made money from the affiliate links. *See id.* at *5. Because a "consumer" includes a "purchaser" of "goods or services from a video tape service provider," under the plaintiff's reading of the VPPA, a plaintiff could file a claim under the VPPA based on a purchase made through an affiliate link. *See id.* The court found that this was an unreasonable interpretation.

---

be a subscriber of goods and services *in the nature of audio-video* content.

As did the plaintiffs in *Carter*, Plaintiff contends that he is a "subscriber" under the VPPA because he signed up for an online newsletter. As with respect the complaint's allegations in *Carter* regarding accessing hgtv.com, the complaint in this case does not allege that an individual can only access the video content from 247Sports.com through signing up for the newsletter. Instead, it appears from the complaint that any individual can access the video content on 247Sports.com without having to sign up for the newsletter or otherwise register for an account on 247Sports.com. Moreover, Plaintiff in this case does not even allege that he accessed video content through the receipt and review of the newsletter.

In light of the Court's finding that an individual is a "subscriber" under the VPPA only when he or she subscribes to audio visual materials, Plaintiff's allegation that his subscription to the newsletter renders him a "subscriber" is unavailing. As noted, there is no allegation in the complaint that Plaintiff accessed audio visual content through the newsletter (or at all, for that matter). The newsletter is therefore not audio visual content, which necessarily means that Plaintiff is not a "subscriber" under the VPPA.

In response to Defendant's argument that Plaintiff is not a "subscriber" of the kind falling within the protection of the VPPA, Plaintiff relies on *Lebakken v. WEBMD, LLC*, 1-22-cv-644, 2022 U.S. Dist. LEXIS 201010, 2022 WL 16716151 (N.D. Ga. Nov. 4, 2022). In *WebMD*, the court, without conducting any statutory interpretation, concluded that WebMD.com's newsletter fell within the

"good or services" described in the VPPA. *See id.* at *3. The defendant argued that the newsletter did not fall under the VPPA because it was "too attenuated from [the plaintiff's] viewing of any WebMD videos to state a claim under the VPPA." *See id.* In rejecting this argument, the court reasoned that "goods or services" should be construed broadly to "encompass all parts of the economic output of society." *See id.* (internal quotations omitted).

The *WebMD* decision is admittedly favorable to Plaintiff in this case. Of course, *WebMD* is not binding authority, and in light of the analysis provided by the court in *Carter* (which, concededly, is also not binding), the Court finds the analysis in *WebMD* unpersuasive. Unlike the court in *Carter*, the court in *WebMD* did not engage in any meaningful statutory interpretation of the VPPA nor did it consider (as did the Court above) the ramifications of allowing VPPA claims based on "goods or services" that are not audio-visual in nature. Therefore, the Court declines to follow the reasoning and holding of *WebMD*.

In summary, based on the Court's interpretation of "subscriber" in the VPPA, Plaintiff fails to state a claim under the VPPA because Plaintiff is not a "subscriber of goods or services of a video tape service provider" (and therefore is not a "consumer") by virtue of registering or signing up for the 247Sports.com's newsletter. The complaint therefore fails to state a claim under the VPPA.

CONCLUSION

For the reasons stated herein, Defendant's motion to dismiss at Doc. No. 16 is GRANTED in part and DENIED in part. Specifically, Defendant's Motion is denied insofar as it requests dismissal based on lack of standing. The Motion is GRANTED insofar as it requests dismissal for failure to state a claim upon which relief can be granted. This is the final order in the case. All relief being denied, the Clerk shall enter judgment. *See* Fed. R. Civ. P. 58(b)(1)(C).

IT IS SO ORDERED.

/s/ Eli Richardson
ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 13, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5748

MICHAEL SALAZAR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

PARAMOUNT GLOBAL, DBA 247SPORTS,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX D — 18 USC 2710

18 U.S.C. § 2710—Wrongful disclosure of video tape rental or sale records

(a) Definitions.—For purposes of this section—

(1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term "ordinary course of business" means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term "video tape service provider" means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) Video Tape Rental and Sale Records.—

(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that—

(i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;

(ii) at the election of the consumer—

(**I**) is given at the time the disclosure is sought; or

(**II**) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules

of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

> **(i)** the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and
>
> **(ii)** the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

> **(i)** the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) CIVIL ACTION.—

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of $2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) Personally Identifiable Information.—

Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) Destruction of Old Records.—

A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is

no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) PREEMPTION.—

The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

(Added Pub. L. 10-618, § 2(a)(2), Nov. 5, 1988, 102 Stat. 3195; amended Pub. L. 112-258, § 2, Jan. 10, 2013, 126 Stat. 2414.)

APPENDIX E — CLASS ACTION COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, FILED SEPTEMBER 27, 2022

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Case No:

Judge:

JURY TRIAL REQUESTED

MICHAEL SALAZAR, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

PARAMOUNT GLOBAL, D/B/A 247SPORTS

Defendant.

CLASS ACTION COMPLAINT

Plaintiff Michael Salazar, individually and on behalf of all others similarly situated, files this Class Action Complaint against Defendant Paramount Global ("Defendant") for violations of the federal Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA"). Plaintiff's claims arise from Defendant's practice of knowingly disclosing

to a third party, Meta Platforms, Inc. ("Facebook"), data containing Plaintiff's and other digital-subscribers Class Members' (i) personally identifiable information or Facebook ID ("FID") and (ii) the computer file containing video and its corresponding URL viewed ("Video Media") (collectively, "Personal Viewing Information"). Plaintiff's allegations are made on personal knowledge as to Plaintiff and Plaintiff's own acts and upon information and belief as to all other matters.

NATURE OF THE ACTION

1. This is a consumer digital privacy class action complaint against Paramount Global, as the owner of 247Sports.com, for violating the VPPA by disclosing its digital subscribers' identities and Video Media to Facebook without the proper consent.

2. The VPPA prohibits "video tape service providers," such as 247Sports.com, from knowingly disclosing consumers' personally identifiable information, including "information which identifies a person as having requested or obtained specific video materials or services from a video tape provider," without express consent in a stand-alone consent form.

3. Like other businesses with an online presence, Defendant collects and shares the personal information of visitors to its website and mobile application ("App") with third parties. Defendant does this through cookies, software development kits ("SDK"), and pixels. In other words, digital subscribers to 247Sports.com have their

personal information disclosed to Defendant's third-party business partners.

4. The Facebook pixel is a code Defendant installed on 247Sports.com allowing it to collect users' data. More specifically, it tracks when digital subscribers enter 247Sports.com or 247Sports.com's accompanying App and view Video Media. 247Sports.com tracks and discloses to Facebook the digital subscribers' viewed Video Media, and most notably, the digital subscribers' FID. This occurs even when the digital subscriber has not shared (nor consented to share) such information.

5. Importantly, Defendant shares the Personal Viewing Information—*i.e.*, digital subscribers' unique FID and video content viewed—together as one data point to Facebook. Because the digital subscriber's FID uniquely identifies an individual's Facebook user account, Facebook—or any other ordinary person—can use it to quickly and easily locate, access, and view digital subscribers' corresponding Facebook profile. Put simply, the pixel allows Facebook to know what Video Media one of its users viewed on 247Sports.com.

6. Thus, without telling its digital subscribers, Defendant profits handsomely from its unauthorized disclosure of its digital subscribers' Personal Viewing Information to Facebook. It does so at the expense of its digital subscribers' privacy and their statutory rights under the VPPA.

7. Because 247Sports.com digital subscribers are not informed about this dissemination of their Personal Viewing Information—indeed, it is automatic and invisible—they cannot exercise reasonable judgment to defend themselves against the highly personal ways 247Sports.com has used and continues to use data it has about them to make money for itself.

8. Defendant chose to disregard Plaintiff's and hundreds of thousands of other 247Sports.com digital subscribers' statutorily protected privacy rights by releasing their sensitive data to Facebook. Accordingly, Plaintiff brings this class action for legal and equitable remedies to redress and put a stop to Defendant's practices of intentionally disclosing its digital subscribers' Personal Viewing Information to Facebook in knowing violation of VPPA.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 over the claims that arise under the Video Privacy Protection Act, 18 U.S.C. § 2710.

10. This Court also has jurisdiction under 28 U.S.C. § 1332(d) because this action is a class action in which the aggregate amount in controversy for the proposed Class (defined below) exceeds $5,000,000, and at least one member of the Class is a citizen of a state different from that of Defendant.

11. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391 because Defendant does business in and is subject to personal jurisdiction in this District. Venue is also proper because a substantial part of the events or omissions giving rise to the claim occurred in or emanated from this District.

THE PARTIES

12. Plaintiff Michael Salazar is an adult citizen of the State of California and is domiciled in the State of California. Plaintiff began a digital subscription to 247Sports.com in 2022 which continues to this day. Plaintiff has had a Facebook account from approximately 2010 to the present. During the relevant time period he has used his 247Sports.com digital subscription to view Video Media through 247Sports.com and/or App while logged into his Facebook account. By doing so, Plaintiff's Personal Viewing Information was disclosed to Facebook pursuant to the systematic process described herein. Plaintiff never gave Defendant express written consent to disclose his Personal Viewing Information.

13. Defendant Paramount Global:

a. Is a publicly traded multinational media conglomerate headquartered in New York, New York.

b. Is the parent company of 247Sports, owner and operator of 247Sports.com.

c. 247Sports.com has approximately 50 million unique monthly visitors.[1]

d. Has an estimated annual revenue of $38 million per year.[2]

e. 247Sports.com includes a Videos section which provides a broad selection of video content.

f. Combined, Paramount Global and 247Sports.com are used by numerous U.S. digital media viewers.

g. Through 247Sports.com and App, Defendant delivers and, indeed, is in the business of delivering countless hours of video content to its digital subscribers.

h. 247 Sports maintains a corporate address at 330 Commerce Street, Nashville, Tennessee 37201.

---

1. *See* similarweb.com, 247sports.com, *available at* https://www.similarweb.com/website/247sports.com/ (last visited September 8, 2022)

2. *See* growjo.com, 247sports.com, *available at* https://growjo.com/company/247Sports (last visited September 8, 2022)

FACTUAL ALLEGATIONS

A. Background of the Video Privacy Protection Act

14. The VPPA generally prohibits the knowing disclosure of a customer's video rental or sale records without the informed, written consent of the customer in a form "distinct and separate from any form setting forth other legal or financial obligations." Under the statute, the Court may award actual damages (but not less than liquidated damages of $2,500.00 per person), punitive damages, equitable relief, and attorney's fees.

15. The VPPA was initially passed in 1988 for the explicit purpose of protecting the privacy of individuals' and their families' video rental, purchase and viewing data. Leading up to its enactment, members of the United States Senate warned that "[e]very day Americans are forced to provide to businesses and others personal information without having any control over where that information goes." S. Rep. No. 100-599 at 7-8 (1988).

16. Senators at the time were particularly troubled by disclosures of records that reveal consumers' purchases and rentals of videos and other audiovisual materials. As Senator Patrick Leahy and the late Senator Paul Simon recognized, records of this nature offer "a window into our loves, likes, and dislikes," such that "the trail of information generated by every transaction that is now recorded and stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of surveillance." S. Rep. No. 100-599 at 7-8 (1988) (statements of Sens. Simon and Leahy, respectively).

17. In proposing the Video and Library Privacy Protection Act (later codified as the VPPA), Senator Leahy stated that "[i]n practical terms our right to privacy protects the choice of movies that we watch with our family in our own homes. And it protects the selection of books that we choose to read." 134 Cong. Rec. S5399 (May 10, 1988). Thus, the personal nature of such information, and the need to protect it from disclosure, is the inspiration of the statute: "[t]hese activities are at the core of any definition of personhood. They reveal our likes and dislikes, our interests and our whims. They say a great deal about our dreams and ambitions, our fears and our hopes. They reflect our individuality, and they describe us as people." *Id.*

18. While these statements rang true in 1988 when the VPPA was passed, the importance of legislation like the VPPA in the modern era of data mining from online activities is more pronounced than ever before. During a recent Senate Judiciary Committee meeting, "The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century," Senator Leahy emphasized the point by stating: "While it is true that technology has changed over the years, we must stay faithful to our fundamental right to privacy and freedom. Today, social networking, video streaming, the 'cloud,' mobile apps and other new technologies have revolutionized the availability of Americans' information."[3]

---

3. *See* Committee on the Judiciary, Subcommittee on Privacy, Technology and the Law, The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century, Senate Judiciary Committee Subcommittee on Privacy, Technology and the Law,

19. In this case, Defendant chose to deprive Plaintiff and the Class members of that right by knowingly and systematically disclosing their Personal Viewing Information to Facebook, without providing notice to (let alone obtaining consent from) anyone, as explained herein.

B. 247Sports.com's Digital Subscriptions

20. To register for 247Sports.com, users sign up for an online newsletter. 247Sports.com users provide their personal information, including but not limited to their email address.

21. Paramount Global operates a website in the U.S. accessible from a desktop and mobile device at 247Sports.com. It also offers an App available for download on Android and iPhone devices.

22. On information and belief, all digital subscribers provide Defendant with their IP address, which is a unique number assigned to all information technology connected devices, that informs Defendant as to subscribers' city, zip code and physical location.

23. Digital subscribers may provide to Defendant the identifier on their mobile devices and/or cookies stored on their devices.

---

https://www.judiciary.senate.gov/meetings/the-video-privacy-protection-act-protecting-viewerprivacy-in-the-21st-century (last visited Sept. 02, 2022).

24. When opening an account, Defendant does not disclose to its digital subscribers that it will share their Personal Viewing Information with third parties, such as Facebook. Digital subscribers are also not asked to consent to such information sharing upon opening an account.

25. After becoming a digital subscriber, viewers have access to a variety of 247Sports.com Video Media on Defendant's digital platform.

26. Notably, once a digital subscriber signs in and watches 247Sports.com Video Media, the digital subscriber is not provided with any notification that their Personal Viewing Information is being shared. Similarly, Defendant also fails to obtain digital subscribers' written consent to collect their Personal Viewing Information "in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer," as the VPPA requires.

C. Defendant Admits It Collects and Discloses Certain Personal Information of Digital Subscribers to Third Parties But Fails to Advise It Discloses Personal Viewing Information, as Required Under the VPPA.

27. The operative Privacy Policy for 247Sports.com states that it collects "Personal Information" from its users:

"**Information about how you access the Services**: When you use the Services, we automatically collect or receive some information about how you access the Services, including the device type, operating system, and browser you use, and how fast or stable your internet connection is. The information we receive depends on the device you are using and which Services you access.

Information about your activity on the Services: Information about your interactions with audio and video content, such as the type of content viewed or listened to (including music applications such as iTunes, Spotify and Last.fm) the content viewed, and information about your interactions with email messages we send you, such as which links you click on, and whether the messages were opened or forwarded.

Unique identifiers: IP addresses associated with the devices you use to access the Services, Advertising IDs, Cookie IDs, media access control (MAC) address and other unique identifiers."[4]

4. *See* Paramount Cookies Policy, *available at* https://www.viacomcbsprivacy.com/en/cookies?r=www.viacomcbsprivacy.com (last accessed September 8, 2022)

28. 247Sports.com discloses in its Privacy Policy that it automatically collects "Information about your interactions with audio and video content, such as the type of content viewed or listened to . . . "[5]

29. Importantly, nowhere in 247Sports.com's Terms of Service or Privacy Policy is it disclosed that Defendant will share digital subscribers' private and protected Personal Viewing Information with third parties, including Facebook.

D. How 247Sports.com Disseminates Digital Subscribers' Personal Viewing Information

1. Tracking Pixels

30. Websites and apps use Facebook's pixel and SDK to collect information about user's devices and activities and send that to Facebook. Facebook then uses that information to show the user targeted ads.

31. The Facebook tracking pixel, also known as a "tag" or "web beacon" among other names, is an invisible tool that tracks consumers' actions on Facebook advertisers' websites and reports them to Facebook. It is a version of the social plugin that gets "rendered" with code from Facebook. To obtain the code for the pixel, the website advertiser tells Facebook which website events it wants to track (*e.g.*, Video Media) and Facebook returns corresponding Facebook pixel code for the advertiser to incorporate into its website.

---

5. *See id.*

32. Defendant installed the Facebook tracking pixel, which enables it to disclose Plaintiff's and Class Members' Personal Viewing Information to Facebook, because it benefits financially from the advertising and information services that stem from use of the pixel. When a 247Sports.com digital subscriber enters the website and watches Video Media on the website, the website sends to Facebook certain information about the viewer, including, but not limited to, their identity and the media content the digital subscriber watched. Specifically, 247Sports.com sends to Facebook the video content name, its URL, and, most notably, the viewers' Facebook ID.

2. Facebook ID ("FID")

33. An FID is a unique and persistent identifier that Facebook assigns to each user. With it, anyone ordinary person can look up the user's Facebook profile and name. When a Facebook user with one or more personally identifiable FID cookies on their browser views Video Media from 247Sports.com on the website or app, 247Sports.com, through its website code, causes the digital subscribers identity and viewed Video Media to be transmitted to Facebook by the user's browser. This transmission is not the digital subscribers decision, but results from Defendant's purposeful use of its Facebook tracking pixel by incorporation of that pixel and code into 247Sports.com's website or App. Defendant could easily program the website and app so that this information is not automatically transmitted to Facebook when a subscriber views Video Media. However, it is not Defendant's financial interest to do so because it benefits financially by providing this highly sought-after information.

34. Notably, while Facebook can easily identify any individual on its Facebook platform with only their unique FID, so too can any ordinary person who comes into possession of an FID. Facebook admits as much on its website. Indeed, ordinary persons who come into possession of the FID can connect to any Facebook profile. Simply put, with only an FID and the video content name and URL—all of which Defendant knowingly and readily provides to Facebook without any consent from the digital subscribers—any ordinary person could learn the identity of the digital subscriber and the specific video or media content they requested on 247Sports.com.

35. At all relevant times, Defendant knew that the Facebook pixel disclosed Personal Viewing Information to Facebook. This was evidenced from, among other things, the functionality of the pixel, including that it enabled 247Sports.com and accompanying app to show targeted advertising to its digital subscribers based on the products those digital subscriber's had previously viewed on the website or app, including Video Media consumption, for which Defendant received financial remuneration.

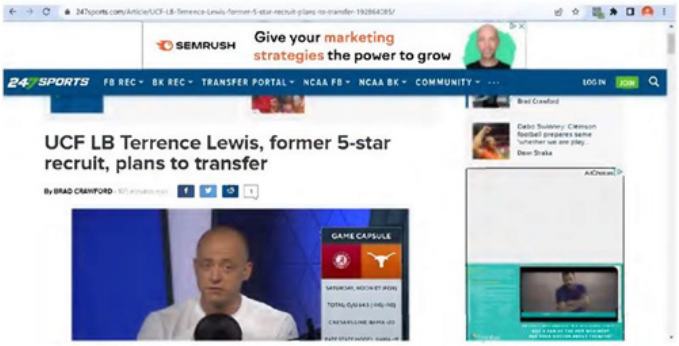
E. 247Sports.com Unlawfully Discloses Its Digital Subscribers' Personal Viewing Information to Facebook

36. Defendant maintains a vast digital database comprised of its digital subscribers' Personal Viewing Information, including the names and e-mail addresses of each digital subscriber and information reflecting the Video Media that each of its digital subscribers viewed.

37. Defendant is not sharing anonymized, non-personally identifiable data with Facebook. To the contrary, the data it discloses is tied to unique identifiers that track specific Facebook users. Importantly, the recipient of the Personal Viewing Information—Facebook—receives the Personal Viewing Information as one data point. Defendant has thus monetized its database by disclosing its digital subscribers' Personal Viewing Information to Facebook in a manner allowing it to make a direct connection—without the consent of its digital subscribers and to the detriment of their legally protected privacy rights.

38. Critically, the Personal Viewing Information Defendant discloses to Facebook allows Facebook to build from scratch or cross-reference and add to the data it already has in their own detailed profiles for its own users, adding to its trove of personally identifiable data.

39. These factual allegations are corroborated by publicly available evidence. For instance, as shown in the screenshot below, a user visits 247Sports.com and clicks on an article titled "UCF LB Terrence Lewis, former 5-star recruit, plans to transfer" and watches the video in the article.



Pictured above: The article titled "UCF LB Terrence Lewis, former 5-star recruit, plans to transfer" (taken from 247Sports.com on or about September 8, 2022).

40. As demonstrated below, once the user clicks on and watches the video in the article, 247Sports.com sends the content name of the video the digital subscriber watched, the URL, and the digital subscriber's FID to Facebook.

HTTP single communication session sent from the device to Facebook, reveals the video name, URL and the viewer's FID (c_user field)

41. As a result of Defendant's data compiling and sharing practices, Defendant has knowingly disclosed to Facebook for its own personal profit the Personal Viewing Information of Defendant's digital subscribers, together with additional sensitive personal information.

42. Defendant does not seek its digital subscribers' prior written consent to the disclosure of their Personal Viewing Information (in writing or otherwise) and its customers remain unaware that their Personal Viewing Information and other sensitive data is being disclosed to Facebook.

43. By disclosing its digital subscribers Personal Viewing Information to Facebook—which undeniably reveals their identity and the specific video materials they requested from Defendant's website—Defendant has intentionally and knowingly violated the VPPA.

F. Disclosing Personal Viewing Information is Not Necessary

44. Tracking pixels are not necessary for Defendant to operate 247Sports.com's digital news publications and sign-up digital subscriptions. They are deployed on Defendant's website for the sole purpose of enriching Defendant and Facebook.

45. Even if an on-line news publication found it useful to integrate Facebook tracking pixels, Defendant is not required to disclose Personal Viewing Information to Facebook. In any event, if Defendant wanted to do so, it

must first comply with the strict requirements of VPPA, which it failed to do.

G. Plaintiff's Experiences

46. Plaintiff Michael Salazar has been a digital subscriber of 247Sports.com from 2022 to the present. Plaintiff became a digital subscriber of 247Sports.com by providing, among other information, his email address and IP address (which informs Defendant as to the city and zip code he resides in as well as his physical location), and any cookies associated with his device. As part of his subscription, he receives emails and other communications from 247Sports.com.

47. Plaintiff has had a Facebook account since approximately 202 1. From 2022 to the present, Plaintiff viewed Video Media via 247Sports.com website and App.

48. Plaintiff never consented, agreed, authorized, or otherwise permitted Defendant to disclose his Personal Viewing Information to Facebook. Plaintiff has never been provided any written notice that Defendant discloses its digital subscribers' Personal Viewing Information, or any means of opting out of such disclosures of his Personal Viewing Information. Defendant nonetheless knowingly disclosed Plaintiff's Personal Viewing Information to Facebook.

49. Because Plaintiff is entitled by law to privacy in his Personal Viewing Information, Defendant's disclosure of his Personal Viewing Information deprived Plaintiff

of the full set of benefits to which he is entitled. Plaintiff did not discover that Defendant disclosed his Personal Viewing Information to Facebook until August 2022.

CLASS ACTION ALLEGATIONS

50. Plaintiff brings this action individually and on behalf of all others similarly situated as a class action under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of the following class (the "Class"):

> All persons in the United States with a digital subscription to an online website owned and/or operated by Defendant that had their Personal Viewing Information disclosed to Facebook by Defendant.

51. Excluded from the Class are Defendant, their past or current officers, directors, affiliates, legal representatives, predecessors, successors, assigns and any entity in which any of them have a controlling interest, as well as all judicial officers assigned to this case as defined in 28 USC § 455(b) and their immediate families.

52. *Numerosity*. Members of the Class are so numerous and geographically dispersed that joinder of all members of the Class is impracticable. Plaintiff believes that there are hundreds of thousands of members of the Class widely dispersed throughout the United States. Class members can be identified from Defendant's records and non-party Facebook's records.

53. *Typicality.* Plaintiff's claims are typical of the claims of members of the Class. Plaintiff and members of the Class were harmed by the same wrongful conduct by Defendant in that Defendant caused Personal Viewing Information to be disclosed to Facebook without obtaining express written consent. His claims are based on the same legal theories as the claims of other Class members.

54. *Adequacy.* Plaintiff will fairly and adequately protect and represent the interests of the members of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of the members of the Class. Plaintiff is represented by counsel with experience in the prosecution of class action litigation generally and in the emerging field of digital privacy litigation specifically.

55. *Commonality.* Questions of law and fact common to the members of the Class predominate over questions that may affect only individual members of the Class because Defendant has acted on grounds generally applicable to the Class. Such generally applicable conduct is inherent in Defendant's wrongful conduct. Questions of law and fact common to the Classes include:

a. Whether Defendant knowingly disclosed Class members' Personal Viewing Information to Facebook;

b. Whether the information disclosed to Facebook concerning Class members' Personal Viewing Information constitutes personally identifiable information under the VPPA;

c. Whether Defendant's disclosure of Class members' Personal Viewing Information to Facebook was knowing under the VPPA;

d. Whether Class members consented to Defendant's disclosure of their Personal Viewing Information to Facebook in the manner required by 18 U.S.C. § 2710(b)(2)(B); and

e. Whether the Class is entitled to damages as a result of Defendant's conduct.

56. *Superiority.* Class action treatment is a superior method for the fair and efficient adjudication of the controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually, substantially outweighs potential difficulties in management of this class action. Plaintiff knows of no special difficulty to be encountered in litigating this action that would preclude its maintenance as a class action.

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710

57. Plaintiff incorporates the preceding paragraphs by reference as if fully set forth herein.

58. The VPPA prohibits a "video tape service provider" from knowingly disclosing "personally-identifying information" concerning any consumer to a third-party without the "informed, written consent (including through an electronic means using the Internet) of the consumer." 18 U.S.C § 2710.

59. As defined in 18 U.S.C. § 2710(a)(4), a "video tape service provider" is "any person, engaged in the business, in or affecting interstate commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audiovisual materials."

60. Defendant is a "video tape service provider" as defined in 18 U.S.C. § 2710(a)(4) because it engaged in the business of delivering audiovisual materials that are similar to prerecorded video cassette tapes and those sales affect interstate or foreign commerce.

61. As defined in 18 U.S.C. § 2710(a)(3), "personally-identifiable information" is defined to include "information which identifies a person as having requested or obtained

specific video materials or services from a video tape service provider."

62. Defendant knowingly caused Personal Viewing Information, including FIDs, concerning Plaintiff and Class members to be disclosed to Facebook. This information constitutes personally identifiable information under 18 U.S.C. § 2710(a)(3) because it identified each Plaintiff and Class member to Facebook as an individual who viewed 247Sports.com Video Media, including the specific video materials requested from the website.

63. As defined in 18 U.S.C. § 2710(a)(1), a "consumer" means "any renter, purchaser, or subscriber of goods or services from a video tape service provider." As alleged in the preceding paragraphs, Plaintiff subscribed to a digital 247Sports.com plan that provides Video Media content to the digital subscriber's desktop, tablet, and mobile device. Plaintiff is thus a "consumer" under this definition.

64. As set forth in 18 U.S.C. § 27109(b)(2)(B), "informed, written consent" must be (1) in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer; and (2) at the election of the consumer, is either given at the time the disclosure is sought or given in advance for a set period of time not to exceed two years or until consent is withdrawn by the consumer, whichever is sooner." Defendant failed to obtain informed, written consent under this definition.

65. In addition, the VPPA creates an opt-out right for consumers in 18 U.S.C. § 2710(2)(B)(iii). It requires video

tape service providers to also "provide[] an opportunity for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election." Defendant failed to provide an opportunity to opt out as required by the VPPA.

66. Defendant knew that these disclosures identified Plaintiff and Class members to Facebook. Defendant also knew that Plaintiff's and Class members' Personal Viewing Information was disclosed to Facebook because, inter alia, Defendant chose, programmed, and intended for Facebook to receive the video content name, its URL, and, most notably, the digital subscribers' FID.

67. By disclosing Plaintiff's and the Class's Personal Viewing Information, Defendant violated Plaintiff's and the Class members' statutorily protected right to privacy in their video-watching habits. *See* 18 U.S.C. § 2710(c).

68. As a result of the above violations, Defendant is liable to the Plaintiff and other Class members for actual damages related to their loss of privacy in an amount to be determined at trial or alternatively for "liquidated damages not less than $2,500 per plaintiff." Under the statute, Defendant is also liable for reasonable attorney's fees, and other litigation costs, injunctive and declaratory relief, and punitive damages in an amount to be determined by a jury, but sufficient to prevent the same or similar conduct by the Defendant in the future.

VII. RELIEF REQUESTED

69. Accordingly, Plaintiff, individually and on behalf of the proposed Class, respectfully requests that this court:

a. Determine that this action may be maintained as a class action pursuant to Fed R. Civ. P. 23(a), (b)(2), and (b)(3) and declare Plaintiff as the representative of the Class and Plaintiff's Counsel as Class Counsel;

b. For an order declaring that Defendant's conduct as described herein violates the federal VPPA, 18 U.S.C. § 2710(c)(2)(D);

c. For Defendant to pay $2,500.00 to Plaintiff and each Class member, as provided by the VPPA, 18 U.S.C. § 2710(c)(2)(A);

d. For punitive damages, as warranted, in an amount to be determined at trial, 18 U.S.C. § 2710(c)(2)(B);

e. For prejudgment interest on all amounts awarded;

f. For an order of restitution and all other forms of equitable monetary relief;

g. For injunctive relief as pleaded or as the Court may deem proper; and

h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit, 18 U.S.C. § 2710(c)(2)(C).

JURY DEMAND

70. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff, individually and on behalf of the proposed Class, demands a trial by jury on all issues so triable.

Dated: September 27, 2022

Respectfully Submitted:

By: */s/ Rachel Schaffer Lawson*

Rachel Schaffer Lawson—TN Bar #029376
Dickinson Wright PLLC
424 Church Street, Suite 800
Nashville, TN 37219
T: 615-620-1715
rlawson@dickinson-wright.com

Brandon M. Wise—IL Bar # 6319580*
Peiffer Wolf Carr
Kane Conway & Wise, LLP
73 W. Monroe, 5th Floor
Chicago, IL 60604
T: 312-444-0734
bwise@peifferwolf.com

Michael L. Murphy (DC 480163)*
Bailey & Glasser LLP
1055 Thomas Jefferson Street NW
Suite 540
Washington, DC 20007
T: 202.494.3531
mmurphy@baileyglasser.com

** to seek admission pro hac vice*

Counsel for Plaintiff and the Putative Class