No. 25-459

IN THE

Supreme Court of the United States

MICHAEL SALAZAR,

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

REPLY BRIEF

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INTRODUCTION

The courts of appeals have split 2–2 on a narrow question of statutory interpretation—namely, what does it take to become a "consumer" under the Video Privacy Protection Act? The VPPA defines a "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). The Second and Seventh Circuits agree this definition means one can become a "consumer" by renting, purchasing, or subscribing to *any* good or service from a video tape service provider. But the Sixth Circuit inserted an atextual limitation. To become a statutory "consumer," it requires one to rent, purchase, or subscribe to an *audiovisual* good or service from a video tape service provider. The D.C. Circuit endorsed this approach. The four cases are factually indistinguishable. But they have produced divergent results.

Paramount concedes there is a 2–2 circuit split on the "consumer" question presented here. Opp. 9, 20. It concedes that, in this case, the district court and the Sixth Circuit based their decisions solely on that "consumer" question. Opp. 7–8, 24. It concedes neither court below addressed the independent statutory questions of whether Paramount is a "video tape service provider" or whether the disclosures here contained "personally identifiable information." *Id.* Accordingly, the Court should grant the petition and resolve the acknowledged circuit split concerning the meaning of "consumer."

Paramount offers just two arguments in response. *First*, it argues the Sixth Circuit reached the right result. Opp. 10–16. Paramount is wrong. For example, Paramount

fails to grapple with the meaningful variations between the VPPA's definitions of "consumer" and "personally identifiable information." Pet. 24–27. It does not account for the ordinary meaning of "goods or services" or "consumer." Pet. 21–24, 31–33. It insists on reading materially identical terms to mean different things. Pet. 29–30. It ignores Congress's repeated use of "any." Pet. 30–31. It brushes aside a glaring surplusage problem. Pet. 27–29. And its interpretive approach unhelpfully hinges on the statute's title, Opp. 12, the mere existence of damages provisions, Opp. 13, and various policy arguments, Opp. 14.

More importantly, though, Paramount's arguments about the merits are irrelevant at this stage. The critical point, which Paramount concedes, is that there is a 2–2 circuit split on the meaning of "consumer." This Court should grant the petition and ensure uniformity no matter which side it ultimately decides is right.

Second, Paramount points to unaddressed and unpreserved arguments about whether it is a "video tape service provider" and whether its disclosures contained "personally identifiable information." Opp. 17–25. But those independent statutory issues, involving separately defined statutory elements, pose no barrier to this Court's review of the narrow "consumer" question presented here.

To start, Paramount concedes neither court below addressed these independent elements. Opp. 7 (agreeing that, after deciding the "consumer" question, the district court "did not reach 247Sports' alternative arguments for dismissal"); Opp. 8 (same for the Sixth Circuit). This fact alone is fatal to Paramount's argument. *See, e.g.*, *A.J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, 605 U.S. 335,

350 (2025) (noting this Court generally "do[es] not decide issues that were not resolved below" (internal quotation marks and citation omitted)); *Barnes v. Felix*, 605 U.S. 73, 83–84 (2025) (holding an issue "[t]he courts below never confronted" was "not properly before" the Court).

After all, this Court is one "of review, not first view." *Smith v. Arizona*, 602 U.S. 779, 800–01 (2024); *see also Chiaverini v. City of Napoleon*, 602 U.S. 556, 565 (2024) (explaining the "most important" reason for this Court not to reach an alternative argument is the fact that the courts below "did not address the matter"). There is no reason to deviate from that bedrock principle here.

Moreover, Paramount did not preserve these non-"consumer" arguments. By its own admission, it did not "press" the argument that it was not a "video tape service provider" "in the court of appeals as an alternate basis for affirming." Opp. 17 n.4. Nor did it advance any argument about the Second Circuit's atextual "ordinary person" gloss on "personally identifiable information."

Put simply, Paramount seeks to revive one argument it abandoned on appeal and to advance another it never raised—neither of which the courts below addressed—all to thwart this Court's review of the only question the lower courts actually resolved. Its effort should fail. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001). Arguments about those independent statutory elements are simply outside the scope of the question presented here. Indeed, both parties agree on this point as well. *Compare* Pet. i (limiting the question presented to the meaning of "consumer"), *with* Opp. i (same).

The Court should grant the petition and resolve the narrow "consumer" question, which both parties agree implicates a 2–2 circuit split, and which both parties agree was the sole basis for the decisions below.

ARGUMENT

I. Paramount concedes the circuits have split 2–2 over whether an individual who rents, purchases, or subscribes to "goods or services," but not *audiovisual* goods or services, is a "consumer."

Four courts of appeals have addressed the narrow issue presented here—namely, whether one who rents, purchases, or subscribes to a non-audiovisual good or service from a video tape service provider is a VPPA "consumer." The Second and Seventh Circuits say "yes." *See Gardner v. Me-TV Nat'l Ltd. P'ship*, 132 F.4th 1022, 1025 (7th Cir. 2025) ("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 v. Nat'l Basketball Ass'n*, 118 F.4th 533, 549 (2d Cir. 2024) (holding that, to become a consumer, one must be "a renter, purchaser, or subscriber of any of [a video tape service] provider's 'goods or services'—audiovisual or not"). These holdings make good sense. After all, the statutory definition contains no limitation on the kinds of goods or services that qualify. *See* 18 U.S.C. § 2710(a)(1) (defining "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider").

But the Sixth and D.C. Circuits say "no." App. 14a (holding "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'"); *Pileggi v. Washington Newspaper Publ'g Co.*, 146 F.4th 1219, 1224 (D.C. Cir. 2025) (similar).

Paramount concedes the existence of this circuit split. Opp. 9 (admitting "there is a 2-2 circuit split over the meaning of 'consumer'"); Opp. 20 ("Petitioner is correct that there is a 2-2 circuit split over the interpretation of 'consumer.'"). And the courts of appeals reached opposite conclusions on practically identical facts. *See, e.g.*, Pet. 13–17. Indeed, the courts themselves acknowledged this reality. *See* App. 17a (noting the Sixth Circuit was "break[ing] with the Second and Seventh Circuits' approach to this issue" in a "virtually indistinguishable" and "almost identical" case); *Pileggi*, 146 F.4th at 1237 n.5 (similar).

Despite Paramount's argument to the contrary, the Sixth and D.C. Circuits expressly acknowledged that the conflict over the meaning of "consumer" does, in fact, "lead to different ultimate outcomes on materially identical facts." Opp. 10. And, in all four cases, the sole "dispositive issue," Opp. 3, was the meaning of "consumer." The split could hardly be more concrete.

Still, Paramount calls the split "illusory" and "abstract." Opp. 2, 21, 23–24. But its effort to undermine this acknowledged and entrenched circuit split hinges entirely on its alteration of the question presented.

In particular, Paramount expands the question to "whether the VPPA applies to claims like [Mr.] Salazar's," which conveniently sweeps in the "video tape service

provider" and "personally identifiable information" issues Paramount did not raise below and neither lower court addressed. Opp. 21 (arguing Mr. Salazar's complaint "would fail in the Second Circuit" based on the atextual "ordinary person" standard that court applies to "personally identifiable information"); Opp. 22 (arguing the Eighth Circuit would reject Mr. Salazar's claim based on its interpretation of "video tape service provider"); Opp. 23 (asking the Court to consider broadly "whether the Pixel-based allegations here state a claim under the VPPA" instead of the narrow "consumer"-based question both parties listed as the question presented). There are multiple problems with this approach.

First, Paramount elsewhere admits the question presented here does not implicate the terms "video tape service provider" or "personally identifiable information." Opp. i. The question is not which side should win, broadly speaking, on the merits of Mr. Salazar's VPPA claim. Both parties agree the relevant question concerns only the meaning of "consumer." Pet. i; Opp. i.

Second, Paramount agrees the "video tape service provider" and "personally identifiable information" arguments present "freestanding" issues—that is, questions unrelated to the meaning of "consumer." Opp. 24; *see also* Opp. 2 (noting the alternative issues concern "additional statutory elements" that are "independent" of the "consumer" question). That Congress separately defined the three terms confirms this reality. *See* 18 U.S.C. §§ 2710(a)(1), (a)(3), (a)(4). So, too, does the courts of appeals' incremental approach to the questions. Opp 9–10 (noting the Seventh Circuit has addressed the meaning of "consumer," but not the other two elements);

Opp. 19 n.5 (noting the First Circuit has addressed the meaning "personally identifiable information," but not "consumer"); Opp. 22 (similar). Additional "percolati[on]" about these independent statutory elements, Opp. 3, 10, 24, will not—and cannot—erase the existing circuit split over the meaning of "consumer."

Third, Paramount admits neither court below addressed those "freestanding" and "independent" elements here. Opp. 7–8, 24. Indeed, Paramount admits "the Sixth Circuit rested its affirmance *solely* on the 'consumer' question." Opp. 24 (emphasis added). As such, these independent statutory questions are not properly before the Court. *See, e.g.*, *Smith*, 602 U.S. at 800–01 (declining to "be the pioneer court to decide" an "independent" question the lower courts did not resolve). There is no reason to avoid the "consumer" question both parties agree has engendered a 2–2 circuit split because the parties might later disagree about some *other* "freestanding" and "independent" statutory issue the courts below did not address.

Fourth, Paramount did not preserve arguments about these independent statutory elements. Regarding "video tape service provider," Paramount admits it did not "press this argument in the court of appeals as an alternate basis for affirming." Opp. 17 n.4; *see also* App. 11a n.7 (noting this fact). And Paramount did not rely on the atextual "ordinary person" test regarding "personally identifiable information" either. It never suggests otherwise. Opp. 1–25.

Nor does Paramount argue this is the "exceptional case" where the Court should "consider grounds

supporting the judgment different from those on which the Court of Appeals rested its decision." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (citation and alteration omitted). In the case's current posture, the Court "would lack guidance from the District Court or the Court of Appeals" on both alternative statutory arguments. *Id.*

Fifth, Paramount overstates the certainty of its hypothetical victory on these independent issues in other circuits. For example, it claims it would win in the Ninth Circuit on the "personally identifiable information" issue. Opp. 19. But the Ninth Circuit left open whether a "Facebook link" might "readily enable an 'ordinary person' to identify an individual." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 986 (9th Cir. 2017).

Paramount similarly claims it would win in the Eighth and Ninth Circuits on the "video tape service provider" issue. Opp. 22–23. But those courts addressed the question only in the context of movie theaters. *See Christopherson v. Cinema Ent. Corp.*, No. 24-3042, --- F.4th ----, 2025 WL 3512393, at *3 (8th Cir. Dec. 8, 2025) (holding a movie theater does not meet the definition of "video tape service provider" because it does not deliver audiovisual materials that can be "played on a home recorder; watched, rewatched, paused, rewound, and fast forwarded; and shared with family and friends"); *Osheske v. Silver Cinemas Acquisition Co.*, 132 F.4th 1110, 1113 (9th Cir. 2025) (reaching the same conclusion because theater patrons do not "obtain the control over audiovisual materials available to prerecorded video viewers"). Paramount, meanwhile, delivers "video clips,"

Opp. 3, 5, 10, 18, that users control and manipulate.[1] It is not akin to a movie theater.

At bottom, both parties agree there is a 2–2 circuit split on the meaning of "consumer." Both parties agree the courts below dismissed Mr. Salazar's claim based solely on their interpretation of "consumer." This Court should ignore unpreserved and unaddressed arguments about independent statutory elements and grant certiorari on the narrow question presented here.

II. This case is an ideal vehicle to resolve the split.

Unlike the NBA's earlier petition, this case is a clean vehicle for resolving the acknowledged circuit split on the "consumer" issue. Pet. 17–20. It has a final judgment, engendered no additional proceedings below (*e.g.*, amended pleadings, a second and simultaneous appeal on a different issue, etc.), and will allow the Court to resolve the question on the same record the lower courts reviewed. *Id.*

Paramount's only "vehicle" counterargument is a rehash of those freestanding and independent "video tape

1. That these video clips "are not physical objects," Opp. 18, is irrelevant. Congress did not require "video tape service providers" to transact in physical "goods." Instead, it required that they rent, sell, or deliver "audio visual *materials*." 18 U.S.C. § 2710 (a)(4) (emphasis added). Congress's repeated use of "materials" instead of "goods," *see also id.* § 2710(a)(3), suggests it did *not* limit the VPPA to physical media. Indeed, this understanding aligns with Congress's later acknowledgement that VHS tapes were "obsolete" and that American consumers watched movies and shows via "Internet streaming services." S. Rep. 112-258, at *2 (Dec. 20, 2012).

service provider" and "personally identifiable information" issues. Opp. 24–25. But the argument fares no better here. Again, Paramount admits the Sixth Circuit "rested its affirmance solely on the 'consumer' question." Opp. 24. It concedes "the Sixth Circuit did not address" those other two statutory elements. *Id.*

Unpreserved and unaddressed arguments about those independent statutory elements pose no barrier to this Court's review. A party's belief that it should win for some additional reason the courts below did not address is not a "vehicle" problem at all. This Court may someday need to address the VPPA's other statutory elements. But not here. Instead, it can resolve a concrete 2–2 circuit split on the meaning of "consumer." It need not go further.

III. Paramount's statutory analysis is wrong.

It is no surprise the parties disagree about the meaning of "consumer." Pet. 20–34 (arguing the Sixth Circuit is wrong); Opp. 10–16 (arguing the Sixth Circuit is right). At this stage, the circuit split's existence matters more than which side is right. *See* Sup. Ct. R. 10(a). Still, Mr. Salazar must clarify several points.

First, Mr. Salazar's approach does not "transmogrify [the VPPA] into a prohibition against targeted advertising." Opp. 1. It does not "ban the free Internet." Opp. 10. Nor does he request any "judicial expansion of the text." Opp. 13. Instead, he asks only that the VPPA's plain language be applied as written. The definition of "consumer"—unlike other provisions in the VPPA—does *not* contain a video-specific limitation. The Sixth Circuit was wrong to insert one. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 942–43

(2000) (explaining that, "[w]hen a statute includes an explicit definition," courts "must follow that definition").

Second, the VPPA is never "triggered" by an individual's "consumer" status. Opp. i, 12, 15–16 (repeatedly referring to "consumer" status as a "triggering condition"). VPPA liability exists only when a "video tape service provider" "knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The unauthorized disclosure of "personally identifiable information"—not the freestanding existence of a "consumer" relationship—triggers liability. As a result, there is no "bizarre disconnect" or "strange misfit" here. Opp. 16.

Consider Judge Bork's experience. He became Potomac Video's "consumer" the first time he rented, purchased, or subscribed to any good or service—video or otherwise—from the store. 18 U.S.C. § 2710(a)(1). But there was no liability at that point. Potomac Video gathered "personally identifiable information" each time Judge Bork "requested or obtained specific video materials or services." *Id.* § 2710(a)(3). Because he rented 146 movies, we can safely assume this process lasted several years. But there was no liability at any of those points either.

Potomac Video's conduct would have violated the VPPA only when it gave a journalist the list of 146 films. To borrow Paramount's term, that unauthorized disclosure is the statute's sole "triggering condition." *See id.* § 2710(b)(1).

Third, Paramount has several statutory safe harbors at its disposal. For example, it could obtain written consent

before disclosing consumers' personally identifiable information. *See id.* § 2710(b)(2)(B). Or it could limit its disclosures to comply with Section 2710(b)(2)(D). That Paramount chose a different path is no reason to rewrite the definition of "consumer."

Fourth, Congress contemplated that the transactions giving rise to "consumer" status, or even "personally identifiable information," "could be years apart." Opp. 16. It allowed consumers to give "advance" consent for a period of up to two years. 18 U.S.C. § 2710(b)(2)(B)(ii)(II). Thus, Congress anticipated the possibility of a temporal gap between the transactions giving rise to "consumer" status or "personally identifiable information" and the prohibited disclosures.

Fifth, there is no reason to believe video tape service providers can more easily track individuals who rent, purchase, or subscribe to audiovisual goods or services instead of non-audiovisual ones. Opp. 14 (suggesting providers have "no reliable way to discern" the latter but can somehow discern the former). Nor would Paramount's argument matter even if this Court indulged that faulty premise. *Compare id.* (advancing a practical superfluity problem), *with Feliciano v. Dep't of Transp.*, 605 U.S. 38, 51–52 (2025) (rejecting an argument about "practical (not linguistic) superfluity").

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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