No. 25-459

IN THE

Supreme Court of the United States

MICHAEL SALAZAR,

Petitioner,

v.

PARAMOUNT GLOBAL, DBA 247SPORTS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CHAMBER OF PROGRESS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Chamber of Progress respectfully submits this brief in support of the Respondent Paramount Global, DBA 247 Sports.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users. It has a direct interest in ensuring that laws like the Video Privacy Protection Act promote rather than inhibit free expression and that the application of such laws do not inadvertently harm consumer welfare by imposing overly restrictive obligations on digital publishers and platforms.

Chamber of Progress' work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto power over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.

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[1] Pursuant to this Court's Rule 37.6, undersigned counsel for Chamber of Progress states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. Chamber of Progress' counsel further states that other attorneys from Davis Wright Tremaine have prepared an *amicus* brief for the Software & Information Industry Association in this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Video Privacy Protection Act ("VPPA") to stop video rental stores from disclosing the titles of the cassette tapes their customers checked out, not to punish the publishers of online newsletters and other expressive content. Yet Petitioner's boundless interpretation of the statutory term "consumer" would have precisely this consequence, which Congress never intended and which would create a chilling effect on protected speech.

Petitioner is not a subscriber to a video service akin to the video cassette rental stores that Congress regulated when it passed the VPPA. Rather, he is a subscriber to an online newsletter published by Respondent's news website focused on college sports. That newsletter does not contain any videos. Petitioner argues that he is nevertheless a "consumer" of a "video tape service provider" because Respondent separately maintains a public news website that does feature videos that allegedly shared data via Facebook's Pixel and his subscription to this newsletter means that he received "goods or services" sufficient to trigger the VPPA. This interpretation is wrong and leads to unconstitutional results.

The VPPA was a response to a news article published during Judge Bork's contentious confirmation hearing, which disclosed some of the videos he had rented from a local video cassette rental store. Congress never attempted to prohibit the publication of *The Bork Tapes* article. Nor could it do so without violating the First Amendment. Instead, it targeted the video rental store clerk who disclosed

Judge Bork's private information to the reporter. The VPPA thus regulates commercial transactions between video rental stores (or their online equivalents) and the customers who actually use those services to obtain videos.

Allowing Petitioner to raise a VPPA claim merely by subscribing to a newsletter would transform a statute aimed at a narrow band of commercial speech into a rogue statute that threatens free expression. Such a reading cannot be reconciled with the First Amendment. This is why Congress chose to regulate the commercial exchange between video rental stores and their customers, not the expressive speech embodied by *The Bork Tapes* article. The VPPA prohibited the video rental clerk's disclosure of Judge Bork's video rental history, but not the journalist's disclosure of that very same information. Yet Petitioner's interpretation of the VPPA would mean that anyone publishing *The Bork Tapes* online today risks potentially ruinous liability so long as the publisher's website happens to feature videos with standard data analytics (as most do) and users can subscribe to an affiliated newsletter. This would provide an invitation for future plaintiffs to file VPPA claims as a means of discouraging protected speech they do not like. It would also create perverse disincentives that chill the publication of videos as part of routine expressive activity and would threaten the viability of newsletters as a creative medium.

The lower court's definition of "consumer" as a person who at least subscribes to a service that provides videos in the manner of video cassette rental shops mitigates this harm and should be affirmed. In addition, as the lower court correctly recognized, the term "consumer" is "tether[ed]" to the related term

"video tape service provider." *Salazar v. Paramount Glob.*, 133 F.4th 642, 650 (6th Cir. 2025). To entirely avoid the problems created by Petitioner's overly broad conception of the VPPA, it is necessary to conclude that Respondent was not acting as a "video tape service provider" in the first place.

ARGUMENT

I. THE VPPA WAS ENACTED TO REGULATE COMMERCIAL TRANSACTIONS BETWEEN VIDEO RENTAL COMPANIES AND THEIR CONSUMERS, NOT EXPRESSIVE SPEECH LIKE NEWSLETTERS

The VPPA is an analog-era statute that limits what video cassette rental stores can do with their customers' borrowing records. The VPPA is not an all-purpose online privacy law. And the VPPA cannot be magically transformed into the comprehensive data privacy statute that Petitioner envisages without placing intolerable burdens on expressive speech that Congress never intended to regulate (and could not regulate even if it had).

A. THE VPPA'S TEXT AND CONTEXT MAKE CLEAR THAT THE LAW GOVERNS COMMERCIAL SPEECH AND DOES NOT APPLY TO PROTECTED CONTENT LIKE NEWS ARTICLES

The VPPA was never intended to penalize protected speech contained in online newsletters and other expressive media. Instead, it is a statute that

Congress enacted to solve a very specific problem at a very specific moment in a bygone era.

The genesis of the VPPA is a news article by journalist Michael Dolan entitled *The Bork Tapes*, which was published in the *Washington City Paper* on September 25, 1987. The article was published in the midst of the contentious confirmation hearings over Judge Robert Bork's nomination to this Court. Michael Dolan, *The Bork Tapes*, WASH. CITY PAPER (Sep. 25, 1987), https://perma.cc/37V2-T2ZD. At this pivotal moment, Mr. Dolan offered insight into Judge Bork's personality and fitness for office by obtaining "a copy of the complete list of VHS tapes" he had rented from the clerk of Potomac Videos, a video cassette rental store in Washington D.C. *Id*. And, as Mr. Dolan noted, the article was also intended to make a satirical point about the fact that Judge Bork was not a "fan of the notion of a constitutional guarantee of privacy." *Id*.

The article does not disclose an exhaustive list of Judge Bork's video cassette rentals but rather presents a summary from which to draw inferences about his character. The article reports, for instance, that "[a]lthough half his rentals are distinctly American films (they range from My Little Chickadee and A Day at the Races through On the Town and the Wild Bunch to the Right Stuff and Ruthless People), Judge Bork clearly has a bad jones for things British"—including films starring Carry Grant and Peter Sellers as well as "five Bond films." *Id*. From here, Mr. Dolan posits that "inquiring minds might be forgiven for concluding that Bork is a hopeless Anglophile, drawn irresistibly to the snappy patter, stiff upper lips, and impeccable manners of mainstream British cinema." *Id*.

True to this "stiff upper lip[]" persona, Judge Bork remained stoic about the disclosure of his rental records and never sought to suppress the article. As Mr. Dolan noted in a follow-up piece, "Judge Bork was a stand-up guy about [the] intrusion; nope, he said, no penumbral guarantee [of privacy], fire away." *See* Michael Dolan, *Borking Around*, THE NEW REPUBLIC (Dec. 19, 2012), https://tinyurl.com/ muy94hv6.

Nonetheless, the publication of *The Bork Tapes* article sparked a furious reaction in Congress from legislators who were upset by the video cassette rental store's disclosure of Judge Bork's rental history to a journalist. As one lawmaker put it, "[w]hether you want to watch a particular T.V. program or not isn't anybody else's business and this law is going to make sure that it stays nobody[] else's business." *Video and Library Privacy Protection Act of1988: Hearing on H.R. 4947 & S. 2361 Before the Subcomm. on Courts, Civ. Liberties & the Admin. of Just. of the H. Comm. of the Judiciary & the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary*, 100th Cong. 19 (1988).

In 1988, Congress passed the VPPA for the specific purpose of preventing future disclosures of consumers' video cassette rental records by "video tape service providers" like the clerk at Potomac Videos. Thus, the law targeted a very specific commercial transaction between a purveyor of video tapes and its customers. The narrowness of the statute is apparent from what Congress chose to exclude. Early drafts of the law included a ban on disclosing library book rental records, but that provision was dropped from the final text of the bill. *See Video and Library Privacy Protection Act of1988: Hearing on H.R. 4947 & S. 2361 Before the Subcomm.*

on Courts, Civ. Liberties & the Admin. of Just. of the H. Comm. on the Judiciary & the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary, 100th Cong. 13-15. And the VPPA never encompassed newspapers, magazines, bookstores, live television services, music or any other medium of expression other than pre-recorded audio-visual material.

The VPPA also never prohibited the publication of video rental records in news articles like *The Bork Tapes*. This much is clear from the text of the statute. The VPPA defines the individuals it applies to and the conduct it prohibits in terms of the specific commercial transaction that occurs between consumers of rental video cassettes and video rental stores like Blockbuster Videos. It does this via a series of interrelated definitions. 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). "[V]ideo tape service provider" is defined, in turn, as "any person … engaged in the business … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* § 2710(a)(4). And the "personally identifiable information" covered by the VPPA "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3).

Putting this all together, the statute prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such products…" 18 U.S.C. § 2710(b)(1). Given the law's laser focus on transactions involving the transfer of video tapes, it is unreasonable to interpret the VPPA

as doing anything more than prohibiting video cassette rental stores (or equivalent entities) from disclosing the records generated by the commercial exchange in which customers buy, rent or subscribe to specific video content. As the lower court held, correctly, "[t]he most natural reading [of the VPPA] 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.'" *Salazar*, 133 F.4th at 650-51.

This transaction-specific interpretation is buttressed by legislative history indicating that "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 (1988).[2] This observation highlights two points that are readily apparent from the text of the statute. First, the law only applies to commercial entities like Blockbuster Video or department stores "that sell[]" videos. *Id*. Second, the law applies only to specific transactions in which a consumer buys, rents or subscribes to video content.

[2] An analogy to a different industry buttresses this point. CVS operates a pharmacy bound by the privacy requirements of the Health Insurance Portability and Accountability Act. Yet no one would suppose that HIPAA governs a customer's purchase of shampoo, snacks, or greeting cards from the front of the store merely because a regulated pharmacy operates in the back. The statute attaches to the regulated transaction—the handling of medical information—not to every item a partially covered entity happens to sell.

B. THE VPPA CANNOT SATISFY THE FIRST AMENDMENT IF IT ENCOMPASSES MORE THAN COMMERCIAL SPEECH

The VPPA's narrow focus on a very specific form of commercial exchange does not reflect an arbitrary whim of Congress; rather, it is a necessary feature of the law designed to satisfy the First Amendment. At bottom, the VPPA prohibits speech. It limits what video store rental companies can say about their customers viewing preferences. And, unless the prohibited speech is commercial in nature, the VPPA is almost certainly unconstitutional. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) ("[t]he Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

This means that the only way for the VPPA to pass constitutional muster is to limit it, as Congress intended, to "restrict[ing] the sellers of certain products [*i.e.*, videos] from disclosing the identity of individuals who purchase those products." *Boelter v. Hearst*, 192 F. Supp. 3d 427, 445 (S.D.N.Y. 2016). If the statute is interpreted narrowly to effectuate this purpose, it may be a permissible regulation of commercial speech because it "solely relate[s] to the economic interests of the speaker and the audience." *Id.* (upholding constitutionality of Michigan Video Rental Privacy Act).

Any First Amendment concerns raised by the VPPA, as properly interpreted, are further mitigated by the posture of the parties to the commercial transaction at issue. The expressive actor in this

scenario is the video store customer, who peruses a range of content and decides (based on his or her proclivities) which videos to rent. While the video tape service provider has their own important First Amendment rights in curating a selection of videos, the VPPA does not focus on this expression but aims instead at their passive role as the commercial entity that facilitates the customer's decisions about what to watch. So long as the VPPA is construed in a way that does not affect speech beyond the confines of this specific transaction, the VPPA may not raise acute First Amendment problems.

But what the VPPA does not do—and could never do—is prohibit Mr. Dolan from publishing Judge Bork's video rental history as part of his newsworthy article. Unlike the passive video rental store, expressive speakers like Mr. Dolan have strong constitutional rights to curate and publish whatever information they deem newsworthy. Indeed, it is axiomatic that "[t]he choice of material to go into a newspaper … constitute[s] the exercise of editorial control and judgment," which is subject to full First Amendment protection. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *See also Moody v. NetChoice*, 603 U.S. 707, 738 (2024) ("'The choice of material,' the 'decisions made as to content,' [and] the 'treatment of public issues'" are a protected element of that expression) (quoting *Tornillo*, 418 U.S. at 258).

The First Amendment right to distribute newsworthy information is not diminished by the fact that an expressive publisher obtained the information from a source who violated the VPPA or any other law. This is because "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki v.*

Vopper, 532 U.S. 514, 528-29, 535 (2001) (holding that it was lawful to publish the contents of a telephone call on a matter of public interest that was recorded in violation of wiretapping laws). *See also Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("[The] government may not prohibit or punish the publication of … information once it falls into the hands of the press ...").

In addition, expressive publishers do not forfeit their First Amendment rights simply because they happen to engage in commercial conduct, like selling advertisements on public websites featuring their articles or using standard data analytics. Indeed, "[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection," precedents protecting the First Amendment rights of publishers "would be little more than empty vessels." *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 667 (1989).

Given these strong First Amendment protections, it is no surprise that Congress never even attempted to pass a law banning the publication of articles like *The Bork Tapes*. Instead, they passed the VPPA, whose text and basic constitutional premise require the law to be limited to a very specific commercial transaction—like the exchange in which a consumer subscribes to a video rental service and requests specific videos through that subscription. Any effort to expand the non-disclosure provisions of the VPPA beyond that narrow band of commercial speech should ring constitutional alarm bells.

II. PETITIONER'S EXPANSIVE READING OF THE VPPA ENCOMPASSES PROTECTED SPEECH AND PERMITS LIABILITY BASED ON THE PUBLICATION OF AN ONLINE NEWSLETTER

Petitioner's argument that signing up to Respondent's free newsletter made him a "consumer" of a "video tape service provider" improperly expands the scope of the VPPA to cover expressive content that Congress never intended to regulate. Such an interpretation would lead to absurd and unconstitutional results, including an effective prohibition on the online publication of *The Bork Tapes* and future articles like it.

A. PETITIONER'S INTERPRETATION OF "CONSUMER" WOULD LEAD TO ABSURD, UNCONSTITUTIONAL RESULTS FOR PUBLISHERS OF EXPRESSIVE CONTENT

Petitioner asserts that he is a "consumer" who is entitled to the strong remedies of the VPPA because he "obtained a digital subscription to 247Sports.com by signing up for its online newsletter." Pet. Br. 7. But, as Petitioner concedes, the free newsletter he signed up for did not feature any videos. *Id.* (explaining he "used his 247Sports.com digital subscription to view Video Media through 247Sports.com[.]"). For that, Petitioner points to the public 247Sports.com website, which features videos that anyone can view (not just subscribers) and which allegedly shares user information with Facebook via its Pixel function. *Id.* To sidestep the inconvenient fact that he did not

actually subscribe to a service carrying videos, Petitioner posits that the VPPA's definition of "consumer" encompasses anyone who has received any "goods or services" whatsoever from a video tape service provider—including 247Sports.com's expressive newsletter about college sports.

If the definition of "consumer" was as capacious as Petitioner suggests, the VPPA would be transformed from a law enacted to stop video rental store clerks from sharing their customer's rental histories into a comprehensive Internet privacy law that imperils vast swathes of expressive content. The arguments for why this reading contradicts the plain meaning of the statute are set forth in Respondent's brief and need not be revisited here. But the dire and unconstitutional consequences of expanding the VPPA beyond the narrow category of commercial video rental transactions it was intended to regulate merit further attention.

In the nearly forty years since Congress passed the VPPA, advances in technology have swept away the neat line that used to distinguish video cassette rental stores like Potomac Video from publishers like *The Washington City Paper*. In place of Blockbuster Videos, we now have online video streaming platforms that may form only one part of larger entities that serve multiple functions, including the publication of news akin to *The Bork Papers*.

Respondent Paramount is an example of this modern phenomenon. It operates the Paramount+ video streaming platform where subscribers pay to access to a wide range of content online. But, unlike the video cassette rental stores of old, Paramount stocks its streaming service with original content it

creates for television channels like CBS and the movies it produces through its Paramount film studio. Paramount also has a diverse news operation that runs networks like CBS News as well as niche news websites like 247Sports.com, which focuses on college sports. The reality of how businesses like Paramount operate online has therefore blurred the lines between commercial enterprises passively distributing third-party videos to consumers (which the VPPA regulates) and the publication of expressive content (which it does not).

Complicating matters further, video content, video advertising and online trackers like Pixel have been woven into the fabric of the Internet. This means that public-facing webpages can and do share basic data from users who interact with these videos, even when those users have not subscribed to a dedicated video streaming platform like Paramount+. In this respect, Respondent is no different from the operators of countless other websites.

For its part, Congress amended the VPPA in 2013 to permit online operators to obtain "informed, written consent" to disclose their video viewing data "through an electronic means using the Internet." Pub. L. No. 112-258, 126 Stat. 2414 (2013). But Congress did not change the basic structure of the statute—including its tethered definitions of "consumer" and "video tape service provider"—and there is no indication whatsoever that the law has evolved to prohibit expressive speech that was previously permitted.

Petitioner's argument that a newsletter is merely a "good or service" provided by a "video tape service provider" conflates two distinct products: the

newsletter he subscribed to (which contains no videos) and the public website affiliated with that newsletter (which he never subscribed to). This sleight of hand would permit Petitioner—and, by extension, any other Internet user—to circumvent the most basic requirement of the VPPA by bringing a claim without ever subscribing to a service from which they rented or otherwise acquired videos. This interpretation also threatens pernicious consequences for the original content embodied in newsletters and other similarly expressive publications.

Consider what might happen if *The Bork Tapes* was published on the Internet rather than in print. This is not an entirely hypothetical question. In 2012, Mr. Dolan published a follow-up article online. *See Borking Around*, *supra*. That article repeats previously-reported details of Judge Bork's video rental history—including the fact that he "enjoyed … Brit films, costume drama and otherwise." *Id*. Under the VPPA, this detail would qualify as "information which identifies a person as having requested or obtained specific video materials … from a video tape service provider." 18 U.S.C. § 2710(a)(3). Even so, in the print context, it is self-evident that the publication of *The Bork Tapes* would not trigger VPPA liability.

But, under Petitioner's broad definition of consumer, the publication of the same article online could give rise to a VPPA claim. If the website hosting *Borking Around* featured video advertisements and other video content, like the 247Sports.com website, it could qualify as a "video tape service provider" under Petitioner's interpretation of the law. Assuming permission to disclose data was not obtained, a subscription to that news website's online newsletter could be enough to transform Judge Bork (or any other

putative plaintiff) into a "consumer" of a "video tape service provider" for the purposes of the VPPA. And, if this false premise is accepted, there is nothing to stop a determined plaintiff from claiming that the news website that published *Borking Around* violated the VPPA by "knowingly disclos[ing] personally identifiable information."[3] Accordingly, the online publication of *Borking Around* would arguably be unlawful even though Congress clearly excluded *The Bork Tapes* from the scope of the VPPA when that article appeared only in print. And, liability could be so easily established, the publisher of *The Bork Tapes* might be saddled with the expense of litigation, a $2,500 award of damages, a potential class action and other exorbitant costs.

While this example may appear to be fanciful, it illustrates a real risk. In the future, there may be another journalist who exercises their right to publish a newsworthy article about a prominent person's video viewing history. There is no question that such an article should receive full First Amendment

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[3] The VPPA bars a "video tape service provider" from disclosing "personally identifiable information concerning any consumer of such a provider," but it does not specify that the law only applies to information that the video tape service provider obtains directly from its customers. This might make sense if the category of "video tape service provider" excluded expressive publishers (*see* Section IV, *supra*) or if the law applied narrowly video data that a company like Blockbuster Videos obtains as a direct result of renting videos to its customers. But Petitioner's untethered definition of "consumer" would break the statute wide open and open the doors to VPPA claims based on the disclosure of any personally identifiable information by a "video service provider," even if it originated from another "video service provider."

protection, just as *The Bork Tapes* did. And the VPPA cannot be interpreted in a way that gives canny plaintiffs ammunition to threaten or file punitive lawsuits against anyone who seeks to publish this information as part of their news reporting or for other expressive purposes. The First Amendment cannot tolerate such perverse and unintended consequences.

The broad application of the VPPA to the publication of newsletters and other expressive content would also have a chilling effect beyond the admittedly small niche of news stories about prominent individual's video rental histories. It is easy to imagine a plaintiff who is unhappy with their coverage on a news website and, following Petitioner's lead, weaponizes the VPPA to deter the publication of newsworthy and otherwise legally unobjectionable information. This could easily result in the suppression of news that putative plaintiffs would prefer to remain hidden. This "'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern" and it cannot be tolerated, particularly because it was never intended by Congress. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1988).

B. ADOPTING A BROAD INTERPRETATION OF "CONSUMER" WOULD CHILL PUBLICATION OF EXPRESSIVE WORKS IN VIDEO FORMATS

Permitting plaintiffs to file VPPA suits based on the publication of newsletters would have absurd and constitutionally dubious results. Such a law would discriminate between publishers that carry video content—including videos that publishers elect to report because they are newsworthy—and publishers whose websites do not feature videos. Publishers who do not carry videos (and thus fall outside the ambit of the VPPA) could harvest and sell all manner of sensitive user data with impunity, while news organizations who publish video content in good faith risk potentially ruinous liability. And, because the VPPA applies only to "prerecorded video" content, the same perverse loophole would apply to websites that exclusively feature live broadcasts. 18 U.S.C. § 2710(a)(4).

The Court should also carefully guard against the chilling effect that a misguided application of the VPPA threatens to have on the publication of videos as part of routine news reporting. One of the immense benefits of the online distribution of news is that publishers can use videos to show their audience what is really happening, rather than relying on dry text descriptions or still photographs. As but a few examples, the events of January 6, 2021 were vividly reported through videos of rioters storming the Capitol, crowds chanting, violent confrontations with

law officials, and lawmakers evacuating the building[4]; broad dissemination of a bystander's cell phone video of George Floyd's murder triggered a national debate on policing[5]; and, more than any image or written text could, the video of the Francis Scott Key bridge collapse conveyed the dramatic scale and suddenness of the bridge's destruction.[6]

In the digital era, the only way to do these stories justice and satisfy audiences is by permitting publishers to make liberal use of video content. Threatening publishers with liability for simply featuring videos in or around their reporting would intrude upon their constitutionally protected editorial judgments about the best way to tell a news story. And it would discourage responsible publishers from featuring videos as part of their reporting, and placing those videos in appropriate context, while less conscientious publishers remain free to take videos out of context and flood the Internet with misinformation.

In addition, permitting Petitioner to use a newsletter as his sole hook for a VPPA claim would also stifle the development of the newsletter medium, which are a vibrant form of expression on the Internet. Newsletters have been an important means of communication since the Internet's inception. Today

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[4] Dmitriy Khavin et al., *Day of Rage: How Trump Supporters Took the U.S. Capitol*, THE N.Y. TIMES (June 30, 2021), https://www.nytimes.com/video/us/politics/100000007606996/capitol-riot-trump-supporters.html.

[5] *'I Can't Breathe!': Video Of Fatal Arrest Shows Minneapolis Officer Kneeling On George Floyd's Neck For Several Minutes*, CBS MINN. (May 26, 2020), https://tinyurl.com/52bppv84.

[6] *See How a cargo ship took down Baltimore's Key Bridge*, THE WASH. POST (Mar. 26, 2024), https://tinyurl.com/mryvyp4n.

they continue to "play a crucial role in digital media." Javier Guallar et al., *The Rise of Curated Newsletters in Media: A Case Study of the New York Times*, Journalism Prac. (Jan. 2025), at 1. Indeed, newsletters have "been experiencing a period of great vitality and increasing proliferation in recent years." *Id.*

The resurgence of online newsletters is not a fluke, but rather a consequence of the unique benefits they offer to publishers and their audiences. Newsletters provide an opportunity for established publishers to expand their readership, as well as allow independent journalists to expand their readership and fund their activities by soliciting subscription fees directly from their audience. This growth has been fueled in part by Substack, an online media platform through which writers can distribute their work by sending newsletters directly to their audience. *See The Rebirth of Newsletters: Leveraging Substack & Email Marketing*, FORBES (May 1, 2024), https://tinyurl.com/ 5cpbwx3f. Simply put, newsletters "are not a trend or a fad" and "[t]heir resurgence indicates a shift towards quality, targeted content." *Id*.

The newsletters published via Substack and other platforms range widely in their subject matter, from news to art and creative writing, to sports and cooking. Some of this content is original to the publisher and some is curated from third party sources. There is no serious question that, "[like] the protected books, plays, and movies that preceded them," online newsletters "communicate ideas" and "[t]hat suffices to confer First Amendment protection." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (holding that the First Amendment applies to video

games). *See also Moody*, 603 U.S. at 717 ("Traditional publishers and editors also select and shape other parties' expression into their own curated speech products. And we have repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements.").

Newsletters are not, as one of Petitioner's *amici* curiously suggests, a Trojan Horse that "enable[s] companies … to avoid the important privacy protections of the VPPA." Victoria L. Schwartz's Brief as *Amicus Curiae* Supporting Petitioner, *Salazar v. Paramount Glob.*, No. 25-459, at 20 (U.S. Apr. 2026). This position treats all newsletters as naked commercial transactions rather than the protected expressive publications that they actually are. And Petitioner's broad reading of the VPPA—which would effectively premise liability on the publication of a newsletter—creates an untenable scenario where the mere publication of protected expression risks triggering a speech-stifling VPPA claim. Adopting Petitioner's broad definition of the VPPA thus threatens to inhibit the online publication of newsletters as a valuable and vibrant medium of expression.

III. THE LOWER COURT'S CORRECT READING OF "CONSUMER" MITIGATES THE HARMS THREATENED BY AN OVERLY BROAD APPLICATION OF THE VPPA

To avoid the obvious harms that would result from adopting Petitioner's maximalist interpretation of the VPPA, the interrelated definitions of "consumer" and "video tape service provider" must be tethered to the specific commercial transaction

Congress sought to regulate. Which is what the lower court did when it correctly interpreted the statute and affirmed dismissal of Petitioner's claim.

The lower court properly rejected the supposition that the receipt of any "goods or services" from the operators of a website that features videos triggers VPPA liability. Looking at the relevant clauses of the statute holistically and applying sound canons of statutory interpretation, the lower court held that "the expression 'goods or services' is limited to audiovisual ones." *Salazar*, 133 F.4th at 651. Accordingly, "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 650-51. Faced with a similar VPPA claim based on subscription to a newsletter containing embedded videos, the Court of Appeals for the District of Columbia reached the same correct conclusion. *See Pileggi v. Wash. Newspaper Publ'g Co.*, 146 F. 4th 1219, 1237 (D.C. Cir. 2025) ("Subscribing to an e-newsletter that includes videos and video links, by itself, is not enough to make someone a 'consumer' under the [VPPA because] the videos for which viewing history is disclosed must be the same video materials or services that the individual purchased, rented, or subscribed to.").

The lower court's appropriately tailored reading of "consumer" is not only correct as a matter of statutory interpretation but also necessary to avoid opening the floodgates to the constitutionally infirm VPPA claims described above. At a minimum, the VPPA should apply only in instances where the "consumer" actually subscribed to "'goods or services' *in the nature of* 'video cassette tapes or similar audio visual materials'" and affirmatively transferred data

about what they viewed as part of that specific transaction. *Salazar*, 133 F.4th at 653.

The lower court's sound interpretation of the term "consumer" appropriately focuses the threshold inquiry for future cases upon the commercial transaction that Congress actually regulated when it passed the VPPA. Litigants like Petitioner would have to at least subscribe to a service providing video content in the manner of video cassette rental stores to bring a claim. This would make it harder to file predatory lawsuits based on a subscription to expressive content, like the newsletter at issue here. Conversely, the lower court's sensible interpretation of "consumer" would allow the VPPA to function as Congress intended.

In reaching its conclusion that Petitioner was not a "consumer," the lower court also reflected upon the related (and critical) issue of what it means to be a "video tape service provider." It noted that the definition of "video tape service provider" is "tether[ed]" to the definition of "consumer" such that the two terms cannot be considered in isolation. *Salazar*, 133 F.4th at 650-51. Accordingly, the "terms 'goods or services,'" which appear in the definition of "consumer," must be "linked to those goods and services provided by a company when it is acting as a 'video tape service provider'—namely 'audio visual materials.'" *Id.* at 651.

The lower court did not have the opportunity to define "video tape service provider" because Respondent assumed that it was one for the purposes of its motion to dismiss. *Salazar*, 133 F.4th at 649 n.7. Nevertheless, the lower court pointedly noted that, "[o]f course, [Petitioner] cannot claim that he is a

'consumer' unless Paramount is a 'video tape service provider' in the first place." *Id*. And the lower court's interpretation of "consumer," which closely examined the nature of Petitioner's relationship to the content to which he subscribed, raises serious doubts as to whether Respondent is a "video tape service provider" by virtue of publishing a newsletter and operating a public website that features video content that allegedly triggered data analytics.

The question of what it means to be a "video tape service provider" is also raised by both parties in their briefs. In his Question Presented section, Petitioner asserts that "Paramount is a 'video tape service provider'" and ultimately asks "whether the phrase 'goods or services from a video tape service provider … refers to *all* of a video tape service provider's goods or services…." Pet. Br. at i. Respondent similarly frames the question presented in terms of whether the VPPA "tethers the definition of 'consumer' to that of 'video tape service provider.'" Respondent Br. at 13.

As a result, though not directly on appeal in this case, the meaning of "video tape service provider" cannot be disregarded. And any interpretation of the statute should avoid construing those terms in a manner that would expand the reach of the VPPA beyond its limited purpose.

IV. ANY DEFINITION OF THE TERM "VIDEO TAPE SERVICE PROVIDER" SHOULD BE NARROWLY CONSTRUED TO AVOID HARM TO EXPRESSIVE SPEECH

If the Court considers the definition of "video tape service provider," there are solid grounds to conclude that news websites like 247Sports.com and other similarly situated speakers are not "video tape service providers" within the meaning of the VPPA.

While a decision holding that Petitioner is not a "consumer" would mitigate the harms that would be caused by an overly broad application of the VPPA, it would not completely solve the constitutional problems raised above. If "video tape service provider" is not appropriately cabined, publishers of newsletters and other forms of expressive content containing pre-recorded videos might still be subject to VPPA liability in ways that Congress never intended. The solution to this problem is to limit the definition of "video tape service provider" to entities that stand in the shoes of video cassette rental stores like Blockbuster Videos and exclude defendants engaged in expressive speech, as Respondent was in its role as publisher of 247Sports.com.

The U.S. government has taken the position that the VPPA "does not apply to news organizations, advocacy groups, or other entities whose mission is to publicize information of public import." United States of America's Memorandum in Support of the Constitutionality of the Video Privacy Protection Act, *Stark v. Patreon, Inc.*, No. 3:22-cv-03131-JCS, Dkt. 49 at 11 (N.D. Cal. filed Dec. 5, 2022). The Department of Justice justified the constitutionality of the VPPA as

a regulation of commercial speech. *Id.* It cut the Gordian knot of how to separate expressive content from commercial speech by simply excluding news organizations and other similarly situated speakers from the ambit of the statute. *See id.*

Taking a different tack, Judge Randolph wrote a concurrence in *Pileggi*—which dismissed a virtually identical VPPA claim to this one on the grounds that the plaintiff was not a "consumer"—suggesting that "there is … a straighter path to the same ultimate result: the *Washington Examiner* is not a 'video tape service provider.'" *Pileggi*, 146 F.4th at 1238 (Randolph, J., concurring). He observed that "[t]he function and operation of a prerecorded video cassette tape bear little similarity to those of a short online video clip" and concluded that the VPPA should be limited to "physical materials" like video cassettes. *Id.* at 1239 (citation modified). And he noted that "[l]imiting 'video tape service provider' in this fashion would avoid the parade of horribles" that would emerge if the VPPA was applied broadly to Internet publishers and "would allay the … fears that the VPPA would sweep in all websites." *Id.*

Another court has held that to be "engaged in the business" of delivery of video content, "the defendant's product must not only be substantially involved in the conveyance of video content to consumers but also significantly tailored to serve that purpose." *In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017). Therefore, "products or services that might be peripherally or passively involved in video content delivery do not fall within the statutory definition of a video tape service provider." *Id.* at 1221-22.

Other courts have likewise rejected VPPA claims because the defendant was not a "video tape service provider," even though it operated a service that distributed videos. *See, e.g.*, *Banks v. CoStar Realty Info., Inc.*, No. 25-00564, 2025 WL 2959228, at *3 (E.D. Mo. Oct. 20, 2025) (Defendant, through its operation of the website apartments.com was not a video tape service provider despite hosting prerecorded videos on its site); *Carroll v. Gen. Mills, Inc.*, 2023 WL 4361093, at *3 (C.D. Cal. June 26, 2023) (holding that defendant was not a video tape service provider, despite hosting videos on its website, because "[n]othing suggests that Defendant's business is centered, tailored, or focused around providing and delivering audiovisual content.").

As these authorities have recognized, technology has blurred the lines between expressive publishers and the heirs to commercial video rental shops in ways that threaten to extend the VPPA beyond commercial speech. The neatest solution to this problem is to determine who is a "video tape service provider" and who is not. For all the reasons set forth above, there are compelling reasons in favor of categorically excluding the publishers of expressive content like the 247Sports.com newsletter and website from the VPPA.

CONCLUSION

Amicus curiae respectfully requests that the Court affirm the Sixth Circuit's decision that Respondent did not violate the VPPA as a matter of law.

Respectfully submitted,

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