No. 25-

IN THE

Supreme Court of the United States

BRANDON HUGHES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Video Privacy Protection Act ("VPPA") prohibits a "video tape service provider" from "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The statute defines "consumer" 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).

The National Football League ("NFL") is a "video tape service provider." It has never argued otherwise. Brandon Hughes is the NFL's "consumer" because he subscribed to the league's online newsletter and to NFL+, a premium video-streaming service. After Mr. Hughes watched videos on NFL.com, the NFL disclosed his video-watching history to Facebook. Facebook understood the disclosed information to identify Mr. Hughes as having requested or obtained those videos. The NFL knew Facebook would understand the disclosed information that way. The Second Circuit dismissed Mr. Hughes's VPPA claim, however, because an "ordinary person" would not *also* have understood the disclosed information.

The question is whether information that, to one recipient, "identifies a person as having requested or obtained specific video materials or services from a video tape service provider" counts as "personally identifiable information," even when a hypothetical "ordinary person" would not understand the information to do so.

PARTIES TO THE PROCEEDING

Petitioner Brandon Hughes was the plaintiff in the district court and the appellant in the Second Circuit. Respondent National Football League was the defendant and appellee in the proceedings below.

RELATED PROCEEDINGS

- *Hughes v. National Football League*, No. 24-2656, U.S. Court of Appeals for the Second Circuit. Judgment entered June 20, 2025. Rehearing denied July 21, 2025.

- *Hughes v. National Football League*, No. 1:22-cv-10743, U.S. District Court for the Southern District of New York. Judgment entered September 5, 2024.

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INTRODUCTION

The VPPA prohibits video tape service providers like the NFL from "knowingly disclos[ing]" information that "identifies a person as having requested or obtained specific video materials or services," 18 U.S.C. § 2710(a)(3), to "any person," *id.* § 2710(b)(1). Facebook fits within this all-encompassing "any person" language. And, here, the NFL disclosed information that—to Facebook—identified Mr. Hughes as having requested or obtained specific videos. As such, Mr. Hughes's VPPA claim against the NFL should have survived a motion to dismiss.

But it did not. The Second Circuit affirmed dismissal for a single reason: In May 2025, that court adopted the "ordinary person" test for the statutorily defined term "personally identifiable information." Under that test, information that allows an "ordinary person to identify a consumer's video-watching habits" counts as "personally identifiable information." *Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 52 (2d Cir. 2025), *cert. denied*, No. 25-228, 2025 WL 3506993 (S. Ct. Dec. 8, 2025). Information "only a sophisticated technology company"—like Facebook—understands to do so does *not* count as "personally identifiable information," even if the relevant disclosure went to a sophisticated technology company that did, in fact, understand it. *Id.*

About six weeks after the Second Circuit adopted the "ordinary person" test, this Court unanimously decided *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025); *CC/Devas (Mauritius) Ltd. v. Antrix Corporation*, 605 U.S. 223 (2025); and *A.J.T. v. Osseo Area Schools, Independent School District No. 279*, 605 U.S. 335 (2025).

In each case, this Court rejected an atextual test and insisted that courts impose only those requirements that arise from the statutory text.

The Second Circuit's "ordinary person" test is atextual. Indeed, that conclusion should hardly be controversial. The VPPA never once mentions an "ordinary person." It never distinguishes between "ordinary" and "sophisticated" recipients of information that identifies a person as having requested or obtained specific video materials. Instead, it prohibits disclosures of such information to "any person," 18 U.S.C. § 2710(b)(1), of whatever kind, without distinction or limitation.

In addition, the Second Circuit admitted Congress's definition can "be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party." *Solomon*, 136 F.4th at 48. It excluded that permissible reading only by imposing a limitation that goes "beyond the statutory definition." *Id.* Not surprisingly, then, multiple courts have accurately described *Solomon*'s test as atextual. That atextual "ordinary person" test conflicts with *Ames*, *Antrix*, and *A.J.T.* Its application also distorts the VPPA's text in ways that conflict with still more of this Court's precedents—including by administering an unenacted exception to the statute's broad coverage.

While the conflicts with this Court's precedents alone justify this Court's review, there is also a 3–1 circuit split about the meaning of "personally identifiable information." The Second, Third, and Ninth Circuits apply the atextual "ordinary person" test. The First Circuit applies an

equally atextual "reasonable foreseeability" test. The split here is acknowledged, entrenched, and outcome-determinative. But all four courts have impermissibly adopted atextual tests. This fact underscores the need for this Court's intervention. That the circuits have adopted *different* atextual tests removes all doubt.

The legal question here is exceptionally important. Indeed, the NFL has already admitted as much. *See Nat'l Basketball Ass'n v. Salazar*, No. 24-994, NFL Amicus Br. [hereinafter "NFL Amicus Br."] at 1–2, 4, 11 (arguing questions that implicate "the scope of liability under the [VPPA] are of significant importance," particularly because this case involves a "common," "ubiquitous," "widely used," and "routine" online practice employed by the NFL and others with "hundreds of millions" of consumers). And this case is an ideal vehicle for this Court to resolve that question. It arrives at the motion-to-dismiss stage, implicates no factual disputes, and involves a final judgment. And there are no alternative bases for the dismissal.

The Court should grant review and reverse.

OPINIONS BELOW

The Second Circuit's opinion (App. 1a–9a) is not reported but can be found at 2025 WL 1720295. The district court's opinion (App. 10a–25a) is not reported but can be found at 2024 WL 4063740.

JURISDICTION

The court of appeals entered its opinion and judgment on June 20, 2025. App. 1a. It denied Mr. Hughes's petition for rehearing en banc on August 21, 2025. App. 26a. Justice Sotomayor's order of November 12, 2025, extended the time to file a petition for a writ of certiorari to January 16, 2026. *See* 28 U.S.C. § 2101(c). This petition is timely filed on January 16, 2026. The 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. 28a–33a.

STATEMENT OF THE CASE

A. Statutory background

After Ronald Reagan nominated Judge Robert Bork to 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), *cert. denied*, No. 24-994, 2025 WL 3506972 (S. Ct. Dec. 8, 2025). 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. at 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. Congress believed watching films is an "intimate process" that "should be protected from the disruptive intrusion of a roving eye." *Id.*

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

The law permits such disclosures in six narrow circumstances, including 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 and other 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" 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).

B. Factual and procedural background

1. The complaint

In this lawsuit, Brandon Hughes alleged the NFL—which owns and operates NFL.com—violated the VPPA by disclosing his personally identifiable information to Facebook without consent. App. 35a–36a, 41a, 49a–51a, 60a–61a. The NFL "is in the business of delivering countless hours of video content." App. 39a. Mr. Hughes signed up for an online newsletter through NFL.com. App. 38a, 42a, 54a–55a. This process required him to provide, among other things, his e-mail address. *Id.* In addition,

Mr. Hughes subscribed to NFL+, a video-streaming service that offers a variety of exclusive video content. App. 38a, 42a, 55a, 60a.

Mr. Hughes then "used his NFL.com digital subscription to view Video Media through NFL.com and the NFL App," all "while logged into his Facebook account." App. 38a. As a result, the NFL disclosed to Facebook Mr. Hughes's Facebook ID—a unique numerical identifier Facebook assigns to every user, App. 49a—and the video content he watched. App. 36a, 49a–51a, 53a–54a, 61a. The disclosures occurred automatically because of the Facebook Pixel, a bit of surveillance software the NFL invisibly installed on NFL.com. App. 36a, 48a–49a.

The disclosed information "allow[ed] Facebook to know what Video Media one of its users [*i.e.*, Mr. Hughes] viewed on NFL.com." App. 36a; *see also* App. 50a (alleging "Facebook can easily identify any individual on its Facebook platform with only [his] unique" Facebook ID); App. 51a (alleging the disclosed information allows Facebook to make "a direct connection" between a specific individual and the videos he watched); App. 54a (alleging the disclosed information "undeniably reveals" the individual's "identity and the specific video materials [he] requested" from the NFL); App. 60a (alleging the disclosed information identified Mr. Hughes "to Facebook as an individual who viewed NFL.com Video Media, including the specific video materials requested from the website").

The NFL "knew" the disclosed information "identified [Mr. Hughes] to Facebook" and also "knew" it included the name of the videos Mr. Hughes watched. App. 61a; *see also*

App. 50a ("At all relevant times, [the NFL] knew that the Facebook pixel disclosed Personal Viewing Information to Facebook.").

Facebook and the NFL then used the disclosed information to create and display targeted advertising, which increased their revenues. App. 49a. Indeed, the NFL used the Pixel to disclose "this highly sought-after information" to Facebook specifically because it was in its "financial interest to do so." App. 50a; *see also* App. 14a (the district court stating the NFL "purposefully incorporated the Pixel code on NFL.com and the NFL App, knew that the Pixel would disclose information to Facebook, and financially benefitted from disclosing this information to Facebook").

2. The district court's decision

The NFL filed a motion to dismiss. App. 21a. It argued Mr. Hughes did not adequately allege he was a "consumer" because he did not allege that he watched prerecorded videos. App. 21a–22a. It also argued the disclosed information was not "personally identifiable information" because Mr. Hughes did not allege his Facebook profile contained his real name. App. 21a. On September 5, 2024, the district court granted the NFL's motion with prejudice based solely on its interpretation of "consumer." App. 21a–25a.

To start, the court held Mr. Hughes's newsletter subscription did not render him a "consumer" because it was not an audiovisual good or service. App. 22a (citing its earlier decision in *Salazar v. National Basketball Association*, 685 F. Supp. 3d 232, 244–46 (S.D.N.Y. 2023),

which held that, to be a statutory "consumer," one must rent, purchase, or subscribe to "audio visual materials, not just any products or services from a video tape service[] provider"). The court then held the NFL+ subscription did not render Mr. Hughes a "consumer" either, this time because he did not allege "that he viewed prerecorded content through NFL+." App. 23a.

The district court did not reach the NFL's argument about "personally identifiable information." App. 21a.

3. The Second Circuit decides *Salazar* and then *Solomon*

Mr. Hughes appealed. Before the Second Circuit decided his case, it decided two others. *First*, on October 15, 2024, the court decided *Salazar*. There, the Second Circuit reviewed the VPPA's text, structure, and purpose to conclude that the statutory term "'consumer' should be understood to encompass a renter, purchaser, or subscriber of *any* of the [video tape service] provider's 'goods or services'—audiovisual or not." *Salazar*, 118 F.4th at 549. This holding eviscerated the district court's sole basis for dismissing Mr. Hughes's complaint.[1]

Second, on May 1, 2025—eleven days before it heard oral argument in this case—the Second Circuit decided *Solomon*. There, the court held the phrase "'personally

1. This "consumer" question has engendered a separate 2–2 circuit split, with the Ninth Circuit poised to break the tie, and is the subject of a pending petition for certiorari. *Salazar v. Paramount Glob.*, No. 25-459 (distributed for the January 16, 2025, conference).

identifiable information' encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so." *Solomon*, 136 F.4th at 52. But the court openly acknowledged the text of Section 2710(a)(3)'s definition of "personally identifiable information" can "be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party." *Id.*

To be clear, the *Solomon* court did not interpret "personally identifiable information" on its own. It did not, for example, apply any canon of statutory interpretation to arrive at the defined term's meaning. Instead, it viewed itself as needing to pick between the Third Circuit's "ordinary person" test and the First Circuit's "reasonable foreseeability" test. *See id.* at 48–51 (walking through the two tests and noting the parties advocated adopting one or the other).

4. The Second Circuit's decision here.

After oral argument in this case, but before the Second Circuit entered a decision, this Court resolved three more relevant cases: *Ames*, *Antrix*, and *A.J.T.* In each case, this Court unanimously rejected an atextual test and insisted that courts apply federal statutes as written. Mr. Hughes promptly notified the Second Circuit of this supplemental authority.

On June 20, 2025, the Second Circuit applied the "ordinary person" test and affirmed the dismissal of Mr. Hughes's complaint. App. 1a–9a. The panel held that

"*Solomon* effectively shut the door for Pixel-based VPPA claims." App. 4a. It explained that, after *Solomon*, courts must ask only "whether an ordinary person would be able to understand the actual underlying code communication itself." App. 8a. Because it did not believe an "ordinary person" would understand the computer code here, the Second Circuit held the disclosures did not contain "personally identifiable information." *Id.*

The Second Circuit did not address the holdings of *Ames*, *Antrix*, or *A.J.T.* It did not explain how *Solomon*'s atextual "ordinary person" test could survive precedents prohibiting atextual tests. Nor did it explain how a test that uses a term that does not appear in the statute (*i.e.*, "ordinary person"), and that hinges on a distinction the statute nowhere draws (*i.e.*, between "ordinary" and "sophisticated" persons), is anything but atextual.

Mr. Hughes sought rehearing, arguing again the atextual "ordinary person" test conflicted with this Court's binding precedent. But, on August 21, 2025, the Second Circuit denied the petition for rehearing. App. 26a–27a. As a result, the Second Circuit has never addressed the vitality of its recently adopted, but entirely atextual, "ordinary person" test in light of this Court's even more recent decisions in *Ames*, *Antrix*, and *A.J.T.*

REASONS FOR GRANTING THE PETITION

The VPPA 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." 18 U.S.C. § 2710(a)(3). The information disclosed here identified Mr. Hughes—to

Facebook—as having requested or obtained specific video materials. But the Second Circuit affirmed the dismissal of Mr. Hughes's VPPA claim because an "ordinary person" would not *also* understand the disclosures to identify Mr. Hughes's video-watching history.

The Second Circuit's decision conflicts with this Court's precedents. In particular, this Court has thrice forbidden the imposition of atextual tests. But, as the Second Circuit admitted and multiple courts have since acknowledged, the "ordinary person" is atextual. Moreover, this Court has required courts to adhere strictly to Congress's express definitions. But the Second Circuit viewed itself as defining "personally identifiable information" *beyond* the statutory definition. Finally, this Court has explained that when—as here—Congress enumerates exceptions, courts are not free to adopt others. But, as the Second Circuit acknowledged, the "ordinary person" test creates an unenacted exception for Pixel-based disclosures.

In addition to conflicts with this Court's precedents, there is an acknowledged and entrenched 3–1 circuit split on the question presented here. That same split was at issue in *Solomon v. Flipps Media, Inc.*, No. 25-228, Petition at i. Critically, though, courts on both sides of the split have embraced atextual tests over top of Congress's definition of "personally identifiable information." Asking the Court to decide between the two atextual tests—as Ms. Solomon did, *id.*—would require it to abandon textualist principles. Instead, the Court should grant review, reject both atextual tests, and enforce the statute as written.

Finally, this case is an ideal vehicle to resolve this critically important question. To start, the NFL has

already confessed that questions about the scope of VPPA liability are exceptionally important in cases like this one because they involve a "common," "ubiquitous," "widely used," and "routine" online practice that impacts "hundreds of millions" of consumers. NFL Amicus Br. at 1–2, 4, 11. In addition, this case hinges on a pure question of law, a matter of statutory interpretation, that arises at the motion-to-dismiss stage, when factual disputes are impossible.

This Court should grant review and reverse.

I. The Second Circuit's decision conflicts with this Court's precedent.

This Court has forbidden courts from imposing atextual tests when evaluating claims brought under federal statutes. And yet the Second Circuit's sole basis for affirming the dismissal of Mr. Hughes's VPPA claim was its atextual "ordinary person" test. That conflict cannot stand.

A. This Court has unanimously forbidden atextual tests.

Near the end of its most recent completed Term, this Court made clear—in repeated and unanimous opinions—that judges are not permitted to impose atextual tests on claims arising under federal statutes. Instead, they must apply federal statutes as written, without embellishment. In other words, courts must demand of litigants only what is required by the statutory text. And, if the statutory text does *not* require a particular element or showing, courts cannot do so either.

Start with *Ames*. There, this Court confronted the "background circumstances" test five circuits imposed on majority-group plaintiffs bringing Title VII discrimination suits. *Ames*, 605 U.S. at 307–08 & n.1. The Court rejected this atextual standard because "Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs." *Id.* at 309. Instead, it prohibits discrimination against "any individual." *Id.* (citation omitted). And "any" means "every." *Id.* at 309–10. Thus, the "background circumstances" test could not "be squared with the text of Title VII." *Id.* at 309. "Congress left no room" for courts to impose additional requirements. *Id.*; *see also id.* at 313 (vacating because the lower courts granted the defendant judgment based on a rule "that Title VII does not impose").

Justice Thomas—joined by Justice Gorsuch—wrote separately "to highlight the problems that arise when judges create atextual legal rules and frameworks." *Id.* at 313 (Thomas, J., concurring). He explained these "[j]udge-made doctrines have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts." *Id.*; *see also id.* at 326 (similar). He also noted atextual standards provide "no principled way to resolve doctrinal ambiguities" precisely because courts have no "underlying legal authority on which to ground their analysis." *Id.* at 315.

The same day this Court decided *Ames*, it delivered *Antrix*. There, it confronted the Ninth Circuit's imposition of *International Shoe*'s "minimum contacts" standard on the Foreign Sovereign Immunities Act's personal-jurisdiction provision. *Antrix*, 605 U.S. at 226, 231. Again, this Court unanimously reversed because that "additional

requirement goes beyond the text of the FSIA." *Id.* at 226 (noting the statute imposes only two requirements, but "the Ninth Circuit imposed a third"). "Notably absent" from the statute was "any reference to 'minimum contacts.'" *Id.* at 233. Indeed, "nothing in the [statutory] text . . . requires a minimum-contacts analysis." *Id.* at 233. And the Court "decline[d] to add in what Congress left out." *Id.*; *see also id.* at 234 (criticizing the Ninth Circuit for "read[ing] an additional requirement" into the statute "[i]nstead of enforcing [its] provisions as written").

About a week later, this Court decided *A.J.T.* There, it confronted yet another judge-made, atextual test—the "bad faith or gross misjudgment" standard some circuits applied to claims concerning "educational services" under the Americans with Disabilities Act. *A.J.T.*, 605 U.S. at 338–39, 344 & n.3. Once again, this Court rejected that "judicial gloss" unanimously. *Id.* at 343–45. It did so because there was "no textual indication" the judge-made test should apply. *Id.* at 345. "Nothing in the [statutory] text . . . suggests" claims concerning educational services "should be subject to a distinct, more demanding analysis." *Id.* Instead, the law's text protected "any" person alleging discrimination. *Id.* This "unqualified" language means the law's protections extend to "*every* such person, without distinction or limitation." *Id.* (internal quotation marks and citation omitted).

These three unanimous cases, all decided after the Second Circuit adopted the "ordinary person" test, make clear that atextual rules are verboten. Courts applying federal statutes are not free to impose additional requirements or limitations that go beyond the statute's text. They must apply the text as written.

B. The Second Circuit's "ordinary person" test is atextual.

The Second Circuit's "ordinary person" standard is not required by the VPPA's text. Imposing the atextual "ordinary person" test—as the Second Circuit did here—flouts this Court's precedents.

1. The VPPA never mentions an "ordinary person."

The most obvious indication that the Second Circuit's "ordinary person" standard is atextual is the fact that the VPPA nowhere includes the words "ordinary person." *See generally* 18 U.S.C. § 2710. It does not use the phrase in the definition of "personally identifiable information." *Id.* § 2710(a)(3). Nor does the phrase appear in the VPPA's liability clause. *Id.* § 2710(b)(1). The statute never once mentions an "ordinary person," at all, anywhere.

In other words, "[n]otably absent" from the VPPA is "any reference" to an ordinary person. *Antrix*, 605 U.S. at 233. Certainly nothing in the VPPA's text *requires* an examination of what an "ordinary person" might understand. *See id.* (assessing whether the text "requires a minimum-contacts analysis"). The statute simply "draws no distinctions," *Ames*, 605 U.S. at 309, between ordinary and technologically sophisticated recipients of "information that identifies a person as having requested or obtained specific video materials from a video tape service provider." 18 U.S.C. § 2710(a)(3). Instead, it prohibits disclosures of such information to "any person." *Id.* § 2710(b)(1).

Thus, the "ordinary person" standard is atextual. It is an "additional requirement" that "goes beyond the [statutory] text." *Antrix*, 605 U.S. at 226. It imposes a judicially invented limitation "that [the VPPA] does not impose." *Id.* at 313. And there is simply "no textual indication" that limit should apply. *A.J.T.*, 605 U.S. at 345.

Like the atextual tests this Court rejected in *Ames*, *Antrix*, and *A.J.T.*, the Second Circuit's "ordinary person" test cannot "be squared with the [statutory] text." *Ames*, 605 U.S. at 309. The Second Circuit's imposition of that atextual test here conflicts with this Court's precedent.

2. The Second Circuit conceded the VPPA's definition of "personally identifiable information" is broad enough to include information only a technologically sophisticated company can understand.

The Second Circuit twice admitted its "ordinary person" test was atextual. *First*, it acknowledged that, prior to its May 2025 decision adopting the "ordinary person" test, it "ha[d] not defined personally identifiable information *beyond the statutory definition*." *Solomon*, 136 F.4th at 48 (emphasis added).

But courts should not be in the business of defining statutory terms *beyond* the definitions Congress has provided. "When Congress takes the trouble to define the terms it uses, a court must respect its definitions as virtually conclusive." *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 59 (2024) (internal quotation marks and citation omitted). A court can "deviate from an express statutory definition . . . only

when applying the definition would be incompatible with Congress's regulatory scheme or would destroy one of the statute's major purposes." *Id.* at 60 (internal quotation marks, alteration, and citation omitted). No one has ever suggested Congress's definition of "personally identifiable information" meets that standard. Nor could they.

Given the Second Circuit's goal of defining the phrase "personally identifiable information" "beyond the statutory definition," *Solomon*, 136 F.4th at 48, it is no wonder the test it adopted ended up being atextual. Undertaking the task put the Second Circuit in conflict with *Kirtz*. Applying the atextual test here puts it in conflict with *Ames*, *Antrix*, and *A.J.T.*

Second, the Second Circuit openly acknowledged the text of Section 2710(a)(3)'s definition of "personally identifiable information" can "be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party." *Solomon*, 136 F.4th at 52. This concession, too, confirms the "ordinary person" test imposes a requirement that goes beyond the VPPA's text.

It is the atextual "ordinary person" test, *not* the VPPA's text, that excludes information the Second Circuit conceded fits within Congress's definition. Nothing in the statute's text requires, as a condition of liability, the information to be disclosed in plain English. Nor does anything in the statute's text require a court to examine whether the disclosure is decipherable by any non-recipient, let alone a hypothetical "ordinary person."

The Second Circuit's separate statement that Section 2710(a)(3)'s definition could also "be read to refer to the

kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior," *id.* (internal quotation marks and citation omitted), changes nothing. There is no textual basis to read Congress's definition to refer, narrowly and exclusively, to information an "ordinary person" can understand. The Second Circuit never suggested otherwise.

To be clear, the statutory definition certainly *includes* that kind of readily decipherable information. But, as the Second Circuit admitted, the statutory definition—the text itself—does not exclude information that can be understood "only by a technologically sophisticated third party." *Id.*

The architect of the "ordinary person" test made a similar admission. *See In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 285 (3d Cir. 2016). In *Nickelodeon*, the Third Circuit, like the Second Circuit, admitted the statutory "text itself is . . . amenable" to an interpretation that would include "static digital identifiers"—like IP addresses, browser fingerprints, and Facebook IDs—as "personally identifiable information." *Id.* at 285–86. Still, the Third Circuit fashioned the "ordinary person" test based on its view of "Congress's purpose," which it divined from "legislative history." *Id.* at 284. The Third Circuit did not even pretend the VPPA's text asked what an "ordinary person" might understand.[2]

2. The Ninth Circuit adopted the "ordinary person" test because it believed that test "better informs video tape service providers of their obligations under the VPPA," *not* because it believed the VPPA's text required it. *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017).

Both the Second and Third Circuits have admitted the obvious—the VPPA's definition of "personally identifiable information" is broad enough to include *both* information only a technologically sophisticated entity understands *and* information an ordinary person understands. This reality confirms the statutory text "draws no distinctions" among recipients, meaning courts are not free to fashion and impose their own. *Ames*, 605 U.S. at 309. The Second Circuit's "[f]irst" justification for the "ordinary person" test, then, is no justification at all. *Solomon*, 136 F.4th at 52.

3. The Second Circuit offered no textual justification for the "ordinary person" test.

The Second Circuit's remaining justifications fare no better. In its "[s]econd" justification, for example, the Second Circuit pointed to the presence of "knowingly" in Section 2710(b)(1), observing that "the statute views disclosure from the perspective of the disclosing party" and that liability does not hinge on "what the recipient of that information decides to do with it." *Id.* (citation omitted). It also noted it would "not make sense" for a provider's liability to "turn on circumstances outside of its control" or on the recipient's "level of sophistication." *Id.*

There are several problems with this approach. To start, "knowingly" appears in the liability clause, *not* in the definition of "personally identifiable information." And, in the liability clause, "knowingly" modifies the verb "discloses," 18 U.S.C. § 2710(b)(1), which linguistically implies the existence of instances where a video tape service provider might *un*knowingly disclose personally identifiable information. In short, the presence of

"knowingly"—in a separate statutory provision—tells us nothing about the scope of the defined term "personally identifiable information." Information that identifies a person as having requested or obtained specific video materials would remain "personally identifiable information" even if a video tape service provider had unwittingly disclosed it.

In addition, the atextual "ordinary person" test does exactly what the Second Circuit claimed would "not make sense." *Solomon*, 136 F.4th at 52. It (1) does not view the disclosure from the disclosing party's perspective and, instead, views it from the perspective of a hypothetical "ordinary person" who neither disclosed nor received the information, (2) necessarily depends on circumstances outside the provider's control (*i.e.*, what a hypothetical "ordinary person" understands), and (3) turns entirely on the sophistication of a third party, albeit a hypothetical "ordinary" one instead of the one that actually received the disclosure. *See, e.g.*, *Manza v. Pesi, Inc.*, 784 F. Supp. 3d 1110, 1121 (W.D. Wis. 2025) (noting the "ordinary person" standard "*does* turn on circumstances outside the video tape service provider's control" and requires providers "to speculate on the abilities of an 'ordinary person'").

More fundamentally, though, the liability clause's inclusion of the word "knowingly" does not require examination of what an "ordinary person" understands. Instead, it requires examination of what the *video tape service provider* understands. *See, e.g.*, *id.* at 1119 (noting the "ordinary person" test improperly "focuses on the recipient" instead of "what the video tape service provider knows").

And all sorts of "knowing" disclosures between communicating parties would *not* be understood by an "ordinary person" uninvolved in that communication. Consider baseball. In a typical game, from Little League all the way to the Majors, a third base coach might use his right hand to touch the brim of his hat, his belt buckle, his knee, his elbow, his left wrist, his chin, his nose, his ear, and then his hat again. The coach understands this sequence of signals to communicate a "bunt" instruction. He knows the batter will understand the signals the same way because they have worked on the signals together all season. And, in fact, the batter understands the instruction and puts down a bunt.

Everyone examining this scenario would conclude the third base coach knowingly disclosed the "bunt" instruction to the batter. That conclusion remains true even though members of the opposing team, the umpire, fans in the stands, viewers at home, and all manner of other people—ordinary and extraordinary—did not understand the signals to communicate any message at all.

This reality, of course, is not unique to baseball. In fact, demonstrative examples abound. Near the end of her weekly variety shows, Carol Burnett tugged her ear as a secret "I love you" to her grandmother. Before shooting his free throws, Utah Jazz legend Jeff Hornacek rubbed the side of his face to say "hi" to his kids. Peyton Manning famously shouted "Omaha" to alert the Broncos' offense that he was changing the snap count. The College of Cardinals informs onlookers that there is a new pope by burning chemicals that release white smoke from the Sistine Chapel. During a televised interview in 1966, future Senator Jeremiah Denton—then a prisoner of

war—said he received adequate food, clothing, and medical care. But he repeatedly blinked T-O-R-T-U-R-E in Morse Code, confident U.S. intelligence officers, who had taught him Morse Code, would understand. Throughout much of World War II, Nazis used the Enigma Machine to communicate top-secret messages, while Americans used Navajo code talkers for the same purpose.

In each example, both the disclosing party and the recipient understood an idiosyncratic code to communicate a particular message. In each case, the sender "knowingly" disclosed that message to the recipient. That some hypothetical "ordinary person" might not have understood—and, without additional information, likely could not have understood—an ear tug, a face rub, "Omaha," a particular color of smoke from a particular Vatican chimney, blink patterns, Morse Code, nonsensical strings of text, or a language he had never learned to communicate those same messages makes no difference at all. The disclosures to the intended and actual recipients—whom the disclosing parties *knew* would understand the coded messages and who did, in fact, understand them—remain "knowing."

A contrary conclusion would not just eviscerate the VPPA. It could also have devastating national security implications. For example, federal law punishes anyone who "knowingly" discloses "classified information" to "an unauthorized person" with fines and imprisonment. 18 U.S.C. § 798(a). If the word "knowingly" somehow imports the "ordinary person" test into a statute, it must do so there too. On that reading, those with classified information are free to disclose it—with impunity—to neighbors, lifelong friends, passing acquaintances, known

spies, hostile foreign governments, and all manner of other unauthorized persons, so long as they do so in ways an "ordinary person" will not understand. To state the proposition is largely to defeat it. It is no wonder courts applying 18 U.S.C. § 798 have *never* imposed the "ordinary person" test. No one would credit the atextual argument in that context. No one should credit it here, either.

Consider, too, that the VPPA twice references "personally identifiable information" without mentioning the word "knowingly" and once without requiring a disclosure of any kind. In Section 2710(e), the VPPA requires providers to "destroy personally identifiable information as soon as practicable." 18 U.S.C. § 2710(e). Here, a video tape service provider must identify, *for itself*, and in the absence of any disclosure, information in its possession that "identifies a person as having requested or obtained specific video materials or services." *Id.* § 2710(a)(3).

If a video tape service provider locates such information, it is statutorily obligated to destroy that information. *See id.* § 2710(e); *Wilson v. Triller, Inc.*, 598 F. Supp. 3d 82, 91–92 (S.D.N.Y. 2022) (noting that, given this requirement, the scope of "personally identifiable information" should not be "recipient-dependent"). And there is no reason to believe "personally identifiable information"—a single, statutorily defined term—might mean something different in Section 2710(e) than it does in Section 2710(b)(1).

Similarly, Section 2710(d) prohibits courts from receiving in evidence "[p]ersonally identifiable information obtained in any manner other than as provided in this

section." 18 U.S.C. § 2710(d). It would make no sense for a court to ask whether a hypothetical "ordinary person" might understand proffered information to identify a person as having requested or obtained specific video materials. If the court understands the information to do so, that information is not admissible unless it was obtained in compliance with the VPPA.

The Second Circuit's third justification falls flat as well. There, it pointed to the fact that the Internet had not yet "transformed the way that individuals and companies use consumer data" in 1988. *Solomon*, 136 F.4th at 53. Perhaps so, but Congress was clearly worried—even then—about the way "the computer age" had "revolutionized our world." S. Rep. No. 100-599, at 6. It was concerned that computerized records gave businesses the ability "to be more intrusive than ever before," as "advanced information technology" continued to foster "more intrusive data collection" and "increased demands for personal information." *Id.* at 5–8.

And Congress passed a broad privacy statute to cover continuously advancing technology. Given its animating concerns, it is hard to believe Congress would have adopted a law that, despite a broadly worded prohibition, silently permits all manner of disclosures as long as they are understood only by technologically sophisticated companies—the very entities about which Congress was *most* concerned.

As a final point, the Second Circuit's analysis of the fact that Congress did not amend the VPPA's definition of "personally identifiable information" in 2013, *Solomon*, 136 F.4th at 53, is out of bounds. As this Court has explained,

"[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

And, even if it were a permissible consideration, it is unclear what post-enactment legislative history could tell us here. The Third Circuit did not adopt the "ordinary person" test until 2016—three years *after* Congress decided not to amend the definition.

And recall the impetus for Congress's limited amendment of the VPPA. In 2012, Congress recognized that "the VHS cassette tape" was largely "obsolete." S. Rep. No. 112-258, at 2. By then, the Internet had already "revolutionized the way that American consumers rent and watch movies and television programs." *Id.* Then, as now, "so-called 'on-demand' cable services and Internet streaming services allow[ed] consumers to watch movies or TV shows on televisions, laptop computers, and cell phones." *Id.* Congress noted that "[t]he Internet has similarly revolutionized how Americans share information." *Id.* Such information could now readily be shared "on social networking sites, like Facebook and Twitter." *Id.*

Under the VPPA as originally enacted, a provider needed to obtain consent "each time [it] wishe[d] to disclose" personally identifiable information. *Id.* at 2–3. To reduce the "obstacles" posed by that constraint, Congress "amend[ed] the VPPA to allow consumers to provide their informed, written consent to disclose video viewing information—if they wish—one time in advance." *Id.* at 3; *see also* 18 U.S.C. § 2710(b)(2)(B) (specifically allowing providers to obtain consumers' advance written consent via "electronic means using the Internet").

Put simply, Congress amended the VPPA specifically to account for the Internet's revolutionary impacts. It did so while acknowledging the existence of streaming services and the new ways Americans might share personally identifiable information. And its amendment mentions the Internet by name.

There is no reason to believe Congress declined to revise the definition of "personally identifiable information" because it failed to appreciate the Internet's impact. There is every reason to believe it declined to do so because it believed the existing definition already covered Internet-based activities. Either way, "speculation about why a later Congress declined to adopt new legislation offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 670 (2020) (internal quotation marks and citations omitted).

4. At least four district courts have described the "ordinary person" test as atextual.

Before the Second Circuit adopted the "ordinary person" test, a district court in the Southern District of New York noted that it "is a judicial construct" that does not arise from the statutory text. *Lee v. Springer Nature Am., Inc.*, 769 F. Supp. 3d 234, 260 (S.D.N.Y. 2025).

A district court in the Western District of Wisconsin similarly held that courts applying the "ordinary person" test do not "rely on the text" of the VPPA. *Manza*, 784 F. Supp. 3d at 1119 (noting "courts that have adopted the 'ordinary person' standard have identified little textual basis for the limitation they impose"); *see also id.* at

1123 (agreeing the "ordinary person" test "is a judicial construct" that "is not supported by the VPPA's text").

A district court in the Western District of Michigan agreed. *See Goodman v. Hillsdale Coll.*, No. 1:25-cv-417, 2025 WL 2941542, at *8 (W.D. Mich. Oct. 17, 2025). It, too, noted that courts applying the "ordinary person" standard "have identified little textual basis" for doing so. *See id.*

A district court in the Eastern District of Missouri similarly described the "ordinary person" test as "extra-textual." *Banks v. CoStar Realty Info., Inc.*, No. 4:25-cv-00564, 2025 WL 2959228, at *6 (E.D. Mo. Oct. 20, 2025).

C. As Justice Thomas predicted, the "ordinary person" test distorts the VPPA.

Perhaps not surprisingly, the Second Circuit's atextual "ordinary person" test distorts the VPPA. The most glaring example is the way the test twists Section 2710(b)(1)'s "any person" language. As in *Ames* and *A.J.T.*, the VPPA prohibits a "video tape service provider" from "knowingly disclos[ing], to *any person*, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1) (emphasis added).

Although the Second Circuit never analyzed the phrase, "any" person means "every" person, "without distinction or limitation." *A.J.T.*, 605 U.S. at 345; *see also Ames*, 605 U.S. at 309–10 (confirming "any" means "every"); *Patel v. Garland*, 596 U.S. 328, 338 (2022) (holding "any" has "an expansive meaning," such that "any judgment" includes judgments "of whatever kind").

Thus, the VPPA's text prohibits knowing disclosures of information that identifies an individual as having requested or obtained specific video materials—to ordinary persons and to technologically sophisticated persons and to "every" person "of whatever kind," "without distinction or limitation." With this "any person" language, "Congress left no room" for courts to impose additional limitations. *Ames*, 605 U.S. at 309; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) (noting that "the presumed point of using general words"—including, specifically, "any person"—"is to produce general coverage," and "not to leave room for courts to recognize ad hoc exceptions").

The "ordinary person" test, meanwhile, allows video tape service providers to disclose information that does identify a person as having requested or obtained specific video materials, even when they know the recipient will understand it to do so, just so long as an "ordinary person" will not *also* understand the disclosed information that way. *See, e.g.*, *Manza*, 784 F. Supp. 3d at 1122 (explaining that, under the "ordinary person" test, "a video tape service provider is free to disclose a customer's video purchases to social media companies, data brokers, or anyone else, even when the provider knows that the third party will be able to easily identify the customer, so long as the provider uses a 'code' that an 'ordinary person' could not decipher"). In this respect, the "ordinary person" test allows the very thing the statutory text prohibits.

Consider its impact here. Mr. Hughes alleged that Facebook understood the disclosures at issue to link him to the specific video materials he had watched. App. 36a, 50a–51a, 54a, 60a. In other words, to Facebook at least,

the disclosed information did identify Mr. Hughes "as having requested or obtained specific video materials." 18 U.S.C. § 2710(a)(3). Since Congress defined "personally identifiable information" to "include[]" precisely that information, without any limitation or exception, *id.*, Mr. Hughes's claim should have proceeded.

Because of its recently adopted atextual test, however, the Second Circuit affirmed the dismissal of Mr. Hughes's claim. App. 4a, 8a. It did so because a hypothetical "ordinary person" who did not receive those disclosures would not have understood them the way Facebook did, in fact, understand them. *Id.*

As this case shows, the "ordinary person" test excludes some information that "identifies a person as having requested or obtained specific video materials"—the very information the statutory definition expressly "includes." 18 U.S.C. § 2710(a)(3). And it does so even where the disclosing party *knows* the recipient will understand the disclosures to identify a person's video-watching history. App. 50a, 61a. The distortion could hardly be clearer.

But there are at least two more notable distortions. *First*, as the Second Circuit noted in this case, the "ordinary person" test embodies a new, unenacted statutory exception: "*Solomon* effectively shut the door for Pixel-based VPPA claims." App. 4a. But Congress did not place the Pixel—or any other technology—beyond the VPPA's reach. Indeed, the statute never mentions *how* the prohibited disclosures might occur at all.

Instead, Congress enacted six narrow exceptions to the VPPA's broad prohibition of all unauthorized

disclosures of personally identifiable information. *See* 18 U.S.C. § 2710(b)(2)(A)–(F). These exceptions are exhaustive. And none applies here. The Second Circuit's creation of an unenacted seventh exception conflicts with the ancient maxim "expressio unius est exclusio alterius" (*i.e.*, the expression of one thing excludes all others).

In other words, when Congress enacted six exceptions, it "left no room," *Ames*, 605 U.S. at 309, for courts to impose still more. *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *United States v. Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third[.]"). The judicially created exception for Pixel-based disclosures, or—more broadly—for those not understood by an "ordinary person," predictably distorts the VPPA. And that distortion conflicts with this Court's precedents in *Johnson* and *Smith*.

Second, the Second Circuit did not hold that every disclosure a hypothetical "ordinary person" would understand to link an individual to his video-watching history contains "personally identifiable information." Instead, it imposed a second atextual limitation. It held a disclosure contains "personally identifiable information" only if an "ordinary person" would understand it to identify an individual's video-watching habits "with little or no extra effort." *Solomon*, 136 F.4th at 54. But "extra" compared to what? There is no identified baseline. It is

unclear how a hypothetical person might exert *any* effort, let alone "extra" effort. In any event, how much "extra" effort is too much?

Courts attempting to answer that question have "no principled way to resolve" it precisely because there is no "underlying legal authority on which to ground their analysis." *Ames*, 605 U.S. at 315 (Thomas, J., concurring). The "ordinary person" test is itself a judicial invention. The same is true of the "with little or no extra effort" add-on. Each aspect introduces unresolvable doctrinal ambiguities about issues the statute never even mentions.

Here, for example, the Second Circuit held that plugging information into ChatGPT is too much "extra" effort. App. 8a; *see also Plotsker v. Envato Pty Ltd.*, No. 2:24-cv-04412, 2025 WL 2481422, at *8 n.7 (C.D. Cal. Aug. 26, 2025) ("The ordinary person that the Second Circuit envisions appears to be one who is particularly unsophisticated or unmotivated to understand the information presented."). What if a disclosure becomes decipherable only after the recipient heats a page of invisible ink to 300°F or runs a 5K or drives across town during rush hour? What if the information identifying a person's video-watching history becomes comprehensible only after the recipient drinks Ovaltine for weeks, sends off for a secret decoder pin, waits to receive it in the mail, and then decodes a radio-based disclosure of a series of numbers into plain English? *See, e.g.*, A CHRISTMAS STORY (MGM 1983).

By virtue of the Second Circuit's doubly atextual "ordinary person" test, there is no way to know. The distortion here is obvious.

D. There is no way to reconcile the Second Circuit's "ordinary person" test with *Ames*, *Antrix*, and *A.J.T.*

The Second Circuit's atextual "ordinary person" test conflicts with this Court's precedents forbidding atextual tests. The Second Circuit has not yet addressed the test's vitality in light of *Ames*, *Antrix*, and *A.J.T.* Mr. Hughes is aware of just one court that has attempted to do so. *See Salazar v. Nat'l Basketball Ass'n*, No. 1:22-cv-07935, 2025 WL 2830939, at *4 (S.D.N.Y. Oct. 6, 2025). That court offered two reasons for continuing to apply the "ordinary person" test.

First, it noted that *Ames*, *Antrix*, and *A.J.T.* "dealt with unrelated and distinct statutes," not the VPPA. *Id.* But judges are not permitted to engraft atextual standards onto any federal statutes. Just as judge-made atextual tests are off limits for Title VII, the Foreign Sovereign Immunities Act, and the Americans with Disabilities Act, they are off limits for the VPPA. This Court should not be required to grant certiorari as to every federal statute, one by one, only to repeat, over and over, that courts are not allowed to impose an atextual test on each individual statute. *See* GROUNDHOG DAY (Columbia Pictures 1993).

Second, the court believed the "ordinary person" test does not "run[] afoul of the statutory text of the VPPA." *Salazar*, 2025 WL 2830939, at *4. But this holding gets the analysis backwards. The question is whether the statutory text requires resort to the "ordinary person" test. No court has ever suggested it does. And multiple courts—including the Second Circuit—have admitted it does not. *See supra* Parts I.B.2 & I.B.4. In addition, the

"ordinary person" test is fundamentally inconsistent with the VPPA's text. *See supra* Part I.C. Indeed, as discussed above, it allows what the statute's text prohibits and excludes what the text includes. *See id.*

The irreconcilable conflict between the Second Circuit's "ordinary person" test and this Court's precedents prohibiting atextual tests warrants this Court's review, particularly because the atextual test distorts the statute in ways that conflict with still more of this Court's precedents. Unless corrected, the decision below will invite courts to substitute judicially invented tests for statutory text—the exact practice this Court has repeatedly, and unanimously, rejected.

II. The circuits have split 3–1 on the meaning of "personally identifiable information."

Four circuits have interpreted "personally identifiable information." The Second, Third, and Ninth have adopted the "ordinary person" test. *See Eichenberger*, 876 F.3d at 985; *Nickelodeon*, 827 F.3d at 284; App. 1a–8a.

But the First Circuit charted a different course. Instead of asking what an "ordinary person" would understand, the First Circuit asks whether "disclosed information" is "reasonably and foreseeability likely to reveal"—to the actual recipient—a person as having requested or obtained specific video materials. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016); *see also id.* at 489–90 (holding the disclosure of a consumer's unique "device identifier," GPS location, "and the titles of the videos he viewed" was a disclosure to which "the VPPA's prohibition" applies).

The First Circuit discussed some examples. "Revealing a person's social security number to the government, for example, plainly identifies a person." *Id.* at 486. The same is true "when a football referee announces a violation by 'No. 12 on the offense'" because "everyone with a game program knows the name of the player who was flagged." *Id.*

Multiple courts, including the Second Circuit, have acknowledged this circuit split. *See, e.g.*, *Solomon*, 136 F.4th at 48–51 (outlining the First Circuit's "reasonable foreseeability" test and explaining that the Third and Ninth Circuits "rejected" and "did not adopt" it, opting for "the ordinary person standard" instead); *Dawson v. Univ. of Phoenix, Inc.*, No. 1:25-cv-03497, 2026 WL 92248, at *7–8 & n.8 (N.D. Ill. Jan. 13, 2026) (noting the "split" and describing the Second Circuit's decision adopting the "ordinary person" test as "unpersuasive" because it is "nonsensical to categorize information as PII based on its format, rather than the type of information conveyed"); *Cochenour v. 360Training.com, Inc.*, 1:25-cv-7, 2025 WL 3251719, at *5 (W.D. Tex. Nov. 3, 2025) (noting "there continues to be a circuit split" on this question); *Goodman*, 2025 WL 2941542, at *7 (similarly outlining the split between the Second, Third, and Ninth Circuits, on the one hand, and the First Circuit, on the other).

And this split is outcome-determinative here. If the Second Circuit had adopted the First Circuit's "reasonable foreseeability" test, Mr. Hughes's claim would have survived. There is little doubt it was "reasonably foreseeable" that the disclosure of Mr. Hughes's Facebook ID, to Facebook (*i.e.*, the entity that assigned that number to Mr. Hughes in the first place), along with the title of the

videos he watched, would have identified him—again, to Facebook—as having requested or obtained those videos. In the First Circuit's parlance, Facebook had the "game program" here.

But the First Circuit's "reasonable foreseeability" test is atextual too. Just as the VPPA prohibits disclosures to "any person," not to "ordinary" persons, it prohibits "knowing" disclosures, not "reasonably foreseeable" ones. The best that can be said for the First Circuit's approach, then, is that it would have reached the right result here for the wrong reasons.

That all four circuits to address the issue have adopted atextual tests highlights the need for this Court's intervention. That they have adopted two *different* atextual tests only bolsters that conclusion.

III. The question here is critically important, and this case is an ideal vehicle to resolve it.

The Second Circuit clearly applied an atextual "ordinary person" test that distorts the VPPA's plain text. As the NFL has already admitted, the Second Circuit's decision—which impacts the scope of defendants' liability under the VPPA—will have far-ranging consequences. *See* NFL Amicus Br. at 1–2, 4, 11 (arguing questions that implicate "the scope of liability under the statute are of significant importance," particularly because this case involves a "common," "ubiquitous," "widely used," and "routine" online practice employed by many entities, including the NFL, that have "hundreds of millions of fans" and consumers).

In addition, the question here is a straightforward matter of statutory interpretation—a pure question of law. It arises at the motion-to-dismiss stage, meaning there are no factual disputes in play. Moreover, this case involves a final judgment, and this Court can review the question on the same record the lower courts considered. As such, this case is an ideal vehicle for the Court to resolve this exceptionally important question, restore textual discipline and fidelity, and clarify the meaning of "personally identifiable information" in the VPPA.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit, Filed June 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-2656

BRANDON HUGHES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

ISRAEL JAMES,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant-Appellee.

June 20, 2025, Decided

Appeal from an order and judgment of the United States District Court for the Southern District of New York. (Rochon, *J.*).

Present: Debra Ann Livingston, *Chief Judge*, Jon O. Newman, Richard J. Sullivan, *Circuit Judges.*

Appendix A

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of the district court is **AFFIRMED.**

Plaintiff-appellant Brandon Hughes appeals from an order and judgment of the United States District Court for the Southern District of New York (Rochon, *J.*), entered on September 5 and 6, 2024, respectively, granting defendant-appellee National Football League's (the "NFL") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On appeal, Hughes initially asked us to vacate and remand in light of our decision in *Salazar v. Nat'l Basketball Ass'n*, 118 F.4th 533 (2d Cir. 2024), which post-dated the district court's order and judgment. Thereafter, we decided *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025). Now, Hughes argues that "*Solomon* does not alter the outcome here," dkt. 44 at 1, and continues to ask us to vacate and remand, while the NFL argues that *Solomon* "is binding and dispositive of this case", dkt. 45 at 1, and asks us to affirm. Because we agree with the NFL, we affirm the district court's decision to dismiss this case. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Hughes alleges that the NFL violated the Video Privacy Protection Act ("VPPA") by installing the Facebook Pixel (the "Pixel") onto its website and app. The Pixel is a string of code that can be installed onto a website/app and shares certain information about users with Facebook. J. App'x at 269-70. The principal question now is whether Hughes can

still plead a viable VPPA claim against the NFL in light of our decision in *Solomon*.[1] We conclude that he cannot.

We review de novo a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *See, e.g., O'Donnell v. AXA Equitable Life Ins. Co.*, 887 F.3d 124, 128 (2d Cir. 2018). To survive a motion to dismiss, a complaint must contain sufficient factual allegations to

1. The NFL also argues that the district court improperly concluded that Hughes had standing to bring his claim. The NFL is mistaken. The crux of its argument is that Hughes lacks Article III standing to pursue a VPPA claim because he supposedly consented to the disclosures in question. Not so. As a threshold matter, there is a factual dispute as to whether Hughes actually consented to the disclosure of his information. *Compare* J. App'x 263 (alleging that "[p]laintiff never gave [d]efendant express written consent to disclose his [p]ersonal [v]iewing [i]nformation") *with* Appellee's Br. at 25 (arguing that plaintiff "consented to the disclosures at issue" by "agree[ing] to the NFL's Privacy Policy when he created his account on NFL.com"). In particular, the parties disagree as to whether the NFL's Privacy Policy informed users that their information may be *disclosed* rather than merely *collected*. In *Salazar*, we concluded that this type of question "should be left for the district court to address in the first instance given that its resolution will require detailed examination of the [relevant] Privacy Policy and [plaintiff's] factual allegations showing his acceptance of that policy." *Salazar*, 118 F.4th at 539 n.4. So too here. Moreover, as the district court correctly observed, the NFL's argument at most establishes an affirmative defense and calls for an analysis of the merits of plaintiff's VPPA claim. Since the "threshold inquiry into standing 'in no way depends on the merits,'" such an analysis is inappropriate at this stage. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1118 n.7 (9th Cir. 2022) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)).

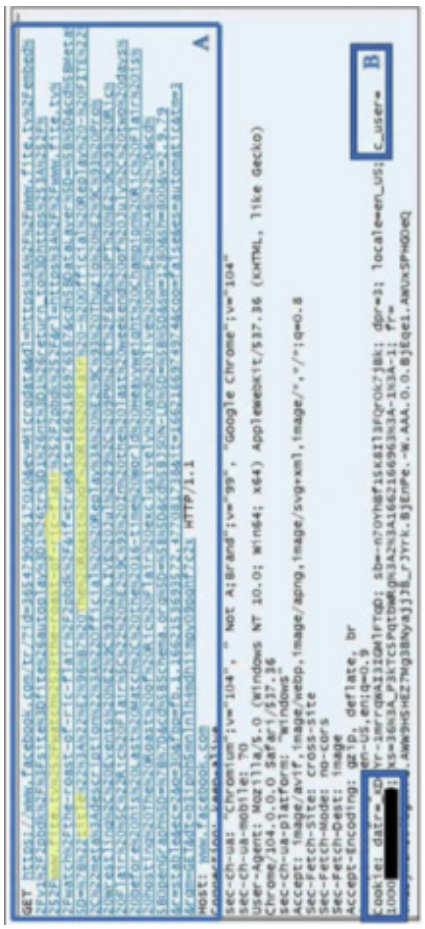
state a claim for relief that is plausible on its face. *See, e.g., id.*

Both *Salazar* and *Solomon* were decided after the district court granted the NFL's motion to dismiss in this case. "Ordinarily, where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances, *unless the new situation demands one result only*." *New England Merchs. Nat. Bank v. Iran Power Generation & Transmission Co.*, 646 F.2d 779, 783-84 (2d Cir.) (internal quotation marks omitted) (emphasis added), *certified question answered sub nom. Iran Nat'l Airlines Corp. v. Marschalk Co.*, 453 U.S. 919, 101 S. Ct. 3154, 69 L. Ed. 2d 1002 (1981). This case presents such a situation.

The VPPA 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[.]" 18 U.S.C. § 2710(b)(1). In *Solomon*, we held that "'personally identifiable information' encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so." 136 F.4th at 52; *see also In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 290 (3d Cir. 2016) (adopting the "ordinary person" standard); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017) (same).

Solomon effectively shut the door for Pixel-based VPPA claims. As is the case here, *Solomon* involved a

plaintiff who brought a VPPA claim against a defendant that had installed the Pixel on its website. The plaintiff's complaint included the following "exemplar" which showed an example of the type of transmission that was sent to Facebook via the Pixel:



Solomon, 136 F.4th at 46. We concluded in *Solomon* that:

> The exemplar depicts some twenty-nine lines of computer code, and the video title is indeed contained in Box A following the GET request. The words of the title, however, are interspersed with many characters, numbers, and letters. It is implausible that an ordinary person would look at the phrase "title%22%3A%22-%E2%96%B7%20The%20Roast%20of%-20Ric%20Flair" . . . and understand it to be a video title. It is also implausible that an ordinary person would understand, "with little or no extra effort," the highlighted portion to be a video title as opposed to any of the other combinations of words within the code, such as, for example, "%9C%93%20In%20the%20 last%20weekend%20of%20-July%2C."
>
> . . .
>
> [I]t is [also] not plausible that an ordinary person, without [] annotation . . . , would see the "c_user" phrase on [a] server[] and conclude that the phrase was a person's [Facebook ID ("FID")].

Id. at 54 (internal citations omitted).

The same holds true here. Hughes' complaint includes a similar screenshot depicting a "single communication session sent from [a] device to Facebook" via the Pixel:

Appendix A

J. App'x at 273. While Hughes asserts that a viewer's FID can be identified based on the string of numerals following the "c_user" field, *id.*, it "is not plausible that an ordinary person, without [] annotation . . . , would see the 'c_user' phrase on [this communication] and conclude that the phrase was a person's FID." *Solomon*, 136 F.4th at 54. And while the district court may not have had the benefit of our decision in *Solomon* when it ruled on the NFL's motion to dismiss, "[w]e are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." *Beijing Neu Cloud Oriental Sys. Tech. Co. v. Int'l Bus. Machines Corp.*, 110 F.4th 106, 113 (2d Cir. 2024) (internal quotation marks omitted).

Hughes argues that, if permitted to amend his complaint, he would allege that: (1) Facebook receives communications from the Pixel "in a way that is automatically translated into a readable format and is displayed (or is displayable) on a user interface as plain text"; (2) an ordinary person could plug the code into "ubiquitous internet-based tools like ChatGPT" to "translate the code to reveal the Facebook ID and video title in plain English"; and (3) 75% of Americans have a Facebook account. Dkt. 44 at 3. None of these arguments supports a VPPA claim post-*Solomon*. In *Solomon*, we focused on whether an ordinary person would be able to understand the actual underlying code communication itself, regardless of how the code is later manipulated or used by Facebook. *Solomon*, 136 F.4th at 52 ("'[P]ersonally identifiable information' encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, *but not information that only a sophisticated technology company could use to do so*." (emphasis added)). The existence of tools like ChatGPT, which were also prevalent at the time *Solomon* was decided, would not alter our conclusion in this case. Finally, the ubiquity of Facebook accounts has no bearing on the ability of ordinary people to interpret the Pixel communications depicted in Hughes' complaint. Accordingly, we see no basis for remanding because amendment would likely be futile.

* * *

We have considered appellant's remaining arguments and find them to be without merit. Accordingly, the order and judgment of the district court are **AFFIRMED**.

Appendix A

FOR THE COURT:

Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

Appendix B — Opinion and Order of the United States District Court for the Southern District of New York, Filed September 5, 2024

Case No. 1:22-cv-10743 (JLR)

BRANDON HUGHES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Filed September 5, 2024

OPINION AND ORDER

JENNIFER L. ROCHON, *District Judge.*

Brandon Hughes ("Plaintiff") sues the National Football League (the "NFL" or "Defendant") under the Video Privacy Protection Act (the "VPPA"), 18 U.S.C. § 2710. Dkt. 79 (the "Second Amended Complaint" or "SAC"). Defendant moves to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6). Dkts. 84 ("Br."), 89 ("Reply"). Plaintiff opposes Defendant's motion. Dkt. 86 ("Opp."). Plaintiff also asks the Court to stay this case pending the Second Circuit's

resolution of the appeal of *Salazar v. National Basketball Ass'n*, 685 F. Supp. 3d 232 (S.D.N.Y. 2023), *argued*, No. 23-1147 (2d Cir. Apr. 2, 2024). Opp. at 5-6. Defendant opposes a stay. Dkt. 88.

For the following reasons, the Court denies Plaintiff's request to stay this case, denies Defendant's motion to dismiss under Rule 12(b)(1), and grants Defendant's motion to dismiss under Rule 12(b)(6).

BACKGROUND

I. Factual Allegations

The Court accepts the factual allegations in the Second Amended Complaint as true and draws all reasonable inferences in Plaintiff's favor. *See Costin v. Glens Falls Hosp.*, 103 F.4th 946, 952 (2d Cir. 2024). The Court also considers materials incorporated by reference in the Second Amended Complaint, integral to the Second Amended Complaint, or subject to judicial notice. *See United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021).

A. NFL.com, the NFL App, and NFL+

The NFL is a major American sports league headquartered in New York. SAC ¶ 13. It operates three similarly named products or services relevant here: a website called NFL.com, a phone application called the NFL App, and a digital subscription called NFL+. *Id.* ¶¶ 13, 21, 65. On NFL.com and the NFL App, users can

watch video content. *Id.* ¶ 13. NFL+ offers access to exclusive video content on a subscriber's desktop, tablet, and mobile device. *Id.* ¶ 65. Although not expressly alleged, *see generally id.*, the parties agree that the video content available on NFL+ includes both live and prerecorded content, *see* Br. at 4; Opp. at 10-11.

An individual may register for NFL.com by signing up for an online newsletter. SAC ¶ 20. To do so, an individual provides personal information including her name, email address, and ZIP code. *Id.* To register for NFL+, a user must provide her first name, last name, date of birth, and country; she also has the option of providing her ZIP code. *Id.* Defendant tracks the IP address used to initiate a subscription to NFL.com or NFL+, thus linking the IP address — and the corresponding physical location — with a specific individual. *Id.* ¶¶ 20, 22. Also, any NFL+ subscriber that uses the NFL App provides Defendant with her unique device-identification number, geolocation data, and other information. *Id.* ¶ 22.

NFL.com has a privacy policy. *Id.* ¶ 27; *see* ECF No. 83-5 (the "Privacy Policy" in effect at the relevant time). The Privacy Policy states that Defendant "may collect" certain "types of information when you register with or use our Services . . . [or] access various content or features," including "[c]ontact information," "[d]emographic information," and "[r]eal-time [g]eolocation information." Privacy Policy § 1; SAC ¶ 27. The Privacy Policy also states that Defendant "may use" this information "for a variety of purposes" and provided examples of such uses. Privacy Policy § 2.

NFL.com also has a terms-and-conditions agreement. Dkt. 83-4 (the "Agreement"). Section 19 of the Agreement is captioned "Choice of Law, Arbitration, and Class Action Waiver." *Id.* § 19. It states, among other things, that:

> Any proceedings to resolve or litigate any dispute will be conducted solely on an individual basis. Neither you nor the NFL will seek to have any dispute heard as a class action or in any other proceeding in which either party acts or proposes to act in a representative capacity. No arbitration or proceeding will be combined with another without the prior written consent of all parties to all affected arbitrations or proceedings.

Id. (further capitalization omitted).

B. Defendant's Data Collection and Disclosure

Defendant collects and shares the data and personal information of users of NFL.com and the NFL App with third parties through cookies, software-development kits ("SDKs"), and tracking pixels. SAC ¶ 3. As pertinent here, Plaintiff alleges that Defendant installed Facebook's tracking pixel (the "Facebook Pixel") on NFL.com and the NFL App. *Id.* ¶¶ 4, 35. When a digital subscriber enters NFL.com or the NFL App and watches a video, the Pixel sends certain information to Facebook, including the name of the video, its URL, and the viewer's Facebook identification number (the "FID"). *Id.* ¶¶ 4, 33, 35; *see id.* ¶ 35 ("An FID is a unique and persistent identifier that

Facebook assigns to each user. With it, anyone ordinary person [sic] can look up the user's Facebook profile and name."). "Similarly, the NFL App can share user data with Facebook, through the use of one or more of Facebook's SDKs." *Id.* ¶ 34.

Facebook uses the information obtained through the Pixel to show targeted advertisements. *Id.* ¶ 31. Defendant purposefully incorporated the Pixel code on NFL.com and the NFL App, knew that the Pixel would disclose information to Facebook, and financially benefitted from disclosing this information to Facebook. *Id.* ¶¶ 33, 35, 39, 45. The information transmitted to Facebook is not anonymized, and thus Facebook can either add the data to the information it already has for specific users or use the data to generate new user profiles. *Id.* ¶¶ 39-40.

C. Plaintiff's Use of NFL.com, the NFL App, and NFL+

Plaintiff, an Illinois resident, has been a digital subscriber of NFL.com from 2020 to the present. *Id.* ¶¶ 12, 48. He has had a Facebook account since 2006. *Id.* ¶ 12. By virtue of his NFL.com digital subscription, Plaintiff receives emails and other communications from Defendant. *Id.* ¶ 48. Also, "[d]uring the relevant time period," Plaintiff "has used his NFL.com digital subscription to view Video Media through NFL.com and the NFL App." *Id.* ¶ 12. When watching videos on NFL.com, Plaintiff was logged into his Facebook account; when watching videos on the NFL App, Plaintiff had the Facebook mobile app also installed on his phone. *Id.*

Consequently, when Plaintiff watched videos on either platform, "Plaintiff's Personal Viewing Information was disclosed to Facebook." *Id.*; *see id.* at 1 (defining "Personal Viewing Information" as including a user's FID, "the computer file containing video," and the "corresponding URL viewed").

Plaintiff "was a digital subscriber of NFL+ during, at least, August 2022." *Id.* ¶ 48. Through his NFL+ subscription, Plaintiff received "access to content and features available only to NFL+ subscribers." *Id.* Plaintiff viewed an unidentified number of videos that were "only provided through the NFL App to NFL+ subscribers." *Id.* ¶ 49.

"Plaintiff never gave Defendant express written consent to disclose his Personal Viewing Information." *Id.* ¶ 12. "Plaintiff did not discover that Defendant disclosed his Personal Viewing Information to Facebook until August 2022." *Id.* ¶ 51.

II. Procedural History

This litigation kicked off in the Northern District of Illinois on September 14, 2022. Dkt. 1. On January 25, 2023, after the case had been transferred to this District, Dkt. 19, the Court granted Plaintiff's unopposed motion to file an amended complaint, Dkt. 30; *see* Dkt. 40 (the "First Amended Complaint"). On March 2, 2023, Defendant moved to dismiss the First Amended Complaint. Dkt. 44. That motion was fully briefed on April 6, 2023. Dkt. 63.

Appendix B

On August 7, 2023, the Court granted a motion to dismiss in *Salazar*, a case involving a similar claim under the VPPA. 685 F. Supp. 3d at 235. Four days later, Plaintiff requested leave to amend in this case. Dkt. 73. The Court granted this request over Defendant's opposition and denied as moot Defendant's motion to dismiss the First Amended Complaint. *Hughes v. Nat'l Football League*, No. 22-cv-10743 (JLR), 2023 WL 8039262, at *1 (S.D.N.Y. Nov. 20, 2023).

Plaintiff filed the Second Amended Complaint on November 27, 2023. SAC. He asserts a single claim for relief under the VPPA. *Id.* ¶¶ 59-70. He also seeks to represent a proposed class of "[a]ll persons in the United States with a digital subscription to an online website or product owned and/or operated by Defendant that had their Personal Viewing Information disclosed to Facebook by Defendant." *Id.* ¶ 52; *see id.* ¶ 71 (requesting both individual and class relief). Defendant moved to dismiss the Second Amended Complaint on December 18, 2023. Br. The motion is fully briefed. Opp.; Reply; *see also* Dkt. 90 (Defendant's submission of supplemental authority).

LEGAL STANDARD

"A district court properly dismisses an action under [Rule] 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when the plaintiff lacks constitutional standing to bring the action." *Brokamp v. James*, 66 F.4th 374, 386 (2d Cir. 2023) (ellipsis, quotation marks, and citation omitted). To survive a motion to dismiss under

Rule 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 572 U.S. 744, 757-58 (2014) (citation omitted). On a motion to dismiss under Rule 12(b)(1) or Rule 12(b)(6), a court accepts the complaint's allegations as true and draws all reasonable inferences in favor of the plaintiff. *Citizens United to Protect Our Neighborhoods v. Village of Chestnut Ridge*, 98 F.4th 386, 391 (2d Cir. 2024) (Rule 12(b)(1)); *Syeed v. Bloomberg L.P.*, 58 F.4th 64, 67 (2d Cir. 2023) (Rule 12(b)(6)).

DISCUSSION

I. Stay

As a threshold matter, the Court denies Plaintiff's request to stay this case pending the Second Circuit's disposition of the *Salazar* appeal.

A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Relevant considerations include "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Kappel v. Comfort*, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996) (citation omitted). "Of course, these factors are guides to the district court's discretion, not a rigid test requiring mechanical operation." *Press v. Primavera*, No. 21-cv-10971 (JLR), 2024 WL 1621203,

at *3 (S.D.N.Y. Apr. 15, 2024). "The proponent of a stay bears the burden of establishing its need." *Clinton*, 520 U.S. at 708.

Plaintiff notes that some issues raised in the *Salazar* appeal are also implicated in this case, and that other courts in this District have stayed VPPA cases pending the Second Circuit's decision in *Salazar*. *See* Opp. at 5-6; *see also Addi v. Int'l Bus. Machs., Inc.*, No. 23-cv-05203 (NSR), 2024 WL 2802863, at *5 (S.D.N.Y. May 31, 2024) (collecting cases). According to Plaintiff, a stay would provide "clarity on the scope of the VPPA before engaging in potentially expensive — and uncertain — litigation." Opp. at 6 (citation omitted). To be sure, "[t]his Court has authority to stay proceedings pending disposition of another case that could affect the outcome." *Pry v. Auto-Chlor Sys., LLC*, No. 23-cv-04541 (DEH), 2024 WL 3728981, at *1 (S.D.N.Y. Aug. 8, 2024) (citation omitted). Nevertheless, Defendant's motion to dismiss the Second Amended Complaint has been fully briefed for some time and, more importantly, raises several issues that are not implicated in the *Salazar* appeal. The Court finds that the interests of Defendant, the Court, and the public in resolving cases in a reasonably timely fashion outweigh countervailing considerations. *See Press*, 2024 WL 1621203, at *5. Therefore, the Court denies Plaintiff's stay request.

II. Standing

The Court turns next to Defendant's Rule 12(b)(1) motion challenging Plaintiff's standing. To establish

Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Invoking *TransUnion*, Defendant asserts that Plaintiff cannot "identify a close historical or common-law analogue for his asserted injury that has been traditionally recognized as a basis for suit." Br. at 11 (brackets, quotation marks, and citation omitted). In *Salazar*, however, the Court held that VPPA claims of this sort are sufficiently analogous to the tort of intrusion upon seclusion to satisfy *TransUnion*. *See* 685 F. Supp. 3d at 239-42. The Court's view on this issue has not changed.

Defendant makes one argument that was not raised in *Salazar* and that the Court therefore addresses now. According to Defendant, Plaintiff "consented to the alleged disclosures through his notice of, and agreement to, Facebook's policies and the NFL's Privacy Policy, both of which alerted him to the cookie-based tracking and ad customization technologies he now complains of." Br. at 12. In turn, Defendant argues that a "disclosure to which an individual consented is not a harm that is traditionally recognized as giving rise to a viable tort suit." *Id.* (quotation marks omitted). "Rather, consent provides an 'absolute privilege' from traditional privacy torts." *Id.* (quoting Restatement (Second) of Torts § 652F cmt. b (Am. L. Inst. 1977)).

This argument does not advance the ball. It is true that consent may provide an affirmative defense to a privacy

tort. *See, e.g., Lewis v. LeGrow*, 670 N.W.2d 675, 688 (Mich. Ct. App. 2003) (under Michigan law, "there can be no invasion of privacy under the theory of intrusion upon the seclusion" if the plaintiff "consented to [the] defendant's intrusion"); *Noble v. Town Sports Int'l, Inc.*, 707 N.Y.S.2d 89, 90 (1st Dep't 2000) (models "provided written consent, without limitation, to the use and reuse of the photographs for advertising purposes . . . , thus waiving any invasion of privacy claim" under New York statute); *Anderson v. Low Rent Hous. Comm'n of Muscatine*, 304 N.W.2d 239, 248 (Iowa 1981) (under Iowa law, "waiver and consent" are "affirmative defenses" to "the tort of invasion of privacy"). But Plaintiff does not allege that he consented to Defendant sharing his personally identifying information with Facebook; in fact, he alleges the opposite. *See, e.g.*, SAC ¶ 12 ("Plaintiff never gave Defendant express written consent to disclose his Personal Viewing Information."). Moreover, if Plaintiff indeed validly consented to Defendant sharing his personally identifying information with Facebook (something that is not obvious from the evidence highlighted by Defendant), that fact could support an affirmative defense to an intrusion-on-seclusion claim and, potentially, a VPPA claim, *see, e.g.*, *Anderson*, 304 N.W.2d at 248; *Feldman v. Star Trib. Media Co.*, 659 F. Supp. 3d 1006, 1023 (D. Minn. 2023) (18 U.S.C. § 2710(b)(2)(B), which establishes a safe harbor for VPPA claims based on a plaintiff's consent, "seems like an affirmative defense that the [defendant] bears the burden to plead and prove"), but it does not mean that Plaintiff lacks standing to assert a VPPA claim at this juncture, *see, e.g.*, *Pileggi v. Wash. Newspaper Publ'g Co.*, No. 23-cv-00345, 2024 WL 324121, at *7-8 (D.D.C. Jan. 29, 2024) (rejecting

defendant's argument that plaintiff, by continuing to visit website with publicly accessible privacy policy, impliedly consented to disclosure and therefore lacked standing to assert VPPA claim); *cf. Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1118 n.7 (9th Cir. 2022) (in case brought under the Telephone Consumer Protection Act (the "TCPA"), defendant argued that plaintiffs lacked standing because they consented to defendant's calls; court rejected this argument because "[e]xpress consent is an affirmative defense" under the TCPA, and "determining whether [p]laintiffs consented to [defendant]'s calls require[d] an analysis of the merits" of plaintiffs' TCPA claim (ellipsis and citation omitted)).

Thus, the Court denies Defendant's motion to dismiss under Rule 12(b)(1).

III. Merits

In seeking dismissal under Rule 12(b)(6) for failure to state a claim, Defendant argues that Plaintiff fails to allege facts to support three elements of his claim: (1) that Plaintiff is a "consumer" of a "video tape service provider"; (2) that Defendant "disclose[d]" "personally identifying information"; and (3) that this disclosure was made "knowingly." Br. at 12 (brackets in original) (quoting 18 U.S.C. § 2710). The Court agrees with Defendant on the first point; it does not address the other two.

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). Neither party

asserts that Plaintiff is a renter or purchaser. Instead, the parties focus on whether Plaintiff is a subscriber.

For substantially the same reasons stated in *Salazar*, Plaintiff does not plausibly allege that his NFL.com subscription "render[s] him a consumer of goods or services from a video tape service provider under the VPPA." 685 F. Supp. 3d at 246. Unlike in *Salazar*, however, Plaintiff asserts an additional basis for qualifying as a "subscriber" and, thus, as a "consumer": his subscription to NFL+. SAC ¶ 65. Plaintiff alleges that as part of his subscription to NFL+, he received "access to content and features only available to NFL+ subscribers." *Id.* ¶ 48. Plaintiff also claims that he watched videos through the NFL App, and that "[s]ome of the viewed content was only provided through the NFL App to NFL+ subscribers." *Id.* ¶ 49. Thus, Plaintiff sufficiently alleges that "the video content he accessed was exclusive to a subscribership." 685 F. Supp. 3d at 245. These allegations, however, establish only that Plaintiff was a "consumer"; they do not establish that Plaintiff was a consumer of "a video tape service provider."

Defendant argues that Plaintiff is not a consumer of a "video tape service provider" because he "does not allege he viewed any *prerecorded* video content whatsoever through his subscription" to NFL+. Br. at 15-17; *see* 18 U.S.C. § 2710(a)(4) (under the VPPA, "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"). Plaintiff, in

response, "readily concedes" that the VPPA applies only to prerecorded content. Opp. at 11. But Plaintiff does not identify any allegation in the Second Amended Complaint asserting that he viewed prerecorded content through NFL+. *See id.* Instead, he argues that the Second Amended Complaint's allegation that he watched videos through NFL+, combined with the undisputed fact that NFL+ has prerecorded content, is sufficient to establish that he was a consumer of a "video tape service provider" for purposes of a motion to dismiss. *See id.* at 10-12.

Even accepting the non-pleaded fact that NFL+ has prerecorded content (to which the parties nonetheless appear to agree), the Court agrees with Defendant that Plaintiff, by failing to plead that he viewed prerecorded video content through NFL+, has insufficiently alleged that he was a consumer of a "video tape service provider." Although a plaintiff need not "allege the specific videos he watched to state a claim under the VPPA," *Frawley v. Nexstar Media Grp. Inc.*, No. 23-cv-02197, 2024 WL 3798073, at *6 (N.D. Tex. July 22, 2024), or "plead the circumstances of every alleged disclosure with particularity," *Campos v. Tubi, Inc.*, ___ F. Supp. 3d ___, 2024 WL 496234, at *9 (N.D. Ill. Feb. 8, 2024), Plaintiff does not allege that he watched *any* prerecorded videos via NFL+ at all during the brief period where he was a subscriber to NFL+. This failure is fatal to the Second Amended Complaint. *See, e.g., Solomon v. Flipps Media, Inc.*, No. 22-cv-05508 (JMA), 2023 WL 6390055, at *5 (E.D.N.Y. Sept. 30, 2023) (granting motion to dismiss where plaintiff "never explicitly allege[d] that she actually accessed [any] 'prerecorded' video on [d]efendant's site");

Stark v. Patreon, Inc., 635 F. Supp. 3d 841, 851 (N.D. Cal. 2022) (granting motion to dismiss where complaint "include[d] numerous references to 'videos' and 'video content,' but d[id] not specify whether they were broadcast live or prerecorded and available on demand," and "[n]othing in the complaint suggest[ed] an inference one way or the other on that question"); *cf. Golden v. NBCUniversal Media, LLC*, 688 F. Supp. 3d 150, 157, 167 (S.D.N.Y. 2023) (denying motion to dismiss on this ground where plaintiff expressly alleged that she used her subscription to view prerecorded videos, although granting dismissal on another ground); *Czarnionka v. Epoch Times Ass'n*, No. 22-cv-06348 (AKH), 2022 WL 17069810, at *4 (S.D.N.Y. Nov. 17, 2022) (denying motion to dismiss where plaintiff alleged that the website had prerecorded videos, and where there was no indication that the website had any live videos).

IV. Class-Action Waiver

As noted, Plaintiff asserts a VPPA claim on behalf of not only himself but also a putative class. SAC ¶ 52. Defendant contends that "[e]ven if the Court declines to dismiss the SAC in its entirety, it should nevertheless dismiss the class claims with prejudice." Br. at 23.

Where, as here, a named plaintiff's claim is dismissed prior to class certification, the Court lacks jurisdiction over any putative class-action claims. *See Martin v. New Am. Cinema Grp., Inc.*, No. 22-cv-05982 (JLR), 2023 WL 2024672, at *9 (S.D.N.Y. Feb. 15, 2023) (collecting cases). Thus, having dismissed Plaintiff's individual VPPA claim,

the Court dismisses the putative VPPA class-action claim without prejudice. *See Miller v. Brightstar Asia, Inc.*, 43 F.4th 112, 126 (2d Cir. 2022) ("A dismissal for lack of jurisdiction must be without prejudice rather than with prejudice." (citation omitted)). The Court does not reach the parties' other arguments about the applicability of the class-action waiver in Section 19 of the Agreement.

CONCLUSION

Plaintiff's request to stay is DENIED, Defendant's motion to dismiss under Rule 12(b)(1) is DENIED, and Defendant's motion to dismiss under Rule 12(b)(6) is GRANTED. The Clerk of Court is respectfully directed to terminate the motion at Dkt. 82 and CLOSE the case.

Dated: September 5, 2024
New York, New York

SO ORDERED.

/s/ Jennifer L. Rochon
Jennifer L. Rochon
United States District Judge

Appendix C — Order of the United States Court of Appeals for the Second Circuit, Filed August 21, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-2656

BRANDON HUGHES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

ISRAEL JAMES,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant-Appellee.

August 21, 2025, Decided

Appellant, Brandon Hughes, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

Appendix D — 18 U.S.C. § 2710

18 U.S.C. § 2710

§ 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.

Appendix D

(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.

Appendix E — Second Amended Class Action Complaint, Filed November 27, 2023

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No: 22-CV-10743

BRANDON HUGHES,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Filed November 27, 2023

JURY TRIAL REQUESTED

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiff Brandon Hughes, individually and on behalf of all others similarly situated, files this Class Action Complaint against Defendant National Football League ("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 National Football League, as the owner of NFL.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 NFL.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 NFL mobile application ("App") – named simply, "NFL" – with third parties. Defendant does this through cookies, software development kits ("SDK"), and pixels. In other words, digital subscribers

to NFL.com and/or the NFL App have their personal information disclosed to Defendant's third-party business partners.

4. The Facebook pixel is a code Defendant installed on NFL.com allowing it to collect users' data. More specifically, it tracks when digital subscribers to NFL+ enter NFL.com or NFL.com's accompanying App and view Video Media. NFL.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 NFL.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 NFL.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 NFL.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 NFL.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 Brandon Hughes is an adult citizen of the State of Illinois and is domiciled in the State of Illinois. Plaintiff began a digital subscription to NFL.com email newsletters in 2020 which continues to this day. Additionally, Plaintiff subscribed to NFL+ on or about August 2022. Plaintiff has had a Facebook account from approximately 2006 to the present. During the relevant time period he has used his NFL.com digital subscription to view Video Media through NFL.com and the NFL App. When viewing Video Media through NFL.com, Plaintiff was logged into his Facebook account. When viewing Video Media through the NFL App, Plaintiff had the Facebook mobile app also installed on his smartphone. 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 National Football League:

a. Is a private corporation and major sports league headquartered in New York, New York.

b. NFL.com had approximately 26 million average monthly users and over 300 million total pageviews in 2021.[1]

1. *See* similarweb, NFL.com, *available at* https://www.similarweb.com/website/nfl.com/#social-media (last visited Nov. 21, 2023).

c. The National Football League had an annual revenue of approximately $11 billion in 2021.[2]

d. NFL.com includes a Videos section which provides a broad selection of video content.

e. Combined, the National Football League and NFL.com are used by numerous U.S. digital media viewers.

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

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'

2. *See* SP, Report: NFL posts US$$11bn in national revenue for 2021, *available at* https://www. sportspromedia.com/news/nfl-national-revenue-2021-roger-goodell/ (last visited Nov. 21, 2023).

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]

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. NFL.com's Digital Subscriptions

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

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, https://www.judiciary.senate. gov/meetings/the-video-privacy-protection-act-protecting-viewer-privacy-in-the-21st-century (last visited Nov. 21, 2023).

address, and zip code. To register for NFL+, users provide NFL their first name, last name, date of birth, country, and (optionally) zip code. Upon information and belief, Defendant tracks the IP address utilized to initialize the subscription, thus linking an IP address with a specific individual. This allows for a host of data connections, which, when combined with other tracking technologies described herein, allows Defendant to aggregate a great deal of information about subscribers, like Plaintiff. As the saying goes, "if you don't pay for the product, you are the product."

21. National Football League operates a website in the U.S. accessible from a desktop and mobile device at NFL.com. It also offers the NFL 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. Further, any NFL+ subscriber who uses the NFL App provides Defendant with their unique device identification number, geolocation data, and other information.

23. Additionally, digital subscribers may provide to Defendant the identifier on their mobile devices and/or cookies stored on their devices, as further described below.

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 NFL.com and NFL App Video Media on Defendant's digital platforms.

26. Notably, once a digital subscriber signs in and watches NFL.com or NFL App Video Media, some of which is exclusive content to digital subscribers, 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.

V. 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.[4]

27. At the time this matter was filed, the operative Privacy Policy for NFL.com states that it collects "Personal Information" from its users:

> "…we may collect some or all of the following types of information when you register with or use our Services, sign up for contests or sweepstakes, participate in surveys, access various content or features, submit comments or content, use a send-to-a-friend feature, or directly contact us with questions or feedback:
>
> - Contact information, such as name, e-mail address, postal address, and telephone number;
> - Unique identifiers, such as a user name or password;
> - Demographic information, such as gender;

4. The allegations in paragraphs 27-29 have been modified slightly to acknowledge recent changes in Defendant's Privacy Policy. Paragraph 30 contains new allegations related primarily to Defendant's October 10, 2023 change to its Privacy Policy.

- Financial information, such as credit card or other payment information;
- Real-time Geolocation information;
- Communications and marketing preferences;
- Favorite team and other personal preferences
- Photographs, if you provide a photograph of yourself to us
- Search queries;
- Comments and other information posted in our interactive online forums;
- Correspondence, waivers or acceptances and other information that you send to us; and
- Additional information as otherwise described to you in this Policy, at the point of collection, or pursuant to your consent."

We also may collect certain information automatically when you visit or use the Services, such as stadium WiFi networks, including:

- Your Internet Protocol (IP) address, which is the number automatically assigned to your computer whenever you access the Internet and that can sometimes be used to derive your general geographic area;

- Your Media Access Control (MAC) address, which is a unique identifier assigned to a network interface controller;

- Your device type or mobile carrier;

- Other unique identifiers, including mobile device identification numbers; and advertising identifiers (e.g., IDFA);

- Your browser type and operating system;

- Sites and apps you visited before and after visiting, or while using, the Services;

- Pages you view and links you click on within the Services;

- Information collected through cookies, web beacons, Local Shared Objects, and other technologies, as described further below;

- Information about your interactions with e-mail messages, such as the links clicked on and whether the messages were received, opened, or forwarded;

- If you link your social media account to your NFL account we will receive information from those social media accounts in accordance with your settings on the social platform and their privacy policy;

- Standard Server Log Information; and

- Standard Network Traffic Information when you are connected to an NFL stadium's WiFi network."[5]

28. Notably, the Privacy Policy in effect at the time of filing neither NFL.com nor the NFL App discloses in its Privacy Policy that it automatically collects "Pages you view and links you click on within the Services…"[6]

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5. *See* Wayback Machine, NFL.COM – Privacy Policy (July 21, 2021 version), *available at* https://web.archive.org/web/20220910012216/https://www.nfl.com/legal/privacy/ (Sept. 10, 2022) (last visited Nov. 26, 2023).

6. *See id.*

29. Importantly, nowhere in NFL.com's Terms of Service or Privacy Policy in effect at the time this matter was filed was it disclosed that Defendant will share digital subscribers' private and protected Personal Viewing Information with third parties, including Facebook.

30. Since the time this matter was filed, the NFL has materially modified its disclosures to its subscribers and users, including but not limited to changes to its Privacy Policy on December 29, 2022, February 1, 2023, June 30, 2023, and October 10, 2023. For the first time on October 10, 2023, the NFL added a section called "Internet-Based Advertising."[7]

D. How NFL.com and the NFL App Disseminates Digital Subscribers' Personal Viewing Information

1. Tracking Pixels

31. 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.

32. 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

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7. *See* NFL, NFL.COM – Privacy Policy, *available at* https://www.nfl.com/legal/privacy/ (last visited Nov. 26, 2023).

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.

33. 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 NFL.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, NFL.com sends to Facebook the video content name, its URL, and, most notably, the viewers' Facebook ID.

34. Similarly, the NFL App can share user data with Facebook, through the use of one or more of Facebook's SDKs.

2. Facebook ID ("FID")

35. 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 NFL.com on the website or app, NFL.com or the NFL App, through its computer code, causes the digital subscribers identity and viewed Video Media to

be transmitted to Facebook by the user's browser or App. 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 NFL.com's website or NFL 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.

36. 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 NFL.com.

37. 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 NFL.com and the NFL 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.

Appendix E

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

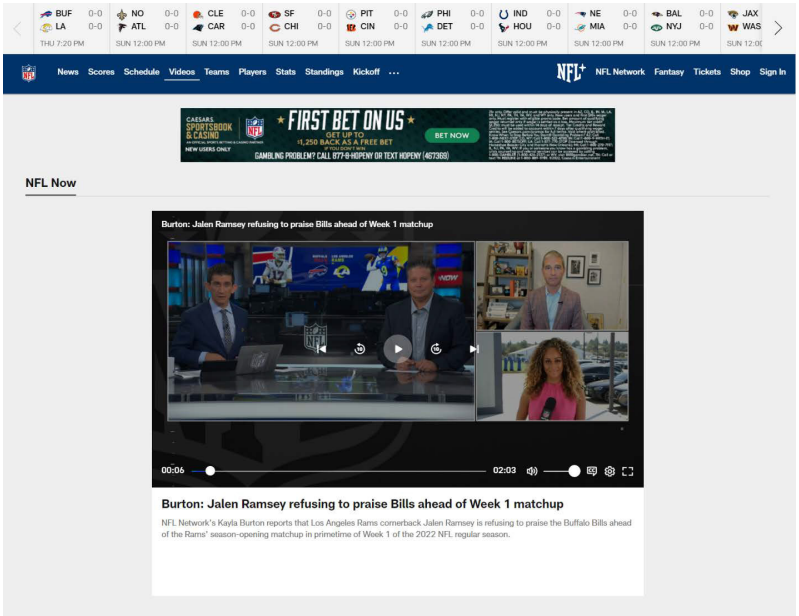
38. Defendant maintains a vast digital database comprised of its digital subscribers' Personal Viewing Information, including the names and e-mail addresses of each digital subscriber and information reflecting the Video Media that each of its digital subscribers viewed.

39. 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.

40. 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.

41. These factual allegations are corroborated by publicly available evidence. For instance, as shown in the screenshot below, a user visits NFL.com and clicks on an

article titled "Burton: Jalen Ramsey refusing to praise Bills ahead of Week 1 matchup" and watches the video in the article.



Pictured above: The article titled "Burton: Jalen Ramsey refusing to praise Bills ahead of Week 1 matchup" (taken from NFL.com on or about September 8, 2022).

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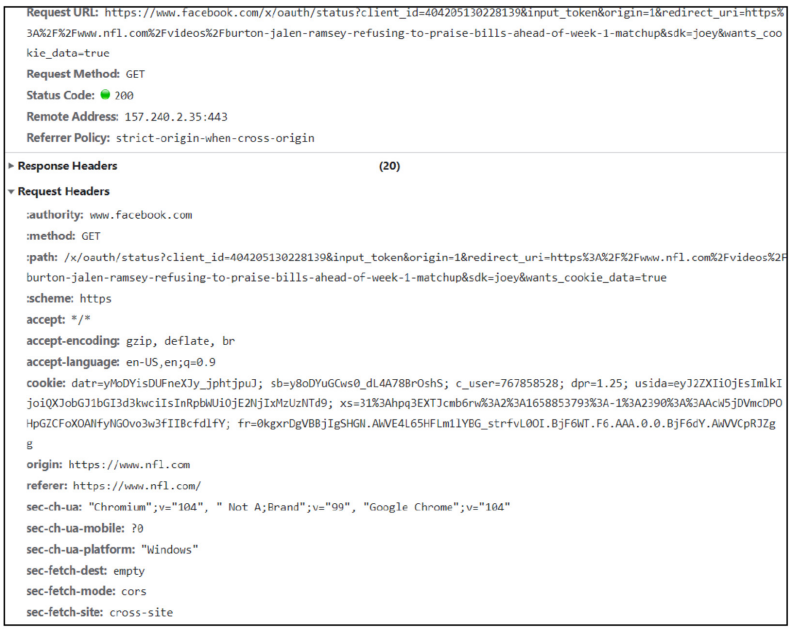
42 As demonstrated below, once the user clicks on and watches the video in the article, NFL.com sends the content name of the video the digital subscriber watched, the URL, and the digital subscriber's FID to Facebook.



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

43. 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.

44. 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.

45. 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

46. Tracking pixels are not necessary for Defendant to operate NFL.com or the NFL App. They are deployed on Defendant's website and app for the sole purpose of enriching Defendant and Facebook.

47. 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

48. Plaintiff Brandon Hughes has been a digital subscriber of NFL.com from 2020 to the present. Further,

Appendix E

Plaintiff Hughes was a digital subscriber of NFL+ during, at least, August 2022. Plaintiff became a digital subscriber of Defendant by providing, among other information, his name, address, email address, IP address (which informs Defendant as to the city and zip code he resides in as well as his physical location), device ID, and any cookies and other demographic, device, geolocation, and other data associated with his devices. As part of his subscription, he receives or received emails and other communications from NFL.com, as well as access to content and features only available to NFL+ subscribers.

49. Plaintiff has had a Facebook account since approximately 2006. From 2006 to the present, Plaintiff viewed Video Media via NFL.com website and App. Some of the viewed content was only provided through the NFL App to NFL+ subscribers.

50. 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.

51. 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

52. 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 or product owned and/or operated by Defendant that had their Personal Viewing Information disclosed to Facebook by Defendant.

53. 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.

54. *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.

55. *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.

56. *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.

57. *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.

58. *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.

Appendix E

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF

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

59. Plaintiff incorporates the allegations set forth in paragraphs 1-58 by reference as if fully set forth herein.

60. 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.

61. 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."

62. 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.

63. 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."

64. 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 NFL.com Video Media, including the specific video materials requested from the website.

65. 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 NFL.com newsletter, as well as NFL+, as digital subscription service offered by Defendant that provides exclusive Video Media content to the digital subscriber's desktop, tablet, and mobile device. Plaintiff is thus a "consumer" under this definition.

66. As set forth in 18 U.S.C. § 2710(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.

67. 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.

68. 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.

69. 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).

70. 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

71. 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).

Appendix E

JURY DEMAND

72. 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: November 27, 2023

Respectfully Submitted:

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