

No. 26-____

IN THE
Supreme Court of the United States

SHERHONDA GOLDEN,
Petitioner,
v.

NBCUNIVERSAL MEDIA, LLC,
Respondent.

**On Petition for 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 like NBCUniversal from “knowingly disclos[ing], to any person, personally identifiable information concerning any consumer.” 18 U.S.C. § 2710(b)(1). The statute 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 statutory text does not mention an “ordinary person.”

Here, NBCUniversal disclosed information to Facebook. It knew Facebook would understand the information to identify Sherhonda Golden as having requested or obtained specific video materials. And Facebook did understand the disclosed information that way. In the First Circuit, Ms. Golden’s VPPA claim would have survived in light of NBCUniversal’s actual knowledge, without considering what an “ordinary person” might have understood. But the Second Circuit dismissed her claim, despite NBCUniversal’s actual knowledge, because an “ordinary person” would not have understood the disclosed information.

The question is whether information is “personally identifiable information” under the VPPA when the provider knows the recipient understands it to identify a person as having requested or obtained specific video materials, even if an “ordinary person” would not.

PARTIES TO THE PROCEEDING

Petitioner Sherhonda Golden was the plaintiff in the district court and the appellant in the Second Circuit. Respondent NBCUniversal was the defendant and appellee in the proceedings below. NBCUniversal is a wholly owned subsidiary of Comcast Corporation (NASDAQ: CMCSA).

RELATED PROCEEDINGS

Golden v. NBCUniversal Media, LLC, No. 25-2226, U.S. Court of Appeals for the Second Circuit. Judgment entered April 23, 2026.

Golden v. NBCUniversal Media, LLC, No. 22 Civ. 9858, U.S. District Court for the Southern District of New York. Judgment entered September 3, 2025.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS BELOW	4
JURISDICTION	4
STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE	4
A. Statutory background.....	4
B. Factual and procedural background	7
1. The complaint	7
2. The district court’s decision	8
3. The Second Circuit’s decision.....	10
REASONS FOR GRANTING THE PETITION.....	10
I. The circuits have split 3–1 on the meaning of “personally identifiable information.”	12
II. The question presented here is critically important, and this case is an ideal vehicle to resolve it	17
III. The Second Circuit’s misguided decision conflicts with this Court’s precedent in critical ways	18

TABLE OF CONTENTS—Continued

	Page
A. The “ordinary person” test imposes an atextual requirement	19
B. The “ordinary person” test improperly disregards the provider’s actual knowledge of the intended recipient’s abilities	25
C. The “ordinary person” test imposes an unenacted exception to the VPPA’s prohibitions	30
CONCLUSION	32
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A.J.T. v. Osseo Area Schs., Ind. Sch. Dist.</i> No. 279, 605 U.S. 335 (2025).....	19, 25
<i>Ames v. Ohio Dep’t of Youth Servs.</i> , 605 U.S. 303 (2025).....	19, 21, 23
<i>Banks v. CoStar Realty Info., Inc.</i> , No. 4:25-cv-00564, 2025 WL 2959228 (E.D. Mo. Oct. 20, 2025).....	16, 24
<i>Blanche v. Lau</i> , 146 S. Ct. 1981 (2026).....	19
<i>CC/Devas (Mauritius) Ltd. v. Antrix Corp.</i> , 605 U.S. 223 (2025).....	19, 20, 24, 32
<i>Chandra v. Prager Univ. Found.</i> , No. 2:25-cv-03984, 2026 WL 434938 (C.D. Cal. Jan. 27, 2026).....	23
<i>Cochenour v. 360Training.com, Inc.</i> , No. 1:25-cv-7, 2025 WL 3251719 (W.D. Tex. Nov. 3, 2025).....	15–16
<i>Damrau v. Colibri Grp., LLC</i> , No. 4:24-cv-01441, 2026 WL 198712 (E.D. Mo. Jan. 23, 2026)	24
<i>Dep’t of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz</i> , 601 U.S. 42 (2024).....	24
<i>Eichenberger v. ESPN, Inc.</i> , 876 F.3d 979 (9th Cir. 2017).....	12, 13

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Flowers Foods, Inc. v. Brock</i> , 608 U.S. 380 (2026).....	19
<i>Goodman v. Hillsdale Coll.</i> , No. 1:25-cv-417, 2025 WL 2941542 (W.D. Mich. Oct. 17, 2025).....	16, 24
<i>Hughes v. Nat’l Football League</i> , No. 24-2656, 2025 WL 1720295 (2d Cir. June 20, 2025)	9, 13, 23, 30
<i>In re Nickelodeon Consumer Privacy Litig.</i> , 827 F.3d 262 (3d Cir. 2016)	12, 13, 20
<i>Kueppers v. Zumba Fitness LLC</i> , 805 F. Supp. 3d 1226 (S.D. Fla. 2025)	15
<i>Krueger v. Chess.com, LLC</i> , No. 1:24-cv-05722, 2025 WL 2765375 (N.D. Ill. Sept. 28, 2025)	16
<i>Lee v. Springer Nature Am., Inc.</i> , 769 F. Supp. 3d 234 (S.D.N.Y. 2025).....	24
<i>Manza v. Pesi, Inc.</i> , 784 F. Supp. 3d 1110 (W.D. Wis. 2025) ...	21, 24
<i>Nixon v. Pond5, Inc.</i> , No. 1:24-cv-05823, 2025 WL 2030303 (S.D.N.Y. July 21, 2025)	16
<i>Plotsker v. Envato Pty Ltd.</i> , No. 2:24-cv-04412, 2025 WL 2481422 (C.D. Cal. Aug. 26, 2025)	23
<i>Salazar v. Nat’l Basketball Ass’n</i> , 118 F.4th 533 (2d Cir. 2024).....	4

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Salazar v. Paramount Global</i> , No. 25-459	3, 4, 12, 32
<i>Solomon v. Flipp's Media</i> , 136 F.4th 41 (2d Cir. 2025)	9, 12, 13, 15, 20–25, 30
<i>United States v. Basilici</i> , 138 F.4th 590 (1st Cir. 2025).....	14
<i>United States v. Johnson</i> , 529 U.S. 53 (2000).....	30
<i>United States v. Smith</i> , 499 U.S. 160 (1991).....	30
<i>United States ex rel. Schutte v.</i> <i>Supervalu Inc.</i> , 598 U.S. 739 (2023).....	26
<i>Wilson v. Triller, Inc.</i> , 598 F. Supp. 3d 82 (S.D.N.Y. 2022).....	27
<i>Yershov v. Gannett Satellite Info.</i> <i>Network, Inc.</i> , 820 F.3d 482 (1st Cir. 2016)	13, 14

Statutes

18 U.S.C. § 798	27
18 U.S.C. § 798(a).....	26
28 U.S.C. § 1254(l).....	4
28 U.S.C. § 2101(c)	4

TABLE OF AUTHORITIES—Continued

	Page(s)
18 U.S.C. § 2710	4
§ 2710(a)(1).....	6
§ 2710(a)(3).....	1, 6, 10, 18, 21, 22, 27
§ 2710(a)(4).....	6
§ 2710(b)(1).....	1, 5, 21, 25, 27, 29, 30, 31
§ 2710(b)(2)(A)–(F)	6, 31
§ 2710(b)(2)(B).....	7, 31
§ 2710(b)(2)(C).....	31
§ 2710(c)(2)	6
§ 2710(d)	27
§ 2710(e)	27
Pub. L. 112-258, 126 Stat. 2414 (2013)	6, 7

Court Filings

Brief of Amici Curiae The Motion Picture Ass’n & NCTA – the Internet & Television Ass’n in Support of Respondent, <i>Salazar v. Paramount Global</i> , No. 25-459 (June 30, 2026)	16
Brief for Respondent, <i>Salazar v. Paramount Global</i> , No. 25-459 (June 23, 2026)	3, 17
Petitioner’s Brief, <i>Salazar v. Paramount Global</i> , No. 25-459 (Apr. 17, 2026)	3
Reply Brief for Petitioner, <i>Nat’l Basketball Ass’n v. Salazar</i> , No. 24-994 (July 16, 2025)	16

TABLE OF AUTHORITIES—Continued

Legislative Materials	Page(s)
134 Cong. Rec. 10259–60 (May 10, 1988).....	4–5
S. Rep. No. 100-599 (1988).....	5
S. Rep. No. 112-258 (2012).....	6, 7
 Other Authorities	
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	21

INTRODUCTION

In its one-sentence liability clause, the VPPA prohibits a video tape service provider like NBCUniversal from “knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1). In its definitions section, the statute defines “personally identifiable information” to include, without exception, information that “identifies a person as having requested or obtained specific video materials or services.” *Id.* § 2710(a)(3). The circuit courts have split over that provision’s meaning.

The Second, Third, and Ninth Circuits impose an “ordinary person” gloss on the statutorily defined term. Under that rule, it does not matter whether the intended and actual recipient understood the disclosed information. Nor does it matter whether the provider knew the recipient would understand it. Instead, in these circuits, the dispositive issue is whether a hypothetical “ordinary person” would have understood the disclosed information.

The First Circuit embraces a materially different test. It asks whether it was “reasonably foreseeable” to the video tape service provider that the intended recipient would understand the disclosed information to identify a person as having requested or obtained specific video materials or services. Critically, unlike the “ordinary person” test, the First Circuit’s “reasonably foreseeable” test accounts for the provider’s actual knowledge of the intended recipient’s ability to understand a coded message.

This 3–1 circuit split is outcome determinative here. NBCUniversal disclosed information to Facebook

via a bit of code known as the Facebook Pixel. It knew Facebook would understand the disclosed information to identify Ms. Golden as having requested or obtained specific video materials. And Facebook did, in fact, understand the disclosed information that way. Under the First Circuit’s test, NBCUniversal’s actual knowledge would have been dispositive, and Ms. Golden’s VPPA claim would have survived. Under the Second Circuit’s test, though, that knowledge was irrelevant. As the decision below makes clear, the Second Circuit focuses exclusively on whether a hypothetical “ordinary person” would have understood the coded disclosure—a question the First Circuit would not have asked at all. Based on that question alone, the courts below dismissed Ms. Golden’s claim.

This entrenched circuit split affects millions of consumers across the country. Companies routinely incorporate technology that, like the Pixel, tracks and, without seeking or obtaining consent, automatically discloses consumers’ video-watching histories to third parties. As a result, disclosures like the ones at issue here are ubiquitous. At present, the circuit courts’ materially different tests yield different outcomes on identical facts. Put simply, the First Circuit protects against disclosures the Second, Third, and Ninth Circuits permit.

This case is an ideal vehicle to resolve the split. It arises from a motion to dismiss, meaning there are no factual disputes. In addition, both lower courts based their decisions exclusively on the “ordinary person” test. In fact, NBCUniversal did not advance any alternative arguments in favor of dismissal. Accordingly, there are no factual or procedural issues to complicate this Court’s review. Instead, this case

presents a purely legal question about the meaning of a statutorily defined term.

Moreover, the Second Circuit’s “ordinary person” rule is wrong. Most glaringly, it makes VPPA liability turn on a counterfactual inquiry—namely, whether a hypothetical “ordinary person” would have understood the disclosed information to identify a person as having requested or obtained specific video materials or services. That test is entirely atextual. The VPPA never once mentions an “ordinary person.” It does not distinguish between recipients based on their technological sophistication. Nor does it suggest any basis to consider the understanding of a hypothetical non-recipient instead of the known and intended recipient of disclosed information.

The Court should grant review and ensure the uniform application of federal law by resolving the split. In the alternative, it should hold the petition pending the outcome of *Salazar v. Paramount Global*, No. 25-459, which is scheduled for argument on October 14, 2026. There, in its first VPPA case, the Court is slated to resolve a separate circuit split over the meaning of a different term defined by the VPPA. But the proper interpretation of that term will depend in part on the meaning of “personally identifiable information.” See, e.g., Petitioner’s Brief at 22–27, 30–33, *Salazar v. Paramount Global*, No. 25-459 (Apr. 17, 2026) (comparing and contrasting the definitions of “consumer” and “personally identifiable information”); Brief for Respondent at 36–42, *Salazar v. Paramount Global*, No. 25-459 (June 23, 2026) (same).

The Court’s decision in *Salazar* may shed meaningful light on “personally identifiable information.” At the very least, then, the Court should hold this petition pending the outcome of *Salazar*, and

then consider whether to grant, vacate, and remand for further proceedings in light of that decision.

OPINIONS BELOW

The Second Circuit’s summary opinion (App. 1a–7a) is not reported but can be found at 2026 WL 1098473. The district court’s opinion (App. 8a–27a) is not reported but can be found at 2025 WL 2530689.

JURISDICTION

The court of appeals entered its opinion and judgment on April 23, 2026. App. 1a. Justice Sotomayor’s order of July 6, 2026, extended the time to file a petition for a writ of certiorari to September 18, 2026. *See* 28 U.S.C. § 2101(c). This petition is timely filed on September 18, 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–32a.

STATEMENT OF THE CASE

A. Statutory background

After President Ronald Reagan nominated Judge Robert Bork to a seat on this Court, a journalist visited Judge Bork’s local video store—Potomac Video—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.* The journalist then published “The Bork Tapes.” *Id.* Members of Congress “quickly decried the

publication.” *Id.*; 134 Cong. Rec. 10259 (May 10, 1988) (“denouncing” the “unwarranted invasion of personal privacy” Judge Bork endured).

Congress responded with the VPPA. The Senate Report reflects a concern that “the computer age,” which had already “revolutionized our world,” gave businesses the ability “to be more intrusive than ever before.” S. Rep. No. 100-599 (1988), at 6; *see also id.* at 5–6 (noting “Big Brother” might engage in broad surveillance based on the accumulation of “vast amounts of personal information” in computerized records); *id.* at 7–8 (crediting testimony that “advanced information technology” fostered “more intrusive data collection,” 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”).

The animating 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.* Members of Congress believed watching films is an “intimate process” that “should be protected from the disruptive intrusion of a roving eye.” *Id.* at 7.

Thus, the VPPA ensures consumers maintain control over their private information. It does so by generally prohibiting a “video tape service provider” from “knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1).

The law permits such disclosures in six specific circumstances, including with the consumer’s

“informed, written consent.” *Id.* § 2710(b)(2)(A)–(F). A provider that knowingly discloses a consumer’s personally identifiable information without consent, however, is subject to liquidated damages. *Id.* § 2710(c)(2).

In a definitions section, the VPPA defines three terms used in its 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).

In 2013, Congress amended the VPPA. *See* Pub. L. 112-258, 126 Stat. 2414 (2013). By then, “the VHS cassette tape” was largely “obsolete,” and the Internet had “revolutionized” both “the way that American consumers rent and watch movies and television programs” and the way they “share information,” including through “social networking sites, like Facebook.” S. Rep. No. 112-258 (2012), at 2. 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.*

As originally enacted, the VPPA required a video tape service provider 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” written consent “one time in advance.” *Id.* at 3; *see also* Pub. L. 112-258 (amending the VPPA “to clarify that a video tape service provider may obtain a consumer’s informed, written consent on an ongoing basis and that consent may be obtained through the Internet”); 18 U.S.C. § 2710(b)(2)(B) (containing the new, Internet-friendly advance-consent provision).

B. Factual and procedural background

1. The complaint

In this lawsuit, Sherhonda Golden alleges that NBCUniversal—which owns and operates Today.com—violated the VPPA by disclosing her personally identifiable information to Facebook without her consent. App. 33a–34a, 37a–39a, 41a, 64a, 69a–71a. Ms. Golden subscribes to NBCUniversal’s online newsletter. App. 62a. She used the newsletter’s hyperlinks to access NBCUniversal’s online video content. App. 62a–63a.

Via the Pixel NBCUniversal invisibly embedded into its website, Today.com automatically disclosed Ms. Golden’s Facebook ID with a video title every time she watched a video. App. 35a–37a, 41a, 54a–56a, 69a–71a. A Facebook ID is a unique numerical identifier Facebook assigns to every user. App. 56a, 58a. The Pixel is a bit of surveillance software Facebook developed, and NBCUniversal programmed and incorporated into Today.com, that tracks how a visitor interacts with a website, including which videos she has requested or obtained. App. 49a–50a, 52a–56a.

NBCUniversal made an “affirmative” and “conscious decision” to enable optional features of the

Pixel so that it would track and disclose personally identifiable information to Facebook. App. 54a–56a. NBCUniversal did so knowing “what the Pixel was, how it functioned, and what data it would collect and share.” App. 56a; *see also* App. 59a (similar). In short, NBCUniversal “knew” the Pixel’s disclosures would identify Ms. Golden to Facebook. App. 71a. It also “knew” the Pixel’s disclosures would reveal to Facebook what videos Ms. Golden had requested or obtained because it “chose, programmed, and intended for Facebook to receive the video content name.” App. 71a. And Facebook did, in fact, understand the disclosed information to identify Ms. Golden’s video-watching history. App. 52a, 62a–64a, 69a–71a.

2. The district court’s decision

NBCUniversal filed a motion to dismiss. App. 10a. It argued the alleged disclosures did not contain “personally identifiable information” because the Pixel’s coded transmissions would not have been understood by an “ordinary person.” App. 17a, 19a, 23a–25a. It did not advance any alternative arguments.

Based on binding Second Circuit precedent, the district court granted the motion. App. 19a, 22a–26a. To start, it acknowledged that the operative complaint “undisputedly alleges that NBCU[niversal], through the Facebook Pixel, transmitted” Ms. Golden’s Facebook ID “and video-watching history” to Facebook. App. 18a; *see also* App. 13a (noting that, “when a digital newsletter recipient watches video content, Today.com transmits to Facebook a cookie with the video content name, the URL of the prerecorded video that was viewed, and . . . the viewer’s Facebook ID” (footnote omitted)); App. 8a–9a (similarly noting that

the disclosed information, “when interpreted, would identify the user’s video title” and “Facebook identification number”).

But the district court applied the “ordinary person” test, which the Second Circuit had adopted months earlier in *Solomon v. Flipp’s Media*, 136 F.4th 41 (2d Cir. 2025), *cert. denied*, 146 S. Ct. 885 (Dec. 8, 2025). App. 20a–25a. There, the Second Circuit held the phrase “‘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.” *Solomon*, 136 F.4th at 52. Indeed, it held information is “personally identifiable information” only if “an ordinary person would understand [it], with little or no extra effort.” *Id.* at 54 (internal quotation marks and citation omitted). It has since explained this test “effectively shut the door for Pixel-based VPPA claims.” *Hughes v. Nat’l Football League*, No. 24-2656, 2025 WL 1720295, at *2 (2d Cir. June 20, 2025), *cert. denied*, 146 S. Ct. 1790 (Mar. 9, 2026).

The district court dismissed Ms. Golden’s complaint because the Pixel’s “HTTP transmissions” are “inaccessible to ordinary persons.” App. 23a. It held a hypothetical “ordinary person” could not “discern” that the strings of computer code transmitted by the Pixel “contained [Ms.] Golden’s F[acebook] ID or the titles of videos she had watched.” App. 24a. Instead, the alleged facts showed only that “*Facebook*—through its proprietary systems—could decode these technical strings” of code. App. 24a. Put simply, the district court held Ms. Golden’s VPPA claim was “foreclose[d]” because, in the Second Circuit, “disclosures comprehensible only to Facebook or other sophisticated actors are not PII.” App. 24a.

3. The Second Circuit's decision

Like the district court, the Second Circuit noted that Today.com, which incorporated the Pixel, “caused a tracking code reflecting [Ms. Golden’s] unique Facebook identification number along with the specific videos she had watched to be transmitted to Facebook.” App. 2a–3a. There was no disagreement about whether Facebook understood the disclosed information, nor about whether NBCUniversal knew Facebook would understand it.

The Second Circuit affirmed the dismissal solely because, under its binding precedent, “the information transmitted to Facebook by the Facebook Pixel tracking code, containing both a URL conveying information on video content watched by a user and a unique ID number tied to that user’s Facebook profile, [is] not personally identifiable information.” App. 4a, 7a. That was so because, in the Second Circuit’s view, “an ordinary person could not, with little or no extra effort, identify a user’s video watching habits on the basis of the code conveyed to Facebook.” App. 4a (internal quotation marks and citation omitted).

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). Everyone agrees the information disclosed here identified Ms. Golden—to Facebook—as having requested or obtained specific video materials. And Ms. Golden plainly alleged NBCUniversal *knew* Facebook would understand the disclosed information that way. The decisions below were based solely on the Second Circuit’s “ordinary

person” gloss on the statutorily defined term “personally identifiable information.” Because an ordinary person would not have understood the disclosures Facebook actually did understand, the lower courts dismissed Ms. Golden’s VPPA claim.

There is an acknowledged and entrenched 3–1 circuit split on the question presented here. The First Circuit’s “reasonable foreseeability” standard accounts for a video tape service provider’s actual knowledge of the recipient’s understanding. Under that test, if a provider knows the recipient will understand a coded disclosure to identify a person as having requested or obtained specific video materials or services, that disclosure is actionable even when others might not have understood it.

The “ordinary person” test adopted by the Second, Third, and Ninth Circuits, on the other hand, disregards a provider’s actual knowledge about the intended recipient of a coded message. In those circuits, a disclosure is actionable only if a hypothetical “ordinary person” would understand it, even when—as here—the recipient did understand it, and the provider knew the recipient would understand it.

This case is an ideal vehicle to resolve this critically important question and restore uniformity to this area of federal law. To start, NBCUniversal did not advance any alternative grounds to justify dismissal. Accordingly, both lower courts based their decisions solely on the “ordinary person” test. The outcome here hinges entirely on a single legal question, a matter of statutory interpretation, that arises at the motion-to-dismiss stage. There are no factual disputes or procedural issues to complicate this Court’s review.

Finally, the Second Circuit’s “ordinary person” test is wrong. It is entirely atextual, imposing a requirement the VPPA’s text nowhere mentions based on a distinction the statute nowhere draws. It is also inconsistent with this Court’s understanding of the word “knowingly” because it ignores a provider’s actual knowledge of the intended recipient’s ability to understand a coded message. Instead, the “ordinary person” test imposes a purely constructive knowledge formulation. At the same time, the test itself excludes some information that identifies a person as having requested or obtained specific video materials or services—the very information the definition *includes* without limitation—from the VPPA’s coverage. In this respect, it impermissibly creates an unenacted exception to the statute’s broad prohibition.

This Court should grant review and reverse. At the very least, it should hold this petition pending the outcome of *Salazar v. Paramount Global*, No. 25-459, and then grant, vacate, and remand if appropriate.

I. The circuits have split 3–1 on the meaning of “personally identifiable information.”

Four circuits have interpreted the phrase “personally identifiable information” as used in the VPPA. The Second, Third, and Ninth Circuits have adopted the “ordinary person” test. *See Solomon*, 136 F.4th at 52, 54; *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 284 (3d Cir. 2016).

In these circuits, disclosed information counts as “personally identifiable information” only if it “would, with little or no extra effort, permit an ordinary recipient to identify a particular person’s

video-watching habits.” *Nickelodeon*, 827 F.3d at 284; *see also id.* at 290 (holding “personally identifiable information” includes only “the kind of information that would readily permit an ordinary person to identify a specific individual’s video-watching behavior”); *Solomon*, 136 F.4th at 52–53 (adopting the Third Circuit’s “ordinary person” test); *Eichenberger*, 876 F.3d at 985 (same).

This test ignores what the actual recipient does with the information and what the provider knows the recipient can do with it. *See, e.g., Hughes*, 2025 WL 1720295, at *3 (explaining that, under the Second Circuit’s “ordinary person” test, it does not matter whether or how the actual recipient understands the disclosed information or whether the provider knew it would; the sole question is “whether an ordinary person would be able to understand the actual underlying code communication itself”); *Eichenberger*, 876 F.3d at 985 (acknowledging the test does not consider “what the recipient of [disclosed] information decides to do with it” because “‘personally identifiable information’ must have the same meaning without regard to its recipient’s capabilities”); *Nickelodeon*, 827 F.3d at 289–90 (acknowledging its rule disregards that the recipient was Google, “whose entire business model is purportedly driven by the aggregation of information about Internet users”).

But the First Circuit has charted a different course. Instead of asking what an “ordinary person” might understand, the First Circuit asks what the disclosed information is “reasonably and foreseeably likely to reveal” to the actual recipient. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016). Critically, this test—unlike the “ordinary person” test—accounts for the provider’s actual

knowledge of a recipient’s capabilities. *See id.* (noting that, according to the complaint, when the defendant made a coded disclosure to Adobe, “it kn[ew] that Adobe ha[d] the ‘game program,’ so to speak, allowing it to link the GPS address and device identifier information to a certain person by name, address, phone number, and more”); *see also United States v. Basilici*, 138 F.4th 590, 598 (1st Cir. 2025) (explaining reasonable foreseeability is “broader than knowledge”).

The First Circuit also discussed some helpful illustrations. It explained: “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.* In both examples, the disclosing party knows the recipient can decode the particular information disclosed. Put otherwise, the disclosing party knows the intended and actual recipient is *not* an “ordinary person.” Thus, the First Circuit’s test does not examine what such a hypothetical non-recipient might have understood.

Under the First Circuit’s test, then, a provider’s actual knowledge that the recipient will understand the disclosed information to identify an individual’s video-watching history is dispositive. Under the “ordinary person” test, however, such knowledge is irrelevant. In the Second, Third, and Ninth Circuits, what a hypothetical “ordinary person” would understand is all that matters—even when the provider knew the actual recipient was not an “ordinary person,” and even when it knew, more particularly, that the actual recipient would

understand the coded disclosure. *See, e.g., Kueppers v. Zumba Fitness LLC*, 805 F. Supp. 3d 1226, 1232–33 (S.D. Fla. 2025) (explaining that “[t]he Ninth Circuit requires not only that the receiving party, but that *any ordinary person*, be able to identify the individual video consumer based upon the information disclosed,” while the First Circuit requires only that “the *intended recipient* can connect the numerical ID to the individual”).

This circuit split is outcome-determinative here. Under the First Circuit’s “reasonable foreseeability” test, which accounts for a provider’s actual knowledge, Ms. Golden’s claim would have survived. As the First Circuit explained, when NBCUniversal disclosed coded information to Facebook, it knew Facebook had the “game program” required to decode it. Indeed, NBCUniversal knew Facebook *wrote* the “game program” needed to decode the disclosed information. But, as both lower courts held, Ms. Golden’s VPPA claim fails the “ordinary person” test.

The circuit split has also been widely acknowledged. For example, the district court here mentioned it. App. 20a (“The courts of appeals have diverged in interpreting PII under the statute.”). Likewise, the Second Circuit discussed the split when it adopted the “ordinary person” test. *See 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).

District courts across the country have similarly acknowledged the split. *See, e.g., Cochenour v. 360Training.com, Inc.*, No. 1:25-cv-7, 2025 WL 3251719, at *5 (W.D. Tex. Nov. 3, 2025) (noting “there continues to be a circuit split on the relevant test for

personally identifiable information”); *Banks v. CoStar Realty Info., Inc.*, No. 4:25-cv-00564, 2025 WL 2959228, at *6 (E.D. Mo. Oct. 20, 2025) (noting “[t]he circuits are split on this issue”); *Goodman v. Hillsdale Coll.*, No. 1:25-cv-417, 2025 WL 2941542, at *7 (W.D. Mich. Oct. 17, 2025) (noting the Second, Third, and Ninth Circuits have “diverged” from the First Circuit “on what it means for information to be personally identifiable”); *Krueger v. Chess.com, LLC*, No. 1:24-cv-05722, 2025 WL 2765375, at *4 n.4 (N.D. Ill. Sept. 28, 2025) (“A circuit split currently exists about the information that qualifies as personally identifiable information, specifically on how easy it must be to use the disclosed information to identify a specific person’s video-watching behavior.”); *Nixon v. Pond5, Inc.*, No. 1:24-cv-05823, 2025 WL 2030303, at *4 (S.D.N.Y. July 21, 2025) (noting “[t]he Courts of Appeals have diverged in their interpretation” of the term “personally identifiable information”).

Likewise, VPPA defendants and their amici have acknowledged the split in previous filings to this Court. *See, e.g.*, Reply Brief for Petitioner at 8, *Nat’l Basketball Ass’n v. Salazar*, No. 24-994 (July 16, 2025) (agreeing the Second Circuit’s decision in *Solomon* “deepened a circuit split about ‘personally identifiable information’”); Brief of Amici Curiae The Motion Picture Ass’n & NCTA – the Internet & Television Ass’n in Support of Respondent at 15–16, *Salazar v. Paramount Global*, No. 25-459 (June 30, 2026) (agreeing the First and Third Circuits “have adopted different definitions of ‘personally identifiable information’”).

The circuit split has already persisted for over a decade. At present, because the circuits disagree about the meaning of “personally identifiable information,” the viability of factually similar VPPA claims hinges

on where they have been brought. This Court should resolve the split and restore uniformity to this important area of federal law.

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

The circuit split over the meaning of “personally identifiable information” has nationwide implications. As the only VPPA defendant to reach this Court has admitted, the use of online tools that, like the Pixel, “track and disclose a website visitor’s browsing activity to a third-party for analytics or target advertising[] is commonplace.” Brief for Respondent at 47, *Salazar v. Paramount Global*, No. 25-459 (June 23, 2026). Indeed, that VPPA defendant described the kinds of disclosures at issue here as “ubiquitous.” *Id.* The VPPA should be applied uniformly to the millions of consumers affected by this “commonplace” and “ubiquitous” practice, no matter where they happen to bring their claims.

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, settle the meaning of “personally identifiable information,” and ensure the VPPA’s privacy protections are applied uniformly nationwide.

III. The Second Circuit’s misguided decision conflicts with this Court’s precedent in critical ways.

The Second Circuit’s “ordinary person” test is wrong as a matter of law. Indeed, it ignores one of the most basic intuitions about human communication—namely, the importance of knowing your audience. Communicators routinely craft their messages based on what they know the intended audience will understand. And not all messages are broadly intended to be understood by an ordinary person. Indeed, some messages are intentionally crafted *not* to be understood by an ordinary person, while remaining perfectly comprehensible to the intended recipient.

The Second Circuit’s “ordinary person” test ignores all that. It starts by replacing a known and intended recipient with an unknown (and possibly unknowable) “ordinary person.” It then examines a counterfactual scenario in which the disclosed information travels to this hypothetical “ordinary person” rather than to the known and actual recipient. And it concludes by permitting disclosures of information the actual recipient understands as identifying a person as having requested or obtained specific video materials—the very thing the statutory definition of “personally identifiable information” explicitly “includes” without exception, 18 U.S.C. § 2710(a)(3)—so long as an “ordinary person” would not *also* understand the disclosed information.

Worse still, the “ordinary person” test conflicts with this Court’s precedents in numerous ways.

A. The “ordinary person” test imposes an atextual requirement.

This Court has repeatedly declined to impose tests that go beyond what a federal statute’s text requires. *See, e.g., Blanche v. Lau*, 146 S. Ct. 1981, 1988 (2026) (rejecting a clear-and-convincing-evidence rule because “[n]othing in the [Immigration and Nationality Act] required the border officer to have clear and convincing evidence”); *Flowers Foods, Inc. v. Brock*, 608 U.S. 380, 385–86 (2026) (rejecting an argument that one “must either cross state lines or interact with a vehicle that does” to be “engaged in interstate commerce” under the Federal Arbitration Act because “[n]othing in [that statute’s] terms requires an individual to cross state lines or interact with a vehicle that does”); *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 605 U.S. 223, 233 (2025) (rejecting a minimum-contacts test because “nothing in the text of [the statute] requires a minimum-contacts analysis” and, instead, the phrase “minimum contacts” was “[n]otably absent” from the statute); *id.* at 234 (criticizing the Ninth Circuit for “read[ing] an additional requirement” into the statute).

Likewise, this Court has repeatedly refused to draw distinctions the statutory text does not itself draw. *See, e.g., A.J.T. v. Osseo Area Schs., Ind. Sch. Dist. No. 279*, 605 U.S. 335, 345–46 (2025) (rejecting a “bad faith or gross misjudgment standard” some circuits applied only to educational-services claims brought under the Americans with Disabilities Act because that statute’s “any person” language applied to “every” person, “without distinction or limitation”); *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 309–10 (2025) (rejecting the “background circumstances” test some circuits imposed on majority-group plaintiffs bringing

Title VII claims because the statute’s “any individual” language “draws no distinctions between majority-group plaintiffs and minority-group plaintiffs,” thereby leaving “no room for courts to impose” distinctions of their own making).

The “ordinary person” test flouts both principles. Nothing in the VPPA requires courts to consider what an “ordinary person” might understand about disclosed information. 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 judicially created “ordinary person” test, *not* the VPPA’s text, does all that work.

Critically, both the Second and Third Circuits acknowledge that the VPPA’s text does *not* impose any “ordinary person” requirement. *See Solomon*, 136 F.4th at 52 (admitting that “the words of the [statutory] definition” can “be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party”); *Nickelodeon*, 827 F.3d at 285–86 (agreeing 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”). In fact, the phrase “ordinary person” is “[n]otably absent,” *Antrix*, 605 U.S. at 233, from the entire VPPA. The statute never mentions such a person.

Instead, the VPPA’s plain text prohibits knowing disclosures of information that identifies a consumer as having requested or obtained video materials to

“any person.” 18 U.S.C. §§ 2710(a)(3), (b)(1). This formulation reaches knowing disclosures of all such information—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 “any person”—“is to produce general coverage,” and “not to leave room for courts to recognize ad hoc exceptions”).

Despite the statute’s all-encompassing “any person” language, the “ordinary person” test draws a distinction among recipients based on their technological sophistication, and then it permits disclosures only the particularly savvy understand. *See, e.g., Solomon*, 136 F.4th at 52 (excluding information “only a sophisticated technology company [can] use” to “identify a consumer’s video-watching habits,” even though the statutory text can “be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party”); *Manza v. Pesi, Inc.*, 784 F. Supp. 3d 1110, 1122 (W.D. Wis. 2025) (explaining that, under the “ordinary person” test, a “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. Ms. Golden alleged that Facebook understood the disclosures at issue to link her to the specific videos she had watched. In other words, to Facebook at least, the disclosed information did identify Ms. Golden “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.*, Ms. Golden’s VPPA claim should have proceeded.

Because of its recently adopted atextual test, however, the Second Circuit affirmed the dismissal of her claim. App. 4a–7a. It did so because a hypothetical “ordinary person” who did not receive the disclosed information would not have understood it the way Facebook did, in fact, understand it. App. 4a–7a.

Consider, too, that the Second Circuit does not hold that every disclosure a hypothetical “ordinary person” would understand to link an individual to her video-watching history contains “personally identifiable information.” Instead, it imposes a second atextual limitation. In its view, 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.

As just one example, the Second Circuit has held that plugging information into ChatGPT is too much “extra” effort. *Hughes*, 2025 WL 1720295, at *3; 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?

By virtue of the Second Circuit’s doubly atextual “ordinary person” test, there is no way to know. It should come as no surprise, then, that the test itself has opened subsidiary splits among the lower courts. Compare, e.g., *Solomon*, 136 F.4th at 54–55 (holding a Facebook ID is not personally identifiable information under the “ordinary person” test), with *Chandra v. Prager Univ. Found.*, No. 2:25-cv-03984, 2026 WL 434938, at *2–3 (C.D. Cal. Jan. 27, 2026) (applying the “ordinary person” test to reach the opposite conclusion, while noting that courts in the Ninth Circuit—which also applies the “ordinary person” test—“have uniformly declined to follow” the Second Circuit’s “application of the ordinary person test”).

Given these overlapping problems, it is no wonder that several courts have rejected the “ordinary person”

test because it is atextual. *See, e.g., Damrau v. Colibri Grp., LLC*, No. 4:24-cv-01441, 2026 WL 198712, at *4 (E.D. Mo. Jan. 23, 2026) (describing the test as both “unnecessary” and “extra-textual”); *Banks*, 2025 WL 2959228, at *6 (same); *Manza*, 784 F. Supp. 3d at 1119 (noting that courts applying the test do not “rely on the text” of the statute and “have identified little textual basis for the limitation they impose”); *Goodman*, 2025 WL 2941542, at *8 (similar); *Lee v. Springer Nature Am., Inc.*, 769 F. Supp. 3d 234, 260 (S.D.N.Y. 2025) (explaining that the test is “a judicial construct” that does not arise from the statute’s text).

At bottom, the “ordinary person” test does exactly what this Court has instructed courts to avoid. It imposes an additional requirement on VPPA plaintiffs beyond those specified in the statute’s text. *Compare Antrix*, 605 U.S. at 226 (rejecting the imposition of an “additional requirement” that “goes beyond the [statutory] text”), *with Solomon*, 136 F.4th at 48 (describing the “ordinary person” test as a judicial attempt to “define[] personally identifiable information beyond the statutory definition”).¹ And it does so based on a distinction the statute never draws,

¹ In fact, the Second Circuit’s effort to define personally identifiable information “beyond the statutory definition” is itself inconsistent with this Court’s precedents. When—as here—“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.

without any “textual indication” that its limitation should apply. *A.J.T.*, 605 U.S. at 345.

B. The “ordinary person” test improperly disregards the provider’s actual knowledge of the intended recipient’s abilities.

The Second Circuit’s entire discussion of the VPPA’s use of “knowingly” is upside down. *See Solomon*, 136 F.4th at 52–53 (relying on “knowingly” to justify its limitation on “personally identifiable information”). The word “knowingly” appears in the liability clause, *not* in the definition of “personally identifiable information.” And, there, “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 *unknowingly* disclose personally identifiable information.

In short, the presence of “knowingly”—in a separate statutory provision—reveals nothing about the scope of the defined term “personally identifiable information.” Information that identifies a person as having requested or obtained specific video materials remains “personally identifiable information” even if a provider only unwittingly discloses it. Section 2710(b)(1)’s scienter requirement involves a separate statutory element. It does not limit the meaning of “personally identifiable information.”

In addition, even accepting the Second Circuit’s faulty premise that “knowingly” sheds light on the meaning of “personally identifiable information,” this Court has held that a “knowingly” requirement refers to one’s actual “knowledge and subjective beliefs—not to what an objectively reasonable person may have

known or believed.” *United States ex rel. Schutte v. Supervalu Inc.*, 598 U.S. 739, 742–43, 748–50 (2023). As a result, this Court rejected a reading of “knowingly” that rendered the “defendants’ subjective beliefs . . . irrelevant to their scienter.” *Id.* at 753; see also *id.* at 755 (rejecting a “purely objective” test for whether a person has acted “knowingly,” even if that term might contain an objective standard *in addition to* a subjective one).

But, as discussed above, the “ordinary person” test requires courts to disregard a provider’s actual knowledge of the intended recipient’s ability to understand a coded message. See *supra* at 13. Indeed, the test reads actual knowledge out of the VPPA’s “knowingly” requirement, replacing it wholesale with a constructive knowledge formulation. That undertaking cannot be squared with *Schutte*.

More fundamentally, 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* itself understands.

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), for example, 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.

To be sure, 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 alike—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. 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 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.

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, a particular color of smoke from a particular Vatican chimney, or coded blink patterns 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.”

These points confirm that the Second Circuit’s “ordinary person” test makes a hash of the VPPA’s “knowingly” requirement. The critical point here, though, is that the test excludes a provider’s *actual* knowledge of the intended recipient’s ability to understand a coded message and forces all plaintiffs to prove *constructive* knowledge based on what a

hypothetical “ordinary person” might understand. This Court’s precedent forecloses that alteration.²

C. The “ordinary person” test imposes an unenacted exception to the VPPA’s prohibitions.

When Congress has specified exceptions to statutory requirements or prohibitions, this Court has steadfastly refused to create 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[.]”).

According to the Second Circuit itself, the “ordinary person” test embodies a new, unenacted statutory exception: “*Solomon* effectively shut the door for Pixel-based VPPA claims.” *Hughes*, 2025 WL 1720295, at *2. But Congress did not place the Pixel—or any other technology—beyond the VPPA’s reach. Indeed,

² To be clear, Section 2710(b)(1)’s “knowingly” requirement might give plaintiffs the ability to rely on *either* actual *or* constructive knowledge. And, in cases involving constructive knowledge, an examination of what an “ordinary person” understands might even make sense. But, under this Court’s precedent, the VPPA plainly does not *require* plaintiffs to show constructive knowledge. The text’s “knowingly” formulation must include, at a minimum, actual knowledge. And this case involves allegations of actual knowledge, not constructive knowledge. Here, then, it makes no sense to consider what anyone other than the provider and the known recipient understood.

the statute never mentions *how* the prohibited disclosures might occur.

Instead, Congress broadly prohibited knowing disclosures of a consumer’s personally identifiable information. *See* 18 U.S.C. § 2710(b)(1). It then enacted six specific exceptions to that broad prohibition. *See id.* § 2710(b)(2)(A)–(F). These exceptions do not concern the technological means by which a disclosure is effectuated. Nor do they concern whether a hypothetical non-recipient would understand the disclosed information. The “ordinary person” test effectively imposes a judicially created exception for Pixel-based disclosures, or—more broadly—for disclosures not readily understood by an “ordinary person.” That exception conflicts with this Court’s precedents. It also conflicts with the ancient maxim “*expressio unius est exclusio alterius*” (*i.e.*, the expression of one thing excludes all others).

And this particular addition seems to swallow the exceptions Congress actually enacted. There is little need, for example, for a law enforcement agency to bother with the burden of getting a warrant to obtain a plain-English disclosure of information that identifies a person’s video-watching history, 18 U.S.C. § 2710(b)(2)(C), when it can instead deploy the Pixel—or work with the provider to create some other code an “ordinary person” will not understand—and avoid the VPPA’s coverage entirely, even as it acquires the same underlying information about the target. Nor is there any real need for providers to get their consumers’ informed, written consent. *Id.* § 2710(b)(2)(B). They can simply use the Pixel to effectuate the disclosures—or otherwise encode their consumers’ information—and knowingly reveal information that does, to those

disclosures’ actual recipients, identify consumers’ video-watching histories without their consent.

* * *

There is no basis to overwrite the VPPA’s definition of “personally identifiable information” to impose an “ordinary person” limitation that appears nowhere in the text. *See Antrix*, 605 U.S. at 233 (declining “to add in what Congress left out”). Still, multiple circuits currently impose that atextual limitation. This Court should grant certiorari, resolve the acknowledged and entrenched circuit split regarding the meaning of “personally identifiable information,” and ensure the VPPA is applied as written nationwide. At the very least, the Court should hold this petition pending the outcome of *Salazar v. Paramount Global*, No. 25-459, and then consider whether to grant the petition, vacate the decision below, and remand the case in light of the Court’s first opinion interpreting the VPPA.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: Summary Order, U.S. Court of Appeals for the Second Circuit (April 23, 2026).....	1a
APPENDIX B: Opinion & Order, U.S. District Court for the Southern District of New York (September 3, 2025).....	8a
APPENDIX C: 18 U.S.C.A. § 2710.....	28a
APPENDIX D: Fourth Amended Class Action Complaint, U.S. District Court for the Southern District of New York (May 9, 2025)	33a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of The United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of April, two thousand twenty-six.

PRESENT:

SUSAN L. CARNEY,
BETH ROBINSON,
MYRNA PEREZ,

Circuit Judges.

No. 25-2226

2a

SHERHONDA GOLDEN, Individually
and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

NBCUNIVERSAL MEDIA, LLC,
Defendant Appellee.

FOR PLAINTIFF-APPELLANT:

JOSHUA HAMMACK (Michael L. Murphy, *on the brief*), Bailey & Glasser, LLP, Washington, D.C.

FOR DEFENDANT-APPELLEE:

BENJAMIN THOMASSEN (Jeffrey Landis, *on the brief*), ZwillGen PLLC, Washington, D.C.

Appeal from a judgment of the United States District Court for the Southern District of New York (Engelmayer, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 3, 2025, is **AFFIRMED**.

Plaintiff-Appellant Sherhonda Golden appeals the judgment of the district court that dismissed her Fourth Amended Complaint against Defendant-Appellee NBCUniversal Media, LLC (“NBC”). Golden alleged that NBC violated the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710, by sharing personally identifiable information about her video-watching activity with third parties without her consent. In particular, she alleges that in its website, Today.com, NBC embedded a “Facebook Pixel” that caused a tracking code reflecting her unique

Facebook identification number along with the specific videos she had watched to be transmitted to Facebook. The district court granted NBC's motion to dismiss on the basis of this Court's decision in *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025), *cert. denied*, 146 S.Ct. 885 (Dec. 8, 2025), which held that factually similar allegations failed to state a VPPA claim. *See Golden v. NBCUniversal Media, LLC*, No. 22-cv-9858, 2025 WL 2530689, at *5-7 (S.D.N.Y. Sep. 3, 2025).¹ We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

"We review the grant of a motion to dismiss under Rule 12(b)(6) without deference to the district court's reasoning." *Marcus & Cinelli, LLP v. Aspen American Insurance Co.*, 158 F.4th 333, 340 (2d Cir. 2025).² "If, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, the complaint fails to plausibly state a claim, then dismissal under Rule 12(b)(6) is warranted." *Id.*

Under the VPPA, "[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). "Personally identifiable

¹ Golden also brought a state law claim for unjust enrichment premised on the same facts. The district court dismissed the unjust enrichment claim as duplicative of Golden's VPPA claim. *See Golden*, 2025 WL 2530689, at *8. Golden does not challenge this ruling on appeal.

² In quotations from caselaw, this summary order omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

information” is defined in the VPPA to include “information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.” *Id.* § 2710(a)(3).

In *Solomon*, this Court recently considered for the first time whether the information disclosed to Facebook through the Facebook Pixel constitutes “personally identifiable information” for purposes of the VPPA. 136 F.4th at 47-55. Based on the text and context provided by other provisions of the statute, and fortified by the legislative history and guidance from other Circuits’ decisions, we determined 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.” *Id.* at 52. We concluded that this ordinary person test best aligns with the statute’s text and purpose because it ties liability to what the disclosing party “knowingly discloses,” 18 U.S.C. § 2710(b), and not to what a technologically savvy third party may do with that information. *See Solomon*, 36 F.4th at 52.

Applying that test, we concluded that the information transmitted to Facebook by the Facebook Pixel tracking code, containing both a URL conveying information on video content watched by a user and a unique ID number tied to that user’s Facebook profile, was not personally identifiable information. *See id.* at 54-55. We reasoned that an ordinary person could not, “with little or no extra effort,” identify a user’s video watching habits on the basis of the code conveyed to Facebook. *Id.* at 54.

The district court here rightly determined that *Solomon* compels dismissal of Golden’s claims, which are based on substantially the same allegations as in *Solomon*.

Golden does not dispute that *Solomon* is dispositive. Rather, she argues that *Solomon* is no longer good law in light of intervening Supreme Court precedent. In particular, she cites a series of recent decisions that she contends compel a different analysis: *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025), *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 605 U.S. 223 (2025) and *A. J. T. ex rel. A. T. v. Osseo Area Schools, Independent School District No. 279*, 605 U.S. 335 (2025).³

A prior decision of this Court is “binding authority from which we cannot deviate, unless and until it is overruled either by an en banc panel of our Court or by the Supreme Court.” *Gilead Community. Services, Inc. v. Town of Cromwell*, 112 F.4th 93, 100 (2d Cir. 2024). A narrow exception to that principle applies when “an intervening Supreme Court decision casts doubt on the prior ruling—that is, where the Supreme Court’s conclusion in a particular case broke the link on which we premised our prior decision.” *Id.* That exception applies only if there is a “conflict, incompatibility, or inconsistency between

³ In addition, in a March 30, 2026 letter submitted to the Court under Fed. R. App. P. 28(j), Golden identified a fourth case that she claims supports her argument: *Rico v. United States*, 607 U.S. ---, 146 S. Ct. 947 (2026). There, the Supreme Court held that the Sentencing Reform Act does not authorize a rule adopted by the Ninth Circuit automatically extending a defendant's period of supervised release if the defendant violates the conditions of her supervision by absconding. *Id.* at 952-53. Nothing in that case alters our analysis.

this Circuit’s precedent and the intervening Supreme Court decision,” and we “resort to this exception cautiously,” as “less-than-stringent application of the standards for overruling prior decisions not only calls into question a panel’s respect for its predecessors but also increases uncertainty in the law by revisiting precedent without cause.” *Id.*

None of the Supreme Court decisions Golden cites creates a “conflict, incompatibility, or inconsistency” with *Solomon*. *Id.* In each case, the Supreme Court concluded that, in applying a statute, the Court of Appeals had adopted requirements that went beyond what the statutory text required or allowed. In *Ames*, the Court held that Title VII does not make or allow for any distinction between discrimination claims brought by majority-group plaintiffs and those brought by minority-group plaintiffs. 605 U.S. at 309-311. In *CC/Devas*, the Court rejected the Ninth Circuit’s imposition of a minimum contacts requirement on top of the two enumerated requirements for personal jurisdiction in the Foreign Sovereign Immunities Act. 605 U.S. at 232-36. And in *A. J. T.*, contrary to the Eighth Circuit’s view, the Court concluded that nothing in the text of the Americans with Disability Act or the Rehabilitation Act requires that discrimination claims based on educational services be subject to a distinct, more demanding analysis than disability discrimination claims brought in other contexts. 605 U.S. at 344-49.

Far from announcing new rules that conflict with this Court’s decision in *Solomon*, these cases simply apply longstanding principles that a statute’s text is the lodestar for its interpretation, and other considerations may not be used to reach an interpretation at odds with the statutory text. That is

exactly the approach taken by *Solomon*. Thus, Golden has not demonstrated that the decisions she cites warrant this panel taking the extraordinary step of seeking to overrule our precedent, regardless of any disagreement Golden may have with the merits of our prior decision. See *Gilead*, 112 F.4th at 100 (holding that overruling precedent was unwarranted where none of the cited Supreme Court decisions addressed the statute at issue, and the decisions counseled “that we must interpret individual statutes on the basis of their particular text, structure, and history, and caution[ed] against unreflective application of rules from one statute to another”). Indeed, the panel *could not* do so absent agreement by a majority of the active judges of this Court that the narrow exception discussed above applies. See *U.S. v. Peguero*, 34 F.4th 143, 158 n.9 (2d Cir. 2022) (“[A] three-judge panel may overrule Circuit precedent if it first follows a mini-*en banc* procedure—i.e., if the panel circulates its opinion among all active judges and receives no objections to its filing.”).

Because Golden’s factual allegations are materially indistinguishable from the claims we decided in *Solomon*, and because *Solomon* is binding precedent in this Circuit, the district court properly dismissed her claims.

* * *

For the above reasons, the judgment is AFFIRMED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court
/s/ Catherine O’Hagan Wolfe

8a

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22 Civ. 9858 (PAE)

SHERHONDA GOLDEN, *individually and on
behalf of all others similarly situated,*
Plaintiff,

-v-

NBCUNIVERSAL MEDIA, LLC,
Defendant.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Plaintiff Sherhonda Golden brings this putative class action against NBCUniversal Media, LLC (“NBCU”), claiming violations of the Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”), and unjust enrichment. Golden claims that NBCU knowingly disclosed to Meta Platforms, Inc. (“Facebook”)—the parent company of popular social media service Facebook—personally identifiable information (“PII”) about Golden and other digital visitors to Today.com (“users”), and also information about their video consumption. This information, which Golden contends was disclosed without users’ consent, was allegedly transmitted through the Facebook Pixel, a functional software code that collects users’ data. The data consisted of (1) a sequence of characters, letters,

and numbers which, when interpreted, would identify the user's video title and uniform resource locator ("URL" or web address), and (2) the user's Facebook identification number ("FID" or "Facebook ID"), a unique sequence of numbers linked to the user's Facebook profile.

This case has a complex history, as reflected in the fact that the complaint that NBCU now moves to dismiss is Golden's Fourth Amended Complaint. In November 2022, Golden filed her first complaint. Dkt. 1. In August 2023, the Court dismissed her First Amended Complaint, holding that Golden had not plausibly alleged her consumer status under the VPPA. Dkt. 34 ("2023 Decision"). But the Court granted Golden leave to amend to add factual allegations as to the operation of NBCU's mobile app and email newsletter. *See id.* at 26. Golden eventually filed the Third Amended Complaint, Dkt. 38 ("TAC"),¹ which the Court dismissed under Federal Rule of Civil Procedure 12(b)(6), finding that Golden's receipt of a non-video email newsletter did not make her a "consumer" under the VPPA, Dkt. 44 ("September 2024 Decision"). In dismissing, however, the Court noted that an appeal was pending in *Salazar v. National Basketball Association*, 685 F. Supp. 3d 232 (S.D.N.Y. 2023) ("*Salazar I*"), which this Court had cited in dismissing. *See* September 2024 Decision at 13 n.7. The Court stated that "[i]n the event the Second Circuit resolves *Salazar* in a manner inconsistent with this decision, Golden may . . . seek an indicative ruling from this Court under Rule 62.1." *Id.*

¹ On September 7, 2023, Golden filed a Second Amended Complaint. Dkt. 35. In September 2023, after the parties conferred, Golden, with NBCU's consent, filed the TAC. Dkt. 38.

Golden appealed. While her appeal was pending, the Circuit issued *Salazar v. National Basketball Association*, 118 F.4th 533 (2d Cir. 2024) (“*Salazar II*”). It held, contrary to a premise of the September 2024 Decision, that a subscription to a digital newsletter linked to video content could establish “consumer” status under the VPPA. *Id.* at 544. This Court then issued an indicative ruling to the effect that, if remanded, it would deny NBCU’s motion to dismiss Golden’s VPPA claim on the basis of *Salazar II*. Dkt. 51 (“November 2024 Ruling”). Golden then moved to dismiss her appeal and remand to this Court, which the Second Circuit granted. *See* Dkt. 52.

Golden thereupon amended and filed the Fourth Amended Complaint, the operative complaint today. *See* Dkt. 56 (“FAC”). NBCU now moves anew to dismiss the FAC, on a ground not previously litigated. For the reasons that follow, the Court grants NBCU’s motion.

I. Factual Background²

The Court incorporates by reference the facts recounted in its earlier decisions. The following summary focuses on the factual allegations—including those added by the FAC—necessary to resolve the limited issue presented.

² The following facts are drawn primarily from the FAC. *See DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010) (“In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.”). For the purpose of resolving the motion to dismiss under Rule 12(b)(6), the Court presumes all well-pled facts to be true and draws all reasonable inferences in favor of plaintiff. *See Koch v. Christie's Intl PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

A. Today.com's Website and Newsletter

NBCU owns and operates Today.com, a website accessible from a desktop computer or a mobile app. FAC ¶¶ 1, 4. Today.com offers both live and on-demand video content.

The website also allows users to “sign up” for a daily digital newsletter. *Id.* ¶ 42. Today.com directs users who wish to sign up for the newsletter to enter an email address and click “sign up.” *Id.* As an illustration, the FAC presents the following screenshot that users, interested in signing up for a newsletter, would have seen on November 18, 2022:



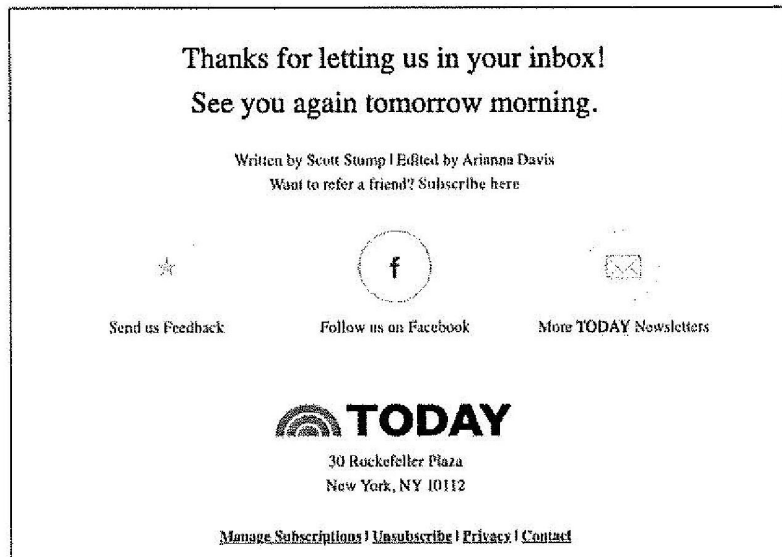
Id. Newsletter recipients provide NBCU with their internet protocol (“IP”) address, a unique number assigned to all information technology connected devices, which conveys to NBCU the device’s city, zip code, and physical location. *Id.* ¶ 49.

Once a user signs up, a daily digital newsletter is delivered to the email address that the user provided to Today.com. The newsletters contain hyperlinks to “web-hosted audio visual content, exclusive content,

12a

and direct, prominently featured links to audio visual content on Today.com.” *Id.* ¶ 53.

The FAC contains an excerpt of a screenshot of a “This is Today” daily digital newsletter from September 6, 2023 that would have been sent to a user’s email address:



Id. ¶ 43. Today.com notifies users who have signed up for a daily newsletter that they can: (1) refer a friend to “subscribe here”; (2) manage their “subscriptions”; and (3) “unsubscribe” from their subscription to the newsletter. *Id.* ¶ 44.

Today.com permits users to sign up for multiple daily digital newsletters. These include ones entitled: This is TODAY; Start TODAY; Stuff We Love; TODAY On the Show; TODAY Food; TODAY Parents; Read with Jenna; and Concert Series Alerts, Show Updates, Special Events & Offers. *Id.* ¶ 45. NBCU offers these daily newsletters “with the goal of building an ongoing relationship with its subscribers

. . . by having direct access to and delivering content to each subscriber’s inbox.” *Id.* ¶ 46. These daily digital newspapers also “drive interactions with [NBCU’s] own website and video content.” *Id.*

B. Facebook Pixel

As of May 2025, Today.com’s privacy policy states that it automatically collects certain information—including “content you view and duration.” *Id.* ¶ 57.³ But the policy does not disclose that Today.com shares that information with third parties, including, as relevant here, Facebook. *Id.* ¶ 59.

Today.com installed Facebook’s tracking pixel (the “Pixel”) to transmit certain information about users to Facebook, which Facebook then uses to target ads for particular users. *Id.* ¶ 61. The Pixel tracks users’ actions on Facebook advertisers’ websites and reports these to Facebook. *Id.* ¶ 78. The website advertiser informs Facebook which website events it wishes to track. *Id.* Facebook, in turn, generates corresponding pixel code for the advertiser to include in the code of its website. *Id.* Thus, when a digital newsletter recipient watches video content, Today.com transmits to Facebook a cookie⁴ with the video content name, the URL of the prerecorded video that was viewed, and, for visitors with an active and logged in Facebook account, the viewer’s Facebook ID. *Id.*

³ NBCU updated its privacy policy on December 16, 2022, approximately one month after Golden filed this lawsuit. *Id.* ¶ 57 n.2.

⁴ A cookie is “a small file or part of a file stored on a World Wide Web user’s computer, created and subsequently read by a website server, and containing personal information (such as a user identification code, customized preferences, or a record of pages visited).” *Cookie*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/cookie>.

¶¶ 80-81. An FID is a unique and persistent identifier Facebook assigns to each Facebook user. *Id.* ¶ 81. Any “ordinary user” can use an FID to look up a Facebook profile, “thereby identifying the person who watched the video and revealing any public details displayed on that profile,” such as photos, posts, location, occupation, spouse, and education. *Id.* ¶ 95.

When installing the Facebook Pixel, “[d]evelopers and marketers can *optionally choose* to send additional information about the visit through Custom Data events.” *Id.* ¶ 83 (emphasis in original). The FAC alleges that NBCU programmed the Pixel to transmit, to Facebook, users’ PII and their video viewing history. *Id.* (NBCU declined to program website or app so as not to transmit user information); *id.* ¶ 81 (NBCU installed Pixel so that Facebook received video content name, URL, and user’s FID).

As a result of the Pixel installation, when users have clicked on hyperlinks on the daily digital newsletter to view video content on Today.com, the Pixel has transmitted to Facebook “the content name of the URL, which identifies: (1) that there was a video on the page; (2) the video was ‘watched;’ (3) an identifier for the video content; and (4) the subscriber’s FID.” *Id.* ¶ 106. As an illustration, the FAC reproduces this screenshot of the computer code transmission sent to Facebook via the Pixel:

[illegible]

Id. ¶ 106. The screenshot depicts a video URL path (e.g., the line of code after “:path:” that contains the text “2Fvideo%2Fthe-line-to-pay-respects-to-queen-elizabeth-wraps-around-london”), which “reveals the video name [and] URL.” *Id.* It also depicts a cookie value (e.g., the line of code after “cookie:” that contains the text “c_user-100003190670927”) that reveals “the viewer’s FID.”⁵ *Id.*

The Pixel transmits users' information without their consent or knowledge. *Id.* ¶ 103. NBCU benefits financially from providing this information to Facebook. *Id.* ¶127.

C. Golden’s Experience

In 2022, Golden signed up to receive a Today.com newsletter. *Id.* ¶ 114. She has since received emails and other communications from Today.com. *Id.* Golden has accessed audiovisual content via hyperlinks provided in the daily digital newsletters. *Id.* ¶ 115. She has also accessed Today.com’s content through its website and mobile app. *Id.* ¶ 118.

Golden has had a Facebook account since approximately 2012. *Id.* ¶ 116. During the period

⁵ The phrase “c user=” is followed by a string of numbers comprising the user's FID. *Id.* ¶ 90.

relevant here, she has used her Today.com subscription to view videos through Today.com or its mobile app while concurrently logged into her Facebook account. *Id.* ¶¶ 122-23. Golden never agreed, authorized, or otherwise consented to NBCU's disclosure of her personal video viewing information to Facebook, and has not been given written notice stating that it is NBCU's practice to do so. *Id.* ¶ 124.

II. Procedural History

On November 18, 2022, Golden filed an initial Complaint. Dkt. 1. On January 27, 2023, NBCU moved to dismiss under Rule 12(b)(6), Dkt. 8. On February 17, 2023, after the Court issued an amend-or-oppose order, Dkt. 13, Golden filed the First Amended Complaint, on behalf of a putative class, bringing VPPA and unjust enrichment claims, Dkt. 14. On March 10, 2023, NBCU moved to dismiss. Dkt. 15. On August 23, 2023, the Court issued the 2023 Decision dismissing the First Amended Complaint, finding that it had not pled that Golden was a "subscriber" within the meaning of the VPPA, without prejudice to Golden's right to amend to add allegations regarding the operation of Today.com's mobile app and email newsletter, which might buttress its claim that Golden qualified as a VPPA subscriber. Dkt. 34.

On September 14, 2023, Golden filed the Third Amended Complaint ("TAC"). Dkt. 38. On September 21, 2023, NBCU moved to dismiss the TAC under Rule 12(b)(6). Dkt. 40. On September 11, 2024, the Court granted NBCU's motion to dismiss. Dkt. 44.

On October 4, 2024, Golden appealed. *See* Dkt. 46. While her appeal was pending, the Second Circuit

decided *Salazar II*, holding that newsletter subscribers can be VPPA “consumers.” 118 F.4th at 550-53. On November 27, 2024, this Court issued an indicative ruling that, were the case remanded, it would deny NBCU’s motion to dismiss. Dkt. 51. On January 3, 2025, the Second Circuit dismissed Golden’s appeal and remanded. *See* Dkt. 52.

On May 9, 2025, Golden, with the Court’s permission, *see* Dkt. 55, amended and filed the FAC, the operative complaint, Dkt. 56. On June 5, 2025, NBCU moved to dismiss the FAC, Dkt. 57, on a different ground—that the FAC does not adequately allege that NBCU disclosed Golden’s PII under the VPPA—and filed a memorandum of law, Dkt. 58 (“Def. Br.”), and declaration, Dkt. 59, in support. On June 27, 2025, Golden opposed. Dkt. 62 (“P1. Opp.”). On July 17, 2025, NBCU replied. Dkt. 65 (“Def. Reply”). On August 1 and 22, 2025, Golden filed notices of supplemental authority. Dkts. 66, 68. On August 7 and 29, 2025, NBCU replied. Dkts. 67, 69.

III. Applicable Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is properly dismissed where, as a matter of law, “the allegations in a complaint, however true, could not raise a claim of entitlement to relief.” *Twombly*, 550 U.S. at 558. When resolving a motion to dismiss, the Court must assume all well-pled facts to be true, “drawing all

reasonable inferences in favor of the plaintiff.” *Koch*, 699 F.3d at 145; *see also Ai Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993) (“[A]ll allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff’s favor, notwithstanding a controverting presentation by the moving party.”). That tenet, however, does not apply to legal conclusions. *See Iqbal*, 556 U.S. at 678. Pleadings that offer only “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

IV. Discussion

On NBCU’s earlier motions to dismiss, the decisive issue was whether Golden had plausibly pled that she was “a subscriber of goods and services,” and thus a “consumer” within the VPPA’s meaning. In light of *Salazar II*, the Court held (and NBCU no longer appears to dispute) that Golden’s TAC adequately so pled. *See* November 2024 Ruling at 2-3. The FAC, the operative pleading today, reprises the allegations that Golden subscribed to Today.com’s digital newsletters, which provided hyperlinks to video content. *See, e.g.*, FAC ¶¶ 121-23. Under *Salazar II*, that subscription makes Golden a consumer. *See* 118 F.4th at 549-50.

NBCU’s current motion to dismiss presses a different point. It argues that the FAC does not adequately allege that NBCU disclosed Golden’s PII within the meaning of the VPPA.

The FAC undisputedly alleges that NBCU, through the Facebook Pixel, transmitted Golden’s URL, FID, and video-watching history. *See, e.g.*, FAC ¶¶ 81, 100. Its basis for claiming that NBCU

disclosed Golden's PII is that an FID uniquely identifies a Facebook user. *See id.* ¶¶ 12, 119. In moving to dismiss, NBCU, relying on the Second Circuit's recent decision construing the VPPA in *Solomon v. Flipps Media, Inc.*, 136 F.4th 41 (2d Cir. 2025), counters that the FAC does not allege an actionable disclosure of PII. Def. Br. at 1-2, 7-16. NBCU is correct.

A. VPPA Claim

The VPPA was enacted in 1988 after a newspaper profile disclosed the video rental history of Supreme Court nominee Robert Bork. *See Salazar II*, 118 F.4th 544-45 (citing S. Rep. No. 100-599, at 5-6 (1988)). Seeking to "preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials," the VPPA creates a private right of action for consumers to sue video tape service providers who disclose personally identifiable information about the consumers' video-watching habits. *Id.* at 545 (quoting S. 2361, 100th Cong. (1988)). Under the Act, "[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). As further defined by the Act,

- (1) "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider; .
- (3) "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) “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[.]

Id. § 2710(a). Salient here, PII, under the VPPA, has three distinct elements: (1) the consumer’s identity, (2) the video material’s identity, and (3) the connection between them. *Id.* It “constitutes more than just information that identifies an individual, but also information that can be *used* to identify an individual.” *Solomon*, 136 F.4th at 48 (collecting cases) (emphasis in original).

The courts of appeals have diverged in interpreting PII under the statute. The First Circuit has adopted a “reasonable foreseeability” standard. It has held that PII is “not limited to information that explicitly names a person,” but also includes information disclosed to a third party that is “reasonably and foreseeably likely to reveal which . . . videos [the plaintiff] has obtained.” *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016). In contrast, the Third and Ninth Circuits—and, now, the Second, in *Solomon*—have adopted the “ordinary person” standard. It limits personally identifiable information to “the kind of information that would readily permit an ordinary person to identify a specific individual’s video-watching behavior.” *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 267 (3d Cir. 2016) (adopting ordinary person standard); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017) (same); *Solomon*, 136 F.4th at 51-52 (same).

In adopting the ordinary person standard in *Solomon*, the Second Circuit rejected a materially identical VPPA claim to the one here—that a Facebook Pixel had disclosed a video user’s FID and video URLs to Facebook. *Id.* at 54-55. The Circuit held that PII “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.*” *Id.* at 52 (emphasis added). Therefore, it held, to survive a motion to dismiss, a complaint must “plausibly allege[] that [the defendant’s] disclosure of [information] ‘would, with little or no extra effort, permit an ordinary recipient to identify [the plaintiff’s] video-watching habits.’” *Id.* at 54 (quoting *In re Nickelodeon*, 827 F.3d at 284). In *Solomon*, the complaint reproduced an exemplar screenshot with several lines of computer code, interspersed with characters, numbers, and letters, which it contended represented an actionable disclosure of PII. *Id.* The Circuit rejected that claim. It found “implausible that an ordinary person would look at [that code] . . . and understand it” to reveal a video title or the plaintiff’s FID, as opposed to “just one phrase embedded in many other lines of code.” *Id.* And, the Circuit noted, the complaint “lack[ed] any details about how an ordinary person might access the information on the Pixel’s PageView,” or “any details about *how* an ordinary person would use an FID to identify [plaintiff].” *Id.* (emphasis in original); see *In re Nickelodeon*, 827 F.3d at 283 (“To an average person, an IP address or a digital code in a cookie file would likely be of little help in trying to identify an actual person.”). In short, because the alleged disclosure could not be appreciated—decoded to reveal the actual identity of the user, and his or her video

selections—by an ordinary person but only by a technology company such as Facebook, it did not amount to PII. *Solomon*, 136 F.4th at 55.

The Circuit reiterated the point—and reached the same conclusion—just over two months ago, in *Hughes v. National Football League*, No. 24-2656, 2025 WL 1720295 (2d Cir. June 20, 2025) (summary order), where it again affirmed the dismissal of a VPPA claim. The plaintiff there, as in *Solomon*, had alleged that the defendant’s website transmitted FIDs and video URLs to Facebook through the Pixel. *Id.* at *2. Rejecting that claim, the Circuit stated that “*Solomon* [had] effectively shut the door for Pixel-based VPPA claims.” *Id.* And it denied leave to amend, explaining that the result would be the same “regardless of how the code is later manipulated or used by Facebook,” notwithstanding “the ubiquity of Facebook accounts,” or the availability of artificial intelligence tools, like ChatGPT, that might facilitate identification. *Id.* at *3. In other words, the Circuit held, the dispositive inquiry is whether the disclosure itself, as transmitted, would be intelligible to an ordinary person.

A month later, Judge Rochon reached the same outcome, applying the recent Circuit authority. The plaintiffs in *Nixon v. Pond5, Inc.* had alleged that the defendant’s website disclosed FIDs and video titles through the Pixel, citing code transmission screenshots in their pleadings. No. 24 Civ. 5823, 2025 WL 2030303, at *4-5 (S.D.N.Y. July 21, 2025). Following *Solomon* and *Hughes*, Judge Rochon dismissed the complaint without leave to amend. *Id.* at *6. She reasoned that because “an ordinary person would not plausibly be able to identify Plaintiffs’ video-watching habits as a result of the Pixel

transmissions,” the complaint had not plausibly alleged a disclosure of PII in violation of the VPPA. *Id.* at *5.

This emergent line of authority disposes of the FAC here as well. Like the complaints in *Solomon*, *Hughes*, and *Nixon*, the FAC alleges that the defendant disclosed users’ video-viewing activity to Facebook via the Pixel, specifically by transmitting URLs, FIDs, and video-watching history without their knowledge or consent. FAC ¶¶ 80-81, 106. It includes a screenshot of computer code showing the alleged transmissions to Facebook. *Id.* ¶ 106. It alleges that because a person with the right tools can use an FID to identify a specific Facebook user, the data constitutes PII. ¶¶ 81, 95.

Those allegations do not materially differ from those in *Solomon*, *Hughes*, and *Nixon*. Indeed, the FAC tacitly underscores its inability to satisfy the Second Circuit’s ordinary person standard, in its description of the Pixel’s disclosures as “technical,” *id.* ¶ 33, and embedded in HTTP transmissions inaccessible to ordinary persons, *id.* ¶ 106; and in its reproduction of the screenshot consisting of several jumbled lines of code separated by characters, numbers, and letters unintelligible to ordinary persons, *id.*⁶ The FAC does not explain how an

⁶ The representative cookie data that includes the user’s FID is reproduced, in full, below:

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sb=5HftYmuKvY9744LJOIjOfWM8;
datr=T3_tYn4t9Ihm5ShZA4tHvGIR;c_user=100003190670927;
dpr=1.5;
xs=40%3ADrvBU-LIwPna1g%3A2%3A1662066646%3A-1%3A2
997%3A%3AAcXJvfy_fGr6B_Alg1_dAqvC9RXRM8opsbHAJttB
kU;
```

ordinary person, “with little or no extra effort,” could discern that these strings contained Golden’s FID or the titles of videos she had watched. *Solomon*, 136 F.4th at 54 (quoting *In re Nickelodeon*, 827 F.3d at 284). At most, the FAC pleads that *Facebook*—through its proprietary systems—could decode these technical strings. But disclosures comprehensible only to Facebook or other sophisticated actors are not PII. *See Hughes*, 2025 WL 1720295, at *2-3; *Solomon*, 136 F.4th at 54-55. That forecloses Golden’s claim.

The Court accordingly dismisses the VPPA claim.⁷ *See, e.g., Hughes*, 2025 WL 1720295, at *3 (affirming dismissal of Pixel-based VPPA claim and declining to remand); *Solomon*, 136 F.4th at 54-55 (affirming dismissal of Pixel-based VPPA claim and denial of leave to amend); *Nixon*, 2025 WL 2030303, at *5-6 (dismissing Pixel-based VPPA claim and denying leave to amend); *see also In re Nickelodeon*, 827 F.3d at 283, 86-90 (affirming dismissal of VPPA claim involving “static digital identifiers,” such as “IP address[es] or a digital code in a cookie file”);

fr=OIQFkgt53TAn2Iz3s.AWX6muyZgZBx8fB6ciylcmWGTPM.B
jI00M.U8.AAA.0.0.BjI00M.AWXqh6rFsPI.

Id.

⁷ Golden has not sought leave to amend or proposed any amendments to the FAC. The dismissal is thus without leave to further amend. *See Gregory v. ProNAi Therapeutics Inc.*, 757 F. App’x 35, 39 (2d Cir. 2018) (summary order) (affirming denial of leave to amend where plaintiffs sought leave to amend only briefly at the end of an opposition to the motion to dismiss and “included no proposed amendments”); *Hughes*, 2025 WL 1720295, at *3 (despite plaintiff’s requests to add greater detail about his Pixel-based claims, explaining that there was “no basis for remanding because amendment would likely be futile”).

Eichenberger, 876 F.3d at 985-86 (similar, as to Roku device serial numbers).

B. Unjust Enrichment

The FAC’s unjust enrichment claim is based on the same allegations as its VPPA claim. *See, e.g.*, FAC ¶¶ 150-53. NBCU moves to dismiss it as duplicative, *see* Def. Br. at 16-17, and Golden does not oppose, *see* Def. Reply at 10 (“Plaintiff makes no effort to rebut this argument [and] thus concedes that her unjust enrichment claim should be dismissed as well.” (citing *Ventillo v. Falco*, No. 19 Civ. 3664, 2020 WL 7496294, at *12 (S.D.N.Y. Dec. 18, 2020))). NBCU’s motion is meritorious.

To allege unjust enrichment under New York law, a plaintiff must plead that the defendant benefitted at the plaintiff’s expense, and that equity and good conscience require restitution. *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of NJ, Inc.*, 448 F.3d 573, 586 (2d Cir. 2006). Unjust enrichment “is not a catchall cause of action to be used when others fail,” and is not available where “it simply duplicates, or replaces, a conventional contract or tort claim.” *Corsello v. Verizon NY, Inc.*, 18 N.Y.3d 777, 790 (2012); *see Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l NV.*, 400 F. App’x 611, 613 (2d Cir. 2010) (summary order) (“Unjust enrichment is an equitable claim that is unavailable where an adequate remedy at law exists.”). “[E]ven pleaded in the alternative, claims for unjust enrichment will not survive a motion to dismiss where plaintiffs fail to explain how their unjust enrichment claim is not merely duplicative of their other causes of action.” *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017); *see Bourbia v. S.C. Johnson & Son, Inc.*, 375 F. Supp. 3d 454, 466 (S.D.N.Y. 2019) (same); *Weisblum*

v. Prophase Labs, Inc., 88 F. Supp. 3d 283, 296 (S.D.N.Y. 2015) (same).

Here, Golden does not distinguish her unjust enrichment claim from her VPPA claim. The FAC states that the basis of the unjust enrichment claim is that NBCU wrongfully shared users' PII without their consent. FAC ¶ 150-53. That claim effectively replicated the FAC's VPPA allegations, and Golden, by not responding to NBCU's motion to dismiss, has waived any opposition. *See Ventillo*, 2020 WL 7496294, at *12 ("As Plaintiff did not respond to Defendants on this point, he effectively conceded the argument by his failure to respond." (cleaned up)).

The Court accordingly dismisses the unjust enrichment claim as duplicative of the FAC's VPPA claim. *See, e.g., Corsello*, 18 N.Y.3d at 791 (dismissing unjust enrichment claim because to the extent that the VPPA claim "succeed[s], the unjust enrichment claim is duplicative," and if the VPPA claim is "defective, an unjust enrichment claim cannot remedy the defects"); *Golden v. NBCUniversal Media, LLC*, 688 F. Supp. 3d 150, 168 (S.D.N.Y. 2023) (same); *Gardener v. MeTV*, No. 22 Civ. 5963, 2023 WL 4365901, at *5 (N.D. Ill. July 6, 2023) (same); *see also Lin v. Canada Goose US, Inc.*, No. 21 Civ. 7614, 2022 WL 16926312, at *6 (S.D.N.Y. Nov. 14, 2022) (dismissing unjust enrichment claim as duplicative of statutory claim); *Ohanian v. Apple Inc.*, No. 20 Civ. 5162, 2022 WL 826415, at *4 (S.D.N.Y. Mar. 18, 2022) (same).

27a

CONCLUSION

For the foregoing reasons, the Court grants NBCU's motion to dismiss the FAC with prejudice. The Clerk of Court is respectfully directed to terminate the motion pending at Docket 57, and to close this case.

SO ORDERED.

/u/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: September 3, 2025
New York, New York

APPENDIX C

18 U.S.C.A. § 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.

(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

30a

(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

31a

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

32a

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 D

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Case No: 1:22-cv-9858-PAE

Hon. Paul A. Engelmayer

SHERHONDA GOLDEN, *Individually and on
behalf of all others similarly situated,*
Plaintiff,

v.

NBCUNIVERSAL MEDIA, LLC,
Defendant.

JURY TRIAL REQUESTED

FOURTH AMENDED CLASS ACTION
COMPLAINT

Pursuant to the Court's Order dated April 17, 2025, Dkt. No 55, Plaintiff Sherhonda Golden, individually and on behalf of all others similarly situated, respectfully submits this Fourth Amended Class Action Complaint against Defendant NBCUniversal Media, LLC ("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. (owner of Facebook and Instagram, as

well as other applications), data containing Plaintiff's and other digital-subscriber Class Members' (i) personally identifiable information or Facebook ID ("FID") and (ii) the computer file containing video and its corresponding URL of the pre-recorded video viewed ("Video Media") (collectively, "Personal Viewing Information"). In other words, this transmission of personally identifiable information to Facebook is achieved through a "pixel" that Facebook programs, entirely controls, and determines what video viewing information is transmitted, when it is transmitted, and the form in which it is transmitted so it can be linked to the individual user by Facebook and then capitalized on by Defendant. 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 NBCUniversal Media, LLC, as the owner and/or operator of Today.com, for violating the VPPA by disclosing its digital subscribers' identities and Video Media they have watched to Facebook without obtaining their digital subscribers' "written consent" "in a form distinct and separate from any other form setting forth other legal or financial obligations of the consumer." 18 U.S.C. § 2710(b)(2)(B).

2. Digital subscribers of the Today.com are "consumers" under the VPPA.

3. The VPPA prohibits "video tape service providers," such as Today.com, from knowingly disclosing consumers' personally identifiable information ("PII"), 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 “distinct and separate” form that “is given at the time the disclosure is sought” or “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[.]” 18 U.S.C. § 2710(b)(2)(B)(ii)(I)-(II).

4. During time periods relevant to this matter, Defendant has collected and shared the personally identifying information of visitors to its website and mobile application (“App”) with third parties.

5. Defendant does this through tracking cookies, software development kits (“SDK”), and tracking pixels.

6. In other words, digital subscribers to Today.com have their personally identifying information disclosed to Defendant’s third-party business partners.

7. Notably, Defendant knows that users “subscribe” to its daily digital newsletters, understands and benefits from convincing users to become “subscribers,” and financially profits from its digital subscribers in numerous ways.

8. The Facebook pixel is a functional software code Defendant has chosen to install on Today.com allowing it to collect users’ data. More specifically, the Facebook pixel tracks when digital subscribers enter Today.com or Today.com’s accompanying App and view Video Media. Importantly, Facebook is able to track which users subscribe to the digital newsletter, when those subscribers visit video content on Defendant’s website, and what video content digital subscribers visit via the daily digital

newsletters. This is accomplished by appending a CID tag (campaign ID) to the URL for the video that clearly identifies that the subscriber clicked on the video link in the newsletter, which newsletter, and the date of that newsletter. For example, the URL for a particular video accessed by a random visitor to the Today.com website appears in the following format:

 <https://www.today.com/popculture/joe-jonas-sophie-turner-divorce-rcna103286>

9. By comparison, when a subscriber clicks the video from an embedded link in the “This is Today” daily digital newsletter Defendant appends “?cid=eml_thisistodayYYYYMMDD” to the URL so newsletter engagement from known users can be tracked and shared:

 [today.com/popculture/joe-jonas-sophie-turner-divorce-rcna103286?cid=eml_thisistoday_20230906](https://www.today.com/popculture/joe-jonas-sophie-turner-divorce-rcna103286?cid=eml_thisistoday_20230906)

10. Additionally, Defendant’s website and tracking technology utilized on the website monitor when a digital daily newsletter subscriber “converts” from the newsletter to the website.

11. Even though this case was filed in 2022, Today.com, as of the time of this filing still tracks and discloses to Facebook the digital subscribers’ viewed Video Media, and most notably, the digital subscribers’ FID which provides any reasonable person access to a person’s Facebook (and Instagram) page and/or account which in turn provides that person with access to information such as the person’s name, location of residence, work history, educational history, date of birth, photographs of the user that include metadata sufficient to demonstrate location, gender, and likes. This occurs even when the digital subscriber has not shared (nor consented to share) such information.

12. Importantly, Defendant packages personally identifiable information and video viewing information together and shares this Personal Viewing Information — *i.e.*, digital subscribers' unique FID and video content viewed — together in a single transmission as one data point with 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 Today.com.

13. Thus, without telling or obtaining the express consent of its digital subscribers in a “distinct and separate form” or otherwise, 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.

14. Because Today.com digital subscribers are not properly 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 Today.com has used and continues to use data it has about them to make money for itself at the expense of consumers.

15. Defendant chose to disregard Plaintiff's and, upon information and belief, hundreds of thousands of other Today.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 Defendant's practices of intentionally disclosing its digital subscribers' Personal Viewing Information to Facebook in knowing and direct violation of the VPPA.

JURISDICTION & VENUE

16. 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.

17. 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.

18. 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

19. Plaintiff Sherhonda Golden is an adult citizen of the State of Missouri and is domiciled in the State of Missouri. Plaintiff began a digital subscription to Today.com in 2022 which continues to this day. Plaintiff has had a Facebook account from approximately 2012 to the present. During the relevant time period she has used her Today.com digital subscription to view Video Media through Today.com and/or App on Defendant's website. Plaintiff did so while logged into her Facebook account. By doing so, Plaintiff's Personal Viewing

Information was disclosed to Facebook pursuant to the systematic process described herein. Plaintiff never gave Defendant express written consent to disclose her Personal Viewing Information to unauthorized third parties.

20. Defendant NBCUniversal Media, LLC is a Delaware limited liability company with its principal place of business located at 30 Rockefeller Plaza, New York, New York.

FACTUAL ALLEGATIONS

A. Background of the Video Privacy Protection Act

21. The United States Congress passed the VPPA in 1988, seeking to confer onto consumers the power to “maintain control over personal information divulged and generated in exchange for receiving services from video tape service providers.” S. Rep. No. 100-599, at 8. “The Act reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual’s consent.” *Id.*

22. The impetus for the VPPA was President Ronald Reagan’s nomination of Judge Robert Bork to the United States Supreme Court. During the confirmation process, a movie rental store disclosed the nominee’s rental history to the Washington City Paper which then published that record. Congress responded by passing the VPPA, with an eye toward the digital future. As Senator Patrick Leahy, who introduced the Act, explained:

It is nobody’s business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy

watch on television or read or think about when they are home. In an area of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. I think that is wrong.

Id. at 5-6 (internal ellipses and brackets omitted).

23. In 2012, Congress amended the VPPA, and in doing so, reiterated the Act's applicability to "so-called 'on-demand' cable services and Internet streaming services [that] allow consumers to watch movies or TV shows on televisions, laptop computers, and cell phones." S. Rep. 112-258, at 2.

24. The 2012 amendments clarified "that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet." Video Privacy Protection Act Amendments Act of 2012, Pub. L. 112-258, 126 Stat. 2414; *see also* 18 U.S.C. § 2710(b)(2)(B) (authorizing a video tape service provider to disclose consumers' personally identifiable information "to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer" provided either "at the time the disclosure is sought" or "in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner").

25. The consent, however, must be “in a *form distinct and separate* from any form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710(a)(4) (emphasis added).

26. The VPPA prohibits “[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider.” 18 U.S.C. § 2710(b)(1).

27. 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).

28. Under the VPPA, a consumer does not have to spend money for a good or service to be a “subscriber.” *Salazar v. Nat’l Basketball Ass’n*, 118 F.4th 533, 551 (2d Cir. 2024).

29. The VPPA defines personally identifiable information (“PII”) as “information which identifies a person as having requested or obtained specific video materials or services from a video service provider.” 18 U.S.C. § 2710(a)(3).

30. By transmitting Facebook-specific identifiers (i.e., Facebook IDs) and video file names through Facebook’s own embedded tool, the disclosing party, here, Defendant, expressly instructed Facebook as to the exact videos and other content the consumer accessed.

31. The Facebook Pixel is one of the most, if not the most, commonly used, known, and easily understood tracking pixels.

32. The Facebook Pixel is designed to allow any ordinary person (as long as we can presume an “ordinary person” can read), to read and understand

the contents of information being shared with Facebook.

33. Even though the information disclosed is technical in nature, any ordinary person can easily surmise what video content a person requested or obtained, as well as that person's FID, as it is an easily identifiable string of numbers.

34. In other words, the disclosure was purposefully structured to be technical in nature given the vast amount of data that entities including Defendant seek to disclose to Facebook.

35. However, even though the disclosure is technical, it can be easily understood by ordinary people, as the general population understands how hyperlinks and URLs work.

36. Further, it is generally understood that when marketing a product or service, knowing your target audience is a fundamental aspect.

37. As such, it is generally understood that the Pixel would receive, decipher, and link data, including data protected by the VPPA, to an individual's Facebook Profile.

38. Indeed, Facebook not only received this information in the precise form it was transmitted but also leveraged it to build detailed profiles for targeted advertising based on a consumer's video-watching habits.

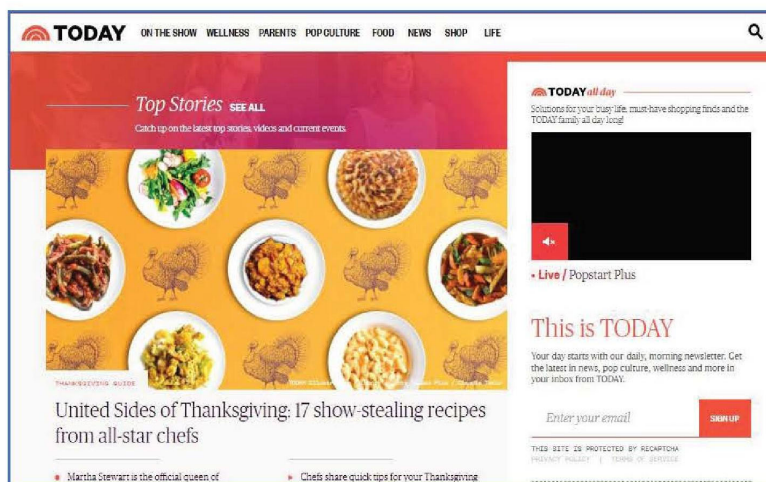
39. A video tape service provider is "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4).

40. Under the VPPA, “[a]ny person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.” 18 U.S.C. § 2710(c)(1).

41. Under the VPPA, “[t]he 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.” 18 U.S.C. § 2710(c)(2).

B. Today.com’s Digital Subscriptions

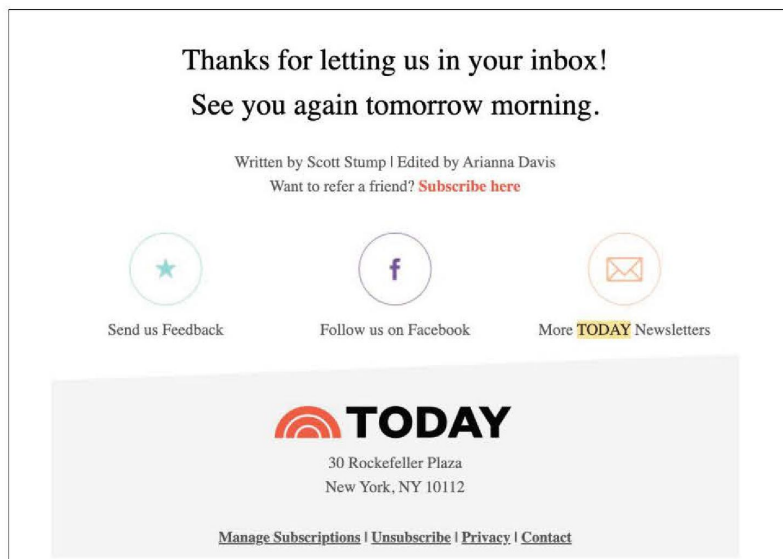
42. Today.com provides its users the option sign up for a daily digital newsletter, which is delivered to an electronic mail (email) address provided by subscribers to Today.com. For example, on November 18, 2022, when this action commenced, a user to Today.com would have been greeted with the following encouragement to sign up for the newsletter:



44a

See Internet Archive, Today.com, Nov. 18, 2022, 9:01:40 a.m., *available at* <https://web.archive.org/web/20221118090140/https://www.today.com/> (last visited May 1, 2025)

43. Importantly, Today.com understands that by entering an email address and clicking “SIGNUP,” that user is becoming a subscriber. At least, an excerpt of the “This is Today” daily digital newsletter makes three references to the daily digital newsletter being a subscription:



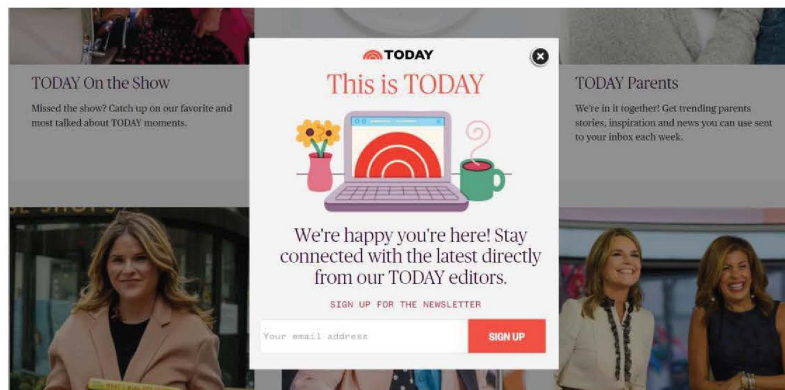
(Screenshot of “This is Today” daily digital newsletter from September 6, 2023).

44. As can be seen from the “This is Today” daily digital newsletter excerpted above, Today.com lets current subscribers know that they can: (1) refer a friend to “**Subscribe here**” (hyperlinked to Today.com “This is Today” signup page); (2) manage their “**Subscriptions;**” and (3) “**Unsubscribe**” from their

45a

subscription to the Today.com “This is Today” digital newsletter.

45. Today.com offers subscriptions to multiple daily digital newsletters, including This is TODAY, Start TODAY, Stuff We Love, TODAY On the Show, TODAY Food, TODAY Parents, Read With Jenna, Concert Series Alerts, Show Updates, Special Events & Offers:



See Today.com, Today Newsletters, *available at* <https://www.today.com/newsletters?search=newsletter> (last visited May 1, 2025).

46. Defendant offers multiple subscription offerings with the goal of building an ongoing relationship with its subscribers, like Plaintiff, by having direct access to and delivering content to each subscriber’s inbox. Defendant also provides the daily digital newsletter to drive interactions with its own website and video content, which benefits Defendant by permitting it to know precisely who exactly is watching its videos and reading its stories through the use of the CID and Facebook Pixel (as opposed to a non-subscriber viewer) and then by sharing that information with Facebook.

47. Today.com users provide their personal information, including but not limited to their name, email address, and zip code.

48. NBCUniversal Media, LLC operates a website in the U.S. accessible from a desktop and mobile device at Today.com. It also offers an App available for download on Android and iPhone devices.

49. 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.

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

51. Because of how Defendant configured its website and tracking technologies, digital subscribers also provided at least one device identification number, and, upon information and belief, a network identifier.

52. When beginning a subscription, Defendant does not disclose to its digital subscribers that it will share Personal Viewing Information with third parties, such as Meta. Digital subscribers, during the relevant time period, did not consent to such information sharing.

53. After becoming a digital subscriber, subscribers receive digital newsletters that contain hyperlinks to Defendant's web-hosted audio visual content, exclusive content, and direct, prominently featured links to audio visual content on Today.com. Clicking a hyperlink and viewing video content on

Today.com from a daily digital newsletter allowed Defendant and third parties, including Facebook via the Facebook Pixel, to know what video content is being consumed, and that the content was accessed via a daily digital newsletter by a subscriber.

54. Moreover, digital subscribers are not provided with any notification that their Personal Viewing Information is being shared.

55. 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.

56. Defendant's active use of the CID parameter to distinguish newsletter-driven video views from generic site traffic underscores the subscriber relationship. By appending a unique campaign identifier tied to each individual's subscription account, Defendant deliberately captures and reports each subscriber's viewing activity back to its advertising partners.

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

57. The operative Privacy Policy for Today.com states that it collects "Personal Information" from its users:

"Connection and Usage

For example: domain names, browsing activity, scrolling and keystroke activity,

advertisements viewed, forms or fields you complete or partially complete, search terms, whether you open an email, content you view and duration, quality of the service and interaction with the content, logs, and other similar information. If these events occur while you are offline, they may be logged and uploaded to us when you next connect.”

See NBCUniversal Privacy Policy, *available at* <https://www.nbcuniversal.com/privacy> (last visited Feb. 15, 2023).¹

58. Today.com discloses in its Privacy Policy that it automatically collects “content you view and duration.”²

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

D. How Today.com Disseminates Digital Subscribers’ Personal Viewing Information

1. Tracking Pixels

60. Approximately seven-in-ten U.S. citizens have a Facebook profile³ — all of whom provided the same

¹ Defendant updated its policy on December 16, 2022 during the pendency of this matter. NBCUniversal Privacy Policy, *available at* <https://www.nbcuniversal.com/privacy> (last visited May 1, 2025). The prior version of the policy are available on the Internet Archive (“Wayback Machine”). See Internet Archive, *available at* <https://archive.org/> (last visited May 1, 2025).

² See *id*

³ Schaeffer, Katherine, Pew Research Center, *5 Facts about how Americans use Facebook, two decades after its launch* (Feb.

personal information to Meta when creating their Facebook profiles.

61. Meta promotes its ability to allow businesses to target their ads to specific audiences using these types of identifying information⁴ as well as information about actions specific users have taken on the businesses' websites.⁵

62. Facebook introduced its Pixel tracking tool in 2013 to allow online businesses like Defendant to track the actions of their users, subscribers, and customers on their websites, and importantly, to build detailed, valuable profiles about their website users.⁶ *See* Meta, *Meta Pixel*, available at <https://developers.facebook.com/docs/meta-pixel/> (last visited May 1, 2025).

63. Meta describes the Meta Pixel as “a snippet of JavaScript code that allows you to track visitor activity on your website. It works by loading a small library of functions which you can use whenever a site visitor takes an action (called an event) that you

2, 2024), available at <https://www.pewresearch.org/short-reads/2024/02/02/5-facts-about-howamericans-use-facebook-two-decades-after-its-launch/> (last visited May 1, 2025).

⁴ Meta Business Help Center, Age and gender, Meta, available at <https://www.facebook.com/business/help/151999381652364> (last visited May 1, 2025); *see also* Meta Business Help Center, About specific targeting, Meta, available at <https://www.facebook.com/business/help/121933141221852?id=176276233019487> (last visited May 1, 2025).

⁵ Meta Business Help Center, Options to create a website custom audience, Meta, available at <https://www.facebook.com/business/help/2539962959620307> (last visited May 1, 2025).

⁶ Meta, *Meta Pixel*, available at <https://developers.facebook.com/docs/meta-pixel/> (last visited May 1, 2025).

want to track (called a conversion). Tracked conversions appear in the Ads Manager where they can be used to measure the effectiveness of your ads, to define custom audiences for ad targeting, for Advantage+ catalog ads campaigns, and to analyze that effectiveness of your website's conversion funnels." See Meta, Meta Pixel, *available at* <https://developers.facebook.com/docs/meta-pixel/> (last visited May 1, 2025).

64. Once activated, the Meta Pixel "tracks the people and type of actions they take,"⁷ including each page users' visit, what buttons they click, as well as specific information that users input into a website.⁸

65. Meta explains that installing the Pixel allows them to "track Facebook ad-driven visitor activity on [their] website" and enables Facebook "to match . . . website visitors to their respective Facebook User accounts."⁹

66. In its "Get Started" page, Meta explains "[b]y default, the Pixel will track URLs visited, domains visited, and the devices your visitors use."¹⁰ In addition, website operators can also program their Pixel to track "conversions" (website visitor actions) which are sent to the Facebook Ads Manager and the

⁷ Meta, Overview, *available at* <https://www.facebook.com/business/goals/retargeting> (last visited May 1, 2025).

⁸ Meta, About Meta Pixel, *available at* <https://www.facebook.com/business/help/742478679120153?id=1205376682832142> (last visited May 1, 2025).

⁹ Meta, Get Started, *available at* <https://developers.facebook.com/docs/meta-pixel/get-started> (last visited May 1, 2025).

¹⁰ Meta for Developers, Get Started, Meta (2024), *available at* <https://developers.facebook.com/docs/meta-pixel/get-started> (last visited May 1, 2025).

Facebook Events Manager to be used to analyze the effectiveness of ad campaigns and to define custom audiences to adjust and create new campaigns.¹¹

67. Meta’s “Get Started” page further explains how it can identify website visitors and match them to their Facebook pages: “[The Meta Pixel] relies on Facebook cookies, which enable us to match your website visitors to their respective Facebook User accounts. Once matched, we can tally their actions in the Facebook Ads Manager so you can use the data to analyze your website’s conversion flows and optimize your ad campaigns.”

68. Facebook maintains vast amounts of data on each of its users’, like Plaintiff and the putative members of the Class.

69. This data is not limited to only what a person does on Facebook but also includes all records relating to when a user is tracked on off-Facebook websites — such as Plaintiff’s interactions with www.today.com.

70. Facebook Pixels continuously add data from new interactions to the historical profiles Meta maintains on individuals with Facebook profiles.

71. Each interaction sent to Meta via the Pixel (including interactions sent by www.today.com), is linked to all of the other personal information Meta possesses about the user, such that Defendant has access to and can leverage a user’s personal data.

72. In addition to the information every user is required to provide to Meta when creating an account

¹¹ Meta for Developers, Conversion Tracking, Meta (2024) *available at* <https://developers.facebook.com/docs/meta-pixel/implementation/conversion-tracking/> (last visited May 1, 2025)

(including First and Last name, date of birth, gender, email address and/or mobile number, and password), Meta also possesses and has access to all of the information every user has ever posted on his or her Facebook profile, profile views, likes, comments, shares and/or re-posts, event invitations, event R.S.V.P.'s, Facebook messages, "check-ins," and much, much more. Further, as explained above, Facebook maintains a record of each user's Off-Facebook Activity — all Facebook Pixel events that "fire" on non-Facebook websites, including www.today.com.

73. Crucial to the Pixel's effectiveness is its ability to associate a user's interactions on websites across the internet with that specific user's unique Facebook profile. The Pixel's fundamental purpose is to continuously add data from new interactions to the historical profiles Meta maintains on individuals with Facebook profiles (and even for a time after users delete their Facebook profiles).

74. Each interaction sent to Meta via the Pixel is linked to all of the other personal information Meta possesses about the user, and this constant addition of data aids Meta — one of the worst data-privacy actors of this generation . . . if not ever — in targeting users.

75. Thus, for each of Plaintiff's interactions on the Website, the Pixel transmitted those interactions to Meta, who was able to instantaneously associate that interaction with Plaintiff's personal information that he submitted when creating her account, and any personal information ever available on his Facebook profile.

76. Facebook also creates “shadow profiles,” of users and at least one court has recognized that a pixel’s ability to track comprehensive browsing history is important. *See, e.g., Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1078-79 (N.D. Cal. 2021) (finding a reasonable expectation of privacy where Google combined the unique identifier of the user it collects from websites and Google Cookies that it collects across the internet on the same user).¹²

77. Once a company or organization has installed the Meta Pixel on its website, the Pixel tracks users as they navigate through the website and logs a variety of information designated for tracking by the company, including pages visited, any website “buttons” they click, the specific information entered in forms (including personal information), as well as “optional values.”¹³

78. 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.

79. 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.

80. Defendant installed the Facebook tracking pixel, which enables it to disclose Plaintiff’s and Class Members’ Personal Viewing Information to

¹² *See* Facebook Shadow Profiles (Feb. 2022), *available at* <https://www.cesifo.org/DocDL/cesifolwp9571.pdf> (last visited May 1, 2025)

¹³ Meta, Meta Pixel, *available at* <https://developers.facebook.com/docs/meta-pixel/> (last visited May 1, 2025).

Facebook, because it benefits financially from the advertising and information services that stem from use of the Pixel.

81. When a Today.com digital subscriber enters the website and watches Video Media on the website, the website sends to Facebook information about the viewer, including, but not limited to, their identity and the media content the digital subscriber watched. Specifically, Today.com sends a single transmission to Facebook containing the video content name, the URL of the pre-recorded video that was viewed (which clearly identified the video content being watched) along with, most notably, the viewers' Facebook ID that uniquely identifies the user.

82. To “implement the pixel” on its website, Defendant had to take several affirmative steps. For example, Facebook notes: “To install the Pixel, we highly recommend that you add its base code between the opening and closing <head> tags on every page where you will be tracking website visitor actions. Most developers add it to their website’s persistent header, so it can be used on all pages.” *See Meta for Developers, Get Started, Installing the Pixel, available at* <https://developers.facebook.com/docs/meta-pixel/get-started> (last visited May 1, 2025) (formatting in original).

83. Moreover, Facebook notes that “[developers and marketers can *optionally choose* to send additional information about the visit through Custom Data events.” *See Facebook, Meta Pixel, available at* <https://developers.facebook.com/docs/meta-pixel> (last visited May 1, 2025). Thus, Defendant made a conscious decision to share its users’ PII to Meta. This awareness is demonstrated by several factors, including: (a) the fundamental purpose and

functionality of the Pixel, which is designed to collect data on user interactions with a website, (b) the widespread public information and media coverage regarding Meta's advertising practices, making these practices widely known, and (c) the resources and documentation provided by Meta on its website, where users like the Defendant can access information about the Pixel's capabilities and obtain the necessary code to implement it on their own websites.

84. The Defendant's awareness of the Pixel is further demonstrated by the benefits it derived from the Pixel's functionality.

85. By installing the Pixel, the Defendant was able to target digital advertising to its subscribers, as well as potential subscribers, based on the content those individuals had previously accessed or requested from the website, including prerecorded audiovisual materials.¹⁴

86. Defendant specifically benefited from its installation of the Pixels because Defendant maintains a Facebook page (www.facebook.com/today) and advertises on Facebook, meaning its disclosure of users' interactions to Meta ensured its ads were shown to the right individuals on Facebook at exactly the right time.

87. Defendant is the sole operator of the Website, and Defendant is solely responsible for the decisions it makes about what technology to include within its

¹⁴ Meta for Developers, Conversion Tracking, Meta for Developers (2024), *available at* <https://developers.facebook.com/docs/meta-pixel/implementation/conversion-tracking/> (last visited May 1, 2025).

Website. Defendant made the affirmative decision to knowingly include the Meta Pixel on its website.

88. Defendant knew and understood what the Pixel was, how it functioned, and what data it would collect and share with Meta because Defendant installed the Pixel on its site and configured its functionality.

2. Facebook ID (“FID”)

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

90. Every Facebook account is assigned a unique User ID (the “c user” field), which links directly to that account regardless of the name or pseudonym displayed. A User ID thus identifies one and only one

profile, providing a more precise means of identification than a common personal name.

91. Facebook itself publishes explanations and help-center materials confirming that a User ID is a string of numbers that connects to a specific profile and can be entered into the URL bar (e.g., “www.facebook.com/[UserID]”) to navigate directly to that profile. Ordinary Internet users – roughly seven in ten Americans – are among Facebook’s user base and regularly encounter URLs and learn from Facebook’s own “Help” pages how to find and use User IDs.¹⁵

92. A simple online search for “how to find Facebook account with Facebook ID” immediately yields publicly available instructions, demonstrating that even non-technical users can, without specialized knowledge, discover and apply a User ID to locate a given Facebook profile.

93. In modern internet use, average individuals see and click URLs dozens or hundreds of times per day across email, news articles, social media, and other web pages.

94. Upon seeing a string beginning “http” or “www,” an ordinary person understands that it can be entered into a browser to access the linked resource.

95. When a URL embedding a Facebook User ID is disclosed — such as by a video service provider — any ordinary user who follows that link will be brought directly to the Facebook profile operating under that ID, thereby identifying the person who

¹⁵ <https://www.pewresearch.org/short-reads/2024/02/02/5-facts-about-how-americans-use-facebook-two-decades-after-its-launch/> (last visited May 8, 2025)

watched the video and revealing any public details displayed on that profile (e.g., photos, posts, “friends”, location, occupation, partner/spouse, educational history, etc.).

96. Even if a profile’s displayed name is pseudonymous (e.g., “Anony Mous”), the underlying User ID still furnishes a clear hook by which third parties can associate specific viewing behavior with a single, uniquely identified human being.

97. Thus, a Facebook User ID is not an obscure technical detail but a readily accessible identifier that ordinary people understand and use to connect personal names, profiles, and online activities.

98. The FID disclosure enables direct linkage of an individual to particular content they have viewed, rendering any assertion of anonymity baseless.

99. Furthermore, with the rise in General Artificial Intelligence agents such as ChatGPT, anyone with an internet connection can use tools to decipher strings of computer code.

100. In other words, 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 Today.com.

101. 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 Today.com and accompanying app to show targeted advertising to its digital subscribers based on the products those digital subscribers had previously viewed on the website or app, including Video Media consumption, for which Defendant received financial remuneration.

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

102. 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.

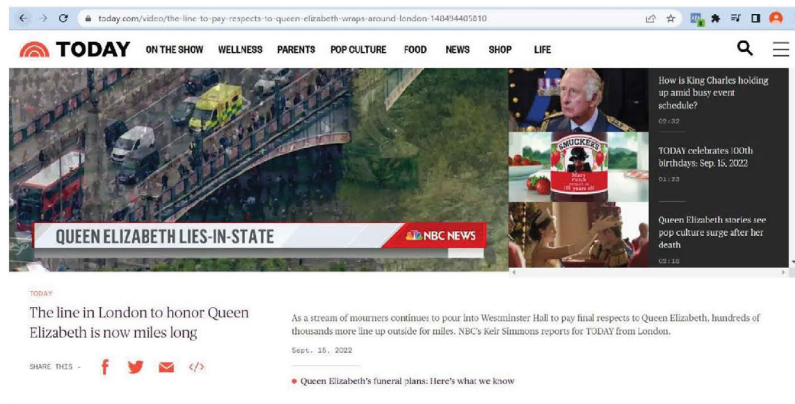
103. Defendant is not sharing anonymized, non-personally identifiable data with Facebook. To the contrary, the data it discloses is tied to unique identifiers that track specific Facebook users. Importantly, the recipient of the Personal Viewing Information — Facebook receives the Personal Viewing Information 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.

104. Critically, the Personal Viewing Information Defendant discloses to Facebook allows Facebook to

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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.

105. These factual allegations are corroborated by publicly available evidence. For instance, as shown in the screenshot that follows, a user visits Today.com and clicks on an article titled “The line in London to honor Queen Elizabeth is now miles long” and watches the video in the article.



Pictured above: The article titled “The line in London to honor Queen Elizabeth is now miles long” (taken from Today.com on or about September 15, 2022).

106. As demonstrated below, once the user clicks on and watches the video in the article, Today.com sends the content name of the URL, which identifies: (1) that there was a video on the page; (2) the video was “watched;” (3) an identifier for the video content; and (4) the subscriber’s FID, to Facebook.

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:authority: www.facebook.com
:method: GET
:path: /tr/?id=258438165004812&ev=Page%20View&dl=https%3A%2F%2Fwww.today.com%2Fvideo%2Fthe-line-to-pay-respects-to-queen-elizabeth-wrap
s-around-london-148494405810&rl=https%3A%2F%2Fwww.today.com%2Fif-false&ts=1663257978096&cd%5Burl%5D=https%3A%2F%2Fwww.today.com%2Fvid
eo%2Fthe-line-to-pay-respects-to-queen-elizabeth-wraps-around-london-148494405810&cd%5Bcontent_name%5D=Page%20View&su=1280&sh=720&v=2.
9.81&r=stable&ec=0&o=30&fbp=fb.1.1663257877355.2010425085&it=1663257977353&coo=false&eid=bf3caf95-5e4e-463f-b08c-d114847b3466&rqm=GET&
dt=ap44nk4htacvejfk1pr94hx79jrxgaed
:scheme: https
:accept: image/avif,image/webp,image/apng,image/svg+xml,image/*,*/*;q=0.8
:accept-encoding: gzip, deflate, br
:accept-language: en-US,en;q=0.9
:cookie: sb=5HfYmukV9744L20I0fH8; dnt=T3_tyn4t9lhms5h2A4thvG1R; c_user=100003190670927; dpr=1.5; xs=40X3ADrvBU_LlwPna1g3A23A16620
664653A-1%3A2997%3A3AAckJvfy_fGr6B_Aig1__daQvc9HX0R0ops5HAJttUKU; fr=0IQKgtS3TAn21Z35_A0Xsmuy/gZ0XBf0eclyIcm6GT9M.8j100M.08.AAA.0.
0.Bj100M.A0KqJhrF=P1
:referrer: https://www.today.com/
:sec-ch-ua: "Google Chrome";v="105", "NotA;Brand";v="8", "Chromium";v="105"
:sec-ch-ua-mobile: ?0

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

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

108. Defendant disclosed PII within the meaning of VPPA because the information transmitted to Facebook including users' FIDs and specific video file names was disclosed in a technical format, but one that is understood by ordinary people.

109. The disclosing party here used Facebook's PageView code to transmit FIDs and video content identifiers directly to Facebook but did so in a manner that is easily decipherable (again, presuming that one can read).

110. 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.

111. 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

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

113. 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

114. Plaintiff Sherhonda Golden has been a digital subscriber of Today.com from 2022 to the present. Plaintiff became a digital subscriber of Today.com by providing, among other information, email address and IP address (which informs Defendant as to the city and zip code she resides in as well as her physical location), and any cookies associated with her device. As part of her subscription, she receives emails and other communications from Today.com.

115. These daily digital newsletters contain exclusive content and hyperlinks to Defendant's web-hosted audio-visual content. Plaintiff has accessed

Defendant's audio-visual content via hyperlinks provided in the daily digital newsletters. Further, Defendant, via its disclosure of Personally Identifiable Information had her personal identity, her classification as a daily digital subscriber who is visiting Defendant's audio-visual content, and what content is being watched, provided information to Facebook unlawfully.

116. Plaintiff has had a Facebook account since approximately 2012.

117. When she created her Facebook profile, Plaintiff provided Meta with the required information to create her profile: her name, date of birth, gender, contact information, and password.

118. From 2022 to the present, Plaintiff viewed Video Media via Today.com website and App.

119. During the relevant period, Plaintiff's Facebook profile included publicly-available information specifically and uniquely identifying her, including but not limited to her full name, personal photographs that contain location and other information, and likes and follows of certain commercial establishments in her hometown. Plaintiff's Facebook profile was accessible to any person in possession of her unique FID (which Facebook maintains for every user). Any person (or corporation) could use her FID to load Plaintiff's Facebook page directly and see this publicly-available information that specifically and uniquely identifies her.

120. Additionally, Facebook, sitting in possession of Plaintiff's entire Facebook profile and account history, was in a special position. It could not only directly identify Plaintiff, but it could also access her

entire historical Facebook dataset, including her visits to www.today.com and information disclosing that she had viewed specific video content.

121. Plaintiff was a subscriber to www.today.com and is therefore a “consumer” under the VPPA.

122. Plaintiff requested, obtained, and/or watched prerecorded audio-visual material on www.today.com and through her digital subscription to Defendant’s services.

123. During the period when Plaintiff was a subscriber to the Defendant’s services, she maintained a Facebook profile. Defendant knowingly shared her Facebook ID (FID) with Meta, along with the titles of the prerecorded audiovisual materials she accessed or requested (frankly, Defendant went one step further and denoted a “watch” in its URLs, which it shared with Facebook) and the URLs for those videos.

124. Plaintiff never consented, agreed, authorized, or otherwise permitted Defendant to disclose her 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 her Personal Viewing Information. Defendant nonetheless knowingly disclosed Plaintiff’s Personal Viewing Information (her identity and the videos she watched) and PII to Facebook.

125. Because Plaintiff is entitled by law to privacy in her Personal Viewing Information, Defendant’s disclosure of her Personal Viewing Information deprived Plaintiff of the full set of benefits to which she is entitled. Plaintiff did not

discover that Defendant disclosed her Personal Viewing Information to Facebook until August 2022.

126. This unlawful disclosure is especially concerning given the bilateral nature of Plaintiff and Defendant's relationship. As the saying goes, "if you are not paying for the product, you are the product."

127. Here, Plaintiff did not pay (in money, at least) for her daily digital subscription to Defendant's newsletter. Instead, Defendant had to pay to operate the daily digital newsletter, including at least transmission and exclusive content creation, and provided this service to Plaintiff for "free." However, an understanding of modern advertising makes clear that Defendant receives an ongoing benefit from Plaintiff. In return for being a subscriber, Defendant receives multiple benefits from Plaintiff. At least, Defendant gets the opportunity to direct Plaintiff back to its site (which benefits Defendant by allowing it to sell advertisements from advertisers to Plaintiff) and Defendant collects a treasure trove of information from digital subscribers when they visit the site, including knowing that the visitor came from a daily digital newsletter by tracking the CID, IP address, and other data valuable to Defendant and its paying advertisers.

Class Action Allegations

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

All persons in the United States with a digital subscription to an online website owned and/or operated by Defendant that had their Personal Viewing Information [of pre-recorded videos] disclosed to Facebook by Defendant.

129. 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.

130. 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, if not millions, of members of the Class widely dispersed throughout the United States. Class members can be identified from Defendant's records and non-party Meta's records. At a minimum, the combination of Defendant's email subscriber list with Meta's identification of users who have Off-Facebook Activity from www.today.com will identify members of the Class.

131. 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. Her claims are based on the same legal theories as the claims of other Class members.

132. 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.

133. 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.

134. 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

Tolling of the Statute of Limitations

135. All applicable statute(s) of limitations have been tolled by Defendant's knowing and active concealment and denial of the facts alleged herein. Plaintiff and Class members could not have reasonably discovered Defendant's practices of sharing their personal viewing content and PII with Meta until shortly before this class action litigation commenced.

136. Defendant was and remains under a continuing duty to disclose to Plaintiff and Class members its practice of sharing personal viewing content and PII to Meta. As a result of the active concealment by Defendant, any and all applicable

statutes of limitations otherwise applicable to the allegations herein have been tolled.

CLAIMS FOR RELIEF

Count I

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

137. Plaintiff incorporates the allegations contained in the preceding paragraphs by reference as if fully set forth herein.

138. 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.

139. 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."

140. 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.

141. 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."

142. Defendant knowingly, as it affirmatively programmed the Pixel into the code for Today.com,

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

143. 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, Defendant refers to Plaintiff and those similarly situated as “subscribers” multiple times in its digital daily newsletters, and Plaintiff is a subscriber based on her digital daily newsletter subscription because it provides Plaintiff exclusive content, direct (guided) access to Defendant’s web-hosted video content, and is a quid pro quo relationship, as Defendant only provides the daily digital newsletters so that it can harvest Plaintiff’s data and sell access to advertise to Plaintiff to Defendant’s advertisers. Plaintiff is thus a “consumer” under the VPPA.

144. As set forth in 18 U.S.C. § 2710(b)(2)(B), “informed, written consent must be 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.

145. 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.

146. 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.

147. 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).

148. 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.

Count II

Unjust Enrichment

149. Plaintiff incorporates the allegations above by reference as if fully set forth herein.

150. Defendant acted wrongfully by sharing Users' FIDS and viewing content to Meta without their consent.

151. Defendant's practice of sharing Users' personal information and viewing content with Meta without their consent, and its failure to disclose this practice, caused Defendant to realize profits it otherwise would not have received, including from its improved ability to promote its content and services to its Users and its improved ability to sell advertising space on its website.

152. Defendant's retention of these ill-gotten gains is unjust and inequitable.

153. Plaintiff, on behalf of himself and the Class, accordingly, seeks restitution, restitutionary disgorgement, and all other appropriate relief permitted by the law of unjust enrichment, including reasonable attorneys' fees and costs. There is no adequate remedy at law that would provide redress to Plaintiff and the Class or ensure that Defendant will not deploy the same data practices in the future.

Relief Requested

154. 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).

74a

Jury Demand

155. 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: May 9, 2025

Respectfully Submitted:

By: /s/ Michael L. Murphy

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