

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SALAZAR,)
Petitioner,)
v.) No. 25-459
PARAMOUNT GLOBAL, DBA 247SPORTS,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 25-459, Salazar
5 versus Paramount Global.

6 Mr. Hammack.

7 ORAL ARGUMENT OF JOSHUA I. HAMMACK

8 ON BEHALF OF THE PETITIONER

9 MR. HAMMACK: Mr. Chief Justice, and
10 may it please the Court:

11 Outraged by the disclosure of one
12 person's video-watching history, Congress
13 enacted the Video Privacy Protection Act. In
14 Section (b)(1), the Act provides for civil
15 liability when a video tape service provider
16 knowingly discloses personally identifiable
17 information concerning any consumer of such
18 provider.

19 The Act defines three of those terms.
20 At bottom, a video tape service provider is the
21 kind of entity that will owe obligations under
22 the law. Personally identifiable information
23 is the kind of information the statute protects
24 in (b)(1)(D) and (E). And a consumer is the
25 kind of person whose information is protected

1 in Section (b)(1). The Act permits disclosures
2 with a consumer's consent. And in 2013,
3 Congress made that consent easier to obtain,
4 online, in advance, for up to two years.

5 Here, Paramount Global systematically
6 discloses personally identifiable information
7 to Facebook without obtaining consent. These
8 are not one-off disclosures. They happen
9 constantly, instantly, every time someone,
10 including a consumer, watches a video on the
11 website. Paramount has shaped its business
12 around these disclosures.

13 All it needed to avoid liability was
14 its consumers' consent, something it and
15 Facebook agree was easy to get. Paramount just
16 didn't get it. So it asks this Court to narrow
17 the law by imposing an audiovisual limitation
18 on the phrase "goods or services" in the
19 definition of "consumer."

20 But Congress put audiovisual
21 limitations where it wanted them, in the
22 definitions of both "video tape service
23 provider" and "personally identifiable
24 information," not in the definition of
25 "consumer." That choice is dispositive.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: But wouldn't it be
3 natural to think that goods or services from a
4 video tape service provider would be
5 video-related services?

6 MR. HAMMACK: Not at all, Justice
7 Thomas, because, here, we have material
8 variations at every stage of the statute, at
9 every stage of the definitions section. So we
10 start with a "video tape service provider."
11 That definition refers to prerecorded video
12 cassette tapes or similar audiovisual
13 materials. That's one subject matter.

14 In (a)(3)'s definition of "personally
15 identifiable information," we have video --
16 video materials or services. That's a second
17 subject matter that's different in scope from
18 (a)(4)'s definition of a provider.

19 And then, in (a)(1), the "consumer"
20 definition, we have goods or services.

21 And all three subject matters are
22 coming from a video tape service provider.
23 That they're different tells us that a provider
24 can do all three things. It can engage in
25 transactions concerning all three.

1 CHIEF JUSTICE ROBERTS: Well, our
2 former colleague, Justice Breyer, confronted
3 with questions like this, you know, his
4 favorite hypothetical in that area anyway was a
5 sign in a park that says, you know, no pets in
6 a park, and the question was, did that mean
7 that the person carrying his pet snail in his
8 pocket was subject to prosecution.

9 I mean, don't we have to look at the
10 general purpose that's involved here before
11 determining that the statute reaches as far as
12 you would have it?

13 MR. HAMMACK: I think we are
14 completely in line with the statutory purpose.
15 And we have no objection, of course, to the
16 Court looking to that purpose. And I don't
17 mean "purpose" in the sense of scouring the
18 legislative history, but look at the text of
19 Section (b)(1), which specifically prohibits
20 the disclosure of personally identifiable
21 information concerning any consumer.

22 We have two different limitations
23 within that section. "Personally identifiable
24 information" is one limitation. "Concerning
25 any consumer" is a second. And the reading, I

1 think the appropriate reading, of those two
2 things together, which exist in (b)(1) but not
3 in other sections of the VPPA, which protect
4 against -- for example, in subsection (d),
5 we've got the admissibility provision.
6 Personally identifiable information won't be
7 admissible unless it's obtained in compliance
8 with the VPPA.

9 In subsection (e), we've got
10 personally identifiable information, an
11 affirmative requirement that providers destroy
12 personally identifiable information after a
13 period of time.

14 In neither location is that personally
15 identifiable information linked to a consumer.
16 It's only in (b)(1) that that link happens, so
17 we know that (b)(1) is protecting less
18 personally identifiable information from
19 disclosure, not more.

20 JUSTICE BARRETT: Mr. Hammack, is it
21 your position -- I'm thinking about the limits.
22 Is it your position that any company that has a
23 short up on its website, be it a commercial or
24 whatever, is a video service provider?

25 MR. HAMMACK: That's not our position,

1 Justice Barrett. And I would say the -- the
2 definition of "video tape service provider" in
3 (a)(4), which, by the way, isn't at issue here,
4 is very clear that you have to be engaged in
5 the business of renting, selling, or delivering
6 those audiovisual materials. So it's not
7 everyone who happens to deliver them. It's not
8 everyone who provides a video once. You have
9 to be engaged in that business. And that's
10 another real limitation on liability in (b)(1).

11 JUSTICE BARRETT: Is your theory that
12 247Sports was engaged in that business or
13 that Paramount was?

14 MR. HAMMACK: Well, in this case,
15 Paramount Global is doing business as --

16 JUSTICE BARRETT: As. Okay.

17 MR. HAMMACK: -- 247Sports. So I
18 think both is the answer. But, yes, our
19 position is absolutely that Paramount Global is
20 a video tape service provider.

21 JUSTICE BARRETT: So you --
22 Mr. Clement used in his brief some examples, of
23 Chick-fil-A, et cetera. Would you take the
24 position that if Chick-fil-A had some videos on
25 its website, it's a video tape service

1 provider?

2 MR. HAMMACK: We would not take that
3 position. And it should come as no surprise
4 that the court that confronted that particular
5 problem found that Chick-fil-A is not a video
6 tape service provider. That's how the motion
7 to dismiss was granted in that case. We have
8 no quarrel with that holding. We don't find it
9 particularly surprising, but that's nothing
10 like what Paramount Global does here.

11 JUSTICE SOTOMAYOR: If Congress's
12 interest was the protection of privacy of a
13 person's video tape watching, why would the
14 disclosure of personally identifiable
15 information be limited only to consumers and
16 not to those who watch videos for free?

17 MR. HAMMACK: Well, I guess I want to
18 be very clear because the person who watches
19 videos for free can still be protected by
20 (b)(1)'s disclosure prohibition as long as he's
21 a consumer of something else from that
22 provider. He's rented, purchased, or
23 subscribed to some --

24 JUSTICE SOTOMAYOR: But the provider
25 has to be in the business of -- but -- so why

1 wouldn't Congress just protect at large anyone
2 who's watching videos, free or not free?

3 MR. HAMMACK: I would say I think
4 there are several kind of overlapping reasons
5 that Congress might have preferred the exact
6 regime it enacted. I think the clearest one is
7 that the consumer relationship provides an easy
8 window for getting consent, and Congress was
9 very concerned about consent and the -- the
10 consumer controlling the disclosure of
11 personally identifiable information.

12 So having that window to get consent
13 and, if you look at the 2013 amendments, you've
14 got consent even for a two-year window. So
15 advance consent comes into play. That consumer
16 window is very important in terms of
17 identifying the place to get consent.

18 It could also be that Congress just
19 thought this regime was more fair. You've got
20 a consumer that's exchanged something of value
21 with the provider, and, therefore, they're
22 entitled to the protections and the possibility
23 of liquidated damages.

24 But whatever we -- I don't -- I won't
25 dispute that there is some mystery about why

1 Congress did something different in (b)(1) than
2 it did in, for example, Sections (d) and (e)
3 when it protected personally identifiable
4 information there.

5 JUSTICE KAVANAUGH: Can you explain
6 exactly how the consent would work in your
7 opinion?

8 MR. HAMMACK: Absolutely. So consent
9 works by allowing a provider to disclose
10 personally identifiable information, and there
11 are several locations where a provider can get
12 that consent. One is the initiation of the
13 consumer transaction. Another is when the
14 person watches a video, you could have a banner
15 pop up and --

16 JUSTICE KAVANAUGH: A non-video
17 consumer transaction you're talking about
18 there, right?

19 MR. HAMMACK: It could be a non-video
20 consumer transaction, or it could be a video
21 consumer transaction. I think the statute is
22 indifferent as to those two possibilities. Or
23 it could be that the provider gets consent just
24 simply before the disclosure is made.

25 I think, again, the statute is

1 indifferent as to when the provider obtains
2 that consent so long as it gets it before the
3 disclosure is made.

4 JUSTICE JACKSON: Could it be also
5 that -- I'm going back to Justice Sotomayor's
6 question -- that we have a statute that was
7 enacted at a time in which it wasn't really
8 conceivable that you could access videos
9 without purchasing them or renting them?

10 In other words, I'm just wondering
11 whether we have sort of limitations in the
12 facts that we need to think about a little bit
13 in -- in -- in trying to assess what Congress's
14 intent was here.

15 MR. HAMMACK: I -- I'm not sure it's
16 true that in 1988 it was inconceivable that
17 someone might watch a video on a computer. I
18 think Congress was very concerned with the
19 changing technological advances and -- and
20 computer technology.

21 But even more in 2013, when Congress
22 stepped back into this statute and revised just
23 the consent provision, I think it was
24 intimately aware -- and, again, this is in the
25 legislative history -- it was intimately aware

1 with the fact that people were streaming all
2 sorts of videos to their phones and to their
3 computers all the time.

4 And I think it's important to note
5 both personally identifiable information in
6 (a)(3) and the consumer relationship in (a)(1)
7 are technology-neutral. Requested or obtained
8 doesn't identify any technology by which you'll
9 request or obtain videos.

10 JUSTICE JACKSON: But I guess I'm just
11 trying to go back maybe to even Justice
12 Thomas's first question, which is what is your
13 theory as to why Congress has a broader
14 category of consumers than the personally
15 identified information and video tape service
16 provider categories?

17 MR. HAMMACK: Well, I think the --
18 the -- the definitions are different. We know
19 that for sure because, if you just line them up
20 and look at them, there are a number of
21 material variations between them.

22 As to why they're different -- and
23 this goes back to the point I was trying to
24 make earlier -- there might be some mystery
25 about why they're different. Whether they're

1 different is very clear. And I think we just
2 have to live with that mystery a little bit
3 rather than rewrite the statute.

4 But, again, I think there are good
5 reasons and -- and, in fact, it might close
6 loopholes to have them do different work
7 because a business could structure its
8 relationship with individuals so that you never
9 rent, purchase, or subscribe directly to the
10 video materials. You request or obtain them
11 some other way. And you rent, purchase, or
12 subscribe to something else entirely.

13 Congress wrote this statute so that
14 that sort of clever structure by a provider
15 won't create a loophole that allows a --

16 JUSTICE JACKSON: Yeah, I mean, I
17 thought your answer was going to be something
18 like, really, the point of this statute was
19 Congress's concern. You started with the
20 concern about the release of video-watching
21 history as it relates to one person.

22 And so, really, the consumer, who is
23 the consumer is not the thrust of this. The
24 thrust of this is the video tape service
25 provider and their activity with respect to

1 releasing or disclosing this information.

2 And Congress wanted to -- or maybe --
3 maybe wanted to have the consumer relationship
4 for the purposes that you indicated earlier,
5 like consent or whatnot, but for some of us, it
6 matters why. And -- and mysteries aren't
7 great. So I'm trying to come up with or
8 understand the theory that Congress would have
9 crafted a statute in this way.

10 MR. HAMMACK: So I'm not sure I could
11 have said it any better myself. I think you're
12 absolutely right to be focused on the thrust of
13 this statute is about personally identifiable
14 information. Every operative provision of this
15 statute protects some amount of personally
16 identifiable information.

17 (B)(1) just has another limitation so
18 that it protects not all personally
19 identifiable information but just the
20 personally identifiable information concerning
21 a consumer.

22 JUSTICE BARRETT: Mr. Hammack,
23 speaking of personally -- personally
24 identifiable information -- sorry -- that
25 definition uses "includes" instead of "means."

1 Does it sweep more broadly than the definition
2 given there? What else could be in it? Why --
3 why would it say just includes? What else does
4 it --

5 MR. HAMMACK: So the parties agree
6 that "personally identifiable information,"
7 although it says includes, requires two strands
8 of information: Something that identifies you
9 and something that identifies the specific
10 video materials or services that you requested
11 or obtained.

12 All the courts of appeals that have
13 addressed that question have reached the exact
14 same conclusion. If you look at the
15 legislative history, Congress actually says why
16 it used the word "includes" instead of "means."

17 And it says we used "includes" there
18 to create a floor, to create a minimum.
19 Personally identifiable information could
20 identify you or -- or identify facts about you
21 in lots of other realms, but at a minimum, it
22 has to identify you as having requested or
23 obtained those specific video --

24 JUSTICE ALITO: Personally --

25 JUSTICE BARRETT: And so that's a

1 limit -- oh, sorry. Go ahead.

2 JUSTICE ALITO: Go ahead, please.

3 JUSTICE BARRETT: So go ahead. I'm
4 done.

5 JUSTICE ALITO: Well, I was just going
6 to ask: Personally identifiable by whom? By
7 the NSA? I mean, how specific does this have
8 to be?

9 MR. HAMMACK: I think the answer to
10 that question lies in subsection (b)(1), the
11 liability provision, which says it prohibits
12 disclosures of PII to any person. So, if it's
13 identifiable to the "any person" that receives
14 that disclosure, it's personally identifiable
15 information.

16 JUSTICE KAGAN: You -- you said before
17 that "includes" was used to suggest a floor,
18 which makes perfect sense, but I think that the
19 question is, does "includes" -- does that
20 provision with the word "includes" also have a
21 ceiling?

22 I think that that's the question that
23 would give rise to some concern. If you
24 thought "includes" could also mean anything
25 else in the world, then you wouldn't have the

1 limit that you're saying comes from that
2 provision.

3 MR. HAMMACK: I think, if you can
4 imagine a disclosure that includes 10 different
5 facts about an individual and just one of them
6 identifies the specific video materials or
7 services that he requested or obtained,
8 Congress is saying that disclosure of that
9 information is personally identifiable
10 information only because of that one strand of
11 information. It might have identified --

12 JUSTICE KAGAN: I see. But that one
13 strand has to be there?

14 MR. HAMMACK: Absolutely, yes, yes.

15 JUSTICE KAVANAUGH: The question of
16 PII, even if you prevail on the issue before
17 us, would still be resolved on remand, correct?

18 MR. HAMMACK: That's correct.

19 JUSTICE KAVANAUGH: It would still be
20 open on remand. We're not resolving that here
21 because there's a big argument, obviously, in
22 the courts of appeals whether this kind of
23 information constitutes PII, correct?

24 MR. HAMMACK: That is correct. And
25 this Court may someday have to resolve that

1 question, but that day is not today.

2 JUSTICE SOTOMAYOR: Is that why you
3 asked us -- is -- is that -- is that why you
4 asked us to vacate instead of remand?

5 MR. HAMMACK: That -- that's exactly
6 why. There are other arguments that -- that
7 Paramount raised below, and that's why we asked
8 to vacate.

9 JUSTICE SOTOMAYOR: Including whether
10 it's a video tape service provider?

11 MR. HAMMACK: In the district court,
12 it raised that question, not in the Sixth
13 Circuit.

14 JUSTICE SOTOMAYOR: Not in the Sixth
15 Circuit. But it is claiming that these videos
16 are for free and not part of a consumer
17 transaction, correct?

18 MR. HAMMACK: Well, it's certainly
19 claiming that the videos are available for
20 free. And our response is, sure, they're
21 delivered for free, and you might request or
22 obtain them for free, but that doesn't change
23 the operative provisions of the statute either
24 in --

25 JUSTICE SOTOMAYOR: No. But then

1 would they then be in the -- in the business
2 of -- of -- of in commerce for rental, sale, or
3 delivery? That's up to the lower courts,
4 correct?

5 MR. HAMMACK: I -- I think that's
6 exactly right. Our position is yes, but that's
7 a question for remand.

8 JUSTICE ALITO: How have these suits
9 generally prevailed in the lower courts?

10 MR. HAMMACK: I'm sorry, what -- what
11 do you mean by "prevailed"?

12 JUSTICE ALITO: Have the plaintiffs
13 won?

14 MR. HAMMACK: I think, if you look at
15 Paramount's brief, it suggests that courts have
16 routinely dismissed VPPA claims.

17 JUSTICE ALITO: And why do you think
18 that is? Why do you think these smart lower
19 court judges have rejected the kind of very
20 literal interpretation of the statutory
21 language that you're presenting to us today?

22 MR. HAMMACK: I -- I think there's --

23 JUSTICE ALITO: Under every provision
24 of this -- of this statute, why -- why have
25 they rejected that?

1 MR. HAMMACK: I think there is,
2 unfortunately, some reluctance to -- to believe
3 that Congress actually meant what it said in
4 the context of this statute. It wrote a broad
5 law that is very protective of personally
6 identifiable information.

7 That prohibits a lot of disclosures of
8 that kind of information, and I think --

9 JUSTICE ALITO: Well, it enacted a law
10 that is based on the technology of the 1980s.
11 And you can see this in every provision of
12 this, in the title, Wrongful Disclosure of
13 Video Tape Rental or Sale -- or Sale Records.
14 And you can go through all the provisions, and
15 it's like that.

16 Suppose we look at (a)(1) and don't
17 consider the statutory definition of "video
18 tape service provider." Is Paramount a video
19 tape service provider in the literal sense of
20 the -- of the term?

21 MR. HAMMACK: Yes, it is. And, in
22 fact --

23 JUSTICE ALITO: In the literal sense
24 of the term? Are they selling video tapes, VHS
25 tapes?

1 MR. HAMMACK: It's very important
2 there that in (a)(4), the definition of "video
3 tape service provider," it says "or similar
4 audiovisual materials."

5 JUSTICE ALITO: Yeah. Okay. That's
6 what I'm saying. But, if we go to that, what
7 does it -- what does its -- what does it mean
8 for it to be similar?

9 MR. HAMMACK: Again, it's not a
10 question that's presented here, but you have, I
11 think, several avenues. One way is to say it's
12 similar in that it's prerecorded. It's similar
13 in that you watch it in the privacy of your
14 home. It's similar in that it can be delivered
15 to you personally; it's not something that you,
16 for example, go to a theater and witness with
17 other people.

18 JUSTICE ALITO: But it is not similar
19 in the sense that you go to a Blockbuster store
20 and get a VHS tape.

21 MR. HAMMACK: Which is true enough, I
22 guess, and, in fact, when Congress stepped back
23 into the statute in 2013, it acknowledged that
24 video cassette tapes were largely obsolete,
25 Blockbuster was either on its way out or

1 already gone, and everyone was streaming videos
2 directly to their phones. Congress saw no need
3 to re-jigger the definitions or to change the
4 provisions at (b)(1)(D) or (E) precisely
5 because they're technology-neutral.

6 JUSTICE KAVANAUGH: Well, isn't there
7 a concern about repurposing a statute that was
8 really about public disclosure of what
9 individuals viewed into a statute that
10 regulates data sharing for targeted advertising
11 on the Internet? Those are very different
12 things. And the context here is the data
13 sharing for the targeted advertising.

14 MR. HAMMACK: So, on the first point,
15 I would say, again, Congress wrote a law that
16 isn't technology-specific. It wrote a broad
17 law that spans all kinds of technologies, all
18 kinds of ways that you might obtain those video
19 materials or services, all kinds of ways you
20 might rent, purchase, or subscribe to goods or
21 services.

22 And then the second point, Congress
23 anticipated that this information would be
24 useful for advertising purposes, and it crafted
25 an exception under (b)(2)(D) that specifically

1 allows disclosures of the subject matter of the
2 videos, along with a name and address, when
3 that disclosure is made exclusively or solely
4 for the purpose of advertising goods or
5 services directly to the consumer.

6 And it's important there goods or
7 service -- it says "goods and services" in
8 (b)(2)(D)(ii), that -- that exception, and it
9 says "goods or services" in subsection (a)'s
10 definition of "consumer."

11 Our reading has "goods or services"
12 and "goods and services" mean the same thing.
13 By its own admission, Paramount's reading has
14 those two virtually identical phrases mean two
15 radically different things.

16 JUSTICE KAGAN: You're -- you're
17 hypothesizing a prescient Congress as opposed
18 to a Congress that mistakenly stumbled into
19 broader language than it meant to use.

20 MR. HAMMACK: I think that is kind of
21 the foundational premise that this Court
22 indulges at the outset of every statutory
23 interpret -- or interpretation case; namely,
24 that Congress said what it meant and meant what
25 it said when it wrote a statute.

1 I think, if you start from the
2 opposite purpose, that maybe Congress
3 accidentally kind of tripped and fell and wrote
4 these words instead of those words, I think, if
5 you indulge that premise, you actually end up
6 landing in the exact same place precisely
7 because, when you walk through (a)(4)'s
8 definition of a "provider," (a)(3)'s definition
9 of "PII," and then (a)(1)'s definition of
10 "consumer," you see that these weren't
11 accidental. The scopes are different every
12 time even though the source is the same.

13 JUSTICE BARRETT: Mr. Hammack, I want
14 to ask you about standing. So the Sixth
15 Circuit recognized in a footnote that its view
16 of standing here, saying that this was similar
17 to publicity given private life, diverged from
18 the Eleventh Circuit's approach to the
19 question.

20 And I want you to give me the pitch on
21 the facts of your complaint as you allege them
22 why you have standing and specifically here --
23 you know, you can have disputes about, as the
24 Eleventh Circuit has taken the position, that
25 you need to have some publicity, telling one

1 private individual isn't enough, but, here, so
2 far as I can tell, no person got this
3 information, whatever this Pixel thing is,
4 right?

5 So why do you have standing?

6 MR. HAMMACK: Well, the person, I
7 suppose, would be Facebook that got the
8 information, just the largest social media
9 company that exists. But it's also true -- and
10 I think, if you -- if you look closely at the
11 Sixth Circuit's opinion, it actually says all
12 six circuits that have answered that standing
13 question in the context of a VPPA claim are in
14 accord. All of them say, yes, you have
15 standing when there's been a disclosure even to
16 one person of your personally identifiable
17 information without your consent. All six are
18 in accord on that point.

19 The difference with the Eleventh
20 Circuit is, well, what happens in a different
21 context. I believe that was the FDCA instead
22 of the VPPA. But, in that context, you
23 basically bounced a disclosure from a mail
24 vendor to the consumer, and the court said in
25 that context that's not really a disclosure.

1 You're basically outsourcing kind of who's
2 going to mail the item to the consumer.

3 Here, we've got an exception for
4 disclosures made to the consumer. It's an open
5 question, I guess, whether a similar mail
6 vendor theory would apply to the VPPA, but
7 that's just radically different than the facts
8 we have here.

9 JUSTICE JACKSON: You all didn't brief
10 standing, right? Is that an issue in this case
11 right now?

12 MR. HAMMACK: It --

13 JUSTICE JACKSON: I mean, it always is
14 in the sense of our jurisdiction, but I'm just
15 saying, do we have arguments written related
16 to -- to standing?

17 MR. HAMMACK: That's actually --
18 that's absolutely right, that it was not put up
19 in issue in this case. We argued that in the
20 district court. Paramount abandoned its
21 standing argument in the Sixth Circuit. It
22 addressed it sua sponte. I think you're right
23 that it's a background issue in this case. But
24 it has not been briefed.

25 JUSTICE JACKSON: And can I ask you a

1 clarifying question just about the lower court
2 dismissals? I -- are they on the consumer
3 issue that is before us now? I thought there
4 was a 2-2 split among the circuits on the
5 definition of "consumer."

6 MR. HAMMACK: That's absolutely right.
7 There is a 2-2 split on the definition of
8 "consumer." And both dismissals here, the --
9 the district court in Tennessee and the Sixth
10 Circuit, held solely that this complaint should
11 be dismissed because of the particular meaning
12 we're giving to the word "consumer."

13 JUSTICE JACKSON: So, if these have
14 not prevailed in large, it could be for other
15 reasons than that?

16 MR. HAMMACK: Absolutely. And, in
17 fact --

18 JUSTICE JACKSON: Yeah.

19 MR. HAMMACK: -- it often is for other
20 reasons. If you look at Paramount's brief in
21 opposition to our petition for certiorari, they
22 point to personally identifiable information,
23 disputes about whether someone is a provider.
24 Those are other reasons, and they point to the
25 fact that there are multiple real limitations

1 to liability coexisting at once in subsection
2 (b)(1).

3 JUSTICE KAVANAUGH: Is -- the PII, is
4 that a 3-1 split against your position on PII?

5 MR. HAMMACK: That -- that's correct,
6 Your Honor, yes.

7 JUSTICE KAVANAUGH: I think the other
8 side's kind of big-picture argument is that we
9 are a textualist Court but usually not a
10 literalist Court and that we have a lot of
11 principles and doctrines -- major questions,
12 elephants in mouse holes, context, common
13 sense -- you see those terms sprinkled through
14 a lot of our cases, including in this general
15 field and that we should be thinking about that
16 so that we don't read this statute for all it's
17 worth when the Congress in the 1980s wasn't
18 thinking about data sharing for targeted
19 advertising.

20 So that's a big-picture question for
21 you to tackle.

22 MR. HAMMACK: I think this Court's
23 approach is exactly right, that you always look
24 at text in context. We have no quarrel with
25 that methodology because text in context shows

1 you exactly what you normally presume at the
2 outset, which is that Congress meant "goods or
3 services," a broader term, when it said "goods
4 or services" in subsection (a)(1).

5 It did not mean video materials or
6 services. Something it said in the same
7 sentence, identically from a video tape service
8 provider, it did not mean prerecorded video
9 cassette tapes or similar audiovisual
10 materials. It didn't even mention services at
11 all in the definition, (a)(4)'s definition, of
12 a "provider." It didn't mean those other
13 phrases that it said elsewhere. It meant
14 something different. And I think context
15 absolutely reinforces that point.

16 JUSTICE ALITO: Well, Mr. Clement says
17 your client is not -- was not a consumer, was
18 not a subscriber of services from a video tape
19 service provider because what he subscribed to
20 was a newsletter.

21 So would you address that? He says
22 that the "from" places a limitation on the
23 literal -- what might be considered the literal
24 interpretation of those phrases. And he has
25 lots of examples in -- in which "from" is used

1 in that way.

2 MR. HAMMACK: I think that's an
3 unusual meaning to ascribe to "from" from the
4 outset. That is usually a word that identifies
5 the source of material, not something that
6 identifies the scope.

7 And, here, we know for sure that
8 Congress was looking at "from" as identifying
9 source. And we know that by comparing (a)(1)'s
10 definition of "consumer" to (a)(3)'s definition
11 of "PII." Both identify subject matter that
12 comes from a video tape service provider.

13 JUSTICE ALITO: I mean, there are a
14 lot of examples in which "from" is used in
15 exactly the way Mr. Clement tells us, and I --
16 I don't have to add an additional hypothetical,
17 but I will anyway.

18 Let's say I -- I got gas at a Costco
19 or a Sam's Club, and then I'm having a
20 conversation with my neighbor, who's
21 complaining about the high cost of gas, and he
22 says: I had to pay X per gallon -- Chief? All
23 right. I had to pay X per gallon for gas.

24 And I said: Well, I paid X minus 20
25 cents. And he says: Wow. Where did you get

1 your gas? And I say: I got it from a provider
2 of optical services because Sam's Club and
3 Costco have optical services as well.

4 Now would -- would I be -- I would
5 just be playing games if I said that, wouldn't
6 I?

7 MR. HAMMACK: I think, in that
8 specific context, that would be a pretty
9 unusual thing to say. But, if we could twist
10 it just a little bit, it would be equally odd
11 to say if we had a statute that defined gas
12 stations a particular way, those that provide
13 fuel, that would be our (a)(4) paradigm.

14 Then we had in the same statute, the
15 same sentence of the same statute, a provision
16 that mentioned fuel materials or services or
17 fuel goods or services. That's (a)(3). And
18 then we had in the same statute, the same
19 sentence, goods or services from a gas station.

20 It would be exceedingly odd to say
21 those three subject matters must be the same
22 thing. Maybe I was feeling really brave at the
23 gas station and I got sushi. That's a good or
24 service from --

25 (Laughter.)

1 MR. HAMMACK: -- a gas station, but
2 it's not a fuel good or service, and it's
3 certainly not the fuel that you would normally
4 buy at a gas station.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: The -- I'd like you
9 to go back to your definition of a "video tape
10 service provider." It means "any person" --
11 I'm just reading from the statute -- "any
12 person engaged in the business in or affecting
13 interstate commerce of rental -- rental, sale,
14 or delivery of prerecorded video cassette tapes
15 or similar audiovisual materials."

16 How does that get us to streaming, to
17 video that is streamed?

18 MR. HAMMACK: I think the courts -- as
19 far as I know at least, the courts are in
20 accord that "or similar audiovisual materials"
21 includes things like streaming videos to a
22 personal device that you would watch in your
23 house. It doesn't require a physicality, you
24 know, necessarily that you're going to have a
25 tape, a physical tape that you play that way.

1 And, again, when you look at in 2013
2 Congress stepped back into this statute, it
3 specifically said we are aware streaming is
4 rampant and we still think this statute covers
5 the -- the personally identifiable information
6 that results from those streaming activities.

7 JUSTICE THOMAS: How, in your own
8 words, though, does that similar audiovisual
9 material get you to streamed video?

10 MR. HAMMACK: Because it's similar in
11 critical ways to a video cassette tape. It
12 allows to you watch that video in the privacy
13 of your home. It allows you to watch it on
14 your own. It allows you to pause, come back
15 later, record -- or, I'm sorry, rewind, and
16 pick it up as you wish. It's -- it's in lots
17 of ways the exact same as the way you would
18 interact with a video cassette tape.

19 JUSTICE THOMAS: Why isn't that closer
20 to, during the 1980s, you had cassette tapes,
21 you had the Blockbuster, you -- you rented the
22 cassette tapes, the VHS, but you also had TV
23 and you had cable.

24 Wouldn't it seem that streaming is
25 closer to cable TV than it is to picking up a

1 video from Blockbuster?

2 MR. HAMMACK: If we're looking at the
3 technology that was available in 1988, I think
4 the answer has to be no precisely because you
5 couldn't pause and rewind and stop and come
6 back hours later and rewatch things the way
7 that you can now both with a prerecorded video
8 cassette tape and with the exact audiovisual
9 materials that we have at issue here.

10 And I would note too all of this
11 concerns whether Paramount is a video tape
12 service provider, which isn't before the Court
13 today.

14 CHIEF JUSTICE ROBERTS: Justice Alito?
15 Justice Sotomayor?
16 Justice Kagan?
17 Justice Gorsuch?
18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: Just on the video
20 tape service provider issue, I know that's not
21 before us, but I think you've waived away some
22 of the concerns about every business in America
23 that has video on its website being targeted,
24 but, certainly, the amicus briefs on the other
25 side -- The Retail Litigation Center, the

1 Chamber of Commerce -- point out that your
2 reading would -- and -- and suits have been
3 brought against every sector of the economy --
4 print media publishers, movie theaters,
5 advocacy groups, sports leagues, health and
6 fitness websites, parenting advice companies,
7 chess websites, crafting websites, professional
8 networking sites, universities -- every other
9 type of defendant under the sun in the words of
10 the amicus brief.

11 And so I think you've waived away some
12 of the concerns about the breadth of your
13 argument on this issue by saying don't worry,
14 it's not going to apply because of the
15 definition of "video tape service provider."

16 But I don't think other plaintiffs are
17 going to be conceding that in the cases against
18 those businesses, or is the amicus -- are the
19 amicus briefs wrong in saying that that's a
20 legitimate concern?

21 MR. HAMMACK: Well, I would say a
22 couple of points. One, it's true that those
23 suits have been brought. It's also true that
24 many of them have resulted in district courts
25 saying: Wait a minute, that entity, like

1 Chick-fil-A, is not a video tape service
2 provider. This is the wrong kind of entity.
3 Congress wasn't targeting Chick-fil-A.

4 JUSTICE KAVANAUGH: And what makes
5 someone a video tape service provider? If they
6 have a video on their business website that
7 let's say is three minutes long, are they a
8 video tape service provider?

9 MR. HAMMACK: I'm not sure the length
10 of the video matters. What will always matter
11 is exactly what (a)(4) says. You have to be
12 engaged in the business of renting, selling, or
13 delivering that audiovisual material.

14 JUSTICE KAVANAUGH: You're delivering
15 it, right, by showing it on your website,
16 correct?

17 MR. HAMMACK: That -- that seems to me
18 to be true. You're delivering it.

19 JUSTICE KAVANAUGH: Okay. And then
20 what makes you --

21 MR. HAMMACK: But are you engaged --

22 JUSTICE KAVANAUGH: -- what makes you
23 in the business? Two minutes, three minutes,
24 four minutes, 10 minutes? What is it?

25 MR. HAMMACK: I don't think the number

1 of minutes long that a video is.

2 JUSTICE KAVANAUGH: What does matter
3 then?

4 MR. HAMMACK: I think it's -- it's
5 exactly what Congress put into (a)(4). Are you
6 engaged in that business? Chick-fil-A is not.

7 JUSTICE KAVANAUGH: I'm trying to --
8 I'm trying to --

9 MR. HAMMACK: Paramount is.

10 JUSTICE KAVANAUGH: I understand the
11 words that are used. And I don't mean to be
12 too sharp, but I just want to have some
13 explanation of what you think "engaged in the
14 business" means because I think you waived away
15 some of the concerns by saying don't worry
16 about Chick-fil-A, and I just want to know why.

17 MR. HAMMACK: Well, I think, if you --
18 if you imagine the Blockbuster paradigm, it was
19 engaged in the business of delivering those
20 materials because that was what was on offer
21 when you walked into the store. The same is
22 true of a department store. When you walked in
23 those doors, you could rent, purchase -- rent
24 or purchase at least those --

25 JUSTICE KAVANAUGH: When you go on a

1 business's website, which is how a lot of
2 people shop, obviously, most people, you'll
3 often see a video quickly and --

4 MR. HAMMACK: And -- and it might --
5 it -- it might be that those websites are in
6 the business of delivering those video
7 materials. I don't think that should alarm us
8 so much precisely because (b)(1) has multiple
9 other limitations in it.

10 You also need PII to be collected.
11 You need a knowing disclosure, not an
12 accidental one, a knowing disclosure. You also
13 need a consumer.

14 So I think, even if we lived in a
15 world where, for example, Chick-fil-A someday
16 becomes a video tape service provider, there
17 are lots of other off-ramps for liability
18 included.

19 JUSTICE KAVANAUGH: I still don't
20 think you've told me what a video -- and this
21 is the last time I'm going to ask it -- what on
22 the business's website's video makes it in the
23 business of delivering?

24 MR. HAMMACK: I apologize, Justice
25 Kavanaugh. I'm not sure I have a better answer

1 except to say putting that material on offer in
2 your store, you are driving -- your -- your
3 profit or your business motive is linked to
4 renting, selling, or delivering that material.

5 JUSTICE KAVANAUGH: A video of your
6 product presumably. Okay, thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: And why do you
10 allege that 247Sports meets that description?

11 MR. HAMMACK: Precisely because it is
12 engaged in the business of delivering a whole
13 host of video materials on its website.

14 JUSTICE BARRETT: Well, that's just
15 sort of repeating back the definition. But
16 what makes it a provider? You say it's engaged
17 in the business. Why? And what -- you know,
18 what is the length of these videos? Why -- why
19 are they similar to the old, you know, VHS
20 tape?

21 MR. HAMMACK: Again, I'm not sure that
22 they're similar in terms of length, but, again,
23 it's the profit motive that Paramount has when
24 it makes these deliveries. It doesn't deliver
25 them, you know, for kicks. It delivers them

1 because it sells advertising. It drives
2 business to the website.

3 JUSTICE BARRETT: Well, that's back to
4 Justice Kavanaugh's concern because that's why
5 every video -- I mean, if I'm on Nordstrom's
6 website and I click to -- to see the model show
7 me what the shoes are going to look like, the
8 mode -- that's a profit motive. It's not doing
9 it just for kicks, I mean, so that does bring
10 in things like Chick-fil-A and basically every
11 other business.

12 MR. HAMMACK: I think the courts have
13 been very consistent in saying it doesn't bring
14 in every kind of business that incidentally
15 happens to provide a single video on its
16 website. That's certainly not our position
17 either.

18 JUSTICE BARRETT: Okay.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So, even if we
22 someday define the universe of video tape
23 service providers because that's not in this
24 case, but even if we define it broadly, can you
25 speak to whether interpreting "consumer" as you

1 have will have the negative consequences?

2 There's a lot of policy arguments in
3 Respondent's brief, and I just wanted to invite
4 you to talk about what the cure for this would
5 be even if this is a broadly interpreted
6 statute.

7 MR. HAMMACK: I don't think it has any
8 real negative consequence here precisely
9 because all of the elements in (b)(1) have to
10 coexist at the same time, so it's not just that
11 you're a video tape service provider and,
12 certainly, that this statute does not prohibit
13 providers from having consumers. It doesn't
14 prohibit them even from collecting or using
15 personally identifiable information.

16 The only thing that triggers
17 liability, the only thing is the disclosure,
18 the knowing disclosure, of personally
19 identifiable information concerning a consumer
20 without consent. And, again, consent is easy
21 to obtain. That's the easiest off-ramp to
22 liability that we have.

23 JUSTICE JACKSON: So that's -- so the
24 cure is pretty simple. It's not that we have
25 to worry so much about roping in all of these

1 businesses. They would just figure out a way
2 to get consent from people who are watching
3 these videos after they've been disclosed?

4 MR. HAMMACK: Absolutely true. And I
5 would say it's -- it's kind of a technological
6 reality that more businesses are engaged in
7 this business today than were engaged in it in
8 1988, and that's not a concern for exactly the
9 reasons we just laid out: Consent is such an
10 easy fix.

11 JUSTICE JACKSON: Thank you.

12 MR. HAMMACK: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Clement.

16 ORAL ARGUMENT OF PAUL D. CLEMENT

17 ON BEHALF OF THE RESPONDENT

18 MR. CLEMENT: Mr. Chief Justice, and
19 may it please the Court:

20 In 1988, Congress addressed a specific
21 problem with a tailored solution protecting the
22 personally identifiable information of
23 consumers of video tape service providers. For
24 years, the statute worked as designed.
25 Personal protection of video -- information of

1 video consumers was protected, and there was
2 virtually no litigation under this statute.

3 Then, however, the plaintiffs' class
4 action bar discovered the VPPA and its
5 statutory and punitive damages. The key to
6 their effort to repurpose the statute is the
7 argument, the claim, that the statute's
8 definition of "consumer" uses the phrase "goods
9 or services" in an unmodified way, so one can
10 become a consumer without ever having rented,
11 purchased, or subscribed to a video.

12 That argument fails at the threshold
13 because the phrase "goods or services" is not
14 unmodified in the statute, but it takes its
15 meaning from the immediate surrounding text.
16 And that immediately surrounding text makes
17 clear that the relevant goods or services are
18 the prerecorded video cassette tapes or similar
19 audiovisual materials that one could rent,
20 purchase, subscribe to, from a video tape
21 service provider.

22 So just as one, when referring to
23 goods or services from a medical service
24 provider, would not logically refer to a cup of
25 coffee or valet parking, when one refers to

1 goods or services from a video tape service
2 provider, one does not logically refer to
3 chicken sandwiches or dog bandanas.

4 The alternative of interpreting the
5 statute to create a veritable army of VPPA
6 consumers without any personal information to
7 protect unless and until years or even decades
8 later they watch a free video has nothing to
9 recommend it and underscores that Petitioner is
10 misreading the statute.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Would you tell me how
13 is -- is -- and I thought it was 247Sports, but
14 247Sports -- I always thought of it as simply a
15 sports site.

16 The -- how does it convert to or is
17 seen now by Petitioner as a video tape service
18 provider? What's the logic of that? Because,
19 if its primary business is simply sports and it
20 shows videos, it would seem just naturally not
21 to be a -- in the business of providing video
22 service.

23 MR. CLEMENT: So, Justice Thomas, with
24 all due respect to my friend, I think he gets
25 there the exact same way you would get there in

1 understanding that Chick-fil-A is in the
2 business of delivering videos. It's the same
3 thing.

4 That's not what the website is mostly
5 about, but there -- if you go to the website,
6 the first thing you'll see is, like, a video
7 starts playing. You don't even have to click
8 on anything. It just starts playing. And
9 that's the way that most websites work these
10 days. And -- and most of the websites also
11 have pixels because most of the reason you can
12 get to free content, rather than being behind
13 the pay wall, is because of targeted --

14 JUSTICE THOMAS: Does that mean
15 they're in the business, though, of delivering
16 video services?

17 MR. CLEMENT: So, I mean, look --

18 JUSTICE THOMAS: They're in the
19 business -- Chick-fil-A is in the business of
20 selling chicken sandwiches. Twenty --
21 247Sports is a sports site that has videos.

22 MR. CLEMENT: Totally agree with you,
23 Justice Thomas, as a common-sense matter. But
24 here is I think a little bit of the problem,
25 which is Congress did make it pretty clear that

1 the department store, when it sells the video,
2 is a video tape service provider even though,
3 when it sells furniture and clothes and
4 everything else, it's not a video tape service
5 provider.

6 And the way I think, you know, I
7 would -- the way I understand my friend's
8 position is, yeah, it's all well and good that
9 247Sports.com is mostly just a sports site,
10 but, because there are videos on it, that's
11 enough to get you in the business of delivering
12 videos. And that's the same way the
13 plaintiffs -- they might not have succeeded,
14 but that's the same way the plaintiffs got to
15 Chick-fil-A, La-Z-Boy, Folger's, Godiva
16 chocolates, and, of course, every newspaper
17 virtually, you know, lots of small newspapers,
18 because all of those newspapers, you know,
19 they're basically in the business of having
20 websites that have news. Some of the news
21 articles are accompanied by videos.

22 And, of course, their theory is not
23 that you become a consumer just by going to the
24 website. That's kind of the weird thing about
25 this theory. Their theory when they sue the

1 newspapers is, well, not everybody that goes
2 there is a consumer, but the people that
3 actually still subscribe to the good
4 old-fashioned paper that comes to your door,
5 they are consumers because they bought a
6 non-video or they subscribed to a non-video
7 product. That gets them in the consumer door.
8 And then maybe five years later, they go to the
9 website --

10 JUSTICE GORSUCH: Well, Mr. Clement --

11 CHIEF JUSTICE ROBERTS: Well --

12 MR. CLEMENT: -- and see a video, and
13 all of a sudden we're off to the raises.

14 CHIEF JUSTICE ROBERTS: -- you've
15 picked some hypotheticals that are particularly
16 helpful for you. Chick-fil-A, you don't think
17 of that as anything other than chicken. But
18 there are a lot of stores that sell a lot of
19 different things, including the type of videos
20 that we're talking about.

21 And so I don't know why we should
22 focus just on the easy hypotheticals.

23 MR. CLEMENT: Well, it's sort of my
24 job to focus on the easy hypotheticals.

25 (Laughter.)

1 MR. CLEMENT: But I think, if you --

2 CHIEF JUSTICE ROBERTS: I would think
3 your job is to focus on the hard ones --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: -- at least
6 from our point of view.

7 MR. CLEMENT: Well, my job is to
8 direct your attention to the easy
9 hypotheticals, I would suppose. But, fair
10 enough, your job is to direct to the harder
11 hypotheticals.

12 But I'm not sure there really are that
13 many hard hypotheticals in the sense that we're
14 not taking the position that if you do --
15 actually are in the business, you are a video
16 tape service provider, that because you do lots
17 of other things or the -- or the rest, that
18 you're not covered.

19 And we think -- I mean, you know, I
20 think we would take the position, though I
21 think Justice Thomas raises a good question
22 about streaming services, but we would take the
23 position that Netflix, when you go online to
24 Netflix, that that might still be covered. So
25 I think the core of the -- of the statute is

1 still covered under our view.

2 But what I think what we would say is
3 that this notion that you can just mix -- mix
4 and match what makes you a consumer and what
5 gives you the personally identifiable
6 information that the statute protects for
7 consumers, that mismatch doesn't make any
8 sense. So a dog bandana --

9 JUSTICE KAGAN: I don't know if it's
10 mixing and matching. It's following the
11 definitions where they lead. So this
12 definition says goods and services. It doesn't
13 say audiovisual goods and services. Other
14 definitions do have the modifier in them. That
15 suggests that the fact that this definition
16 does not have the modifier in it is especially
17 important.

18 And you -- you -- you can't get the
19 modifier from the "from" clause because the
20 "from" clause just tells you what -- where
21 you're getting the goods and services from, but
22 the goods and services are the goods and
23 services not modified in any other way.

24 So mixing and matching, there are
25 three different definitions. You have to put

1 them together. What you get, most naturally
2 read, is the Petitioner's understanding of the
3 statute.

4 MR. CLEMENT: Well, two things, Your
5 Honor. I mean, one, you know, sometimes when
6 that's what you get, maybe you should take
7 another look. And the premise of your
8 question, of course, is that "from a video tape
9 service provider" isn't doing any definitional
10 work in the definition of "consumer."

11 And I would just take issue with that.
12 I mean, you know, "from a video tape service
13 provider," "video tape service provider" is a
14 defined term in the statute. If you plug that
15 definition into the statute, then what you get
16 is "consumer" means any renter, purchaser, or
17 subscriber of goods or services from any person
18 engaged in the business in or affecting
19 interstate or foreign commerce of rental, sale,
20 or delivery of prerecorded video cassette tapes
21 or similar audiovisual materials.

22 After I'm done plugging that into the
23 statute, I'm left with the conclusion that the
24 goods or service we're talking about here are
25 prerecorded video cassette tapes or similar

1 audiovisual materials.

2 JUSTICE JACKSON: But they don't have
3 to be, Mr. --

4 MR. CLEMENT: That makes sense --

5 JUSTICE JACKSON: But they -- but they
6 don't have to be. I mean, we -- we talked
7 about hypotheticals. Let me -- let me give
8 you what I hope is a hard hypothetical that you
9 can address.

10 So suppose we had Justice Breyer -- he
11 was mentioned before -- entering a video store,
12 and the store not only rents and sells videos
13 but also books about films. And Justice Breyer
14 is particularly interested in foreign films, so
15 he buys a book at the counter about French
16 films. And as he's flipping through the book,
17 he sees mention of several films that he would
18 actually like to preview in the store before he
19 decides whether he wants to rent or buy them.
20 And they have that service. And he says: Can
21 I please go into the corner here, to the
22 machine, and watch X, Y, Z film?

23 So he does this. A reporter then
24 comes in and acquires his video-watching
25 history as a result of this escapade, and he

1 has not actually purchased the films. He's
2 only purchased the book, but he's in the video
3 store and he's watching the films, and his
4 history then gets disclosed to the reporter.

5 What I can't figure out is why it
6 would matter from Congress's standpoint that
7 he's only purchased a book under those
8 circumstances when, really, what Congress cared
9 about is whether his video-watching history was
10 disclosed to a third-party under this statute.

11 MR. CLEMENT: So I guess what I would
12 say is that, you know, no statute pursues its
13 purpose to the ends of the earth. And, here,
14 Congress was very clear that if you don't have
15 a rental, purchaser, or subscription
16 relationship, then you're not covered by this
17 statute. And that's common ground between both
18 parties.

19 JUSTICE JACKSON: Right. He has a
20 purchaser relationship. What he's purchased is
21 a good of the video store that is not a film or
22 audiovisual. He's purchased a book that the
23 video store sells, so he is a consumer of the
24 video store.

25 Your position, as I take it, would be

1 that because he has not purchased video
2 materials, he's not a consumer for the purpose
3 of this statute, and I'm asking you why that
4 is.

5 MR. CLEMENT: That's because of the
6 way the statute's written. And for those that
7 look at legislative history, that also seems
8 entirely consistent with what Congress said.
9 Congress envisioned the possibility of a
10 department store selling videos and other
11 things, and they were quite clear that they
12 didn't think there was privacy protection for
13 the other things.

14 And then I also --

15 JUSTICE JACKSON: Privacy protection
16 for the other things. So, if the reporter had
17 asked what book did he buy, then that's not
18 covered. But the reporter asked what videos
19 did he watch, and that seems to me to be
20 materially indistinguishable from the actual
21 scenario that gave rise to this statute.

22 MR. CLEMENT: But, with respect, I
23 think, if Justice Breyer went into the same
24 store, didn't buy the book but still looked at
25 three videos in some cabin and didn't have to

1 subscribe anything to do it, and the reporter
2 asked the same question, he would still fit --

3 JUSTICE JACKSON: He doesn't cover
4 the --

5 MR. CLEMENT: -- he would --

6 JUSTICE JACKSON: -- he doesn't cover
7 the -- the consumer definition on its face
8 because he's not a consumer. He hasn't
9 purchased any goods or services.

10 MR. CLEMENT: Right, right. But it's
11 a perfect illustration of how the statute
12 doesn't capture every disclosure of personal
13 identifying information. It requires you to be
14 a consumer.

15 And, logically, the transaction that
16 makes you a consumer is one that involves some
17 personal identifying information. And what's
18 illogical is that you become a consumer on day
19 one, and then there's personal identifiable
20 information doesn't catch up to you --

21 JUSTICE KAVANAUGH: What -- what
22 seems --

23 MR. CLEMENT: -- until day -- until
24 years later.

25 JUSTICE KAVANAUGH: What seems

1 different to me about now from the 1980s is not
2 so much the plaintiffs but the type of personal
3 identifying information. It's not your name
4 being released. It's this data-sharing code,
5 right? And that's quite a bit different. And
6 there are a lot of arguments about PII.

7 And then treating everyone as a video
8 tape service provider, every business as
9 opposed to the ones that are analogous to
10 Blockbuster. But those two arguments, both of
11 which may be raised in future cases in which
12 your side's prevailing in the lower courts for
13 the most part, are not the issues before us.

14 So how do we think about, you know,
15 the sky-is-falling concern in the amicus briefs
16 and it's part of your brief when there are
17 these two other arguments that you may prevail
18 on? And why shouldn't we just follow
19 "consumer" as written and worry about that in a
20 future case?

21 MR. CLEMENT: So a couple of things,
22 Justice Kavanaugh. I mean, first of all, like,
23 if you're going to tell me that I'm going to
24 win on those other arguments, I mean, great.

25 But we don't know that. My friend

1 has -- you know, thinks that he has great
2 arguments on both PII and on video tape service
3 provider. I also don't think you can really
4 get away from the definition of "video tape
5 service provider" in interpreting the scope of
6 "consumer" because that word, that defined
7 word, is part of the definition of "consumer."

8 But I also want to say there are
9 distinct problems with this expansive
10 definition of "consumer," and it really takes
11 you away from the structure of the statute
12 because this statute operates on the assumption
13 that consumers are going to have personally
14 identifiable information and they are going to
15 be the ones -- the consumers are going to be in
16 the position to consent to the disclosure of
17 that information.

18 And my friend's position breaks that
19 structure of the statute because, even when he
20 answers Justice Jackson and says the way this
21 is going to work is we're going to ask for
22 consent from everybody before they go for a
23 website, well, they are going to ask for
24 consent from everybody and they're going to ask
25 for consent from a whole bunch of people who

1 aren't consumers.

2 JUSTICE KAVANAUGH: Well, it's going
3 to be overbroad consent, no doubt. But you --
4 it's a very easy solution for these businesses
5 going forward.

6 And I get the retrospective liability,
7 believe me, but going forward, it's a very easy
8 solution to get consent, isn't it? That's a
9 question. And maybe it's not easy. But --

10 MR. CLEMENT: So I'd like --

11 JUSTICE KAVANAUGH: -- tell me the
12 answer going forward.

13 MR. CLEMENT: Yeah. I mean, you did
14 point to the two years of liability from the
15 day you decide this case and all of that
16 overhang, but to answer your specific
17 question --

18 JUSTICE KAGAN: Well, this statutory
19 language, you know, it's relatively clear. And
20 you might have been -- be -- be charged with
21 having read it. And going forward, you have
22 two very simple solutions. One is to get
23 consent. Easy enough. People do it every day.
24 And the other is to stop selling people's
25 private information. Take your pick.

1 MR. CLEMENT: Yeah. Or put everything
2 behind a pay wall. That would be great. But I
3 guess what I would say is that --

4 JUSTICE KAGAN: Not the same thing.

5 MR. CLEMENT: Well, I think that's one
6 way that people will try to deal with this, but
7 as to the question --

8 JUSTICE KAVANAUGH: Can you answer --

9 MR. CLEMENT: -- of whether consent is
10 easy, the -- the statute's set up --

11 JUSTICE SOTOMAYOR: But what's the
12 problem with not?

13 MR. CLEMENT: I'm sorry?

14 JUSTICE SOTOMAYOR: What's the problem
15 with not disclosing private video view?

16 MR. CLEMENT: Oh, that is --

17 JUSTICE SOTOMAYOR: I mean, it -- it's
18 a business for you, and it might end your
19 business if you don't want to get consent, but
20 if you want to stay in the business, get
21 consent, or just don't do it.

22 What -- other than that you have
23 created a business model that might contradict
24 the law, because we still have a lot of open
25 issues, what's the problem?

1 MR. CLEMENT: So, I mean, the -- the
2 problem is the pay wall issue, which is the
3 reason that material is available for "free" on
4 the Internet is precisely because it's being
5 financed by targeted advertisement. And --

6 JUSTICE SOTOMAYOR: So people will be
7 told that if you want to see this, you have to
8 give consent.

9 MR. CLEMENT: Right. And --

10 JUSTICE SOTOMAYOR: And so they'll
11 make the choice of whether they want to watch
12 it for free and have their view -- their
13 viewing sold to other people or they won't. I
14 mean, it'll be up to the person, which seems to
15 me the way it should be.

16 MR. CLEMENT: So I guess what I would
17 say to try to answer the question, I'm just not
18 sure the consent is going to be easy as you
19 imagine. Certainly, Congress tried to make
20 consent relatively sort of sticky and said that
21 it had to be in a separate -- a separate
22 formulation. It couldn't be with when you get
23 consent to anything else. And, certainly, the
24 way these cases have been litigated, people
25 have argued that the consent, even when

1 websites have tried to get consent, wasn't
2 clear enough, wasn't unmistakable.

3 JUSTICE KAVANAUGH: Well, that'll
4 always be the argument. But it seems, just
5 technologically, isn't it pretty easy for --
6 for you all to obtain consent going forward?
7 It'll be a little more hassle for all of us,
8 but --

9 MR. CLEMENT: For everyone.

10 JUSTICE KAVANAUGH: Yeah. But one --

11 JUSTICE KAGAN: It's just one of those
12 cookies boxes that comes up, right? Wouldn't
13 you do it the exact same way?

14 MR. CLEMENT: I -- I -- I -- I --

15 JUSTICE KAGAN: I mean, we do that a
16 thousand times a day.

17 MR. CLEMENT: I know you do that a
18 thousand times a day. I will say that
19 Congress, when it was -- when it was setting up
20 this statute, did try to provide the consent,
21 informed written consent. It also said that it
22 has to be provided in a clear and conspicuous
23 manner for the consumer to withdraw on a
24 case-by-case basis.

25 So I -- I -- I think, look, I'm not

1 telling you that it's impossible, but I don't
2 think you should decide this case about the
3 meaning of "consumer" on the assumption that
4 consent is absolutely easy.

5 And I do think what they would do,
6 because they don't know who's a consumer
7 because they don't know who bought a chicken
8 sandwich or who bought a dog bandana, they're
9 going to ask consent from everybody. And right
10 there is a signal that something's off because
11 the statute requires consent from the consumer
12 to the disclosure of the consumer's
13 information.

14 JUSTICE KAVANAUGH: Well, the
15 definition might have been under-inclusive back
16 in the day given modern technology, the
17 definition of "consumer." I mean, maybe the --
18 the real concern Congress had if you translate
19 it to today would be everyone who views the
20 video.

21 MR. CLEMENT: I don't know that that's
22 the case. I mean, I think that's, you know,
23 open to speculation, but as we point out in the
24 brief, I think the one thing that's not open to
25 speculation is that if Congress passes a

1 statute to address the issues with targeted
2 advertisement, they're not going to have
3 coverage turn on the happenstance of where you
4 bought a chicken sandwich or where you bought a
5 dog bandana. I mean, that's kind of lunacy.
6 And that's why I think when you get to that
7 kind of result you go back.

8 And then, to the point of --

9 JUSTICE KAGAN: But, Mr. Clement, take
10 the -- the -- the facts of this case, right?
11 So I -- I don't know 247, but there's a sports
12 site and somebody gets a newsletter, purchases
13 a newsletter from that site.

14 MR. CLEMENT: It was a free
15 newsletter, so they don't purchase it, it's
16 free.

17 JUSTICE KAGAN: Just let's assume that
18 they --

19 MR. CLEMENT: Just the way you sign up
20 for, like, The New York Times.

21 JUSTICE KAGAN: -- they purchase
22 something from that site.

23 MR. CLEMENT: Yep.

24 JUSTICE KAGAN: And then they watch a
25 lot of videos. And let's say a judge does

1 this. And then it turns out that the judge
2 watches some pretty funky sports videos, you
3 know, like a lot of women wrestling or
4 something.

5 (Laughter.)

6 JUSTICE KAGAN: And that's
7 embarrassing. That's embarrassing and exactly
8 the way Congress thought we're passing this
9 statute to prevent disclosure of that
10 information.

11 So why is it like this case? It kind
12 of falls -- you know, a lot of times we get
13 cases that they don't fall within the heartland
14 of the statute and we say, oh, well, the
15 heartland of the statute isn't the whole
16 statute. The paradigmatic case isn't the only
17 case.

18 But couldn't this case kind of be the
19 paradigmatic case? It's like you can, like,
20 watch lots of embarrassing sports videos that
21 you don't want anybody else to know about. A
22 judge could.

23 MR. CLEMENT: I mean, I think it's
24 hard to watch a lot of embarrassing videos on
25 247Sports based on my perusal of it. But,

1 like, you know, I don't know, maybe, like,
2 watching, you know, Chicago Bears films is
3 embarrassing in certain parts of the country.
4 I don't know. Maybe it is embarrassing.

5 The point is, though, it shouldn't
6 turn on whether you also subscribed to a free
7 online newsletter, a free email newsletter.
8 See, the --

9 JUSTICE KAGAN: Maybe that's right.
10 Maybe that's right. Maybe the thing that
11 Congress should do as they look at this again
12 is to take away that limitation, but -- but --
13 but that wouldn't really serve your purpose,
14 would it?

15 I mean, that's -- that's a limitation
16 that works in your favor. And the fact that it
17 excludes some people who might be embarrassed
18 doesn't seem like an argument for your
19 interpretation of the statute.

20 MR. CLEMENT: Well, here's what I
21 think is an argument for my statute, which is
22 it's undeniable that the statute turns on that
23 happenstance, whether you get the chicken
24 sandwich, whether you subscribe to the free
25 email newsletter, and that doesn't make a lot

1 of sense.

2 And then the other thing that doesn't
3 make a lot of sense is because they've
4 untethered the "consumer" definition from
5 "personally identifying information" and from
6 "video tape service provider," then you get the
7 situation where there's no temporal connection
8 whatsoever.

9 So, under their theory, I can buy my
10 chicken sandwich 10 years ago, I can buy my
11 recliner 15 years ago, and then I don't watch a
12 video on the website until a decade later.

13 Congress would never write a statute
14 like that. If they really expected people to
15 be able to -- and I'll say it again -- mix and
16 match consumer status with personal information
17 and video watching, they would have put some
18 temporal limit that connected the two.

19 JUSTICE BARRETT: Mr. Clement --

20 MR. CLEMENT: And then --

21 JUSTICE BARRETT: -- doesn't yours
22 have a problem with temporal limit too, though?
23 May -- may -- let me just make sure I
24 understand your theory.

25 MR. CLEMENT: Yeah.

1 JUSTICE BARRETT: If said judge
2 purchases a subscription to 247Sports that
3 allows, you know, him or her to watch these
4 videos at Point A and then five or 10 years
5 later watches a free video from 247Sports, I
6 mean, haven't you also created a temporal --
7 there's a gap?

8 MR. CLEMENT: So there could be a gap
9 in certain situations, but I think it's a very,
10 like, narrow gap. I don't think you're going
11 to have millions of consumers that are all of a
12 sudden VPPA consumers.

13 But it's also -- there is no gap in
14 this sense: If the initial purchase is a video
15 purchase or, I think, to be more precise, is a
16 prerecorded video cassette tape or similar
17 audiovisual material, there is under the
18 statute an immediate opportunity to give
19 advance consent for two years.

20 And so that provision that was added
21 in 2013, even in the somewhat funky hypo I
22 think you're giving me, I mean, that -- that
23 advance consent provision works sensibly from
24 the get-go, whereas, under my friend's
25 position, you could buy a dog bandana and then

1 you could give advance consent to the
2 disclosure of PII before there's any PII under
3 his reading of the statute, and then five years
4 later, when you finally have PII, your advance
5 consent has already expired.

6 And that just shows, like, every
7 provision in this statute is -- makes sense if
8 you tether what makes you a consumer to what
9 generates PII in the first instance. And --

10 JUSTICE JACKSON: Except, Mr. --
11 Mr. Clement, I still think you -- you have a
12 line-drawing problem because, from the
13 standpoint of the statute being concerned about
14 the disclosure of personally identifying
15 information, you are creating two different
16 categories of customers. You're creating two
17 different categories of people.

18 In other words, the statute only
19 protects those whose personally identifying
20 information is disclosed if they have a
21 consumer relationship that involves buying
22 those videos, as opposed to those who have
23 their personally identifying information
24 disclosed, but they bought something else.

25 I think that's irrational as well if

1 the thrust and the point of the statute is to
2 protect the -- against the disclosure of
3 personally identifying information.

4 And I understand your point being that
5 because we have any definition of "consumer,"
6 it's under-inclusive. You have people who are
7 not consumers whose personally identifying
8 information might be disclosed. Justice Kagan
9 brought that point up with you.

10 But, fine, assuming we have that
11 oddity, you seem to be making yet another one
12 by carving up even more the category of people
13 whose personally identifying information is
14 disclosed.

15 MR. CLEMENT: I don't think I'm
16 carving it up more, and I think I'm doing
17 exactly what Congress intended. And
18 Congress -- you know, for those who read Senate
19 reports, Congress focused on this possibility
20 that you could have the department store and
21 they would sell a couple of video tapes and
22 they would a lot of -- bunch of other stuff,
23 and they didn't think they wanted to protect
24 the other goods and services.

25 Now my friend will tell you, yeah,

1 that piece of legislative history focused on
2 the PII definition. But here's the thing: It
3 would be pretty weird to have the thing in the
4 statute that does the limiting work to be a
5 definition that by its terms is expressly
6 inclusive.

7 That's not a well-designed tool to do
8 limiting work. What is a well --

9 JUSTICE JACKSON: I guess I don't
10 understand -- I don't understand your answer to
11 my question. I mean, I'm saying that what
12 mattered in the statute was the unlawful
13 disclosure without consent of personally
14 identifying information.

15 And your interpretation of the statute
16 has that coming out differently, the same set
17 of circumstances happening, coming out
18 differently depending upon what particular item
19 the consumer purchased. And I don't understand
20 why that should be the dividing line or why
21 that makes any sense in this concept.

22 MR. CLEMENT: So, to me, it makes a
23 ton of sense because what makes you a consumer
24 is a transaction that generates personal
25 identifiable information. And when you buy a

1 book or a dog bandana, under both parties' view
2 of the statute, that doesn't generate any
3 personally identifiable --

4 JUSTICE JACKSON: But that's not what
5 makes you a consumer under the statute, right?
6 The statute has a different category of
7 personally identifying information than it does
8 of consumer. So it doesn't make you a consumer
9 to have personally identifying information
10 under this statute.

11 MR. CLEMENT: What I'm saying is, if
12 there is a close connection between what makes
13 you a consumer and what generates personally
14 identifiable information, the whole statute,
15 including the consent provisions, work
16 coherently.

17 And that's why I think Congress said
18 that when you buy a video, you're a consumer,
19 but when you buy a book or you buy gasoline or
20 you buy a chicken sandwich, you're not a
21 consumer because, at the moment you buy the
22 book, the -- the chicken sandwich, the
23 gasoline, there's no personally identifiable
24 information.

25 JUSTICE JACKSON: Right.

1 MR. CLEMENT: So you don't really --

2 JUSTICE JACKSON: The statute doesn't
3 say that. That's your theory of what the
4 statute said when it said "goods or services."

5 MR. CLEMENT: It's both parties'
6 agreed understanding of personally identifiable
7 information until you get specific video
8 information.

9 And speaking of specific video
10 information -- I don't want to sit down before
11 I make this point -- my friend tries to make
12 something of the fact that the word "video"
13 appears in the personally identifiable
14 information definition before the phrase "from
15 a video tape service provider." And he says,
16 aha, they know how to use it.

17 But he ignores that they use two
18 words. They didn't use "video." They used
19 "specific video." And there's a very good
20 reason they did that because there's another
21 provision in the statute, (b)(2)(D), that
22 allows the disclosure of general subject matter
23 information about videos in certain
24 circumstances. So "specific video" is doing
25 work in the "personal identifiable information"

1 definition that there's no analogue to in the
2 definition of "consumer."

3 And here's something else to consider.

4 If you did what my friend wants you to do to
5 make this an easier case, if Congress had put
6 "video" in front of "goods or services," it
7 would have gone a long way to making the phrase
8 "from a video tape service provider" redundant.
9 And my friend tells you we try to avoid
10 redundancy if at all possible.

11 But think of the way the statute
12 works. In order to be a consumer, you have to
13 rent, buy, or subscribe to a video. And if --
14 no matter what else your business does, if you
15 rent, sell, or deliver videos, prerecorded
16 videos, you are per force a video tape service
17 provider.

18 So, if you had a hypothetical statute
19 that has the word that he wants in it, it said
20 video goods and services from a video tape
21 service provider, at that point, you have two
22 options. Either you admit that "from a video
23 tape service provider" is doing no work, or you
24 do what you might do, which is to struggle to
25 give it some meaning, you would say, ah, you

1 know, there actually are some video goods or
2 services that aren't actually prerecorded video
3 cassette tapes or similar audiovisual
4 materials.

5 So take, for example, a blank VCR
6 tape. Now that's clearly a video good or
7 service, but it's not prerecorded and it
8 doesn't involve any personal identifiable
9 information. So, in a hypothetical statute
10 that had the word "video" where my friend wants
11 it, you probably would look to "from a video
12 tape service provider" to limit the scope of --
13 of video goods or services.

14 But, if you can look to "from a video
15 tape service provider" to limit the scope of
16 video goods or services, I don't know why you
17 can't look to it to limit the scope of goods or
18 services.

19 And I do think that is natural,
20 ordinary meaning, as Justice Alito alluded to,
21 but it also makes particular sense in a statute
22 that's focused on privacy concerns that
23 uniquely arise out of video transactions.

24 Go back to the example I started with,
25 with goods or services from a medical service

1 provider. Okay, in ordinary English, I don't
2 think that covers buying a cup of coffee from
3 the hospital, but in a medical privacy statute,
4 nobody cares whether I got, like, you know,
5 half caf, but what they care about is whether I
6 had an appendectomy or plastic surgery or
7 something.

8 So you would naturally in that context
9 say that a consumer of goods or services from a
10 medical service provider talks about people
11 that got actual medical services, not people
12 who got a valet parking service when they got
13 to the -- the medical office.

14 And that's what we're asking to you do
15 here. And my friend's whole position really
16 depends on reading three words in the
17 definition in isolation. But it's a 15-word
18 definition.

19 And the other 12 words all direct you
20 to audiovisual materials that are similar to
21 prerecorded video cassettes. Because it starts
22 with this triad of terms: Renter, buyer, or
23 subscriber. Weird.

24 It doesn't appear anywhere else in the
25 U.S. code but it precisely captures the three

1 ways that you got videotapes in 1988 and it
2 starts with rental, which was the single most
3 obvious way you would get videotapes in 1988.

4 And then if you carry through to the
5 definition of a videotape service provider, you
6 see the same triad. You see selling
7 videotapes, renting videotapes or delivering
8 them. And it all works together as a
9 harmonious whole. And I wouldn't just
10 interpret those three words in splendid
11 isolation and read them to the limits of the
12 world.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 JUSTICE ALITO: What you argue and
18 your amici argue that accepting the
19 Petitioner's interpretation of (a)(1) would
20 lead to drastic consequences and, in response
21 to that, it is said that's not necessarily so
22 because you could win under other provisions of
23 this statute.

24 And, of course, you don't want to say
25 no, we stand a chance of losing under these

1 other provisions based on the same sort of
2 linguistic interpretation that Petitioner is
3 advancing here. And, therefore, I think, for
4 this reason, Mr. Hammack was asked about
5 (a)(4).

6 And I wonder if you could say
7 something about (a)(4) and what you understand
8 the statute to mean when it talks about any
9 person engaged in the business of delivery of
10 audiovisual materials that are similar to video
11 cassette tapes?

12 What does it mean to be in the
13 business? And does it mean -- does it reach
14 any -- any person or entity that derives any
15 economic benefit from providing access to
16 videos or at the other extreme, does it mean
17 any person or entity that is engaged solely in
18 that or predominantly in that? What does it
19 mean?

20 MR. CLEMENT: So I don't think it can
21 mean, unfortunately -- it would help me win
22 this case eventually -- if I thought it meant,
23 like, predominantly or exclusively. But I
24 think that's pretty impossible to square with
25 the idea that Congress plainly wanted to

1 capture department stores that sold videos back
2 in 1988, grocery stores that sold videos in
3 1988.

4 So I think that if you're engaged in
5 the business, and, you know, there's a
6 reference to interstate or foreign commerce, so
7 I'm thinking they're casting a pretty wide net,
8 and you deliver videos, it seems most naturally
9 read -- and some of you are maybe suggesting I
10 am most -- not most naturally reading consumer
11 but I think I'm most naturally reading all 15
12 words.

13 But I think most naturally read this
14 would capture Chick-fil-A, La-Z-Boy, all of
15 these things because they're certainly in
16 business and they are delivering videos.

17 Now, like, I don't want to put two
18 feet on that because I could be back in some
19 court arguing no, no, no, that, you know, it
20 means something slightly different. But I
21 think it's tough, given that Congress clearly
22 wanted to capture the -- the -- the -- the
23 department stores and the grocery stores.

24 And that's why I really think the most
25 natural way to narrow this statute is to get

1 the definition of consumer right and limit it
2 to the consumers -- and again, we're talking
3 about the (a)(4) definition. But the (a)(4)
4 definition is kind of baked right in to the
5 definition of consumer.

6 And that's why I think it would have
7 been redundant if -- I mean, you know, just to
8 make the redundancy point one more time, I
9 mean, (a)(4) is already baked in and already
10 says a prerecorded video cassette tape or
11 similar audiovisual material.

12 So I suppose what Congress could have
13 said in the definition of consumer is consumer
14 means any renter, purchaser or subscriber of
15 prerecorded video cassette tapes or similar
16 audiovisual materials from a videotape service
17 provider, which, of course, is a provider of
18 prerecorded video cassette tapes or similar
19 audiovisual materials.

20 JUSTICE ALITO: Right, but --

21 MR. CLEMENT: But that would be
22 hopelessly awkward and redundant.

23 And it -- it just underscores that if
24 Congress had done both it would have been
25 redundant, and I think there was a perfectly

1 good reason it left goods or services
2 unmodified.

3 JUSTICE ALITO: Well, the statute
4 means what the statute means, regardless of the
5 consequences, but it would be interesting to
6 know whether "in the business of" means
7 deriving any sort of commercial advantage from
8 providing access to videos on a website because
9 that would seem to impose huge retroactive
10 liability on a broad, broad range of entities.

11 And I'm not sure I understood
12 Mr. Hammack's definition of what it means to be
13 "in the business of." Maybe he'll take another
14 shot at that on -- on rebuttal.

15 MR. CLEMENT: Yeah. I -- I must
16 confess I did not understand it either. And I
17 don't think it explains away Chick-fil-A. And
18 just to put it in concrete terms, if you look
19 at the complaint in this case, he alleges that
20 there are over 100,000 subscribers to
21 247Sports.com that he wants to represent in a
22 class action.

23 Now, not great at math but \$2500 per
24 plaintiff in a class action that includes at
25 least 100,000 people, I think, is \$250 million

1 of liability in this case alone.

2 And then you look at the chamber brief
3 and all those footnotes, you look at the retail
4 litigation center appendix and all of those
5 cases, and there's a reason, I think, as you
6 alluded to, that every district court judge
7 that looks at this thinks this cannot be right.
8 This is crazy.

9 And I would suggest that a careful
10 textual reading of all 15 words in this
11 definition actually gets you to the result
12 that, yes, it's not right.

13 JUSTICE ALITO: All right, thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: Well, some very
17 intelligent Circuit Court judges have disagreed
18 with you. The linchpin of your argument is
19 that the transaction that some -- that makes
20 someone a VPPA consumer must be the same one
21 that generates PII, but the VPPA refutes that.

22 "(D) governs the use of personally
23 identifiable information" -- I'm quoting,
24 "obtained in any manner as evidence in some
25 governmental proceeding." So you don't have to

1 be a consumer in there. And it requires
2 destroying such information as soon as
3 practicable. Those provisions apply regardless
4 of whether the information concerns a consumer.

5 So if the statute explicitly envisions
6 that PII can exist without a consumer, I don't
7 understand why it's absurd that a consumer
8 might exist who hasn't yet generated but will
9 generate PII. Because you're only liable if
10 you are disclosing PII of someone's video
11 viewing.

12 So what's -- I don't understand.

13 MR. CLEMENT: So I do think there is a
14 fundamental difference between having PII
15 without a consumer and having a consumer who
16 has no PII. Now as we point out in our
17 brief --

18 JUSTICE SOTOMAYOR: No, a consumer
19 will have PII because you're going to disclose
20 PII. You're only liable --

21 MR. CLEMENT: No. No --

22 JUSTICE SOTOMAYOR: What you're saying
23 that it's different than if the consumer
24 doesn't create it at that moment.

25 MR. CLEMENT: I -- no, what I'm saying

1 is actually under his view as I understand it,
2 if you go into the Blockbuster, is the last
3 one, the brick and mortar store, you buy your
4 dog bandana and then you never look at the
5 Blockbuster website then you are a consumer in
6 his view but you have no PII. You are an
7 inchoate VPPA consumer.

8 And I think that is far more anomalous
9 --

10 JUSTICE SOTOMAYOR: All right. Then
11 why? When you finally buy something, it is
12 what you buy, that video viewing, that is being
13 protected.

14 MR. CLEMENT: Well you don't have to
15 buy anything. And that's another anomaly.
16 See, under the statute Congress wrote, if you
17 walked into even a video store and they gave
18 you a video, you're not protected by the
19 statute. You have to have a video transaction.

20 And what makes his position -- and I
21 would respectfully suggest consumers without
22 PII, so anomalous, is they essentially make
23 this free online viewing of videos that
24 otherwise doesn't make anybody a consumer and
25 then they retroactively become a consumer

1 because they bought a chicken sandwich ten
2 years later, they subscribed to the local
3 newspaper, they signed up for a free e-mail.

4 I don't think that makes any sense.
5 And I do think it does damage to the statute
6 that having the converse doesn't because as
7 I've alluded to, all of the consent provisions
8 are premised on the idea that the person that
9 can provide consent is the consumer.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: I just want to make
13 sure I understand your view of (a)(3). So this
14 is the PII includes information which
15 identifies a person as having requested or
16 obtained specific video materials.

17 What does "includes" mean, do you
18 believe?

19 MR. CLEMENT: So I think that it means
20 something different from means. I think it
21 does set a floor. And that's why I don't think
22 the definition of PII can do the limiting --

23 JUSTICE KAGAN: But what kind of floor
24 are you saying? In other words, does it
25 include information which identifies a person

1 as having requested or obtained other materials
2 or services? I mean, your bandanas or your
3 La-Z-Boys, do you think that there's no
4 requirement that the person have requested or
5 obtained video materials or services?

6 MR. CLEMENT: Well, it's tricky,
7 right, because if we're going to be literal, I
8 mean, "includes" --

9 JUSTICE KAGAN: I want to -- I want to
10 know what you think.

11 MR. CLEMENT: So --

12 JUSTICE KAGAN: Does it include
13 bandanas and La-Z-Boys?

14 MR. CLEMENT: So I would say that it
15 doesn't. But it's hard to get there from a
16 literal reading of the text because the textual
17 definition is just an "includes" definition.

18 Now, I know from the Senate report,
19 which I read, that Congress didn't want to
20 protect private information about dog bandanas
21 or furniture that you bought from a department
22 store. So if we're going to be faithful to the
23 intent that was reflected in the Senate report,
24 we have to figure some way to limit this
25 statute so that it protects video information

1 and not bandana information.

2 And I would respectfully suggest that,
3 you know, you could do it, and I would suppose
4 I might even argue for it some day, but it's
5 hard to get the limit from a definition that's
6 an inclusive definition.

7 And I think the better place to get
8 the limiting principle is from the definition
9 of consumer.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: Do you disagree with
14 the American Newspaper amicus brief that
15 similar would at least require content like
16 full-length movies and television shows that
17 were on video tape lining Blockbuster shelves?

18 MR. CLEMENT: Ultimately, when that
19 issue comes up, I would -- you know, in that --

20 JUSTICE GORSUCH: You're going to --
21 you're going to -- you're going to take that
22 position?

23 MR. CLEMENT: I am going to take that
24 position.

25 JUSTICE GORSUCH: You'd agree with

1 newspapers that that -- that that -- that is a
2 distinction?

3 MR. CLEMENT: And I might even go one
4 further and agree with Judge Randolph that they
5 have to be --

6 JUSTICE GORSUCH: Physical.

7 MR. CLEMENT: Physical.

8 JUSTICE GORSUCH: Yeah.

9 MR. CLEMENT: Because, you know,
10 materials is kind of physical.

11 JUSTICE GORSUCH: Thank you.

12 MR. CLEMENT: So if you -- yeah.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 Justice Barrett?

16 JUSTICE BARRETT: Do you concede that
17 Salazar has standing?

18 MR. CLEMENT: We haven't argued that
19 he doesn't. And I guess this is what -- if I
20 could -- I think the best answer to that is I
21 think it depends on what you make of page 11 of
22 the Meta brief. I don't know if you have it in
23 of you, but it's -- you know, it's got this
24 gobbledegook. And that's -- that's what's
25 disclosed to a third party.

1 And so I take it the question would be
2 is the disclosure of gobbledegook to a third
3 party sufficiently close to the common-law
4 analog of disclosing personal information to a
5 third party to satisfy Article III?

6 That's a tricky question. I mean, if
7 you want us to, we can brief it. I would
8 really hate for the Court to reject -- like, it
9 -- to say that there's definitively standing
10 here in this case without any briefing. So I
11 don't know if you can drop a footnote and say
12 this is just a drive-by jurisdictional ruling
13 --

14 (Laughter.)

15 MR. CLEMENT: -- so you can ignore it
16 in the future. I don't know if you're allowed
17 to do that, but --

18 JUSTICE BARRETT: You raised it in the
19 district court.

20 MR. CLEMENT: We did raise it in the
21 district court. And then --

22 JUSTICE BARRETT: But then dropped it
23 before the Sixth Circuit.

24 MR. CLEMENT: We did. But you know
25 the funny thing about standing arguments, you

1 can't really drop them.

2 JUSTICE BARRETT: Right.

3 MR. CLEMENT: So if you -- if you're
4 intrigued by that question, you know, I'd be
5 happy to provide supplemental briefing. And --
6 but I -- but I do think the question really
7 comes down to whether that gobbledegook is
8 sufficiently close to a common-law analog.

9 JUSTICE BARRETT: Well, this
10 gobbledegook also presents the question of
11 whether it's PII, right? If nobody can look at
12 it and really identify -- only a computer can
13 figure out what this means?

14 MR. CLEMENT: Yeah, and maybe that's
15 one more reason to not decide the standing
16 question definitively without more briefing
17 because I do think there is a close
18 relationship between the standing question and
19 the PII question.

20 So, you know, if you say there's
21 standing here because it's sort of not really
22 totally gobbledegook, then my friend is going
23 to use that in the lower courts to say, aha, it
24 is personally identifiable information.

25 So, again, I'm -- we're happy to brief

1 it if you'd like us to. But I -- I do think it
2 would be a mistake to definitively decide
3 standing without any briefing.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 Thank you, counsel.

7 Rebuttal, Mr. Hammack?

8 REBUTTAL ARGUMENT OF JOSHUA I. HAMMACK
9 ON BEHALF OF THE PETITIONER

10 MR. HAMMACK: Thank you, Mr. Chief
11 Justice.

12 Just a couple of points. First, I
13 think it's really important to keep our eye on
14 the ball that what we're looking for here in
15 Section (b)(1) is any consumer of such
16 provider, any consumer. So when we -- when we
17 have questions about, well, what about someone
18 who purchased a dog bandana or someone who
19 purchased a La-Z-Boys recliner or someone who
20 purchased something or rented something years
21 ago, our question is made simpler by the fact
22 that (b)(1) says any consumer of such provider.

23 So is someone who rented something a
24 number of years ago or purchases a chicken
25 sandwich from a provider, is that person any

1 consumer of such provider? The answer has to
2 be yes. That's the most natural reading. It
3 aligns with ordinary meaning all over the
4 statute.

5 Second, I want to address the -- the
6 point that my friend on the other side made
7 regarding this shift in the number of cases
8 brought happening, you know, a decade or so
9 ago. And that shift did not occur because
10 plaintiffs suddenly woke up one day and
11 discovered the Video Privacy Protection Act.
12 It occurred because of the advent of Pixel
13 technology, this technology that all kinds of
14 businesses started embedding in their websites
15 that is automatically target -- tracking and
16 disclosing all sorts of personally identifiable
17 information about you, including the personally
18 identifiable information specifically defined
19 in this statute.

20 Third, that huge liability problem, if
21 we get through all of the various elements of
22 the statute and land in a world where there is
23 large liability, I won't dispute that that's a
24 possibility, but I think it's -- it reflects
25 necessarily the fact that this is a huge scale

1 disclosure regime. That large liability is
2 only possible because of the scope of the
3 disclosures of personally identifiable
4 information here.

5 Fourth, I want to address the mix or
6 match point that my friend on the other side
7 made. And I would say it's entirely
8 unsurprising that you might mix or match as
9 between what makes you a consumer and what
10 gives rise to PII. That's exactly why and the
11 direct result of the fact that Congress
12 mentioned two different relationships to two
13 different subject matters from the same source
14 across those two provisions. It's the
15 inevitable consequence of that.

16 To go to Justice Jackson's point
17 regarding the hypothetical that you were
18 discussing with my friend on the other side, I
19 think that exchange really shows the incredible
20 loophole that their reading creates where they
21 can basically structure themselves around VPPA
22 compliance by making sure that you request or
23 obtain video materials or services, but we've
24 structured our business so that you never
25 actually rent, purchase, or subscribe to them.

1 You'll rent, purchase, and subscribe to lots of
2 other things but not those video materials.
3 So, suddenly, we can disclose your personally
4 identifiable information with impunity without
5 your consent. That, I think, should be the
6 anomaly when you're looking at this statute.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:30 a.m., the case
12 was submitted.)

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\$ \$250 ^[1] 80:25 \$2500 ^[1] 80:23 1 10 ^[4] 18:4 37:24 66:10 67:4 10:05 ^[2] 1:15 3:2 100,000 ^[2] 80:20,25 11 ^[1] 87:21 11:30 ^[1] 93:11 12 ^[1] 75:19 14 ^[1] 1:11 15 ^[3] 66:11 78:11 81:10 15-word ^[1] 75:17 1980s ^[4] 21:10 29:17 34:20 56:1 1988 ^[8] 12:16 35:3 43:8,20 76:1,3 78:2,3 2 20 ^[1] 31:24 2013 ^[6] 4:2 10:13 12:21 22:23 34:1 67:21 2026 ^[1] 1:11 2-2 ^[2] 28:4,7 247 ^[1] 63:11 247sports ^[10] 1:6 8:12,17 40:10 45:13,14 46:21 64:25 67:2,5 247sports.com ^[2] 47:9 80:21 25-459 ^[1] 3:4 3 3 ^[1] 2:4 3-1 ^[1] 29:4 4 43 ^[1] 2:7 9 90 ^[1] 2:10 A a(1) ^[5] 5:19 13:6 21:16 30:4 76:19 a(1)'s ^[2] 25:9 31:9 a(3) ^[3] 13:6 32:17 84:13 a(3)'s ^[3] 5:14 25:8 31:10 a(4) ^[10] 8:3 22:2 32:13 37:11 38:5 77:5,7 79:3,3,9 a(4)'s ^[3] 5:18 25:7 30:11 a's ^[1] 24:9 a.m ^[3] 1:15 3:2 93:11 abandoned ^[1] 27:20 able ^[1] 66:15	about ^[52] 7:21 10:9,25 11:17 12:12 13:25 14:20 15:13 16:20 18:5 23:7,8 25:14,23 28:1,23 29:15,18 31:21 35:22 36:12 38:16 42:4,25 46:5 47:24 48:20 49:22 51:24 52:7,13,15 53:9 56:1,6,14,19 62:2 64:21 68:13 72:23 75:5,10 77:4,7,8 79:3 85:20 88:25 90:17,17 91:17 above-entitled ^[1] 1:13 absolutely ^[10] 8:19 11:8 15:12 18:14 27:18 28:6,16 30:15 43:4 62:4 absurd ^[1] 82:7 accepting ^[1] 76:18 access ^[3] 12:8 77:15 80:8 accidental ^[2] 25:11 39:12 accidentally ^[1] 25:3 accompanied ^[1] 47:21 accord ^[3] 26:14,18 33:20 acknowledged ^[1] 22:23 acquires ^[1] 52:24 across ^[1] 92:14 act ^[5] 3:13,14,19 4:1 91:11 action ^[3] 44:4 80:22,24 activities ^[1] 34:6 activity ^[1] 14:25 actual ^[2] 54:20 75:11 actually ^[14] 16:15 21:3 25:5 26:11 27:17 48:3 49:15 52:18 53:1 74:1,2 81:11 83:1 92:25 add ^[1] 31:16 added ^[1] 67:20 additional ^[1] 31:16 address ^[6] 24:2 30:21 52:9 63:1 91:5 92:5 addressed ^[3] 16:13 27:22 43:20 admissibility ^[1] 7:5 admissible ^[1] 7:7 admission ^[1] 24:13 admit ^[1] 73:22 advance ^[6] 4:4 10:15 67:19,23 68:1,4 advances ^[1] 12:19 advancing ^[1] 77:3 advantage ^[1] 80:7 advent ^[1] 91:12 advertisement ^[2] 60:5 63:2 advertising ^[6] 23:10,13,24 24:4 29:19 41:1 advice ^[1] 36:6 advocacy ^[1] 36:5 affecting ^[2] 33:12 51:18 affirmative ^[1] 7:11	after ^[3] 7:12 43:3 51:22 again ^[13] 11:25 12:24 14:4 22:9 23:15 34:1 40:21,22 42:20 65:11 66:15 79:2 89:25 against ^[5] 7:4 29:4 36:3,17 69:2 ago ^[5] 66:10,11 90:21,24 91:9 agree ^[5] 4:15 16:5 46:22 86:25 87:4 agreed ^[1] 72:6 ah ^[1] 73:25 aha ^[2] 72:16 89:23 ahead ^[3] 17:1,2,3 alarm ^[1] 39:7 alexandria ^[1] 1:20 aligns ^[1] 91:3 alito ^[20] 16:24 17:2,5 20:8,12,17,23 21:9,23 22:5,18 30:16 31:13 35:14 74:20 76:16,17 79:20 80:3 81:13 all ^[47] 4:13 5:6,21,24,25 13:1,3 15:18 16:12 21:14 23:17,17,19 26:11,14,17 27:9 29:16 30:11 31:22 35:10 42:9,25 45:24 47:8,18 48:13 56:22 58:15 61:6,7 67:11 73:10 75:19 76:8 78:11,14 81:3,4,10,13 83:10 84:7 91:3,13,16,21 allege ^[2] 25:21 40:10 alleges ^[1] 80:19 allowed ^[1] 88:16 allowing ^[1] 11:9 allows ^[7] 14:15 24:1 34:12,13,14 67:3 72:22 alluded ^[3] 74:20 81:6 84:7 alone ^[1] 81:1 along ^[1] 24:2 already ^[4] 23:1 68:5 79:9,9 also ^[21] 10:18 12:4 17:20,24 26:9 34:22 36:23 39:10,12 46:10 52:13 54:7,14 57:3,8 61:21 65:6 67:6,13 74:21 89:10 alternative ^[1] 45:4 although ^[1] 16:7 always ^[5] 27:13 29:23 37:10 45:14 61:4 am ^[2] 78:10 86:23 amendments ^[1] 10:13 america ^[1] 35:22 american ^[1] 86:14 amici ^[1] 76:18 amicus ^[6] 35:24 36:10,18,19 56:15 86:14 among ^[1] 28:4	amount ^[1] 15:15 an ^[21] 4:17 7:10 10:7 18:5 23:25 27:3,4,10 31:2,16 39:11 43:9 44:9 65:18,21 67:18 73:5 75:6 83:6 85:17 86:6 analog ^[2] 88:4 89:8 analogous ^[1] 56:9 analogue ^[1] 73:1 anomalous ^[2] 83:8,22 anomaly ^[2] 83:15 93:6 another ^[8] 8:10 11:13 15:17 51:7 69:11 72:20 80:13 83:15 answer ^[12] 8:18 14:17 17:9 35:4 39:25 58:12,16 59:8 60:17 70:10 87:20 91:1 answered ^[1] 26:12 answers ^[1] 57:20 anticipated ^[1] 23:23 any ^[38] 3:17 6:21,25 7:22 13:8 15:11 17:12,13 33:10,11 42:7 45:6 50:7,23 51:9,16,17 55:9 68:2 69:5 70:21 71:2 74:8 77:8,14,14,14,17 79:14 80:7 81:24 84:4 88:10 90:3,15,16,22,25 anybody ^[2] 64:21 83:24 anyone ^[1] 10:1 anything ^[7] 17:24 33:7 46:8 48:17 55:1 60:23 83:15 anyway ^[2] 6:4 31:17 anywhere ^[1] 75:24 apologize ^[1] 39:24 appeals ^[2] 16:12 18:22 appear ^[1] 75:24 appearances ^[1] 1:17 appears ^[1] 72:13 appendectomy ^[1] 75:6 appendix ^[1] 81:4 apply ^[3] 27:6 36:14 82:3 approach ^[2] 25:18 29:23 appropriate ^[1] 7:1 are ^[73] 4:8 5:21 6:13 10:4 11:11 13:7,18,20 14:4 19:6,16,19 21:24 23:11 25:11 26:13,17 28:2,24,25 29:9 31:13 33:19 34:3 36:16,18 37:7,21 38:5,11 39:5,17 40:2,19 41:7 43:2,6 44:17 47:10,21 48:5,15,18 49:12,15,15 50:22,24 51:24 56:6,9,13,16 57:8,13,14,15,23 67:11 68:15 69:6 73:16 74:1 75:20 77:10 78:9,16 80:20 82:10 83:5,6 84:8,24 area ^[1] 6:4 aren't ^[3] 15:6 58:1 74:2
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