



MEMORANDUM

**SUPREME COURT HEARS INTERNET PRIVACY CASE:
*SALAZAR v. PARAMOUNT GLOBAL***

Does a 1988 statute, enacted in response to a journalist publishing Judge Robert Bork's videocassette rental history, apply to companies operating websites showing videos with "tracking pixels" that share a viewer's identity and viewing history with Facebook? That was a central focus of the Supreme Court at oral argument in *Salazar v. Paramount Global*.

The case requires the Court to interpret a statute whose words might literally fit present-day facts but in a context markedly different from the 1987 video-rental intrusion the statute was enacted to curtail. Justice Kavanaugh captured the tension when he summed up respondent Paramount's "big-picture argument" that the Court is "a textualist Court but usually not a literalist Court," and so should not "read this statute for all it's worth when the Congress in the 1980s wasn't thinking about data sharing for targeted advertising."

The Video Privacy Protection Act (VPPA) was a legal curiosity for decades until video shorts on the internet blew up, and websites began using tracking technologies that share information about what visitors watch with third parties for advertising purposes. The VPPA allows any "person aggrieved" to sue in federal district court for "actual damages but not less than liquidated damages in an amount of \$2,500," plus punitive damages and reasonable attorneys' fees. In plain terms, a person whose viewing information was improperly disclosed can seek at least \$2,500 per violation without proving any actual loss, generating a significant incentive for plaintiffs' lawyers to bring VPPA claims, particularly as class actions. Many companies with websites have been named as defendants in VPPA class actions, including Netflix, WebMD, and General Mills.

The specific issue before the Court was the scope of the word "consumer" in the statute: is Salazar, who signed up for a free email newsletter from 247Sports and viewed college-sports video on a Paramount-owned site, a "consumer"? The VPPA says a "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider." But does the consumer have to be someone who's there to consume audio visual recordings, as Bork did, or can the consumer be someone who buys any "goods or services"?

Another phrase in the statute that drew questions is "video tape service provider." Is a company that operates a website that runs a video that viewers can sample a "video tape service provider"? The statute covers anyone "engaged in the business" of the "rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." Justice Thomas doubted that a sports site that happens to show videos is "in the business of providing video service," and

Justice Kavanaugh asked whether a three-minute video on a business's website would be enough. A third statutory phrase, "personally identifiable information," was also the subject of questioning. Is the data a tracking pixel sends to Facebook "information which identifies a person as having requested or obtained specific video materials or services"?

The Court didn't grant certiorari on the latter two issues, but they will surely continue to be litigated in the lower courts.

During the argument, the Justices repeatedly called out the statute's vintage, with Justice Thomas musing that "streaming is closer to cable TV"—which is not covered by the VPPA—"than it is to picking up a video from Blockbuster." Justice Kavanaugh queried whether the Court should be "repurposing a statute that was really about public disclosure of what individuals viewed into a statute that regulates data sharing for targeted advertising," and noted that suits have been brought against "every sector of the economy." Justice Alito likewise asked whether reading "in the business of" to cover any commercial benefit from hosting videos would "impose huge retroactive liability on a broad, broad range of entities."

Given the genesis of the VPPA, Justice Kagan fittingly asked about a hypothetical judge who watches embarrassing sports videos. Respondent's counsel, former Solicitor General Paul Clement, responded that "maybe . . . watching . . . Chicago Bears films is embarrassing in certain parts of the country," but that liability "shouldn't turn on whether you also subscribed to a free online newsletter." Justice Kagan rejoined that "[m]aybe the thing that Congress should do as they look at this again is to take away that limitation," a reminder that Congress, which last tweaked the statute in 2013, may have the final word.

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