No. 12-25

In the
Supreme Court of the United States

EDWARD F. MARACICH, *ET AL.*,

PETITIONERS,

v.

MICHAEL EUGENE SPEARS, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Did the Fourth Circuit properly interpret the Driver's Privacy Protection Act's "litigation exception" to hold that the exception applied where attorneys obtained, disclosed or used personal information in connection with imminent and/or pending litigation filed on behalf of their clients (for the clients' benefit and for the benefit of other injured members of the public), even if the attorneys' conduct could also be characterized as "solicitation"?

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INTRODUCTION

Respondents obtained and used information from a state department of motor vehicles database in connection with litigation. Those actions fall squarely within one of the 14 separate permissible-use provisions in the federal Driver's Privacy Protection Act ("DPPA"). That should be the end of this case. Nonetheless, petitioners contend that respondents' actions violated the DPPA because they also constituted solicitation, which is a separate permissible use but one that requires consent, which was not obtained. Petitioners invoke the specific-controls-the-general canon, but that effort fails at the outset because there is no sense in which the provision they invoke is any more specific than the litigation provision. One specifically covers solicitation, the other specifically covers litigation, and solicitation in connection with litigation appears to be covered by both. Such overlap is common in the DPPA. The statute's 14 permissible-use provisions contain substantial overlap with no indication that Congress intended them to be mutually exclusive or wanted certain provisions to trump others. To the contrary, when a particular use falls within two overlapping permissible-use provisions, that only underscores that Congress did not want federal law to criminalize such a use. The 14 permissible-use provisions also ensure that the DPPA does not impermissibly upset the federal-state balance or intrude on areas of traditional state concern. The DPPA is commerce power legislation designed to end a practice by which some States would sell private information to all comers with potentially tragic results. In addressing that problem, Congress left

alone core government functions and areas of traditional state regulation, such as insurance and the practice of law. Thus, both basic principles of statutory construction and respect for federalism require rejection of petitioners' effort to ignore the clear application of the DPPA's litigation provision.

STATEMENT OF THE CASE

A. The Driver's Privacy Protection Act

Congress enacted the DPPA for an important, but limited, purpose: to "close a loophole in State law that allow[ed] anyone, for any reason, to gain access to personal information" by purchasing it from a state department of motor vehicles ("DMV"). 140 Cong. Rec. 7,924 (1994) (Rep. Moran). The Act was largely prompted by the tragic murder of actress Rebecca Schaeffer by an obsessed fan who obtained her address by purchasing it from the California DMV. To prevent States from allowing would-be criminals and "stalkers to obtain—on demand—private, personal information about their potential victims," 139 Cong. Rec. 29,470 (1993) (Sen. Biden), "[t]he DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Reno v. Condon*, 528 U.S. 141, 144 (2000). The purpose of the Act is "simple and straightforward": Congress "want[ed] to stop stalkers from obtaining the name and address of their prey before another tragedy occurs." 140 Cong. Rec. 7,929 (Rep. Goss).

Because the DPPA is a federal intrusion on how States disclose information contained in the States' own databases, Congress was particularly cognizant

of the need to limit the scope of its regulatory reach. Congress thus carefully crafted the DPPA to ensure that while it would prevent disclosure of information to those without legitimate need for it, it would leave to the States many questions about the extent of disclosure to those with valid needs for the information. To that end, the statute does not prohibit all disclosure of information, but rather makes it unlawful only for a State to "knowingly disclose or otherwise make available" information from its DMV database "except as provided in subsection (b)" of the statute. 18 U.S.C. § 2721(a). Subsection (b) then delineates 14 broad categories of "permissible uses" as to which States retain their traditional discretion to determine whether and how to disclose information.

By design, those permissible-use provisions substantially overlap. For instance, one provision permits disclosure "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1). But many of those same actors and activities are also covered by a separate provision permitting disclosure

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of

> judgments and orders, or pursuant to an order of a Federal, State, or local court.

§ 2721(b)(4). Any disclosure that occurred in the course of litigation in this Court would clearly appear to come within both subsections. In the same vein, the statute permits disclosure for "research activities" subject to limitations, § 2721(b)(5), and "[f]or bulk distribution for surveys, marketing or solicitations" with consent, § 2721(b)(12). But it also permits disclosure for use in "motor vehicle research activities, including survey research," without those caveats. § 2721(b)(2).

The DPPA not only prohibits disclosure by state DMVs for uses not permitted, but also makes it unlawful for individuals "knowingly to obtain or disclose personal information … for any use not permitted under section 2721(b)." § 2722(a). The same 14 permissible-use provisions apply in both situations. The DPPA also makes it unlawful "to make false representation to obtain any personal information from" a DMV record. § 2722(b). "A person who knowingly violates" the DPPA is subject to a criminal fine, § 2723(a), and anyone whose information is obtained or disclosed "for a purpose not permitted" by the statute may sue for "actual damages, but not less than liquidated damages in the amount of $2,500," and punitive damages "upon proof of willful or reckless disregard of the law." § 2724. Although States are exempt from that private cause of action, § 2725(2), the Act authorizes civil penalties of up to $5,000 per day against any state DMV with "a policy or practice of substantial noncompliance with" any of its provisions. § 2723(b).

As the DPPA's sponsors reiterated throughout its consideration and enactment, the expansive permissible-use provisions are essential to ensuring that the statute "strikes a critical balance between an individual's fundamental right to privacy and safety and the legitimate governmental and business needs for this information." 140 Cong. Rec. 7,925 (Rep. Moran); *see also* 139 Cong. Rec. 29,470 (Sen. Harkin); 139 Cong. Rec. 29,468 (Sen. Boxer). They are also essential to the balance between federal and state regulation Congress sought to achieve. By neither prohibiting nor requiring States to disclose information in situations covered by the 14 permissible-use categories, the statute leaves States with significant flexibility to design more privacy-protective regimes should they choose to do so, or to restrict uses of information through other mechanisms, like direct regulation of the businesses or professionals to whom it is disclosed. Finally, the permissible-use provisions are essential to ensuring that the DPPA regulates commercial activity in the heartland of Congress' commerce power, rather than interfering with activities that do not implicate commerce but do intrude into areas of traditional state authority. *See Condon*, 528 U.S. at 148 (affirming constitutionality of DPPA as a regulation of "the sale or release of [personal] information in interstate commerce").

In striking that critical balance, Congress paid careful attention to the DPPA's litigation provision. Because that provision deals with the circumstances under which attorneys may access the States' DMV databases, it addresses matters at the core of the States' "especially great" interest in regulating

members of the legal profession, who "are essential to the primary governmental function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Early iterations of the litigation provision were considerably narrower than the final version. For example, one version would have permitted disclosure only "[f]or the use in any civil or criminal proceeding in any Federal, State, or local court, if such proceeding involves a motor vehicle," S. 1589, 103d Cong.; a slightly broader version allowed disclosure "[f]or use in any civil or criminal proceeding in any Federal or State court," H.R. 3365, 103d Cong.

The provision ultimately was expanded to allow disclosure for use "in connection with" a much wider range of proceedings and to make clear that information could be disclosed for, among other things, "investigation in anticipation of litigation." § 2721(b)(4). When introducing the bill containing that final version of the litigation provision, its sponsor emphasized that the revised legislation was "very different" from earlier versions and gave "more flexibility to the States in allowing additional uses of personal information." 140 Cong. Rec. 7,925 (Rep. Moran). He further reiterated that those revisions would ensure that "insurance companies, law enforcement professionals, attorneys, and all other authorized users would continue to have access to this information." *Id.*

Since the DPPA's enactment, Congress has underscored both the importance of the litigation provision and its desire to leave all matters falling within it to the discretion of the States. One year

after Congress amended subsection (b)(12) from an opt-out to an opt-in provision, *see Condon*, 528 U.S. at 144, it further amended the statute to draw a distinction between standard contact information and what it labeled "highly restricted personal information"—namely, photographs or images, social security numbers, and medical or disability information, § 2725(4). Pub. L. No. 106-346, 114 Stat. 11356 (2000). When Congress did so, it made the litigation provision one of only four provisions under which States have the option to disclose that highly restricted information. § 2721(a)(2).

B. The *Herron* Litigation

South Carolina's Manufacturers, Distributors, and Dealers Act ("MDDA") prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code § 56-15-40. Anyone injured by a violation of the MDDA may sue for damages. § 56-15-110. The MDDA also provides that when an action "is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole." § 56-15-110(2). That representative action provision allows an individual to bring a private attorney general suit akin to a class action, albeit with fewer procedural constraints.

Respondents are state-licensed attorneys who practice law in South Carolina. In June 2006, they were approached by several consumers who complained that certain car dealers were charging unlawful administrative fees. By its nature, such

conduct tends to succeed only when done in concert with other dealers, lest consumers simply take their business elsewhere. The attorneys thus began investigating whether the practice was widespread and determined that it appeared to be occurring statewide. Accordingly, respondents sought additional information to determine whether the lawsuit they anticipated filing would be "one of common or general interest to many persons" under the MDDA's representative action provision.

To that end, on June 23, 2006, one of the respondents sent a Freedom of Information Act ("FOIA") request to the South Carolina DMV. The letter informed: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is common practice, and am accordingly submitting this FOIA request." JA57. It further stated that the request was made "in anticipation of litigation … pursuant to … 18 U.S.C § 2721(b)(4) of the [DPPA]." JA57. The letter requested information regarding "[p]rivate purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." JA57. The DMV provided the information.

On August 24, 2006, respondents sent a second FOIA request, which also stated that it was made "in anticipation of litigation … pursuant to … 18 U.S.C. § 2721(b)(4)." JA67. The letter sought the same

information for car purchases in five additional counties during the same week. JA67. Five days later, respondents filed suit on behalf of four consumers who originally contacted them about the illegal fees, naming 51 dealers as defendants. Dist.Ct.Doc.77-2. Because respondents' investigation had revealed that the deceptive practices appeared widespread, the four named plaintiffs invoked the MDDA's representative action provision to assert their claims "for the benefit of all South Carolina car buyers who[] paid administrative fees" to the dealer/defendants during the same time frame, and also alleged various conspiracy claims. *Id.* at 14. Respondents did not contact any of the purchasers the DMV disclosed before filing their complaint or indeed for several months afterwards.

Between September 2006 and February 27, 2007, various dealer/defendants filed more than 180 motions to dismiss. One of the central arguments in those motions was that the plaintiffs lacked standing to pursue their representative action against dealers from whom they did not personally purchase cars. *See, e.g.*, JA144-69. In the dealers' view, every dealer for whom there was not a corresponding purchaser named as a plaintiff should be dismissed. Respondents disagreed, as, in their view, the group action provision permitted the named plaintiffs and respondents to represent the interests of all similarly situated individuals. But they worried that the state trial court might accept the defendants' theory. Accordingly, respondents endeavored to add a purchaser/plaintiff corresponding to each dealer/defendant named in the *Herron* complaint.

To locate those additional plaintiffs, respondents sent a third FOIA request to the DMV on October 26, 2006. That request, which was also made pursuant "the exception in 18 U.S.C. § 2721(b)(4)," sought information concerning vehicle sales from May 1-14, 2006, by specific dealers seeking dismissal to the members of the public respondents believed they were already representing in the MDDA representative action. JA69-82. While that request was pending, on October 31, 2006, respondents also amended the complaint to add four more plaintiffs who had contacted respondents on their own initiative, and approximately 250 more dealer/defendants. JA114-19.

In early January 2007, more than four months after they filed the *Herron* litigation, respondents began reaching out to the purchasers disclosed by the DMV to determine whether they, too, had been charged illegal fees and were interested in participating in the lawsuit. Respondents sent each individual a letter informing:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. We obtained this information in response to a Freedom of

> Information Act request to the South Carolina Department of Motor Vehicles.
>
> The exact nature of your legal situation will depend on facts not known at this time. You should understand that the advice and information in this communication is general and that your own situation may vary. However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.

JA91-92 (emphasis omitted). To ensure that their efforts would comply with South Carolina's Rules of Professional Conduct, respondents labeled the letters "ADVERTISING MATERIAL" and included all statements required for written communication with prospective clients. JA91; *see* S.C. R. Prof. Conduct 7.3. In accordance with the version of Rule 7.3(c) then in effect, respondents also filed a representative copy, along with a list of recipients, with the South Carolina Supreme Court's Office of Disciplinary Counsel. JA89.

Over the next few months, respondents made a series of similar FOIA requests, each stating that it was made pursuant to "the exception in 18 U.S.C. § 2721(b)(4)" and each seeking information relating to purchases from specific dealers actively seeking dismissal from the ongoing litigation. The DMV responded to each request by providing the

information, and respondents sent a series of nearly identical letters to the purchasers the DMV disclosed.

On March 9, 2007, the plaintiffs responded to the dealers' motions to dismiss by arguing that they had standing to pursue the suit against all dealers "for the benefit of the whole" because, *inter alia*, the MDDA's representative action provision authorized such a suit, and because their own personal injuries had resulted from the dealers' conspiracy to each charge the same illegal fees. Dist.Ct.Doc.77-12–15. The court held a hearing on the motions on April 4, 2007, but deferred ruling. Dist.Ct.Doc.78-1. Accordingly, respondents moved forward with their plan to add a purchaser/plaintiff for each dealer/defendant, thereby eliminating any potential standing concern. To that end, in June 2007, the plaintiffs moved to amend the complaint to name 247 additional plaintiffs identified through respondents' outreach. JA179-88. Several dealers opposed the motion, arguing that joining new plaintiffs would be improper and prejudicial. JA189-210. In addition, they argued that respondents had violated the DPPA by obtaining the new plaintiffs' contact information from the DMV and sending them "solicitation" letters. JA193-96.

While the motion to amend remained pending, the trial court denied the dealers' motions to dismiss, ruling that the eight original plaintiffs had made sufficient allegations of standing to survive a motion to dismiss and continue representing the public at large. JA211-13. The same day, the trial court heard arguments on the motion to amend. During the hearing, the dealers' counsel acknowledged that the

FOIA requests and subsequent letters were sent "to try to satisfy an issue of standing that was raised by [defense] counsel," but argued that they violated the DPPA nonetheless because they also involved solicitation of prospective clients. JA224. During the same hearing, the trial court itself observed that respondents' actions were taken to "rectify" or "remedy" the court's own expressed "concern" about standing, an issue that the court repeatedly noted it did not intend to finally resolve until after discovery. Dist.Ct.Doc.78-9 ("Hrg.") 48; *id.* at 50 ("if you go forward with eight people you've still got the standing issue that we've still got to deal with somewhere down the road"). In a subsequent order noting that "Plaintiffs seek to add the 246 parties in order to address the standing issue raised by Defendants in their Motions to Dismiss," the trial court ultimately denied the motion to amend on grounds that, *inter alia*, state procedural rules did not allow it. JA228-29.

Because the trial court had made clear that the standing issue remained unresolved, respondents decided to moot it by filing two new lawsuits on behalf of the 247 other purchasers in September 2007. Pet.App.14a. Those cases were consolidated with *Herron*, and defendants as to whom there was no corresponding named plaintiff in the original *Herron* case were then voluntarily dismissed from that case on January 31, 2008. JA234-35. When granting those voluntary dismissals, the trial court reconsidered and partially reversed its earlier standing ruling. The court now held that "a named Plaintiff does not have standing to sue, on behalf of himself or others, any Defendant with which he did

not transact any business" unless the plaintiff alleges a conspiracy involving "the Defendant from which the named Plaintiff purchased a vehicle." JA235. Nonetheless, the court subsequently confirmed that respondents, "as private attorneys general, from the inception of this litigation have represented the public interest … and therefore represent all those affected by such practices." JA253-54.

Because the new lawsuits effectively mooted the standing issue, all three cases then proceeded on the merits, and the trial court ultimately found that the dealers had violated the MDDA. JA261-76. Consistent with the broad scope of the representation respondents undertook, subsequent settlements have resulted in monetary relief to approximately 30,000 purchasers.

C. The Instant Litigation

After their efforts to stymie the MDDA litigation failed, the dealers' attorneys decided to try a different tack. On June 23, 2009, one of the same attorneys who represented the dealers in the still-pending *Herron* case filed a putative class action against respondents in federal court, seeking to represent a class composed largely of the same purchasers whose interests respondents were representing in the ongoing state court litigation.[1] The complaint

[1] That attorney eventually withdrew from this case after respondents pointed out the obvious conflict that arose from his attempt to represent individuals in this case who were also plaintiffs in the *Herron* case, where he continued to represent some of the dealer defendants. Dist.Ct.Doc.80.

rehashed the same theory the attorney had pressed in state court, that respondents violated the DPPA by obtaining the purchasers' information from the South Carolina DMV and using it to contact them "for the statutorily prohibited purpose of mailing lawyer advertising and solicitation materials." JA36. The complaint sought $2,500 in liquidated damages for each instance in which each individual's information was obtained, disclosed, or used—a request totaling more than $200 million—and punitive damages as well. JA55.

Respondents moved to dismiss, arguing that petitioners failed to state a claim under the DPPA because respondents' FOIA requests and subsequent letters were for the permissible purpose of "use in connection with [a] civil … proceeding," "including … investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). Respondents also argued that the information was obtained and used for the permissible purpose of "use by … any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions," § 2721(b)(1), because respondents were acting as private attorneys general, pursuant to the MDDA. Relatedly, they agued that in the context of the *Herron* litigation, their conduct was not solicitation because they in fact were contacting individuals they were already representing as part of the group action. The District Court denied the motion, concluding that "the factual allegations in the complaint [we]re sufficient to satisfy the low bar for pleading a claim for relief." Pet.App.96a.

The case proceeded to summary judgment, and at that point, the District Court granted judgment in respondents' favor. The court first concluded that respondents "did not solicit the unnamed Car Buyers as a matter of law" because respondents already had an attorney-client relationship with, or at least a fiduciary duty to, those individuals under state law by virtue of the fact that the *Herron* litigation was proceeding "'for the benefit of the whole.'" Pet.App.61a (quoting S.C. Code § 56-15-110(2)). The court went on to hold that "even if the Defendants' actions constituted solicitation, as long as the Defendants had a permissible use for the information, there [wa]s no DPPA violation." Pet.App.75a-76a. Finding "no question that the Defendants utilized the information they obtained for use in the *Herron* litigation," the court concluded that their conduct was for the "permissible purpose" of "the litigation exception." Pet.App.78a. The court also concluded that because they acted pursuant to their state law authority as private attorneys general, their actions also satisfied subsection (b)(1). Pet.App.79a-81a.

Petitioners appealed, and the Court of Appeals affirmed. Although the court disagreed with the District Court's conclusion that respondents "did not engage in solicitation," it concluded that they "indisputably made permissible use of the" information "for use 'in connection with [litigation],' including 'investigation in anticipation of litigation.'" Pet.App.5a (quoting 18 U.S.C. § 2721(b)(4)). Following the Eleventh Circuit's lead in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (2009), the court deemed the case governed by the principle that "where two provisions overlap but 'both apply to

situations not governed by the other,' they 'both must be given effect unless they pose an either-or proposition,'" which the DPPA's permissible-use provisions do not. Pet.App.34a (quoting *Rine*, 590 F.3d at 1226). As for petitioners' reliance on the specific-controls-the-general canon, the court found that canon irrelevant because "the DPPA provisions are equally specific." *Id.*

Finding that respondents "always had only one use as their purpose, i.e., litigation, litigation that at all times of their conduct was either imminent or ongoing," and that their "satisfaction of the state solicitation requirements was inextricably intertwined with their intended permitted use of the personal information they obtained," the court concluded "that full effect should be given to the permissive uses protected by the litigation exception." Pet.App.37a-38a. "Put simply," the court explained, respondents "did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances." Pet.App.38a. Given its holding that respondents satisfied the litigation provision, the court did not address the District Court's alternative ruling that they satisfied subsection (b)(1) as well. Pet.App.23a n.9.

SUMMARY OF ARGUMENT

The DPPA expressly permits disclosure of personal information for, *inter alia*, use "in connection with [a] civil ... proceeding," including "investigation in anticipation of litigation." That litigation provision and the other 13 permissible-use provisions are the key to ensuring that the DPPA

remains a modest and permissible regulation of commerce, rather than a problematic federal intrusion into local government functions and areas of traditional state concern. If a use is prohibited by the DPPA, any contrary state law is preempted and substantial civil and criminal penalties apply. If a use comes within a permissible-use provision, by contrast, States may still limit disclosure or regulate permissible users via industry-specific rules or standards of professional conduct.

There can be no serious dispute that respondents' actions were in connection with a civil proceeding, as they were all taken for specific purposes directly related to the *Herron* litigation, which was either ongoing or imminent at all relevant times. Rather than contend otherwise, petitioners insist that whether respondents satisfied the litigation provision is entirely beside the point because they did not simultaneously satisfy the DPPA's separate provision permitting bulk distribution of personal information for solicitation with express consent. That contention cannot withstand scrutiny.

The bulk distribution provision is not a prohibition or limitation on the circumstances in which information from DMV databases may be disclosed. To the contrary, it is a permissive provision, permitting disclosure of such information for "bulk distribution for surveys, marketing or solicitation" with express consent. Petitioners nonetheless maintain that this permissive provision operates as an implicit prohibition on any solicitation without express consent, without regard to whether it simultaneously satisfies one of the 13 other

permissible-use provisions, because the "bulk distribution" provision specifically addresses solicitation and the specific governs the general. That argument fails at the outset because the bulk distribution provision is no more specific than the litigation provision or any of the other permissible-use provisions. While the bulk distribution provision specifically addresses, *inter alia*, solicitation, the litigation provision specifically addresses use in connection with litigation, and there is no indication that the two are mutually exclusive. Thus, a use for solicitation in connection with litigation is potentially covered by two overlapping permissible-use provisions, albeit with slightly different conditions and limitations. In that situation, the use is permissible as long as it satisfies either one of the two potentially applicable provisions. There is no basis for an inference that one provision is more specific than the other or that either provision was meant to exclude the other. Indeed, the structure of the DPPA strongly supports this conclusion, as numerous permissive-use provisions overlap, and the statute provides courts with no tools to determine which ones are more specific or intended to trump others.

Petitioners also ignore canons against reading federal statutes to upset the federal-state balance or intrude on matters of traditional state authority. Congress knew that any federal regulation of state-created databases had to be sensitive to federalism concerns. Giving the permissible-use provisions their full, natural scope is critical to ensuring that the DPPA addresses core federal concerns while leaving the States with substantial discretion whether to authorize disclosure in areas of traditional state

authority, such as government functions, insurance regulation, or the practice of law. Petitioners would convert the bulk distribution provision into a tool of direct federal interference with States' traditional regulatory authority over attorney solicitation, and even into a mechanism for forcing attorneys to choose between violating state ethics rules or the DPPA. Nothing in the statute comes close to providing the requisite clear statement that Congress intended the bulk distribution provision—a provision *permitting* disclosure of information in certain circumstances—to upset the federal-state balance in that manner, or to impose the kind of extreme preemption even of state ethical obligations that petitioners envision. Simply put, such a further extension of federal authority over both state databases and the States' regulation of the legal profession—in the face of a permissible-use provision that allows use "in connection with" litigation—must rest on a clearer indication of congressional intent than the specific-controls-the-general canon could provide, even were it otherwise applicable. That is even more true in light of the substantial civil and criminal penalties applicable to a DPPA violation.

Petitioners alternatively contend that even if the bulk distribution provision does not prohibit disclosure for solicitation in connection with litigation without express consent, the litigation provision should be construed narrowly to exclude it. That argument fails for largely the same reasons that petitioners' specific-controls-the-general argument does. The DPPA's permissible-use provisions must be construed broadly because they are, in the first instance, limitations on direct federal regulation of

States—limitations Congress carefully constructed to avoid sensitive constitutional concerns. Moreover, the text of the litigation provision and the expansive terminology Congress employed refutes any contention that it is the sort of narrow provision petitioners suggest. Indeed, if any provision is to be construed narrowly to avoid any overlap between the litigation and bulk distribution provisions, it is "solicitation," which certainly need not extend to communications between attorneys and individuals in circumstances where state law already recognizes an attorney-client relationship.

Petitioners make the mistake of viewing the DPPA in a vacuum, but just because a use of information falls within one of the permissible-use provisions does not mean that the use is necessarily lawful. States remain free to impose their own limits on disclosure or to regulate the use of information by state-regulated professionals. Here, South Carolina created a cause of action that made certain DMV information useful "in connection with" litigation. The state DMV then released that information, and a state court observed that the information was relevant to defenses raised by defendants in the state-court civil proceeding. To conclude that all of that violated a federal statute that permits disclosure and use of such information in connection with litigation based on an inference from another *permissible*-use provision is simply not tenable. A congressional statute designed to address a discrete federal problem while minimizing federal intrusion into a State's management of its own database through a series of 14 overlapping permissible-use

provisions cannot be interpreted to have such an intrusive effect.

ARGUMENT

I. Respondents Readily Satisfied The DPPA's Litigation Provision, Which Is Not Trumped By The DPPA's Bulk Distribution Provision.

A. Respondents' Conduct Falls Squarely Within the DPPA's Provision Allowing Use "In Connection With" Litigation.

There can be no serious dispute that the information at issue in this case was disclosed and used "in connection with [a] civil … proceeding," § 2721(b)(4)—namely, the *Herron* litigation, which was either imminent or pending at all times. Respondents made the first two county-specific FOIA requests, five days and two months respectively before they filed the *Herron* complaint, to obtain information about the scope of the unfair practices that formed the basis for the complaint. JA57. Those requests did not result in solicitation of any kind; they were quite clearly for investigatory purposes and thus do not even implicate the question presented. Respondents made the subsequent FOIA requests to identify other individuals who had been charged the same unlawful fees as the plaintiffs they were representing. And they reached out to the individuals whose information the DMV provided to address a specific concern the dealers and the court had raised about whether their existing clients' claims could proceed against certain defendants.

Petitioners' own former counsel acknowledged the direct connection between respondents' actions

and the *Herron* litigation while representing some of the dealers in *Herron*. As he pointed out when first raising the DPPA issue before the *Herron* trial court (a telling fact in and of itself), all the letters were sent "to try to satisfy an issue of standing that was raised by" the dealers. JA224. The trial court also acknowledged that respondents reached out to other purchasers because they were attempting to add plaintiffs to the *Herron* complaint to "rectify" or "remedy" the court's own "concern" that respondents would need to find a plaintiff/purchaser for each dealer/defendant. Hrg. 48. Respondents sent every single one of the letters to individuals in the seven-month period during which the trial court repeatedly reiterated that standing remained a live issue and sent none after the court decided that it would not allow additional plaintiffs.

Applying the plain text of the DPPA's litigation provision to those undisputed facts, the applicability of the litigation provision is not even a close call. Respondents were not acting in connection with or anticipation of litigation in some vague, attenuated sense. They obtained and used personal information to further specific investigatory needs for existing clients in anticipation of a state court lawsuit they promptly commenced and in direct response to concerns raised by the defendants and the court during that pending case. Whatever the outer bounds of conduct "in connection with" a civil proceeding may be, obtaining personal information to identify and contact similarly situated individuals in furtherance of the interests of existing clients in imminent or pending litigation—especially a representative action—does not begin to approach them.

B. The Bulk Distribution Provision Does Not Trump the Litigation Provision.

Petitioners nonetheless insist respondents should be held liable for hundreds of millions of dollars in damages because respondents did not also satisfy the DPPA's separate provision permitting disclosure of personal information "[f]or bulk distribution for surveys, marketing or solicitations" with express consent. § 2721(b)(12). In their view, that provision trumps the other 13 permissible-use provisions under the canon of construction that "the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That contention lacks merit. Like all canons, "the general/specific canon is not an absolute rule." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2072 (2012). It is "simply [a] 'rule[] of thumb' which will sometimes 'help courts determine the meaning of legislation,'" *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996), and "can be overcome by textual indications that point in the other direction." *RadLAX*, 132 S. Ct. at 2072. Here, there is no reason to resort to the canon at all because the text, structure, and purpose of the DPPA all confirm that the various permissible-use provisions are purposefully overlapping, such that no one provision is more specific than—or otherwise implicitly trumps—the others. In short, if disclosure and use comes within any one of the DPPA's 14 permissible-use provisions, the analysis is at an end. The use certainly does not become problematic because another provision also is potentially relevant. Once one permissible-use provision is satisfied, there is no need to inquire whether another is as well.

1. The DPPA's permissible-use provisions are equally specific and not mutually exclusive, and thus reliance on the specific-controls-the-general canon is misplaced.

At the outset, the text of the DPPA lends no support to petitioners' argument that the bulk distribution provision trumps the statute's other permissible-use provisions. The bulk distribution provision is not a "flat prohibition on nonconsensual bulk solicitation." Pet'rs' Opening Br. ("Br.") 32. Indeed, it is not a prohibition at all. Rather, it is one of 14 provisions setting forth circumstances under which disclosure is *permitted*, satisfaction of any one of which precludes DPPA liability. The basic structure of the statute confirms as much, as the statute prohibits disclosure only when it is not for a permissible use. *See* § 2722(a) (prohibiting persons from obtaining or disclosing information "for any use not permitted under section 2721(b)"); § 2721(a)(1) (prohibiting DMVs from disclosing information "except as provided in subsection (b)"). If a use is permitted by any subsection of section 2721(b), then the statutory prohibition is not satisfied. The bulk distribution provision offers one avenue to demonstrating a permissible use, but so, too, does the litigation provision, the government functions provision, and every other permissible-use provision the statute enumerates.

Petitioners maintain the bulk distribution provision nonetheless implicitly prohibits any solicitation without consent that the other permissible-use provisions permit because it is a

"specific" provision and "the specific governs the general." *Morales*, 504 U.S. at 384. The fatal flaw in that logic is readily apparent: The bulk distribution provision is no more specific than the litigation provision or any other provision. The bulk solicitation provision specifically addresses, *inter alia*, solicitation. But the litigation provision just as specifically addresses use in connection with litigation. And nothing in the statute explicitly or implicitly suggests one should trump the other when it comes to solicitation in connection with litigation. Subsection (b)(4) is not a "general" or "catchall" provision that kicks in only when none of the statute's more "specific" provisions applies. It is a specific provision that governs in a context where others may not—namely, when personal information is sought and used in connection with litigation. To be sure, the litigation provision does not address solicitation, a subject that the bulk distribution provision "specifically" does. Br.28. But the bulk distribution provision does not address litigation, a subject that the litigation provision "specifically" does. Thus, while petitioners blithely declare this a solicitation case that must be governed exclusively by the bulk distribution provision, respondents could just as easily declare it a litigation case that must be governed exclusively by the litigation provision.

Petitioners' resort to the specific-controls-the-general canon thus fails at the outset because subsection (b)(12) is no more specific or general than subsection (b)(4). But that canon is inapplicable for the further reason that nothing in the text or structure of section 2721(b) suggests the permissible-use provisions were intended to be mutually

exclusive, with each uniquely occupying its own exclusive field. To the contrary, the substantial overlap among the various provisions refutes any suggestion that any one subsection was intended to govern exclusively any particular field.

For example, subsection (b)(1) broadly permits disclosure "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." § 2721(b)(1). Government agencies routinely engage in many of the activities covered by section 2721(b)'s other permissible-use provisions, such as "matters of motor vehicle or driver safety and theft," (b)(2); "research activities," (b)(5); "providing notice to the owners of towed or impounded vehicles," (b)(7); and, of course, activities "in connection with" litigation, (b)(4). If conduct falls within the overlap of two permissible-use provisions—such as if this Court were to include some information in its opinion in this case (which would seem obviously covered by both subsection (b)(1) and subsection (b)(4))—the logical inference is that Congress was particularly anxious not to prohibit such use and that such use is permitted by one or both provisions. There is no need to consider which provision is more specific or general—and no tools available to the judiciary for making such a determination—because one provision is enough. In other words, a use that falls within two permissible-use provisions is an easy case, and there is no need to accept petitioners' invitation to make it a hard one.

To be sure, there are circumstances where a use comes within the ambit of two different permissible-use provisions but ultimately satisfies only one of

them. But there is no reason to assume that the restrictions from one provision are somehow transferred to the other just because the use falls within the overlap of two potentially applicable provisions. For example, only a few provisions allow access to more restricted information. In the case of a use that comes within the potential ambit of two provisions, only one of which allows use of more sensitive information, it would make no sense to suggest that the sensitive information could not be disclosed. Likewise, if a use falls within two provisions, only one of which allows use without consent, there is no reason to transfer the consent requirement from one provision to the other. But that is precisely what petitioners seek to do.

Notwithstanding the substantial overlap among the various permissible-use provisions, petitioners seek to have the bulk distribution provision occupy its field to the exclusion of all other subsections. But the plain text of the statute conclusively refutes the notion that subsection (b)(12) is intended to cover the entire universe of "surveys, marketing or solicitations," as another permissible-use provision *explicitly* permits a subset of such activities without express consent. Among the many disclosures "[f]or use in connection with matters of motor vehicle or driver safety" that subsection (b)(2) permits without consent is disclosure for "motor vehicle market research activities, *including survey research*." § 2721(b)(2) (emphasis added). As that provision illustrates, the DPPA necessarily contemplates circumstances in which subsection (b)(12) is the more general provision, covering disclosure for "surveys, marketing or solicitations" generally, while subsection (b)(2)

specifically addresses surveys conducted for motor vehicle market research.

And in many respects subsection (b)(12) *is* the more general provision in the litigation context, which certainly does not involve the kind of activities at the core of the bulk distribution provision. Subsection (b)(12) is not a "solicitation exception," but rather permits disclosure with express consent "[f]or bulk distribution for surveys, marketing or solicitations." § 2721(b)(12). As those terms convey, and the legislative history confirms, the provision's principal aim is to regulate the circumstances under which States may sell DMV database information to direct marketers. *See, e.g.*, 139 Cong. Rec. 29,468 (Sen. Boxer) (discussing Act's effect on "States [that] sell personal information to direct marketers"); 139 Cong. Rec. 29,469 (Sen. Warner) (discussing circumstances under which Act "[p]rovide[s] access to this information for marketing purposes"); 140 Cong. Rec. 7,925 (Rep. Moran) (noting that "[m]arketers use DMV lists to do targeted mailings and other types of marketing," which Act "will allow them to continue to do" under certain circumstances).

And it certainly would not be illogical for Congress to treat solicitation in connection with litigation differently from solicitation via bulk distribution to direct marketers. While communication between attorneys and potential clients might, loosely speaking, constitute a form of "solicitation," it is a unique form that "ha[s] long been subject to the State's oversight." *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977). Not only is solicitation by attorneys subject to forms of

regulation by the state bar with no analog for direct marketers, but solicitation "in connection with" litigation generally also will be subject to the oversight of the court in which the proceeding is pending. Thus, Congress wisely left to the States (and in other contexts, federal courts) how best to address conduct that falls within subsection (b)(4). Should States choose to restrict access to attorneys, or restrict the uses to which attorneys may put such information, they remain free to do so. But the bulk distribution provision, which does not deal with attorneys or litigation at all, in no way requires States to take those steps or supports imposition of liability on attorneys who use information for solicitation that the litigation provision permits.

To the extent Congress' approach in subsection (b)(4) results in overlap with subsection (b)(12), it is the kind of overlap the DPPA tolerates, because Congress wanted to cast a wide net when seeking to ensure that its efforts to keep personal information out of the hands of those who do *not* need it would not have the unintended consequence of keeping it out of the hands of those who do. If the sheer breadth of the overlapping textual provisions leaves any room for doubt on that score, the legislative history confirms that Congress was just as concerned with what the DPPA would *permit* as with what it would *prohibit*. As its primary drafter explained, the Act is designed to "restrict access to all those without a legitimate purpose," not to "limit those legitimate organizations in using the information." 139 Cong. Rec. 27,328 (Rep. Moran); *see also* 140 Cong. Rec. 7,929 (Rep. Goss) ("The flow of information would only be denied to a narrow group of people that lack legitimate

business."). Although Congress made sure "someone coming in off the street, without a permissible purpose could not gain access to" personal information, it also made sure "insurance companies, law enforcement professionals, attorneys, and all other authorized users would continue to have access to this information." 140 Cong. Rec. 7,925 (Rep. Moran). And it did so by constructing a set of overlapping permissible-use provisions that leave States with discretion to decide whether to disclose information to the authorized users they cover.

In the end, because of the substantial overlap of the various permissible-use provisions and the absence of any indication that they were intended to be mutually exclusive, petitioners' argument is less that the specific-controls-the-general than an effort to convert subsection (b)(12)'s authorization of bulk distribution for solicitation with consent into a blanket prohibition on solicitation without consent. Neither the specific-controls-the-general canon nor any other principle of statutory construction can justify that feat of legal alchemy. Permission for use with consent remains permission, and in no way suggests that a different permissible-use provision for which consent is not a prerequisite is inapplicable. Indeed, the flaw in petitioners' theory is evident in considering a permissible use under subsection (b)(4) that would otherwise be wholly impermissible. While bulk distributions and solicitations may be annoying, they are not life threatening, which is why the DPPA permits them with consent. The use of information to serve process on a defendant at her home is much closer to the core concerns that prompted the DPPA, yet subsection

(b)(4) unambiguously authorizes disclosure for that purpose. It would be more than passing strange if conduct that not only satisfies subsection (b)(4) but could also satisfy subsection (b)(12) if consent were obtained were treated less favorably than conduct that would be wholly prohibited but for subsection (b)(4). But that is the inevitable consequence of petitioners' misguided effort to convert subsection (b)(12)'s limited permission into a prohibition.

2. Applying the specific-controls-the-general canon to the DPPA would not serve the canon's underlying rationales.

"To apply a canon properly one must understand its rationale." *Varity*, 516 U.S. at 511. Precisely because the DPPA provides a series of overlapping and not mutually exclusive permissible-use provisions, it does not present either of the issues—contradiction or superfluity—that the specific-controls-the-general canon is typically applied to address. That only underscores why petitioners' attempt to invoke the specific-controls-the-general framework would frustrate rather than further the ultimate goal of effectuating Congress' intent.

"The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is *contradicted* by a specific prohibition or permission." *RadLAX*, 132 S. Ct. at 2071 (emphasis added); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Text* § 28 (2012) ("[t]he general/specific canon … deals with what to do when conflicting provisions simply cannot be reconciled"). In that context, "the

specific provision is construed as an exception to the general one" in order "[t]o eliminate the contradiction" that would otherwise exist. *RadLAX*, 132 S. Ct. at 2071; *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (invoking canon to resolve conflict between laws prohibiting employment discrimination and statutes granting hiring preferences to Native Americans). Plainly, there is no such contradiction to eliminate here because subsections (b)(4) and (b)(12) both *permit* disclosure of personal information and do not conflict with each other at all. The provisions are instead more readily governed by the rule that "so long as there is no 'positive repugnancy' between two" provisions, "a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Mancari*, 417 U.S. at 551 (when provisions "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Recognizing as much, petitioners focus on cases applying the canon to statutes "in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX*, 132 S. Ct. at 2071. But those do not help petitioners, either, because the canon applies in that context only when necessary to "avoid[] … the superfluity of a specific provision that is swallowed by the general one." *Id.*; *see also D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (canon effectuates "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute"). Because subsection (b)(4) is no more general or specific than subsection (b)(12), and allows access to restricted information that could

never be disclosed under subsection (b)(12), no such superfluity problem exists here.[2]

To be sure, by permitting solicitation when it is in connection with litigation, subsection (b)(4) necessarily overlaps with subsection (b)(12) to some extent. But "this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Subsections (b)(4) and (b)(12) easily satisfy that standard. Many (indeed, most) instances in which information is used for solicitation will not be in connection with litigation, just like many (indeed, most) instances in which information is used in connection with litigation will not involve solicitation. Like the DPPA's many other overlapping provisions, each governs in a sphere that the other does not threaten to subsume because neither is any more specific or general than the other, and neither was designed to be exclusive. In those circumstances, a use that falls within the overlap of two provisions is an easy case. There is no need to invoke the specific-controls-the-general canon

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[2] If restricted information were used for solicitation in connection with litigation, the bulk distribution provision, which never allows access to restricted information, would simply be irrelevant—it would not somehow rise up and prevent the access to restricted information that subsection (b)(4) allows. But the same is true for information where the State has not obtained consent. The absence of consent renders subsection (b)(12) inapplicable, not dispositive, when subsection (b)(4) also applies.

or otherwise try to determine which permissible-use provision takes precedence.

That makes the DPPA readily distinguishable from the statutory scheme this Court considered in *RadLAX*, the principal case on which petitioners rely. *RadLAX* involved a statute that contained three provisions setting forth different circumstances under which a Chapter 11 bankruptcy plan could be confirmed despite a class of creditors' objections. *See* 11 U.S.C. § 1129(b)(2)(A). The first provision established "the rule for plans under which the creditor's lien remains on the property," the second established "the rule for plans under which the property is sold free and clear of the creditor's lien," and the third served as "a residual provision covering dispositions under all other plans." *RadLAX*, 132 S. Ct. at 2072. The debtor sought to invoke the third provision to obtain confirmation of a plan under which it would sell the property free and clear of the creditor's lien, but without complying with the second provision's requirements for doing so. Relying on the specific-controls-the-general canon, the Court rejected the debtor's argument.

As the Court explained, application of the canon was necessary there to "avoid[] … the superfluity of a specific provision that is swallowed by the general one." *Id.* at 2071. That superfluity problem arose because, under the debtor's reading, the second provision would be "entirely a subset" of the third residual provision, which "applie[d] to *all* cramdown plans, … includ[ing] all of the plans within the more narrow category described in" the second provision. *Id.* at 2072-73. Thus, if "the general language" of the

residual provision were interpreted so broadly as to allow circumvention of the specific requirements for plans governed by the first two provisions, those provisions would no longer serve any independent purpose, and the three as a whole would no longer have the mutually exclusive operation Congress intended. *Id.* Here, by contrast, there remain plenty of solicitations not in connection with litigation and plenty of uses in connection with litigation that do not constitute solicitation. Accordingly, there is no risk of superfluity.

This case is thus more analogous to *Varity Corp. v. Howe*, a case in which the Court declined to apply the specific-controls-the-general canon to statutory provisions that, much like the subsections of section 2721(b), contained significant overlap but were neither mutually exclusive nor superfluous. *Varity* involved a provision of ERISA that authorized beneficiaries to bring a civil action to obtain, among other things, "appropriate relief under section 409" of ERISA, § 502(a)(2), and also "other appropriate equitable relief," § 502(a)(3). Although those subsections clearly overlapped, neither rendered the other redundant because subsection (a)(2) authorized non-equitable compensatory and punitive damages that subsection (a)(3) did not, and subsection (a)(3) authorized additional equitable relief that subsection (a)(2) did not. 516 U.S. at 509. Nonetheless, the plan administrator invoked the specific-controls-the-general canon to argue that beneficiaries should not be able to seek equitable relief under subsection (a)(3) unless it was also available under section 409 because to do so would circumvent a limit implicit in subsection (a)(2). *Id.* at 510.

Finding no reason to "believe that Congress intended the specific remedies in § 409 as a *limitation*" on the additional remedies the other provisions of section 502 authorized, the Court rejected the plan administrator's argument. *Id.* at 511. As the Court explained, the overlap between section 502's six subsections, which authorized a wide range of remedies in a variety of different circumstances, evinced Congress' intent to create a unified "safety net, offering appropriate and equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," not its intent to render each provision an implicit limitation on the others. *Id.* at 512.

The same is true here. While subsections (b)(4) and (b)(12) contain some minor overlap, that overlap is typical of the 14 permissible-use provisions, which plainly were not designed to be mutually exclusive. The overlap is not some inadvertent flaw in the statutory scheme, but a natural consequence of Congress' efforts to draft the permissible-use provisions broadly to guard against unintended preemption of state law and inadvertent imposition of massive liability and even criminal fines for conduct that it had no desire to prohibit or regulate.

Attempting to prove otherwise, petitioners invoke dictum from *RadLAX* to the effect that the specific-controls-the-general canon is not "confined to situations in which the entirety of the specific provision is a 'subset' of the general one," but also governs "[w]hen the conduct at issue falls within the scope of *both* provisions, … whether or not the specific provision also applies to some conduct that

falls outside the general." *RadLAX*, 131 S. Ct. at 2072. That observation was dictum because in the end the Court held that the second provision of the statute *was* "entirely a subset" of the third, which is why the Court explained that the canon must be applied to "avoid[] … the superfluity of a specific provision that is swallowed by the general one." *Id.* at 2071, 2072. In any event, whatever the scope for invoking the specific-controls-the-general canon to avoid substantial as well as total superfluity, it cannot be invoked when Congress designed various provisions to overlap and did not intend them to be mutually exclusive.

Thus, it is hardly surprising that petitioners' other cases involved the same kind of obviously general or catch-all provision and the same resulting superfluity problem as *RadLAX*. *See, e.g.*, *Bloate v. United States*, 130 S. Ct. 1345 (2009) (applying canon where proposed reading of Speedy Trial Act provision would render superfluous specific provision dealing with pretrial motions); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981) (applying canon where proposed reading of tax exemption provision for charitable organizations would render superfluous specific provision addressing charitable cooperative hospital services); *Popkin*, 285 U.S. at 206 (applying canon where proposed reading of provision allowing bankruptcy courts to "make such orders … as may be necessary" would render superfluous specific provision limiting circumstances in which they may issue arrest warrants); *United States v. Chase*, 135 U.S. 255, 261 (1890) (applying canon where proposed reading of provision banning obscene "writings" from mail would render superfluous specific provision

limiting circumstances in which "letters" could be banned).

By contrast, in cases involving statutes or provisions where, like the DPPA, any overlap does not cause superfluity and reflects Congress' desire to legislative comprehensively, "this Court has not hesitated to give effect to" both. *J.E.M. Ag Supply*, 534 U.S. at 144; *see also, e.g.*, *Varity*, 516 U.S. at 511; *Germain*, 503 U.S. at 253 (refusing to apply canon to read statute conferring appellate jurisdiction over final bankruptcy decisions as "precluding … by negative implication" general grant of jurisdiction over interlocutory appeals). Because that is also the situation here, the specific-controls-the-general canon need not and should not apply.

Finally, *RadLAX* is also readily distinguishable because it did not involve any competing canons of interpretation. *RadLAX* resolved an ambiguity concerning the relative roles of two bankruptcy provisions that did not implicate potential criminal liability or the federal-state balance. Here, both considerations are implicated and both give rise to canons under which ambiguities are resolved against liability. The DPPA not only authorizes criminal fines against violators, § 2723(a), but also contains a liquidated damages remedy in its civil suit provision that routinely, as here, produces astronomical damages requests (typically accompanied by a plea for punitive damages as well), § 2724(b). Moreover, while States themselves are exempt from some of those provisions, municipalities and state and local actors are not. It is one thing to apply the specific-controls-the-general canon when determining whether a

bankruptcy plan will be confirmed or an organization will be tax-exempt. It is another thing entirely to apply it when the result would be sanctioning criminal and massive civil liability for engaging in conduct that a statute on its faces declares permissible. In that context, the canon simply cannot supply by implication the requisite clarity the statute lacks. And a Congress leery of intruding too deeply on States' management of their own databases—let alone the practice of law—should not be deemed to have preempted state law and upset the federal-state balance based on a mere inference that subsection (b)(12) was intended to occupy the field of solicitation, even if the solicitation comes within the terms of subsection (b)(4) or another permissible-use provision.

3. Applying the specific-controls-the-general canon to the DPPA would violate more readily applicable statutory construction principles.

That the DPPA implicates sensitive federalism concerns provides yet another reason why the specific-controls-the-general canon cannot be applied to expand its regulatory reach. The DPPA is no ordinary statute. It not only preempts state laws that would permit certain disclosures, but it regulates the States directly. Indeed, its first and central aim is to regulate States, by "restrict[ing] the States' ability to disclose a driver's personal information." *Condon*, 528 U.S. at 144. Because that kind of direct interference with "the integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), is a delicate constitutional matter, Congress carefully

limited it with a broad set of permissible uses for which States may continue to disclose information as they see fit without running the risk of civil penalties or federal lawsuits against their employees and agents. Some of those provisions avoid federal intrusion into the State's own functions or into professions traditionally regulated by the States, but all operate in the first instance to limit federal regulation of a State's disclosure of information from its own database. Any suggestion that the bulk distribution provision should be read to *implicitly* prohibit conduct that other provisions of the DPPA *explicitly* permit therefore is readily overcome not just by the presumption against preemption but also by the constitutionally compelled rule that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

That rule applies with full force to the DPPA's litigation provision. Because "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,'" *Goldfarb*, 421 U.S. at 792, this Court has recognized routinely "the State's strong interest in regulating members of the Bar." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978). The Court has also emphasized "the importance of the State's interest in regulating solicitation of paying clients by lawyers," *id.* at 459 n.16, and noted that "controls over solicitation and advertising by attorneys have long been subject to the State's oversight." *Bates*, 433 U.S. at 362. While the First

Amendment remains a check on how stringent such regulation may be, beyond that, both Congress and this Court have been wary of "Federal interference with a State's traditional regulation of [the legal] profession." *Id.*

By insisting that the bulk distribution provision must be satisfied even when solicitation is in connection with litigation, petitioners would create exactly the kind of federal interference with state regulation of lawyers Congress sought to avoid. That much is clear from their ready concession that, in their view, the bulk distribution provision preempts any state law that authorizes attorneys to obtain information from DMV databases to contact potential clients in connection with litigation. Br.52. Indeed, according to petitioners, even if an attorney had "an *ethical duty*" to solicit an individual whose information was available through a state DMV database—which arguably was the situation in this very case, given the representational nature of the MDDA suit, *see* Pet.App.61—the bulk distribution provision would *still* prevent the attorney from doing so absent express consent. Br.54 (emphasis added).

Nothing in the DPPA comes close to confirming that Congress intended to preempt regulation of those matters "at the core of the State's power," *Bates*, 433 U.S. at 361, let alone intended the extreme form of preemption petitioners press. "[I]n all pre-emption cases, and particularly in those" involving "a field which the States have traditionally occupied," this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was

the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Far from evincing that requisite clear and manifest intent to preempt, subsection (b)(4) evinces Congress' clear and manifest intent to *avoid* interference with the States' historic power to regulate members of their bars and determine the extent to which attorneys should have access to information in their DMV databases.

To be sure, the DPPA manifests Congress' intent to preempt the state laws it was specifically targeting—namely, those permitting disclosure of personal information to any and all comers for a small fee. *See Condon*, 528 U.S. at 147; 140 Cong. Rec. 7,924 (Rep. Moran) (DPPA "close[s] a loophole in State law that allows anyone, for any reason, to gain access to personal information" by purchasing it from state DMV). But when it came to whether the DPPA should prohibit attorneys from accessing such information, Congress unmistakably eschewed interference with existing state regulatory regimes by providing attorneys broad access to such information for any and all uses in connection with litigation. *See, e.g.*, 140 Cong. Rec. 7,925 (Rep. Moran) ("insurance companies, law enforcement professionals, *attorneys*, and all other *authorized users* would continue to have access to this information" (emphasis added)). Indeed, even petitioners are forced to acknowledge that "lawyers are given unique access to information in DMV databases" under the DPPA, Br.33, which is clear from the fact that they are one of only a few select groups given access to highly restricted information. § 2721(b)(2). Certainly a federal law that explicitly

protects broad attorney access to personal information cannot be read to implicitly preempt state laws that allow such access.

Of course, that does not mean States are required to give attorneys access to their DMV databases, whether attorneys seek information for solicitation, investigation, service of process, or other purposes the DPPA permits. The DPPA does not restrict the States' ability to deny access to their databases to the extent they deem appropriate. *See* 139 Cong. Rec. 29,468 (Sen. Boxer) ("States are free to be more restrictive with this information."); 139 Cong. Rec. 29,469 (Sen. Warner) (Act will "[a]llow States to enact tougher restrictions"). The consequences of resolving any ambiguity here are thus asymmetrical. Construing subsection (b)(12) to trump subsection (b)(4) via the specific-controls-the-general canon would preempt state law and opens up massive civil and criminal liability. Recognizing that subsection (b)(4) applies would leave States in their traditional position of regulating the legal profession and determining the proper scope of disclosure in connection with litigation. Given "the State's strong interest in regulating members of the Bar," *Ohralik*, 436 U.S. at 467, adopting petitioners' position not only is inconsistent with basic principles of statutory construction, but also would violate the rule that courts should not interpret a "statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the

legislation." *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 432 (2002).[3]

That conclusion is further reinforced by the fact that, notwithstanding petitioners' efforts to portray this as a case about a "special dispensation" for attorneys, Br.41, needlessly exposing attorneys to massive liability is not the only unintended consequence of petitioners' proposed reading of the DPPA. If petitioners were correct that subsection (b)(12) implicitly prohibits all solicitation without express consent, then it would also prohibit government agencies or actors from using personal information "for surveys, marketing or solicitations" without "express consent," § 2721(b)(12), even if the government agency or actor did so in the course of "carrying out its functions," § 2721(b)(1). Certainly all the same arguments petitioners make here would apply with the same force to subsection (b)(1), which is just as broad as subsection (b)(4) and is equally silent on those activities.

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[3] Giving subsection (b)(4) its full effect also serves separation of powers principles. Subsection (b)(4) by its plain terms allows disclosure and use of information in connection with federal as well as state court litigation. When, as here, DMV information is used to facilitate a lawsuit, including by communicating with absent class members or even potential additional plaintiffs to cure a standing problem, it is subject to oversight by the federal court in a way that is completely different from the ordinary disclosures the DPPA targeted. Just as courts should not lightly infer that Congress wanted to upset the federal-state balance, there is no reason to lightly infer that Congress intended to impose DPPA liability for actions taken in connection with litigation being overseen by state and federal courts.

Indeed, all the same arguments *were* made before (and rejected by) the Eleventh Circuit in a case involving billion-dollar multi-district DPPA litigation against a government contractor. *See Rine*, 590 F.3d at 1225. As the United States explained in urging the contrary view, nothing in the DPPA remotely suggests Congress intended a provision *permitting* disclosure for solicitation under certain circumstances to trump the government functions provision and expose government actors to massive liability for using personal information for surveys, marketing, or solicitations in the course of carrying out their functions. *See* Br. of United States as *Amicus Curiae*, *Rine v. Imagitas, Inc.*, No. 08-148800-AA (11th Cir. 2009); Statement of Interest of the United States, *In re: Imagitas, Inc.*, No. 3:07-md-00002 (M.D. Fla. 2007) (Doc. 71). Rather, both "the plain language" and "the structure of the statute" confirm that "if any of the 14 enumerated exceptions, which are all of equal rank, are applicable, the disclosure of personal information is allowed." *Id.* at 11-12. That "Congress had a particular concern about the sale of personal information 'to commercial enterprises, solicitors, and direct marketers'" does not mean that it sought to "regulate or prohibit all bulk marketing activities; rather the DPPA … places restrictions only where the statutory exceptions do not apply." *Id.* at 14-15.[4]

[4] Even if petitioners were to argue that the bulk distribution provision somehow does not trump subsection (b)(1), that would not help them here because the District Court correctly concluded that respondents also satisfied that provision.

In fact, there is every reason to think Congress did *not* intend to regulate all such activities, as doing so in the context of government functions or litigation would run counter to Congress' efforts to confine the DPPA's regulatory reach to matters more obviously within the scope of its commerce power. Release of information contained in state DMV databases is not inherently a matter of federal concern. This Court recognized as much in *Condon*, when it repeatedly emphasized that it was willing to treat that information as an "an article of commerce" only in the limited "context of this case," which involved the "sale or release of that information *in interstate commerce*." 528 U.S. at 148-49 (emphasis added); *see also id.* at 149 ("drivers' personal information is, in the context of this case, an article in interstate commerce"). The Court expressly declined to address the federal government's alternative and much more attenuated argument that "the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information have a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation." *Id.* at 148-49. Thus, to allow the solicitation provision to trump all others—even those expressly disclaiming regulation of activities nowhere near the core commercial activity at issue in *Condon*—would create difficult constitutional questions both Congress and this Court sought to avoid.

Pet.App.79a-81a. Although the Court of Appeals had no need to reach that issue, at the very least, a remand therefore would be necessary were the Court to conclude that the bulk distribution provision trumps subsection (b)(4) alone.

II. The DPPA's Litigation Provision Does Not Implicitly Exclude All Conduct That Might Be Construed As Solicitation.

Petitioners alternatively contend that even if the bulk distribution provision does not trump the litigation provision altogether, the latter nonetheless should be construed to exclude use of personal information for solicitation in connection with litigation. That argument largely rests on the same flawed premises underlying petitioners' misplaced reliance on the specific-controls-the-general canon. Congress intended overlap among the DPPA's permissible-use provisions and drafted subsection (b)(4) in broad terms to avoid interference with use of information by state-regulated attorneys. There is no reason not to give Congress' words their intended breadth. As this case demonstrates, nothing about litigation-related activities that could be characterized as solicitation makes them any less "in connection with" litigation. Indeed, if this Court were going to construe subsections (b)(4) and (b)(12) to avoid any overlap, the more logical conclusion would be that efforts by attorneys to contact individuals with whom they already have a distinct relationship by virtue of the filing of a state-law representative action do not constitute solicitation. But whether solicitation or not, respondents' efforts to do "what any good lawyer would have done" in connection with the *Herron* litigation cannot be construed to fall outside subsection (b)(4). Pet.App.38a.

A. The Permissible-Use Provisions Must Be Construed Broadly to Preserve the DPPA's Delicate Constitutional Balance.

At the outset, petitioners' attempt to impose a limiting construction on the litigation provision rests on a faulty premise. According to petitioners, subsection (b)(4)—and presumably all of 2721(b)'s permissible-use provisions—must be read narrowly because when "a general statement of policy is qualified by an exception," courts "usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Whatever force that principle may have in other contexts, it has none here. Quite the contrary, those provisions must be construed broadly to protect the delicate federal-state balance Congress sought to achieve and to avoid interference with traditional state matters such as regulation of the bar. Thus, all the same statutory interpretation principles that counsel against application of the specific-controls-the-general canon counsel against imposing an unintended narrowing construction on the permissible-use provisions, which serve the essential function of limiting the statute's regulatory reach to activities at the core of Congress' commerce power. *See supra* Part I.B.3.

Indeed, even the premise that the DPPA reflects "a general statement of policy … qualified by an exception," *Clark*, 489 U.S. at 739, is at fundamental odds with the statute. The permissible-use provisions are not mere exceptions to a general prohibition on disclosure. Rather, they are an integral part of the prohibition itself, which applies only to disclosures

that are not for a permissible use. *See, e.g.*, §§ 2721(a)(1), 2722(a). That is because the DPPA was designed to ensure that "[t]he flow of information would only be denied to a narrow group of people that lack legitimate business," not to interfere with "the legitimate public and business interests in keeping these records available," or the States' traditional discretion to regulate those activities. 140 Cong. Rec. 7,929 (Rep. Goss); *see also* 139 Cong. Rec. 29,470 (Sen. Biden) (statute "is narrowly tailored in that it carefully preserves the right of States to disseminate this private information for legitimate purposes"). To assume that the DPPA's critical permissible-use provisions must be construed narrowly thus would upset the sensitive constitutional and policy balance Congress struck.

Petitioners cannot get around that reality by arguing that giving the permissible-use provisions their intended scope might marginally "increase[] the risk of inadvertent disclosure to" would-be stalkers. Br.44. That mistakes the DPPA for a general privacy protection provision Congress did not intend, and one that might well be beyond Congress' power to enact. Rather than promote privacy at all costs, Congress targeted a particular problem within its commerce power and left substantial areas to state regulation through the 14 separate permissible-use provisions. While narrowing every one of those provisions would limit disclosure (and increase criminal exposure and federal intrusion in state affairs), it would not remotely reflect Congress' intent in enacting the DPPA. Congress addressed the concerns petitioners raise by directing many of the permissible-use provisions to individuals who are already subject to

substantial oversight and prohibiting the making of a "false representation" to obtain personal information. § 2722(b); *cf.* 139 Cong. Rec. 29,468 (Sen. Warner) ("There are specific exceptions of course for law enforcement individuals and other areas where proven experience shows that this information should flow. But in those instances we have to presume it is somewhat protected.").

B. Nothing in the Text of Subsection (b)(4) Supports Any of the Vague "Narrowing" Constructions Petitioners Propose.

The text of subsection (b)(4) also lends no support to petitioners' attempt to manufacture a special carve-out to exclude solicitation in connection with litigation. Subsection (b)(4) permits disclosure of personal information

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

§ 2721(b)(4). Notwithstanding petitioners' contrary contention, there is nothing the least bit "narrow" about that language. Br.32. The provision's terms—"in connection with," "any" (thrice), "including"—convey breadth and readily encompass efforts to contact individuals who might want to take part in anticipated or ongoing litigation. Thus, the statute's

"expansive language offers no indication whatever that Congress intended the limiting construction" petitioners "now urge." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

Petitioners attempt to demonstrate otherwise by applying canons such as *noscitur a sociis* and *ejusdem generis* to the terms that following "including," but this Court "do[es] not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). And here the terms Congress employed and the illustrative examples all indicate breadth, rather than some implicit intent to limit subsection (b)(4)'s reach.

At the outset, the phrase "in connection with" is a term of great breadth. *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000). And the word "including" generally "signal[s] that the list that follows is meant to be illustrative rather than exhaustive." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (2010); *see also* Singer & Singer, 2A Sutherland Statutes & Statutory Construction § 47:7 (7th ed. 2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation"). Plainly, that is the case in subsection (b)(4), which provides examples that do not begin to exhaust the many permissible uses to which personal information might be put in connection with litigation. And the included examples are truly illustrative. They do not carry any implicit intent to exclude other uses in connection with litigation, but do seem to cover the litigation process from its pre-filing beginnings to its utter end (execution of judgment). That the statute specifically

mentions "investigation *in anticipation* of litigation," for example, does not mean that it excludes access to personal information for investigation once litigation has commenced.

Moreover, "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010). The examples provided in subsection (b)(4)—"the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders"—are simply "too few and too disparate to qualify as 'a string of statutory terms,' … or 'items in a list'" giving rise to some limitation. *Id.*

Indeed, it is not "apparent what common attribute connects" those examples, other than their comprehensive cradle-to-grave coverage of the litigation process. *Ali*, 552 U.S. at 225. Petitioners struggle mightily to identify a theme in the pudding, but the best they can come up with is a collection of vague phrases no more illuminating than "in connection with" litigation. *See, e.g.*, Br.39 ("Each furthers the integrity of a judicial or administrative proceeding."); *id.* (each "further[s] a necessary step in the … proceeding" or "the truth-seeking function of a court or agency"); Br.35 (each "ensure[s] a court or other tribunal's ability to make or effectuate a judgment"). Those are hardly phrases of limitation or concepts that lend themselves to judicial administration. Nor is it obvious that they necessarily exclude solicitation. *See infra* Part II.C.

Petitioners alternatively contend (at 41-42) the litigation provision must be read to exclude solicitation lest other provisions using the words "in connection with" be read to encompass solicitation as well. But that argument runs into the problem that one of those provisions (one petitioners conveniently fail to mention) *does* quite clearly permit activities covered by subsection (b)(12). Subsection (b)(2) permits disclosure (regardless of consent) "[f]or use in connection with … motor vehicle market research activities, *including survey research*." § 2721(b)(2) (emphasis added). It is hard to conceive of a narrowing construction that would avoid any overlap between subsections (b)(2) and (b)(12) when it comes to surveys for motor vehicle market research, which underscores that there is nothing inherently "implausible," Br.42, about the notion that Congress considered disclosure for surveys, marketing, or solicitations without express consent consistent with the statute's purpose in certain circumstances narrower than general bulk distribution.

And the provisions petitioners do discuss differ from subsection (b)(4) in both structure and breadth. For example, subsection (b)(10) permits disclosure "[f]or use in connection with the operation of private toll transportation facilities." While that provision clearly reflects Congress' intent to broadly allow States to address disclosures involving the operation of private toll facilities, it is not obvious that "advertising the commuting benefits of the road," Br.43, comes within Congress' broad phrase (although it might). The same is true of subsection (b)(6), which permits disclosure for use "by any insurer … in connection with … underwriting." Petitioners identify

no norm of "underwriting" that inherently includes contacting potential underwriting clients. But to the extent any such norm exists, there is no obvious reason why subsection (b)(6) must be read to exclude it, rather than to leave to the States whether and how members of the insurance industry—another area at the core of the States' police power—may access and use information stored in their DMV databases.

In short, nothing in the DPPA as a whole or in subsection (b)(4) specifically is "inconsistent with the conclusion that" the litigation provision "sweeps as broadly as its language suggests." *Ali*, 552 U.S. at 226. Congress provided no indication whatsoever that it intended to draw an artificial line between solicitation and all other uses of personal information in connection with litigation, and petitioners are "not at liberty to rewrite the statute to reflect a meaning [they] deem more desirable." *Id.* at 228.

C. Petitioners' Cramped Construction of the Litigation Provision Is Unworkable.

Petitioners' attempt to artificially cabin the scope of the litigation provision also is wholly unworkable in practice. At the outset, other than the fact that it is supposed to exclude solicitation, exactly how petitioners envision their nebulous limiting construction as narrowing the scope of subsection (b)(4) is difficult to discern. Presumably, petitioners do not mean to suggest a subjective analysis, under which each request for personal information is examined to determine whether it would in fact "further[] the integrity" of the relevant proceeding. Br.39. Even apart from finding no support in the statute, that approach would be utterly impractical

for the state DMVs whose disclosure of personal information the DPPA regulates in the first instance.

But if the test is not a subjective one, it is not at all clear why solicitation objectively fails to satisfy it, as solicitation *does* "further[] the integrity" of litigation in many instances. "[S]olicitation may serve vital purposes and promote the administration of justice." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 639 (1995) (Kennedy, J., dissenting); *see also, e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 643 (1985) (solicitation may have "the salutary effect of informing some persons of rights of which they would otherwise have been unaware"). This case is a perfect example. Respondents did not contact the individuals whose information the state DMV provided simply because they sought to "initiat[e] … a proposed business transaction." Br.41. They contacted them because they were trying to add plaintiffs who had suffered a concrete legal injury relevant to an ongoing representative lawsuit to "rectify" or "remedy" a standing "concern" the trial court was having difficulty resolving. Hrg. 48; *see also* JA224 (acknowledging that respondents sent FOIA requests and letters "to try to satisfy an issue of standing that was raised by [defense] counsel"). Indeed, to the extent respondents' efforts addressed standing concerns and ensured a more concrete adversary presentation, they directly "further[ed] the integrity" of the proceeding. Br.39; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992) (standing "assure[s] that concrete adverseness with sharpens the presentation of issues upon which the

court so largely depends for illumination of difficult ... questions").

Moreover, petitioners' attempt to draw a bright line between solicitation and other plainly permissible uses of personal information is doomed by their own concessions. Petitioners do not deny that respondents could have requested and obtained all the same information from the state DMV as part of their efforts to investigate their existing clients' claims that dealers throughout South Carolina were engaged in a conspiracy to charge illegal fees. Br.48-49. Presumably, petitioners would also concede that, as part of those efforts, respondents could have reached out to those individuals by sending them letters advising that they "represent a group of consumers in a pending lawsuit" involving certain fees, "believe that these fees are being charged in violation of South Carolina law," "understand that you may have been charged one of these fees," and "would like the opportunity" to discuss "[t]he exact nature of your legal situation." JA91-92 (emphasis omitted). But because respondents labeled the letters stating all of those same things "advertising material" in order to comply with state law, petitioners claim they crossed some implicit line between permissible investigation and impermissible solicitation. That fine a line simply cannot be the difference between lawful conduct and unlawful conduct when millions of dollars in damages, criminal liability, and the federal-state balance are all stake. *See supra* Part I.C.3.

Indeed, were it really necessary to interpret subsections (b)(4) and (b)(12) to avoid any overlap—and it is not—the far more logical conclusion would be

that an attorney's communications with individuals he may already represent in a representative lawsuit is not solicitation at all. Even petitioners appear to concede that using DMV information to notify class members of their opt-out rights would be protected by subsection (b)(4), Br.40, even though an attorney-client relationship may not exist until that process has occurred. *Cf. Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). But that is not materially different from the relationship between respondents and the class of individuals petitioners hope to represent.

Although the MDDA representative action is a unique creature of South Carolina law, it has many of the characteristics, if not all the formality, of a class action. *See Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010) (repeatedly referring to *Herron* litigation as a "class action suit"). And both the *Herron* trial court and the District Court (which is presumably the federal court most familiar with the MDDA) concluded that respondents had either an attorney-client relationship or at least a fiduciary duty with the purchasers they contacted. JA253-54; Pet.App.61a. Thus, were it really necessary to construe subsections (b)(4) and (b)(12) to avoid any potential overlap, the better conclusion would be that solicitation "in connection with" litigation, at least in these circumstances, is not solicitation within the meaning of subsection (b)(12). But the far more logical conclusion, and the one overwhelmingly supported by the text and structure of the DPPA, is that such overlap is unproblematic because activity that satisfies subsection (b)(4) is permitted without regard to whether it might also constitute "solicitation."

Petitioners seek to capitalize on the fact that the letters respondents sent were prominently labeled "advertising material." But that just underscores the potential interference with state regulation of attorneys inherent in petitioners' argument. In South Carolina, as in many States, professional conduct rules *require* attorneys to label any written communication with prospective clients "advertising material." S.C. R. Prof. Conduct 7.3; *see also* ABA Model R. Prof. Conduct 7.3. Surely contact with individuals similarly situated to plaintiffs in pending lawsuits will often result in inquiries into whether the attorney is willing to represent the contacted individuals as well—particularly in the context of a case like *Herron*, which was in essence a class action lawsuit. Accordingly, even if respondents' letters had modeled petitioners' vision of what an exclusively "investigation-oriented" letter to a non-client should look like, respondents still would have been obligated to label them "advertising material."

Petitioners' argument thus reduces to the notion that respondents' very effort to comply with state ethics rules is what put them in violation of federal law. In other words, petitioners would force an attorney to choose between risking an ethics violation that might result in sanctions or even disbarment and risking a DPPA violation that might result in a multi-million dollar lawsuit or even criminal liability. Indeed, petitioners even go so far as to suggest that respondents violated the DPPA merely by complying with a state bar rule requiring them to supply the Office of Disciplinary Counsel with a copy of their

letter and the distribution list. Br.44.[5] That cannot possibly be what Congress intended when it sought to "close[] a loophole in the law that permits stalkers to obtain—on demand—private, personal information about their potential victims." 139 Cong. Rec. 29,470 (Sen. Biden).

In the end, this case is not nearly as complicated as petitioners try to make it. The precise nature of respondents' communications with individuals whose interests were implicated by the *Herron* litigation is a question that turns on the details of that litigation and the nature of South Carolina's distinctive MDDA representative action. Whether those communications "further[ed] the integrity" of the litigation process, were similar to notifications to class members, or were more like other uses "in connection with" litigation than like ordinary bulk distributions for solicitation may be debatable questions. But what is not debatable is that respondents obtained and used DMV information for "investigation in anticipation of litigation" and for communications "in connection with" the *Herron* civil proceeding. That is more than

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[5] That contention is independently foreclosed by subsection (b)(1), as disclosure to a state agency is clearly for the permissible purpose of "use by any government agency … in carrying out its functions." § 2721(b)(1); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("the most obvious" way in which States "can regulate" attorney solicitation "is to require the lawyer to file any solicitation letter with a state agency"). Nonetheless, that petitioners' theory would impose massive liability based on attorneys' efforts to comply with state bar rules underscores just how intrusive of traditional state authority they would make the DPPA.

sufficient to bring respondents' conduct within subsection (b)(4) and to resolve this case. Nothing in the bulk distribution permissible-use provision indicates that it is the exclusive mechanism by which conduct that might be viewed as solicitation can comply with the DPAA. And that provision does not remotely provide the kind of clarity necessary to impose criminal liability on conduct that appears to be left to the States under the plain terms of subsection (b)(4). Respondents "did what any good lawyer would have done" in connection with the *Herron* civil proceeding. Pet.App.38a. By the plain terms of subsection (b)(4), those actions were permissible, not the occasion for the imposition of massive liability under the DPPA.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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December 10, 2012

Statutory Appendix

STATUTORY APPENDIX

Driver's Privacy Protection Act

18 U.S.C §§ 2721–2725

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records.

(a) **In General**.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in the subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) **Permissible Uses.**—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle

emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et sq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organizations, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) **Resale or Redisclosure.**—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use

permitted under subsection (b) (but for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) **Waiver Procedures.**—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) **Prohibition on Conditions.**—No State may condition or burden in any way the issuance of an individuals' motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to

prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

§ 2722. Additional unlawful acts

(a) **Procurement for Unlawful Purpose.**—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) **False Representation.**—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties.

(a) **Criminal Fine.**—A person who knowingly violates this chapter shall be fined under this title.

(b) **Violations by State Department of Motor Vehicles.**—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) **Cause of Action.**—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains,

who may bring a civil action in a United States district court.

(b) **Remedies.**—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability

information, but does not include information on vehicular accidents, driving violations, and driver's status;

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.