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**

## PETITIONERS' OPENING BRIEF

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## QUESTIONS PRESENTED

The Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. §§ 2721–2725, prohibits the acquisition, use, or disclosure of "personal information" maintained in state motor vehicle department (DMV) databases, unless the use of such information falls within one of several discrete enumerated exceptions. This case presents an opportunity for this Court to resolve a conflict among the circuits and even state courts as to the circumstances under which the litigation exception to the Act permits lawyers special rights of access to DPPA-protected information.

In this case, the Fourth Circuit became the first court to hold that the acquisition and use by lawyers of confidential information from a DPPA-protected database solely for the purpose of soliciting clients, as opposed to searching for evidence or witnesses, qualified as a use "in connection with" litigation, pursuant to 18 U.S.C. § 2721(b)(4). The Eleventh Circuit, the Third Circuit, and the District of Columbia Court of Appeals, on the other hand, have held that the litigation exception does not permit lawyers to obtain or use DPPA-protected information to find or solicit clients. Instead, these courts have made clear that the litigation exception permits use of private information only when the information is relevant or likely to lead to discovery of evidence or witnesses. The Fourth Circuit has crossed that line, thereby inserting into the DPPA what amounts to a "for use by lawyers" exception, as opposed to a "for use in litigation" exception, and further muddling an already confusing and conflicted area of the law.

This petition asks the Court to consider two questions:

1. Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Act.

2. Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."

## PARTIES TO THE PROCEEDING

Petitioners include Edward F. Maracich, individually and on behalf of all others similarly situated, Martha L. Weeks, individually and on behalf of all others similarly situated, and John C. Tanner, individually and on behalf of all others similarly situated. Petitioners were plaintiffs in the district court and appellants in the court of appeals.

Respondents include Michael Eugene Spears; Michael Spears, PA; Gedney Main Howe, III; Gedney Main Howe III, PA; Richard A. Harpootlian; Richard A. Harpootlian, PA; A. Camden Lewis; and Lewis & Babcock, LLP. Respondents were defendants in the district court and appellees in the court of appeals.

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The decision of the U.S. Court of Appeals for the Fourth Circuit is reported at 675 F.3d 281 and reprinted in the Petition Appendix (Pet. App.) at 1a–44a. The decision of the district court is unreported and is reprinted at Pet. App. 47a–84a.

## JURISDICTION

The Fourth Circuit issued its decision and judgment on April 4, 2012. Pet. App. 1a, 45a. On July 2, 2012, petitioners filed a timely petition for a writ of certiorari, which this Court granted on September 25, 2012. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. §§ 2721–2725. The Act is reproduced in full in the addendum to this brief.

## STATEMENT OF THE CASE

### A. Introduction

The DPPA "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)." *Reno* v. *Condon*, 528 U.S. 141, 143 (2000). The Act's fundamental purpose is to protect the privacy of the millions of individuals who must disclose personal information to state DMVs in order to obtain driver's licenses and to register vehicles. The DPPA achieves this purpose by flatly barring state DMVs from disclosing drivers' personal information unless the particular disclosure is authorized by one of the Act's exceptions.

One such exception permits disclosure and use of DPPA-protected information for "bulk … solicitations," but only if the person to whom such personal information pertains has expressly consented. In this case, respondents obtained tens of thousands of names and addresses from a state DMV and used this protected information to engage in mass solicitation of individuals who (like petitioners and the class they seek to represent) never consented to such use. The Fourth Circuit nevertheless ruled that this use of DPPA-protected information for mass advertising was permissible. According to the lower court, a different provision of the DPPA exempts one group of commercial actors alone—lawyers—from the express-consent requirement of the solicitation exception.

The DPPA's "litigation exception," however, creates no such anomalous loophole. The solicitation exception reflects Congress's specific response to the targeted problem of people and companies obtaining personal information from state DMVs and using it to engage in mass advertising. The litigation exception, by contrast, does not mention solicitation, much less bulk solicitation. Accordingly, the solicitation exception is more specific than, and takes precedence over, any expansive reading of the litigation exception that would permit lawyer mass solicitation. Moreover, when read in its entirety, and in light of its placement and function in the overall structure of the DPPA, it is clear that the litigation exception permits disclosure of information only to ensure the integrity of judicial and agency proceedings. It is not designed to promote the commercial interests of lawyers. The Fourth Circuit's additional theory—that mass solicitation of potential clients is permissible if it is "inextricably intertwined" with otherwise permissible non-

solicitation conduct—has no basis in the text of the statute, and is in all events factually unfounded.

Enforcing the DPPA in accordance with its terms will not impair class actions. For many class action lawyers—such as those pursuing medical device tort actions or employment discrimination suits—DMV databases provide no means of identifying and soliciting potential clients. The DPPA simply requires lawyers who pursue motor vehicle-related litigation to advertise without the benefit of personal information stored in government databases, just as other class action lawyers, and all other commercial entities, must. Similarly, while the DPPA permits lawyers to obtain protected information—including highly sensitive information such as social security numbers and medical conditions—to *investigate* claims and potential claims, mass *solicitation* of clients is not necessary to such investigations. In this case, respondents did not need to solicit 34,000 potential plaintiffs to determine whether the four individuals who retained them could assert a "group action" claim. Nor was such mass solicitation necessary to protect the rights of other car buyers. In all events, the scope of the DPPA's litigation exception does not vary based on the vagaries of state causes of action and the ethical duties of the lawyers who pursue them. The Court should reverse and remand.

### B. Statutory Background

Congress enacted the DPPA in response to concerns that sensitive personal information collected by state DMVs was being disclosed and used. To obtain a driver's license or register a vehicle, state DMVs require an individual to disclose a considerable amount of personal information, such as the individual's name, date of birth, place of birth, gender, race, address, medical conditions, or social security number.

See, *e.g.*, S.C. Code Ann. § 56-1-20 (requiring driver's license); *id.* § 56-1-90 (identification requirements for license application); *id.* § 56-1-130 (medical information for license); *id.* § 56-3-240 (required information for vehicle registration); see also *id.* §§ 56-3-110, 56-3-200 (requiring license and registration).

Congress learned that this government-collected information was being regularly disclosed and used for purposes unrelated to the reasons individuals had entrusted it to state DMVs. For instance, Congress heard that, on numerous occasions, women had become victims of violence because stalkers, assailants, or abusive relatives had obtained and used their personal information from state DMVs.[1] Also, state DMVs had regularly sold personal information to industries that used it to support direct marketing and solicitation.[2] Congress passed the DPPA to help protect the safety and privacy of Americans.[3]

The Act provides that a state DMV "and any officer, employee, or contractor thereof, shall not knowingly

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[1] *See, e.g.*, 140 Cong. Rec. 7924–25 (1994) (statement of Rep. Moran); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin); 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Fraternal Order of Police).

[2] *See, e.g.*, 1994 WL 212836 (Feb. 3, 1994) (statement of Direct Marketing Association) (discussing marketing efforts of automotive industry); 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan) (discussing use of personal information by direct marketers and database compilers).

[3] *See, e.g.*, 139 Cong. Rec. 29,467–68 (1993) (statement of Sen. Boxer) (discussing the goal of "protect[ing] the privacy and safety of all Americans"); *id.* at 26,267 (statement of Sen. Warner) ("both personal privacy and personal safety are disappearing and this legislation would help to protect both").

disclose or otherwise make available" two types of information that were "obtained by the department in connection with a motor vehicle record": (1) "personal information" and (2) "highly restricted personal information." § 2721(a)(1)–(2).[4] "Personal information" is defined as "information that identifies an individual, including [a] driver identification number, name, address …, [or] telephone number, … but does not include information on vehicular accidents, driving violations, and driver's status." § 2725(3). The Act defines "highly restricted personal information" as "an individual's photograph or image, social security number, medical or disability information." § 2725(4).

The DPPA's ban on the disclosure of "personal information" is subject to certain express exceptions set forth in subsection (b) of § 2721. That subsection requires the disclosure of personal information for uses related to motor vehicle or driver safety and theft, as well as for certain uses related to the regulation of motor vehicles under state and federal laws. § 2721(b). It also enumerates fourteen other discrete exceptions for which personal information "may be disclosed." *Id.* For instance, subsection (b) permits disclosure for use by a government agency in carrying out its functions, § 2721(b)(1); for use by an insurer "in connection with claims investigation activities … or underwriting," § 2721(b)(6); or for use by an employer to verify driver's license information, § 2721(b)(9). Under subsection (b)(4), state DMVs may also disclose personal information:

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[4] Unless otherwise indicated, all references are to Title 18 the 2012 version of the United States Code.

> [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). This is commonly referred to as the "litigation exception."

Subsection (b) also contains a "solicitation exception," which is found in subsection (b)(12). As originally enacted, this exception created an "opt-out" regime that allowed a state DMV to disclose personal information for purposes of surveys, marketing, or solicitation only if the DMV had implemented procedures that gave individuals an opportunity to prohibit such disclosures. § 2721(b)(12) (1994); *Condon*, 528 U.S. at 144. In 1999, Congress amended the solicitation exception to make it even more restrictive and protective of privacy interests. It "changed this 'opt-out' alternative to an 'opt-in' requirement" that permits disclosures of personal information for purposes of solicitation only if an individual has given the state express consent. *Condon*, 528 U.S. at 144–45. Thus, as amended, the Act now provides that personal information may be disclosed "[f]or bulk distribution for surveys, marketing or solicitations *if* the State has obtained the *express consent* of the person to whom such personal information pertains." § 2721(b)(12) (emphases added).

For highly restricted personal information, the DPPA creates a more restrictive regime. Only four exceptions authorize the disclosure or use of such information. Thus, highly restricted information may be disclosed for "uses permitted" by the governmen-

tal-function exception in (b)(1), the litigation exception in (b)(4), the insurer exception in (b)(6), and the employer-verification exception in (b)(9). § 2721(a)(2).

In addition to regulating the disclosure of information by a state DMV, the DPPA makes it "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)." § 2722(a). The Act also creates a private cause of action against any "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter." § 2724(a).

### C. Factual Background

1. Petitioners Edward F. Maracich, Martha L. Weeks, and John C. Tanner are South Carolina residents whose personal information was obtained from the South Carolina DMV and then used without their consent as part of a bulk solicitation by lawyers seeking potential clients. Joint Appendix at 500–08, *Maracich* v. *Spears*, No. 10-2021 (4th Cir. filed Dec. 10, 2010) (CA4 JA). Maracich received a solicitation letter in March 2007. *Id.* at 500; Pet. App. 13a. This letter had the phrase "ADVERTISING MATERIAL" emblazoned across the top. See, *e.g.*, CA4 JA 502; Pet. App. 10a; see also Joint Appendix (App.) 101–02. The body of the letter stated that respondents were lawyers who "represent a group of consumers in a pending lawsuit" against South Carolina car dealerships concerning allegedly unlawful administrative fees. CA4 JA 502. Respondents stated that they understood Maracich "may have been charged one of these fees on [his] recent purchase of an automobile," and said that they "would like the opportunity [to] discuss [his] rights and options … in a free consultation." *Id.* The letter stated that respondents had obtained in-

formation about Maracich "in response to a Freedom of Information Act [(FOIA)] request to the South Carolina Department of Motor Vehicles." *Id.* The letter said nothing about the loss or impairment of any rights if Maracich failed to participate in the pending lawsuit. Nor did it state that respondents already represented Maracich or were under any ethical obligation to protect his interests. To the contrary, the letter noted that he was free to consult with other lawyers. *Id.*

Petitioners Weeks and Tanner received nearly identical letters in approximately May of 2007. CA4 JA 506; App. 280–81, 283; Pet. App. 13a. These letters were also denominated "ADVERTISING MATERIAL," noted the lawsuit respondents were pursuing on behalf of others, and sought an "opportunity [to] discuss [Weeks's and Tanner's] rights and options with a free consultation." App. 283–84; CA4 JA 508. Like the letter Maracich received, these letters stated that respondents had obtained information about Weeks and Tanner in response to a FOIA request to the South Carolina DMV. App. 283; CA4 JA 508. These letters likewise did not mention any existing attorney-client relationship or ethical obligations; nor did they state that the recipients might forfeit rights or otherwise be prejudiced by failing to participate in the lawsuit. *Id.*

In response to his letter, Tanner called Richard A. Harpootlian, one of the respondents listed on the letter. App. 281. On this call, Harpootlian "made an aggressive sales pitch" in an attempt to get Tanner "to sign up as a client for a lawsuit against the dealership from which [he] had purchased [his] car." *Id.*; see Pet. App. 13a. According to Tanner, Harpootlian stated that, if Tanner "agreed to be his client," Harpootlian "would get [Tanner] two to three times what

[Tanner] had paid in fees to the dealership." App. 281. During the call, Harpootlian expressed no interest in discovering any facts about Tanner's "interaction with the dealership who sold" his car. *Id.* at 281–82. Rather, he "expressed interest only in signing [Tanner] up as a client." *Id.* at 282. When Tanner asked how respondents had obtained his name and address, Harpootlian confirmed they had obtained this information from the DMV. *Id.* at 281.

Petitioners have never given consent to the South Carolina DMV to disclose their personal information for purposes of surveys, marketing, or solicitation. App. 282; CA4 JA 500, 506.

2. Petitioners soon learned that respondents' use of their personal information from the South Carolina DMV for purposes of solicitation was part of a much broader advertising campaign. Beginning in June 2006, respondents were approached by individual car buyers who complained about the administrative fees charged by automobile dealerships in certain South Carolina counties. Pet. App. 6a. Later that month, respondents submitted an initial FOIA request to the South Carolina DMV. App. 57–58. The request stated that respondents represented "plaintiffs who have complained of certain conduct as a result of their transactions with car dealers." *Id.* at 57. It stated further that the request was made "in anticipation of litigation … pursuant to" the DPPA's litigation exception and that respondents sought information concerning "[p]rivate purchases of new or used automobiles" in a particular county, "including the name, address, and telephone number of the buyer" and the "dealership where purchased." *Id.*

Two months later, respondents made a second FOIA request for similar information specific to five additional counties. App. 67–68. The South Carolina

DMV provided responsive information to these and all other relevant FOIA requests by respondents. Pet. App. 7a–8a, 9a, 11a.

A few days after their second FOIA request, respondents filed a lawsuit captioned *Herron* v. *CarMax Auto Superstores, Inc.* in South Carolina state court against 51 car dealerships. Pet. App. 8a. The complaint alleged that the car dealerships charged unlawful fees in violation of, among other laws, South Carolina's Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-10-10 *et seq.* Pet. App. 8a, 48a. Respondents filed this lawsuit on behalf of four named plaintiffs and as a purported "group action" on behalf of other car buyers who paid the allegedly unlawful fees. Pet. App. 8a, 48a; see also S.C. Code Ann. § 56-15-110 (allowing "one or more [to] sue for the benefit of the whole"). Shortly after the complaint was filed, most of the car dealerships filed motions to dismiss, contending that the named plaintiffs lacked standing to pursue claims against car dealerships from which they had not purchased a car. Pet. App. 9a; CA4 JA 184.

At the end of October 2006, respondents sent another FOIA request to the South Carolina DMV, seeking personal information about car buyers who had bought automobiles from a list of 328 car dealers in the state. Pet. App. 9a; App. 69–82. Five days later, respondents filed an amended complaint in the *Herron* lawsuit, adding four named plaintiffs and increasing the number of defendants to 324. Pet. App. 9a. As with the initial complaint, many of the car dealerships moved to dismiss for lack of standing. *Id.*

On January 4, 2007, respondents used the DMV information from their FOIA requests to send their first round of solicitation letters to car buyers. Pet. App. 9a. These letters were nearly identical to those later

sent to petitioners. *Id.* Respondents filed a copy of their January 4 letters and a list of the recipients' names and addresses with the South Carolina Office of Disciplinary Counsel in accordance with South Carolina Rule of Professional Conduct 7.3, which regulates the solicitation of prospective clients. *Id.* at 11a; see App. 89–95. As a result, the recipients' names and addresses became publicly available. See CA4 JA 484.

In January, respondents also submitted three additional FOIA requests to the South Carolina DMV, requesting personal information about additional car buyers. Pet. App. 11a. Respondents then sent additional mass mailings of solicitation letters on January 23, March 1, March 5, and May 8, 2007. *Id.* at 12a–13a, 49a. In each case, respondents filed a copy of their letters and a list of the recipients' names and addresses with the South Carolina Office of Disciplinary Counsel. *Id.* at 50a. In total, respondents used the information from their FOIA requests to send letters to over 34,000 car buyers in South Carolina. *Id.* at 12a–13a. Petitioners received letters from the March 1 and May 8 mailings. CA4 JA 500–08.

In June 2007, in response to continuing disputes over standing in the *Herron* lawsuit, respondents sought to amend their complaint to add nearly 250 plaintiffs. Pet. App. 13a. These additional plaintiffs had each responded to the solicitation letters sent by respondents. *Id.* The court denied leave to amend the complaint and held that the remaining plaintiffs had standing to sue only the dealerships from which they had purchased automobiles and any coconspirators. *Id.* at 13a–14a.

### D. Proceedings Below

1. After discovering the breadth of the solicitation campaign respondents had conducted using information from the South Carolina DMV, petitioners filed a class action lawsuit, alleging that respondents had violated the DPPA by obtaining, disclosing, and using personal information from DMV records for bulk solicitation without the express consent of petitioners and the other members of the class petitioners seek to represent. Pet. App. 4a; App. 47–48.

Respondents moved to dismiss. Pet. App. 86a. They argued, among other things, that their acquisition and use of personal information from the South Carolina DMV fell within the litigation and governmental-function exceptions, because those uses were assertedly "in connection with" litigation, and because, as group representatives in the *Herron* lawsuit, respondents were assertedly "acting on behalf" of South Carolina in carrying out its governmental function. Pet. App. 92a–97a. The district court denied the motion. *Id.* at 17a–18a, 92a–97a, 101a.

2. Approximately one year later, the district court reversed itself in ruling on cross-motions for summary judgment. As an initial matter, the court concluded that the letters respondents sent to petitioners and other car buyers were not solicitations "as a matter of law," because respondents as group representatives in *Herron* were already acting on behalf of petitioners. Pet. App. 61a. The court then held that, even if the letters were solicitations, and even though the solicitation exception's express-consent requirement was not satisfied, respondents' uses of personal information from the DMV were independently permitted by the litigation exception. *Id.* at 62a–79a. According to the district court, "obtaining and using the personal information in order to respond to potential-

ly dispositive motions" in the *Herron* case "falls squarely within the litigation exception." *Id.* at 78a; see also *id.* at 76a. The court also found that respondents satisfied the governmental-function exception because they used the personal information in their role "as 'private attorneys general'" in bringing the group action in *Herron*. *Id.* at 80a. Accordingly, the court granted respondents' summary-judgment motion and denied petitioners' cross-motion.

3. The Fourth Circuit affirmed on slightly different grounds. It first held that the district court erred as a matter of law in holding that respondents' letters were not solicitations. Pet. App. 5a, 28a–29a. The court held that, under an objective standard, respondents' letters to car buyers were "solicitations" within the meaning of the DPPA because they were entirely consistent with the "common understanding of the meaning of" solicitation "as targeted lawyer advertising aimed at affording representation to potential clients." *Id.* at 28a.

Nonetheless, the court of appeals held that respondents cannot be liable under the DPPA because, even if their conduct "amount[ed] to prohibited solicitation (i.e., that prohibited absent express consent)" under subsection (b)(12), it was permitted by the litigation exception of (b)(4). Pet. App. 39a, 41a–42a. Reasoning that these subsections are "'not mutually exclusive,'" *id.* at 34a, the lower court ruled that, when "solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains," even in the absence of their express consent, *id.* at 5a.

The court concluded that respondents' nonconsensual solicitations were authorized because they "al-

ways had only one use as their purpose, i.e., litigation." Pet. App. 37a. Because, in the court's view, respondents' solicitations were "inextricably intertwined with [their] permissible use of [petitioners'] personal information pursuant to the litigation exception," *id.* at 29a, respondents were not liable under the DPPA as a matter of law. According to the lower court, any other conclusion would be "contrary to the public interest benefits that can inhere in impact litigation specifically aimed at protecting consumers on a broad scale." *Id.* at 38a. The court opined that respondents "simply could not make appropriate, efficient and ethical use of [petitioners'] personal information under [its] pragmatic approach to the litigation exception without first engaging in solicitation." *Id.*[5]

## SUMMARY OF ARGUMENT

I. The DPPA's solicitation exception governs this case under the bedrock rule of statutory interpretation that a specific statutory provision governs a general one. In the solicitation exception, Congress addressed a specific problem (using personal information for bulk solicitation) and provided a specific, fine-tuned solution (express consent). Because Congress specifically required express consent as a condition of using DPPA-protected personal information for bulk solicitation, that requirement must be satisfied and cannot be evaded by relying on a more general provision, even if the general provision's terms could otherwise be read to authorize bulk solicitation. As this Court has long held, and reiterated just last Term in an analytically indistinguishable case, general lan-

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[5] Because the court of appeals concluded that respondents' solicitations were authorized under the litigation exception, it did not decide whether the governmental-function exception applies. Pet. App. 23a n.9. That issue is not before this Court.

guage of a statutory provision does not apply to a matter specifically dealt with in another part of the same statute. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012).

As a result, the litigation exception's general language cannot be read to exempt one group of commercial actors alone—lawyers who handle motor vehicle-related litigation—from the solicitation exception's express-consent requirement. Unlike the solicitation exception, which speaks directly to the question of bulk solicitation, the litigation exception is a generally worded provision that authorizes a range of uses of personal information but says nothing specifically about bulk solicitation. The solicitation exception is thus the more specific provision, and its express-consent requirement must be complied with even if the litigation exception's general language otherwise could be read to authorize bulk solicitation of potential clients.

II. Even apart from the general/specific canon, the litigation exception does not clash with—much less override—the solicitation exception's express-consent requirement. The text, structure, and purpose of the DPPA show that the litigation exception permits uses of protected information to promote the integrity and efficacy of adjudicative proceedings, not the commercial interests of lawyers. It thus does not authorize disclosure of protected information to enable lawyers to solicit clients.

The Fourth Circuit based its contrary, and admittedly expansive, interpretation on the phrases "in connection with" and "in anticipation of." This unduly narrow focus conflicts with this Court's cases holding that statutory phrases should not be read in isolation, and with its admonition against uncritically literal interpretations of indeterminate phrases like "in con-

nection with," which must be read in light of the structure and purpose of the statute as a whole. Here, the structure and purpose of the DPPA make clear that Congress did not authorize lawyers to use personal information to solicit clients. The Act's central provision is a broad prohibition on disclosure and use of protected information. As an exception to that general rule, the litigation exception is to be construed narrowly. This is particularly true here, because subsection (b)(4) is an exceptional exception: it is one of only four provisions that permit use of highly restricted personal information without consent. That Congress afforded lawyers access to especially sensitive information such as social security numbers and disability status underscores that the litigation exception is intended to promote the integrity of adjudicative processes, not to confer a unique privilege on lawyers who handle motor vehicle-related litigation to use information in DMV databases to solicit business.

The express examples Congress provided in the text of the litigation exception itself, including "investigation in anticipation of litigation," confirm that the exception allows lawyers, as officers of the court, to use personal information in furtherance of the court's adjudicative functions, not to advance their own commercial interests. A contrary interpretation would lead to absurd results under other exceptions in the Act that use the same "in connection with" language as the litigation exception, and would undermine the important privacy and safety interests the DPPA was designed to protect.

III. The Fourth Circuit's alternative and wholly novel theory—that conduct violative of the solicitation exception is nevertheless permissible if it is "inextricably intertwined" with non-solicitation conduct

permitted under the litigation exception—has no basis in the statute and is, in all events, factually unfounded. The solicitation exception's express-consent requirement cannot be evaded on the ground that solicitation is "inextricably intertwined" with conduct permitted by another exception. The Fourth Circuit's contrary ruling effectively amends the statute's text.

Respondents' solicitations, moreover, were not necessary to any legitimate use: Respondents could have achieved their purported investigative purposes without *soliciting* anyone. The summary-judgment record shows that respondents' *only* purpose in obtaining and using the information was to solicit potential clients, not to investigate in anticipation of litigation. But even if respondents obtained and initially used the information for legitimate investigative purposes, their solicitations were separate and distinct uses of protected information that violated the DPPA. Respondents cannot escape liability for these unauthorized solicitations by relying on purported ethical duties under state law. Respondents had no duty to solicit the unnamed car buyers, let alone to use DPPA-protected personal information to do so. And state law cannot in any event trump the DPPA.

## ARGUMENT

The DPPA's solicitation exception provides that an individual's personal information may be used for "bulk … solicitations," but only "if the State has obtained the express consent of the person to whom such personal information pertains." § 2721(b)(12). Respondents' acquisition, use, and disclosure of DMV-derived personal information about petitioners and tens of thousands of other potential class members plainly was not authorized under the solicitation exception. The Fourth Circuit correctly held that res-

pondents' mass mailings constituted "solicitations." That holding was compelled by, among other things, the letters' content and respondents' filings with the South Carolina Office of Disciplinary Counsel, and respondents did not ask this Court to review that holding. See Sup. Ct. R. 15.2; *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011). It is undisputed, moreover, that petitioners and the class they seek to represent did not expressly consent to this use of their personal information.

By failing to comply with the solicitation exception's express-consent requirement, respondents violated the DPPA. As the only provision of the DPPA that specifically addresses bulk solicitation, the solicitation exception controls. Neither the litigation exception nor any other exception authorized respondents' acquisition, disclosure, and use of petitioners' personal information for bulk solicitation, and respondents' conduct cannot be justified on the ground that it was "inextricably intertwined" with other conduct permitted by the litigation exception. The Fourth Circuit's contrary decision violates settled principles of statutory interpretation, undermines the privacy and safety interests protected by the DPPA, and should be reversed.

## I. THE SOLICITATION EXCEPTION CONTROLS THIS CASE.

It is a "commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "That is particularly true where, as [here], 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX*, 132 S. Ct. at 2071 (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)). The rationale for this canon is that, when Con-

gress has focused on a specific problem and "observed all the circumstances of the case and provided for them," it does not intend a general provision "to derogate from its own act when it makes no special mention of its intention so to do." *Rodgers* v. *United States*, 185 U.S. 83, 88 (1902) (internal quotation marks omitted); see also *id.* at 89 (a general provision does not control "a special provision in respect to a matter to which the attention of Congress was at the time directed").

Applying these principles, this Court has repeatedly held that when a statutory provision specifically authorizes a given action subject to specified conditions or limitations, those conditions and limitations must be satisfied and cannot be circumvented by relying upon a general provision in the same statute, even if the general provision's terms otherwise could be construed to authorize the action at issue. That principle governs this case: The solicitation exception specifically authorizes use of DPPA-protected personal information for bulk solicitation, subject to the requirement that the state first obtain the affected individuals' express consent. The solicitation exception's express-consent requirement cannot be evaded by relying on the litigation exception's general terms, even if they could otherwise be read to authorize bulk solicitation of potential clients.

## II. CONGRESS PROVIDED A SPECIFIC SOLUTION—EXPRESS CONSENT—TO THE DELIBERATELY TARGETED PROBLEM OF DISCLOSURE AND USE OF PERSONAL INFORMATION FOR BULK SOLICITATIONS.

A major impetus behind enactment of the DPPA was Congress's finding that state DMVs sold personal information to individuals and businesses. *Condon*,

528 U.S. at 143. In particular, the personal information sold by state DMVs was used extensively to support the direct-marketing efforts of businesses. See Br. of the United States at 3–5, *Reno* v. *Condon*, 528 U.S. 141 (U.S. filed July 15, 1999) (No. 98-1464) (collecting testimony before Congress and other legislative history). Disapproving of this practice, Congress responded with a specific solution: prohibiting the disclosure, acquisition, and use of personal information from DMVs for bulk solicitation unless the state has obtained the express consent of the individuals whose information is disclosed.

As noted earlier, the solicitation exception originally provided that personal information could be used for bulk solicitation "if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity." *Condon*, 528 U.S. at 144. Concluding that this opt-out procedure was not sufficiently protective of individuals' privacy, Congress in 1999 amended the solicitation provision to its current form, requiring the state to "obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 144–45 (citing Pub. L. No. 106-69, § 350(c)–(e), 113 Stat. 986); see also 145 Cong. Rec. 23,699 (1999) (statement of Sen. Shelby) (expressing concern "that private information is too available").

The importance of consent in the overall scheme of the DPPA is underscored by several other provisions. *First*, the DPPA's general prohibition bars disclosure of personal information and highly restricted personal information "without the express consent of the person to whom such information applies." § 2721(a);

see also *Condon*, 528 U.S. at 144 ("The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent."). *Second*, in addition to the solicitation exception, two other exceptions likewise permit disclosure only with express or written consent. § 2721(b)(11), (13). *Third*, the DPPA expressly prohibits states from conditioning or burdening "in any way the issuance of an individual's motor vehicle record … to obtain express consent." § 2721(e).

*Fourth*, other provisions permit private parties to use personal information (but not highly restricted personal information) without consent only for narrow and discrete purposes. Thus, private parties may obtain and use personal information to verify information provided to them, § 2721(b)(3); for matters involving vehicle and driver safety; vehicle theft, recalls, and advisories; performance monitoring of motor vehicles, motor vehicle parts, or dealers; or motor vehicle market research activities, § 2721(b)(2); to notify owners that their cars have been towed or impounded, § 2721(b)(7); to operate private toll facilities, § 2721(b)(10); for research activities, provided that the information is not published, re-disclosed, or used to contact individuals, § 2721(b)(5); or for uses "specifically authorized under the law of the State that holds" the motor vehicle record, but only if that authorized use "is related to the operation of a motor vehicle or public safety," § 2721(b)(14). None of these exceptions authorizes private individuals to use protected personal information to propose commercial transactions without express consent.

The narrow scope of these exceptions is underscored by the subsection that immediately follows the DPPA's exceptions. It provides that an "authorized recipient of personal information (except a recipient

under subsection (b)(11) or (b)(12)) may resell or re-disclose the information only for a use permitted under subsection (b) (but *not for uses under subsection (b)(11) or (b)(12)).*" § 2721(c) (emphasis added). Subsection (c) thus reinforces the importance of the express-consent requirement, by barring private parties from obtaining personal information for any of the limited purposes for which consent is not required, then reselling or re-disclosing that information for purposes that require consent. Subsection (c) further provides that recipients under the (b)(12) solicitation exception may resell or re-disclose personal information only for this same purpose, thereby confirming that only information obtained with express consent can be resold or re-disclosed for bulk solicitation purposes.[6]

In short, subsection (b)(12) is part of "a comprehensive scheme" and reflects that Congress "has deliberately targeted [a] specific proble[m]"—bulk solicitations using DMV-derived personal information—"with [a] specific solution[n]"—a prohibition on such solicitation absent express consent. *RadLAX*, 132 S. Ct. at 2071 (internal quotation marks omitted). As we show next, this specific provision necessarily controls over any other provision of the DPPA that might otherwise apply to bulk solicitations.

### A. Under Settled Principles Of Statutory Interpretation, A Specific Authorization Controls A General One.

The interpretive canon that a specific provision governs over a more general one has a number of applications. It "is perhaps most frequently applied to sta-

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[6] Subsection (c) also permits a recipient under subsection (b)(11), which also requires express consent, to resell or re-disclose personal information for any purpose. § 2721(c).

tutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *RadLAX*, 132 S. Ct. at 2071. "To eliminate the contradiction, the specific provision is construed as an exception to the general one." *Id.* But the canon is not limited to situations in which two provisions directly conflict. It "has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side." *Id.* The canon holds that when the conduct at issue falls within the more specific authorization, "[t]he terms of the specific authorization must be complied with." *Id.*

The Court applied this latter version of the canon just last Term in *RadLAX*. There the Court considered a provision of the bankruptcy code that created three exceptions to the general rule that a Chapter 11 bankruptcy plan may not be confirmed without the affected creditors' consent. *Id.* at 2069. The second exception provided that a plan authorizing the sale of a debtor's assets free and clear of a creditor's lien could be approved without the creditor's consent, subject to the requirement that the creditor be permitted to "credit-bid" at the sale. *Id.* at 2070. The third exception did not specifically address elimination of the creditor's lien or credit-bidding, but more generally authorized confirmation of a nonconsensual plan if it provided for realization of the "'indubitable equivalent'" of the creditor's claims. *Id.* The question presented was whether a nonconsensual plan providing for the sale of collateral free and clear of the creditor's lien could be approved under the third exception if the plan satisfied the "indubitable equivalent" requirement but did not permit credit-bidding.

Applying the general/specific canon, the Court held that such a plan could not be confirmed under the

third exception, even though the exception's "'general language,'" read in isolation, was "'broad enough'" to authorize confirmation. *Id.* at 2071 (alteration omitted). That was so because the second exception specifically "spell[ed] out the requirements for selling collateral free of liens," whereas the third exception was "a broadly worded provision that sa[id] nothing about such a sale." *Id.* In other words, because the second exception specifically addressed the conduct at issue—sale of collateral free of liens—its requirement that the creditor be permitted to credit-bid had to be complied with, and could not be circumvented by proceeding under a more general exception. The second exception was thus the exclusive "rule for plans under which the property is sold free and clear of the creditor's lien." *Id.* at 2072.

*RadLAX* built on a long line of cases in which this Court has held that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same statute." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). In *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), for example, the Court held that the time granted to a party to prepare pretrial motions was not automatically excludable from the Speedy Trial Act's 70-day time limit, because Congress had specifically addressed delay resulting from pretrial motions and provided that only the time from the filing of the motion through its disposition was automatically excludable. *Id.* at 1351–58. Because Congress had expressly addressed pretrial-motion-related delay in a specific provision, resort could not be had to a more general provision addressing delay resulting from "proceedings concerning the defendant." *Id.* at 1352–55. Rather, the Court held, delay that fell within the

category Congress had specifically addressed was "governed by the limits" Congress imposed in the specific provision, and those limits could not be evaded by relying on a general provision that was not so limited, even though the delay might otherwise have fallen with the general provision's terms. *Id.* at 1354.

The same principle was applied in *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981) (per curiam), where the Court held that a cooperative hospital service organization that provided laundry service could not qualify for income tax exemption under the general provision exempting charitable organizations because Congress had specifically addressed cooperative hospital service organizations in a separate provision and had omitted laundry service from the list of services qualifying for the exemption. *Id.* at 5–6. The Court cited the "basic principle of statutory construction" that a specific statute controls a general one, "particularly when the two are interrelated and closely positioned, both in fact being parts of" the same statute. *Id.* at 6. Thus, "despite the seemingly broad general language" of the provision authorizing tax exemption for charitable organizations, the Court held that the specific provision addressing cooperative hospital service organizations was the only provision under which those organizations could qualify for exemption. *Id.* at 6–8.

Other cases are in accord. See, *e.g.*, *D. Ginsberg & Sons*, 285 U.S. at 206–09 (holding that a specific provision prescribing the procedures for the arrest and detention of bankrupts about to flee the district could not be circumvented by relying on a general provision allowing bankruptcy courts to make such orders as were necessary to enforce the statute); *United States* v. *Chase*, 135 U.S. 255, 259–60 (1890) (holding that a statute proscribing the mailing of indecent "'writ-

ing[s]'" did not apply to indecent letters because a separate clause specifically addressed letters and proscribed only letters "whose indecent matter is exposed on the envelope"); *Rodgers*, 185 U.S. at 87–89 (holding that a provision specifically addressing the salary of rear admirals controlled a provision addressing the salary of naval officers generally).

The lesson of these cases is that when a provision in a statute specifically authorizes a given action subject to specified conditions or limitations, and when the conduct at issue falls within the specific authorization, "[t]he terms of the specific authorization must be complied with," and cannot "be avoided by relying upon a general provision" in the same statute. *RadLAX*, 132 S. Ct. at 2071. As the Court explained more than a century ago, "'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.'" *Chase*, 135 U.S. at 260. "This rule," which has lost none of its vitality, "applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include." *Id.* In such cases, "the special provision must be taken as an exception to and limitation of the general rule." *Rodgers*, 185 U.S. at 89.[7]

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[7] The Court has also applied this rule in reconciling general and specific authorizations in separate statutes. *See, e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 152–58 (1976) (holding that a specific venue provision authorizing suits against national banks only in the district where the bank was established controlled a broad venue provision authorizing suits

### B. The Solicitation Exception Is The Most Specific Provision Concerning Use Of DPPA-Protected Information For Mass Solicitation Of Potential Clients.

1. Under these cases, and the "well established principles of statutory construction" they apply, the solicitation exception governs the mass solicitation activity at issue in this case. *RadLAX*, 132 S. Ct. at 2073. In that exception, Congress specifically addressed use of personal information for bulk solicitation and authorized such use only "if the State has obtained the express consent of the person to whom such personal information pertains." § 2721(b)(12). Because Congress specifically required express consent as a condition of using personal information for bulk solicitation, that limitation "must be complied with," and cannot "be avoided by relying upon a general provision" like the litigation exception. *RadLAX*, 132 S. Ct. at 2071.

Indeed, this case is analytically indistinguishable from *RadLAX*. Like the bankruptcy statute at issue there, which prohibited nonconsensual plans subject to specified exceptions, the DPPA establishes a broad prohibition on use of personal information followed by

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under the Securities Exchange Act of 1934 in any district where the defendant could be found); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 754–61 (1961) (holding that a specific provision authorizing interest on overpayment of taxes attributable to an excess profits credit carry-back controlled a general provision authorizing interest on judgments for overpayment of taxes); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 224–29 (1957) (holding that a specific venue provision authorizing patent-infringement suits only in the district where the defendant resided or committed the infringement and had a regular place of business controlled a general venue provision authorizing suits against corporations in any district where they were incorporated, were licensed to do business, or did business).

enumerated exceptions. Like the second exception in *RadLAX*, which specifically authorized sale of collateral free of liens subject to the requirement that creditors be permitted to credit-bid, the DPPA's solicitation exception specifically authorizes use of an individual's personal information for bulk solicitation subject to the requirement that the state obtain that individual's express consent. And like the third exception in *RadLAX*, which was a more "broadly worded provision that sa[id] nothing about" liens, *id.*, the DPPA's litigation exception is a more general provision that says nothing about solicitation. Thus, as in *RadLAX*, the litigation exception's "'general language,'" even if "'broad enough to include it, will not be held to apply to a matter specifically dealt with'" in the solicitation exception. *Id.* at 2071–72.

2. The court of appeals wrongly concluded that the solicitation and litigation exceptions "are equally specific." Pet. App. 34a. With respect to the conduct at issue—bulk solicitation of potential clients—the solicitation exception is the more specific provision. It expressly addresses bulk solicitation and spells out the requirement—express consent—for using personal information for that purpose. The solicitation exception makes clear that Congress focused specifically on the problem of bulk solicitation and adopted a targeted solution. See *RadLAX*, 132 S. Ct. 2071 (the general/specific canon applies with particular force when "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions'"). By contrast, the litigation exception covers a range of possible uses and says nothing specifically about solicitation, much less bulk solicitation. The solicitation exception is thus more specific in the same sense that the second exception was more specific than the third exception in

*RadLAX*. See *id.* (the second exception "spell[ed] out the requirements for selling collateral free of liens," whereas the third exception "sa[id] nothing about such a sale").

Likewise, it does not matter that the solicitation and litigation exceptions "'both apply to situations not governed by the other.'" Pet. App. 34a. The general/specific canon is not "confined to situations in which the entirety of the specific provision is a 'subset' of the general one." *RadLAX*, 132 S. Ct. at 2072. "When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general." *Id.* Thus, even if bulk solicitation of potential clients for a lawsuit fell within the scope of both the solicitation and litigation exceptions, the solicitation exception would "presumptively gover[n]." *Id.*

The court of appeals also erred in concluding that the solicitation and litigation exceptions are "'not mutually exclusive.'" Pet. App. 34a. This Court's cases make clear that a specific authorization *exclusively* governs the conduct it addresses, and its requirements cannot be evaded by resorting to a more general authorization. See *RadLAX*, 132 S. Ct. at 2073 n.4 ("*after* applying the canon," the general authorization "will no longer be deemed applicable" to the conduct addressed by the specific authorization); *Bloate*, 130 S. Ct. at 1355 (a specific authorization "conclusively" governs the conduct it addresses unless it indicates otherwise); *HCSC*, 450 U.S. at 6 (a specific authorization is "exclusive and controlling" for the conduct it addresses); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957) (a specific authorization is "the sole and exclusive provision controlling" the conduct it addresses).

For this same reason, recognizing that personal information may not be used for mass solicitation of clients absent express consent does not mean that respondents must satisfy both the solicitation exception and the litigation exception. "The question here is not whether [respondents] must comply with more than one [exception], but rather which one of the [exceptions] they must satisfy." *RadLAX*, 132 S. Ct. at 2072. Because respondents used DPPA-protected personal information for bulk solicitation, they must satisfy the solicitation exception's express-consent requirement, and cannot evade that requirement by relying on the litigation exception's general language, even if that language could otherwise be read broadly to authorize bulk solicitation of potential clients for a lawsuit. But see *infra*, Part III.

Also misplaced was the court of appeals' reliance on *Connecticut National Bank* v. *Germain*, 503 U.S. 249 (1992). That case held that a provision granting courts of appeals jurisdiction over final decisions of bankruptcy courts and bankruptcy appellate panels did not impliedly repeal the general provision granting appellate jurisdiction over district courts' interlocutory orders. *Id.* at 251–54. In *Germain*, however, the bankruptcy-specific provision did not specifically address interlocutory orders, and the general jurisdictional provision did. *Id.* at 254 ("Section 1292 provides for review [of interlocutory orders]. Section 158(d) is silent as to review of interlocutory orders."). Here the opposite is true: The solicitation exception specifically addresses use of personal information for bulk solicitation, and the litigation exception says nothing on the subject. Moreover, *Germain* applied the standard for implied repeals, under which a statute will not be construed as impliedly repealing an earlier statute unless "there is [a] 'positive repug-

nancy' between [the] two laws." *Id.* at 253. By contrast, here the Court's task is to reconcile two simultaneously enacted provisions of the same statute. See *Varity Corp.*, 516 U.S. at 520 n.1 (Thomas, J., dissenting) ("*Germain* did not involve simultaneously enacted, consecutive provisions of the same Act"). Thus, the cases discussed above, not implied-repeal cases, supply the applicable interpretive principles.

For all these reasons, under the general/specific canon as articulated and applied in this Court's cases, DPPA-protected personal information may not be used for bulk solicitation without complying with the solicitation exception's express-consent requirement, regardless of whether the use would otherwise fall within the litigation exception's general terms. Of course, this canon of interpretation, like all others, "is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." *RadLAX*, 132 S. Ct. at 2072. Here, however, there are no textual or other indications pointing in the other direction. Rather, as discussed next, even on its own terms, the litigation exception does not authorize use of DPPA-protected personal information for bulk solicitation of potential clients without express consent.

## III. THE LITIGATION EXCEPTION DOES NOT OVERRIDE THE SOLICITATION EXCEPTION'S EXPRESS-CONSENT REQUIREMENT AND THEREBY CONFER UNIQUE ADVERTISING PRIVILEGES ON TRIAL LAWYERS.

Notwithstanding the solicitation exception's specific prohibition on use of DMV-derived information for nonconsensual mass advertising, the Fourth Circuit gave an "expansive sweep to the [DPPA's] litigation exception," Pet. App. 30a, and then resolved the re-

sulting tension between the two exceptions by ruling that the latter overrode the former's express-consent requirement. As we have just shown, that resolution was improper under the general/specific principle, which the Fourth Circuit failed to apply properly. But the "manifest tension" the Fourth Circuit perceived between the two exceptions, *id.*, is in fact illusory.

Like all of its counterparts in subsection (b), subsection (b)(4) is an exception to the DPPA's general policy *prohibiting* the disclosure or use of individuals' personal information housed in a state's DMV. §§ 2721(a), 2722(a), 2724(a). Like any other exception to a general prohibition, therefore, this provision is to be construed narrowly, not expansively. Apart from invoking the "benefits [of] … impact litigation," Pet. App. 38a—a policy nowhere reflected in the DPPA's privacy- and safety-protecting provisions—the Fourth Circuit based its contrary construction primarily on the phrase "in connection with" in the litigation exception, *id.* at 41a–42a. This phrase, however, does not justify the implausible conclusion that Congress decided to confer unique advertising privileges on a single group of commercial actors—lawyers who handle motor vehicle-related litigation—and exempt them alone from the DPPA's otherwise flat prohibition on nonconsensual bulk solicitation. Instead, subsection (b)(4) is a narrow exception designed to protect the integrity and efficacy of adjudicative processes in which lawyers participate, not to promote lawyers' commercial interests.

### A. The Fourth Circuit's Interpretation Of The Litigation Exception Rests On An Unduly Narrow And Uncritically Literal Focus On Parts Of The Statute.

In adopting its broad interpretation of subsection (b)(4), the Fourth Circuit focused primarily on the

phrases "in connection with" and "in anticipation of." According to the lower court, the "solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." Pet. App. 42a. Any other conclusion, the lower court reasoned, would impose an overly narrow construction on the phrases "in connection with" and "in anticipation of" in this exception. *Id.* at 41a–42a.

This Court has stressed, however, that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and alteration omitted); see also, *e.g.*, *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) ("[s]tatutory construction is a 'holistic endeavor'") (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). As Sir Edward Coke explained long ago, "it is the most natural and genuine expression of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." 1 Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728, at 381a (14th ed. 1791) (1628), *quoted in* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012).

The Fourth Circuit's interpretation runs afoul of this fundamental principle by focusing unduly on the phrases "in connection with" and "in anticipation of." The latter phrase is part of an illustrative list of permissible uses that confirms that lawyers are given unique access to information in DMV databases—including highly sensitive information such as social

security numbers and disability status—in order to promote the integrity and efficacy of adjudicative processes, not their own commercial interests. Read in conjunction with its companion illustrations, the phrase "in anticipation of" provides no evidence that Congress afforded lawyers a unique ability to advertise using such information. See *infra*, Part III.B.2.

Likewise, the inherently vague phrase "in connection with" must, of necessity, be construed in the context of the full statute of which it is a part. Indeed, this Court has warned against "uncritical literalism" when interpreting the phrase "relating to" in ERISA, *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)—a phrase the Court has equated with the phrase "in connection with," see *Morales*, 504 U.S. at 383 (defining "relating to" as, *inter alia*, "'to bring into … *connection with*'" (emphasis added)). Like "relating to," the phrase "in connection with" is essentially "indetermina[te]," because connections, like relations, "stop nowhere." *Travelers*, 514 at 655 (internal quotation marks omitted); see also *id.* at 656 ("For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections.").[8] Interpreting "relating to" in ERISA's preemption provision, this Court has gone "beyond the unhelpful text and the frustrating difficulty of defining its key term, and look[ed] instead to the objectives of the ERISA statute as a guide." *Id.*

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[8] To paraphrase Justice Scalia's concurrence in *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A. Inc.*, 519 U.S. 316 (1997), "applying the [phrase 'in connection with'] according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is [connected] to everything else." *Id.* at 335.

So too here, the Court must look beyond the unhelpful and indeterminate phrase "in connection with" to determine the uses of DMV-derived information that Congress intended to authorize "in connection with" judicial proceedings. We discuss the relevant guideposts for ascertaining the range of permissible uses next.

### B. Properly Construed, The Litigation Exception Does Not Permit Solicitation Of Clients By Lawyers.

The phrase "in connection with" signals that Congress intended to permit uses of DMV-derived information beyond direct use as evidence in litigation. This is clear from a comparison of this phrase with Congress's use of the narrower phrase "use in" in other exceptions in subsection (b). Compare § 2721(b)(4) ("use in connection with" proceedings), with § 2721(b)(5) ("use in research activities"), and § 2721(b)(7) ("use in providing notice"). A holistic analysis, however, likewise demonstrates that Congress did not authorize all conceivable uses that have some "connection" with litigation. Instead, read in its entirety and in the full context of the DPPA, the litigation exception is designed to ensure a court or other tribunal's ability to make or effectuate a judgment, not to facilitate commercial transactions by lawyers.

#### 1. The Placement and Function of the Litigation Exception Compel a Narrow Interpretation.

An interpretation of the litigation exception must begin with a recognition of its fundamental function and placement in the DPPA. Subsection (b)(4) is an *exception* to a provision that bars a state DMV "and any officer, employee, or contractor thereof," from "knowingly disclos[ing] or otherwise mak[ing] availa-

ble" personal information or highly restricted personal information "obtained by the department in connection with a motor vehicle record." § 2721(a). Congress underscored the importance of this prohibition, and the privacy and safety interests it is designed to protect, by providing for both civil and criminal fines, and civil liability, against those who impermissibly disclose, receive, or use DPPA-protected information. §§ 2723, 2724.[9]

Under this Court's precedents, therefore, the litigation exception must be interpreted narrowly. "In construing provisions … in which a general statement of policy is qualified by an exception," courts generally must "read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989); accord *Knight* v. *Comm'r*, 552 U.S. 181, 190 (2008) (same). The reason is simple: "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people." *A.H. Phil-*

[9] Unsurprisingly, therefore, the legislative history is replete with statements reflecting Congress's goal of "protect[ing] the privacy and safety of all Americans." 139 Cong. Rec. 29,467–68 (1993) (statement of Sen. Boxer); *see also id.* at 26,267 (statement of Sen. Warner) ("both personal privacy and personal safety are disappearing and this legislation would help to protect both"); *id.* at 29,470 (statement of Sen. Biden) ("Americans do not believe they should relinquish their legitimate expectations of privacy" over their personal information "simply by obtaining drivers' licenses or registering their cars"); *id.* at 29,468 (statement of Sen. Warner) ("There is a war in this country to fight for privacy. People are now fighting, and [the DPPA] is coming to their assistance to provide the privacy, which I and many others thought existed."); *id.* at 27,327 (statement of Rep. Moran) ("92 percent of Americans believe that the DMV should not sell or release personal data about them without their knowledge and approval.").

*lips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945); accord *Clark*, 489 U.S. at 739.

This principle applies with particular force to subsection (b)(4), because it is an exceptional exception. It is one of only four exceptions that authorize use of "highly restricted personal information" by private individuals. § 2721(a)(2).[10] As noted, "highly restricted personal information" is the subset of personal information comprising "an individual's photograph or image, social security number, [and] medical or disability information." § 2725(4).

The Fourth Circuit thus plainly erred in giving an "expansive sweep to the litigation exception." Pet. App. 30a. With respect to less sensitive personal information, Congress conditioned disclosure and use for bulk solicitation and other purposes on express consent, created narrow exceptions for private parties to use personal information without express consent, and placed additional restrictions on the resale or redisclosure of less sensitive information obtained without consent. See *supra*, Part II. In light of this scheme, and the DPPA's central purpose of protecting

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[10] The other three such exceptions, *see* § 2721(a)(2), are subsection (b)(1), which permits "use by any government agency … in carrying out its functions, or any private person or entity acting on behalf of" a government agency, § 2721(b)(1); subsection (b)(9), which allows employers or their agents to verify "information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49," § 2721(b)(9); and subsection (b)(6), which permits use by insurers, insurance support organizations or self-insured entities "[f]or use … in connection with claims investigation activities, antifraud activities, rating or underwriting," § 2721(b)(6). Another exception allows use by private investigators, but is entirely derivative of the foregoing exceptions. § 2721(b)(8) (permitting use "by any licensed private investigative agency or licensed security service for any purpose permitted by this subsection").

privacy and safety, it is implausible that Congress afforded lawyers access to *more sensitive* private information under an "expansive" provision that allows them to use social security numbers and medical and disability information to engage in mass solicitation without consent. The full text of the litigation exception confirms this was not Congress's intent.

### 2. The Full Text of the Litigation Exception Confirms that It Does Not Permit Use of Protected Information for Soliciting Clients.

The Fourth Circuit relied, uncritically, on the breadth of the phrase "in connection with," but that phrase "does not stand alone." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Rather, the litigation exception provides that uses of personal information are permitted when they are "in connection with [a judicial or administrative] proceeding …, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to" a court order. § 2721(b)(4). These express examples of permissible uses of protected information "in connection with" litigation underscore that the litigation exception permits use of DMV-derived information—including highly restricted personal information—to ensure the integrity and efficacy of adjudicative processes in which lawyers participate.

Under the familiar interpretive rule that "words and people are known by their companions," *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000), phrases in a statute that are "capable of many meanings" are given a particular meaning or delimited by surrounding words in the statute, *Jarecki*, 367 U.S. at 307. For instance, general terms in a list are given a narrower or more definite meaning by looking to the more specific

terms in that list. See, *e.g.*, *Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384–85 (2003) (holding that the phrase "'other legal process' should be understood to be process much like the processes of execution, levy, attachment, and garnishment" listed in the statute). Likewise, broader words or phrases that are "surrounded" by specific terms or examples are given meaning or are narrowed according to those terms and examples. *Gutierrez*, 528 U.S. at 254–55 ("The reference to 'any election' is preceded by two references to gubernatorial election and followed by four."). This rule of construction also delimits general statutory phrases that are followed by a "nonexhaustive list." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010) (explaining that "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive," and holding that the "nonexhaustive list" following "include" limited the meaning of a general statutory term).

Here, the express examples Congress provided in the litigation exception involve "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to" a court order. § 2721(b)(4). Each furthers the integrity of a judicial or administrative proceeding. That is, personal information and highly restricted information are used to further a necessary step in the judicial or administrative proceeding (*e.g.*, service of process, executing judgments, compliance with court orders), or to further the truth-seeking function of a court or agency (investigation in anticipation of litigation). All of these uses of DPPA-protected information aid the court or agency in reaching or enforcing a judgment.

Properly understood, the litigation exception may be used for a variety of purposes that further the ability of a court or agency to make or effectuate a decision in the proceeding: for example, it may be used to identify witnesses or other evidence; to identify absent class members to whom an opt-out notice must be sent; to track down the next of kin in a probate proceeding; or to locate a father who is delinquent on child support or alimony payments. Indeed, the very fact that subsection (b)(4) is one of only four exceptions that allow private use of highly restricted personal information underscores why Congress would link disclosure and use of such information to the integrity of judicial and agency proceedings.

By contrast, "solicitation by a lawyer of remunerative employment is a business transaction." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (addressing First Amendment challenge to restriction on in-person solicitation); see also *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 376 (1977) ("Advertising," including lawyer advertising, "is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange."). That is, lawyer solicitations merely "propose a commercial transaction." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (First Amendment challenge to restrictions on soliciting business through newspaper advertisements). And, as this Court has recognized, "the business of getting clients" is separate from other aspects of the legal profession: "It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen* v. *Hur-*

*ley*, 366 U.S. 117, 124 (1961), *overruled on other grounds*, *Spevack* v. *Klein*, 385 U.S. 511 (1967).

Accordingly, use of DMV information to solicit potential clients is not a use "in connection with" a judicial or administrative proceeding within the meaning of the DPPA because it does not further the integrity of a judicial or administrative proceeding. It is not necessary to a step in the judicial or administrative process, nor does it contribute to the truth-seeking function of that proceeding. Rather, it is merely the initiation of a proposed business transaction. Read as a whole and in the context of the entire statute of which it is a part, the litigation exception reflects no intent by Congress to grant trial lawyers a special dispensation not available to any other commercial actors to use DPPA-protected personal information and highly restricted personal information to solicit business.

### 3. Other Provisions, As Well As the Consequences of the Lower Court's Ruling, Confirm that the Litigation Exception Does Not Permit Solicitation of Clients.

The error of the Fourth Circuit's expansive interpretation of the phrase "in connection with" is confirmed by two other provisions that use the same phrase. It is also confirmed by the consequences of its expansive reading of the litigation exception itself.

Subsection (b)(6) creates an "insurer exception" that permits use of personal and highly restricted personal information "by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, *in connection with* claims investigation activities, anti-fraud activities, rating or underwriting." § 2721(b)(6) (emphasis

added). Thus, like the litigation exception, subsection (b)(6) uses the indeterminate phrase "in connection with." It is clear, however, that, in this provision, Congress did not intend that phrase to be given the sweeping scope the Fourth Circuit accorded the same phrase in subsection (b)(4).

Under subsection (b)(6), personal information may be disclosed for use "by any insurer … in connection with … underwriting." Underwriting, in turn, means to "insure on life or property." *Merriam-Webster's Collegiate Dictionary* 1289 (10th ed. 1993). Thus, under the Fourth Circuit's interpretation of "in connection with," this provision would authorize insurers to use DPPA-protected information to solicit customers without their consent, because underwriting—*i.e.* "insuring on life or property"—would be the ultimate "goal" of the solicitation. Pet. App. 41a–42a.

It is utterly implausible, however, to believe that, by using the words "in connection with," Congress intended to create a blanket exemption for the auto insurance industry from the DPPA's ban on the disclosure and use of personal information, and to grant this group of commercial entities access to private information—including highly restricted personal information—for use in soliciting customers. Indeed, as noted, one of the practices the DPPA sought to end was the sale of personal information by state DMVs, see, *e.g.*, *Condon*, 528 U.S. at 143–44, and one of the most natural purchasers of such information would be insurers seeking individuals who had just purchased a car requiring insurance, *id.* at 148. Thus, an expansive interpretation of "in connection with" in subsection (b)(6) would significantly undermine one of the Act's fundamental goals. See *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulato-

ry scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Accordingly, the underwriter exception is properly read to permit disclosure and use by insurers only for underwriting activities akin to the other expressly identified activities, such as claims investigation and anti-fraud activities—*i.e.*, to verify information as part of "rating and underwriting."

Similarly, subsection (b)(10) permits use of personal information "*in connection with* the operation of private toll facilities." § 2721(b)(10) (emphasis added). Under the lower court's expansive view of the italicized phrase, the owner of a private toll road could obtain the addresses of the potentially thousands of motorists who purchased vehicles in the region served by that private road in order to send targeted mass mailings advertising the commuting benefits of the road. Such a reading of "in connection with" in this provision, therefore, would likewise undermine one of the Act's fundamental goals.

Nor are the anomalies that arise from the lower court's expansive reading of "in connection with" limited to other exceptions. Under its reading of the litigation exception, a lawyer who witnessed an auto accident and took down a driver's license plate number could obtain the driver's name and address from the state DMV to solicit the driver as a client. This activity would entail none of the benefits of "impact litigation," Pet. App. 38a, and would involve the type of "mer[e] 'trolling'" that the lower court apparently deemed objectionable, *id.* at 42a. Yet, this use is plainly permissible under the Fourth Circuit's expansive reading: such "solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." *Id.* For all the reasons discussed above, however, it is implausible to

believe that, in enacting a provision that grants lawyers access to highly restricted personal information, Congress intended to afford them a unique opportunity, "as self-employed" professionals, *Cohen*, 366 U.S. at 124, to use protected information to propose commercial transactions.

Finally, a broad interpretation of the litigation exception increases the risk of undermining the DPPA's purpose of protecting individuals, particularly women, from threats, harassment and violence. One impetus behind passage of the Act was the murder of actress Rebecca Schaeffer outside her home by an individual who had obtained her address from DMV records. See 139 Cong. Rec. 29,466 (1993) (Statement of Sen. Boxer). To permit lawyers (or any other individual) to obtain tens of thousands of names and addresses increases the risk of inadvertent disclosure to those who might use the information to track down, threaten, and hurt individuals who have taken steps to hide their whereabouts from former abusive spouses or persons who have threatened them harm. See, *e.g.*, *Menghi* v. *Hart*, 745 F. Supp. 2d 89, 96–97 (E.D.N.Y. 2010) (police officer obtained plaintiff's personal information for a legitimate reason, then used it to harass and threaten her for years), *aff'd*, 478 F. App'x 716 (2d Cir. 2012). In this case, for example, the names and addresses of over 34,000 car buyers were filed with the South Carolina Office of Disciplinary Counsel, making those records available to the public. See CA4 JA 484. The fact that wholly inadvertent disclosures can result from otherwise permissible acquisitions is yet another factor counseling against the lower court's impermissibly broad interpretation of the litigation exception.

## IV. THE FOURTH CIRCUIT'S "INEXTRICABLY INTERTWINED" RATIONALE IS LEGALLY AND FACTUALLY ERRONEOUS.

For the reasons given above, respondents' use of DPPA-protected personal information to solicit potential clients for a lawsuit was not authorized by either the solicitation exception or the litigation exception. The Fourth Circuit nevertheless held that respondents' solicitations are not actionable because they were "inextricably intertwined" with other conduct satisfying the litigation exception. Pet. App. 5a; see also *id.* at 23a, 29a, 37a–39a, 44a. That holding is wrong as a matter of both law and fact. The solicitation exception's express-consent requirement cannot be evaded on the ground that solicitation is "inextricably intertwined" with some other permissible use. Rather, if solicitation is necessary to a permissible use, express consent must be obtained. In any event, respondents' solicitations were not "inextricably intertwined" with any permissible use.

### A. A Use Of Personal Information That Is "Inextricably Intertwined" With Bulk Solicitation Requires Express Consent.

The Fourth Circuit held that personal information may be used for bulk solicitation absent express consent if the solicitation is "inextricably intertwined" with other conduct satisfying the litigation exception. Pet. App. 5a. As discussed below, respondents' solicitations were not "inextricably intertwined" with any conduct permitted by the litigation exception. But even if they were, it would not change the fact that the DPPA requires express consent as a condition of using personal information for bulk solicitation.

The Fourth Circuit's "inextricably intertwined" test has no basis in the Act. Nothing in the DPPA permits

personal information to be used for bulk solicitation absent express consent if the solicitation is "inextricably intertwined" with conduct permitted by another exception. "'The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose.'" *Pichler* v. *UNITE*, 542 F.3d 380, 395 (3d Cir. 2008). Quite the contrary, the DPPA makes each "use not permitted under section 2721(b)" unlawful and the basis for a civil cause of action. § 2722(a) (making it unlawful to obtain or disclose personal information "for *any use not permitted* under section 2721(b)" (emphasis added)); § 2724(a) (creating a civil cause of action for uses of personal information "for *a purpose* not permitted under this chapter" (emphasis added)).

Moreover, as discussed above, the solicitation exception is the *exclusive* provision governing bulk solicitation, and its express-consent requirement cannot be evaded by relying on a more general authorization. Deeming solicitation "inextricably intertwined" with conduct permitted by another exception does not change this principle. The result in *RadLAX* would not have been different if selling the debtor's collateral free of the creditor's lien was necessary to provide the "indubitable equivalent" of the creditor's claims under the third exception; the plan still would have been subject to the second exception's credit-bidding requirement. See 132 S. Ct. at 2072 ("debtors may not sell their property free of liens … without allowing lienholders to credit-bid"). Likewise here, personal information may not be used for bulk solicitation without complying with the solicitation exception's express-consent requirement. Thus, if bulk solicitation is necessary to conduct otherwise permitted by the DPPA, express consent must be obtained. The lowest common denominator, as it were, must govern.

At base, the Fourth Circuit's new "inextricably intertwined" exception violates the fundamental principle that courts "are not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). "'[When] the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The DPPA forbids the disclosure or use of personal information unless the particular use satisfies one of the Act's exceptions. As explained above, the solicitations here do not satisfy one of those exceptions, and that should be the end of the matter. Instead, the Fourth Circuit effectively rewrote subsection (b)(12) to permit use of DPPA-protected information for bulk solicitations "if the State has obtained the express consent of the person to whom such personal information pertains, *or if such solicitation is inextricably intertwined with non-solicitation activities authorized under subsection (b)(4)*." As this Court has explained previously, however, "it is for Congress, not for [courts], to create exceptions or qualifications at odds with [a statute's] plain terms." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 490 (1947); see also *Dodd*, 545 U.S. at 359.

### B. The Solicitations Were Not "Inextricably Intertwined" With Any Permissible Use.

Even if the solicitation exception's express-consent requirement could be evaded when solicitation is "inextricably intertwined" with some other permissible use, the judgment below should still be reversed because respondents' solicitations were not inextricably intertwined with any permissible use.

1. The court of appeals concluded that the solicitations were inextricably intertwined with respondents'

"investigation" in anticipation of the *Herron* litigation. Pet. App. 39a–40a. According to the court, respondents used the personal information they obtained from the DMV "'in determining whether to file a group action'" and "'to assist in identifying the highest volume dealers.'" *Id.* The court's reasoning does not withstand scrutiny, for two reasons.

*First*, respondents did not need to *solicit* anyone to achieve these purported investigative purposes. The FOIA requests themselves asked for the names of the dealers that sold the cars, App. 57, 67, so respondents did not need to send solicitation letters to identify the highest volume dealers. Indeed, respondents did not need to obtain the *buyers'* personal information at all to identify the highest volume dealers; the *dealers'* information would have sufficed.

Nor was it necessary to solicit anyone to determine whether the challenged practice was common enough to support a group action. Respondents could simply have asked the buyers where they bought their cars and whether they paid the challenged administrative fees. Instead, as the court of appeals recognized, respondents used the buyers' personal information to solicit them. Pet. App. 25a–29a. That *solicitation* was not *investigation* in anticipation of litigation; nor was it "integral to" any investigation. *Id.* at 29a.

*Second*, the evidence shows that respondents' *only* purpose in obtaining and using the personal information was to solicit potential clients, not to investigate in anticipation of litigation. The solicitation letters did not seek information about whether car buyers were charged administrative fees. Rather, as the court of appeals noted, they contained "boilerplate solicitation language," and made "[n]o mention" of any investigation. Pet. App. 28a. Petitioner Tanner attested without contradiction that when he called res-

pondent Harpootlian in response to the solicitation letter, "Harpootlian did not express any interest in finding out any facts about [Tanner's] interaction with the dealership" or "sugges[t] that they needed or were interested in [him] as a possible witness." App. 281–82. Instead he "made an aggressive sales pitch" in which "he tried to get [Tanner] to sign up as a client for a lawsuit." *Id.* at 281.

In addition, four of the six FOIA requests, and all of the solicitation letters, were sent *after* respondents filed the *Herron* lawsuit. Pet. App. 8a–9a. One of the two pre-*Herron* FOIA requests was submitted just four days before *Herron* was filed, App. 67, and the other requested information only about purchases in Spartanburg County, *id.* at 57, where no named plaintiff in *Herron* purchased a car, CA4 JA 222–23, 226, 230–31. Respondents acknowledged below that they did not use any personal information to contact car buyers until they sent the first solicitation letter, four months after they filed *Herron*. *Id.* at 520. And respondents submitted no sworn declarations attesting that they obtained and used the information for investigative purposes, but instead made only unsworn statements in their briefs.

In light of these undisputed facts, a reasonable jury could conclude that respondents obtained and used the car buyers' personal information solely to solicit potential clients and not for any investigative purpose. In all events, even if respondents obtained and used protected information for an initial investigation, their later solicitation of thousands of potential clients was a separate and distinct use of the buyers' personal information. That separate and distinct use violated the DPPA regardless of whether respondents had a permissible investigative purpose in obtaining the information, and regardless of whether respon-

dents also used the information for permissible investigative purposes.

The court of appeals thus erred in holding that respondents were entitled to summary judgment based on their purported use of the personal information for investigation in anticipation of *Herron*.

2. The courts below also concluded that the solicitations were inextricably intertwined with the "prosecution of" *Herron*, Pet. App. 39a, because they were necessary to respond to the dealers' motions to dismiss, *id.* at 72a–79a. According to the lower courts, respondents were not "merely 'trolling'" for clients when they sent the solicitation letters, *id.* at 42a, because they did so in order to "respond to potentially dispositive motions in a pending case," *id.* at 78a. This reasoning too is wrong and, if accepted, would permit lawyers to file lawsuits without plaintiffs and then obtain and use DPPA-protected personal information to solicit clients to maintain the suit.

The dealers' motions to dismiss in *Herron* were based on the named plaintiffs' lack of standing to sue dealers from whom they had not bought a car. CA4 JA 668–74. The *Herron* court held that the plaintiffs had standing to sue only the dealers with whom they had dealt and any coconspirators. App. 235. In an effort to prevent dismissal of the other dealers, respondents obtained car buyers' personal information from the DMV, sent them solicitation letters without their consent, and then moved to amend the complaint to add the additional plaintiffs they had recruited through their solicitations. CA4 JA 520–22.

Contrary to the Fourth Circuit's view, these solicitations were not "inextricably intertwined" with some other permissible use of DPPA-protected information. Instead, they were pure solicitations. In suing dealers

with whom their existing clients had never dealt, respondents were acting no differently than a lawyer who files a "placeholder" lawsuit without *any* plaintiff, then uses DPPA-protected information to solicit clients to maintain the suit. See *Wemhoff* v. *Dist. of Columbia*, 887 A.2d 1004, 1007 & nn.1–2 (D.C. 2005). The act of filing a lawsuit without an actual client is not a use (permissible or otherwise) of "personal information pursuant to the litigation exception." Pet. App. 29a. Thus, seeking DMV information to find a proper plaintiff to maintain that suit cannot be "inextricably intertwined" with a use of "personal information pursuant to the litigation exception." The result cannot be different when a lawyer files a suit on behalf of a client against a dealer from whom that client bought a car, and ten other dealers the client has no standing to sue.

The lower courts' contrary conclusion rests on an illogical distinction between lawyers who use DPPA-protected personal information to "troll" for clients before suing (which it apparently viewed as impermissible) and lawyers who sue without a proper plaintiff and then use DPPA-protected personal information to solicit clients in response to the defendant's motion to dismiss (which the lower court deemed permissible). Nothing in the Act supports this arbitrary distinction. In both situations, lawyers are improperly filing suits against named defendants, then using that impropriety as a bootstrap to justify use of DPPA-protected information to solicit clients, on the ground that the use is "in connection with"—or, under the Fourth Circuit's construct, "inextricably intertwined with"—an improperly instituted "proceeding." Such conduct does not immunize respondents from liability for their improper acquisition and use of personal information to solicit clients.

3. Finally, the court of appeals suggested that respondents' solicitations are not actionable because "the solicitation was entirely consistent with state law." Pet. App. 29a. That is irrelevant. Whether respondents complied with state ethical rules regarding lawyer solicitation has no bearing on whether they violated the DPPA. Nothing in South Carolina law required respondents to solicit car buyers, let alone authorized them to obtain and use the buyers' DPPA-protected personal information to do so.

Moreover, even if South Carolina law did authorize lawyers to obtain and use DPPA-protected personal information to solicit clients, it would not matter. Any such law would be preempted by the DPPA. Under the Supremacy Clause, state law cannot permit what federal law forbids. See, *e.g.*, *Mich. Canners & Freezers Ass'n* v. *Agric. Mktg. & Bargaining Bd.* 467 U.S. 461, 478 (1984). Indeed, the DPPA contains an exception for "any other use specifically authorized under the law of the State that holds the record," but only "if such use is related to the operation of a motor vehicle or public safety." § 2721(b)(14). Because respondents' use of the car buyers' personal information was not related to the operation of a motor vehicle or public safety, state law is irrelevant.

In all events, respondents' reliance on their supposed ethical obligations is groundless. Respondents contended below that, as group representatives in *Herron*, they had an ethical obligation to protect the interests of unnamed class members, and that as part of that obligation they had to solicit car buyers to prevent them from losing their claims. This argument fails for multiple reasons. Initially, given the *Herron* court's ruling that the named plaintiffs had standing to sue only the dealers with whom they had dealt, App. 235, the "group" that respondents represented

included only those individuals who had bought their cars from the same dealers as the named plaintiffs, *id.* at 248 (the "statute allows one aggrieved car purchaser to sue 'for the benefit of the whole,' including all persons hurt by the same Defendant's violations of the Dealers Act"); *id.* at 251 ("the named Plaintiffs [are] prosecuting these cases in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership"). As to car buyers who purchased from other dealers, no suit had been properly instituted on their behalf, and respondents therefore were not acting in any representative capacity.

But even if these other car buyers were somehow within the orbit of respondents' group representation, respondents still had no ethical duty to solicit them. Respondents never explained exactly how they believed their solicitations were necessary to prevent the unnamed car buyers from losing their claims. In fact, the motions to dismiss in *Herron* had no bearing on the claims of individuals who had bought their cars from the improperly named dealers. A judgment dismissing those dealers for lack of a proper plaintiff would not have been a ruling on the merits of the unnamed buyers' claims and thus would not have had any preclusive effect on those buyers. See *Berry* v. *McLeod*, 492 S.E.2d 794, 800 n.2 (S.C. Ct. App. 1997) (per curiam); *Griggs* v. *Griggs*, 51 S.E.2d 622, 626 (S.C. 1949). Moreover, because the group action proceeded without the procedural protections of a class action such as notice and an opportunity to opt out, see App. 251–52, the judgment could not constitutionally have extinguished the unnamed buyers' claims, see *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (due process requires notice and an opportunity to opt out).

Finally, even if respondents did have an ethical duty to solicit unnamed car buyers, that duty would not have given them license to violate the DPPA. Instead, like other lawyers for whom DMV databases provide no ready source of potential claimants, respondents would have had to discharge those duties through other means. Thus, they could have sought to identify the unnamed buyers through advertising. They could have sought to utilize the DPPA's waiver procedure. § 2721(d) (allowing DMVs to mail a copy of a request for information to the individuals whose information was requested and seek a waiver of their right to privacy). Alternatively, they could have sought to comply with South Carolina's rules for class actions and, following class certification, requested a court order for DMV information to provide class notice. Instead, respondents obtained, used, and disclosed petitioners' and thousands of other car buyers' protected personal information in order to solicit them, without their express consent. In so doing, they violated the DPPA.

## CONCLUSION

For these reasons, the Court should reverse and remand.

Respectfully submitted,

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## STATUTORY ADDENDUM

## FEDERAL STATUTES

### 18 U.S.C. § 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 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 mo-

tor vehicle manufacturers to carry out the pur-poses of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), 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 product 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 organization, 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 not 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 individual's 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.

**18 U.S.C. § 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.

**18 U.S.C. § 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.

**18 U.S.C. § 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.

**18 U.S.C. § 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 identifi-

cation 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.[11]

**(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.

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[11] So in original. The period probably should be replaced with a semicolon.