

No. 12-25

IN THE
Supreme Court of the United States

EDWARD F. MARACICH, *et al.*,

Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF ELECTRONIC FRONTIER FOUNDATION
AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

Electronic Frontier Foundation (“EFF”) is a nonprofit, member-supported civil liberties organization working to protect privacy rights in a world of rapid technological change. As part of that mission, EFF actively encourages and challenges government and the courts to support privacy, and has served as counsel or *amicus curiae* in privacy cases before this Court, including *United States v. Jones*, 132 S. Ct. 945 (2012), *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

**INTRODUCTION AND SUMMARY
OF THE ARGUMENT**

We live in an age of instant access to information. With the click of a mouse or the tap of a screen on a smartphone, we can find available hotel rooms in Moscow, determine the price of gold in Chile, or find every sushi restaurant within ten miles of our current location. In many ways, this access to information has made our lives easier. But there is another side to this wealth of information at our fingertips – much of our personal information is also now a click away. Information such as a person’s criminal record, the purchase price of someone’s house, or someone’s bankruptcy filings is now instantly available

1. This brief is filed with the written consent of all parties. The parties’ letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus made a monetary contribution intended to fund the preparation or submission of this brief.

to everyone. Although such information may always have been somehow available, obtaining it required visits to the recorder of deeds or the county courthouse. The Internet has made this information *easily* accessible, as information brokers compile such information into readily searchable databases.

For many Americans, the information that we are required to provide to government agencies in order legally to own and operate a motor vehicle, our motor vehicle record (“MVR”) information, is also available on the Internet. States require drivers to provide personal information, which “may include a person’s name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver’s license or registering an automobile.” *Reno v. Condon*, 528 U.S. 141, 143 (2000). Concerned about the dissemination of this information, Congress passed the Driver’s Privacy Protection Act of 1994 (the “DPPA”), which imposes civil and criminal liability for disclosure of MVR information unless it comes within one of fourteen narrowly-defined “permissible uses.” 18 U.S.C. §§ 2721-2724. Therefore, before an individual can obtain MVR information electronically, he or she must first identify one of the fourteen “permissible purposes” provided in Section 2721(b) of the DPPA for obtaining such information.

This Court has recognized the importance of providing individuals with the ability to control the dissemination of private information about them. *See Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989) (“[B]oth the common law and the literal understandings of privacy encompass the individual’s

control of information concerning his or her person.”) Yet, with three statutory exceptions,² the obtainment of MVR information is in no way controlled by the individual whose information is being obtained. Rather, the determination whether an individual’s MVR information may be accessed under the DPPA is left solely to the individual requesting the information, who must self-determine whether he or she has one of the DPPA’s permitted purposes that would entitle him or her to access the information. Indeed, in most instances, the individuals whose MVR information is obtained have no way of knowing that their information has been obtained.

The consequence of this cannot be overstated; the responsibility of maintaining the privacy of MVR information falls on the very individuals who wish to obtain the MVR information. It is inevitable that individuals seeking to obtain MVR information will, when faced with a nebulous standard such as the “inextricably intertwined” analysis adopted by the Fourth Circuit in this case, interpret such a standard in their own self-interest and therefore in favor of disclosure of such records. Such an interpretation is made more likely when the searches occur in the virtual anonymity of the Internet. To avoid this consequence, the DPPA should be interpreted exactly as it is drafted – so that a person with any non-permissible purpose is precluded from obtaining confidential MVR information. This interpretation not

2. Sections 2721(b)(11) (for “any other use” not provided in Section 2721(b)), (b)(12) (for “bulk distribution for surveys, marketing or solicitations”), and (b)(13) (for “use by any requester”) require the consent of the person to whom the information pertains to disclose such information, as discussed below. 18 U.S.C. § 2721(b)(11)-(13).

only would effectuate the purpose of the DPPA, but also would set forth a clear standard for individuals seeking to obtain MVR information, thereby protecting the privacy of the individuals whose personal information is sought.

ARGUMENT

I. CONGRESS HAS RECOGNIZED THE IMPORTANCE OF MAINTAINING THE PRIVACY OF MOTOR VEHICLE RECORDS IN LIGHT OF THE EASY ACCESS AFFORDED BY THE INTERNET.

In response to concerns about the access of stalkers and other criminals to MVR information, on the one hand, and the common practice of many states of selling motor vehicle records to businesses, marketers, and individuals, on the other hand, Congress enacted the DPPA in 1994 to restrict states' ability to disclose a driver's personal information without the driver's consent. *Reno v. Condon*, 528 U.S. at 144. As originally enacted, the DPPA allowed the disclosure of motor vehicle information for certain commercial uses, such as solicitation, unless the motorist "opted out" by expressly forbidding such disclosure. *Id.* However, in 1999, Congress amended Section 2721(b)(12) governing "bulk distribution for surveys, marketing or solicitations," to change it from an "opt-out" alternative to an "opt-in" requirement. *Id.* at 144-45. Motorists now no longer need to take any affirmative steps to protect the privacy of their information from being used for marketing or solicitation; rather, subsection 2721(b)(12) requires the express consent of the motorist before the protected information can be used for such purposes.

Congress also expanded the privacy protection under the DPPA in 2000 by adding a limitation on the disclosure of “highly restricted personal information” which is defined as “an individual’s photograph or image, social security number, medical or disability information.” 18 U.S.C. § 2725(4). Pursuant to Section 2721(a), states are not permitted to disclose this “highly restricted personal information” without the “express consent of the person to whom such information applied, except [for] uses permitted in subsections (b)(1), b(4), (b)(6), and (b)(9).” 18 U.S.C. § 2721(a)(2). In other words, an individual’s “highly restricted personal information” cannot be obtained or used without that person’s express consent unless the information is to be used for one of four specified DPPA permitted uses: by a government agency (§ 2721(b)(1)); in connection with litigation ((b)(4))³; by an insurer ((b)(6)); and by an employer to verify information relating to a holder of a commercial driver’s license ((b)(9)).

These amendments to the DPPA manifest a clear Congressional intent to expand privacy protection by narrowing the exceptions in Section 2721(b). They were motivated at least in part by growing concern about the increasing availability of personal information on the Internet. For example, in discussing the proposed amendments in 1999, Senator Richard Shelby noted

3. In full, Section 2721(b)(4) provides for the disclosure of MVR information “[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.” 18 U.S.C. § 2721(b)(4).

that the Internet presented a threat to the privacy of individuals' MVR information requiring heightened protection of such information:

My concern is that private information is too available. The proliferation of information over the Internet makes it easy and cheap for almost anyone to access very personal information.

I think members would be shocked by what virtually anyone--including weirdos and stalkers--can find out about you, your wife, or your children with only a rudimentary knowledge of how to search the Internet.

I believe that there should be a presumption that personal information will be kept confidential, unless there is compelling state need to disclose that information. Most states, however, readily make this information available, and because states sell this information, a lot of information about you effectively comes from public records.

Section 350 of the conference protects personal information from broad distribution by requiring express consent prior to the release of information in two situations. First, individuals must give their consent before a state is able to release photographs, social security numbers, and medical or disability information. Of course, this excludes law enforcement and others acting on behalf of the government. Second, individuals must give their consent before the state can sell

or release other personal information when that information is disseminated for the purpose of direct marketing or solicitations.

145 Cong. Rec. 23,699 (1999) (statement of Sen. Shelby). Magnifying the concerns articulated by Senator Shelby in 1999, MVR information is today even more widely available on the Internet.

II. PERSONAL INFORMATION FROM MOTOR VEHICLE RECORDS IS WIDELY AVAILABLE OVER THE INTERNET.

Courts have interpreted the DPPA to permit state departments of motor vehicles to sell MVR information in bulk to “aggregator” companies, which may then resell such information to third-parties. *See Taylor v. Axiom Corp.*, 612 F.3d 325, 340 (5th Cir. 2010) (holding that “a person who buys DMV records in bulk does so for the purpose of making permissible actual use of information therein under 18 U.S.C. § 2721(b), even if that person does not actually use every single item of information therein” and that “the plain language of 18 U.S.C. § 2721 allows resale of DMV records.”); *Cook v. ACS State & Local Solutions, Inc.*, 663 F.3d 989, 996 (10th Cir. 2011) (finding that state departments of motor vehicles may sell MVR information in bulk to companies who intend re-sell this information to third parties and that “[s]o long as personal information is ultimately used only for permitted purposes, it is not clear why Congress would have intended to regulate *who* could obtain it.”) (emphasis in original). As a result, motor vehicle information is available through a broad range of websites on the Internet. For example, the

two major electronic research services used by the legal profession – Lexis and Westlaw – both make available MVR information.⁴

Specifically, current or historical⁵ MVR information from thirty-four states is now available online through Lexis⁶ and Westlaw:⁷

- Current MVR information is available on both Lexis and Westlaw for twenty (20) states and the District

4. Lexis and Westlaw are provided as examples of companies that provide access to MVR Information over the Internet because they set forth the MVR Information that they make available by state. There are many other websites on the Internet which promise access to MVR Information, either for free or for a fee.

5. Those states for which “historical” MVR information is available are those that have suspended publication of motor vehicle records due to state imposed use restrictions. However, individuals’ MVR information as of the time such restrictions went into effect continues to be available.

6. *See* LEXIS SOURCE INFORMATION – MOTOR VEHICLE REGISTRATIONS/TITLE, <http://w3.lexis.com/sources/scripts/info.pl?314696> (last visited Nov. 13, 2012).

7. *See* WESTLAW DATABASE DIRECTORY – MOTOR VEHICLE RECORDS – COMBINED, <http://weblinks.westlaw.com/result/default.aspx?action=Search&cnt=DOC&db=IDEN&elmap=Inline&eq=search&fmqv=s&fn=%5Ftop&method=WIN&mt=DUIPractitioner&n=31&origin=Search&query=dmv%2Dall&rtl=CLID%5FQRYRLT38304937101411&rltdb=CLID%5FDB256584937101411&rti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=IDEN3%2E0&sxt=WL&service=Search&sp=SEARCHIDEN%2D001&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA416584937101411&sv=Split&tnprpdd=None&tnprpds=TaxNewsFIT&utid=%7B2BCD41B2%2D1E84%2D4EA1%2DAFAE%2DA7E878E07CC6%7D&vr=2%2E0> (last visited Nov. 13, 2012).

of Columbia: Colorado, the District of Columbia, Florida, Illinois, Kentucky, Louisiana,⁸ Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada,⁹ North Dakota, Ohio, Tennessee, Texas, Wisconsin, and Wyoming

- Historical MVR information is available on both Lexis and Westlaw for six (6) states: Alabama, Alaska, Connecticut, Idaho, Maryland, and Utah
- Historical MVR information is available on Lexis while no MVR information is available on Westlaw for four (4) states: Delaware, North Carolina, Oklahoma, and South Carolina
- No MVR information is available on Lexis while historical MVR information is available on Westlaw for one (1) state: Iowa
- No MVR information is available on Lexis while current MVR information is available on Westlaw for one (1) state: New Mexico
- Historical MVR information is available on Lexis while current MVR information is available on Westlaw for one (1) state: New York
- No MVR information is available on either Lexis or Westlaw for seventeen (17) states: Arizona,

8. Louisiana data received after September 2012 does not contain license plate information.

9. License plate numbers are not available from Nevada.

Arkansas, California, Georgia, Hawaii, Indiana, Kansas, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia

The information about each motor vehicle owner typically available in these databases includes the owner's name and address; the make, model and year of the vehicle; the vehicle's license plate number and state; the vehicle identification number; and title information about the vehicle.¹⁰

Through an initial motor vehicle search, an individual is able to obtain identifying information about the vehicle's owner. Moreover, because of the ability of data brokers to consolidate reports from multiple sources, this identifying information may also be used to obtain information about the motor vehicle owner's bankruptcy filings, concealed weapons permits, criminal records, employment, foreclosures, hunting and fishing licenses, judgments and liens, real property, sexual offender status, and voter registration. Therefore, with only a license plate number, an individual may obtain a wealth of private information about the owner of a motor vehicle.¹¹

10. See footnotes 6 and 7, *supra*, for citations to the MOTOR VEHICLE REGISTRATIONS/TITLE directory on Lexis and the MOTOR VEHICLE RECORDS – COMBINED directory on Westlaw.

11. See, e.g., PEOPLEPUBLICRECORDS.ORG, <http://www.peoplepublicrecords.org/index.php?xpath=dmv> (last visited Nov. 15, 2012) (explaining that “PeoplePublicRecords.org is the leading provider of online DMV records, allowing you the convenience of accessing thousands of public and private data sources instantly from the comfort of home. Find the precise driving records you’re searching for, and enjoy a *complete background report*”).

The limiting factor on this access, of course, is the DPPA. Although this case concerns MVR information that was obtained through a Freedom of Information Act request rather than electronically, the ease with which MVR information is available electronically presents heightened privacy concerns that require the attention of the Court in interpreting the DPPA.¹²

III. THE DPPA SHOULD BE INTERPRETED TO PROVIDE THAT A PERSON WHO OBTAINS PERSONAL INFORMATION FROM A MOTOR VEHICLE RECORD FOR A PURPOSE NOT PERMITTED IS LIABLE TO THE INDIVIDUAL TO WHOM THE INFORMATION PERTAINS EVEN IF THE PERSON OBTAINING THE INFORMATION ALSO HAS A PERMISSIBLE PURPOSE.

In 1999, Senator Shelby articulated a concern that is even more relevant today – the proliferation of personal MVR information available over the Internet. Yet the Fourth Circuit has failed to give effect to the amendments that were adopted by Congress, at least in part, to address this issue. The Fourth Circuit did not limit individuals engaging in solicitation to obtaining the personal information of only those persons who had provided express consent to the release of their information.

about anyone you choose using the power of the Internet. Using information from the DMV records, you can *easily search by license plate number.*”) (Emphasis added).

12. For example, in *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009), the defendant had conducted “approximately 13,700 motor vehicle searches on Westlaw.” *Id.* at 743.

Moreover, even though the litigation exception provides access to “highly restricted personal information” which Congress intended to protect, the Fourth Circuit found that it was permissible pursuant to that exception for attorneys engaged in the solicitation of legal business to obtain the personal information of 34,000 individuals – information that was subsequently filed with the South Carolina Office of Disciplinary Counsel and thereby made available to the public. *See* CA4 JA 484.

“The starting point in every case involving construction of a statute is the language itself.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Section 2724(a) of the DPPA provides: “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.” 18 U.S.C. § 2724(a) (emphasis added). This civil liability provision of the DPPA does not provide that a person with a permissible purpose is not liable; rather it provides that a person with an *impermissible* purpose *is* liable. Here, even if the Respondents (“Lawyers”) had obtained information for a purpose permissible under Section 2721(b)(4), such as an investigation of a client’s claims,¹³ such a use does not excuse their failure to comply with

13. For the reasons set forth in Petitioners’ Brief, the DPPA’s litigation exception should not be interpreted to afford lawyers *carte blanche* to use MVR information to identify and solicit potential clients.

the DPPA's requirements for use in connection with bulk marketing and solicitation. There is no question that the Lawyers obtained MVR information of numerous South Carolina residents and engaged in solicitation of those individuals. *See Maracich v. Spears*, 675 F.3d 281, 293 (4th Cir. 2012) (“viewed objectively, the mailings constituted ‘solicitations.’”) Moreover, the Lawyers do not contend that the individuals whom they solicited had provided express consent to the South Carolina Department of Motor Vehicles that their MVR information could be disclosed for purposes of solicitation, as required by Section 2721(b)(12). Therefore, the Lawyers obtained the MVR information “for a purpose not permitted” by the DPPA and they should be held liable pursuant to its express terms.

The Fourth Circuit properly recognized that the DPPA “makes unlawful ‘any use not permitted’ in [Section 2721(b)].” *Id.* at 297. Nevertheless, the Fourth Circuit rejected this “absolute rule,” and instead, “without undertaking to lay down a rule applicable in all future cases,” *id.* at 294, held that “conduct that might, *prima facie*, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception.” *Id.* at 298. Yet there is nothing in the DPPA that permits a court to balance or determine the relatedness of the various permitted and non-permitted uses; instead, the court evaluating the purpose or purposes of the party who obtained the MVR information need only determine whether the defendant has an impermissible purpose.

See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (where “the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.”). In *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), the Third Circuit adopted this construction, finding that it was irrelevant whether the defendant’s efforts fell within the litigation exception and holding that “[b]ecause UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had.” *Id.* at 395.

Moreover, the Fourth Circuit’s finding that the Lawyers’ solicitation of clients was permissible because it was “inextricably intertwined with their intended permitted use of the personal information they obtained,” *Maracich*, 675 F.3d at 297, presents an amorphous standard that threatens to undo the protections of individuals’ MVR information set forth in the DPPA. This standard leaves both courts enforcing the DPPA and individuals seeking MVR information in the unenviable position of determining when a non-permitted use is “inextricably intertwined” with a permitted use under the DPPA.

In the context of the electronic availability of individuals’ MVR information, gatekeeper sites like Lexis and Westlaw merely request that the user indicate a permitted purpose – there is no reference to what happens if the individual also has a non-permitted purpose. The result is that these websites have adopted a *de facto* standard that the presence of any permissible purpose is sufficient to sell access to MVR information. This *de facto* standard is not consistent with the Fourth

Circuit’s “inextricably intertwined” standard, which necessarily implies that a non-permitted purpose that is not “inextricably intertwined” with a permitted purpose would violate the DPPA. Nor is it consistent with the DPPA itself, which provides that a person seeking motor vehicle records with an impermissible purpose is liable. Because the DPPA contains no language that would excuse an impermissible purpose merely because it was undertaken in conjunction with a permissible purpose, the Court should uphold the DPPA’s express provision that an individual is liable “who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted.”

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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