No. 12-25

In The Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS, AND JOHN C. TANNER,

Petitioners,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A., GEDNEY M. HOWE, III, GEDNEY M. HOWE, III, P.A., RICHARD A. HARPOOTLIAN, RICHARD A. HARPOOTIAN, P.A., A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents' Brief in Opposition ("BIO") ultimately underscores the need for this Court to take up the important public policy question of whether 18 U.S.C. § 2721(b)(4), referred to in the interest of brevity as the "litigation exception" to the Driver's Privacy Protection Act of 1994 ("DPPA" or "the Act"), allows lawyers to solicit clients, as the Fourth Circuit held below. Significantly, the BIO's own "Conclusion" does not even oppose this Court's review in so many words, stating instead that "[e]ven if this Court grants *certiorari* and vacates the Fourth Circuit's decision, numerous additional statutory and constitutional issues will remain to be decided on summary judgment." BIO at 36. While it may be true that some other issues would remain outstanding if this Court were to vacate the Fourth Circuit's decision (as with most any other case previously disposed of on summary judgment), that is no reason for this Court to decline addressing the "lawyer solicitation" issue that the Fourth Circuit's decision has squarely framed, in clear conflict with decisions of the Third Circuit and other lower courts.

1. Notwithstanding The Brief In Opposition's Assertions To The Contrary (Which Simply Mirror Language From The Fourth Circuit's Opinion), There Is No Limiting Principle In The Fourth Circuit's Decision That Would Prohibit "Trolling" For Clients Under The Litigation Exception.

Rejecting Respondents' persistent protestations to the contrary, the Fourth Circuit clearly and unequivocally found (applying an objective standard) that Respondents had, indeed, engaged in "solicitation" of clients within the meaning of the Act, but then excused it on the basis that the solicitation was "inextricably intertwined" with litigation. App. 5a, 25a-29a.[1] The fundamental flaw in the Fourth Circuit's decision (apart from its lack of any footing in the statutory text)[2] is that it lacks any limiting principle. While purporting not to be "undertaking to lay down a rule applicable in all future cases," *see* App. 30a, the court's rationale plainly allows lawyers to obtain and use "personal information" (as the Act

[1] It bears noting that the Fourth Circuit did not just confine itself to excusing Respondents' solicitations; later on in its opinion, the court affirmatively commended Respondents' conduct: "Put simply, they did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances." App. 38a. Query why the same could not be said of any "good" purveyor of goods and services.

[2] The full text of the entire statute is set forth as Appendix F to the original Petition.

defines it)[3] to solicit clients, without limitation. Despite its disclaimer, the Fourth Circuit effectively adopted Respondents' unabashed position that "Congress intended for lawyers to have *unfettered* access and use of DMV information for use in litigation." *Cf.* App. 19a (quoting from Respondents' counterclaim in the district court) (emphasis added).

The Fourth Circuit ostensibly condemns using personal information to "troll[ ]" for clients, as if to suggest that "trolling" would constitute a violation of the DPPA. App. 35a n.13 (distinguishing *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1011-12 (D.C. 2005)); App. 42a (observing that Respondents could not be said to have been merely "trolling" when they had "already been contacted by potential clients"). There is, however, nothing in the Fourth Circuit's reasoning that would effectively prohibit a lawyer's obtainment and use of DMV information to "troll" for

[3] And in terms of elaborating upon the invasion of privacy that the Fourth Circuit's decision allows, it bears emphasis that because soliciting lawyers would be operating under the aegis of the litigation exception, they would have access to what the statute defines as "highly restricted personal information," which, above and beyond "personal information," includes "medical or disability information" about a driver. *Compare* 18 U.S.C. § 2721(a)(2) (identifying the limited statutory exceptions that allow access to "highly restricted personal information") *with* 18 U.S.C. § 2725(3)-(4) (defining the terms "personal information" and "highly restricted personal information"). At the risk of belaboring the obvious, lawyer access to such otherwise confidential information substantially expands the universe of potential clients and claims.

clients. To the extent the court is suggesting that a lawyer's contact by a "potential client" constitutes an essential prerequisite to then invoking the litigation exception to solicit clients based upon DMV information (and thereby avoid the charge of "trolling"), that is no meaningful limitation at all. (Moreover, all an unscrupulous lawyer would have to do is simply say that he or she had been contacted by a "potential client," an assertion that would be, as a practical matter, completely unverifiable.)[4]

2. There Is An Undeniable Conflict Between The Fourth Circuit And The Third Circuit (As Well As Other Lower Courts) As To Whether The Litigation Exception Allows Lawyer Solicitation Of Clients.

The Third Circuit got it right in *Pichler v. UNITE*, 542 F.3d 380, 395-96 (3d Cir. 2008) (*Pichler V*), and *Pichler v. UNITE*, 585 F.3d 741, 751-53 (3d Cir. 2009) (*Pichler VII*), as had the district court before it. *See Pichler v. UNITE*, 446 F. Supp. 2d 353,

[4] Elsewhere in its opinion, the court actually seems to acknowledge, at least implicitly, that prior contact by a potential client is not a threshold requirement. *See* App. 3a-4a (reciting without qualification that Respondents used "personal information" to identify potential named plaintiffs in the "Dealer Act group action"); App. 26a (referring to Petitioners' contention that the solicitation letters that Respondents generated from the personal information they obtained from the DMV accomplished the aim of finding "potential named plaintiffs" for the same litigation, and taking no exception to this characterization).

368-70 (E.D. Pa. 2006) (*Pichler III*). The DPPA's litigation exception does not embody a "lawyer exception" to the Act's prohibition in 18 U.S.C. § 2721(b)(12) against solicitation derived from personal information (absent a recipient's prior "express consent").[5]

The other lower court decisions cited in the Petition are in agreement. *See Manso v. Santamarina & Assocs.*, No. 1:04-cv-10276, 2005 WL 975854 (S.D.N.Y. 2005); *Wemhoff v. District of Columbia, supra*, 887 A.2d at 1010-12; *Young v. West Publ'g Corp.*, 724 F. Supp. 2d 1268, 1279 n.4 (S.D. Fla. 2010) (quoting *Pichler VII, supra,* 585 F.3d at 752).

In their BIO, Respondents quite appropriately direct the Court's attention to the First Circuit's recent decision in *Downing v. Globe Direct LLC*, 682 F.3d 18 (1st Cir. 2012), which held that on the facts of that case, the inclusion of advertising material in automobile registration renewal notices issued by a vendor that had contracted with the State for that very purpose fell within the "government function" exception of 18 U.S.C. § 2721(b)(1). This was especially so because the contract with the vendor actually

[5] The Fourth Circuit's opinion is notable for its complete lack of any reference at all to *Pichler VII*, in which the Third Circuit made it most emphatically clear that, in its view, the DPPA does not allow the use of personal information to identify potential litigants. *See* 585 F.3d at 751-55. In this connection, it bears mention that the panels in *Pichler V* and *Pichler VII* were completely different, *viz.*, there was no overlap in judges at all. Accordingly, the Fourth Circuit's parting of the ways with the Third Circuit is even greater than appears at first blush.

called for it to sell advertising for the purpose of raising revenue for the Massachusetts Registry of Motor Vehicles ("RMV"), but prohibited the vendor from any further disclosure of the drivers' personal information (including to the advertisers themselves). *See id.* at 20, 24-25.

The *Downing* court's holding was distilled as follows:

> The fact that no one other than the RMV and its contractor, Globe Direct, ever possesses the personal information, combined with the integrated goals of the program, including mailing the renewal notices as well as cutting the costs of and raising revenue for RMV programs, leaves us convinced that the program is a permissible government function under subsection (b)(1). And because the program is a permissible means for the use of personal information, Globe Direct cannot be liable.

Id. at 25.

The court quoted in passing from the Fourth Circuit's decision below, *see id.* at 24,[6] but *Downing* was an unremarkable application of the "government

[6] "Because the solicitation was entirely consistent with state law, was integral to, and was, indeed, inextricably intertwined with the defendants' permissible use of the Buyers' personal information pursuant to the litigation exception, the Buyers' claim fails as a matter of law." *Id.* (quoting *Maracich v. Spears*, 675 F.3d 281, 293-94 (4th Cir. 2012)).

function" exception in section 2721(b)(1). It is also materially indistinguishable (factually and legally) from the Eleventh Circuit's earlier, equally unremarkable application of the same exception in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009). Neither case informs the resolution of the "lawyer solicitation" issue framed by subsection 2721(b)(4) that this case presents.

In terms of contributing to the division of authority among the courts of appeal that we believe meets the criteria of Rule 10(a) of this Court, however, it is somewhat significant that the First Circuit was unpersuaded by the appellant's invocation of the Third Circuit's "finding" in *Pichler V* that "the DPPA contains no language that would excuse an impermissible use [union organizing] merely because it was executed in conjunction with a permissible purpose [referring to the *Pichler* defendant's attempted but misplaced invocation of the litigation exception]." *Id.* at 23 (quoting *Pichler V, supra*, 542 F.3d at 395). In other words, to the extent that the *Downing* court endorsed the Fourth Circuit's position over the Third's, the First Circuit has actually contributed to the circuit split.

3. While It Does Not Speak To The Issue In This Case Or Give Rise To Any Other Division Of Authority, The Seventh Circuit's Very Recent (And Deeply Divided) En Banc Decision In *Senne v. Village Of Palatine* Provides Another Compelling Example Of Why This Court Needs To Bring Greater Clarity To The DPPA's Litigation Exception.

Finally, and while it will probably be the subject of its own certiorari petition shortly, the Seventh Circuit's very recent en banc decision in *Senne v. Village of Palatine*, No. 10-3243, 2012 U.S. App. LEXIS 16328 (7th Cir. Aug. 6, 2012),[7] further illustrates the need for this Court's guidance in interpreting the DPPA, most particularly the litigation exception. To have generated an en banc decision by the Seventh Circuit, *Senne's* origins could hardly have been more mundane. It arose from the placement of a parking citation on the windshield of the plaintiff's car on a public way. In keeping with the routine procedure of the Village's police department, the citation disclosed "personal information" that the ticketing officer had obtained from the Illinois DMV, specifically, Senne's full name, address, driver's license number, date of birth, sex, height, and weight. 2012 U.S. App. LEXIS

[7] By sheer coincidence, the release date of the *Senne* opinion was the same as the filing deadline for the BIO, which obviously made it impossible for Respondents to direct the Court's attention to *Senne*.

16328, at *1-*4. Senne then brought a putative class action against the Village under the DPPA, contending that this "disclosure" of his personal information (and, by extension, the personal information of all others similarly situated) constituted a violation of the Act. *See id.* at *5.

The Village responded with a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., which the district court summarily granted, concluding that there had been no "disclosure" within the meaning of the statute in the first instance. *Id.* at *5-*6. A divided Seventh Circuit panel initially affirmed, *see* 645 F.3d 919 (7th Cir. 2011), but then the full court granted en banc review, which resulted in a reversal. The en banc decision, however, generated not only a majority opinion (by Judge Ripple, the panel's dissenter), but also two different dissenting opinions, one authored by Judge Posner and the other by Judge Flaum (in which Judge Posner also joined).

The Village argued that the parking ticket was not a "disclosure," but even if was, it satisfied either the "government function" exception (18 U.S.C. § 2721(b)(1)) or, as here, the litigation exception (18 U.S.C. § 2721(b)(4), specifically in that the citation constituted "service of process," which was undisputed). The Seventh Circuit majority found that the citation was a disclosure, but then, having focused on the recurring "for use" requirement in the "permissible uses" section of the statute (section

2721(b)), Judge Ripple questioned whether the personal information that the citation contained was actually "used" to effectuate what was undeniably a function of the Village's police department (i.e., issuing citations) or the service of process. *See* 2012 U.S. App. LEXIS at *27-*29. If not, a violation had occurred, but the resolution of this "use" issue required further proceedings. *Id.* at *29. Consequently, at least within the context of a Rule 12(b)(6) motion, the majority held that Senne had articulated a "plausible claim that the Village's actions failed to fulfill its statutory duties," and it reversed and remanded the district court's dismissal. *Id.* at *31.

Judge Posner's brief dissent argued, in substance, that the "litigation exception" applied by its terms, essentially because the citation constituted "service of process" in an "administrative proceeding" in a "local court." *See id.* at *33-*34. He concluded, somewhat ruefully, that under the majority's interpretation of the statute (unless reversed by this Court), "only a sucker would park legally in the Village of Palatine." *Id.* at *40.

Judge Flaum's much lengthier dissent turned on his view that while the parking citation did constitute a "disclosure" within the meaning of the Act, it was a permissible use of the "personal information" under the litigation exception. He focused on, and rejected, the majority's narrow view of the "for use" statutory language. *See id.* at *40-*55.

For present purposes, there is no reason to further expound upon the majority and dissenting opinions in *Senne*. The point is that while it is far afield from the "lawyer solicitation" issue that this case presents under the litigation exception, *Senne* amply illustrates the struggles that the lower courts have faced and will continue to face in construing the DPPA, particularly its litigation exception.

CONCLUSION

In its opinion, the Fourth Circuit referred to the "manifest tension between the solicitation and litigation exceptions under the DPPA" and to the "state of continued evolution" in the circuit courts concerning "the permissible use provisions of the DPPA." Petitioners contend that this Court should exercise its jurisdiction to relieve the perceived "manifest tension" between these two exceptions as they relate to lawyer solicitation based upon the obtainment and use of "personal information" within the meaning of the Act and that, in any event, any "continued evolution" into the allowance of such solicitation (which the Fourth Circuit has now sanctioned and which any other court persuaded by its opinion would permit) should be stopped, which is solely within this Court's

power. Accordingly, the Court should grant the Petition.

Respectfully submitted,

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