NO. _____

In the
Supreme Court of the United States

VILLAGE OF PALATINE, ILLINOIS,

PETITIONER,

v.

JASON M. SENNE,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Like many municipalities, the Village of Palatine prints a recipient's identifying information on a parking ticket before affixing it to an illegally parked vehicle to effect service of process in the administrative proceeding the ticket initiates. That kind of routine use of personal information by a state or local government has never been a subject of federal regulation. Nor did the federal Driver's Privacy Protection Act change that, for the rather obvious reasons that the Act explicitly exempts disclosure of personal information for "use in connection with any … administrative … proceeding … including the service of process" and "use by any government agency … in carrying out its functions." 18 U.S.C. § 2721(b)(1), (4). Despite the undisputed facts that the personal information here was used in issuing a parking ticket (a government function) and that the ticket effects service of process, the en banc court of appeals found those exemptions inapplicable. In the en banc court's view, Palatine's parking tickets were not "compatible with the purpose" of those exceptions because they used "too much" personal information. App. 19. As a result, Palatine faces the prospect of more than $80 million in damages for using personal information in a manner that Congress expressly excluded from the Act's reach.

The question presented is:

Whether the Driver's Privacy Protection Act interferes with such quintessentially local government functions as a municipality's decision concerning how much information to include on a parking ticket.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This case involves an $80 million federal lawsuit against a municipality based on the manner in which it discharged the most quintessentially local of government functions: the issuance and service of parking tickets. It would be more than passing strange in our federalist system to have the federal government micro-manage such a distinctly local responsibility. Fortunately, Congress itself guarded against that counterintuitive result by exempting, *inter alia*, the use of personal information for service of process and for carrying out government functions from its effort to regulate the commercial exploitation of drivers' personal information. Despite these directly on-point exemptions and the federalism-protective restraint Congress demonstrated, respondent filed suit advancing the theory that by including the recipient's identifying information on a parking ticket and then affixing the ticket to the illegally parked vehicle to effect service of process, the Village of Palatine violated the federal Driver's Privacy Protection Act ("DPPA") and should be forced to pay $2,500 in damages for each of the tens of thousands of parking tickets it issued over a four-year period.

The district court would have none of this and held respondent's theory foreclosed by the statute. A panel of the court of appeals affirmed, concluding that the Village cannot be held liable for disclosing personal information in the course of serving process when the DPPA explicitly exempts that use. But a majority of the en banc court disagreed, insisting that the fact that the information actually was used

in effecting service of process of an administrative complaint was not enough to avoid liability under the DPPA because the use must also be sufficiently "compatible with the purpose of the exception," App. 19, a standard it believed the Village could not satisfy because its parking tickets used "too much" personal information.

As the four dissenting judges correctly recognized, that conclusion is wholly irreconcilable with the unambiguous text of the statute and the respect for local government functions embodied in the DPPA. Indeed, notwithstanding his open acknowledgement that he is no "fan of literal interpretation," App. 28, even Judge Posner readily concluded that the statute cannot be read to prohibit the very disclosures Congress expressly declared permissible. And, of course, the decision below leaves municipalities at sea as to how to avoid liability, as a statute that wholly exempts government functions and service of process necessarily provides no guidance as to how much personal information is "too much" for a particular government function.

The structure and purpose of the Act reinforce the conclusion that, in regulating the commercial exploitation of drivers' personal information, Congress had no intention of micro-managing local government functions, let alone of regulating how much information could be included on a parking ticket. The DPPA was enacted to prevent the indiscriminate sale of personal information contained in state department of motor vehicle ("DMV") databases, not to regulate how States and municipalities perform core government functions

like issuing parking tickets. Congress categorically excluded such functions from the statute's reach precisely because it recognized the need to craft a careful balance between protecting privacy and protecting States and municipalities from federal interference with their quintessentially local functions. By converting the DPPA into a mechanism for exactly that kind of intrusion, the en banc court not only ignored the statute's unambiguous text and Congress' plain intent, but also created the very constitutional problems Congress sought to avoid when it disclaimed interference with state and local government functions that do not directly implicate the interstate commerce the DPPA regulates.

And the problems with the en banc decision do not end there. If Congress had undertaken the constitutionally dubious task of regulating use of personal information in carrying out state and local government functions, it at least might have provided some clear guidance as to what was permissible and what was not. The en banc decision, by contrast, creates these constitutional difficulties without providing the least bit of guidance as to how much personal information is "too much." As a result, the decision will have dramatic and immediate consequences, not just for Palatine and municipalities within the Seventh Circuit, but for governments large and small across the country. The court's narrowing purpose-based construction casts doubt on all manner of government functions, from handling FOIA requests, to processing moving violations, to filling out police reports and beyond. Indeed, any time a State or municipality uses

personal information from a DMV database in executing a government function, it will face the prospect of judicial second-guessing that it used more information than necessary to discharge the function. Municipalities should not be put in the untenable position of facing unintended liability under the DPPA while guidance slowly emerges from courts on a case-by-case basis.

The potentially crippling nature of the liability makes this Court's immediate review imperative. If the consequence of an adjudicated violation of the DPPA were simply a corrective injunction, further percolation might be an option. But, as this case amply illustrates, the application of the DPPA and its $2,500-a-violation liquidated damages provision to routine government functions creates the possibility of bankrupting liability for municipalities. The choice between modifying a local government policy and facing millions of dollars in potential liability is no choice at all. Indeed, Palatine would have been better off never issuing parking tickets at all, as the damages it now faces are *more than 100 times* the total revenue generated by the parking tickets at issue. Absent this Court's review, States and municipalities will be forced to modify—or even eliminate—core government functions to avoid the possibility of similarly devastating liability.

Left standing, the decision below thus will impose federal uniformity on state and local government functions of every stripe, even though Congress expressly avoided such federalism costs by exempting those functions from the DPPA's ambit. The DPPA was a targeted effort to regulate the

commercial exploitation of personal information in a particular type of database, not a general privacy measure that required state and local governments to retool their most basic functions—let alone to do so without clear guidance. The en banc court turned that congressional decision on its head. The court converted a statute deliberately crafted to preserve the federal-state balance into one that intrudes deeply into the discharge of local functions. The decision below threatens both crippling liability and the prospect of federal judges micro-managing the way in which municipalities serve process and conduct other quintessentially local government functions. This decision cannot stand. The Court should grant certiorari and reverse the decision below.

OPINIONS BELOW

The en banc opinion of the court of appeals is not yet reported but is available at 2011 WL 3156335 and is reproduced at App. 1–45. The panel's opinion is reported at 645 F.3d 919 and reproduced at App. 46–65. The transcript of the district court hearing on Palatine's motion to dismiss is reproduced at App. 66–71.

JURISDICTION

The court of appeals rendered its en banc decision on August 6, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Driver's Privacy Protection Act, 18 U.S.C. §§ 2721–25, is reproduced at App. 72–79.

STATEMENT OF THE CASE

A. The Driver's Protection Privacy Act

Congress enacted the DPPA to "close a loophole in State law that allow[ed] anyone, for any reason, to gain access to personal information" by purchasing it from a state DMV. 140 Cong. Rec. 7,924 (April 20, 1994) (Rep. Moran). The Act was largely prompted by the tragic murder of actress Rebecca Schaeffer by an obsessed fan who obtained her address by purchasing it from the California DMV. To prevent States from allowing would-be criminals and "stalkers to obtain—on demand—private, personal information about their potential victims," 139 Cong. Rec. 29,470 (Nov. 16, 1993) (Sen. Biden), "[t]he DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Reno v. Condon*, 528 U.S. 141, 144 (2000).

In recognition of the constitutional concerns that arise when the federal government intrudes upon matters traditionally left to state and local governments, Congress was careful to ensure that while the DPPA would limit the sale of protected information, it would not interfere with the many ways in which States and municipalities use such information when performing their own basic functions. To that end, the statute does not prohibit all disclosures of protected information, but rather makes it unlawful only for a state DMV to "knowingly disclose or otherwise make available" personal information from its database "except as provided in subsection (b)" of the statute, which delineates 14 categories of "permissible uses" for

which information may be disclosed. 18 U.S.C. § 2721(a)(1). First among them is a broad exception "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." § 2721(b)(1). In addition, the DPPA permits disclosure

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

§ 2721(b)(4) (emphasis added).

Like the provision regulating state DMVs, the DPPA's separate provision governing those who obtain or disclose information from state DMVs incorporates the same 14 exceptions, making 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). Anyone whose information is obtained or disclosed in violation of that prohibition may sue for "actual damages, but not less than liquidated damages in the amount of $2,500," and punitive damages "upon proof of willful or reckless disregard of the law." § 2724(b). Although States are exempt from that private cause of action, *see* § 2725(2), municipalities are not. And as to States, the Act authorizes civil penalties of up to $5,000 per

day against any state DMV with "a policy or practice of substantial noncompliance with" any of its provisions. § 2723(b).

As the DPPA's sponsors and supporters repeatedly reiterated throughout its consideration, the statute's broad permissible use provisions are essential to ensuring that the Act "strikes a critical balance between an individual's fundamental right to privacy and safety and the legitimate governmental and business needs for this information." 140 Cong. Rec. 7,925 (Rep. Moran); *see also* 139 Cong. Rec. 29,470 (Sen. Harkin); *id.* at 29,468 (Sen. Boxer). By "allow[ing] full access for all governmental agencies, courts, and law enforcement personnel," *id.*, the Act not only prevents interference with the vital functions of state and local governments, but also guards against imposition of potentially crippling damages based on government conduct that has nothing to do with the commercial activity Congress sought to regulate. Indeed, the exemptions ensure that the DPPA regulates commercial activity in the heartland of Congress' commerce power, rather than interfering with government uses that do not implicate commerce and raise more sensitive constitutional concerns. *See Condon*, 528 U.S. at 148 (affirming constitutionality of DPPA as a regulation of "the sale or release of [personal] information in interstate commerce").

B. The Proceedings Below

At 1:35 a.m. on August 20, 2010, a Palatine police officer issued respondent a parking citation for violating the Village's overnight parking ban and left the citation affixed to his car. *See* Complaint—Class

Action for Damages and Other Relief Under the Driver's Privacy Protection Act ("Complaint") Ex. 1 [Dkt. 1]. The standard form on which the citation was electronically printed serves as an administrative complaint, brought "In the Name and by the Authority of the Village of Palatine, Illinois, a Municipal Corporation, Plaintiff," versus "Jason M Senne," for violating section 18-86 of the Village's traffic ordinances. *Id.* In addition to naming Senne as the respondent in that proceeding, the citation lists his address, driver's license number, date of birth, sex, height, and weight. *Id.* That personal information replicates the personal information included on the uniform citation approved under the Illinois Supreme Court Rules for use in traffic violations. *See* Ill. Sup. Ct. R. 552.

The citation also states the day, date, and time of the offense and what the officer who issued the citation observed—the location of the vehicle, as well as its make, year, identification number, and license plate number and expiration date. Complaint Ex. 1. The citation instructs that the respondent may pay the $20 fine by mail or in person or, in the alternative, may request an in-person administrative hearing date within 14 days. *Id.* In accordance with Illinois law detailing how parking tickets may be served, *see* 625 Ill. Comp. Stat. 5/11-208.3, the citation also contains the issuing officer's certification by signature "that [he] served a copy of this citation by affixing it to the respondent's vehicle." Complaint Ex. 1.

Respondent discovered the citation under his windshield wiper blade about five hours after it was issued, at around 6:30 in the morning. Complaint 5

¶ 13. One week later, he responded by filing a class action complaint against Palatine, alleging that it violated section 2722(a) of the DPPA by leaving the ticket on his car after printing his personal information on it. The complaint does not allege that anyone other than respondent or the issuing officer ever saw the ticket or any of the information it contained. It instead alleges that the information was "disclosed" for purposes of the DPPA because the ticket "could have" been viewed or removed by someone passing by his vehicle. Complaint 6 ¶ 20. Respondent also sought to represent a class of all individuals whose personal information was included on a Palatine parking ticket without their consent within the four-year statute of limitations applicable to DPPA actions, and sought $2,500 in liquidated damages for each of those purported DPPA violations. Complaint 7 ¶¶ 9, 30. Respondent estimated that Palatine issued more than 8,000 parking tickets in each of those years, bringing his damages request to upwards of $80 million. Complaint 8 ¶ 31. He also sought punitive damages, attorneys' fees, costs, and equitable relief. Complaint 9 ¶ 34.

The Village moved to dismiss, arguing that respondent failed to allege any potential DPPA violation because any disclosure of his personal information in serving him with the parking ticket was for the permissible purposes of, *inter alia*, "use in connection with any civil, criminal, administrative or arbitral proceeding … including the service of process" and "use by any government agency, including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1), (4). The district court agreed and dismissed the

complaint, holding that the parking ticket was not a "disclosure" within the meaning of the DPPA, but that even if it were, it would be covered by at least the government function provision and likely "some others" as well. App. 69.

Respondent appealed, and, in an opinion authored by Judge Flaum, the court of appeals affirmed. Although the court disagreed with the district court's conclusion that no disclosure occurred, it agreed that the disclosure was for a permissible purpose "[b]ecause affixing the parking citation to Senne's vehicle constituted service of process." App. 54. In response to respondent's contention that Palatine did not need to include his personal information on the ticket to effect service, the court concluded that "[t]he statute does not ask whether the service of process reveals no more information than necessary to effect service, and so neither do we." App. 55. Judge Ripple dissented, arguing that the DPPA's permissible use provisions should be interpreted to contain an unwritten caveat that "the information disclosed under an exception must have a reasonable relationship to the purpose of the exception." App. 61.

The full court subsequently vacated the panel's opinion and granted rehearing en banc and, in a 7-4 decision authored by Judge Ripple, reversed the district court's dismissal of the complaint. The court conceded that leaving the ticket on respondent's illegally parked car "did constitute service of process in the administrative proceeding" and was "part of the function of the Village's police department," thus seemingly bringing any disclosure within two of the

DPPA's permissible use provisions. App. 24; *see* 18 U.S.C. § 2721(b)(1), (4). But the court nonetheless concluded that Palatine could not invoke either provision unless "all of the disclosed information actually *was used* in effectuating either of these purposes" because the statute should be interpreted to contain an implicit requirement that "[t]he disclosure actually made under the exception must be compatible with the purpose of the exception." App. 19, 24. In other words, information included on the ticket that was deemed superfluous to the actual service of process would constitute a DPPA violation. According to the court, that narrow reading was necessary to further Congress' "overarching purpose of privacy protection." App. 26. While the court remanded for the district court to consider whether Palatine could satisfy its new standard, it declared it "difficult to conceive, even on a theoretical level," how it could do so. App. 25.

In a dissent joined by Chief Judge Easterbrook, Judge Posner, and Judge Sykes, Judge Flaum reiterated his view that "[n]either the text nor the legislative history conveys Congress's intent to limit the information that may be disclosed in connection with a particular exception." App. 35. Recognizing the federalism implications of the majority's contrary conclusion, Judge Flaum pointed out that "[i]t is not uncommon for Congress, out of respect for our federal system, to limit its response to legitimate policy challenges." App. 40. He emphasized that "the majority makes the statute less straightforward, less predictable, and more costly to administer," as the DPPA "offers no guidance to the judges, lawyers, and public actors who will inevitably struggle to

distinguish between necessary and extraneous information." App. 41. Judge Flaum also expressed concern that "[b]y construing 'for use' to contain a limiting principle without articulating its substance," the majority's opinion "opens municipalities up to substantial liability for incorrectly predicting" whether seemingly permissible uses of personal information really are so. App. 43, 45.

Judge Posner also authored a separate dissent. While he candidly acknowledged that he is "not a fan of literal interpretation," he discerned nothing in the statute's text or its legislative history that could justify "[t]he majority's free interpretation of the Act." App. 28. As he explained, "[t]he Act does not limit disclosure that falls within one of its exceptions to what is 'reasonable' or 'necessary,' or authorize judges to impose such a requirement." App. 29. Nor, he concluded, is there any "indication that without being able to express its intention in words Congress intended to forbid police to place personal information on a parking ticket." App. 29. Noting the absence of any evidence that anyone had ever used personal information on a parking ticket to "facilitate" crime, he questioned whether it is "wise to dislocate a statute in order to solve a problem that so far as anyone knows or can guess has never arisen and will never arise." App. 30–31. Like Judge Flaum, Judge Posner lamented "the magnitude of the liability that the opinion fixes on Palatine" and "every police department in the Seventh Circuit that has done such a thing within the four-year statute of limitations." App. 32, 33.

REASONS FOR GRANTING THE PETITION

The decision below converts a statute that Congress carefully crafted to avoid impermissible interference with state and local governments into a mechanism for sweeping federal interference with matters as quintessentially local as issuing and serving parking tickets. By its plain terms, the DPPA exempts from the scope of its regulatory reach the disclosure of personal information for use in service of process and, more broadly, in carrying out all government functions. Here, there is no question that the personal information was actually used in the course of both serving process and carrying out a government function, not in some other way. That should have been the end of the matter and resulted in affirmance of the district court's dismissal of this effort to turn a $20 parking ticket into an $80 million windfall. But the en banc court nonetheless refused to dismiss the case based on its deeply misguided notion that Congress intended to bestow upon federal courts discretion to determine whether a municipality's reasons for disclosing personal information are sufficiently consistent with the DPPA's "overarching purpose of privacy protection." App. 26.

That decision is irreconcilable with the text, structure, and purpose of the statute, and raises constitutional concerns that Congress wisely and expressly avoided. The DPPA categorically exempts any disclosure of personal information "for use in … the service of process," 18 U.S.C. § 2721(b)(4), not just those disclosures that a court later deems "reasonable" or "necessary" to effect that permissible purpose. That is no accident—Congress deliberately

crafted the statute's 14 permissible use provisions broadly to avoid unintended interference with the core police powers of state and local governments. Even if there could be any doubt on that score—and there is none—the legislative history confirms Congress' desire to achieve a delicate balance between preventing commercial exploitation and preserving the discretion of state and local governments to use personal information to discharge their functions. Thus, the decision below imposes the federalism costs and raises the constitutional problems that Congress itself avoided.

The decision below also has dramatic and immediate consequences not just for Palatine, which faces an $80 million federal lawsuit for issuing parking tickets, but for every municipality that uses personal information to discharge a government function. The potential for devastating class action awards under the DPPA's liquidated damages provision forecloses the possibility of delaying review of the question presented. When the cost of misapprehending the amount of personal information that can be used in discharging a government function may be liability in the tens of millions of dollars, municipalities across the country have little practical choice but to alter their practices now. And because neither the statute nor the decision below offers any guidance as to how much personal information is "too much," municipalities will have every incentive to minimize, or even eliminate altogether, the use of such information. And all of this disruption of state and local government practices will take place in the name of avoiding liability under a statute that expressly exempts government functions. As Judge

Posner aptly put it, left standing, the decision below "is unlikely to do any good" and "is bound to do harm." App. 28. This Court should grant certiorari and restore the federalism-protective balance that Congress struck in the DPPA.

I. The Decision Below Is Irreconcilable with the Text, Structure, and Purpose of the DPPA and Violates Settled Principles of Statutory Construction.

The decision below is manifestly incorrect. There is no dispute that by leaving a parking ticket on respondent's car, Palatine was serving him with an administrative complaint for a violation of municipal law. App. 47. And there is no dispute that the personal information was actually used as part and parcel of the service of process in that administrative proceeding, not some other act. The DPPA expressly allows disclosure of personal information "for use in connection with any … administrative … proceeding, … including the service of process." 18 U.S.C. § 2721(b)(4). Palatine plainly cannot violate a statute that permits disclosure of personal information "for use in … service of process" by using or disclosing personal information to effect service of process. And since the issuance and service of parking tickets is a quintessential government function, the Village's conduct was doubly exempt. § 2721(b)(1). Thus, as the panel concluded, the fact that any disclosure was for a use that the DPPA explicitly declares "permissible" should have been the end of the matter.

The en banc court's contrary conclusion cannot be reconciled with the text, structure, or purpose of the statute. According to the court, is not enough that any

disclosure was made in the course of serving process in an administrative proceeding because the statute contains an unwritten caveat that "[t]he disclosure actually made under the exception must be compatible with the purpose of the exception." App. 19. Although the court declined to elaborate on either its conception of "the purpose of the exception" or how to go about determining what information is "compatible" with that tacit purpose, it made quite clear that it viewed some of the personal information actually included on the ticket superfluous for purposes of issuing and serving a parking ticket. Indeed, the court found it "difficult to conceive, even on a theoretical level," how Palatine could justify the inclusion of some of the information on the ticket. App. 25.

But, of course, the DPPA is not a federal statute designed to regulate what information is included on a parking ticket or service of process in an administrative proceeding. If it were, it would be an extraordinary deviation from Congress' usual reluctance to micro-manage paradigmatic local government functions, and Congress presumably would have provided clear guidance as to how to comply. In reality, the DPPA expressly exempts use of personal information in the service of process and administrative proceedings from its regulatory reach. It is thus no accident that the en banc court was unable to give municipalities any direction as to how to come into compliance with its reading of the statute. Nonetheless, the en banc court envisions Palatine paying more than $80 million for using "too much" personal information to carry out a function that Congress made a conscious and explicit decision not to regulate.

The en banc court's refusal to abide by Congress' decision is truly remarkable. If the DPPA were really a statute designed to regulate the use of personal information to serve process, Congress at the very least would have put municipalities on notice of potential liability by limiting disclosure to what is "reasonable" or "necessary" to serve process and providing some guidance as to what information is reasonable or necessary. But the DPPA does not purport to micro-manage the use of personal information to effect service of process; it exempts that function altogether. The statute categorically declares "permissible" any disclosure of personal information "for use in … service of process." § 2721(b)(4). Had Congress wanted to qualify that broad language in some way, it would have been easy enough to do so. Congress having instead chosen "the unmodified, all-encompassing" language that it did, the en banc court was "not at liberty to rewrite the statute to reflect a meaning [it] deem[ed] more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227–28 (2008); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) (refusing to interpret broad statutory language narrowly where "Congress did not add any language limiting [its] breadth"). Indeed, even Judge Posner, no unalloyed textualist, found himself unable to ascribe to "[t]he majority's free interpretation of the Act." App. 28.

Because it is so abundantly clear from the DPPA's unambiguous text that Congress did not intend to regulate the very uses of personal information it expressly declared permissible, there is no need to look any further. But settled canons of construction also reinforce the result that the plain

text compels. It is well established that to avoid both constitutional questions and the unintended reallocation of local and national functions, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *Owasso Indep. Sch. Dist. No. I-001 v. Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting [a] statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.").

There can be no serious dispute that a statute empowering federal courts to micro-manage how state and local governments issue and serve parking tickets would "effect a drastic alteration of the existing allocation of responsibilities between States and the National Government," *id.*—particularly when the consequence of employing a practice found wanting might be crippling liability or burdensome civil penalties. Such a scheme not only would risk undermining "the integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), but also would intrude deeply into matters that by tradition, if not constitutional command, have always been within the exclusive province of governments closer and more responsive to the people. Of course, the real problem with the en banc court's analysis here is its failure to heed Congress' clear textual statement that it did not want to get into the business of affecting the service of process or other government functions at all. But the court's failure to even acknowledge

the need for a "clear statement [that] assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved," *Bass*, 404 U.S. at 349, is a further sign that something was seriously amiss.

To be sure, Congress plainly intended the DPPA to regulate States and municipalities when they choose to engage in "the sale or release of [protected] information *in interstate commerce*." *Condon*, 528 U.S. at 148 (emphasis added). But Congress was well aware of the need to tailor that regulatory scheme to avoid federal interference with the many uses of personal information by state and local governments that have nothing to do with interstate commerce or matters of federal concern. The extent to which state and local governments respect their citizens' privacy in carrying out quintessentially local functions—as opposed to in the course of commercial transactions—is not an obvious source of federal concern or power. Moreover, attempting to micro-manage how much information is included on a local parking ticket would be a radical change in Congress' normal reluctance to intrude upon such matters. "Rather than expressing a desire to readjust the federal-state balance" to such an extreme degree, the DPPA confirms that "Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States" and municipalities. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (internal quotation marks omitted).

There is no better illustration of that than the very first of the DPPA's exemptions, which declares

permissible the disclosure of personal information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1). Congress could not have been clearer in conveying its intent to ensure that the DPPA's restrictions on commercial use of protected information would not infringe on the traditional discretion of States and municipalities to use that information as they see fit when carrying out the vast array of government functions they perform. Yet instead of applauding and applying Congress' admirable exercise of restraint, the en banc court interpreted the DPPA to interfere with the very state and local government functions Congress clearly left undisturbed.

Contrary to the en banc court's contention, the structure of the Act only underscores how erroneous that conclusion is. The DPPA is not a broadly applicable attempt to protect privacy or deter identity theft by regulating release of personal information from the many kinds of databases in which it might be stored. Rather, it targets information in one particular type of state database that had been abused in a specific manner that produced tragic results. Far from evincing Congress' intent "to prevent all but a limited range of authorized disclosures" of that information, the "overall statutory scheme," like the text of the DPPA, confirms precisely the opposite: Congress sought to *permit* all but a limited range of *un*authorized disclosures. App. 17. That much is apparent from the sheer breadth of the Act's 14 permissible use provisions, which, in addition to explicitly covering service of process in administrative proceedings (the

precise activity at issue here), cover everything from "operation of private toll transportation facilities," to "research activities," to all manner of activities relating to ongoing or anticipated litigation, to the catch-all "any other use specifically authorized under" state law that "relate[s] to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(4), (5), (10), (14).

The DPPA's liability provision also underscores Congress' intent to provide broad protection for activities outside the scope of the Act's limited purpose. Rather than require a defendant to prove that a disclosure was for a permissible use, Congress made the lack of a permissible purpose an element of a statutory violation, thus rendering it the plaintiff's burden to prove that a challenged disclosure was for a "use *not* permitted under section 2721(b)." § 2722(a) (emphasis added); *see, e.g.*, *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,* 525 F.3d 1107, 1112 (11th Cir. 2008); *Taylor v. Acxiom Corp.*, 612 F.3d 325, 335 (5th Cir. 2010). In short, like the text, the structure of the Act confirms that Congress meant to accommodate, not interfere with, the vast array of government and other uses it declared permissible.

Of course, "recourse to legislative history" is "futile" when Congress' intent to alter the federal-state balance "is not unmistakably clear." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). But the legislative history conclusively refutes any suggestion that Congress intended the kind of federal court meddling that the decision below facilitates. The record is replete with statements stressing the need to craft the

permissible use provisions "broadly, [to] includ[e] all the duties of Federal, State, and local law enforcement agencies and courts." 140 Cong. Rec. 7,929 (Rep. Goss); *see also, e.g.*, *id.* at 7,925 (Rep. Moran) (emphasizing that Act "authorizes unlimited access to personal information for courts, law enforcement, governmental agencies"); 139 Cong. Rec. 29,697 (Sen. Harkin) (emphasizing that "law enforcement agencies have unrestricted access to this information in carrying out its functions"); *id.* at 29,470 (Sen. Biden) (emphasizing that Act is "narrowly tailored in that it carefully preserves the right of States to disseminate this private information for legitimate purposes").

By contrast, there is not a single statement so much as hinting at the possibility that any government function—let alone a function that, like service of process, Congress *explicitly* exempted—would remain subject to some implicit, undefined measure of oversight by the federal judiciary to ensure local law enforcement officials did not disclose "too much."[1] Surely had Congress intended the

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[1] The en banc court made much of Senator Harkin's remark that the government function provision "is not a gaping loophole in this law." 139 Cong. Rec. 29,697. But as he went on to explain, his concern was that law enforcement officers might make "false representation[s] that this information will be used for law enforcement purposes," *id.*, not that States or municipalities might disclose more information than he or a federal court thought appropriate. Indeed, Senator Harkin made clear that his "strong support for this legislation [wa]s premised on the belief that its implementation will not in any way undermine law enforcement or community policing efforts." *Id.*

DPPA to effect such "a drastic alteration of the existing allocation of responsibilities between States and the National Government," *Owasso Indep. Sch. Dist.*, 534 U.S. at 432, at least one member of Congress would have mentioned as much—especially given the potentially devastating financial consequences. That Congress quite clearly neither envisioned nor intended such a result makes it all the more imperative to reject any reading of the statute that is "inconsistent with [its] limited purpose and would further expand federal law into a domain traditionally reserved for the States" and local government. *Mac's Shell Service, Inc. v. Shell Oil Prods. Co. LLC*, 130 S. Ct. 1251, 1259 (2010).

If all that were not reason enough to defeat the en banc court's untenable interpretation of the statute, the same constitutional avoidance principles underlying the clear statement rule provide an independent basis for doing so. *See Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). When this Court rejected a facial challenge to the DPPA in *Reno v. Condon*, it did so with the explicit caveat that it was willing to treat personal information stored in DMV databases as "an article of commerce" subject to federal regulation only in the limited "context of this case," which involved the "sale or release of that information *in interstate commerce*." 528 U.S. at 148–49 (emphasis added). It is one thing to conclude "'[t]hat a State wishing to engage in" inherently commercial "activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity.'" *Id.* at 150–51 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)). It is another

thing entirely to conclude that Congress may regulate States or municipalities when they use personal information to carry out core, non-commercial government functions like issuing parking tickets.

Needless to say, the Court had no reason to reach that question in *Condon* because it correctly recognized that the DPPA does not reach that far. *See id.* at 145 & n.1 (detailing statute's permissible uses). By interpreting the statute to regulate States and municipalities in ways that neither Congress nor this Court in *Condon* ever envisioned, the en banc court violated the cardinal rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency*, 531 U.S. at 173 (internal quotation marks omitted).

In short, the decision below converts a statute that expressly disclaims interference with the workings of state and local governments into a mechanism for sweeping federal intrusion into even the most local of government functions. That result is irreconcilable with the text, structure, and purpose of the DPPA, not to mention constitutionally compelled canons of construction. Congress did not impose any implicit limits on the use of personal information for the purposes it expressly declared permissible. This Court should grant certiorari and reverse the en banc court's erroneous conclusion to the contrary.

II. The Decision Below Will Have Dramatic and Immediate Effects on States and Municipalities Throughout the Nation.

As the dissenting judges emphasized, the majority's reading of the DPPA is extraordinarily disruptive not just for Palatine, but for state and local governments everywhere. Not only does the decision below retroactively rob States and municipalities of the straightforward exemptions Congress granted them, thereby exposing them to liability for conduct they had every reason to believe was lawful when undertaken. It also leaves them guessing as to how much information will be considered "too much" when it comes to uses Congress expressly allowed, and thus as to whether seemingly permissible uses of personal information will in fact be deemed so.

But what makes this Court's review truly imperative is the interaction between the en banc decision and the potentially crippling liability the DPPA imposes on municipalities. If the only consequence of including "too much" information in effecting service of process or discharging another government function were a corrective injunction, then perhaps further percolation would be an option. But when the consequences include the potential for tens of millions of dollars in liability, governments across the Nation have little realistic choice but to begin to alter their government policies now in order to avoid the potential for ruinous liability. In other words, the prospect of runaway DPPA liability is forcing governments to alter the very government policies that Congress expressly disclaimed any

interference with when it exempted them from the DPPA. This Court's review is critical.

The circumstances in this case provide a vivid illustration of the enormous practical consequences of the erroneous decision below. Respondent seeks to represent a class of all parking ticket recipients over a four-year period, which he estimates will number more than 32,000. For each of those recipients whose ticket included any identifying information whatsoever, App. 32, respondent seeks "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). The typical fine for a parking violation in Palatine is $20. Accordingly, the Village now faces potential liability in excess of $80 million—more than 100 times the total revenue generated by all 32,000 parking tickets combined—for discharging the quintessentially local function of issuing parking tickets. *See* App. 32 ("little Palatine (its population roughly one-fortieth that of Chicago) faces … a potential liability of … more than $1,000 per resident"). Unsurprisingly, the Village has already altered its method of issuing parking tickets, rather than risk the possibility of facing a never-ending succession of $2,500 damages claims for every $20 ticket it issues.[2]

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[2] Palatine does not concede that liquidated damages would be available in this case. As Justices Scalia and Alito have noted, it is an open question whether a plaintiff must prove actual damages to recover under the DPPA's liquidated damages provision. *See Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari). But it is the potential for—not the certainty

Palatine is certainly not the only municipality that has included the recipient's identifying information on a parking ticket within the DPPA's four-year statute of limitations—particularly since the plain text of the statute led municipalities to believe that it was perfectly permissible to do so. Thus, "every police department in the Seventh Circuit that has done such a thing" could face similarly massive liability for discharging a function expressly exempted by the statute. App. 32. And similar lawsuits are sure to pop up in other jurisdictions throughout the Nation. But more than just the threat of needless and crippling liability, the real problem justifying this Court's immediate intervention is the prospect that municipalities across the Nation will modify the very policies Congress sought to leave untouched in an effort to avoid being sued for a DPPA violation. Absent this Court's review, the decision below will effectively become the de facto law of the land, as municipalities will be loath to take any chances that carrying out a core government function could result in damages in the tens of millions of dollars.

While it would be absurd enough if the DPPA had the unintended consequence of prescribing a

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of—truly astronomical damages for discharging routine government functions, which by virtue of being routine raise the prospects of numerous violations, that will suffice to cause jurisdictions to reconsider policies Congress expressly exempted. No jurisdiction would rationally risk crippling liability in hopes that it could persuade a court that actual damages must be proven.

uniform national rule for the content of parking tickets, that is far from the only unintended consequence of the decision below. The en banc court did not stop at imposing its amorphous purposive test on the DPPA's service of process provision. According to the court, *all* of the statute's permissible use provisions are subject to the same unwritten caveat that "[t]he disclosure actually made under the exception must be compatible with the purpose of the exception." App. 19. As a result, *no* disclosure that a State or municipality makes "in carrying out its functions," 18 U.S.C. § 2721(b)(1), is safe from the DPPA's reach. To make matters worse, the court's inevitable refusal to articulate any clear standard for how much personal information is "too much" leaves States and municipalities guessing as to whether their justifications for disclosing personal information must be rational, reasonable, or something more still.[3] And jurisdictions will have little choice but to err on the side of altering the way they discharge their functions in order to minimize the potential for DPPA liability.

These concerns are not hypothetical. Since the en banc court's decision came down, States and municipalities have been trying to discern whether a whole host of routine activities long considered wholly unaffected by the DPPA might in fact subject

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[3] This refusal was inevitable because a statute that expressly exempts service of process and government functions necessarily "offers no guidance to the judges, lawyers, and public actors who will inevitably struggle to distinguish between necessary and extraneous information." App. 41.

them to civil penalties or onerous liability. Among the many issues the decision below implicates are whether personal information must be redacted from police reports and similar documents subject to disclosure under federal and state freedom of information acts, what information may be disclosed when informing the public about the search for or arrest of suspected criminals, and whether police departments may still disclose personal information to outside vendors like CARFAX and LexisNexis. And that is just a small sample of the questions States and municipalities have been struggling to answer since the en banc court converted the DPPA into a mechanism for federal oversight of their government functions.

Injecting that kind of uncertainty into the day-to-day operations of state and local governments is bad enough under any circumstances. But it is wholly unacceptable when the statute properly understood exempts those government functions and the consequence of guessing wrong might be tens of millions of dollars in damages. And it is all the more problematic in the context of a statute that has already been a source of confusion for lower courts. Indeed, this Court just recently granted certiorari to resolve a split of authority regarding the scope of the DPPA's provisions permitting use of personal information in connection with litigation and for solicitation with express consent, 18 U.S.C. § 2721(b)(4), (12). *See Maracich v. Spears*, No. 12-24, cert. granted Sept. 25, 2012. Like most of the issues involving interpretation of the DPPA's permissible use provisions, that issue has already prompted litigation against government actors. *See, e.g.*, *Rine v. Imagitas,*

Inc., 590 F.3d 1215, 1224 (11th Cir. 2009) (rejecting argument that solicitation provision prohibited contractor hired to perform government function of sending out registration renewal forms from including advertisements in those mailings without express consent).

Because resolution of the question presented in this case is of pressing importance to state and local governments throughout the country, and because the mere threat of massive liability will cause jurisdictions to reconsider functions Congress itself exempted from the DPPA, Palatine believes the Court should grant certiorari now to put an end to the uncertainty that the decision below creates. But at a bare minimum, the Court should consider holding this case pending resolution of *Maracich,* particularly since the litigation exception at issue in *Maracich* is found in the same provision as the service of process exception. *See* 18 U.S.C. § 2721(b)(4). Thus, if the Court is not inclined to grant certiorari outright at this time, it should wait and see what impact resolution of *Maracich* has before deciding what ultimate course of action to take. In all events, whether by granting outright or by vacating and remanding for reconsideration in light of *Maracich*, this Court should not allow the deeply flawed decision below to stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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