NO. 12-573

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

REPLY BRIEF FOR PETITIONER

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January 2, 2013

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REPLY BRIEF

Respondent's brief in opposition largely ignores the startling reality that, with the blessing of the en banc Seventh Circuit, he is actively seeking $80 million in damages against a municipality for discharging the quintessentially local function of issuing parking tickets. Instead, respondent contends that review would be premature because he does not yet have an $80 million final judgment in hand. But respondent's suggestion that plenary review can wait ignores two critical facts.

First, the Seventh Circuit has remanded for an inquiry that is totally unnecessary under the statute and totally unguided by any statutory text. Recognizing the potential for interference with matters of traditional state and local concern inherent in the Driver's Privacy Protection Act ("DPPA"), Congress expressly exempted a variety of state and local government functions, including service of process. And no one disputes that parking tickets effect service of process. That should be the end of the matter, but the en banc court has remanded for an inquiry into whether the extent of Palatine's use of personal information was appropriate in the totality of the circumstances. There is certainly no reason to defer this Court's review for an amorphous inquiry that is wholly unnecessary under—and, a fortiori, wholly uninformed by—the statute Congress actually passed.

Second, respondent's plea for delay ignores the reality that a certainty of $80 million in damages is not necessary to cause States and municipalities

fundamentally to reorder their government operations in ways Congress never intended. Even the threat of $80 million is quite sufficient, as numerous *amici* have attested. No rational municipality would risk a $2,500 damages award for serving process to collect for a $20 parking violation. And the potential impact of the Seventh Circuit's decision and its threat of ruinous liability extends far beyond parking tickets. In short, the decision below converts a statute designed to protect the federal-state balance into a mechanism for precisely the sort of federal interference with quintessentially local matters Congress sought to avoid. The decision is having immediate real-world effects, and there is no prospect that the en banc court will revisit its erroneous decision. The need for this Court's review is imperative, and the time for that review is now. The Court should grant certiorari.

I. The Decision Below Is Wrong and Should Not Be Allowed to Stand.

Respondent does not meaningfully respond to Palatine's argument that the decision below converts the DPPA into a mechanism for federal interference with quintessentially local government matters that Congress expressly declared outside the statute's reach. Respondent does not even acknowledge that the DPPA explicitly permits use of personal information for "service of process," 18 U.S.C. § 2721(b)(4), let alone attempt to explain how Palatine could have violated the statute when it is undisputed that issuing a parking ticket constitutes service of process and Palatine used the information only in the course of serving process to initiate a legal

proceeding. Nor does respondent deny that using personal information in the course of issuing and serving a parking ticket constitutes "use by any government agency … in carrying out its functions," § 2721(b)(1). Respondent instead simply insists that, notwithstanding Congress' efforts to exclude service of process and government functions from the DPPA's reach, the statute should be understood to implicitly grant courts "discretion … to consider the facts and circumstances" surrounding the use of personal information to discharge those functions. Resp. Br. 14.

If that test sounds amorphous, it is with good reason. The DPPA exempts the use of personal information when used to effect service of process. It provides no yardstick to determine whether the use of some information in the process of effecting service of process is superfluous or unnecessary. And while the en banc court insisted that there must be some inquiry beyond whether the information was used in the course of serving process, it expressly declined to give content to the inquiry and denied it was imposing a requirement that the information used be necessary to discharge the government function. Pet. App. 20 n.12. In short, the en banc court remanded for a nebulous inquiry that is neither required nor informed by the statute Congress actually passed.

For all the reasons already set forth in Palatine's petition (at 16–25), the Seventh Circuit's conclusion is irreconcilable with the text, structure, and purpose of the DPPA. In arguing otherwise, respondent makes the same mistake as the en banc court, proceeding as if the DPPA were a general privacy

protection statute that should be interpreted to further privacy interests at all costs. *See, e.g.*, Resp. Br. 10–11. That is not the kind of statute Congress envisioned or enacted when it undertook the constitutionally delicate task of regulating how States use information in their own department of motor vehicles ("DMV") databases. In fact, Congress designed the DPPA to achieve a careful balance between protecting privacy and avoiding federal interference with the many legitimate and essential uses to which States, municipalities, and other authorized users put that information. And it did so by including a broad range of permissible use provisions that must be interpreted with that federalism-protective intent in mind. Converting the DPPA into a means of regulating something as paradigmatically local as what information a municipality includes on parking tickets is not remotely consistent with Congress' intent, let alone with the principle that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Respondent suggests (at 15) this Court should ignore the federalism and constitutional implications of the decision below because the en banc court did not directly address constitutional issues. But the merits of the en banc court's textually unsustainable interpretation of the DPPA were squarely before the Seventh Circuit, and constitutional avoidance principles are always relevant to the enterprise of correctly interpreting a statute. *See Clark v.*

Martinez, 543 U.S. 371, 380–81 (2005). It was thus "incumbent upon the" en banc court "to be certain of Congress' intent before finding that" the DPPA "overrides" the federal-state balance. *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). More generally, courts should always work to interpret a statute to avoid doubts about its constitutionality, even when that interpretation is not the most obvious reading of the law. Here, the interpretation that avoids all constitutional doubt is plain on the face of the statute. By exempting local government functions generally and service of process in particular from the DPPA, Congress avoided all possibility of constitutional doubt or upsetting the federal-state balance. Rather than adopt that straightforward and constitutionally unproblematic construction, the Seventh Circuit converted the DPPA into exactly the sort of intrusion into state and local government that Congress sought to avoid.

Instead of addressing head on those fatal flaws in the en banc court's reasoning, respondent attempts to prove that the court's atextual construction of the statute serves useful purposes by embarking on a lengthy detour through cases in which a handful of police officers used DMV information to stalk or harass people. Resp. Br. 11–13. But those cases lend no support to the imposition of an amorphous totality-of-the-circumstances overlay on the DPPA's permissible use provisions, as the statute Congress actually enacted already addresses the situations in those cases. Unlike serving process and issuing parking tickets, stalking or harassing a civilian plainly is not a government function. The courts in the cases respondent cites thus imposed liability for

using protected information for an *impermissible* use, not because they believed, as the Seventh Circuit did here, that information used for a *permissible* purpose was somehow superfluous, unnecessary, or inappropriate in the totality of the circumstances to the proper discharge of that permissible purpose. Those cases thus only underscore that the en banc court's misguided interpretation is wholly unnecessary. Indeed, most persons who abuse access to DMV information in that manner will have doubly violated the statute, for the DPPA also prohibits "any person" from "mak[ing] false representation to obtain" personal information. 18 U.S.C. § 2722(b).

In short, nothing in respondent's brief refutes Judge Posner's warning that the decision below "is unlikely to do any good" and "is bound to do harm." Pet. App. 28. This Court should grant certiorari.

II. State and Local Governments Are in Need of this Court's Guidance Now.

The erroneous decision below is having dramatic and immediate effects on Palatine and municipalities across the country *right now*. Accordingly, there is no reason to delay relief while the district court assesses liability under a nebulous totality-of-the-circumstances standard that the DPPA neither requires nor informs. Because Congress never intended municipalities to be held liable for using DMV information to serve process or discharge other government functions, the statute provides no guidance whatsoever for courts to assess whether the manner in which a municipality issues parking tickets or performs other government functions involving such information is sufficiently "compatible with the

purpose of the" DPPA's permissible use provisions. Pet. App. 19. And the en banc court expressly declined to fill that gap, and went out of its way to deny that it was adopting any recognizable standard like necessity, thus leaving courts and municipalities entirely in the dark as to what it takes to avoid liability. There is certainly no reason to defer review to permit an inquiry that is both amorphous and wholly unnecessary under the statute Congress actually passed. Given the potential for massive awards under the statute's liquidated damages provision, this Court's review is needed now to prevent municipalities from being forced to alter core government functions rather than expose themselves to bankrupting DPPA liability that Congress never intended.

Respondent attempts to downplay the wide-ranging impact of the decision below by insisting that only Palatine faces the prospect of massive liability based on the manner in which it issued and served parking tickets. In fact, Palatine has identified numerous jurisdictions throughout both the Seventh Circuit and the rest of the country that include the recipient's identifying information on their parking tickets, which is hardly surprising given that many States have authorized local governments to issue parking tickets on uniform traffic citation forms nearly identical to the one Illinois approved and Palatine used. *See Amicus* Br. for International Municipal Lawyers Association and National League

of Cities ("IMLA Br.") 7–9 & n.2.[1] Tellingly, respondent provides no support for his contrary claim other than the observation that his lawsuit was unprecedented. *See* Resp. Br. 3–4. But the novelty of respondent's lawsuit reflects not the uniqueness of Palatine's practices, but the reality that up until the en banc decision everyone had assumed Congress meant what it said when it exempted government functions generally and service of process in particular from the DPPA's reach. By ignoring the result that the statute plainly compels, the en banc court has opened the floodgates to copycat class action suits throughout the country.[2]

Respondent also ignores entirely the effect of the decision below on myriad other heretofore-permissible uses of personal information. As Palatine explained in its petition (at 29–30), the en banc court imposed its amorphous purposive overlay

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[1] In fact, recent rules enacted by the Illinois Supreme Court appear to *require* inclusion of the recipient's name and address on a parking ticket. *See* Ill. Sup. Ct. R. 572–73; *Amicus* Br. for Illinois Association of Chiefs of Police *et al.* 11–12 & App. 48–55.

[2] Respondent suggests (at 8) Palatine conceded at oral argument before the en banc court that no other jurisdiction follows the practice Palatine did, but Palatine in fact admitted nothing more than that although it had confirmed that other municipalities have included personal information on their parking tickets, it was not sure whether others included precisely the same information Palatine did. Palatine has since been able to confirm that it was not alone in including all the same personal information that has been approved for inclusion on traffic citations in Illinois. Pet. 9.

on each and every one of the DPPA's permissible use provisions, thus sanctioning judicial second-guessing of how much information is "too much" any time a State or municipality discloses any personal information obtained from a DMV database—including even just an individual's name—in the course of carrying out its functions. As a result, "local governments seeking to avoid massive liability will need to undertake compliance reviews and then potentially revise a variety of practices, including the drafting of police and accident reports, the compilation of driving records, and the policing of moving violations." IMLA Br. 8. States and municipalities have also been left with no choice but to reassess how to respond to the thousands of annual requests they receive under federal and state freedom of information statutes, as well as whether and how to comply with various state open records laws. *See, e.g.*, *Amicus* Br. for Illinois Association of Chiefs of Police *et al.* 8–12; IMLA Br. 8–9. There is simply no reason to force state and local governments to start making decisions Congress never dreamed the DPPA would require while the district court engages in an inquiry that the statute neither permits nor provides the tools to perform.[3]

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[3] Respondent suggests (at 8) States are not impacted by the decision below because they are exempt from the DPPA's civil cause of action, but he overlooks the fact that the Act authorizes civil penalties against any state DMV with "a policy or practice of substantial noncompliance with" any of its provisions. 18 U.S.C. § 2723(b).

Respondent emphasizes that at this juncture Palatine faces only the prospect, not the certainty, of an $80 million judgment. But that lack of certainty is no reason to delay review, for the mere threat of devastating liability is more than sufficient to cause state and local governments to modify core government functions *now* rather than take their chances on convincing a court that the statute's liquidated damages provision does not apply. Palatine is the perfect example—it changed its method of issuing and serving parking tickets after respondent filed suit not because its practice of including the recipient's identifying information was unnecessary or superfluous, but because no rational municipality would continue to risk $2,500 in damages for issuing a ticket for a $20 parking violation. And the prospect that, with the en banc court's blessing, respondent may succeed in his claim for $80 million in damages has already forced Palatine to reduce or eliminate funding for necessary improvements to its sidewalks and streetlights and delay much-needed renovations to its village hall. And even with substantial cuts to its $105 million total annual budget, Palatine could not begin pay off an $80 million judgment without imposing devastating tax increases on its residents, meaning the Village will have no choice but to resort to bonding, with a resulting debt in excess of its entire budget. Moreover, because Palatine, like most municipalities, pools its risk management and financing with other local governments, the astronomical liability it faces will impact those municipalities as well. *See Amicus* Br. for Association of Governmental Risk Pools 3 (noting "immediate and overwhelming" impact of $80 million

judgment on public risk pools, which are primary means by which local governments assess, manage, and insure against liabilities).

Those substantial and immediate impacts on Palatine and countless other municipalities make this case a much stronger candidate for certiorari than previous DPPA petitions. Indeed, that two members of the Court have already described the "enormous potential liability" as "a strong factor" supporting review in DPPA cases, *Fidelity Federal Bank v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring in denial of certiorari), only underscores that state and local governments would have little choice but to alter core functions Congress never intended to regulate if this Court allows the issue to percolate. That consideration was not present in cases the Court previously declined to review, as they did not involve municipalities or the disruption of government functions that makes the need for review so urgent here.

Moreover, those cases involved questions about the DPPA's damages provisions, not its liability provisions. While it makes sense to delay consideration of a damages question in a case in which liability has not yet been established, the cert-worthy question here is the one already decided by the en banc court concerning the scope of the government functions and service of process exemptions. The fact that Palatine will face trial under an amorphous test based on conduct Congress clearly intended to exempt is reason enough to grant review now. That Palatine and other jurisdictions face the prospect of crippling liability if a court

ultimately second-guesses the extent to which they used DMV information is a compelling reason why review simply cannot wait. At the very least, the Court should hold this case pending resolution of *Maracich v. Spears*, No. 12-25, cert. granted Sept. 25, 2012, which involves one of the same provisions at issue here and many of the same arguments about how the DPPA's permissible use provisions should be interpreted. While Palatine believes the better course is to provide States and municipalities much-needed relief from the erroneous decision below now, at a bare minimum, the Court should wait and see whether its resolution of *Maracich* warrants vacating and remanding for reconsideration.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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