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

BRIEF FOR FOR THE ASSOCIATION OF GOVERNMENTAL RISK POOLS ("AGRIP") AS *AMICUS CURIAE*, SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The *Amicus Curiae*, the Association of Governmental Risk Pools ("AGRiP"),[1] is a not-for-profit membership association of public entity risk and benefits pools. Organized in 1998, it succeeded the Pooling Section of the Public Risk Management Association which had existed for nearly 20 years. Public entity pools are generally non-profit, inter-local cooperatives, often formed under special legislation or through joint powers agreements, to provide risk management and risk financing services (in lieu of traditional commercial insurance) to local public entities. AGRiP is the only nationwide organization, representing these pools, whose purpose is to promote, educate, and advocate on behalf of pools. With approximately 480 public entity risk pools or trusts in the nation, 200 of which are active AGRiP members, pooling is the predominant form of risk management and risk financing owned and used by cities, counties and towns. AGRiP estimates that 30,000 such municipal entities participate in pools. Through joint and several agreements amongst the member entities, these pools often indemnify their members for liabilities that arise as a result of their policing powers,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention. The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

including the power to write parking tickets. AGRiP is, therefore, affected by the *en banc* decision.

Pools, formed to help local public entities improve their risk management as a more cost effective source of 'insurance," generally do so by socializing risk, in that the loss to one entity becomes the loss of all. Furthermore, although some pools may carry excess insurance or reinsurance, the cost and availability of this resource diminishes as a result of material changes in risk, such as that implied by the *en banc* decision. Other pools, suffering particularly high judgments, may have these liabilities fall back on the members after exhaustion of the excess coverage.

One function of AGRiP is to support pooling as a practical extension of a local government's obligation to be a good steward of public funds. The Village of Palatine is a member of such a pool, and that pool is a member of AGRiP. Another function of AGRiP is to provide information regarding issues affecting intergovernmental pools. Although AGRiP does not make a regular habit of filing *Amicus* briefs, AGRiP is interested in the final decision in this case. The disastrous affect that an unexpected and unpredictable judgment against just one pool member can have on many others linked together financially in an inter-local pool could prove devastating.

Since AGRiP is comprised of pools, and pools are comprised of many entities, this *Amicus* brief represents the interests of literally thousands of governmental entities. And, because pool members are financially bound together, the financial aspect of a

class action, such as that at bar, ripples throughout local governments far beyond the immediate defendant.

The financial threat to governmental risk pools and their member public entities is particularly great in this case, which deals with an after-the-fact judicial construction of a statute relating to ticket summonses or notices to appear issued from standard form books in great numbers. Summonses and notices have been used historically in a manner to ensure that the correct person has been effectively summoned. The notion that this activity – performed perhaps millions of times a day throughout the country - could give rise to liabilities and damages assessed against taxpayers - through their public entity and the pool that responds to such a claim - is chilling.

Consequently, because the *en banc decision* addresses more than a unique instance of action by a single municipality (indeed an historic practice hitherto viewed as a perfectly responsible part of day-to-day operations of local government carried out by thousands of governmental entities across the Country), it can be particularly devastating if permitted to stand. Indeed, the resulting financial havoc could wreck governmental pools (and drain their contributing constituent members, which are in fact taxpayer-supported public entities). This adverse financial impact on governmental liability pools is so likely to be immediate and overwhelming that AGRiP felt compelled to support the grant of certiorari.

Additionally, AGRiP is concerned that the after-the-fact judicial weighing of the appropriateness of the information contained in each kind of ticket/summons

or notice to appear to the particular function (suggested by the Court *en banc)* will create a paralyzing uncertainty for the pool members regarding how to proceed in the future. It exposes the pools to great unfunded liabilities - the costs associated with litigating federal claims – and promises financial instability and unpredictability that will ultimately destabilize the pooling industry, impairing its ability to provide the valuable services they now provide to local public entities. It is for these reasons, AGRiP has chosen to support the Village of Palatine's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

This case rests on an exemption from the disclosure restrictions imposed by the federal Driver's Privacy Protection Act ("DPPA"). 18 U.S.C. §2721. This exemption regards conduct that would otherwise be considered criminal and is, consequently, written in a categorical manner. It exempts all disclosure

> in connection with any civil, criminal, administrative or arbitral proceeding in any...State or local court or agency...including service of process....

18 U.S.C. 2721(b)(4).

Both the District Court, in dismissing the Complaint, and the Seventh Circuit panel, in affirming the dismissal, agreed that this exemption as enacted is categorical. The Seventh Circuit's *en banc* decision, however, under the guise of statutory construction, departed from the exemption's categorical language,

and imparted to it unexpressed qualifications and shadings. It was not reasonably foreseeable by Palatine and other local governments, given a literal reading of the exemption. The financial impact on local government entities that issue summonses and their respective taxpayers throughout the Seventh Circuit's territory, and probably nationally, stemming from this unexpected *en banc* decision will be overwhelming if not calamitous – *e.g.*, it is projected that it could reach $80 million for Palatine alone.

Nevertheless, the *Amicus* recognizes that this is not a court concerned merely with error correction. It is the Nation's constitutional court. And, constitutional grounds there are. Certiorari should be granted to review the *en banc* decision not only because of its circuit-wide, and, indeed, nationwide, impact, but also because of the many constitutional challenges and infirmities the *en banc* decision opens up DPPA to.

The *Amicus* agrees with the points made by the Village of Palatine. There are, however, other ramifications of the Seventh Circuit's *en banc* decision not yet focused on. One is the source of congressional power to enact DPPA, and whether the Seventh Circuit's interpretation results in DPPA exceeding Congress' authority.

The source of Congress' power to enact DPPA is to be found in the Interstate Commerce Clause of the United States Constitution. But, a summons or notice to appear issued by a local authority with respect to a local proceeding for a geographically local offense committed at the locale against a local law (*e.g.*, a

parking ticket) is not a matter in interstate commerce. Congress understood this.

Congress limited its enactment by removing the possibility of such an application by a categorical exemption. The Seventh Circuit's *en banc* decision unthinkingly and improperly backs into extending DPPA to purely local conduct creating a constitutional infirmity, or at least a serious federal constitutional question (something courts are to avoid).

The Seventh Circuit's *en banc* decision also lost sight of the fact that DPPA is a criminal statute. 18 U.S.C. §2721. It is no less criminal because individuals can also make a private claim for its violation. The language of a single criminal statutory provision does not change its meaning because of who is bringing the action or for what relief. The identical language governs both. Provisions which establish particular conduct as criminal must be clear and certain so that all may foreseeably know what conduct has been made unlawful. Criminal laws are not to trap the unwary or to become known only *ex post facto*.

Also, criminal sanctions and liquidated damages per occurrence should not be a matter left to serendipity. What is considered criminal should not be a matter of patchwork across the nation as the result of possible disagreements among the circuits. There should be only one universal criminal law binding on all.

Congress enacted a criminal statute with a clear and definite categorical exemption. Only the Seventh Circuit's *en banc* decision introduces uncertainty, leaving municipalities and other law enforcement

agencies *in terrorem* and subject to grave liability based on an after-the-fact evaluation as to whether in the particular instance their conduct was exempt or criminal.

A third constitutional issue arises as well. Unlike Congress' chosen language, the Seventh Circuit's *en banc* decision promotes, if it does not itself bring, excessive federal entanglement with the local affairs of the States and their subdivisions and agents, many of which issue tickets for non-moving offenses. This is inconsistent with maintaining a federal structure and order, and with comity between sovereigns.

The impacts of the Seventh Circuit's *en banc* departure from the categorically worded exemption will be financially severe on State subdivisions and agents. The statutory "liquidated damages" penalty sum for a violation of DPPA is $2500 per occurrence (*e.g.*, per ticket). Tickets are printed forms, so a violation, if found, will virtually always be committed in large multiples. The Village of Palatine alone faces an exposure of millions of dollars. If the Seventh Circuit's *en banc* holding, that a claim has been stated upon which quasi-criminal "liquidated damage" penalties will be imposed, is left unreviewed, tickets and notices to appear, that were previously routinely and naturally used within the Seventh Circuit, will establish wide liability which will cost local governments (even within the statute of limitations) tens of millions of dollars, and potentially billions nationally.

Municipalities and other local law enforcement agencies, which use parking regulations to maintain a fair use of public facilities, will be defenseless because

the conduct for which they will now be held liable has already taken place. The die has been cast. The plaintiffs' bar can grab millions away from public service and safety and transfer it to their private hands, the hands of likely law breakers who have not been actually harmed in any way. Local governments, particularly in the present economy, will be crippled. For the plaintiffs, it will be like shooting fish in a barrel.

Congress cannot have intended this. Congress bore no malice or intent to harm local governments or to interfere with standard practice by criminalizing it with a Draconian sanction without fair warning. The only thing that can rectify this situation, created by the *en banc* decision, and prevent great financial harm to the public, is the grant of certiorari.

ARGUMENT

I. THE *EN BANC* DECISION NOT ONLY DISAGREED WITH THE VILLAGE'S SUMMONS FORM, AND THE JUDGMENTS OF THE DISTRICT COURT AND APPEALS PANEL, BUT ALSO OVERLOOKED CONSTITUTIONAL INFIRMITIES IT WOULD IMPOSE ON DPPA.

Although the *Amicus* agrees with the Points made in the Village of Palatine's Petition, it wishes to spotlight important constitutional issues that have arisen for the first time as a result of the *en banc* decision. The constitutional issues addressed herein were unrecognized and unaddressed by the Seventh Circuit's *en banc* decision. The constitutional issues

created by the *en banc* decision need immediate resolution, a resolution which can only occur if this Court grants certiorari.

Before moving on to the concrete constitutional infirmities imposed on DPPA by the *en banc* decision, however, there is one more related factor that supports the grant of certiorari. This case is the poster child for an issue that has dogged the court's and become a current topic of discussion as a result of Justice Scalia's book, *Reading Law: The Interpretation of Legal Texts* and Judge Posner's review of it. http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#. The issue is: when, if ever, should a statute be construed literally according to its enacted words, and when should guidance be sought further afield in chosen aspects of legislative history.

In the case at bar, the literal viewpoint was applied by the District Court and the Appeals panel, both of which avoided the constitutional issues (and financial distress for municipalities and law enforcement agencies). The Seventh Circuit's *en banc* decision took the other view, and by departing from the literal meaning of the categorical exemption expressed for summonses in the Act, raised constitutional issues and created financial exposure (that could reach $80 million for the Village). Consequently, each viewpoint has been well represented. This case, consequently, presents an unrivaled opportunity to resolve the conflict of viewpoints (or, at least, set clear standards for when each can be properly applied), thus informing and guiding the entire federal judiciary on this very important and recurring issue.

There is a further reason why this is a case for which certiorari should be granted related to this point. Even Judge Posner, normally a proponent of the less literal approach to statutory construction, felt compelled to state in his dissent from the *en banc* decision:

> I am not a fan of literal interpretation. But it is the proper default rule when it has reasonable consequences and there is no indication that the legislature stumbled in trying to translate legislative purpose into words.

Senne v. Village of Palatine, Ill., 695 F.3d 597, 609 (7th Cir. 2012) *(en banc, Posner, J., dissent*ing). This is an indication that there is a significant chance that an error (with devastating impacts for the Village and potential catastrophic proportions nationally) has been committed by the Seventh Circuit *en banc (over four dissenters).*

A. THE *EN BANC* DECISION RAISES A SERIOUS CONSTITUTIONAL QUESTION REGARDING CONGRESS' AUTHORITY TO ENACT DPPA AS CONSTRUED BY THE SEVENTH CIRCUIT *EN BANC.*

It is both elementary and fundamental that the Federal Government is a government that is limited to those enumerated powers granted to it. *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819). Congress can enact only legislation that falls within its enumerated powers. *Id.* The DPPA was passed pursuant to Congress' power to regulate interstate commerce. *Reno v. Condon,* 528 U.S. 141, 143-44, 148, 120 S. Ct. 666, 668, 671 (2000)("Congress found that

many...sell this personal information to individuals and businesses. (Citations omitted.) These sales generate significant revenues for the States.***The United States bases its commerce clause argument on the fact that the personal, identifying information that DPPA regulates is a "thin[g] in interstate commerce, and that sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. (Citation omitted.) We agree...").

The Seventh Circuit *en banc* focused on the fact that DPPA was enacted, at least in part, because a State (no doubt for a fee) provided an actress' personal information to the public which lead to her murder by the purchaser of the information (*i.e.,* the Rebecca Shaeffer incident). *Senne,* 695 F.3d, at 607. Such deliberate programs of supplying the public with personal information was Congress' concern. A sale of information to a broad consuming public is commerce and arguably within interstate commerce.

There must, nevertheless, be this requisite nexus with interstate commerce. *See, United States v. Lopez,* 514 U.S. 549, 559, 567, 115 S. Ct. 1624, 1630, 1633 (1995)("[T]he Court has never declared that 'Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of State or private activities' *** The possession of a gun in a local school zone is in no sense an economic activity that might through repetition elsewhere, substantially affect any sort of interstate commerce"). If what DPPA, in the context construed by the Seventh Circuit *en banc*, seeks to regulate does not form a part of interstate commerce, it cannot by validly regulated by DPPA. Indeed,

judicial, quasi-judicial and law enforcement administrative proceedings for geographically local acts in violation of local ordinances are not in commerce, not to mention interstate commerce. *See, United States v. Lopez,* 514 U.S. 549, 559, 567, 115 S. Ct. 1624, 1630, 1633 (1995).

Congress apparently realized this when it exempted information used

> in connection with any civil, criminal, administrative or arbitral proceeding in any...State or local court or agency...including the service of process....

18 U.S.C. §2721(b)(4). Congress worded, and passed, this exemption as a categorical exemption. Congress thereby eschewed any attempt to become entangled with a State's internal criminal and civil law enforcement and process.

When the Seventh Circuit *en banc* rendered its decision, applying DPPA restrictions to parking ticket summonses or notices to appear for local offenses, it failed to recognize that it was extending the statute outside of interstate commerce. A parking ticket serves the function of a summons or a notice to appear before a local government quasi-criminal judicial or adjudicative administrative proceeding charged with the enforcement of a local parking ordinance. 65 ILCS 5/1-2-9. This is a matter that is not of a commercial character and has in its purpose and design no evident commercial nexus. It, therefore, lies beyond Congress and its power over interstate commerce. *United States*

v. Lopez, 514 U.S. 549, 580, 115 S. Ct. 1624, 1640 (1995)(Kennedy and O'Conner, JJ., concurring).

The Seventh Circuit was obligated to hold Congress' enactment within constitutional limits. Beyond this, however, the Seventh Circuit *en banc,* as all federal courts, had the additional obligation to so construe DPPA as to avoid raising a constitutional question. *United States v. Five Gambling Devices,* 346 U.S. 441, 448 (1953)("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only when the statutory language leaves no reasonable alternative"); *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S. Ct. 527, 536 (1909)(grave and doubtful constitutional questions should be avoided by the construction given a statute). In the case at bar, both the District Court and the Appeals panel decisions establish a reasonable alternative to raising this, and other, serious constitutional questions.

The *en banc* Seventh Circuit decision thus violates judicial duties, and, therefore, the *en banc* decision merits, indeed needs, the prompt review by this Court. The Village of Palatine's Petition for Certiorari should be granted.

B. THE *EN BANC* DECISION OVERLOOKS THE FACT THAT DPPA IS A CRIMINAL STATUTE AND THAT A CRIMINAL STATUTE MUST BE DEFINITE IN ITS DISTINCTION BETWEEN A CRIMINAL AND AN INNOCENT ACT IN ORDER TO GIVE FAIR, DUE PROCESS, WARNING.

The Seventh Circuit's *en banc* decision overlooks the fact that it is construing a criminal statute. It makes every case under the exception turn on its own facts, weighted and considered by a court after the ticket summons has been given. The *en banc* decision states:

> [T]he complaint does put in issue whether all of the disclosed information [within the ticket] actually *was used* in effectuating either of these purposes [service of process and function of the police department].***With respect to some of the information, it is difficult to conceive, even on a theoretical level, how such information could play a role in the excepted law enforcement purposes.[2]

Senne, 695 F.3d, at 606 (italics in original). The majority of the Court *en banc* seems unmindful that by subjecting tickets to an after-the-fact weighing of whether information was required in each differing context, it has destroyed the definiteness and certainty required of a criminal statute. *Rabe v. Washington,* 405 U.S. 313, 315, 92 S. Ct. 993 (1972); *Connally v.*

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[2] It is impossible to square this basis for the *en banc* decision with the *en banc* footnote 12, which eschews equating "use" with "necessary use" or to require "best practices."

General Const. Co., 269 U.S. 385, 391, 393, 46 S. Ct. 126, 127, 128 (1926)(the terms of penal statute creating an offense should be explicit to inform what conduct will make one liable; this cannot be left to conjecture).

Congress, however, was mindful of the need to define with clarity and definiteness the differentiation between what is proscribed conduct and what is permissible. It was for this reason that it created a categorical exemption. Local governments would have no doubt what they could do lawfully. Local governments would not be inhibited in their official actions or held *in terrorem* of large class action "liquidated damages" (*e.g.*, $2,500 per ticket) by Congress' unmistakable exemption from DPPA restrictions. Congress' exemption, in contrast to the Seventh Circuit *en banc's* "construction" of it, would not leave local governments to the mercy of hindsight judgments.

Congress is not ignorant of how to draft a criminal statute that is narrower than categorical yet gives proper warning by including an enacted standard. For instance, the statute that makes it a federal crime to "own, possess, or use...any chemical weapon," 18 U.S.C. §229, contains an exemption for chemicals intended for a "peaceful...activity," but only so long as the "type and quantity" is "consistent with such purpose." 18 U.S.C. §229F(1)(A), (7)(A). Had Congress intended such a qualified exemption in DPPA, it could have so provided. Congress, however, chose not to. Congress chose to word the exemption in DPPA categorically. The Seventh Circuit *en banc* was not at liberty to change the scope of the exemption under the guise of statutory construction. *Blaski v. Hoffman,* 260

F.2d 317, 322 (7th Cir. 1958)("[A] court has no more right to unduly enlarge than it has to unduly circumscribe a limitation which Congress has specifically provided").

Congress used the word "any" in the exemption provision of DPPA to apply to all the likely State and local activities it listed thereafter. It is purpose driven. *Taylor v. Acxiom Corp.*, 612 F.3d 325, 334 (5th Cir. 2010). A local governmental entity can only be liable if it put the personal information to a purpose not permitted. *Id.* A parking ticket serves the purpose of a summons, 65 ILCS 5/1-2-9, a lawful purpose. Any individual, lawyer or not, would and should, therefore, understand a ticket to be within the categorical exemption.

Although plaintiffs have been allowed to bring private claims for "liquidated damages" for each criminal occurrence, the private claim remains rooted in a criminal provision. The plaintiffs' claims are not simply a matter of tort subject to the usual common law duty analysis. It springs directly from a criminal provision which must meet the exacting standards for defining what conduct will be criminal, making the offense foreseeable. The same criminal provision (*i.e.*, the identical language) cannot be read in two different ways depending on whether the United States or a private person is bringing the enforcement action.

The categorical manner in which Congress stated the exemption from DPPA's restrictions on information, relied on by the Village, the District Court and the Appeals panel, satisfies the need for a bright line as to what is and is not prohibited. The parsed approach

created by the Seventh Circuit *en banc*, which shades the exemption's application by piecing through the specific information on a case by case basis, does not.

The Seventh Circuit's *en banc* construction and application of the exemption only allows one to know with certainty if its conduct passes muster after the fact, when it is too late. This is anathema to the criminal law. *Bouie v. City of Columbia,* 378 U.S. 347, 352, 84 S. Ct. 1697, 1702 (1964)("There can be no doubt that a deprivation of the right of fair warning can result...from an unforeseeable and retroactive judicial expansion of...precise statutory language. *** '[J]udicial enlargement of a criminal act by interpretation is at war with a fundamental concept...that crimes must be defined with appropriate definiteness'"). When can anyone know what is criminal? Indeed, in the case at bar, would the Seventh Circuit's *en banc* decision have found that the tickets of the Village passed statutory muster if only some of the information had been revealed. If so, which parts (height and weight, but not birthday)?

And, what then of the State's and public's interest in trying to ensure that only the correct person must respond. The facts contained in the ticket should allow the person finding the physical ticket to know whether he was actually the intended recipient, or charged in error, with someone else intended to be charged. Absent this, a person getting a ticket for illegal parking could simply put the ticket on someone else's vehicle and hope and expect that they had passed on the "civil, criminal, administrative or arbitral proceeding" to someone else.

Can such a practical, long standing and fundamental concept of governmental action suddenly result in huge, nationwide damages? Tickets are documents generally torn out of form books which can be expected to be filled out many times a day with information often specifically required to be included by State statues and court rules, *e.g.,* Ill. Sup. Ct. R. 552. Can the visitation of huge damage awards always hang in the balance for merely enforcing parking restrictions.

This is not a situation in which specifics can be imposed after the fact, as the Seventh Circuit's *en banc* decision seeks to do. The destruction of the certainty and definiteness that Congress provided in 18 U.S.C. §2721(b)(4) by the Seventh Circuit *en banc*, under the guise of statutory construction, is not suitable. It needs to be addressed and cured. It cannot be left until after local governments are faced with financial chaos, not unlike the Village of Palatine, which is presently facing a potential multi-million dollar exposure solely as a result of the Seventh Circuit *en banc's* break with the previous understanding and holdings regarding this exemption provision in DPPA.

C. THE SEVENTH CIRCUIT *EN BANC* DECISION OVERLOOKS, AND DISRUPTS, THE FEDERAL CONSTITUTIONAL STRUCTURE.

The criminal statutory provision at the core of this case is most unusual. It is directed against the States and their political subdivisions and agents. For Congress to criminalize decisions of sovereign States, their political subdivisions and agents, regarding what forms to use and fill out for summonses and notices to

appear in criminal or quasi-criminal judicial or quasi-judicial administrative proceedings, is particularly serious business. Indeed, a confrontation between the national government and the State governments is on its face not consistent with a healthy federalism.

Below the surface, it is even worse. Many thousands of local governmental units, not protected by the Eleventh Amendment, are most at risk of crushingly large judgments in class actions, such as that at bar. Yet, they are also caught in a vice between State statutory requirements and federal prohibitions. In many cases, the information included in ticket summonses and notices to appear, along with accident or crash reports and the like, is established or patterned on State statutes and/or court rules.

The Seventh Circuit's *en banc* decision places counties, municipalities, park districts, *etc.* (all common parking ticket writers) in a conflict of interest. For instance, by virtue of Illinois Supreme Court Rule 572, at least the name and address of the person charged on parking tickets is required and for other vehicle offenses, drivers license number, date of birth, sex, height and weight, are required by virtue of the Illinois Supreme Court Rule 552. *See also*, Uniform Citation and Complaint Form; 725 ILCS 5/111-3(b). This is the very information that is challenged as necessary by the Seventh Circuit *en banc*. *Senne,* 695 F.3d, at 608, 600. Furthermore, tickets are "deemed public records, and shall at all times be open to inspection...and all persons shall have free access for inspection and examination to such records...and shall have the right to take memoranda and abstracts...." 705 ILCS 105/16(6).

Must local governments follow State statutes, rules and judicial forms under a sword of Damocles or depart from them on a Supremacy Clause claim, arrogating to themselves the power to nullify them as if a federal court? Are municipalities to be subjected to huge liability for guessing wrong, particularly when what is or is not permissible shifts under the *en banc* decision from factual context to factual context? *Senne*, 695 F.3d, at 606. It turns the relationship of municipalities as agents of the State on its head, requiring the agents to place their own judgment over that of their principal, the State. The risk attendant on municipalities that choose to follow a State's dictates is a crushing burden of "liquidated damages" cumulated over a vast number of form tickets.

In addition, the Seventh Circuit *en banc* decision failed to recognize that it was carving out a role for the federal judiciary to second-guess state or local legislative judgments as to what is proper to include in a summons in order for it to perform its function. This injects the federal government into a wholly local exercise by the State of its own police power. No court, let alone a federal court, should place itself in a position to second-guess the wisdom of a State or local legislative entity's decision and to substitute its judgment for that of the legislative body as to what is necessary or serves the need of the public safety and welfare. *Zahn v. Board of Public Works of the City of Los Angeles,* 274 U.S. 325, 328, 47 S. Ct. 594, 595 (1927); *General Tel. Co. of Southwest v. United States,* 449 F.2d 846, 859 (5th Cir. 1971). Federal power is limited, and not permitted to envelop all.

What may be sufficient merely to charge an offense may not be sufficient to ensure that it is the correctly intended person who receives the ticket and is forced to appear and defend. This calls for a legislative judgment, not a judicial fiat. Such an interference with State sovereign functions would be virtually unheard of for Congress to legitimately mandate. Indeed, Congress did not mandate it. This peculiar situation, created by judicial fiat, should not be allowed to stand.

Congress avoided this anti-federalism approach. It carved out a categorical exemption from the restrictions of DPPA. DPPA "leave[s] the State's internal and political affairs alone and regulates only how it interacts with private parities *who seek information* in its possession." *Travis v. Reno,* 163 F.3d 1000, 1008 (7th Cir. 1998) (italics added). Federal courts should not be permitted *sui sponte* to become enmeshed in and to micro-manage State operations. The *en banc* decision should be reviewed and reversed.

II. CATASTROPHIC FISCAL CONSEQUENCES WILL FOLLOW FROM THE *EN BANC* DECISION WITHIN THE TERRITORY OF THE SEVENTH CIRCUIT, AND POSSIBLY NATIONALLY, IF IT IS NOT REVIEWED AND REVERSED. CERTIORARI SHOULD BE GRANTED.

The decision of the Seventh Circuit *en banc* raises, by its very existence, the spectre of fiscal catastrophe and financial chaos for municipalities and other local law enforcement agencies across the territory of the Seventh Circuit, if not the nation. This is not hyperbole. The after-the-fact judicial evaluation of the

contents of summons forms (*e.g.*, tickets) that the Seventh Circuit has imported into Congress' categorically stated exemption from DPPA restrictions for summonses will lead naturally to tens, if not thousands, of claims within a class action context against a plethora of local law enforcement agencies, as it has against the Village of Palatine. It is in the very nature of tickets that they are forms. Filling out each form constitutes a violation. Tickets are written routinely and, at $2,500 per occurrence, 18 U.S.C. §2724(b)(1), the amount with respect to each local government entity will be enormous. All that is left to prove is the number of tickets that were issued with that information contained. By the same token, tickets issued by other municipalities and local law enforcement agencies which include the same information (or possibly, just some of it) are also in violation of DPPA, with enormous financial consequences for them as well.

Because parking tickets have been consistently issued for about 100 years, to suddenly disapprove of the ticket form now leaves each municipality and local enforcement agency a "sitting duck" for imposition of a judgment equal to $2,500 per ticket for the full period of the statute of limitations. The die has been cast. As a result of the class action at bar, DPPA suits against municipalities and local law enforcement agencies will be ready made; it will be like shooting fish in a barrel.

The potential liability that the Village of Palatine alone faces is about $80 million. There are almost 2,500 municipalities within the Seventh Circuit – 1,299 cities, villages and incorporated towns in Illinois, U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS: ILLINOIS

(2007), http://www2.census.gov/govs/cog/2007/il.pdf; 592 in Wisconsin, U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS: WISCONSIN (2007), http://www2.census.gov/govs/cog/2007/wi.pdf; and 567 in Indiana, U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS: INDIANA (2007), http://www2.census.gov/govs/cog/2007/in.pdf. Just one ticket in each of these communities sued on for violation of DPPA would amount to $6,145,000 of public funds transferred to private hands. But, ticket summons forms are issued in the tens, if not hundreds or thousands, depending on the size of the community.

This Court, of course, does not have to be reminded of the financial crisis facing local governments. MICHAEL A. PAGANO, ET AL., NATIONAL LEAGUE OF CITIES, CITY FISCAL CONDITIONS IN 2012 (2012), http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/city-fiscal-conditions-research-brief-rpt-sep12.pdf. In Illinois, because of its own fiscal crisis, the State has deprived municipalities of revenue transfers from the State income tax, *etc.*, that were previously made. STATE BUDGET CRISIS TASK FORCE, ILLINOIS REPORT (2012), http://www.statebudgetcrisis.org/wpcms/wp-content/images/2012-10-12-Illinois-Report-Final-2.pdf. This is the worst time to layer an unexpected and, from the categorical wording of the DPPA exemption, unintended diversion of public moneys from the public safety and welfare to wholly private hands, without so much as any proof of loss or damage. Review is required immediately by such financial impacts and fiscal circumstances. Certiorari should be granted.

CONCLUSION

This case is particularly appropriate for the grant of certiorari given the difference of judicial opinion it has engendered. The district court and a majority of the Appeals panel ruled in favor of the Village of Palatine. The Seventh Circuit *en banc* shifted to a decision for *Senne* and his class. The Seventh Circuit's *en banc* decision, however, again reflected a split in judgment. Seven members of the Court *en banc* voted for the shift, over the dissent of four members. Without this Court's review, the nation is likely to become a crazy quilt, visiting financial chaos willy-nilly on municipal and local governmental entities. For all of the above demonstrations of error in the Seventh Circuit's *en banc* decision, and because of the impending harm that the Seventh Circuit's *en banc* decision will impose by precedent on other communities and local agencies throughout the Circuit, and possibly in other circuits which may follow it—in defense costs, as well as staggering liability—this Court should grant the Village of Palatine's Petition for Certiorari which seeks review of the Seventh Circuit's *en banc* decision and holding, and their reversal.

Short of reversal, there are two other reasons for the grant of certiorari: (1) to vacate the *en banc* decision and remand to the Seventh Circuit to reconsider its *en banc* decision in light of the constitutional issues identified herein implicated by that decision; and (2) at the very least, make the *en banc* decision, its holding and judgment, only prospective in effect. *United States v. Lanier,* 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997)("[D]ue process bias courts from applying a novel construction of a

criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

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