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 IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly held that the Complaint states a plausible cause of action against the Village under the Driver's Privacy Protection Act.

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STATEMENT OF THE CASE

This putative class action arose under the Driver's Privacy Protection Act. 18 U.S.C. §§ 2721 et seq. The claim stems from the petitioner's public redisclosures of highly sensitive personal information.

The Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. §§ 2721-2725 (1994 ed. and Supp. IV), regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). *Reno v. Condon,* 528 U.S. 141, 143 (2000). State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. *Id.* The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent. *Id.* at 144. The DPPA's provisions do not apply solely to States. *Id.* at 146. The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV. 18 U.S.C. § 2721(c) (1994 ed. and Supp. III). *Id.* Any person who rediscloses or resells personal information from DMV records must, for five years, maintain records identifying to whom the records were disclosed and the permitted purpose for the resale or redisclosure. *Id.*

The Petitioner, Village of Palatine, Illinois ("Village" or "Palatine") has filed a petition for writ of certiorari claiming that absent this Court's review, states and

municipalities will be forced to modify – or even eliminate—core government functions. (Petition at *4). Contrary to the petition, this case has nothing to do with the manner in which the Village issues, serves or collects fines for parking tickets. This case is about the information the Village chooses to print on those parking tickets. Unlike most municipalities, the Village printed the name, address, date of birth, height, weight, sex, driver's license number, vehicle identification number, year, make, model, color, and tag number on parking citations it issued to unattended vehicles. All of this information, along with a description, location, and time of the alleged violation was printed, by the Village, on the outside of an easy to identify yellow envelope and left on an unattended vehicle in plain view of the public.

If one holds to the side the obvious risks of identity and property theft that can foreseeably result from Palatine's perilous practices, there are other less obvious risks that can also follow. Senator Harkin pointed out one such risk, noting that:

> The Drivers Privacy Protection Act, of which I am an original cosponsor, strikes a fair balance between reasonable interests of the State and the public in this information, and the rights of private citizens to be left alone.
>
> I became aware of this issue through the plight of one of my constituents, Karen Stewart. Karen was a patient of Dr. Herbert Remer, a physician who specializes in obstetrics and gynecological care in the Des Moines area. Because Dr. Remer performs abortions, his clinic has been the site of

> repeated protests by those who oppose a women's right to choose.
>
> But Karen was going to Dr. Remer to save her pregnancy, not to terminate it. She was experiencing complications, and went to Dr. Remer for treatment. Unfortunately, a few days after the visit, Karen suffered a miscarriage.
>
> And then she received the letter. Extremists from Operation Rescue sent a venomous letter apparently intended to traumatize Dr. Remer's patients. The letter spoke of 'God's curses for the shedding of innocent blood,' and 'the guilt of having killed one's own child.' They got her name and address from department of transportation records, after they spotted her car parked near Dr. Remer's clinic.

139 Cong. Rec. S-15766 (Nov. 16, 1993).

This real life example highlights why Palatine's policies are so dangerous. It would not be a stretch to imagine the consequences of getting a parking ticket in Palatine and having a venomous group stalk that person because they happened to park in the wrong place like close to an abortion clinic, mosque, church, or temple.

Fortunately, the Village is nearly alone in publishing such a vast amount of private and unnecessary information on its parking tickets. This is evidenced by the fact that in the eighteen years since Congress passed the DPPA, no other municipality has been sued for violating the Act in this manner.

Palatine also demonstrated that inclusion of the personal information was unnecessary for, as soon as this lawsuit was filed, the Village immediately stopped printing the information. As Judge Ripple noted, there is nothing in the record to indicate that the Village's parking enforcement or fine collections were stymied in any way by the exclusion of this unnecessary information. Resp. App. 6.

The district court dismissed the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), holding that Palatine did not disclose personal information within the meaning of the Act. Pet. App. 70. Alternatively, the district court held that if Palatine did disclose personal information, the disclosures were permitted for use by a law enforcement agency in carrying out its functions. *Id.* 18 U.S.C. § 2721(b)(1).

The court of appeals held that, by publicly posting personal information from Plaintiff's motor vehicle record, Palatine disclosed personal information within the meaning of the Act. Pet. App. 11. The court of appeals then remanded the case to the district court for further proceedings after finding that the complaint plausibly alleged a violation of the Act. Pet. App. 26-27. On remand, the district court must address "whether the [personal] information in question was used for a governmental activity mentioned in the statutory exceptions." Resp. App. 6. *See, also,* § 2721 (c) of the Act.

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split

This is a case of first impression both in the Seventh Circuit and the federal courts more generally. *Id.* at *2. Accordingly, the decision below does not conflict with any other United States court of appeals or state court of last resort on the question presented.

II. The Interlocutory Petition is Premature

As Judge Ripple stated: "The procedural posture of this litigation makes this case a very poor candidate for a grant of certiorari. As noted earlier, the district court must address on remand whether the information in question was used for a governmental activity mentioned in the statutory exemptions. See Senne, 2012 WL 3156335, at *10 [695 F.3d at 608-09]. The Village has not been heard on this important question. Secondly, the court pointedly pretermitted any discussion of the appropriate measure of damages." Resp. App. 6.

a. The Village May Yet Prevail

The circuit court unanimously agreed that publicly posting personal information to the windshield of an unattended vehicle constitutes a disclosure under the Act. The court then remanded the case to the district court to determine if the disclosures fall within the governmental function exception of the statute. Pet. App. 26-27. Thus, at this time, the question whether Palatine violated the DPPA remains open in the courts below.

b. The Claim of Millions of Dollars in Damages is Premature

The court of appeals, finding that discussion of damages was premature, pretermitted any such decision. Pet. App. *26, fn20. Palatine also makes the familiar claim that this Court's review is truly imperative because of the "potentially crippling liability the DPPA imposes on municipalities." Pet. *26. This same argument was previously made, and rejected, by this Court in two other DPPA cases claiming that the potential of billions of dollars in damages warranted immediate review. *See, Fid. Fed. Bank & Trust v. Kehoe,* 547 U.S. at 1051 (Scalia, J, concurring in the denial of certiorari) and *Dickinson v. Collier,* No. 07-197, cert. denied Jan. 7, 2008.

While Plaintiff has alleged that the Village issued 32,000 unlawful tickets, over a four year period, the damages claim is unresolved; because no discovery has taken place; no class has been certified; no liability has been adjudicated; no damages calculated; and no judgment entered. The case was remanded to the district court to address such issues. There is no reason for this Court to screen the complaint before the district and appellate courts have an opportunity to weigh in on a case which, after being stalled in appeals for two years, is just getting underway in the district court.

In addition, despite arguing throughout its petition that this is an $80 million case, Palatine claims in a footnote near the end of its petition that liquidated damages may not even be available in this case. Petition at *27-28, fn3. ("Palatine does not concede

that liquidated damages would be available in this case.") This disclaimer further undermines Palatine's argument about the urgency for this Court to hear an interlocutory appeal.

Moreover, at this interlocutory stage—before any ruling on liability, damages, injunctive relief, or class certification--there is no risk that the Village would be forced to pay anything until all appeals have been exhausted.

Also, in denying the Village's motion for stay of mandate, Judge Ripple stated that:

> Moreover, before the en banc court, the Village represented that it had modified its practices. There is no indication that modification of traffic citation practice to ensure that irrelevant personal information was eliminated from public view was a significant burden. No argument is made that elimination of such information has hampered in any way law enforcement efforts.

Resp. App. 6.

Since August 30, 2010, the Village has revised its practices to completely eliminate the publication of personal information on parking citations left open to public view so as to make them DPPA compliant. Thus, denying the petition will not prejudice the Village by subjecting it to continuing accumulation of statutory damages. *If* respondents were to prevail on final judgment; *if* the Village is assessed tens of millions of dollars in liability; and *if* that judgment is upheld on appeal, then the Court will have ample

opportunity to take the case at that time on the basis of a fully developed factual record.

III. The Question Presented By Palatine Is Not Likely To Be Recurring

At oral argument, Palatine's counsel readily admitted that it is not aware of any other municipality that prints as much information on their parking tickets as Palatine does. (Appeal No. 10-3243, 7th Cir., Oral Arg., Feb. 9, 2012 at 57:35 to 58:33). There is also no evidence in the record that other municipalities continue to disclose excessively or would be immediately affected by the court's ruling.

In addition, Palatine is not the owner of the motor vehicle records, it is merely an authorized recipient of personal information from them. In other words, the information is also available from the state DMVs. Under the DPPA, states are immune from civil actions for improper disclosure. 18 U.S.C. § 2725 (2). ("person' means an individual, organization or entity, but does not include a State or agency thereof") Thus, it is unlikely that anyone, with a legitimate need for the information, would be denied access by the states.

The Act states that authorized recipients ***may*** redisclose personal information. It does not say that authorized recipients shall or must redisclose personal information. Nothing in the Act compels Palatine to redisclose personal information it obtains from motor vehicle records. 18 U.S.C. § 2721(c). ("An authorized recipient of personal information … ***may*** … redisclose the information only for a use permitted under subsection (b)…"). (emphasis added) *Also, see*

McCready v. White, 417 F. 3d 700, 703 (7th Cir. 2005). ("The statute authorizes private suits, but ***only*** by persons whose information has been disclosed improperly. 18 U.S.C. § 2724(a)") (emphasis added) In *McCready,* the Seventh Circuit was confronted with a lawsuit wherein a Plaintiff sued to compel the disclosure of motor vehicle title records by the state for the purposes of investigating fraud. The court of appeals rejected the claim holding that the Act permits, but does not require, disclosure for such a purpose.

Moreover, the Village is under no obligation to disclose any personal information from motor vehicle records to anyone, because, the Act only permits persons whose information has been disclosed improperly to sue, Thus, Palatine can avoid the potential of future liability by merely redirecting inquiries regarding motor vehicle information to the DMVs.

Accordingly, based upon Palatine's ill-fated interpretation of the court's ruling, it is unlikely that Palatine would repeat its unlawful policy of making unnecessary disclosures. Also, because there is nothing in the record to indicate that Palatine has been prejudiced in any way by its voluntary undertaking to stop disclosing personal information, there is no urgency for this Court to hear this interlocutory appeal until a record can be developed.

IV. The Decision Below Follows The Text, Structure And Purpose Of The DPPA.

a. The Inherent Risks Associated With Unfettered Disclosures Are Real

Every case that has addressed the DPPA, recognizes that impetus for the law was the murder of a young woman named Rebecca Schaefer whose personal information was obtained by a stalker from California's DMV and used to kill her in front of her apartment building. As Judge Ripple stated, the consequences of indiscriminate disclosures are not theoretical but real. (Pet. App. 62). The DPPA was included as part of omnibus crime legislation known as the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub. L 103-322, 18 U.S.C. § 2721 *et seq*. The statute's caption --"Prohibition on release and use of certain personal information from State motor vehicle records"-- conveys its gist. *McCready v. White*, 417 F.3d 700 (7th Cir. 2005). By placing the DPPA's protections in the criminal code, Congress sought to strongly deter the release of personal information and crimes facilitated by the indiscriminate flow of personal information from unwitting government employees.

Congress enacted the DPPA, in response to growing concerns regarding the actual and potential misuse of personal information contained in the driver license records of state motor vehicle bureaus. *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005). Prior to the DPPA's enactment, individuals with little or no justifiable purpose could obtain the home address of any licensed driver simply by name or by providing the tag/license plate number

to a local motor vehicle bureau. *Id.* Congress enacted the DPPA to prevent the potential misuse of this information by individuals who did not have a legitimate need for it. *Id.*

According to Palatine's petition, the purpose of the DPPA is "to regulate commercial exploitation of personal information in a particular type of database." Petition at *4-5. This was not the purpose of the DPPA. The DPPA was enacted, among other reasons, to:

> Prevent easy access to personal information that has, in the past, been used to facilitate murder, stalking, and robbery. Statement of Senator Barbara Boxer, 139 Cong. Rec. S-15745 (Nov. 13, 1993);
>
> Protect a person's right to privacy and prevent unnecessary hate crimes. Statement of Senator Charles Robb, 139 Cong. Rec. S-15765 (Nov. 16, 1993); and
>
> Stop the indiscriminate release of private information and close a loophole in the law that permits stalkers to obtain—on demand—private, personal information about their victims. Statement of Senator Joseph Biden, 139 Cong. Rec. S-15765 (Nov. 16, 1993).

Access to personal information has not only been used by civilians to commit crimes, it has also been used by law enforcement officers to commit or aid in the commission of crimes. For example, in one case, a police officer lawfully obtained and used a woman's

personal information to issue her a speeding ticket. The officer retained the woman's information and later began stalking her, leaving a note on her car (which was parked in her apartment complex) asking her out on a date and offering to buy her dinner. *Paredeo v. Collins,* Civil Case No. 2011 cv 9296 (N.D. Ill).

In another case, a police officer obtained a woman's name and address pursuant to a lawful traffic stop and later used the information to stalk and harass the woman. *Menghi v. Hart*, 745 F.Supp. 2d 89, 103-04 (E.D. N.Y. 2010).

Similarly, in *Margan v. Niles*, a police officer disclosed personal information from a state-wide database to a civilian. 250 F.Supp. 2nd 63, 66-67, (N.D. N.Y. 2003). The civilian passed the information along to another person who was being investigated for workman's compensation fraud. The individual being investigated used the information to stalk and harass the family of the private investigator sending them videos of the children, flowers, and threatening notes. *Id.*

In *Parus v. Kroeplin,* 402 F. Supp. 2d 999, 1006-1007 (W.D. Wis. 2005), a conservation officer obtained a vehicle owner's name using a license plate number. The Officer disclosed the name of the individual to his nephew. The nephew was able to use the name and a phone book to track down and threaten the estranged mother of his child and her new boyfriend.

And in another case, police officers were sued for unlawfully accessing the motor vehicle records of a

former officer 425 times. *Rasmusson v City of Bloomington,* Civil Case No. 12 cv 0632 (D. Minn.)

These cases demonstrate the sensitivity of motor vehicle information and the potential for abuse when safeguards are ignored. The DPPA, just like the Privacy Act, gives "forceful recognition" to a motorist's interest in maintaining the "confidentiality of sensitive information" in his motor vehicle record. *National Aero. And Space Admin. v. Nelson,* 131 S. Ct. 746, 762 (2011). Thus, municipalities must become more vigilant in protecting personal information, monitoring access, and preventing abuse.

b. The Decision Below Follows the Text of the DPPA

Plaintiff's position has been that; the DPPA prohibits municipalities from publically posting all personal information from motor vehicle records. The Village of course has argued the opposite; that it is always okay to publically post all of the personal information as long as it is done in connection with a law enforcement purpose. The court rejected both positions taking a more reasonable middle ground. Rather than creating a bright line rule, the court held that it is okay to disclose personal information "for use" in connection with a valid law enforcement purpose as long as the personal information being disclosed is actually intended to be used for that purpose. In other words, gratuitous disclosures for no apparent purpose are prohibited. For example, printing a name and address on an envelope for use by the post office to deliver mail is okay. Also including a social security number, driver's license number or other irrelevant

highly sensitive personal information would not be permitted. The court's more reasonable approach leaves discretion with the district court's to consider the facts and circumstances of the disclosures as they find them.

Section 2724 (a) provides that: "A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains..." 18 U.S.C. § 2724(a). There is no dispute that Palatine is a person who knowingly disclosed respondent's personal information from a motor vehicle record. Thus, the only question is whether the disclosure was "for a purpose not permitted." To determine what is not permitted, one must go to the beginning of the Act.

Section 2721 (a) generally prohibits DMVs (as owners of the information) and its officers, employees, or contractors from knowingly disclosing or otherwise making available to any person or entity: (1) personal information, as defined in 18 U.S.C. § 2725 (3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b). 18 U.S.C. § 2721 (a).

Subsection (b) requires DMVs to disclose personal information in connection with certain federal laws not applicable here. Subsection (b) also permits disclosure of personal information ***for use*** in connection with 14 listed uses. 18 U.S.C. § 2721 (b). Subsection (b)(1) permits DMVs to disclose personal information: ***For use*** by any government agency, including any court or law enforcement agency, in carrying out its functions.

Thus, DMVs are permitted to disclose personal information to Palatine so long as the information is being used for a lawful purpose. The court held that: "When a particular piece of disclosed information is *not used* to effectuate that purpose in any way, the exception provides no protection for the disclosing party." Pet. App. 18-19. Under the court's reasoning, the law enforcement officers, previously discussed, that obtained highly sensitive personal information from a DMV for the purpose of stalking their victims can take no cover under the Act's carve out for law enforcement.

Likewise, subsection (c) permits an authorized recipient to redisclose information, but only to another authorized recipient "for use" in connection with one of the fourteen permissible uses allowed under subsection (b). As the court stated; "In short, an authorized recipient, faced with a general prohibition against further disclosure, can disclose the information only in a manner that does not *exceed the scope* of the authorized statutory exception." Pet. App. 19.

The courts' opinion as well as the text and structure of the DPPA are clearly compatible. The opinion and DPPA text in no uncertain terms, provide, that a state department of motor vehicles may only release personal information to "authorized recipients." 18 U.S.C. § 2721(b). The opinion and text also provide in no uncertain terms, that an "authorized recipient" may only release or redisclose personal information to other "authorized recipients." 18 U.S.C. § 2721(c). Thus, the court left open the question of who is an authorized recipient for the district courts to decide based upon the totality of the circumstances.

The court of appeals' decision is also consistent with this Court's Opinion in *Condon* where it held that the DPPA can prohibit states from disclosing information from their motor vehicle databases. *Condon,* 528 U.S. 141 (2000). The DPPA's provisions do not apply solely to States. *Condon*, 528 U.S. at 146. The Act also regulates the redisclosure of drivers' personal information by persons who have obtained that information from a state DMV. 18 U. S. C. § 2721(c). *Id*. Because Palatine obtained Plaintiff's personal information from a state DMV, the Act also regulates the Village's redisclosure of that information on parking tickets.

Although not directly raised in its petition, Palatine hints at a constitutional challenge to the DPPA as applied to Palatine. In its Motion to Stay Mandate, Palatine argued that it intended to argue whether the DPPA, as applied, exceeds Congress's authority under the Commerce clause. The following is what Judge Ripple had to say about that:

> Noting that Congress enacted the Driver's Policy protection Act under its Commerce Clause power, *see Reno v. Condon*, 528 U.S. 141, 148 (2000), the Village states that it intends to argue that regulating the use of personal information on parking tickets--as opposed to the sale of personal information--exceeds Congress's authority under the Commerce Clause. The contours of the commerce power argument that the Village intends to present to the Supreme Court are not discernible with any precision from the laconic reference in the motion. However, one nearly insuperable barrier to its

> consideration by the Court is evident. The issue never was raised throughout the proceeding in this court. It would be indeed a rare occasion for the Supreme Court to consider on certiorari an argument that could have been presented to the court of appeals in the normal course of litigation, but was not, appearing only after the last drop of ink had been expended in not one, but two, rounds of consideration by the court of appeals.

Resp. App. 3.

Accordingly, any constitutional challenge should be considered by the district in the first instance and not this Court.

V. There Is No Reason To Hold For *Maracich*

There is also no reason for the Court to hold this case in abeyance pending resolution of *Maracich v. Spears*, because the cases have no similar facts or common questions of law. No. 12-25, cert. granted Sept. 25, 2012. *Maracich* involves an obtainment and use for solicitation by an attorney in connection with proposed, or placeholder, litigation under section 2721 (b)(4). *Id.* Conversely, this case involves an unlawful disclosure under section 2721(c). The facts and issues in the two cases are not even remotely related and a decision in *Maracich* will have no bearing on this case. In addition, because this case is interlocutory, the lower courts will be able to take into account any relevant holding in *Maracich*. Accordingly, there is no need to hold, vacate, and remand for reconsideration in light of the Court's eventual decision in that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

No. 10-3243

[Filed September 6, 2012]

JASON M. SENNE,

Plaintiff-Appellant,

v.

VILLAGE OF PALATINE, ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:10-cv-05434—**Matthew F. Kennelly**, *Judge*.

ON MOTION FOR STAY OF MANDATE

SEPTEMBER 6, 2012*

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* This opinion was released initially in typescript form.

RIPPLE, *Circuit Judge* (in chambers). This matter is here on the motion of the Village of Palatine for a stay of this court's mandate pending the disposition of a petition for a writ of certiorari by the Supreme Court of the United States. Because I believe that the Village has not carried its burden of showing that there is a reasonable probability that four Justices will vote to grant the writ of certiorari and that there is a reasonable possibility that five Justices will vote to reverse this court's judgment, I must deny the requested relief. Alternatively, assuming, for the sake of argument, that the Village has shown the requisite probability of success on the merits, the Village has not met its burden of showing the requisite harm if the stay is not granted.

This case presented our court with an issue of first impression both in this circuit and in the United States. After a thorough review at the panel level, the court, sitting en banc, reversed the district court's dismissal of Jason Senne's action against the Village of Palatine. *Senne v. Vill. of Palatine*, No. 10-3243, 2012 WL 3156335, at *10 (7th Cir. Aug. 6, 2012) (en banc). Mr. Senne had alleged violations of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25. The court determined that his complaint plausibly alleged a violation of the statute. While noting the "very real safety and security concerns at stake," we left it to the district court to explore on remand whether the information disclosed by the Village's police department was used for a purpose exempted from the non-disclosure provisions of the statute. *Senne,* 2012 WL 3156335, at *9-10. We further pretermitted any discussion of the burden of proof with respect to the

statutory exceptions as well any determination of the measure of damages.[1]

The standards that govern the disposition of this motion are well established. "When a party asks this court to stay its mandate pending the filing of a petition for a writ of certiorari, that party must show that the petition will present a substantial question and that there is good cause for a stay." *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (citing Fed. R. App. P. 41(d)(2)(A)). The grant of a motion to stay the mandate "is far from a foregone conclusion." 16AA Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3987.1 (4th ed. 2008). Instead, the party seeking the stay must demonstrate both "'a reasonable probability of succeeding on the merits' and 'irreparable injury absent a stay.'" *Bricklayers Local 21 of Illinois Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers) (quoting *Galdikas v. Fagan*, 347 F.3d 625, 625 (7th Cir. 2003) (Ripple, J., in chambers)); *see also Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). More precisely, in order to demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari petition, a party must demonstrate a reasonable probability that four Justices will vote to grant certiorari and that five Justices will vote to reverse the judgment of this court. *See*

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[1] Our mandate was scheduled to issue on August 27, 2012. The filing of this motion to stay has stayed temporarily its issuance.

California v. American Stores Co., 492 U.S. 1301, 1307 (1989); *United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers); *Williams*, 50 F.3d at 1360. In applying this standard, we must consider carefully the issues that the applicant plans to raise in its certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari. *Williams*, 50 F.3d at 1361.

Noting that Congress enacted the Driver's Policy Protection Act under its Commerce Clause power, *see Reno v. Condon*, 528 U.S. 141, 148 (2000), the Village states that it intends to argue that regulating the use of personal information on parking tickets—as opposed to the sale of personal information—exceeds Congress's authority under the Commerce Clause. The contours of the commerce power argument that the Village intends to present to the Supreme Court are not discernible with any precision from the laconic reference in the motion. However, one nearly insuperable barrier to its consideration by the Court is evident. The issue never was raised throughout the proceeding in this court. It would be indeed a rare occasion for the Supreme Court to consider on certiorari an argument that could have been presented to the court of appeals in the normal course of litigation, but was not, appearing only after the last drop of ink had been expended in not one, but two, rounds of consideration by the court of appeals.

It is difficult to ascertain the precise commerce power argument the Village has in mind. Nevertheless, for the sake of completeness, I simply shall point out that, although the Supreme Court recently has

explored the boundaries of the commerce power, *see, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012), this case presents a far different situation and one upon which the Court already has passed. Here, there is no instance of the federal government forcing a state or an individual to participate in an interstate market. Indeed, the answer that the Court gave to a constitutional challenge to the DPPA in *Reno*, seems unaffected by *National Federation*:

> The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA regulates is a "thin[g] in interstate commerce," and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). We agree with the United States' contention. The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, *an article of commerce*, *its sale or release* into the interstate stream of business is sufficient to support congressional regulation.

Reno, 528 U.S. at 148 (emphasis added). Notably, *Reno* does not appear to rely on the *sale* of any information.

Instead, it identifies the information that the state possesses and "release[s]" into interstate commerce as "an article of commerce."[2] The states' ongoing decision to *release* that article would seem to be the critical distinction here. Under the reading of the DPPA adopted by this court, states are not penalized for inactivity, nor are they forced into activity; they simply are regulated in an activity they voluntarily undertake because that activity involves data that the Supreme Court already has determined to be "an article of commerce."

The Village also plans to submit to the Supreme Court several arguments about this court's interpretation of the statute. It begins by suggesting that the purpose of the DPPA was limited to the *sale* of personal information by state motor vehicle departments. Although the Village generally condemns

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[2] *Reno v. Condon*, 528 U.S. 141 (2000), involved the *sale* of information by the State of South Carolina, and the Court based its preliminary holding that the statute is within the commerce power on that set of facts. In accepting the argument that the Commerce Clause directly authorized regulation, the Court explicitly declined to address the alternative argument for constitutionality, "that the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information have a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation." *Id.* at 148-49. In *Reno*, therefore, the Government supplied the Court with a rationale that would have allowed them to uphold the DPPA's regulation data under an even more attenuated relationship to commerce; without limiting its holding to data that actually *was sold*, *see id.* at 148 (referencing "sale *or release*"), the Court viewed the data as a sufficient item in interstate commerce itself to justify regulation.

our court for ignoring a plain language approach in its interpretation of the statute, it ignores the fact that the plain language of the statute supports the view that the statute's scope, while certainly including the sale of such information, facially regulates other sorts of dissemination as well. The terms of 18 U.S.C. § 2721(a) are clear. The statute regulates a state's ability to *disclose* (not simply to "sell"). Employing "disclose" rather than "sale" does not appear to be an unconscious use of a more general term by Congress in crafting its background rule of non-release of information because the statute later, in subsection (c), specifically regulates "[r]esale or [r]edisclosure." Reading these two subsections side-by-side, it is clear that Congress consciously chose to regulate activity *beyond* sales and, indeed, to establish a broad background rule of *non-disclosure* from which the listed exceptions obtain. The statutory language alone, therefore, undercuts any argument that Congress intended to limit the reach of the statute to commercial transactions.

The motion continues its condemnation of the court's statutory analysis by suggesting that this case presents, in stark relief, a division among the circuit judges over the proper methodology of interpreting statutes. In the Village's view, the dissenters have adhered to the plain text, while the court has rewritten the statute to cover what it believes Congress should have included in order to achieve its goals. Def.'s Mot. to Stay 12 (citing *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010)). A fair reading of the court's opinion makes very clear the unfairness of this characterization. Indeed, the court in its textual analysis emphasized the importance of the "basic canon of construction to give meaning to every word of a

statute." *Senne*, 2012 WL 3156335, at *7 (citing *Duncan v. Walker,* 533 U.S. 167, 174 (2001)). At bottom, what separates the judges of the circuit is a respectful disagreement about what the words of the statutory text convey.

The motion makes several more points about the merits of the case and its candidacy for a grant of certiorari. It suggests that the mere fact that our court decided to hear the case en banc demonstrates that the court's final disposition of the case is worthy of review on certiorari. This argument, occupying a significant amount of space in the motion, needs little comment. The grant of an en banc hearing by a court of appeals can be motivated by many factors, including a belief that a panel's decision is so wrong that it will frustrate the statutory intent and upset the settled understanding of the statute's command. Indeed, it is not at all clear, despite two rounds of appellate hearings, that the absence of earlier litigation on this statutory provision is due to anything other than forthright obedience to the plain command of the statute.

The procedural posture of this litigation also makes this case a very poor candidate for a grant of certiorari. As noted earlier, the district court must address on remand whether the information in question was used for a governmental activity mentioned in the statutory exemptions. *See Senne*, 2012 WL 3156335, at *10. The Village has not been heard on this important question. Secondly, the court pointedly pretermitted any discussion about the appropriate measure of damages.

I turn now to the alternate ground of irreparable injury. Because the court of appeals merely reversed the grant of a motion to dismiss for failure to state a cause of action, there is no monetary judgment at issue. Moreover, before the en banc court, the Village represented that it had modified its practices. There is no indication that modification of traffic citation practice to ensure that irrelevant personal information was eliminated from public view was a significant burden. No argument is made that elimination of such information has hampered in any way law enforcement efforts.

Because the Village has not met the established criteria for the granting of a stay, I must deny the motion.