No. 12-25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS, and JOHN C. TANNER, individually and on behalf of all others similarly situated,
Petitioners,

v.

MICHAEL EUGENE SPEARS, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Fourth Circuit properly interpret the Driver's Privacy Protection Act's "litigation exception" to hold that the exception applied where attorneys obtained, disclosed or used personal information in connection with imminent and/or pending litigation filed on behalf of their clients (for the clients' benefit and for the benefit of other injured members of the public), even if the attorneys' conduct could also be characterized as "solicitation"?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT

Petitioners are car buyers who commenced this putative class action under the Driver's Privacy Protection Act of 1994 ("Act"), 18 U.S.C. §§ 2721, *et seq*. Petitioners' claims stem from mailings they received in connection with a pending South Carolina state court consumer protection lawsuit ("*Herron*").

This case concerns the permissible uses under Section 2721(b) of the Act. The Respondents/ Defendants ("Attorneys") filed *Herron* as attorneys on behalf of car buyers ("Consumers") against car

dealerships ("Dealers") charging illegal fees, alleging, *inter alia*, violations of the South Carolina Manufacturers, Distributors, and Dealers Act ("MDDA"), S.C. Code §§ 56-15-10, *et seq*.

A. The MDDA

South Carolina's MDDA prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code § 56-15-40. The statute creates a private right of action for damages. In addition, to protect the rights of the South Carolina public, the MDDA includes a private attorney general provision that allows for the filing of a representative action (essentially a class action) "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief." S.C. Code § 56-15-110(2).

B. Chronology of Events in *Herron* Relevant to the Petition

In June of 2006, several Consumers approached some of the Attorneys with complaints of Dealers' unfair practices. Believing that those practices violated the MDDA, the Attorneys began investigating and discovered that the Automobile Dealers Association might have ratified the illegal conduct.

As part of this investigation, on June 23, 2006 a Freedom of Information Act ("FOIA") request[1] was

[1] The FOIA requests at issue here will be referred to as the "FOIA Requests."

submitted to the South Carolina Department of Motor Vehicles ("DMV") stating: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request." The DMV provided information responsive to this FOIA Request, as it did in response to *all* of the FOIA Requests. On August 24, 2006, a second FOIA Request was sent "in anticipation of litigation . . . pursuant to the exception in 18 U.S.C. § 2721(b)(4)." In an attempt to investigate whether the claimed charging of illegal fees was a common practice, this FOIA Request sought information about automobile sales in five South Carolina Counties from May 1-7, 2006.

On August 29, 2006, the Attorneys commenced *Herron*, naming four individual Consumers as plaintiffs. Because their investigation disclosed that the deceptive practices might be widespread, pursuant to the MDDA's authorization of a representative action, the Attorneys also asserted claims "for the benefit of *all* car buyers who[] paid 'administrative fees'" against 51 named Dealers. The Attorneys alleged the *Herron* claims on behalf of all car Buyers pursuant to the MDDA's authorization of a representative action "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court." S.C. Code § 56-15-110(2).

Between September 2006 and February 27, 2007, various Dealers filed over 180 motions to dismiss in *Herron* arguing that the Consumers' claims should be dismissed for lack of standing. With these motions,

beginning in September 2006, the Dealers began a campaign of arguing that standing rules prohibited the four named Consumers from suing, as representatives, dealers with whom they did not personally deal. The Dealers argued that, for every named Dealer, there had to be a corresponding named Consumer plaintiff who was an actual customer.

On October 26, 2006, after the Dealers began filing motions to dismiss, another FOIA Request was sent seeking information concerning vehicle sales from May 1-14, 2006 by numerous specified Dealers.[2] This FOIA Request stated it was made pursuant to "the exception in 18 U.S.C. § 2721(b)(4)." On October 31, 2006, the Attorneys amended the *Herron* Complaint to add four more Consumer plaintiffs and over 250 Dealer Defendants.[3]

More than five months after *Herron* was commenced and after the filing of numerous motions to dismiss for lack of standing, letters[4] were sent to unnamed Consumers who had been identified through the FOIA Requests.[5] These letters explained:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealer-

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[2] Subsequent FOIA requests were made on January 19, 22, and 23, 2007. These requests were similar in substance, but sought information about different Dealers.

[3] The Attorneys did not discover these additional named plaintiffs through FOIA Requests. In fact, the Letters (defined below) were not sent until well after this date.

[4] The letters at issue in this case allegedly sent by or on behalf of the Attorneys are collectively referred to as the "Letters."

[5] Additional Letters were sent on January 23, 2007, March 1 and 5, 2007, and May 8, 2007.

> ships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.
>
> The exact nature of your legal situation will depend on facts not known at this time. You should understand that the advice and information in this communication is general and that your own situation may vary. However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card. . . .

Out of an abundance of caution, the words "ADVERTISING MATERIAL" and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the Letters.

On March 9, 2007, the Consumers filed a Memorandum in Opposition to Motions to Dismiss, arguing, *inter alia*, that the MDDA's authorization of suit "for the benefit of the whole" conferred standing on the named plaintiff Consumers to sue *all* defendant Dealers on behalf of all affected Consumers. The Consumers argued that they were not required to name an individual customer plaintiff corresponding to each named Dealer. On April 4, 2007, state court

Judge Doyet A. Early, III held oral argument on the Dealers' motions to dismiss, wherein the Dealers and Consumers maintained their standing arguments.

When a ruling did not immediately follow oral argument, the Attorneys deemed it prudent to take affirmative steps to protect the Consumers' rights by moving to amend the *Herron* complaint to name an individual plaintiff Consumer who had transacted business with each defendant Dealer. This would effectively eliminate the standing issue. Thus, the Consumers moved to amend their Complaint to add 247 named plaintiffs who purchased cars from each named Dealer and came forward because of the Letters. On July 25 and 27, 2007, several Dealers opposed this Motion to Amend Complaint arguing, *inter alia*, that the Attorneys had violated the Act in contacting the newly-named plaintiff Consumers. This opposition was curious, insofar as the proposed amendment would eliminate the standing issues the Dealers raised.

On July 31, 2007, Judge Early denied the Dealers' Motions to Dismiss, ruling that the Consumers had standing and that the Act's private attorney general provision "creates a substantive right" so that a complaint thereunder did not need "to plead and prove the class certification requirements of S.C.R.C.P. Rule 23." Judge Early endorsed the statutory right of the named Consumers to proceed "for the benefit of the whole" and held that the eight named Consumers could sue all of the named Dealers.

Later that day, Judge Early also heard arguments on the Consumers' motion to amend. Judge Early notified the parties of his denial of the Dealers' motions to dismiss, explaining that he "made a ruling on the relationship between the South Carolina Rules

of Civil Procedure 23 and the Code § 56-15-110(2) and in that I found [Title] 56 created a substantive right and Rule 23 was not required to move forward in this case." Judge Early noted that he had "raised consistently" concerns about standing and that those concerns were not a "secret."

Despite the implications of their motions to dismiss, the Dealers opposed the Consumers' motion to amend arguing that the Attorneys improperly used FOIA Requests to "solicit" clients. Judge Early summarily rejected those arguments as irrelevant and stated that his denial of the motions to dismiss foreclosed any issues under the Act. Judge Early indicated he would deny the motion to amend and allow *Herron* to proceed with eight named Consumers against all defendant Dealers; in the interest of efficiency, he encouraged the Dealers to select a group of Dealers to conduct discovery. In suggesting this, he indicated that *Herron* was "like a little class action … like it's a mass lawsuit." On August 21, 2007, Judge Early denied the Consumers' motion to amend the complaint, concluding that Rule 15, SCRCP, "does not allow the existing plaintiffs to add new plaintiffs to the case in order to assert a claim against the defendant."

On January 31, 2008, Judge Early reconsidered his denial of the Dealers' motions to dismiss. He then held that each named Consumer had representative standing only to sue Dealers with whom he transacted business. He stated that a Consumer could acquire standing to sue Dealers with which he did not transact any business "if that [Consumer], during discovery, obtains evidence sufficient to raise a genuine issue of material fact on whether certain [Dealers] engaged in a civil conspiracy with regard to

charging a closing fee." Judge Early's decision reconfirmed that the named Consumers acted as representatives for unnamed Consumers; he ruled that he did not change his prior ruling that Section 56-15-110(2) created a substantive right to proceed in a representative capacity without the need for Rule 23 class certification.

C. Procedural History of This Case

Petitioners commenced this action on June 23, 2009, by filing a putative class action asserting claims pursuant to the Act based on the Letters they received from Attorneys. On August 3, 2009, the Attorneys filed a comprehensive Motion to Dismiss with a lengthy memorandum in support. On September 9, 2009, the District Court denied that Motion, finding that "the factual allegations in the complaint are sufficient to satisfy the low bar for pleading a claim for relief."

On January 11, 2010, the Attorneys filed a Motion to Stay, arguing, *inter alia*, that discovery might result in the disclosure of protected work-product or privileged information. Thus, on January 25, 2010, the District Court stayed this action for six months. On February 17, 2010, Petitioners moved to lift the stay to request class certification. On March 23, 2010, the District Court lifted the stay to allow for the filing of summary judgment motions because, in part, "the Plaintiffs further stated that they believed that they would not need any discovery to respond to the Defendants' Motion for Summary Judgment." In May 2010, the parties filed cross summary judgment motions and supporting documents. On August 4, 2010, the District Court granted the Attorneys summary judgment, and Petitioners appealed.

The Fourth Circuit affirmed the entry of summary judgment. On appeal, the Petitioners contended that the FOIA Requests and the Letters were not proper under the "litigation exception" of Section 2721(b)(4). Petitioners did not seriously contend that the FOIA Requests and the Letters were not "in connection with" the *Herron* litigation. Instead, Petitioners argued that – because the Letters could be characterized as "solicitation" – the "litigation exception" could not apply as a matter of law. The Fourth Circuit rejected Petitioners' argument, holding that even if the Attorneys engaged in "solicitation," their conduct could still fall within the scope of the "litigation exception." The instant Petition followed.

REASONS FOR DENYING THE PETITION

A. PETITIONERS COMPLICATE THE FOURTH CIRCUIT'S DECISION

Under the Act, "[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). The Act prohibits state DMVs from disclosing personal information, unless an exception applies. *See* 18 U.S.C. § 2721(a). Those exceptions (14 in all) are enumerated in Section 2721(b), including:

> Personal information referred to in subsection (a) . . . may be disclosed as follows: . . .
>
> (4) For use in connection with any civil . . . proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforce-

> ment of judgments and orders, or pursuant to an order of a Federal, State, or local court.[6] . . .
>
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.[7]

Petitioners carry the burden of proving that the Act did not permit the Attorneys' conduct. *See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008); *accord Bailey v. Daniels*, 679 F. Supp. 2d 713, 720 (W.D. La. 2009) ("[T]he plaintiff must carry the burden of establishing that the defendant's intended use for the information was not permitted under the DPPA.").

The Attorneys have asserted in this case that their conduct was permitted under the "litigation exception" of subsection (b)(4) because their conduct was all "in connection with" *Herron*. Petitioners do not seriously dispute this. Rather, Petitioners contend that the Attorneys' challenged conduct – even if "in connection with" *Herron* – can be characterized as "solicitation" and, therefore, is permissible *only* if consent was granted under the "bulk solicitation exception" of subsection (b)(12). At its heart, Petitioners' argument boils down to this: to be permitted under the Act, a disclosure or use of information must satisfy *all* potentially-applicable exceptions.

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[6] Under the "litigation exception" of Section 2721(b)(4), both "personal information" and "*highly restricted* personal information" may be disclosed. *See* 18 U.S.C. § 2721(a)(2).

[7] Under the "bulk solicitation exception" of Section 2721(b)(12), only "personal information" may be disclosed, not "highly restricted confidential information."

The Attorneys countered that the fourteen exceptions under the Act are individual and independent of each other. They are separate exceptions, not cumulative conditions to permissible use. To be permissible, a disclosure of information need satisfy *only* one exception. As a result, unless the Petitioners could show that Attorneys' conduct fell outside of *all* of the exceptions, their claims had to fail. The undisputed evidence showed that the FOIA Requests and actual use of information were "in connection with" the *Herron* litigation. The characterization of their alleged conduct as "solicitation" was irrelevant to whether the Attorneys could be held liable under the Act.

The Fourth Circuit's central holding – agreeing with the Attorneys – was clear and uncontroversial:

> In short, where as a matter of settled state law and practice, as here, solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains.

(*See* Pet. App., at p. 5a; *accord* Pet. App., at p. 39a). The Fourth Circuit merely held – consistent with decades of law governing statutory interpretation – that a party falling within one exception to liability may not be held liable. Petitioners attack this holding claiming that it "muddle[s] an already complex area of law" and threatens "profoundly troubling policy implications." (*See* Petition, at p. 12). Petitioners' suggestion that the Fourth Circuit somehow crafted a complicated or questionable rule of law is not in line with reality. To the contrary, the Petition injects

needless complexity into a straightforward statutory interpretation.

As discussed above, the Act provides that personal information may not be disclosed except as fourteen separate and independent exceptions permit. *See Reno v. Condon*, 528 U.S. 141, 145 (2000) ("The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions."). These exceptions are not *conditions* that must *all* be satisfied; rather, they are alternative routes to permissibility under the Act. None of the exceptions are given precedence in application over the others. Nothing in the Act suggests that if a use is permissible under one exception it must also satisfy other potentially relevant exceptions. Petitioners' contention finds no support in the language or logic of the Act. The Petitioners would write a "not solicitation" requirement into Section 2721(b)(4) where Congress did not.

B. THE FOURTH CIRCUIT DID NOT CREATE A NEW "INEXTRICABLY INTERTWINED TEST"; IT MERELY RENDERED A CORRECT INTERPRETATION OF THE ACT

Petitioners devote substantial attention to the Fourth Circuit's use of the phrase "inextricably intertwined." Petitioners apparently do so to suggest that the Fourth Circuit created a new legal "test" of general application that conflicts with prior law. As the Attorneys will discuss herein, the Fourth Circuit's opinion does not squarely conflict with any prior law. However, before undertaking that effort, the Attorneys wish to accurately clarify what the Fourth Circuit did in this case.

On appeal, Petitioners contended, *inter alia*, that the claimed use "in connection with" litigation was a subterfuge for "solicitation." According to Petitioners, the issue confronting the Fourth Circuit was whether the Attorneys' conduct was within the "litigation exception," even though it was also "solicitation." The Fourth Circuit did conclude that the Attorneys' conduct could be considered "solicitation." (*See* Pet. App., at pp. 25a-29a). However, the Fourth Circuit then noted that "this determination is not dispositive." (*See id.*, at p.29a).

> [Petitioners] contend that the district court erred in ruling that, as a matter of law, the nonconsensual use of personal information for solicitation is nonetheless non-actionable under 18 U.S.C. § 2724, see supra n.5, if the solicitation is sufficiently tied to a permissible use under the litigation exception. In other words, and more generally, the Buyers urge a theory of DPPA liability in which any impermissible use of personal information, e.g., solicitation absent consent, would violate the statute (and support a damages action), even if, concomitantly, the personal information is put to a permissible use, i.e., in litigation.
>
> For the reasons explained below, *without undertaking to lay down a rule applicable in all future cases*, we are persuaded that the most rational resolution of the manifest tension between the solicitation and litigation exceptions under the DPPA compels us to reject the Buyers' absolute rule.

(*See id.*, at p. 30a (emphasis added)). Specifically, the Fourth Circuit held that under the unique circumstances of this case the "litigation exception" applied,

notwithstanding the alleged "solicitation," if such "solicitation" was "in connection with" *Herron:*

> We therefore hold that as to DPPA provisions (b)(4) and (b)(12), conduct that might, prima facie, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such *use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception*. [Citation omitted.] We determine next whether the district court erred in concluding that the litigation exception applies to the undisputed facts reflected in the record of this case.

(*See* Pet. App., at p.39a (emphasis added)).

As both the Fourth Circuit and the district court recognized, the Attorneys' use of information was directly related to the litigation of *Herron*. For example, before *Herron* was filed, information was sought to determine whether a large number of Dealers engaged in prohibited practices and the scope of those practices. If the action was "of common or general interest to many persons" too numerous to join, the Attorneys could file a representative MDDA suit "for the benefit of the whole." S.C. Code. § 56-15-110(2). The first pre-suit FOIA Request, dated June 23, 2006, confirms this purpose:

> This is a Freedom of Information request in anticipation of litigation … pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed).
>
> I have plaintiffs who have complained of certain conduct as a result of their transactions with car

> dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request.

The second pre-suit FOIA Request asked for the same information from a larger geographical area, again "pursuant to the exception in 18 U.S.C. 2721(b)(4)." Both FOIA Requests were part of the investigation in anticipation of litigation. They were made within 60 days of filing *Herron*, with the second coming only five days before filing. None of the personal information obtained from these FOIA Requests was used to identify or contact the eight named *Herron* plaintiffs, who had independently approached the Attorneys. The purpose of obtaining the DMV information was clearly not, as Petitioners claim, to solicit new clients for a theoretical future lawsuit. Rather, these requests were designed to assist in the analysis of a potential and later pending lawsuit to be filed on behalf of already extant clients. Petitioners cannot genuinely dispute this fact since the Attorneys did not communicate with any unnamed Consumers until five months *after* filing *Herron*.

Once the Attorneys commenced *Herron*, there existed active, pending litigation with real named plaintiffs and represented absent Consumers. Defendant Dealers subsequently moved to dismiss the claims of all unnamed Consumers against Dealers for whom there was no corresponding named Consumer. To the extent that unnamed Consumers could be identified, the Attorneys could use that information to oppose the Dealers' motions to dismiss. If the motions to dismiss were granted, unnamed Consumers, unaware of their rights and unable to make

informed decisions about their participation in *Herron*, could have lost their claims. The DMV information at issue here was obtained and used in order to resolve a highly contested issue in pending litigation – the standing of the named Consumers to represent the unnamed Consumers. It was the Dealers – some represented by Petitioners' original attorneys in this lawsuit – who filed motions to dismiss challenging the standing of unnamed Consumers. The post-commencement FOIA Requests were submitted in response to those motions and in an effort to gather information and witnesses in support of their claims.[8]

As the state trial court ruled, *Herron* is not a "class action" under Rule 23, of the South Carolina Rules of Civil Procedure, but is a group representative action under the South Carolina MDDA analogous to a class action,[9] in which named Consumers represent unnamed Consumers and proceed for the "benefit of the whole," albeit without formal class certification.

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[8] The motions to dismiss were filed between September 2006 and February 12, 2007. The post-suit FOIA Requests are dated October 26, 2006 through January 23, 2007, and the Letters communicating with the unnamed Consumers were dated January 3 through May 8, 2007.

[9] Section 56-15-110(2) is a substantive statute that authorizes a representative suit under circumstances similar to some of the factors that a class action under Rule 23. *Compare* S.C. Code § 56-15-110(2) (where the action is of "common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole ….") *with* Fed. R. Civ. P. 23(a)(1) & (2) (authorizing a representative suit if, (among other requisite factors inapplicable in a representative suit under the MDDA), "the class is so numerous that joinder of all members is impracticable" and "there are questions of law or fact common to the class.").

With the filing of this representative action, the unnamed Consumers' legal interests were directly implicated and afforded protection. While the Attorneys did not have an express attorney-client relationship with unnamed Consumers, their professional and fiduciary obligations to them were nonetheless imperative. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys … owe the entire class a fiduciary duty once the class complaint is filed."), *cert. denied*, 516 U.S. 824 (1995); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) ("C]lass attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class"); *Kingsepp v. Wesleyan Univ.*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("[T]he role of class counsel is akin to that of a fiduciary for the class members"); *Wagner v. Lehman Bros. Kuhn Loeb*, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (stating class counsel "stands in a fiduciary relationship with the absent class"); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) ("class action counsel possess, in a very real sense, fiduciary obligations to those not before the court"). Thus, at a minimum, upon filing a representative suit on behalf of a group of persons (some unnamed), the Attorneys owed a fiduciary obligation toward unnamed members. In accordance with that duty, "'[s]olicitation' of parties to help maintain the action on behalf of the putative group "may be entirely appropriate, **if not required**, as part of class counsel's fiduciary duty" to the group. *In re Avon Sec. Litig.*, 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (emphasis added). Once the Attorneys filed *Herron*, their subsequent communications to inform the unnamed Consumers about the suit and deter-

mine their interest in joinder to protect their claims from the Dealers' standing challenges was not a ploy to solicit new business, but was a necessary part of their professional obligations to members of the represented "class."

Moreover, as the Fourth Circuit observed, Petitioners have never even attempted to factually dispute that the Attorneys' conduct was "in connection with" the *Herron* litigation:

> [Petitioners'] arguments throughout the proceedings below had been focused solely on the applicability of the litigation provision as a matter of law, *i.e.*, that it did not protect the use here because the solicitation provision applied, as well and imposed liability regardless of any other permitted use. They did not, however, produce or suggest any evidence that the provision did not apply as a factual matter.

(*See* Pet. App., at p.41a).

In light of the foregoing, the Fourth Circuit concluded that the Attorneys' "solicitation" was "inextricably intertwined" with the use of personal information "in connection with" the *Herron* litigation. The context makes clear that the "inextricably intertwined" language used in the Fourth Circuit's opinion did not create a new legal test. Rather, the court simply held that, because, in this case, solicitation was inextricably intertwined with use "in connection with litigation," Section 2721(b)(4) applied. In other words, even though the conduct could be considered "solicitation," that did not preclude it from also being use "in connection with" litigation.

This was not a new test. Rather, this was simply a plain construction of the Act's provisions as applied to the particular factual circumstance before the court. The Fourth Circuit expressly held that, in resolving the claimed tension between the "litigation" and "bulk solicitation" exception, it was not "undertaking to lay down a rule applicable in all future cases." (See id., at pp. 29a-30a). Rather, the Fourth Circuit simply decided that, under the facts before it, the Attorneys' conduct was sufficiently connected to the *Herron* litigation to render the fact that it could also be called "solicitation" irrelevant.

The Fourth Circuit's holding is consistent with the respect that the Act affords to attorneys' litigation activities. The Act recognizes that use of DMV data in connection with litigation is a paramount interest; it permits the release of even "highly restricted personal information"[10] without consent of the individual to whom the information pertains for that

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[10] The Act provides different degrees of protection to information, depending upon whether it is "personal information" or "highly restricted personal information":

> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.
>
> (4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information;

See 18 U.S.C. § 2725(3) & (4).

use. 18 U.S.C. § 2721(a)(2).[11] Although Petitioners minimize the "litigation exception," the Act grants that exception broad application.

C. THERE IS NO CONFLICT IN THE LAW APPROPRIATE FOR REVIEW

Petitioners suggest that this Court should grant *certiorari* because the Fourth Circuit's opinion creates law that is in conflict with prior caselaw. (*See* Pet. for Writ of Certiorari, at pp. 13-14). However, as discussed above, the Petitioners' statement of the two issues misstates what the Court of Appeals did. Moreover, for the reasons discussed below, the Fourth Circuit's opinion does not squarely conflict with any prior law, and, consequently, this is not an appropriate case for *certiorari*.

1. There Is No Irreconcilable Conflict Between the Fourth Circuit's Opinion in This Case and Prior Precedent From the Third Circuit and the District of Columbia Court of Appeals (Petitioner's Claimed First Issue)

Petitioners first argue that the Fourth Circuit creates a conflict with other cases as to the issue of whether "pure solicitation of clients qualifies as a permissible use under the litigation exception of the Act." However, these cases can be reconciled with this case, because they are factually distinguishable.

Petitioners first cite *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*"). In *Pichler VII*, a

[11] By comparison, the "bulk solicitation" exception only permits disclosure of "personal information" (and then only upon consent). *See* 18 U.S.C. § 2721(a).

union ("UNITE") launched an organizing campaign targeting CINTAS Corporation. In an effort to contact CINTAS employees at home, UNITE, *inter alia*, recorded license plate numbers of cars parked in CINTAS parking lots in a process called "tagging." UNITE used those numbers – through Westlaw searches and third-party "information brokers" – to obtain personal information from databases containing state motor vehicle records. According to Westlaw, UNITE conducted about 13,700 searches. Of the total searches, only about 1,500 pertained to CINTAS. The remaining approximately 12,000 did not pertain to individuals related to the labor organizing campaign at CINTAS. UNITE was then sued in a class-action alleging violations of the Act through the tagging process, and it was ultimately determined that UNITE violated the Act. During that litigation, UNITE obtained a protective order preventing CINTAS from using information obtained in the lawsuit as a weapon against the organizing effort. Among the information that the order protected was the personal information of the 12,000 people who were not connected to the organizing campaign.

The National Right to Work Legal Defense Foundation ("NRTW") sought to intervene and have the protective order amended to permit it to obtain information about those 12,000 people. NRTW claimed that it wanted the information to inform those individuals, who were outside the class that had sued UNITE, that UNITE obtained personal information in violation of the Act. The district court refused to modify the protective order because NRTW had no right of access to the documents.

The Third Circuit affirmed the District Court's refusal to modify the protective order, holding that

NRTW's proposed use for the disputed information was impermissible under the "litigation exception":

> The records the NRTW is seeking will not advance the inquiry of any decisionmaker charged with deciding any claims under the DPPA that may arise from disclosure to the NRTW. The information the NRTW wants to obtain would do nothing more than identify potential litigants and claimants who may wish to pursue remedies for UNITE's violation of the DPPA. That is not enough to compromise the privacy afforded motorists by the DPPA. In fact,
>
> > The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is *merely contemplating* the commencement of litigation. The risk of a *fishing expedition* or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need.
>
> Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L.Rev. 427, 499 (1991).
>
> UNITE's use of the information obtained through tagging was impermissible because it amounted to *nothing more than discovery of potential plaintiffs*.

Id. at 752 (emphasis added).

The Fourth Circuit's opinion here does not conflict with *Pichler VII*. The logic of the two cases is consistent, and their different results stem from vastly

different facts. In *Pichler VII*, the NRTW literally wanted to use the "litigation exception" to drum up speculative litigation. There were no existing clients. There was no pending or imminent lawsuit. There was simply an organization that wanted to engage in a fishing expedition to find potential litigants to see if a lawsuit *might* follow. The "solicitation" of clients could not be "in connection with" any litigation, pending or anticipated; any litigation was purely hypothetical. *Pichler VII* correctly held that the "litigation exception" does not permit – whether through "solicitation" or otherwise – personal information to be used to manufacture a lawsuit.

Here, in contrast, the Fourth Circuit addressed a scenario where litigation – with actual, existing clients – was either imminent or actually pending. The so-called "solicitation" was not used to locate potential litigants in the first instance. The pre-filing FOIA Requests were intended to discover the scope of the alleged misconduct and identify high-volume dealers. The *Herron* lawsuit was initially filed with named plaintiffs who came to the Attorneys and were not located through the FOIA Requests. The subsequent FOIA Requests obtained information that the Attorneys used to oppose motions to dismiss that the Dealers filed in *Herron* and in furtherance of the Attorneys' obligation to discover unnamed parties with interests in the representative *Herron* action. The instant case is facially distinguishable from *Pichler VII*. The Fourth Circuit's logic, however, is entirely consistent with *Pichler VII*.

The Fourth Circuit did not announce any legal principle of general application in conflict with the law of the Third Circuit. Because there is no "square conflict" with the law of the Third Circuit, the Court

should not grant certiorari. *See Frank v. United States*, 506 U.S. 932, 932 (1992) ("[T]he Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation."); *Miroyan v. United States*, 439 U.S. 1338, 1339 (1978) ("While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist.") (Rehnquist, J.) (denying motion to stay Circuit Court mandate).

Petitioners also argue that the Fourth Circuit opinion is inconsistent with *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. Ct. App. 2005), which held that "[a]cquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." (Petition, at p. 17). In *Wemhoff*, the DMV denied a lawyer's request for the addresses of motorists receiving traffic citations from a malfunctioning traffic camera. Wemhoff filed, without having a named plaintiff, a class action suit styled *Thousands of Motorists to be Identified v. District of Columbia.* It was summarily dismissed because Wemhoff did not name a single actual plaintiff. *Id*. at 1107 n.1.

Unlike the Attorneys, Wemhoff had no attorney-client relationship with any person and had no pending or imminent lawsuit on behalf of a client. Unlike the Attorneys, Wemhoff had no fiduciary obligations to investigate or obtain information to

protect the rights of any person. As the Fourth Circuit noted, *Wemhoff* is "plainly distinguishable" from this case, because the attorney in that case "was merely trolling for clients in the hope that litigation *might be in the offing*." (*See* Pet. App., at p. 36a n.13 (emphasis added)). Here, there is no evidence that the Attorneys "trolled" for clients to start a lawsuit; rather, their conduct was all in connection with litigation filed for their named clients (and on behalf of others similarly situated). There is no conflict at all, let alone a square conflict, between the Fourth Circuit and *Wemhoff*.

In sum, there is no conflict in the law regarding whether conduct is automatically disqualified from being "in connection with" litigation simply because it can be characterized as "solicitation." Petitioners cite to no case setting forth such a black letter rule of law.[12] The *Pichler* and *Wemhoff* cases certainly do

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[12] Petitioners cite *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008) to suggest that – consistent with their reading of *Pichler VII* and *Wemhoff* – the "litigation exception" cannot apply where an attorney "solicits." However, Petitioners' cited language from *Thomas* is not a substantive discussion of the Act but merely a suggestion that it is not unfair to require a plaintiff to carry the burden of proving that no exceptions apply since most of the exceptions are tied to certain professions or scenarios (and which exceptions might apply would, consequently, be knowable to a plaintiff):

> Many of the § 2721(b) enumerations are tied to a particular occupation or organization and its corresponding lawful need for the information. . . Finally, the remaining three enumerations only apply when the plaintiff has provided consent. See 18 U.S.C. § 2721(b)(11)-(13).
>
> Thus, for example, if a plaintiff names a law firm (as here) or an insurance agency as the defendant, there is a high probability that subsection (b)(4) is at issue in the former

not set forth such a rule; rather, they held that the "litigation exception" did not apply under their facts because the defendants were literally engaging in speculative expeditions to generate a lawsuit. These cases can be harmonized with the Fourth Circuit.

2. There Is No Irreconcilable Conflict Between the Fourth Circuit's Opinion (and Cited Law From the Eleventh Circuit) and the Third Circuit (Petitioners' Claimed Second Issue)

Petitioners argue that there is a legal conflict among the following courts as to the question of whether liability may be imposed where a proper use follows an allegedly improper original use:

(a) The Fourth Circuit in this case and the Eleventh Circuit in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009);

(b) The Third Circuit in *Pichler v. UNITE ("Pichler V")*, 542 F.3d 380 (3d Cir. 2008); and

(c) Judge Sloviter's dissent in *Pichler V*[13] and a subsequent decision of the Pennsylvania Commonwealth Court in *Hartman v. Depart-*

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and (b)(6) in the latter. Similarly, if a plaintiff is a recipient of a mass marketing letter, it is no secret that (b)(12) is at issue, which allows for bulk distribution of solicitations only if express consent is obtained.

Id. at 1113-14.

[13] Petitioners do not make clear how a dissenting opinion can be used to create a "conflict" supporting the granting of *certiorari.*

ment of Conservation and Natural Res., 892 A.2d 897 (Pa. Commw. Ct. 2006).

However, contrary to Petitioners' contention, there is no square legal dispute among these cases.

First, *Pichler V* is consistent with the Fourth Circuit. In *Pichler V,* UNITE was "tagging" (using license plate numbers and Westlaw searches to locate addresses) during a union organizing effort at CINTAS. A secondary element of that organizing strategy involved locating potential claimants for a lawsuit against CINTAS. Thus, the information was literally used in two completely different manners (although toward a common union organizing end). While the information in *Pichler V* could arguably be used to locate litigants for a theoretical lawsuit, it was first separately used for union organization activities that did not include litigation. The Third Circuit merely reached the unremarkable holding that where there was a completely independent and separate *use* of information *wholly unrelated to litigation*, DPPA liability could attach for that impermissible use. *See Pichler V*, 542 F.3d at 395 ("Because UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had."). The crux of *Pichler V* is that a party cannot "launder" an improper use of personal information through a proper use.

The instant case is factually distinguishable from *Pichler V* but is consistent with its logic. Although Petitioners characterize the Attorneys' conduct as having multiple purposes, it is undisputed that the Attorneys *only* used the information "in connection with" litigating *Herron*. That the Fourth Circuit

stated that such use could also be characterized as "solicitation" does not change the fact any solicitation was also "in connection with" the litigation of litigating *Herron* – including determining the scope of the Dealers conduct and responding to motions to dismiss concerning standing. There is no evidence that the Attorneys "used" the information to solicit clients for matters other than *Herron*, nor is there evidence that the Attorneys made commercial use of protected information for general marketing. Rather, as detailed above, the FOIA Requests and the Letters were only used "in connection with" *Herron*. Nothing in *Pichler V* makes such use improper. *Pichler V* only states that where there are distinctive and separate uses of information, each must be permissible. Petitioners seek to twist *Pichler V* to rewrite the Act to require that a use of DMV information satisfy all of the Act exceptions, a result that is inconsistent with the language of the Act.

Moreover, contrary to Petitioners' suggestion, *Pichler V* does not conflict with the Eleventh Circuit's *Rine* opinion. In *Rine*, the court held that, where the "state action" exception was met, a use did not also need to meet the "bulk solicitation exception":

> Plaintiff-appellants argue that even if subsection 2721(b)(1) generally applies, subsection 2721(b)(12), which specifically addresses the bulk distribution of marketing and solicitation materials, must be complied with instead. . . . Both are exceptions to the general prohibition against the disclosure of drivers' personal information. Subsection (b)(1) applies to a situation not addressed by subsection (b)(12) and vice versa. [T]his case involves two statutory provisions that potentially apply. *While these provisions may overlap, they*

> *both apply to situations not governed by the other and both must be given effect unless they "pose an either-or proposition."* [(Citation omitted)]. *Furthermore, nothing in the DPPA suggests that the (b)(12) exception alters the scope or meaning of the separate and independent exception found in subsection (b)(1).* As such, the statutory exceptions found in section 2721(b) are *not mutually exclusive, meaning that any one or more of them may be applicable to a given situation.*

See Rine v. Imagitas, Inc., 590 F.3d 1215, 1225-26 (11th Cir. 2009) (affirming summary judgment) (emphasis added). The Fourth Circuit relied heavily on *Rine* and its construction of the plain language of the Act. The holding in *Rine* (and in this case) was that a use need only fall within one exception to the Act to avoid liability. In *Pichler V*, the Third Circuit held that where there are multiple *uses* of information (there, home visits to organize a union and efforts to start litigation), each *use* must fall within an exception. *Pichler V* prohibits a party from using a permissible use to shield a second improper use of information, and is entirely consistent with both *Rine* and the Fourth Circuit.

Finally, Petitioners cite a Pennsylvania state court case, *Hartman v. Department of Conservation and Natural Res.*, 892 A.2d 897 (Pa. Commw. Ct. 2006). In *Hartman*, a publisher of the magazine of a snowmobile association sought information regarding registered snowmobile owners so he could mail his magazine to snowmobile owners. The publisher argued that he was entitled to the information under the Act under a "driver safety" exception because one issue of the magazine included safety articles. The

court held that this was insufficient to trigger the "driver safety" exception:

> Although Hartman contends he requested the information to promote snowmobile safety, it is clear the requested information would be used primarily to promote snowmobiling in Pennsylvania and membership in the PSSA. The mere placement of safety information in one edition of the magazine cannot transform a commercial use into a "use in connection with matters of motor vehicle or driver safety." 18 U.S.C. § 2721(b)(2).

Id. at 905.

This is consistent with the Fourth Circuit and the other cases Petitioners cite (and, even if it was inconsistent, a lone state court case does not create a "conflict warranting" this Court's review). *Hartman* does not turn upon multiple uses or tension between exceptions. Rather, the issue in *Hartman* was whether, as an evidentiary matter, Hartman could show – this was not an action for damages, but Hartman litigating against the Commonwealth seeking disclosure – that he was within a permissible use. The court simply concluded that the inclusion of safety information in a single issue of a magazine was insufficient to satisfy the exception. There is nothing about this holding in conflict with the Fourth Circuit's interpretation of the Act.

The fact that no conflict exists is bolstered by the First Circuit's recent case, *Downing v. Globe Direct, LLC*, 682 F.3d 18 (1st Cir. 2012). There, the Commonwealth of Massachusetts DMV entered into an arrangement wherein Globe, a third-party contractor, would send out drivers' license renewal information

and include, along with that information, advertisements. The DMV retained the right to approve advertisements and received a portion of revenues from those advertisements. The DMV also was to provide Globe with driver information to permit it to perform its work under this arrangement. A disgruntled driver who received advertising solicitation with his renewal forms sued Globe under the Act.

The First Circuit held that this arrangement was within the "state action" exception of the Act, found at 18 U.S.C. § 2721(b)(1). The plaintiff there argued – much as Petitioners do here – that the more appropriate exception to consider the propriety of Globe's conduct was the "bulk solicitation exception" of Section 2721(b)(12). The First Circuit, as the Fourth Circuit did here, held that the Act's exceptions are independent and that a defendant need only fall within one exception:

> The structure of the DPPA supports the idea that one permissible use does not define or control another. Each "permissible use" under subsection (b) is a specific carve-out from liability. Once a person's activities are deemed to fall within *one of the carve-outs, subsection (a)'s general rule of nondisclosure no longer applies*. . . . *Each "permissible use" under subsection (b) is like a key to unlock a door through which a person may go* to escape DPPA liability. So long as Globe Direct may unlock the (b)(I) door, the fact that they may or may not possess the key to the (b)(12) door is irrelevant to our inquiry.

Id. at 23 (emphasis added). The First Circuit also distinguished itself from *Pichler V* and, *citing the Fourth Circuit's opinion*, held that *Pichler V* did not

require the imposition of liability under the facts before the First Circuit:

> This situation is unlike that in *Pichler [V]*, where the primary (and impermissible) purpose of collecting the statutorily protected personal information was union organizing, which the court found the union had "attempt[ed] to mask ... behind the veil of a [permissible and severable] litigation purpose." *Id*. at 396. Here, the advertising function is inextricably linked to the proper government functions of registration renewal and increasing the availability of funds for RMV programs. We think that the integration of the advertising into the structure of the program renders that advertising a part of the government function exempted from the statute's reach under subsection (h)(I).
>
> We are not alone in this line of analysis. Post-*Pichler [V]*, both the Fourth and Eleventh Circuits have declined to impose DPPA liability where solicitation or advertising was part and parcel of a permissible use of statutorily protected information.

Id. at 24. As the First Circuit held, the case law is not in conflict, but rather can be harmonized by analyzing the facts of each case.

As set forth above, Petitioners have failed to show a square conflict between the law stated in this case and the law stated in other cases. To the contrary, in terms of the law applied, this case is entirely consistent with the cases Petitioners cite.

D. EVEN IF THERE ARE CONFLICTS IN THE CASELAW, NUMEROUS OTHER FACTORS MAKE THIS CASE A POOR VEHICLE FOR THE COURT TO RESOLVE SUCH PERCEIVED CONFLICTS

Even accepting Petitioners' position that conflicts exist between the lower courts, this case is not a "clean vehicle" for the Court to resolve those claimed conflicts.

1. Important Issues of State Law Make This Case Inappropriate for Review

To resolve the applicability of the "litigation exception," this Court would be required to construe issues of South Carolina procedural law, state law governing representative claims, and substantive issues under the MDDA. As set forth above, the Attorneys' uses of personal information were made in the context of a procedurally complex representative action arising under South Carolina statutory law. Information was obtained to determine whether a representative claim under the statute might exist in the first instance. Information was also obtained to oppose motions to dismiss under South Carolina state law. The Fourth Circuit relied upon several findings by state court Judge Early to analyze the relationship between the Attorneys and the Consumers. Thus, before this Court could ever get to a "clean" issue under the Act, it would have to navigate a complicated factual background containing nuanced procedural and substantive questions arising under South Carolina state law.

2. Policy Considerations Do Not Support the Granting of *Certiorari*

Petitioners suggest that *certiorari* is proper because the Fourth Circuit "muddled an already complex area of federal law" and reached a decision with "profoundly troubling policy implications." (*See* Pet., at p.12). To the contrary, the Fourth Circuit's opinion is consonant with sound public policy.

The Fourth Circuit noted that its holding was supported, in part, by the fact that the Attorneys' conduct was undertaken in good faith and in compliance with their ethical obligations:

> In the context of the circumstances presented in this case, it is no stretch to say that the Lawyers simply could not make appropriate, efficient and ethical use of the Buyers' personal information under our pragmatic approach to the litigation exception without first engaging in solicitation, and they did so in a manner that was *entirely in keeping with applicable state ethics norms*. Put simply, *they did what any good lawyer would have done*; Congress *could not possibly* have intended to impose DPPA liability under such circumstances.

(See Pet. App., at p.38a (emphasis added)). In other words, the Fourth Circuit held that, in addition to being proper under the Act, the Attorneys' conduct was ethical and proper under the circumstances. Petitioners seek to impose liability upon Attorneys for conduct that the Fourth Circuit held was not only proper, but was "what any good lawyer would have done." The Fourth Circuit's construction, authorizing attorneys to ethically act in their clients' best interests, furthers proper public policy. On the other

hand, Petitioners second-guess Attorneys' professional judgment and inject undue complexity into attorney-client relationships.

3. There Are Numerous Independent Sustaining Grounds

Because of its decision regarding the "litigation exception," the Fourth Circuit did not analyze numerous additional, independent grounds to affirm summary judgment:

(a) The Attorneys' conduct was permissible under the Act's "state function exception" because (as the *Herron* court determined) the Attorneys prosecuted *Herron* on behalf of the public acting as "private attorneys general."

(b) The Act requires Petitioners to prove that the Attorneys knew that they used information for an impermissible purpose, and the record is devoid of such evidence. *See* 18 U.S.C. § 2724(a).

(c) The Act requires proof of "actual damages," and there is no evidence of same.

(d) Petitioners' construction of the Act could render it unconstitutional under the commerce clause.

CONCLUSION

Even if this Court grants *certiorari* and vacates the Fourth Circuit's decision, numerous additional statutory and constitutional issues will remain to be decided on summary judgment.

Respectfully submitted,

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