No. 12–25

IN THE

Supreme Court of the United States

EDWARD F. MARACICH, *et al.*,
Petitioners,

v.

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

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

PETITIONERS' REPLY BRIEF

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The Driver's Privacy Protection Act (DPPA) targets a specific problem—use of DMV information for bulk solicitations—with a specific solution—express consent. By its terms, this consent requirement applies when lawyers sue hundreds of defendants without a proper plaintiff, then obtain tens of thousands of names and addresses from DMV records to solicit plaintiffs with claims against those defendants. As the Fourth Circuit correctly held, that conduct constitutes bulk solicitation within the meaning of the DPPA. According to respondents, however, Congress created an exception to the bulk-solicitation consent requirement for a small subset of lawyers for whom DMV information provides a ready means of identifying potential clients. Indeed, under respondents' view, Congress gave these lawyers the additional, extraordinary right to use highly restricted personal information, such as medical or disability information, to solicit business.

The Fourth Circuit suggested that solicitude for "impact litigation" explained such an anomalous lawyer exception, but respondents abandon that theory. They hypothesize instead that federalism concerns led Congress to draft a series of overlapping permissions that allow broad use of DMV information subject to state regulation. This theory is groundless.

Contrary to respondents' claims, Congress indisputably intended the DPPA to alter the federal/state balance. Indeed, industry argued (as respondents do now) that private use of DMV information should be left to state regulation. But Congress chose instead to regulate both states and private parties. The problem Congress addressed, moreover, was not one of traditional state concern. The DPPA does not regulate the

content of bulk solicitations or address overreaching or customer deception. It addresses the collection of information for one purpose, and its later use for different purposes without consent—a practice the public deemed highly objectionable. States did not traditionally regulate this problem; they created it.

Congress's solution (express consent for bulk commercial use of DMV information) admits of no exception for class action lawyers. As respondents themselves note, another provision that uses the phrase "in connection with" (subsection (b)(2)) expressly exempts one industry (the automotive industry) from *one* aspect of the bulk-use consent requirement (use for market research surveys). This provision confirms that Congress did not create an additional exception for lawyers in a provision that simply uses the phrase "in connection with" but nowhere mentions solicitation.

Requiring lawyers to comply with the bulk-use consent requirement does not force them to violate state ethics rules. Respondents identify no duty to solicit, much less a duty to solicit clients *in bulk*. They fail to address petitioners' showing that they had no client relationship with or obligations to those who purchased cars from the dealers respondents improperly sued. Nor do they explain why they had to discharge any such (hypothetical) duty using DMV information, rather than advertising, as many other lawyers do to find clients.

Finally, excluding lawyer solicitation from the scope of the DPPA's "litigation exception" does not render the law "unworkable." Indeed, respondents' own actions reflect their understanding that the litigation exception does not authorize use for bulk client solicitation. Despite their current claims, they never stated in any DMV request that they sought thou-

sands of names and addresses to solicit plaintiffs. Traditional interpretive tools confirm that the DPPA confers no special entitlement on lawyers.

I. THE BULK SOLICITATION EXCEPTION CONTROLS THIS CASE.

Subsection (b)(12) controls this case because it specifically addresses the conduct of bulk solicitation. Subsection (b)(4), by contrast, says nothing about solicitation, and provides no evidence that Congress consciously chose to permit lawyers to use DMV information for this purpose. Unable to identify any such evidence, respondents seek to recast the DPPA and the concerns underlying its enactment. Contrary to their claims, however, the bulk-solicitation and litigation exceptions are not equally specific. The statute's text and history demonstrate that Congress specifically focused on use of DMV information for bulk solicitation, marketing, and surveys and crafted a nuanced solution that exempted the automotive industry from one restriction (nonconsensual use for research surveys), but provided no comparable exception for lawyers. The canons respondents invoke cannot overcome this showing.

A. The Statute's Structure Raises—But Does Not Resolve—The Interpretive Question Posed By This Case.

Respondents claim that subsection (b)(12) is "not a prohibition at all," but one of several broad, overlapping permissions that has no limiting effect on any other permission. Br. 25. They are mistaken.

Subsection (a) prohibits disclosure of all DMV personal information. § 2721(a). Subsection (b)(12) then lifts that prohibition for "bulk distribution for surveys, marketing or solicitations if the State has obtained … express consent." § 2721(b)(12). This "per-

mission" thus prohibits use of DMV information for bulk solicitations absent consent. Cf. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070 (2012) (clause *permitting* sale of property free of liens with credit-bidding "*proscribes*" such sales without credit-bidding (emphasis added)); *Smith* v. *McCullough*, 270 U.S. 456, 465 (1926) (because a statutory "permission to give short leases was … an exception to the comprehensive restraint already in place," a lease "not within that permission evidently was … within the general prohibition"). The question, therefore, is not whether respondents had to satisfy more than one exception. It is whether another exception's general language can be read to authorize bulk solicitations without compliance with the solicitation exception's consent requirement.

That the DPPA sets forth multiple permissions does not answer this question. This Court has often found that restrictions in one permission foreclose resort to a less restricted permission. *RadLAX*, 132 S. Ct. at 2070–71 (credit-bidding restriction in permission for sale of collateral free of liens foreclosed use of another permission that did not require credit-bidding); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 152–58 (1976) (limitation in venue authorization foreclosed use of second venue authorization lacking that limitation); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 224–29 (1957) (same); *Bloate* v. *United States*, 130 S. Ct. 1345, 1351–58 (2010) (limited exclusion, for Speedy Trial Act purposes, of pretrial-motion-related delay foreclosed resort to unlimited exclusion of delay resulting from "proceedings concerning the defendant"). Respondents' "basic structure" argument "merely points up the question and does nothing to answer it." *Fourco Glass*, 353 U.S. at 228.

B. Subsections (b)(4) And (b)(12) Are Not Equally Specific Provisions.

Respondents claim that subsections (b)(4) and (b)(12) are equally specific, because one specifically addresses litigation while the other specifically addresses bulk solicitations. Br. 26. This "fifty thousand foot" analysis is misguided. When two provisions overlap, the Court seeks to discern which aspects of the overlap were the focus of congressional attention. Thus, it considers whether Congress "'has *deliberately targeted specific problems with specific solutions*,'" *RadLAX*, 132 S. Ct. at 2071 (emphasis added), and assumes that "when the mind of the legislator has been turned *to the details of a subject*, and he has acted upon it," a provision "treating the subject in a general manner … shall not be considered as intended to affect the more particular or positive … provisio[n], unless it is absolutely necessary to give the latter … such a construction." *Radzanower*, 426 U.S. at 153 (emphasis added). Here, all relevant evidence demonstrates that Congress focused carefully on use of DMV information for bulk solicitations, permitted such use only with consent, and created no exception for lawyers.

As a textual matter, subsection (b)(4) addresses litigation at a much higher level of generality than subsection (b)(12) addresses bulk solicitation. The latter specifically addresses a particular act—use of personal information for bulk solicitations. By contrast, the former's "in connection with" language authorizes a category of acts based on their relationship to "proceeding[s]," but does not mention solicitation at all, much less bulk solicitation. Thus, subsection (b)(4) provides no textual evidence that Congress affirmatively contemplated lawyers using personal information (including highly restricted information) to soli-

cit clients, whereas the solicitation exception makes clear that Congress affirmatively conditioned use of personal information for bulk solicitations on consent. Subsection (b)(12) is thus directly analogous to the second exception in *RadLAX*, which was more specific because it was "a detailed provision that spell[ed] out the requirements for selling collateral free of liens," whereas the third exception was "a broadly worded provision that sa[id] nothing about such a sale." 132 S. Ct. at 2071.

Subsection (b)(2) provides additional, compelling evidence that the phrase "in connection with" in other provisions does not override the bulk-use consent requirement. Subsection (b)(2) permits use of DMV information "in connection with … motor vehicle market research activities, including survey research." § 2721(b)(2). Congress thus created a narrow exception to the consent requirement for *one* industry to engage in only *one* of the three bulk-use activities (bulk research surveys), and did *not* extend that exception to bulk solicitations. Subsection (b)(2) demonstrates that (1) Congress intended the consent requirement to apply to bulk solicitations, even when that would limit marketing efforts by a legitimate and important U.S. industry; and (2) when Congress wished to except certain commercial actors from any aspect of the consent requirement, it expressed that intention through even more specific language. Subsection (b)(4) lacks any such specific language.

This textual evidence reflects the fact that use of DMV information by legitimate businesses for bulk marketing and solicitations was a central problem Congress sought to address. *Reno* v. *Condon*, 528 U.S. 141, 143–44, 148 (2000). Respondents seek to minimize this problem as ancillary to concerns over stalking, or limited to DMV *sales* of information. Br. 2, 29,

31, 60. But Congress had detailed evidence that the public strongly disapproved of nonconsensual disclosure of personal information that was collected for one purpose, then used for a different purpose—disapproval that did not depend on whether the later use resulted from sales of the information or free disclosure.[1] The DPPA's principal sponsor, as well as others, plainly acted on that evidence.[2] Indeed, marketers argued that the law should address stalking alone and leave regulation of private use of DMV information to the states. 1994 WL 212836 (Feb. 3, 1994) (statement of Direct Marketing Association (DMA)). Congress obviously disagreed.[3]

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[1] *See, e.g.*, 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan).

[2] *See* 139 Cong. Rec. 27,327 (1993) (statement of Rep. Moran) ("92 percent of Americans believe that the DMV should not sell *or release* personal data about them without their knowledge and approval." (emphasis added)); *id.* at 29,470 (statement of Sen. Biden) ("Americans do not believe they should relinquish their legitimate expectations of privacy" over personal information "simply by obtaining drivers' licenses or registering their cars"); *id.* at 29,468 (statement of Sen. Boxer) (law "gives people more control over the disclosure of their personal information, especially for those reasons that are totally incompatible with the purpose for which the information was collected").

[3] In light of this history, respondents' reliance, Br. 45–46, on subsection (b)(1) and *Rine* v. *Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009), is misplaced. Profiting from DMV information to defray the costs of government services cannot be a governmental "function" within the meaning of subsection (b)(1), because that is the very practice Congress intended to end. *See Condon*, 528 U.S. at 143–44. Respondents identify no governmental function that entails bulk use of DMV information for non-commercial purposes. Assuming any exists, any conflict would more logically be resolved by limiting subsection (b)(12) to *commercial* surveys, given its focus on "solicitation" and "marketing," and the direct-marketing problem Congress addressed. In all events, a hypo-

Congress's solution, moreover, reflects a detailed and nuanced focus. Recognizing the legitimate needs of businesses, Congress did not ban use of DMV information for bulk solicitations, but instead required consent. It later refined its solution, amending an original "opt-out" to an "opt-in" system. *Condon*, 528 U.S. at 144–45. And, because DMV information was "absolutely essential" to automotive marketing efforts, 1994 WL 212836 (DMA statement), Congress provided a limited carve-out from the consent requirement for bulk automotive marketing surveys.

Respondents cite evidence that Congress expected lawyers to use DMV information, and that it rejected a draft of subsection (b)(4) that permitted use only "in litigation." Br. 6. This merely shows that, in addition to using DMV information *in* litigation, lawyers can use it to investigate claims in advance of, serve process to initiate, and enforce judgments produced in, litigation. What it does *not* show is that, when Congress "turned to the details of [the] subject" of bulk solicitation, *Radzanower*, 426 U.S. at 153, it foresaw that some class action lawyers might use DMV information to solicit clients in bulk and granted them the very exception to the consent requirement it denied to carmakers. This is hardly surprising. Most lawyers are not class action lawyers, and most that are cannot use information in DMV databases to identify potential plaintiffs for securities, employment, medical device, or many other common class actions.

Thus, even if subsection (b)(4)'s general language could otherwise be read, in isolation, to encompass

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thetical conflict between subsection (b)(12) and a governmental function that entails non-commercial bulk use of DMV information does not show that Congress excepted lawyer solicitation from the bulk-use consent requirement.

use of DMV information for bulk solicitation of clients—but see *infra*, Part II—there is no evidence Congress actually "intended [subsection (b)(4)] to affect the more particular" terms of subsection (b)(12). *Radzanower*, 426 U.S. at 153. To the contrary, subsection (b)(2) shows that, when Congress intended to create an exception to the bulk-use consent requirement in another provision that uses the "in connection with" language, it did so explicitly—something it did not do in subsection (b)(4). In sum, subsection (b)(12) more specifically addresses the bulk solicitations at issue here.

C. As The More Specific Provision, Subsection (b)(12) Controls.

Perhaps recognizing the foregoing, respondents claim that the general/specific canon applies only where necessary to avoid rendering one of two authorizations superfluous and, thus, is unavailable here. Br. 33. The Court unanimously rejected this precise argument in *RadLAX*, finding "no authority for the proposition that the canon is confined to situations in which the entirety of the specific provision is a 'subset' of the general one." 132 S. Ct. at 2072. Rather, the Court held, "[w]hen the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, *whether or not the specific provision also applies to some conduct that falls outside the general*." *Id.* (second emphasis added). If the specific provision also applies to some conduct that falls outside the general, then applying the general/specific canon is not necessary to avoid rendering the specific provision superfluous.

Respondents dismiss that reasoning as "dictum." Br. 37–38. But the Court's conclusion was an independent basis for its decision, and thus cannot "be relegated to the category of *obiter dictum*." *Woods* v. *In-*

terstate Realty Co., 337 U.S. 535, 537 (1949); see also *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 352 (2006) ("It is no answer to argue … that the holding in *Breard* was 'unnecessary' simply because the petitioner in that case had several ways to lose.").

In any event, this Court has applied the general/specific canon even where there was no arguable problem of superfluity. In *Radzanower*, the Court held that a specific venue provision for suits against national banks controlled a broad venue provision for suits under the Securities Exchange Act. 426 U.S. at 149–58. A contrary interpretation would not have rendered the national bank provision superfluous; it still would have applied to all suits against national banks not brought under the Exchange Act. Similarly, the Court's holding in *Fourco Glass* that a specific venue provision for patent infringement suits controlled a general venue provision for suits against corporations was not necessary to avoid rendering the former provision superfluous because it still would have applied to patent infringement suits against noncorporate defendants. And in *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961), a contrary interpretation would not have rendered superfluous the specific provision for interest on tax refunds attributable to an excess profits credit carry-back because it still would have applied to tax refunds that were not awarded by a court judgment.

These cases confirm that a specific authorization controls a general one, "whether or not the specific provision also applies to some conduct that falls outside the general." *RadLAX*, 132 S. Ct. at 2072. Respondents assert without citation that this canon "cannot be invoked when Congress designed various provisions to overlap and did not intend them to be mutually exclusive," Br. 38, but this substitutes con-

clusion for analysis. The entire point of the canon is that, when Congress specifically authorizes an action subject to specified conditions, it intends those conditions to be exclusive, and not to be evaded through reliance on a more general authorization. See *RadLAX*, 131 S. Ct. at 2071; Op. Br. 29.

Respondents' cases are not to the contrary. In two, the question was whether a general provision had been impliedly repealed by a later-enacted provision that a party claimed was more specific. See *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 251–54 (1992); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130–45 (2001). The Court accordingly applied the strict "positive repugnancy" standard for implied repeals. *Germain*, 503 U.S. at 253; *J.E.M.*, 534 U.S. at 141–42 ("'statutes [must be] irreconcilable'"); see also *id.* at 137 (emphasizing the "overwhelming evidence needed to establish repeal by implication").[4] By contrast, here the Court's task is to reconcile "a general authorization and a more limited, specific authorization" that "exist side-by-side" in the same statute. *RadLAX*, 132 S. Ct. at 2071. In such cases, the specific authorization "presumptively governs," and its terms "must be complied with," even though there is no "contradiction" between the provisions. *Id.* at 2071–72.

Nor does *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), help respondents. There the Court held that one pro-

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[4] In both cases, moreover, the general provision's meaning was settled. *J.E.M.*, 534 U.S. at 131, 135 (noting definitive interpretation of utility patent statute); *Germain*, 503 U.S. at 255 (Stevens, J., concurring) (limiting review of interlocutory bankruptcy orders would constitute "a significant change in the scheme of appellate jurisdiction"). Here, the scope of subsection (b)(4) is not settled, and properly construed does not even overlap with subsection (b)(12). *See infra*, Part II.

vision of ERISA, which provided remedies for breach of fiduciary duty only to the ERISA plan, not to beneficiaries, did not implicitly preclude individual remedies for breach of fiduciary duty under a separate provision authorizing participants "to obtain other appropriate equitable relief." *Id.* at 507–15. The first provision's remedial limitations derived from its cross-reference to § 409 of ERISA, which the second provision did not incorporate. *Id.* at 509. Because § 409 "reflect[ed] a special congressional concern about plan asset management," its specific remedies were not intended "as a *limitation*," and did not foreclose the conclusion that "Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligations in another, 'catchall' remedial section" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id.* at 511–12.

The clear "textual indications," *RadLAX*, 132 S. Ct. at 2072, that overrode the general/specific canon in *Varity* are absent here. The litigation exception is not a "catchall" authorizing all uses of personal information not authorized elsewhere. And applying the general/specific canon would not leave violations of law unredressed (as it would have in *Varity*). Instead, as just shown, textual and other evidence confirms that Congress intended the bulk-use consent requirement to govern absent a more specific exception like that set forth in subsection (b)(2) and noticeably missing from subsection (b)(4).

D. The Interpretive Principles Respondents Invoke Are Inapposite.

Because the DPPA's text and history demonstrate that Congress did not grant lawyers a unique exemption from the bulk-use consent requirement, respon-

dents resort to other canons to justify such a result. This effort fails for multiple reasons.

Initially, respondents cite no authority establishing that the canons they cite trump the general/specific canon, nor could they: respondents' canons are used to resolve statutory "ambiguities." Br. 39; see, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (presumption against preemption does not apply to a "nonambiguous command to pre-empt"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) ("In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions"); *DePierre* v. *United States*, 131 S. Ct. 2225, 2237 (2011) (rule of lenity "is reserved for cases where, 'after seizing everything from which aid can be derived, the Court is left with an ambiguous statute'"); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) ("canon of constitutional avoidance has no application in the absence of statutory ambiguity"). By contrast, the general/specific canon is used to determine "statutory meaning," *RadLAX*, 132 S. Ct. at 2072, and thus whether there is ambiguity in the first place. Because that canon establishes that the DPPA unambiguously prohibits nonconsensual use of personal information for bulk solicitations by lawyers, respondents' canons never come into play.

Even if they could, however, they would not alter the outcome.

1. Federalism/Preemption.

This case does not implicate any presumption against preemption, as respondents identify no state law that would be preempted. They argue that, under petitioners' interpretation, the DPPA would preempt a hypothetical state law that authorizes lawyers to

use DMV information for solicitation. Br. 42. But such speculation cannot bring the presumption against preemption into play. If it could, the presumption would apply in virtually every statutory interpretation case, because one can nearly always hypothesize a state law that would conflict with the federal law.

Respondents claim that the bulk-use consent requirement conflicts with state ethical duties, but they identify no law, requirement, or ruling—in South Carolina or elsewhere—that imposes a *duty to solicit*, much less to solicit clients *in bulk*. Moreover, by suing dealers with whom their clients had never dealt, respondents did not create any client relationship with, or ethical obligation to, anyone who had purchased cars from such dealers. Contrary to their claims, Br. 58, the *Herron* court made clear that the named plaintiffs were suing "in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership," not purchasers who bought their cars from dealerships with whom those plaintiffs had never dealt. JA 251. The Fourth Circuit rejected respondents' claim of an attorney-client relationship, Pet. App. 27a—a claim inconsistent with the solicitation letters themselves, *id.* at 10a ("'You may wish to consult your lawyer or another lawyer instead of us'"). And respondents do not even address petitioners' showing that dismissal of the improperly named defendants could not have impaired the rights of those who bought from them, Op. Br. 52–53—a showing that precludes any claim of an ethical or fiduciary duty to solicit such persons. Nor did solicitation of such car buyers further the interests of respondents' existing clients. Br. 23. Because those clients had standing to sue the dealerships where they bought cars, their interests would

not have been impaired by dismissal of other dealerships that they could not have sued in the first place.

But even if a duty-to-solicit-clients-in-bulk exists, few lawyers could discharge it using DMV information, because for most lawsuits, DMV databases provide no means of identifying potential plaintiffs (such as victims of securities fraud or a defective drug). Rather, the vast majority of lawyers (including most class action lawyers) could only discharge such a duty through mass advertising. Thus, subsection (b)(12) would simply foreclose one means of discharging this (hypothetical) duty—a means available only to a small subset of uniquely situated attorneys—and would leave intact the methods most lawyers would have to use to discharge such a duty. This ancillary and modest effect on a hypothetical ethical duty works no "significant" alteration in the federal/state balance.

In all events, the DPPA reflects a clear intent to alter the federal/state balance: it *directly regulates the states*, *Condon*, 528 U.S. at 151, and no longer permits them to disclose information "as they see fit," Br. 41, but only in accordance with federal standards, see, *e.g.*, § 2721(b)(14) (permitting disclosure for uses "authorized under state law," but only "if such use is related to the operation of a motor vehicle or public safety"). In so doing, Congress did not intrude on traditional state regulation of attorney solicitation—regulation designed to prevent deception and overreaching—but addressed the problem of non-misleading use of DMV information that had been collected for an entirely different purpose. States had not traditionally regulated such use but instead had facilitated it. In addressing this new problem, Congress rejected arguments (like those respondents make now) that it should allow "states … to provide

appropriate solutions" and not "limit the flexibility of states to respond" to unwanted disclosures. 1994 WL 212836 (DMA statement).

2. Constitutional Avoidance.

Nor is there any merit to respondents' tacit reliance on the canon of constitutional avoidance. See Br. 47. In addition to requiring ambiguity, which is absent here, the avoidance canon applies only when one of the competing interpretations "raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). There is no serious constitutional doubt that Congress has power to regulate the disclosure and use of personal information for mass marketing of legal services, particularly where, as here, the mail is used to distribute the marketing materials. The unanimous Court in *Condon* easily dispatched constitutional challenges to the DPPA, holding that the statute was a proper exercise of Congress's authority under the Commerce Clause because drivers' information is "an article of commerce," and its "sale or release into the interstate stream of business is sufficient to support congressional regulation." 528 U.S. at 148.

Respondents assert that their use of the information is "nowhere near the core commercial activity at issue in *Condon*," Br. 47, but they never explain why information used by lawyers engaged in interstate commerce to recruit clients to sue car dealers engaged in interstate commerce is any less "an article in interstate commerce" than information used by other mass marketers to advertise their services and products. Nor do they raise any serious doubt that mass marketing of legal services substantially affects interstate commerce. See 139 Cong. Rec. 29,468 (1993) (statement of Sen. Boxer) ("with mail, cars, and harassment involved, this issue clearly has an

impact on interstate commerce"); cf. *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 783–85 (1975). Certainly this activity is far closer to the "core commercial activity" at the heart of Congress's commerce power than other activities that respondents concede Congress expressly targeted in the DPPA, such as the disclosure of personal information to a stalker.

3. Rule of Lenity.

Respondents also repeatedly invoke the fact that violation of the DPPA may give rise to criminal liability. But, "after considering text, structure, history, and purpose, there remains [no] 'grievous ambiguity'" calling for application of the rule of lenity. *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010). Moreover, Congress adequately addressed any concern about fair notice by providing criminal penalties only for those who "knowingly violat[e]," § 2723(a), an Act that makes it unlawful "knowingly to obtain … personal information … for any use not permitted under section 2721(b)," § 2722(a)).

II. THE LITIGATION EXCEPTION DOES NOT PERMIT LAWYER SOLICITATION.

Properly construed, the litigation exception does not permit use of personal information for solicitation; it permits uses that enable tribunals to make or effectuate judgments. Op. Br. 31–44. Respondents claim a broad construction is necessary "to protect the delicate federal-state balance Congress sought to achieve and to avoid interference with traditional state matters." Br. 49. But respondents' federalism claims are misplaced. See *supra*, 14–16. Stripped of this premise, their reading violates several interpretive norms and produces inexplicable anomalies.

1. Respondents repeatedly stress the breadth of the phrase "in connection with." Br. 22–23, 52, 55. But

this Court has warned against such "uncritical literalism," and seeks to discern the limits of such indeterminate language based on context. Op. Br. 34. Here, because the DPPA imposes a flat prohibition subject to exceptions, an exception such as subsection (b)(4) should be construed narrowly.

Apart from their misplaced federalism claims, respondents claim this rule is inapplicable because the "permissible-use provisions are not mere exceptions to a general prohibition" but are "an integral part of the prohibition itself." Br. 49. But any exception to a general prohibition can be characterized this way. Any exception fine-tunes the prohibition and thus may be considered part of the "prohibition itself." Respondents' argument would thus swallow the rule that courts read the exception narrowly so that it does not extend to anything not "plainly and unmistakably within its terms." *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Nor can respondents avoid this narrowing rule based on a single floor statement. Br. 50. This statement does not alter the fact that the DPPA imposes a broad prohibition subject to exceptions—precisely the situation requiring courts to "read the exception narrowly." *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989).

Contrary to respondents' strawman suggestion, moreover, a narrowing construction is not justified to "promote privacy at all costs." Br. 50. It is necessary to prevent the "particular problem" Congress "targeted," *id.*—collection of personal information for one purpose and its disclosure, without consent, for another. Because the litigation exception permits disclosure without consent, and does so with respect to the most sensitive information DMVs collect, it is implausible that Congress afforded lawyers access to

DMV information such as medical and disability status and social-security numbers to solicit clients.

Respondents argue that subsection (b)(4)'s terms "convey breadth." Br. 51. As noted, their reliance on the breadth of "in connection with" is misplaced, as that phrase cannot be construed in isolation. The word "any," while broad, modifies proceedings and tribunals, not "uses" of DMV information. This confirms that the litigation exception exists for the benefit of dispute resolution processes, not the financial interests of lawyers.

Nor does the term "including" support respondents' broad reading. In *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010), this Court narrowed a general phrase by reference to a nonexhaustive list that followed the term "including." Thus, *Samantar* fully supports interpreting "in connection with" according to the well-established rule that a term or phrase is "'known by the company it keeps.'" *Id.* at 2287–88.

Respondents claim that subsection (b)(4)'s examples are "too few and too disparate" and lack any "common attribute" that "connects" them. Br. 53 (internal quotation marks omitted). But each use furthers a tribunal's ability to make or enforce a judgment; none refers to commercial activities by lawyers. Op. Br. 39–41. Because lawyers function both as commercial actors and officers of courts, see *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961), *overruled on other grounds by Spevack* v. *Klein*, 385 U.S. 511 (1967), subsection (b)(4)'s recitation of uses that enable tribunals to make and effectuate judgments confirms that lawyers are afforded access to sensitive DMV information as officers of courts, not so they can solicit business.[5]

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[5] Evidence that legislators expected lawyers to use DMV information, Br. 43, does not show that Congress authorized use

2. Applying respondents' sweeping interpretation of "in connection with" to other subsections yields utterly implausible exceptions for insurance companies and private toll road operators. Op. Br. 41–44. Contrary to respondents' claim, Br. 55, there is a very "obvious reason why subsection (b)(6) must be read" to preclude insurance company use of personal information for solicitation: disclosure of DMV information for "us[e] *by insurers*, manufacturers, direct marketers, and others," *Condon*, 528 U.S. at 148 (emphasis added), was precisely what Congress sought to ban. And Congress rejected the argument that states—the very entities profiting from this practice—should regulate such use. By contrast, applying the narrowing presumption for exceptions and the *noscitur a sociis* principle limits subsection (b)(6) to use by insurance companies for "claims investigation and antifraud activities." 139 Cong. Rec. 29,468–69 (statement of Sen. Warner) (1993). Similarly, respondents assert that "it is not obvious" that their reading would allow private toll road operators to use DMV information to advertise the benefits of their roads, but they nowhere explain why such use is not captured by their capacious reading of subsection (b)(4).

Respondents attempt to tease a competing incongruity from subsection (b)(2), but this provision once again undermines their claims. If "in connection with" were all-encompassing, the further specification

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for solicitation, but simply confirms that the litigation exception is intended to facilitate proceedings. *See also* 139 Cong. Rec. 29,468 (1993) (statement of Sen. Boxer) (law "allows access for all governmental agencies, *courts*, and law enforcement personnel" (emphasis added)); 140 Cong. Rec. 7925 (1994) (statement of Rep. Moran) (law provides "access to personal information for *courts*, law enforcement, governmental agencies, and for other driver and automobile safety purposes" (emphasis added)).

of "survey research" would be unnecessary, as it would plainly be "in connection with" "market research activities." § 2721(b)(2). Thus, respondents' interpretation of "in connection with" renders subsection (b)(2)'s "including survey research" clause superfluous. Under petitioners' reading, by contrast, that clause is necessary to exempt these marketing surveys from subsection (b)(12)'s consent requirement.

3. Finally, although they deride petitioners' reading of subsection (b)(4) as "nebulous," Br. 55, respondents nowhere defend the lower court's "inextricably intertwined" test, or explain how DMV officials would apply their sweeping "in connection with" test. In fact, petitioners propose an entirely workable scheme: it permits uses of DMV information that promote the integrity and efficacy of proceedings—*e.g.*, by identifying and summoning potential jurors, identifying witnesses or evidence, or facilitating service of process or the provision of class notice.[6] The civil liability provisions effectively place the onus for compliance on requesting attorneys, and good-faith reliance on their representations shields DMV officials from liability.

Solicitation does not meet this test because, as this Court has repeatedly recognized, it is commercial activity, not activity undertaken as an officer of the courts. Indeed, this case vividly illustrates the distinction. By suing hundreds of defendants against whom their clients had no claim, respondents acted no differently than a lawyer who files a suit without

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[6] Such notice is materially different from solicitation; it informs absent class members that they have a right to file an individual action and that they will be bound by the judgment if they do not opt out. Such notice thus promotes the fairness of the proceedings and enables courts to render binding judgments.

any plaintiff, then uses DMV information to find one. Use of DMV information to remedy a standing defect *caused by an improper filing* does not further the integrity of the judicial proceedings; it encourages improper filings, and furthers the commercial interests of lawyers who use them to "fence out" other lawyers from a potentially large class action.[7]

Those filings did not obligate respondents to solicit plaintiffs who purchased from the improperly named dealers. And the content of their letters (not their mere labels) belies respondents' claim that they did not engage in "solicitation at all." Br. 58. The Fourth Circuit properly rejected that claim, Pet. App. 27a–28a, which falls outside the questions presented and was waived by respondents' failure to raise it in their brief in opposition, Op. Br. 18.

While baseless, respondents' back-door attempt to recast their activities as non-solicitation is telling. They complain about liability turning on fine distinctions, but their conduct reveals their understanding of this very distinction. None of their DMV requests, including those made after litigation began, stated that respondents sought information to solicit clients. Instead, they were couched as requests for information designed to further adjudicative processes. By failing to limit their use to those purposes, respondents violated the DPPA.

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[7] Contrary to respondents' ends-justify-the-means suggestion, Br. 14, the trial court did not find any violation of South Carolina law, but instead simply interpreted two terms in the relevant statute, JA 262.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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