No. 98-1464

IN THE
Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL,

Petitioners,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE*

The Electronic Privacy Information Center is a project of the Fund for Constitutional Government, a non-profit charitable organization, incorporated in the District of Columbia in 1974. EPIC was established to focus public attention on emerging privacy and civil liberties issues

This case concerns the authority of the federal government to enact privacy laws that protect the privacy interests of individuals. Because the court below failed to give sufficient weight to the privacy interests underlying the Drivers Privacy Protection Act, we respectfully submit this brief as amicus curiae.

SUMMARY OF THE ARGUMENT

The Drivers Privacy Protection Act safeguards the personal information of licensed drivers from improper use or disclosure. It is a valid exercise of federal authority in that it seeks to protect a fundamental privacy interest. It restricts the activities of states only to the extent that it concerns the subsequent use or disclosure of the information in a manner unrelated to the original purpose for which the personal information was collected. The states should not impermissibly burden the right to travel by first compelling the collection of sensitive personal information and then

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* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, it is stated that the Counsel of Record authored the brief with the assistance of Alex Driggs, a law student, and that no monetary contributions were made for the preparation or submission of the brief.

subsequently disclosing the same information for unrelated purposes.

The Fourth Circuit failed to give sufficient weight to the privacy interests at issue in the Drivers Privacy Protection Act. For this reason, the decision of the lower court should be reversed.

ARGUMENT

I. The Driver's Privacy Protection Act is a Valid Exercise of Congressional Power Authorized By the 14th Amendment

The Fourteenth Amendment provides, in part, that:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> […]
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§1, 5. This Court has described Section 5 as "a positive grant of legislative power authorizing

Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). More recently, this Court rejected "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). However, the Driver's Privacy Protection Act. 18 USC 2721-2725 [hereinafter "The Act"] is not an attempt to create new constitutional protections. Rather, the privacy interests protected by the Act are well established.

In *Roe v. Wade*, 410 U.S. 113, 153 (1973), this Court held that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." In *Whalen v. Roe*, 429 U.S. 589, 599 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977), this Court declared that the constitutional right to privacy respects "the individual interest in avoiding disclosure of personal matters." The *Whalen* Court also noted "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." 429 U.S. at 605. The present controversy squarely presents a question left unanswered in *Whalen*: whether the intentional disclosure of personal information compiled by a State agency violates the right to privacy guaranteed by the Fourteenth Amendment.

A. Individuals have a constitutional interest in limiting the collection and use of personal information obtained by state agencies.

In *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692 (1999), this Court said that government actions during a search must be "related to the objectives of the authorized intrusion." *Id*. at 1698. As a result, state police were not permitted to bring reporters and photographers into a private home during the execution of a lawful warrant. The occupants in the home had a constitutionally protected right to limit the public disclosure of information pertaining to the search even though the state authorities had the lawful authority to enter the premises.

While the information collected by a state agency for the purpose of issuing drivers licenses is not a search for Fourth Amendment purposes, it is gathered for a specific purpose related to the protection of public safety and the administration of state roadways. As this Court made clear in *Wilson*, a state intrusion is impermissible it "bears no direct relation to the constitutional justification for the . . . intrusion." 119 S.Ct at 1698.

A state Department of Motor Vehicles may compel the collection of certain personal information necessary to administer the licensing system and to safeguard public safety. However, the personal information should be used only for licensing-related uses, absent the party's consent. Moreover, it is consistent with the licensee's expectation of privacy that information that is collected for a particular purpose will be used for that purpose. "Those who disclose certain facts to a bank or phone company for a limited

business purpose need not assume that this information will be released to other persons for other purposes." *Smith v. Maryland*, 442 U.S. 735, 749 (1979)(Marshall, J., dissenting).

Limitations on the ability of states to collect personal information were also recognized by this Court in *Chandler v. Miller*, 520 U.S. 305 (1997). In that case, the Court struck down a state drug testing requirement for candidates for political office. The Court held that the drug test does not fall within the narrow category of constitutionally permissible suspicionless searches. *Id.* at 309. In *Chandler* the Court further noted that the intrusiveness of mandatory drug testing was mitigated in part because "the results of the test are given first to the candidate, who controls further dissemination of the report." *Id.* At 318. In *Chandler* the Court implicity recognized the central tenets of information privacy – the right of individuals to limit the collection of personally identifiable information and the right to obtain access to that information when it is collected – to a state statute that would have otherwise enabled the collection of sensitive personally identifiable information, much like the information at issue in this case. As the Court said in *Reporters Committee*, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 US 749, 763 (1989).

The DPPA seeks to give drivers similar control over personal information. In adopting the Act, Representative Moran, a sponsor of the DPPA, said "Currently in 34 states across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name,

address, phone number, and other personal information–no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994).

The data protected by the DPPA includes "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." 18 U.S.C. §2725(3).

The privacy interest in avoiding disclosure of contact information—name, address, and telephone number—was recognized in *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). In upholding exemption of home address information from disclosure under the Labor Relations Act, this Court noted that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Id.* at 501. *See also, Reporters Committee,* 489 U.S. at 767, 770. This Court further characterized this interest as "far from insignificant," owing in part to the potential abuse of contact information by commercial entities.

The Court has also recognized similar limitations on the disclosure of personal information held by federal agencies that might otherwise be disclosed under the Freedom of Information Act, 5 U.S.C. 552 (1999*). Reporters Comm.,* 489 US 449 (1989) (FBI "rap sheets"). Other courts have interpreted Whalen as creating a constitutional right to confidentiality. *See, e.g., Utz v. Cullinane,* 520 F.2d 467, 482

n.41 (D.C. Cir. 1975) (pre-conviction or post-exoneration arrest data), *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (financial information), *Hawaii Psychiatric Soc'y Dist. Branch v. Ariyoshi*, 481 F.Supp. 1028, 1043 (D. Hawaii 1979) (psychiatric records); But see *American Fed'n of Gov't Employees v. Dep't of Housing and Urban Development*, 118 F.3d 786, 791 (D.C. Cir. 1997), *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994).

B. Individuals have a reasonable expectation of privacy regarding information submitted to a state DMV

The lower court relied on *California v. Carney*, 471 U.S. 386, 392 (1986), for the proposition that vehicle licensing schemes lead to reduced privacy expectations. *Condon v. Reno*, 155 F.3d 453, 465 (4th Cir. 1998). However, *Carney* concerned one's expectations of privacy while in driving in a car. The argument that decreased automotive privacy is the expected social cost of effective regulation of cars is irrelevant to the issue of information privacy. The Court has said that there is a diminished expectation of privacy in cars because of the state's role in regulating vehicle safety. *Carney*, 471 U.S. at 392-93.

There is no similar interest here. When a state invades a person's privacy by selling personal information, it does not further any public safety purpose. The fact that the information may be sold to anyone for any purpose, absent regulation, underscores the lack of a specific, articulable policy goal. Consequently, federal regulation of data sales does not impede a state's ability to ensure safety on its roads.

As the Seventh Circuit recognized, "[n]othing in the DPPA interferes with states' ability to license drivers and remove dangerous ones from the road; it regulates external rather than internal uses of information." *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998).

The "distribution" of personal information that is displayed on the license—for cashing a check, using a credit card, or boarding a commercial flight—is similarly distinguishable. Using a driver's license to verify identity does not require the recording and dissemination to third parties of personal information. The Act, by allowing states to implement an opt-out procedure, requires the same consent for disclosure to third parties as would be available to an individual in the display of a license for authentication.

Finally, the Act is consistent with the lower court's precedents that treat motor vehicles as public records. *See Condon*, 155 F.3d at 465. The DPPA permits the public availability of vehicle information, such as vehicle registration and accident histories, while maintaining the privacy of certain personally identifiable information. Furthermore, even an individual's personal information can be publicly available if the state implements an opt-out procedure that enables the individual licensee to authorize subsequent disclosure if he or she wishes.

C. Legitimate state interests regarding use of personal information are preserved by the DPPA

Before a governmental entity can override the constitutional protection of personal information, a "vital" or

"compelling" state interest must be established. *See Whalen*, 429 U.S. at 598, and 606 (Brennan, J., concurring). The state interest in collecting personal information is grounded in the state's duty to regulate safe operation and maintenance of motor vehicles. However, such regulation requires only internal use of personal data, which the DPPA does not affect. "[T]he activity under consideration is not licensing but disclosure." *Travis v. Reno*, 163 F.3d at 1004.

Furthermore, the Act explicitly allows States to create individualized disclosure policies regarding necessary uses, those "related to the operation of a motor vehicle or public safety." 18 U.S.C. §2721(b)(14). Thus the DPPA restricts only disclosures unrelated to legitimate purposes of licensing and state regulation.

The state interest in the public disclosure of personal information regulated by the Act is either non-existent or purely economic. *See Condon v. Reno*, 972 F.Supp. 977, 990 (D.S.C. 1997) ("the State . . . has offered no specific interest (other than historical) to justify its need to allow its motor vehicle records to be publicly disseminated.") The Seventh Circuit noted that Wisconsin generated $8 million annually from the sale of DMV records. *See Travis*, 163 F.3d at 1002. Other states have found DMV record sales even more lucrative: Maryland earned $12.9 million in 1996,[1] Pennsylvania received $20.6 million in 1998,[2] and New York has collected almost $50 million a year since 1994.[3]

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[1] Rajiv Chandrasekaran, *Governments Find Information Pays*, WASHINGTON POST, March 9, 1998, at A1.

[2] Reid Kanaley, *Consumer Privacy Debate Continues in Pennsylvania*, THE PHILADELPHIA INQUIRER, June 13, 1999.

[3] James M. Odato, *DMV Data a Revenue Vehicle*, THE TIMES UNION (Albany, NY), February 7, 1999, at A1.

II. The DPPA Removes an Unconstitutional Burden on the Right to Travel

Even if the privacy interest in control over private, secondary uses of personal information does not rise to a constitutional level, State laws authorizing public disclosure of DMV records violate the Fourteenth Amendment by excessively burdening the right to travel. Therefore, the adoption of federal legislation to protect the privacy of motor vehicle records is consistent with Congressional § 5 powers.

A. The right to travel is constitutionally protected

The right of free passage in and between states has been recognized repeatedly in this Court's decisions, most recently in *Saenz v. Roe*, ___ U.S. ___, 119 S.Ct. 1518, 1524 (1999)(noting that this right is "firmly embedded in our jurisprudence"). In *Saenz* this Court further characterized the right to travel as "a virtually unconditional personal right." *Id.*, quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)(Stewart, J., concurring). Any imposition upon this right violates the Equal Protection Clause, unless it is justified by a compelling state interest. *See Saenz*, 119 S.Ct. at 1524.

B. Availability of DMV records for public and commercial use impermissibly burdens the right to travel

As discussed *supra*, the state's legitimate interest in collecting and distributing personal information is limited to internal use and vehicle-related external uses. Given the lack of a compelling state interest justifying public disclosure and commercial use of DMV records, any burden it places on travel rights is impermissible.

A recent study by the Bureau of Transportation Statistics suggests that virtually all travel in the United States is performed by means requiring a state-issued license or identification card. A valid driver's license is required to drive a motor vehicle, and either a license, a state ID card, or passport must be presented before boarding a commercial flight. The study found that these means of transportation accounted for over 96% of personal and household travel in 1995.[4]

The practical impossibility of travel without state-issued ID lends a constitutional dimension to the privacy interest in avoiding disclosure and commercial use of DMV records. Without adequate protection of personal information maintained by state DMVs, citizens must essentially choose between privacy and the right to travel. Such a choice places an unreasonable burden on a protected interest. The Fourth Circuit reached a similar result in *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993), a case challenging the constitutionality of a Virginia statute requiring public disclosure of registered voters' Social Security numbers. Conditioning the exercise of a basic right on the public disclosure of such personal data was ruled an "intolerable

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[4] BUREAU OF INFORMATION STATISTICS, U.S. DEPARTMENT OF TRANSPORTATION, 1995 American Travel Survey, Pub. BTS/ATS95-US, at 3, 13 (1997).

burden" on individual rights. *Id.* at 1355. The public release of personal information maintained by a state agency was *Greidinger*'s touchstone—the court noted that provision of personal data for internal agency use did not threaten the plaintiff's right to vote. *Id.* at 1354 n.10.

C. The DPPA is a narrowly tailored legislative response to these concerns

The DPPA regulates public and commercial access to DMV records, the licensing practices that most threaten individual rights. The DPPA's opt-out provisions for public and commercial uses constitute a narrowly tailored mechanism that eliminates the privacy burden on citizens' right to travel. An opt-out system allows drivers to limit disclosure of personal information without forgoing travel rights. States that choose not to implement opt-out provisions may only distribute personal information for other approved uses. Hence under the DPPA an individual's information is available for public and commercial use either consensually or not at all.

By narrowly eliminating the barriers to free travel erected by state DMVs, The DPPA is a legitimate exercise of Congress's authority to enforce the provisions of the Fourteenth Amendment.

III. The DPPA is Consistent With Constitutional Principles of Federalism

A. The DPPA creates a baseline standard of privacy protection for state DMV records

Federal legislation establishing minimum standards for state regulatory schemes was upheld by this Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981). The baseline approach was approved as "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs . . ." *Id.* at 289 (listing cases).

The language from *Hodel* is remarkably similar to comments made on the Senate floor by Senator Barbara Boxer, one of the Act's sponsors:

> This amendment simply gives people more control over the disclosure of their personal information …. States are free to be more restrictive with this information. This bill simply takes a national problem and gives the States broad latitude and nine months to enact a national solution.

139 Cong. Rec S 15764 (Nov. 16, 1993).

Federal privacy legislation frequently establishes similar baselines that permit sates to regulate upward if they wish. *See, e.g.,* The Video Privacy Protection Act, 18 U.S.C. § 2710(f). In this manner, the exercise of federal authority to

protect privacy still allows states to function as "laboratories of democracy." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In testimony before a House subcommittee, Representative Moran confirmed that the Act creates a minimum standard that states may strengthen. *See* 1994 WL 212698 (Feb. 4, 1994).

States themselves have treated the Act as a baseline standard—many have passed stricter restrictions on access to DMV records than the Act requires.[5] Fourteen states have much tighter controls, prohibiting commercial and public access to personal information without the licensee's express written consent. Thirty states have implemented an opt-out system for disclosure to private users, commercial users, or both. Finally, a number of states have adopted unique record disclosure systems. For example, Hawaii's system incorporates a high degree of individual choice. Drivers may set individual preferences for data release.[6] In Colorado, news organizations may access records freely, but only for verification of address information.[7] The variety of state responses to the Act illustrates that the statute creates only a minimum standard of privacy protection, allowing ample room for state innovation. Indeed, the Act explicitly encourages experimentation by allowing states to disclose information "for any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14).

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[5] PUBLIC RECORD RESEARCH LIBRARY, The MVR Book: Motor Services Guide (Rev. ed. 1999)

[6] *Id.* at 79.

[7] *Id.* at 49.

B. The DPPA does not "commandeer" state legislative authority

Although this Court's Tenth Amendment jurisprudence recognizes a distinction between statutes that are generally applicable, affecting both states and private parties, and those directed exclusively at state behavior, this Court has never held that a law affecting states must be generally applicable to survive constitutional scrutiny. *See New York v. United States*, 505 U.S. 144, 160 (1992) (noting the distinction). On the contrary, this Court has upheld statutes that directly regulate state administrative policies. In *South Carolina v. Baker*, this Court considered a federal tax code provision requiring states to issue bonds in registered form. *See* 485 U.S. 505, 514-15 (1988). The *Baker* Court rejected the argument that a state's compliance costs represented impermissible federal commandeering of the state legislative and administrative process. *Id. See also Hodel*, 452 U.S. 264, 288 (1981) (prohibiting Congress from forcing states to "enact and enforce a federal regulatory program"). Because the DPPA is virtually identical to the statute in *Baker*—a state-targeted statute which imposes implementation costs—the question of general applicability need not even arise.

Further, as Judge Phillips noted in dissent below, the DPPA did not "commandeer" the South Carolina legislature because the state could have stopped selling information compiled from motor vehicle records. *Condon* at 467. Judge Phillips also found that because the DPPA directly regulates a state agency, it differs fundamentally from statutes that indirectly regulate private conduct, such as the ones

invalidated in *New York* and *Printz*. *Id.* at 466-67. Following *South Carolina v. Baker,* he concluded that the DPPA is a similarly permissible federal regulation of state governments. *Id.*

Under the DPPA states are regulated only to the extent that they choose to take personal information provided to a state agency for the purpose of a obtaining a license to operate a motor vehicle on a public roadway and then subsequently sell or disclose that information to purposes unrelated to the operation of the Department of Motor Vehicle or the protection of public safety.

CONCLUSION

The Drivers Privacy Protection Act safeguards the personal information of licensed drivers from improper use or disclosure. It is a valid exercise of federal authority in that it seeks to protect a fundamental privacy interest. It restricts the activities of states only to the extent that it concerns the subsequent use or disclosure of the information in a manner unrelated to the original purpose for which the personal information was collected. The states should not impermissibly burden the right to travel by first compelling the collection of sensitive personal information and then subsequently disclosing the same information for unrelated purposes. For these reasons, we respectfully urge the Court to reverse the decision of the lower court.

Dated: July 15, 1999

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