RECORD NO. 21-1478

In The
United States Court of Appeals
For The Fourth Circuit

WILLIAM PARKER GAREY; AARON KENT CRUTHIS; JUSTIN BRENT BLAKESLEE; ADILAH HANEEFAH-KHADI MCNEIL; CHARLOTTE MOFFAT CLEVENGER; BELINDA LEE STEINMETZ, on behalf of themselves and others similarly situated,

Plaintiffs – Appellants,

v.

JAMES S. FARRIN, P.C., d/b/a Law Offices of James Scott Farrin; MARCARI, RUSSOTTO, SPENCER & BALABAN, P.C.; RIDDLE & BRANTLEY, L.L.P.; WALLACE PIERCE LAW, PLLC; R. BRADLEY VAN LANINGHAM; LANIER LAW GROUP, P.A.; JAMES S. FARRIN; DONALD W. MARCARI; SEAN A. COLE; JARED PIERCE; VAN LANINGHAM & ASSOCIATES, PLLC, d/b/a Bradley Law Group; LISA LANIER; CHRIS ROBERTS; CRUMLEY ROBERTS, LLP; HARDISON & COCHRAN, PLLC; BENJAMIN T. COCHRAN; TED A. GREVE & ASSOCIATES, P.A.; TED A. GREVE; LAW OFFICES OF MICHAEL A. DEMAYO, L.L.P.; MICHAEL A. DEMAYO; HARDEE & HARDEE, LLP; CHARLES HARDEE; G. WAYNE HARDEE; KATHERINE E. ANDREWS-LANIER,

Defendants – Appellees,

and

UNITED STATES OF AMERICA,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLANTS

J. David Stradley
Robert P. Holmes, IV
WHITE & STRADLEY, LLP
3105 Charles B. Root Wynd
Raleigh, North Carolina 27612
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Counsel for Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1478 Caption: William Parker Garey, et al. v. James S. Farrin, P.C., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

William Parker Garey
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: William Parker Garey

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Aaron Kent Cruthis
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: Aaron Kent Cruthis

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Adilah Haneefah-Khadi McNeil
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: Adilah Haneefah-Khadi McNeil

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Charlotte Moffat Clevenger
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: Charlotte Moffat Clevenger

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Justin Brent Blakeslee
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: Justin Brent Blakeslee

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Belinda Lee Steinmetz
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Robert P Holmes Date: 05/12/2021

Counsel for: Belinda Lee Steinmetz

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JURISDICTIONAL STATEMENT

The district court had federal question subject-matter jurisdiction over this matter under 28 U.S.C. § 1331 because Plaintiffs'/Appellants' claim for relief arises under 18 U.S.C.A. § 2724, a federal statute. Defendant-Appellees did not contest personal jurisdiction in the district court. *See* JA 720-754, JA 755-789, JA 824-830.

This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291 because the judgment below is a final judgment of the United States District Court. On March 24, 2021, the district court entered final judgment as to all claims and all parties, granting Appellees' motions for summary judgment. JA 5576-5577. Appellants gave notice of appeal on April 22, 2021. JA 5578-5582. Accordingly, the appeal is timely.

STATEMENT OF THE ISSUES

I. The plain language of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25 ("DPPA") prohibits obtaining or using personal information "from a motor vehicle record." The Supreme Court has stated that "[t]he DPPA regulates the universe of entities that…suppl[y]

motor vehicle information" including States as well as "redisclosers" of that information. Did the district court err in pronouncing that the DPPA protects only information obtained directly from a department of motor vehicles ("DMV")?

II. Where the undisputed evidence shows that Defendants knowingly obtained personal information, from a motor vehicle record for a purpose not permitted by the DPPA, did the district court err in granting Defendant's motions for summary judgment, failing to grant Plaintiffs' motion for summary judgment, and dismissing Plaintiffs' claim for injunctive relief?

STATEMENT OF THE CASE

North Carolina law enforcement officers ("LEOs") use a standard form to report car accidents. JA 1954. That form—the DMV-349 ("Report")—has blanks for the LEO to insert each driver's personal information, including name, address, license number, and birth date. *See, e.g.*, JA 522-524. Notably, for each driver the Report has a section

labeled "Same Address on Driver's License?" ("SADL") followed by "Yes" and "No" check boxes. *Id.*

LEOs from each law enforcement agency that prepared the accident reports involving Plaintiffs[1] are trained to answer the SADL question accurately by examining either the address shown on the physical driver's license or, if the license is not available at the scene of the accident, the driver's address shown in the North Carolina DMV database. JA 1512-1513, JA 1514-1516; JA 1055 ¶¶1-15; JA 1039 ¶¶1-4, 8-9; JA 1064 ¶¶1-11. The spokesman for the Greensboro Police Department was less definitive, but he testified that officers are trained to confirm whether a driver's address matches the license address before completing the SADL question. JA 1044 ¶¶1-19. And it is statewide policy in North Carolina for the LEO to check "Yes" only if the address on the Report "is the same as it appears on the driver's license." JA 1998.

[1] The Charlotte-Mecklenburg Police Department, the N.C. State Highway Patrol, the Raleigh Police Department, and the Greensboro Police Department.

The Appellees ("Lawyers")[2] have admitted that they obtained—either directly from the Reports or from spreadsheets purchased from Digital Solutions of the Carolinas, Inc.—the names and addresses of accident-involved drivers for the purpose of sending them direct mail advertisements. JA 1650-1685, JA 1687-1697, JA1717-1724, JA 1739-1746, JA 1760-1768, JA 1781-1791, JA 1803-1811, JA 1847-1855, JA 1874-1879, JA 1891-1895, JA 1908-1912, JA 1925-1932. Digital Solutions derived the names and address information in its spreadsheets from the Reports. JA 1523 ¶¶2-3, 8.

Each Appellant ("Driver") drove a vehicle involved in a car accident in 2016. JA 1528-1602 ¶¶3-4 of each Declaration therein; JA 148-149, JA 229-231, JA 301-302, JA 408-409, JA 522-524, JA 945-946. A LEO investigated each Driver's accident and created a Report. *Id*.

At each accident scene, the LEO obtained each Driver's name, residential address, license number, birthdate, and other information, and then typed that information onto the Report. *See* JA 148, JA 229,

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[2] Appellee Katherine Andrews-Lanier is not a lawyer, but is joined for the fraudulent transfer claim involving the gratuitous transfer of an entirety interest in parcels of real property which Lisa Lanier transferred to Katherine after the original complaint was filed. JA 807-822, JA 901-915. "Lawyers" herein does not include Katherine.

JA 301, JA 408, JA 522, JA 945. Notably, the Report for each Driver has the SADL box checked "Yes," indicating that the Driver's address written on the Report was, in fact, the same address on the Driver's license. *Id.* Each Driver has declared that the address on their Report is the same address on their license. JA 1625-1649 ¶6 of each Declaration therein. There is no record evidence that any "Yes" response was inaccurate.

These Reports were then made available to the public by each LEOs' law enforcement agency. *See, e.g.,* JA 1521-1522. The Lawyers then obtained the Reports (or vendor-supplied Report information) of one or more Drivers and used the Drivers' names and addresses from the Reports to send targeted direct mail advertising letters to the Drivers' home addresses ("Advertising Letters"). JA 1687-1697, 1711-1712; JA 1717-1724, 1732-1734; JA 1739-1746, 1754-1755; JA 1760-1768, 1776-1777; JA 1781-1791, 1798-1799; JA 1825-1833, 1842-1843; JA 1847-1855, 1868-1869; JA 1874-1879, 1885-1886; JA 1891-1895, 1902; JA 1908-1912, 1919; JA 1925-1932, 1941-1942. Copies of the Advertising Letters (with redacted Reports) were attached the pleadings. JA 141-560 and JA 916-961.

In 2016, shortly after their respective accidents, each Driver received an Advertising Letter from one or more of the Lawyers, and each Letter contained the sentence, "This is an advertisement for legal services." JA 1625-1649 ¶¶7-9 of each Declaration therein. No Driver consented to allow any Lawyer to use their personal information for any purpose. *Id*. ¶¶10-11 of each.

Several Lawyers continue their targeted direct mail advertising programs. JA 1484-1485, JA 1496, JA 1503-1505, JA 1898-1899.

Except for individual Lawyers Sean Cole, Donald Marcari, Charles Hardee, and Wayne Hardee, each of the individual Lawyers controlled his or her firm. JA 5668-5669, JA 1487-1488, JA6276-6277, JA 6151-6153, JA 6034-6038, JA 2088, JA 1506, JA 1490. Lawyers Charles Hardee and Wayne Hardee each owned half of Lawyer Hardee & Hardee LLP. JA 5663-5664, JA 5926-5928. But Lawyers Wayne Hardee, Donald Marcari, and Sean Cole signed the Advertising Letters, as did individual Lawyers Farrin, Marcari, Pierce, Van Laningham, Roberts, Cochran, Greve, and DeMayo. *See, e.g.*, JA 147; JA 360; JA 171; JA 180; JA 186; JA 226; JA 205, JA 240; JA 557; JA 553-554;

JA249. Lawyer Charles Hardee played an active role in his firm's targeted direct mail advertising program. JA 248, JA 2072-2084.

Drivers, on behalf of themselves and others similarly situated, filed this action seeking damages from Lawyers and injunctive relief. JA 84-103, JA 104-560.[3] Lawyers moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing, *inter alia*, that the DPPA did not apply to their conduct because they did not procure Drivers' information directly from a DMV. JA 573-576, JA 577-622, JA 623-626. The district court denied the motions to dismiss, forcefully rejecting the precise argument upon which it later granted summary judgment—that the DPPA protects drivers' personal information only if acquired directly from a DMV—as "fly[ing] in the face of the precise language of the DPPA." JA 699-700.

On July 23, 2020, the court denied the Drivers' motion for class certification. JA 5124-5148. The court ruled that the Drivers' claims were not "typical" of the claims of all putative class members because the Drivers did not establish that the personal information of every member of the putative class had come from either driver's licenses or DMV databases, as had Plaintiffs'. JA 5135-5136.

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[3] The complaint was later amended to its final form. JA 915.

Certain Lawyers then moved to dismiss the claim for injunctive relief, JA 1075-1078, which the court granted. JA 5427-5444. In the same Order, the court again rejected, after extensive discussion, Defendants' argument that the DPPA protects only personal information obtained directly from a DMV. JA 5441-5444.

After more than two years of discovery, both sides moved for summary judgment. JA 1619-1624, JA 2141-2142, JA 4992-4993, JA 5051-5053. On January 22, 2021, the district court—without giving the parties any notice that it was reconsidering its ruling on the DPPA's scope—reversed itself and granted the Lawyers' Motions and denied the Drivers' motion, ruling that the Lawyers could not be liable under the DPPA as a matter of law because they did not procure the Drivers' information directly from a DMV. JA 5543. The Drivers sought reconsideration of the summary judgment ruling. JA 5549-5551. On March 24, 2021, the court denied the motion for reconsideration and entered final judgment. JA 5568-5574, JA 5576-5577.

SUMMARY OF THE ARGUMENT

The plain language of the DPPA protects personal information derived from a "motor vehicle record," such as a driver's license. The Act

does not limit its scope to information obtained directly from a DMV, as the district court determined. Indeed, Congress referred to DMVs numerous times in the DPPA and could easily have limited its reach to information obtained directly from a DMV had it so intended. The district court's reasoning is at odds with the Supreme Court's description of the scope of the DPPA; would render other provisions of the Act mere surplusage; and would in large part remove the privacy protections that Congress intended. The district erred in granting summary judgment to the Lawyers.

Indeed, the court below should have granted summary judgment to the Drivers on their DPPA claims. The summary judgment evidence establishes the Drivers' standing to maintain their claims under the DPPA for liquidated damages and injunctive relief. The evidence is undisputed, moreover, that the Drivers' personal information obtained and used by the Lawyers in their marketing campaigns came from either a DMV database or a driver's license, both of which are "motor vehicle records" under the DPPA; indeed, the Drivers' DPPA personal information on the accident reports, in and of itself, constitutes a DPPA "motor vehicle record," regardless of its source. The Lawyers, as a

matter of law, "knowingly" obtained and used the Drivers' personal information, as defined by the DPPA, and did so for advertising purposes, an impermissible purpose under the DPPA. Finally, the First Amendment arguments raised by the Lawyers below—that the DPPA is unconstitutional on its face and as applied to them, and that the release of the Drivers' accident reports by State and local law enforcement agencies gives the Lawyers a First Amendment right to obtain and use the Drivers' personal information therein—lack merit.

ARGUMENT

I. BECAUSE THE DPPA, BY ITS PLAIN LANGUAGE, APPLIES TO INFORMATION "FROM A MOTOR VEHICLE RECORD," NOT MERELY TO INFORMATION FROM A DEPARTMENT OF MOTOR VEHICLES, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFFS.[4]

The grant of summary judgment is reviewed *de novo*.

A. The DPPA's protections are not limited to information obtained directly from DMV.

The district court held that the DPPA only imposes liability for the misuse of information obtained directly from a DMV. JA 5543. But the DPPA's plain language dictates otherwise.

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[4] The granting of summary judgment is reviewed *de novo*. *Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997).

The DPPA concisely defines the cause of action upon which Plaintiffs maintain this action as follows:

> A person who [1] knowingly obtains, discloses or uses personal information, [2] from a motor vehicle record, [3] 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). *See Maracich v. Spears*, 570 U.S. 48, 71 (2013); *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008).

As the statute makes clear, to be protected by the DPPA, personal information must come "from a motor vehicle record." 18 U.S.C. § 2724(a). The Act defines a "motor vehicle record" as

> any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.

18 U.S.C. § 2725(1).

1. The plain language of the DPPA shows that Congress did not intend to limit the DPPA's protections to information obtained directly from a DMV.

Section 2724, the section under which the Drivers sue, imposes liability on any person who "knowingly obtains, discloses or uses

personal information, **from a motor vehicle record**." 18 U.S.C. § 2724 (emphasis added). Nothing in the DPPA would even suggest the Act's scope is limited to information disclosed directly by the DMV, as the district court held. *See, e.g.*, *Ctr. for Individual Rights v. Chevaldina*, 2018 U.S. Dist. LEXIS 28723, *11-13 (S.D. Fla. Feb. 21, 2018) ("[T]here is nothing in the statutory language [of the DPPA] that limits liability only if the personal information comes directly from a department of motor vehicles"); *Pavone v. Law Offices of Anthony Mancini, Ltd.*, 205 F. Supp. 3d 961, 964-965 (N.D. Ill. 2016) ("[G]iven the wording of the statute, even if a document is created by the police, the DPPA protects any information in the report that the police obtained *from* the motor vehicle record" (emphasis in original; citation, quotations omitted)).

If Congress intended to protect only that information obtained directly from a DMV, it could easily have said so: For example, instead of imposing liability on persons who obtain personal information "**from a motor vehicle record**", § 2724(a), it could have imposed that liability only on persons who obtain such information "**from a DMV**." Or instead of defining "motor vehicle record" as "any record that pertains to a motor vehicle operator's permit," etc., § 2725(1), Congress

could have defined motor vehicle record as "any record **in the possession of a DMV** that pertains to a motor vehicle operator's permit," etc. But Congress chose broad language to protect "motor vehicle records," not just motor vehicle records in the hands of a DMV.

Further, because Congress referred to DMVs throughout the DPPA, it surely did not inadvertently fail to state that the DPPA applied only to records in the hands of a DMV. For example:

- Section 2721(a) regulates departments of motor vehicles, ("A State department of motor vehicles…shall not knowingly disclose…");
- Section 2721(d) allows DMVs to establish procedures for obtaining drivers' consent to release their personal information; and
- Section 2723(b) imposes monetary penalties on DMVs that have "a policy or practice of substantial noncompliance" with the Act.

Having mentioned DMVs repeatedly in the DPPA, Congress surely would have included one additional mention of DMVs had it intended to restrict the DPPA's protections to records in the hands of a DMV.

Bedrock principles of statutory construction militate against surmising that the absence of language, in the most critical provision of the DPPA, limiting the scope of the Act to personal information obtained directly from a DMV was a mere drafting error. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

Likewise, the district court's reading of the DPPA would make surplusage of the "knowingly" element of § 2724(a). "A court must attempt to interpret a statute so as to give each word meaning and to avoid creating surplusage." *Hedin v. Thompson*, 355 F.3d 746, 750 (4th Cir. 2004). If the DPPA imposed liability only on those who obtained information directly from a DMV, there would be no reason for the Act to limit liability to those who "knowingly" obtain, use or disclose information: "[A] person who gets the information directly from a state agency quite obviously knows that is where he is getting the information." *Pavone v. Law Offices of Anthony Mancini, Ltd.*, No. 15 C

1538, 2016 WL 4678311, at *3 (N.D. Ill. Sept. 7, 2016). Hence, the district court's reading of the DPPA violates a basic tenet of statutory construction.

The district court's holding is at odds with the fundamental tenet of statutory construction that if the text of a statute evinces "a plain, nonabsurd meaning," then the court should not "read an absent word into the statute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). The lower court erred in granting summary judgment to the Defendants, and this Court should reverse.

2. The Supreme Court has at least implicitly rejected the district's court's reading of the DPPA.

In *Reno v. Condon*, 528 U.S. 141 (2000), the Supreme Court addressed the question of whether the DPPA exclusively regulated states, as opposed to non-state actors. The High Court held:

> **The DPPA regulates the universe of entities** that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.

Id. at 151 (emphasis added). Hence, the Court rejected the notion of a narrowly cabined DPPA. Instead, the Court instructed that Congress

intended to regulate the "universe" of traffickers in motor vehicle information, so long as the DMV is the "initial supplier" of the information. *Id.*

The district court disregarded the Supreme Court's description of the broad reach of the DPPA in granting summary judgment for the Lawyers. Curiously, though the district court's opinion rests on a judge-made restriction on the scope of the DPPA—that the DPPA regulates only information obtained directly from a DMV—the district court failed address the *Reno*'s recognition of a much wider scope of the Act, consistent with the statute's plain terms. JA5526.

Instead, the district court focused on the following *Reno dicta:*

> The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV.

Reno, *supra* at 146. Yet, it is clear from a careful reading of *Reno* that the Court did not intend to restrict the reach of the DPPA to information obtained **directly** from a DMV. Indeed, a mere two sentences later the Court notes that the DPPA applies to "a private actor who has obtained drivers' information **from DMV records**", *id.* (emphasis added), as opposed to "from a DMV." The district court

improperly leveraged this strained reading of an isolated *dicta* passage in *Reno* to support its grant of summary judgment. JA 5536-5538.

3. The DPPA's structure shows that Congress intended to provide broad protection for personal information that drivers must provide to DMV.

The Supreme Court has directed that the DPPA be read as a whole. Specifically addressing the DPPA, the Court noted,

> It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.

Maracich, 570 U.S. at 65.

Section 2721(c) provides, in pertinent part:

> **Resale or redisclosure.**--An authorized recipient of personal information…may resell or redisclose the information only for a use permitted under subsection (b)….Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

18 U.S.C. § 2721(c).

This subsection proves two points: First, Congress understood that merely regulating the release of information in the first instance, i.e., by DMV, would be ineffective, so it also regulated the re-release by those who obtained the information from DMV. Second, Congress intended to provide far-reaching protection of personal information originating at the DMV, not just information obtained directly from a DMV.

Read against the backdrop of § 2721(c)'s redisclosure ban (in accord with the Supreme Court's direction in *Maracich*, *supra*), limiting the meaning of "motor vehicle record" to records currently in the hands of DMV defies both logic and common sense. In § 2721, Congress unquestionably regulated both the disclosure of information directly from DMV, as well as the redisclosure of that information by persons other than DMV. § 2721(a), (c). Had Congress intended to retreat from that position in § 2724—to limit civil liability to those persons who obtained information **directly** from DMV—it surely would have said so. If anything, Congress did the opposite: it defined "motor vehicle record" in § 2725(1), and at that definition is not limited to records in the hands of DMV.

Thus, the district court's view of the DPPA's scope flies in the face of both the language and the structure of the DPPA. Accordingly, this Court should reverse the summary judgment order below.

4. At least one circuit court and several district courts, including the only court in the Fourth Circuit to address the issue, reject the district court's narrow reading of the DPPA.

Numerous courts agree that the DPPA protects information not obtained directly from a DMV.[5] In *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), the Third Circuit imposed liability under the DPPA where personal information was obtained not directly from a DMV but from Westlaw. *Id.* at 384, 396-97. There, a labor union, attempting to organize workers, copied down employees' license plate numbers in the company parking lot. *Id.* at 384. The union then obtained the employees' names and addresses by searching the license plate numbers on Westlaw and through "information brokers." *Id.* Without question,

[5] The district court's opinion states that "Plaintiffs point to no decision—nor has this Court been able to find one—where a defendant was adjudged liable as a matter of law for a DPPA violation after obtaining, disclosing, or using 'personal information' that was not gathered directly from a state DMV." JA 5543. To the contrary, two of the cases the court discusses extensively in its opinion, *Pichler* and *Gaston*, so hold.

the defendant in *Pichler* did not obtain the drivers' information directly from a DMV. Further, nothing suggests that either the district court or the Third Circuit found an agency relationship or a civil conspiracy between either Westlaw or the information brokers and the defendant union. Yet the Third Circuit did not hesitate to affirm summary judgment against the union, even though it did not acquire information directly from a DMV. *Id.* 396-97. Thus, the district court's holding simply cannot be reconciled with the Third Circuit's holding in *Pichler*.

Another North Carolina district court has rejected Judge Biggs' narrow reading of the DPPA. In *Gaston v. LexisNexis Risk Solutions, Inc.*, 483 F. Supp. 3d 318 (W.D.N.C. 2020), Judge Kenneth Bell of the Western District of North Carolina addressed a case in which an online information broker was accused of selling thousands of motor vehicle accident reports prepared by a police department. *Id.* at 328-29. Judge Bell held that crash reports which indicated that the driver's address on the report matched the address on the driver's license were protected by the DPPA. *Id.* at 336-37. That was so

> [r]egardless of whether the initial source of the address information was the accident participant's records in the DMV database…, or a

> driver's license, or [whether] the driver's license was only used to confirm earlier provided information.

Id. at 336-37. The DPPA applied, even though, just as in the case at bar, the personal information went through the hands of the police department before the defendant obtained or used that information. In other words, the DPPA protected information that did not come directly from a DMV.

Similarly, *Public Interest Legal Foundation v. Boockvar*, 431 F. Supp. 3d 553 (M.D. Pa. 2019), the court rejected the argument that the DPPA does not apply to releases of information by other government departments that procured the information from the DMV. *Id.* at 562. The court noted that "[p]ersonal information is 'from' a motor vehicle record when it derives from DMV sources." The court then held that the DPPA prevented disclosure of information held by Pennsylvania's Department of State, i.e., not its DMV. *Id.* at 555, 562.

Even the district court **in this case** initially rejected the strained reading of the DPPA that it eventually adopted:

> …Defendants, citing to section 2721(a)(1) of the statute, assert that "[t]he DPPA only regulates the disclosure of information held by a state DMV."

> The Court rejects these arguments, which fly in the face of the precise language of the DPPA. To be sure, section 2721(a)(1) of the DPPA prohibits the knowing use or disclosure of protected "personal information" by State DMVs, as well as their employees and agents. 18 U.S.C. § 2721(a)(1). However, section 2724(a) of the statute also ascribes liability to anyone "who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under [the DPPA]." *Id.* § 2724(a). In accordance with "one of the most basic interpretive canons" of statutory interpretation, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Accordingly, giving effect to the entire statute, including section 2721(a) on which Defendants rely, as well as section 2724(a), the Court concludes that the DPPA covers information knowingly disclosed by a state DMV *as well as* information that is knowingly obtained, disclosed, or used by any person. Nowhere in the statute does it state that it applies so as to limit liability in the manner argued by Defendants.

JA 692.

5. The district court's narrow reading of the DPPA would gut its protections.

The lower court's ruling here means that DPPA personal information "laundered" through another entity can be used by anyone for any purpose, including stalking and marketing, two uses which Congress intended to thwart. *Maracich*, 570 U.S. at 57. Indeed, the district court's ruling would mean that law enforcement agencies effectively laundered the Drivers' personal information, obtaining the Drivers' DPPA-protected information directly from the DMV and thereby insulating subsequent recipients such as Defendants from liability. As the Seventh Circuit has stated in a different context, "Congress would not bother passing such an easily circumvented law." *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000).

6. The district court relied on poorly reasoned or distinguishable opinions outside the Fourth Circuit.

The district court rested its analysis on a number of cases in which courts failed to analyze and apply the plain language of the DPPA. For example, the courts in *Ocasio v. Riverbay*, No. 06-CIV-6455, 2007 WL 1771770 (S.D.N.Y. June 19, 2017), *Kresal v. Secura Ins. Holdings, Inc.*, No. 17-CV-766-WMC, 2018 WL 2899694, at *4 (W.D.

Wis. June 11, 2018), *Fontanez v. Skepple*, 563 F. App'x 847, 849 (2d Cir. 2014) (summary order), engaged in little or no analysis of the DPPA's language.

The district court also relied on a number of cases in which the courts denied relief under the DPPA because the plaintiff voluntarily disclosed his or her own personal information. *See Hurst v. State Farm Mut. Auto. Ins. Co.*, No. CIV.A. 10-1001-GMS, 2012 WL 426018, at *10 (D. Del. Feb. 9, 2012), *aff'd* (Oct. 24, 2012) (plaintiff disclosed his information in affidavit attached to lawsuit); and *Siegler v. Best Buy Co. of Minnesota*, 519 F. App'x 604, 605 (11th Cir. 2013) (per curiam) (DPPA did not cover information voluntarily provided by consumer when he provided his driver's license to merchant). One of these courts captured the distinction:

> [The DPPA] seeks to control dissemination of information collected using the coercive power of the state. It does not regulate information freely given by consumers to private businesses, such as when plaintiff tendered his driver's license to [the defendant].

O'Brien v. Quad Six, Inc., 219 F. Supp. 2d 933, 935 (N.D. Ill. 2002) (No DPPA claim where plaintiff provided his driver's license to obtain entry into a nightclub).

These cases simply are not apposite here, where the Drivers were compelled to provide their information by North Carolina law. Here, because the Drivers were involved in motor vehicle collisions, North Carolina law forced them to provide their drivers' licenses to law enforcement. *See* N.C. Gen. Stat. § 20-29 (class 2 misdemeanor to refuse to provide license to officer at accident scene). Accordingly,

> "personal information from [a driver's license] would be sufficient in the circumstance of the compelled production of a driver's license to a law enforcement officer to fall within the scope of information protected by the DPPA.

Gaston, *supra*, 483 F. Supp. 3d at 336, n. 9. The *Gaston* court continued:

> Applying a modicum of common sense to what is a clearly written statute, being involved in a fender bender on the way to work is clearly an insufficient reason to expose protected "personal information" (especially a person's name and home address) to a web audience increasingly inhabited more by identity thieves than boy scouts

Id. Here, the district court's reliance on the voluntary disclosure cases simply misses the mark.

II. THE DISTRICT COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO DRIVERS.[6]

A. Because Plaintiffs have Suffered Concrete Harms that are both Related to Harms at Common Law and have been Elevated by Congress, Plaintiffs have Standing.

1. The Article III standing requirement.

To establish Article III standing, a plaintiff must have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quotations and citations omitted). Additionally, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant." *Id.* (quotations and citations omitted). Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotations and citations omitted). At the summary judgment stage, the

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[6] The court reviews cross-motions for summary judgment *de novo*, "considering each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Bacon v. City of Richmond, Virginia*, 475 F.3d 633, 637-38 (4th Cir. 2007) *quoting Rossignol v. Voorhar,* 316 F.3d

party seeking federal jurisdiction must establish standing with more than "mere allegations," but instead "must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 411-12 (2013) (quotation and citations omitted).

In denying the Lawyers' motions to dismiss, the district court correctly determined that the Drivers alleged a legally cognizable harm when they alleged that the Lawyers obtained and/or used their personal information for a purpose not permitted under the DPPA. JA 692. The court noted that this "allegation bears a close relationship to the interest protected by the invasion of privacy tort," and thus constituted a legally cognizable harm. *Id.* (citing *Spokeo v. Robins*, 136 S. Ct. 1540 (2016)).

""The court ruled that Plaintiffs alleged more than a mere procedural violation of the DPPA. *Id.* at 13. "Rather, Plaintiffs allege that Defendants engaged in the substantive conduct that the DPPA seeks to prohibit—obtaining, disclosing, and using personal information for a purpose other than that outlined in the statute." *Id.* at 13-14. *Accord Heglund v. Aitkin Cty.*, 871 F.3d 572, 578 (8th Cir. 2017) ("The intangible harm associated with an alleged violation of the DPPA's

substantive protections is sufficient for the [plaintiffs] to establish an injury in fact"); *Whitaker*, 229 F. Supp. 3d at 812-814 ("But Appriss misses a primary purpose of the DPPA: data protection to prevent unwanted solicitation.…The analogous harmless DPPA violation wouldn't be the unauthorized spread of a person's name and address. It would be information that could never be used to identify or to cause physical or economic harm. An example would be the disclosure of a person's first name alone, without last name, address, or social security. This might violate the letter of the DPPA, but it presents no actual risk to privacy").

This Court's recent opinion in *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir.), *cert. denied,* 140 S. Ct. 676 (2019), makes clear that violation of a substantive provision of a privacy statute such as the DPPA constitutes a legally cognizable harm. In *Krakauer*, a Telephone Communications Privacy Act ("TCPA") case, this Court instructed that a statutory privacy violation constitutes a harm sufficient to support standing. *Id.* at 652–54. In doing so, the Court rejected the defendant's attempt to distort the holding of *Spokeo*, *supra.* The court noted that, in the TCPA, "Congress responded to the harms of actual people by

creating a cause of action that protects their particular and concrete privacy interests." *Krakauer*, *supra.* at 653. Noting that "[i]ntrusions upon personal privacy were recognized in tort law and redressable through private litigation," the Court concluded that a substantive violation of the TCPA amounted to a legally cognizable harm. *See also Maracich*, 570 U.S. at 67 ("Direct marketing and solicitation present a particular concern…because contacting an individual is an affront to privacy even beyond the fact that a large number of persons have access to the personal information"); *Pichler v. UNITE*, 542 F.3d 380, 400 (3d Cir. 2008) ("The plain language of the DPPA, Supreme Court and other precedent, and the common law of privacy all support construing § 2724(b) so as not to require actual damages to recover liquidated damages); *Kehoe v. Fidelity Fed. Bank & Trust*, *supra*, 421 F.3d 1209, 1216 (11th Cir. 2005) ("Having considered the plain text of the DPPA's remedial provision, we conclude that a plaintiff need not prove actual damages to recover liquidated damages").

2. The Drivers need not prove actual damages to recover liquidated damages.

This Court has already addressed the question of whether a plaintiff must prove she suffered actual damages to recover liquidated damages under the DPPA. *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 205 (4th Cir. 2009). There, the Court cited the DPPA as an example of a statute which does not require proof of actual damages as a prerequisite for liquidated damages. *Id.*; *accord Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1214-1216 (11th Cir. 2005). Hence, the Court has answered that question in the Drivers' favor.

3. The Drivers suffered concrete harms fairly traceable to the Lawyers' obtainment and use of the Drivers' protected information.

The Lawyers' mere act of obtaining the Drivers' personal information constitutes a harm sufficient to support standing. JA 692, JA 796-797; *Whitaker v. Appriss, Inc.*, *supra.* Further, the Drivers sustained other harms. For example, they each experienced frustration, annoyance, confusion, privacy violation, and a sense of being overwhelmed when they received and read the letters marketing legal services for their recent accidents sent by the Lawyers. JA 1528-1602. *See Ben-Davies v. Blibaum & Assocs., P.A.*, 695 F. App'x 674, 676-77,

2017 U.S. App. LEXIS 9667 (4th Cir. June 1, 2017) (unpublished) (allegations of emotional distress, anger, and frustration resulting from defendant's alleged FDCPA violations sufficient injury in fact).

The Drivers can "fairly trace" concrete harms back to the Lawyers' obtaining and using the Drivers' protected information. The Lawyers used the information they unlawfully obtained to send letters to the Drivers. The Drivers received those letters and thus experienced harms. If the Lawyers had not obtained the Drivers' protected information, they could not have placed the Drivers' names and addresses on envelopes or sent letters to the Drivers. Hence, no DPPA violation, no harm.

Thus, uncontradicted evidence shows that the Drivers have suffered both a Congressionally elevated harm as well as other concrete harms from the Lawyers' obtainment and use of the Drivers' personal information. The Drivers, accordingly, satisfy both the injury and causation elements of standing.

B. The Drivers Have Standing to Seek Injunctive Relief Against the Fox Defendants.[7]

The district court's September 28, 2020 Order (JA 5427-5444) denied Defendants' motions to dismiss the Second Amended Complaint in all respects but one: The court granted the Fox Defendants' motion to dismiss the Drivers' claim for an injunction to prohibit Defendants from continuing to obtain and to use protected DPPA personal information in connection with their marketing efforts. The district court first noted that "[t]o successfully plead for injunctive relief, a plaintiff 'must establish an ongoing or future injury in fact[.]'" JA 5442 (quoting *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018)). The court then determined that the Drivers lacked standing to maintain the claim for an injunction because the likelihood that their personal information would be obtained and used for marketing purposes by the Lawyers in the event

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[7] Defendants James S. Farrin, P.C. d/b/a Law Offices of James Scott Farrin, James S. Farrin, Marcari, Russotto, Spencer & Balaban, P.C., Donald W. Marcari, Riddle & Brantley, L.L.P., Sean A. Cole, Wallace Pierce Law, PLLC, Jared Pierce, Van Laningham & Associates, PLLC d/b/a Bradley Law Group, R. Bradley Van Laningham, Lanier Law Group, P.A., Lisa Lanier, Crumley Roberts, LLP, Chris Roberts, Hardee & Hardee LLP, Charles Hardee, and G. Wayne Hardee are represented by Fox Rothschild and are referred to as "the Fox Defendants."

of a future accident was too remote and speculative to support the claim. The court erred.

"Standing is determined at the commencement of a lawsuit." *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n. 5 (1992)). At the time the Complaint in this action was filed, all Lawyers were unlawfully using DPPA-protected information in connection with their mail solicitation efforts. Even today, four Lawyers continue their unlawful mailing campaigns.[8] Thus, the next time a Driver is involved in a reportable motor vehicle collision in North Carolina, it is virtually certain that DPPA-protected personal information in his accident report will be "obtained" by certain Lawyers for their marketing campaigns and, if he meets a Lawyer's mailing criteria, that the personal information will be "used" by a Lawyer to send a mailing.

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[8] Injunctive relief is appropriate even as to the Lawyers that have ceased their mail-marketing campaigns. *See, e.g., Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed"); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice").

The DPPA expressly provides a remedy of "preliminary and equitable relief as the court deems appropriate." 18 U.S.C. § 2724(b)(4). Hence, as Defendants acknowledge, JA 596, injunctive relief is a remedy available under the DPPA. Here, the Lawyers' continuing violations of the DPPA, and the resulting risk of violations affecting the Drivers, is sufficient to confer standing on Drivers to pursue injunctive relief. *See, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) ("A plaintiff seeking injunctive relief shows redressability by 'alleg[ing] a continuing violation or the imminence of a future violation' of the statute at issue" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)); *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981) ("When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown"); *Gaston*, *supra*, 483 F. Supp. 3d at 343 n.18 ("Courts make an exception to the general rules of justiciability for claims like this where a defendant is likely to continue engaging in its conduct but also evade review as soon as a plaintiff files suit….There is

no evidence that Defendants will stop disclosing unredacted personal information contained in North Carolina accident reports without requiring compliance with the DPPA in the absence of an injunction. Therefore, the named plaintiffs have standing to seek injunctive relief" (citations omitted)); *Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015) ("Federal courts have held that plaintiffs have standing to seek injunctive relief based on the allegation that a product's labeling or marketing is misleading to a reasonable consumer, because to "hold otherwise would effectively bar any consumer who avoids the offending product from seeking injunctive relief" (citations, quotations omitted)).

C. The Lawyers obtained Plaintiffs' information "from a motor vehicle record."

The Drivers have shown that their personal information is "from a motor vehicle record" for four independently sufficient reasons:

1. The information came from either a DMV database or a driver's license, both of which are "motor vehicle records";
2. Even if the license is not a DMV record, the information on the license is "from a motor record";

3. The accident report revealed the address on the Driver's driver's license, which is information "from a motor vehicle record"; and

4. The address of the Driver on the DMV-349 with the SADL box checked yes—meaning that the Driver's address is identical to the address on his driver's license or the DMV database (both of which are motor vehicle records)—constitutes a DPPA motor vehicle record because it "pertains to a motor vehicle operator's permit." 18 U.S.C. § 2725(1).

1. Both the DMV database and a driver's license are motor vehicle records under the DPPA.

Under the text of the DPPA, a "motor vehicle record" is "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C.A. § 2725. The DMV database is unquestionably a motor vehicle record.

The Lawyers take the position that a driver's license is not a motor vehicle record. JA 1197, JA 1188. In the words of one court, "On its face, defendant's argument that a driver's license is not a 'motor vehicle record' is difficult to take seriously." *Eggen v. WESTconsin*

Credit Union, 2016 WL 4382773, at *3 (W.D. Wis. Aug. 16, 2016). The court continued, "After all, a driver's license is created by the Department of Motor Vehicles and it is a record of the information on the license." *Id.*

The Lawyers' argument defies common sense. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573 (2010) ("When interpreting… statutory provisions…,[courts] begin by looking at the terms of the provisions and the 'commonsense conception' of those terms.) The Lawyers essentially argue that although a "motor vehicle record" is "any record that *pertains* to a motor vehicle operator's permit,"18 U.S.C. § 2725(1) (emphasis added), a driver's license cannot pertain to itself. As the *Eggen* court pointed out, "'pertains to' is meant to *expand* the scope of the Act's coverage, so that a driver's information is protected not just with respect to a small list of the most obvious motor vehicle records, but any related records as well." *Id.* "If Congress had wanted to exclude from protection the very records that are listed in the statute, one would expect must clearer language expressing that intent." *Id.*

(1) The structure of the DPPA shows that a driver's license is a motor vehicle record.

The *Eggen* court's holding —that driver's licenses are motor vehicle records—finds additional support in other sections of the DPPA itself. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). "Where…Congress uses similar statutory language…in two adjoining provisions, it normally intends similar interpretations." *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009). Here, when the definition of "motor vehicle record" is read in the context of the entire DPPA, it becomes clear that "motor vehicle record" includes documents which are "issued" by a DMV, i.e., a driver's license in its owner's hands.

Under the DPPA, certain permitted uses of personal information require the "consent of the person to whom such personal information pertains." §§ 2721(b)(11)-(13). However, Section 2721(e) provides that "[n]o State may condition or burden in any way the **issuance** of an individual's **motor vehicle record**…to obtain express consent." § 2721(e) (emphasis added). Importantly, the DPPA defines "motor

vehicle record" as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card ***issued*** by a department of motor vehicles." § 2725(1) (emphasis added).

Reading these sections in context shows beyond any reasonable dispute that Congress understood "motor vehicle records" to be documents which are "issued" to individuals, i.e., driver's licenses, registration cards, titles, etc. Nothing in the DPPA's text suggests that these documents lose their character as "motor vehicle records" the moment they are issued. Hence, the Lawyers' suggestion a driver's license is not a "motor vehicle record" defies the structure and context of the DPPA.

(2) *Andrews v. Sirius XM Radio, Inc.* is not persuasive.

While the "argument that a driver's license is not a motor vehicle record is difficult to take seriously," *Eggen*, *supra*, at least one court apparently adopted it. *Andrews v. Sirius XM Radio, Inc.*, 932 F.3d 1253 (9th Cir. 2019), held that a driver's license in the hands of its owner is

not a "motor vehicle record" under the DPPA. *Id.* at 1260[9]. For several reasons, the *Andrews* court is mistaken. First, the *Andrews* court bases its holding on the fact that, once a driver's license has been issued to a driver, it "becomes the possession of *an individual*, not the DMV that issued it." *Id.* Apparently, in the *Andrews* court's view, the fact that the license is no longer in the hands of DMV deprives the license of the DPPA's protections. For the reasons stated in Section I, *supra*, that argument defies the plain language and structure of the DPPA.

Second, the *Andrews* court makes no attempt to square the account for the DPPA's provisions relating to the "issuance" of "motor vehicle records" discussed above. The opinion simply ignores § 2721(e).

Additionally, if the *Andrews* court's reading of the DPPA were correct, i.e., if a driver's license lost all DPPA protection the moment it was issued, a State could easily circumvent § 2721(e)'s prohibitions on imposing burdens or conditions. The State could issue the license and require drivers to surrender the license immediately for inspection and

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[9] The *Andrews* decision, obviously, does not bind this Court. *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012).

copying. The State could then do as it pleases with this copy of the license because it would no longer be a motor vehicle record. This would thwart Congress's clear intent in enacting § 2721(e). Hence, for all of these reasons, a driver's license is a "motor vehicle record" under the DPPA.

Indeed, if the *Andrews* court were correct, North Carolina has itself worked an end-run around the DPPA. For, when each Plaintiff had the misfortune to be involved in an accident, North Carolina compelled them to produce their driver's licenses on demand. N.C. Gen. Stat. § 20-29. An officer then incorporated the Driver's name and address—from the license—into the accident reports. Under the district court's reasoning, that report then can be obtained and used by anyone for any purpose. Hence, if a driver's license loses the DPPA's protections the moment it is issued, North Carolina has quite easily circumvented Congress's intent to protect personal information in DMV records. This Court should decline Defendants' invitation to thwart Congressional intent. *See Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010) ("Our objective in all cases of statutory interpretation is 'to ascertain and implement the intent of Congress.")

2. Even if a driver's license were not a "motor vehicle record," the driver's name and address on the license is information "from a motor vehicle record" because it comes from a DMV database.

Even if a driver's license itself were not a motor vehicle record, a driver's name and address, copied off of a driver's license would still be a "from a motor vehicle record" because the name and address originate from the DMV. When a person applies for a North Carolina driver's license, the DMV collects, *inter alia*, the person's full name and address. N.C. Gen. Stat. § 20-7(b1). The DMV then issues the license from a "central location," § 20-7(f)(5), printing the driver's name and address on the license. Thus, even if the license itself is not a DMV record, the name and address printed on the license are themselves DMV records.

3. The Drivers' accident reports and/or the Drivers' personal information on those reports are motor vehicle records.

As the *Gaston* court explained,

> [The DPPA] defines a "motor vehicle record" as "any record that *pertains to* a motor vehicle operator's permit…." 18 U.S.C. § 2725(1) (emphasis added). All of the Crash Reports in which the "Same address as Driver's License" box is checked "pertain to" a motor vehicle operator's permit (i.e., a driver's license). Regardless of whether the initial source of the address

> information was the accident participant's records in the DMV database…, or a driver's license, or if the driver's license was only used to confirm earlier provided information, *everyone who has access to the Crash Reports knows the address on that individual's driver's license just the same as if they had the person's driver's license in their hands. Thus, the accident report is plainly a record that "pertains to" the driver's license and thus qualifies as a "motor vehicle record" under the DPPA.*

483 F. Supp. 3d at 336–37 (emphasis added). Here, the SADL box was checked on each Driver's accident report. Since that report itself (or, at a minimum, the Driver's address on that report) is a motor vehicle record, and since the Lawyers obtained each Driver's address from such a report, the Lawyers obtained the Drivers' information "from a motor vehicle record."

D. The Lawyers knowingly obtained the Drivers' information.

As previously noted, a person is liable for a DPPA violation if that person "**knowingly** obtains, discloses, or uses personal information, from a motor vehicle record, for a purpose not permitted." 18 U.S.C. § 2724(a) (emphasis added). The courts agree that the "knowingly" scienter applies merely to the obtaining, disclosing, or using of personal information, and does not require a showing that the defendant he or

she was doing so in violation of the DPPA. *See, e.g., Wilcox v. Swapp*, 330 F.R.D. 584, 594-595 (E.D. Wash 2019) ("Because the rest of the statute is offset by commas, the 'knowingly' requirement in section 2724(a) only applies to the portion before the commas, which is the first element of the statute….Further, beyond reasons related to punctuation, the first element of a DPPA claim contains the action verbs required to commit a DPPA violation, and with the term 'knowingly' being an adverb, it follows that 'knowingly' only applies to the requisite verbs….Because of the commas that offset the 'knowingly' requirement from the other two elements of a DPPA claim, 'knowingly' only defines the first element, which is that the person 'obtains, discloses or uses personal information'" (citations omitted)); *Wiles v. Worldwide Info., Inc.*, 809 F. Supp. 2d 1059, 1080-1081 (W.D. Mo. 2011) (rejecting defendant's argument that "even if it had technically violated the DPPA, it did so without the knowledge that its purposes were impermissible, and therefore it could not be liable because of the statutory requirement that it act knowingly….The only reason to use commas to isolate the clause 'from a motor vehicle record' is to confine the adverb 'knowingly' to modifying the act of obtainment, disclosure, or

use….Congress intended to prevent liability in a case, for example, in which a customer intended to request only one individual's record but was delivered the entire database; such obtainment would not have occurred knowingly" (citation omitted)).

Here, the Lawyers concede that they obtained the Drivers' personal information as part of a systematic marketing effort which required obtaining names and addresses for marketing mailers. JA 1650-JA 1686, JA 1687-1697, JA 1717-1724, JA 1739-1746, JA 1760-1768, JA 1781-1791, JA 1803-1811, JA 1847-1855, JA 1874-1879, JA 1891-1895, JA 1908-1912, JA 1925-1932. Thus, it is undisputed that Defendants obtained and used the DPPA personal information of the Drivers. Accordingly, the "knowingly" requirement is established as a matter of law.

E. The Lawyers obtained the Drivers' information for marketing, an impermissible purpose.

Under the DPPA, "[d]isclosure of personal information is prohibited unless for a purpose permitted by an exception listed in 1 of 14 statutory subsections." *Maracich v. Spears*, 570 U.S. 48, 52 (2013), *citing* 18 U.S.C. §§ 2721(b)(1)-(14). Marketing by attorneys is not one of those permitted purposes. *Id.* at 72. "Where a reasonable observer could

discern that the predominant purpose of obtaining, using, or disclosing protected personal information was to initiate or propose a business transaction with a prospective client," a DPPA violation occurs as a matter of law. *Id.*

The Lawyers concede that they obtained addresses for marketing purposes. JA 1650-1686, JA 1687-1697, JA 1717-1724, JA 1739-1746, JA 1760-1768, JA 1781-1791, JA 1803-1811, JA 1847-1855, JA 1874-1879, JA 1891-1895, JA 1908-1912, JA 1925-1932; JA 1523-1527 ¶¶ 4, 8 (showing the names and addresses obtained from Digital Solutions of the Carolinas came from accident reports). Thus, the only question is whether some Defendants had any other purpose.

The Lawyers' protestations to the contrary[10] notwithstanding, even a cursory glance at the Lawyers' mailers shows that they were sent to market legal services and for no other purpose. To begin with, each Lawyer sent out mailers containing the legend, "This is an advertisement for legal services," (the "Advertising Legend") on both the

[10] In discovery responses and depositions, Defendants attempt to characterize their marketing materials as "informational mailers." *See, e.g.,* Farrin Firm Dep. at JA 1482-1483.

inside and the outside of the mailer. JA 141-560. These documents speak for themselves.

Reading the Lawyers' materials, one cannot help but "discern that the predominant purpose of obtaining [a Driver's] protected personal information was to initiate or propose a business transaction with a prospective client." Indeed, if Defendants had ***any*** purpose other than marketing—and it does not appear that they did—the marketing purpose dwarfs that alternate purpose. Accordingly, the record evidence shows that there is no genuine issue of material fact: Defendants obtained Plaintiffs' information for the predominant purpose of marketing.

F. North Carolina Cannot End-Run the DPPA by Designating Accident Reports as Public Records.

North Carolina's designation of accident reports as public records does not DPPA liability. The Lawyers argue that North Carolina law enforcement agencies made the Drivers' reports public under the law enforcement exception, § 2721(b)(1). Therefore, according the Lawyers, the Drivers' information was fair game.

As a preliminary matter, North Carolina law must yield to the DPPA, a federal statute, pursuant to the Supremacy Clause. Const.,

Art. IV, cl. 2. "There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986). Hence, when North Carolina law and the DPPA collide, the DPPA wins.

The Supreme Court directs lower courts to interpret the DPPA's permitted purposes narrowly:

> An exception to a general statement of policy is usually read ... narrowly in order to preserve the primary operation of the provision. It is true that the DPPA's 14 exceptions permit disclosure of personal information in a range of circumstances. Unless commanded by the text, however, these exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design.

Maracich, 560 U.S. at 60 (internal quotation omitted). Thus, to qualify under one of the DPPA's exceptions, the **disclosure** of personal information must **itself** further the purpose of the exception. *Senne v. Vill. Of Palatine, Ill.,* 695 F.3d 597, 606 (9th Cir. 2012) (en banc), *cert denied*, 570 U.S. 917 (2013). It is not enough that the disclosure have some tangential relationship to a governmental purpose. *See id.* Accordingly, the publication of accident reports, not just the creation of those reports must fall within a DPPA exception.

Here, the publication of the Drivers' personal information serves no law enforcement purpose, and the Lawyers have not identified any such purpose. Therefore, law enforcement's publications of the Drivers' information violated the DPPA and thus cannot shield the Lawyers from liability.

G. The First Amendment does not Protect the Lawyers' Conduct.

1. The First Amendment does not Bar the Drivers' Claims for Obtaining Information in Violation of the DPPA.

The Lawyers argue[11] that they are entitled to summary judgment because the DPPA is unconstitutional on its face and as applied to them. They are mistaken:

(1) The First Amendment Applies to Speech, not Conduct.

The DPPA's prohibition on obtaining information targets conduct, not speech. Likewise, a proscription on the use of information (as opposed to its disclosure) prohibits conduct, not speech. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (noting that the

[11] The United States intervened below and filed an amicus brief defending the constitutionality of the DPPA. *See* JA 5406-5425.

prohibition on the use of illegally intercepted communications under 18 U.S.C. § 2511(1)(d) regulates conduct, while the prohibition on disclosure of the same information, under § 2522(1)(c), regulates speech). Therefore, First Amendment scrutiny does not apply to the DPPA's prohibitions on obtaining and using personal information. *E.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct…. [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("We have …afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression").

(2) The Lawyers have No First Amendment Right to Obtain DPPA-Protected Information.

The Lawyers' imaginative contention, at its essence, is that the First Amendment gives them the right to obtain accident victims' DPPA-protected personal information in violation of the DPPA so that

they can compile mailing lists of advertising targets. *But see, e.g., Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("[There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminished the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right").

Fundamentally, "[t]here is no constitutional right to have access to particular government information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion). *See also Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999) ("This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.…For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession"). Despite the Lawyers' creative efforts to justify their unlawful obtaining and use of protected DPPA information as speech,

the case law makes clear that nothing more than conduct is involved, and the First Amendment is not implicated.

This Court recently analyzed the Supreme Court jurisprudence in this area, including the opinions cited above, and confirmed that a law that "regulates access to a government record…is not ordinarily subject to any First Amendment constraints." *Fusaro v. Cogan*, 930 F.3d 241, 256 (4th Cir. 2019). In *Fusaro*, after the plaintiff, a Virginia resident, was acquitted in a Maryland state court criminal trial, he decided to try to force his prosecutor to resign by writing letters critical of him to Maryland residents. To accomplish his goal, Fusaro requested a copy of Maryland's list of registered voters from the State Board of Elections. However, the Board rejected Fusaro's application, citing a Maryland statute, Md. Code Election Law § 3-506(a), which restricts the availability of voter registration lists to (1) registered Maryland voters (2) for purposes limited to the electoral process. *Id.* at 244-46. Fusaro filed suit, challenging the statute on First Amendment grounds, facially and as applied to him. *Id.* at 247.

The Court began its analysis with the proposition that "there is no general First Amendment right to access a government record.…

Rather, the decision to make government information available to the public is general a 'question of policy' for the 'political branches.'" *Id.* at 249-50 (quoting *Houchins*, 438 U.S. at 12, 16). The Court determined, however, that the lists of registered voters requested by Fusaro were "closely tied to political speech." *Id.* at 251. That fact, the Fourth Circuit explained, distinguished the matter from Supreme Court cases like *United Reporting* and *Houchins* because "[t]he information sought by the plaintiffs in those two situations lacked any direct relationship to political speech, let alone an explicit connection to the electoral process." *Id.* at 250-51 (quotation omitted). Because of "the connection between the List and political speech," the Court explained, "we are obliged to hesitate before placing such a regulation beyond judicial scrutiny." *Id.* at 251. As a result, the Court held, under the unique circumstances before it, "the conditions that § 3-506 imposes with respect to the List present a sufficient risk of *improper government interference with political speech* that it is susceptible to being challenged under the Free Speech Clause." *Id.* at 250 (emphasis added).

Here, there is no more connection between political speech and the names and addresses of accident victims protected by the DPPA than

there was in the list of arrestees' addresses in *United Reporting*. Thus, the narrow exception to the rule that the First Amendment provides no right of access to government information adopted in *Fusaro* for political speech does not apply. As a result, the Defendants cannot excuse their unlawful obtaining and use of DPPA protected information on First Amendment grounds.

(3) The Lawyers have not and cannot Distinguish *Dahlstrom*.

The Seventh Circuit's opinion in *Dahlstrom* applies the legal principles above in the context of a constitutional challenge by a newspaper to the DPPA's prohibition on obtaining personal information. There, the Sun-Times obtained from the Illinois Secretary of State, and published, personal information relating to the plaintiffs, five police officers. The officers sued the Sun-Times for DPPA violations, and the newspaper argued, *inter alia*, that the DPPA violated the First Amendment. The Seventh Circuit addressed the Sun-Times' argument that the DPPA's prohibition on obtaining personal information from motor vehicle records interferes with the ability of the press to gather the news, in relevant part, as follows:

> We conclude that Sun-Times has not alleged a cognizable First Amendment injury with respect to the DPPA's prohibition on obtaining information from driving records—a limitation only on *access* to information….This position accords with the Supreme Court's holding that "there is no constitutional right to obtain all the information provided by FOIA laws." *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013); *see also L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 34, 40….Numerous federal statutes, including, for instance, the Privacy Act of 1974, 5 U.S.C. § 552a, limit public access to sensitive information, and the constitutionality of those limitations is widely accepted….
>
> It is true that the Supreme Court has recognized a limited right of access to certain governmental proceedings, specifically those related to the judicial process….There is no corresponding need for public participation in the maintenance of driving records, which can hardly be described as an "essential component" of self-government.

777 F.3d at 946-47.

The Court turned to Sun-Times' argument—similar to that made by Defendants here (*e.g.*, JA 5003-5004)—that the restriction on access to motor vehicle records impinged speech, triggering First Amendment protection:

> Sun-Times argues that, although on its face the DPPA is aimed at limiting *access* to motor vehicle records at the outset, the statute was nevertheless enacted to suppress speech—albeit at an earlier point in the speech process….
>
> However,…the DPPA[] prohibit[s]…the acquisition of personal information from a single, isolated source. It can hardly be said that this targeted restriction renders Sun-Times's right to publish the truthful information at issue here—much of which can be gathered from physical observation of the Officers or from other lawful sources (including, of course, a state FOIA request)—"largely ineffective." Further, in forbidding only the act of peering into an individual's personal government records, the DPPA protects privacy concerns…
>
> For the foregoing reasons, we conclude that the DPPA's prohibition on knowingly obtaining an individual's personal information from motor vehicle records does not trigger heightened First Amendment scrutiny and instead requires only rational basis review.

777 F.3d at 947-949 (2015) (emphasis in original; citations omitted).

Likewise, here, the DPPA does not—despite Defendants' protestations and hyperbole below to the contrary[12]—prohibit the

[12] *E.g.*, JA 5097 ("The aim of this lawsuit is to prohibit hundreds of thousands of North Carolinians from receiving an important message: that they have rights arising from an auto accident which can be vindicated in court").

Defendants' from advertising. The DPPA's restrictions prevent Defendants from accessing a "single, isolated source," *id.* at 948—motor vehicle records—to obtain mailing targets for their advertising campaign. As the Supreme Court pointed out in *Maracich*, "Attorneys are free to solicit plaintiffs through traditional and permitted advertising without obtaining personal information from a state DMV." 570 U.S. at 73.

Controlling precedent, as well as the Seventh Circuit's *Dahlstrom* opinion, make clear that the DPPA's prohibitions on obtaining and using personal information from DMV records do not raise First Amendment concerns. The Court, accordingly, should apply the proscription as written. Defendants obtained Plaintiff's DPPA-protected information and used it to address marketing materials. Both that acquisition and that use, each independent of Defendants' mailed advertisements, violate the DPPA.

(4) Congress had a Rational Basis for Prohibiting the Obtainment and Use of DPPA Personal Information.

As noted above, in *Dahlstrom*, the Seventh Circuit concluded that the First Amendment does not insulate from DPPA liability a person who obtains DPPA personal information without a permissible purpose. Rather, the Seventh Circuit held, the statute's proscription on obtainment is subject only to a rational basis standard. 777 F.3d at 749. The court held that the DPPA easily met the rational basis test:

> Because limiting public access to driving records is rationally related to the government's legitimate interest in preventing "stalkers and criminals [from] acquir[ing] personal information from state DMVs," the restriction easily satisfies the deferential rational basis standard. *Maracich*, 133 S. Ct. at 2198; *see also Wis. Educ. Ass'n Council*, 705 F.3d at 653 (setting forth the rational basis test).

777 F.3d at 946-949 (2015).

In sum, the First Amendment does not insulate Defendants from their violations of the DPPA. The district court should have entered summary judgment against them.

2. The Release of Reports by State and Local Law Enforcement Agencies does not Give the Lawyers a First Amendment Right to Use Information Protected by Federal Law.

(1) The First Amendment does not Protect Defendants' Disclosure of Plaintiffs' Information Because Defendants Obtained that Information Unlawfully.

Because the Lawyers obtained the Drivers' information unlawfully, the First Amendment provides no protection for their disclosure of the Drivers' personal information. While the First Amendment does afford some protection to publication of information that is lawfully obtained and which relates to matters of public concern, the Constitution provides no protection to one who obtains information unlawfully:

> It would be frivolous to assert…that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.

Branzburg v. Hayes, 408 U.S. 665, 691 (1972). This principle applies in civil cases as well. Indeed, the Seventh Circuit applied it in a DPPA case, *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (2015), as follows:

> The Supreme Court has established that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); see also Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989). Sun–Times, however, cites no authority for the proposition that an entity that acquires information by breaking the law enjoys a First Amendment right to disseminate that information. Instead, all of the many cases on which Sun–Times relies involve scenarios where the press's initial acquisition of sensitive information was lawful.

Id. at 950 (emphasis added).

The Lawyers obtained the Drivers' information for a non-permitted purpose, rendering their acquisition of the Drivers' information unlawful. Since the First Amendment does not protect the use or disclosure of unlawfully obtained information, the Constitution is no bar to the Lawyers' liability here.

(2) <u>If the First Amendment Prohibited the Federal Government from Regulating the Use of Information Improperly Released by State Governments, States could Nullify Federal Law.</u>

The DPPA regulates both the supply of and the demand for "personal information, from a motor vehicle record." In the Lawyers'

view, a State, or even a local governmental entity, could release that information and render the federal government powerless to punish or to regulate the consumption of that information on account of the First Amendment. (*See, e.g.*, JA 962 ("The recognition by the Fourth Circuit that the records at issue are public records [under North Carolina law] is conclusive and requires summary judgment for Defendants")).[13]

The Lawyers have pointed to no precedent suggesting that State public records laws or local-government action can work as an end-run around the Supremacy Clause. To the contrary, the Supreme Court has made clear that federal law, including the DPPA, trumps any contrary State law. Indeed, in *Maracich*, the Supreme Court expressly foreclosed the argument the Lawyers make to this Court:

> The fact that an attorney complies with state bar rules governing solicitations also does not resolve whether he is entitled to access the state DMV database for that purpose under the DPPA. There

[13] Lawyers suggest that the mere fact that some North Carolina LEAs' accident reports can be found on the Internet renders the DPPA's prohibitions on obtaining and use of personal information contained therein unconstitutional. E.g., JA 5003 ("[A]ny statute purporting to punish the use or publication of information already in the public domain is a presumptively unconstitutional speech restriction"). Such an argument, which would presumably provide a First Amendment defense to a person who downloaded child pornography from the Internet, is clearly flawed.

> is no provision of South Carolina law that either permits or requires attorneys to use DPPA-protected information to solicit potential clients. *Even if such a provision existed, under the Supremacy Clause, it would not protect respondents from DPPA liability unless their conduct fell within one of the Act's exceptions.*

Maracich v. Spears, 570 U.S. 48, 71 (2013) (emphasis added). *See also Reno v. Condon*, 528 U.S. at 147-48 (where South Carolina law conflicted with the DPPA's provisions by allowing the State DMV to release records to the general public upon request, Supreme Court reversed lower court's rulings that the DPPA violated Constitutional principles of federalism);*Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011) ("Under ordinary conflict pre-emption principles a state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law is pre-empted" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

CONCLUSION

Based on the foregoing facts, authorities, and arguments, this Court should (1) reverse the district court's entry of summary judgment in favor of the Lawyers, and (2) remand with instructions for the

district court to enter summary judgment in favor of the Plaintiffs on their claims for damages and injunctive relief.

Respectfully Submitted,

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Dated: October 1, 2021

/s/ J. David Stradley
Counsel for Appellants

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