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.

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENTS

Filed September 2, 1999

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Respondents,

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

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Journalists depend on the First Amendment, state open records law, and the federal Freedom of Information Act

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

(FOI Act) to obtain information from and about government agencies. The media in turn provide the public with information that allows public participation in self-government. Journalists also depend on primary source material contained in government databases, such as names, addresses, and telephone numbers, as an indispensable resource for investigative reporting. In the case at hand, the federal government contends that it may constitutionally restrict access to formerly public information contained in state motor vehicle records in order to protect drivers' privacy.

Although the case before this Court has developed largely on federalism grounds, Petitioner's *amici* insist that the appellate court failed to give sufficient weight to the privacy interests of drivers. A ruling by this Court recognizing a constitutional privacy interest in routine drivers' information would not only unduly expand the parameters of privacy law, but would threaten the press' and public's right of access to traditionally public information. Because Petitioner's *amici* argue against both the weight of this Court's precedent and common sense — and because a decision adopting their view could impede the flow of accurate, timely, and important public information — The Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors and the Society of Professional Journalists submit this brief as *amici curiae*.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, guidance, and research in virtually every major press freedom case that has been litigated in the United States since

1970. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which daily advises reporters on issues of access to government records and proceedings.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded more than 75 years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of the country with complete and accurate reports of the affairs of government — be they executive, legislative or judicial.

The Society of Professional Journalists is a voluntary, non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

STATEMENT OF THE CASE

Amici adopt the Respondent's Statement of the Case.

SUMMARY OF THE ARGUMENT

Although Congress has the authority to enact laws under § 5 of the Fourteenth Amendment, it may do so only to protect an individual's *rights*. Contrary to the contentions of

Petitioner's *amici,* the Electronic Privacy Information Center, the Screen Actors Guild, *et al.*, and the Feminist Majority Foundation, *et al.*, individuals do not have a constitutional right to privacy in the sort of routine information contained in state-maintained drivers' records. Neither the Supreme Court, nor the Fourth Circuit Court of Appeals, has ever recognized a constitutional right of privacy in the information contained in drivers' records or in any similar records. The Fourth Circuit Court of Appeals properly recognized this fact and correctly held that Congress could not constitutionally enact the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25 (1997)(the "DPPA"), under the Fourteenth Amendment. This Court should do the same.

Furthermore, even assuming *arguendo* that such a privacy interest exists, the public's interest in disclosure outweighs any purported need for privacy.

Not only does Congress lack the authority to enact the DPPA under the Fourteenth Amendment, but its attempt to protect a driver's privacy from intrusions *by other citizens* runs contrary to this Court's recognition in *Katz v. U.S.* that the protection of a general right to privacy is better left to the states. Privacy rights under the federal constitution protect individuals from government intrusion. The right to be protected from intrusion by other private individuals traditionally has been regulated by the states. Every state in the Union has its own open records laws, many of which were subverted by passage of the DPPA. Efforts by the federal government to protect privacy against invasion by other citizens impermissibly trample on an area of traditional state regulation.

This Court should uphold the Fourth Circuit's ruling. Doing so will reinforce the appellate court's correct interpretation of constitutional privacy rights and promote this nation's long tradition of access to public records and information.

ARGUMENT

I. NO CONSTITUTIONAL RIGHT TO PRIVACY IN DRIVERS' INFORMATION EXISTS AND CONGRESS CANNOT THEREFORE ENACT THE DRIVERS' PRIVACY PROTECTION ACT UNDER § 5 OF THE FOURTEENTH AMENDMENT.

A. This Court has never recognized a constitutional right to privacy in drivers' information.

Several *amici* filing briefs on behalf of the United States contend that drivers' information[2] is private information, the disclosure of which may be prohibited under § 5 of the

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[2] The DPPA prohibits the disclosure of personal information contained in drivers' records and defines such information as:

> [I]nformation that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not 5-digit zip code), telephone number, and medical and disability information, but does not include information on vehicular accidents, driving violations and driver's status.

18 U.S.C. § 2725 (3) (1997).

Fourteenth Amendment.[3] Such a claim is specious.

Although many state regulatory schemes for drivers' information involve some subsequent disclosure of the information, not every government disclosure of personal information implicates constitutional protections. *See People of State of California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996), *cert. denied*, 517 U.S. 1216 (1996)(disclosure of telephone number is not protected by the federal constitution; it is "not among the select privacy interests protected by a federal constitutional right to privacy"), *citing Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992); *see also Katz v. U.S.*, 389 U.S. 347, 350, fn. 5 (1967) (virtually every governmental action interferes with personal privacy to some degree; the question is whether that interference violates a right guaranteed by the Constitution).

As this Court has noted, for Congress to invoke § 5 of the Fourteenth Amendment, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, ___ U.S. ___, 67 U.S.L.W. 4580, 4583 (1999). Thus, in order to enact the DPPA, Congress must look for a right, the protection of

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[3] The Fourteenth Amendment provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law.
>
> . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

which is grounded in the federal constitution.[4] However, neither this Court nor the Fourth Circuit Court of Appeals has ever recognized a constitutional right of privacy in drivers' information.

Although privacy rights arise from several constitutional provisions, the case before this Court questions whether a right to privacy in drivers' information exists. Such a right, if it were to exist, could only be grounded in the Fourth Amendment.[5] Other privacy rights, such as a right to privacy

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[4] In a recent decision, this Court explained:

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne v. Flores, 521 U.S. 507, 519 (1997)(*internal cites omitted*).

[5] The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

(continued...)

in one's home or in one's associations,[6] simply are not implicated by the information at issue in this case.[7]

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[5](...continued)
place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

[6] The Fourteenth Amendment is not the only source of constitutional privacy rights. Several constitutional provisions protect an individual's privacy from government invasion. *Katz*, 389 U.S. at 350. As this Court explained:

> The First Amendment, for example, imposes limitations upon governmental abridgement of "freedom to associate and privacy in one's associations." The Third Amendment's prohibition against the unconsented peace-time quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life." '" Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

Katz, 389 U.S. 347, 350, fn. 5 (internal citation omitted).

[7] The Court has recognized a finite number of constitutional privacy interests. Among them is a right to political privacy. *See DeGregory v. Attorney General of State of New Hampshire*, 383 U.S. 825 (1966). This Court and others have also recognized a limited right to privacy in communications, personal financial matters, and the contents of first-class mail. *See also Gelbard v. U.S.*, 408 U.S. 41 (1972)(privacy right in communications); *Hahnemann University v. Edgar*, 74 F.3d 456 (3rd Cir. 1996)(patient's right to confidentiality of psychiatric records constitutionally protected), *but see F.E.R. v. Valdez*, 58 F.3d 1530 (10th
(continued...)

As this Court has noted, "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Katz*, 389 U.S. at 350, *see also Whalen v. Roe*, 429 U.S. 589, 608 (1977)(Stewart, J. concurring). Rather, this Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees. *Paul v. Davis*, 424 U.S. 693, 712-13 (1976).[8]

Twenty-three years ago, this Court noted that its privacy cases, "while defying categorical description, deal generally with the substantive provisions of the Fourteenth Amendment." *Paul*, 424 U.S. at 714.[9] One year later, the Court characterized its privacy cases as "hav[ing] . . . involved at least two different interests." *Whalen*, 429 U.S. at 598-600. "One," it noted, "is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of personal decisions." *Id.*

Of the two interests set forth by the Court, the first con-

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[7](...continued)
Cir. 1995) and *In Interest of M.B.*, 686 A.2d 877 (Pa. Commw. Ct. 1996); *Taylor v. I.R.S.*, 915 F.Supp. 1015 (N.D. Iowa 1996)(laws infringing on financial privacy rights are subject to intermediate scrutiny), *judgment aff'd*, 106 F.3d 833 (8th.Cir. 1997); and *U.S. v. Van Leeuwen*, 397 U.S. 249 (1970)(first-class mail free from inspection except as provided by the Fourth Amendment).

[8] Among these are the cases dealing with unreasonable searches and seizures by the government. *See Katz*, 389 U.S. at 351 and *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

[9] Rights guaranteed by the Fourteenth Amendment are those that are "fundamental" or "implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937).

cerns the right of the individual to maintain a degree of autonomy regarding intimate personal decisions about family and parenthood. It has long been settled law that the Constitution places limits on government's ability to interfere with a person's most basic decisions about marriage, procreation, contraception, family relationships, child rearing, education and bodily integrity. *Paul*, 424 U.S. at 713. *See also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849-51 (1992), *citing Carey v. Population Services International*, 421 U.S. 678, 684-86 (1977), *Loving v. Virginia*, 388 U.S. 1, 12 (1967), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Washington v. Harper*, 494 U.S. 210, 221-22 (1990), *Winston v. Lee*, 470 U.S. 753 (1985) and *Rochin v. California*, 324 U.S. 165 (1952).

The second interest concerns the right to prevent the government from disseminating personal information. This is an interest, however, that this Court has refused to define. *See American Federation of Gov't Employees v. Dept. of Housing*, 118 F.3d 786, 791 (D.C. Cir. 1997).

The Court has examined this interest in at least two cases. In *Whalen*, this Court considered the constitutionality of a New York statute requiring the state to maintain a centralized computer file containing the names of individuals who had received certain dangerous prescription drugs. It concluded that "the New York program does not, on its face, pose a sufficiently grievous threat to either [privacy] interest to establish a constitutional violation." *Whalen*, 429 U.S. at 600. Tellingly, the Court went on to state that the government duty to avoid disclosure only "*arguably* has its roots in the Constitution." It then held that the record before the Court did not establish an invasion of any right or liberty protected

by the Fourteenth Amendment. *Id.* (emphasis added).[10]

This Court was equally reluctant to find a constitutional right to privacy in the disclosure of information in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In that case, former President Nixon challenged the Presidential Recordings and Materials Preservation Act which required the disclosure of public and private documents and tape recordings kept during his presidency. Under the statute, an archivist would redact any "personal" materials. This Court stated, "We *may* agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Nixon*, 433 U.S. at 457 (emphasis added). In the next sentence, this Court again repeated the use of "may," writing that "We *may* assume with the District Court, for purposes of this case, that the pattern of de facto Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials." *Id.* at 457-58 (emphasis added). "But the merit of appellant's claim of his invasion of privacy cannot be considered in the abstract; rather, the claim must be

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[10] Additionally, in two cases cited in *Whalen*, the Court cites two dissents, neither of which argue for a *general* constitutional right to privacy. *See Olmstead v. United States*, 277 U.S. 438 (1928)(Brandeis, J., dissenting) and *California Bankers Assn. v. Shultz*, 416 U.S. 21, 85-86 (1974)(Douglas, J., dissenting). As the D.C. Circuit noted, "One reading of these citations, perhaps the one intended by *Whalen*, is that the Constitution protects against mandatory disclosure only where it threatens at particularized right such as the associational rights protected by the First Amendment." *American Federation of Gov't Employees v. Dept. of Housing*, 118 F.3d 786, 792 (D.C. Cir. 1997).

considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in [disclosure]," it added. *Id.*

This Court then held that even if the former president had a legitimate expectation of privacy in "personal" materials contained in the requested documents, the public interest in preserving the materials was sufficiently important to uphold the statute.

Perhaps as a result of its unwillingness to create new fundamental rights where none had previously existed, this Court has never recognized a general right of privacy in information disclosure. See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986)(advising against expanding list of fundamental rights) and *Reno v. Flores*, 507 U.S. 292 (1993). This Court has been more willing to discuss specific privacy interests arising within the context of the disclosure of certain uniquely personal information, such as that involved in *Nixon* (personal papers and files) and *Whalen* (information regarding the prescription of dangerous pharmaceuticals such as cocaine, methadone, and opium). However, it has stopped short of expressly recognizing a constitutional right of privacy in even this more intimate information.

Given this Court's refusal to find constitutional privacy rights arising from the disclosure of specific, *highly personal* information, it is hard to see how Petitioner's *amici* could suggest that a constitutional privacy right exists in information which is not of an intimate nature and is routinely distributed to other members of the public, businesses, and

government.[11] As a conceptual matter, routine identification information such as name, telephone number, and address information stands much farther from core privacy interests protected by the Fourth Amendment. Further, as the appellate panel recognized, it is a legal impossibility to claim a privacy interest in information one routinely provides to others.[12] In short, there simply is no constitutionally protectable privacy interest in drivers' information as defined under the DPPA. Without a constitutional right to privacy in drivers' information, Congress cannot utilize § 5 of the Fourteenth Amendment to enact the legislation in question.

B. A decision by this Court upholding the DPPA may constitutionalize a previously unrecognized privacy interest in the disclosure of routine public information, ultimately hindering newsgathering.

The information that the DPPA bars from disclosure is

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[11] Claims that a right to privacy in drivers' information are even more tenuous in situations where the driver has shared the information with other persons. This Court has stated that a privacy claim cannot succeed where the materials requested to be disclosed have already been made available to the public. *See Nixon*, at 459, *citing United States v. Dionisio*, 410 U.S. 1, 14 (1973).

[12] Not only does the holder of a driver's license routinely share that information with the public when providing identification for such tasks as writing checks or purchasing alcohol, but the exceptions contained in the Act itself undermine any expectation of privacy a driver may have. The Act is riddled with exceptions allowing access for such intrusive purposes as mass marketing, legal proceedings, insurance investigations, and motor vehicle market research surveys. *See* 18 U.S.C. § 2721(2)-(12). The exceptions allow access to drivers' information by a diverse range of parties and, ultimately, undermine the arguments of Petitioner's *amici* that Congress enacted the DPPA to protect the privacy of drivers.

not the sort of information in which a privacy right has been recognized. Nor should it be. This Court has not recognized a right to privacy from disclosure of routine information about individuals. Its refusal to do so would be undermined by any recognition of the validity of the DPPA. A decision by this Court declaring the DPPA to be validly enacted legislation could have the *de facto* effect of creating a drastically lower threshold for the sort of information to which one has a constitutional privacy interest. As a result, virtually any transfer of information regarding a citizen would be subject to scrutiny as an unconstitutional invasion of privacy.

Limiting disclosure about individuals who have transactions with government will severely impede newsgathering. Journalists routinely rely on information in government databases as an indispensable resource for investigative reporting. Drivers' records were among the investigative reporter's most valuable tools. By barring access to these records, the DPPA has the undeniable effect of silencing potential speech.

Prior to the enactment of the DPPA, the press and public used drivers' information for many purposes. For example, they could link cars that frequent open-air drug markets and other high-crime areas to certain addresses, thus establishing whether these crime-ridden areas attract a clientele from other neighborhoods. They also could investigate whether automobiles seen at those locations are owned by prominent individuals, civic leaders or public servants.

A major use of the records was for verification of identities. Journalists could exonerate innocent people, allowing specification of which "Smith," "Jones," or "Davis" was accused of a crime. Both neighborhood watch groups and reporters could use the information to identify reckless drivers, as well as those involved in hit-and-run accidents.

Thus, as the basic tool for reporting, drivers' information formed the foundation upon which much speech was later built. However, if journalists were to obtain this same information today, they would be subject to the DPPA's criminal and civil penalties. *See* 18 U.S.C. § 2722.[13]

Routine information identifying individuals appears in a wide range of government records — in property ownership records, in voter registration records, and in all manner of lists pertaining to governmental licenses, permits, grants, awards, and contracts. By recognizing, tacitly or otherwise, a privacy right in the disclosure of such routine information by the government, this Court could extend the chilling effect of the DPPA to a wide range of government records, thus threatening these traditional sources of information. The chilling effect of any expansion of the constitutional right to privacy will be substantial and, ultimately, the press and public will be deprived of much valuable information.

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[13] Section 2722 (a) provides that "It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under [the exceptions contained in the act]." Violations of the Act are punishable by criminal fines under Title 18 of the U.S. Code and individuals about whom information has been disclosed in violation of the DPPA's provisions may bring a civil suit under the Act against "a person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted [by the DPPA]." 18 U.S.C. § 2724.

II. EVEN ASSUMING *ARGUENDO* THAT A PRIVACY INTEREST IN THE DISCLOSURE OF DRIVERS' INFORMATION EXISTS, IT IS OUTWEIGHED BY THE PUBLIC'S INTEREST IN DISCLOSURE.

Even if one were to assume for the sake of argument that a constitutional privacy interest in the disclosure of drivers' information exists, that assumption does not end the relevant analysis. As this Court suggested in *Nixon*, analyzing whether government actions violate an individual's privacy interests is a two-step process. A court first must look for the existence of a constitutionally protected privacy right. Upon finding such an abstract interest, the court must then weigh the intrusion against the practical merits of both the privacy safeguards in the legislation and public's interest in disclosure. *Nixon*, 433 U.S. at 458,[14] *see also Whalen*, 429 U.S. at 605-06.[15]

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[14] Drawing on the two Fourth Amendment search and seizure cases, this Court in *Nixon* wrote that "the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of [Nixon's] administration to archival screening." *Nixon*, 433 U.S. at 458, *citing Camara v. Municipal Court*, 387 U.S. 523, 534-539 (1967) and *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

[15] Although this Court in *Whalen* addressed only the existence of a privacy right and ended its analysis by holding that the record did not establish an invasion of a right protected by the Fourteenth Amendment, its dicta suggests that a two-part test may be appropriate. This Court wrote that:

> The collection of taxes, the distribution of welfare and social
>
> (continued...)

In the case at hand, the public interest in the broad disclosure of drivers' information is substantial. Access to DMV records enables the press and public to scrutinize the government's handling of the licensing of drivers and the registration of vehicles. In the past, journalists have used DMV records to document how the state of Florida failed to keep drunk drivers off its highways. In 1991, *The Miami Herald* uncovered more than 70,000 persons in Dade and Broward counties who had been caught driving with suspended licenses.[16] DMV records also have great utility outside of the context of driving offenses. As a means of locating and

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[15](...continued)
> security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data — whether intentional or unintentional — or by a system that did not contain comparable security provisions.

Whalen, 429 U.S. at 605-606.

[16] Driver's Privacy Protection Act of1994: Hearings on H.R. 3365 Before the Subcomm. On Civil and Constitutional Rights, 103rd Cong. 2nd Sess. (1994) (Statement of Richard Oppel, Washington Bureau Chief, Knight Ridder Newspapers).

identifying individuals, DMV records offer journalists an unparalleled resource. By using such records, journalists have been able to identify hooded Ku Klux Klan members and deadbeat dads.[17] A television news reporter used DMV records to discover that the drivers of Minnesota school buses included men convicted of murder, felony drug possession and armed robbery. One driver had even had his license revoked a year earlier. Although a criminal records check would have ordinarily uncovered the information, the state had a backlog of more than 100,000 criminal records that were not entered into its computer system.[18] A Minneapolis newspaper was able to uncover 41 passenger airline pilots who lost their Minnesota driver's licenses because of alcohol-related incidents. Such incidents had not been reported to the Federal Aviation Administration as required.[19] Without access to drivers' records, it is likely these stories would never have unfolded.

Stories such as these have produced tangible benefits for

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[17] *Id., see also* Driver's Privacy Protection Act of 1994: Hearings on H.R. 3365 Before the Subcomm. On Civil and Constitutional Rights, 103rd Cong. 2nd Sess. (1994)(Statement of Lucy Dalglish, National Chairwoman, Freedom of Information Committee, Society of Professional Journalists).

[18] Robert Franklin, *Keeping Open Records Open*, MINNEAPOLIS STAR-TRIBUNE, Feb. 2, 1994, at A12.

[19] *Id.* Other uses cited by Franklin have included investigating a man who claimed to have foreign banking connections that would finance a $35 million riverfront entertainment center in St. Paul and discovering that a charity which had been pleading for donations to buy a refrigerated truck had recently purchased a Mercedes-Benz for its president. *Id.*

the public. An award-winning, five-month undercover investigation into automobile title laundering by a Minneapolis television station documented how automobiles wrecked in other states were issued "clean titles" in that state and sold to unsuspecting customers. The station's reporters relied on DMV records to locate and contact the owners of rebuilt vehicles and to determine which dealerships sold those vehicles without informing consumers. This information, along with other reportage, was broadcast in a 30-minute documentary titled "Licensed to Steal." Following its airing, one of the dealers pleaded guilty to criminal charges and federal legislation aiming to combat salvage fraud was proposed.[20]

The evidence is clear — the public interest in the broad disclosure of DMV records is substantial. Whether to used ensure government accountability or prevent consumer fraud, DMV records served as an crucial source of information, access to which must be weighed against the value of any constitutional right to privacy in the information.

III. BY ENACTING THE DPPA, CONGRESS HAS INTRUDED UPON AN AREA TRADITIONALLY CONTROLLED BY THE STATES.

In the case before the Court, the United States claims that the DPPA is not a regulatory scheme. However, it clearly is. Every state has its own open records law dictating what information may be withheld from the public. In this way, the states are able to regulate what information about individuals is made available to other parties, thus controlling the degree to which information about a driver is disseminated to third-party requesters.

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[20] *Id.*

Historically speaking, it has been the states — and not the federal government — that have licensed drivers and registered motor vehicles.[21] In doing so, the states collected drivers' information and disclosed it according to their individual open records laws.[22] Thus, each individual state could tailor its disclosure scheme to meet the openness requirements of its citizens. Prior to the implementation of the DPPA, thirty-four of the states deemed access to this infor-

[21] State regulation in this area dates to the turn of the century. Brief for *Amici Curiae*, States of Alabama and Oklahoma, *et al.*, *Condon v. Reno*, (4th Cir. 1998) at 5, *citing* Xenophon P. Huddy, *The Law of Automobiles*, 9 Law Notes 147, 148 nn. 9 & 10 (1905)(discussing State of New York's motor vehicle registration requirements and State of Missouri's driver's license requirements); Xenophon P. Huddy, *The Motor Car's Status*, 15 Yale L.J. 83, 85 & n.16 (1905)(noting "statutory enactments concerning the registration and licensing of automobiles" and citing Rhode Island's 1904 registration statute); H.B. Brown, *The Status of the Automobile,* 17 Yale L.J. 223, 225 (1908)(explaining that it had already been deemed necessary to require automobiles "to be registered or licensed"); *Kane v. State of New Jersey*, 242 U.S. 160 (1916) and *Hendrick v. State of Maryland,* 235 U.S. 610 (1915).

[22] In 1941, this Court acknowledged that registration and licensing of drivers by the states was "universal."

> The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of the regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted *by the states* to insure competence and care on the part of the licensees and to protect others using the highway is consonant with due process.

Reitz v. Mealey, 314 U.S. 33, 36 (1941)(emphasis added).

mation to be of such importance that their open records laws required it to be available to the public. They were: Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[23] On the other end of the spectrum, eight states' laws were already more restrictive than the federal law.[24]

However, by forcing the states to comply with a federal regulatory scheme, Congress has undercut the states' traditional authority in this area. In so doing, Congress runs afoul of this Court's proclamation in *Katz* that the protection of a general right to privacy is left to the states, and not the federal government.[25] Enacted primarily as an anti-stalking

[23] *See e.g.* 139 Cong. Rec. S15, 762 (Nov. 16, 1993)(statement of Sen. Boxer); Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 1994 WL 14167988 (Feb. 4, 1994)(statement of Rep. Moran).

[24] According to the Society of Professional Journalists, these states are: Alaska, Arkansas, California, Georgia, Hawaii, Pennsylvania, Utah and Virginia. *See* http://spj.org/foia/drivers/drivside1.htm (updated Jan. 13, 1999).

[25] This Court wrote that:

> [The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go no further, and often have nothing to do with privacy at all. Other provisions of

(continued...)

measure, the DPPA aims to prevent members of the public from uncovering address and other information about an individual, thereby encroaching on a state's traditional role in protecting its citizens' privacy from intrusions by other individuals. However, states had already acted to meet the needs of potential stalking victims directly. In response to growing fears sparked by the 1989 stalking and murder of actress Rebecca Schaeffer — the same murder that gave rise to the DPPA — California enacted an anti-stalking law, criminalizing the act of stalking itself. *See* Cal. Penal Code § 646.9 *et. seq.* By the close of 1993, all fifty states and the District of Columbia had enacted anti-stalking statutes. *See* James L. Hankins, *Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon*, 46 OKLA. L. REV. 109, 114 (1993)(collecting citations). Thus, every state had addressed concerns about stalking through anti-stalking legislation. Concerns about the dissemination of information were adequately considered in state open records laws, as well. The DPPA's passage and enactment therefore impermissibly intruded on an area of traditional state regulation.

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[25](...continued)
the Constitution protect personal privacy from other forms of government invasion. But the protection of a person's general right to privacy — his right to be left alone by other people — is, like the protection of his property and his very life, left largely to the law of the individual states.

Katz, 389 U.S. 347, 351.

CONCLUSION

If the DPPA is allowed to stand, this Court will effectively signal to Congress that restrictions on the disclosure of previously public information are perfectly acceptable if executed to protect a heretofore unrecognized privacy interest. The consequences of this Court's decision will have far-reaching effects, restricting newsgathering and expanding the parameters of privacy. As a clear breach of the principles of federalism, the DPPA should be struck down because it violates the states' sovereignty. As a matter of Fourteenth Amendment jurisprudence, the law should be struck down because Congress lacked the authority to enact it. As legislation enacted contrary to this nation's tradition of broad public access to government records, the law should be struck because it threatens the public's right to access. Therefore, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors and the Society of Professional Journalists urge this Court to uphold the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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