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 OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Filed September 3, 1999

QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the Tenth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issue presented in this case: whether Congress may command the States and their departments of motor vehicles to adopt and administer the federal regulatory program created by the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725.

This case is of vital importance to *amici* not only because it concerns the States' longstanding responsibility in operating their own state departments of motor vehicles, but also—and more fundamentally—because it strikes at the very heart of the States' political autonomy and ability to have a *choice* whether to adopt a federal regulatory program. *Amici* likewise have a substantial interest in ensuring that the lines of political accountability are not blurred by Congress to the detriment of the States. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

The United States stakes its case on a single, central assertion: It contends that the *sole* purpose of the Tenth Amendment is prohibiting the federal government from requiring the States "to regulate

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the primary activities of private parties or to participate in the enforcement of federal law against private actors." U.S. Br. 27. In the constitutional scheme hypothesized by the United States, all other considerations—for example, whether the federal statute singles out the States for special and unique burdens—are beside the point. Moreover, the United States' theory is based on an unsustainably cramped reading of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997).

In our view, the United States' approach is fundamentally flawed. *First*, the United States' argument should fail even if its constitutional construct is accepted. The United States premises its argument on the basic assumption that the DPPA "impose[s] no affirmative obligations on the States to implement federal law." U.S. Br. 28. But that simply is not so: the DPPA in fact directs in unambiguously mandatory terms that state officials "shall" take affirmative steps to release specified information in aid of the federal programmatic regime. 18 U.S.C. § 2721(b). This is precisely the sort of statutory prescription that, the Court explained in *New York*, "clearly 'commandeer[s] the legislative processes of the States.' " 505 U.S. at 170 (citation omitted).

Second, and more fundamentally, the United States' underlying constitutional analysis is itself insupportable. Notably, the United States' brief fails to address the basic constitutional purposes and principles that underlie the Tenth Amendment. As the Court has explained, these principles ensure both that States "remain independent and autonomous within their proper sphere of authority" (*Printz*, 521 U.S. at 928), and that the state and federal governments govern along "distinct and discernable lines of political accountability." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). The DPPA runs afoul of both of these principles, and it accordingly may not stand.

ARGUMENT

I. THE TENTH AMENDMENT PROHIBITS THE FEDERAL GOVERNMENT FROM COMPELLING STATES TO ENACT OR ADMINISTER A FEDERAL REGULATORY PROGRAM

1. It is common ground between the parties to this case that "[t]he Constitution * * * 'leaves the several States a residuary and inviolable sovereignty,' THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment." *New York*, 505 U.S. at 188. In identifying the nature of this area of state sovereignty, the Court recognized in its two recent Tenth Amendment decisions, *New York* and *Printz*, that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Indeed, as the Court has long recognized:

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.

Lane County v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (emphasis added). See also 2 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863) ("This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. * * * But this legal coercion singles out the * * * individual.") (Oliver Ellsworth); 4 *id.* at 456 ("the

necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present") (Charles Pinckney).

Principles of federalism embodied in the Tenth Amendment thus forbid the Federal Government from "commandeering" or compelling state governments or officials to effectuate the federal government's policies. While the federal government may encourage States to enact or administer a federal regulatory program, "[t]he Federal Government *may not* compel the States" to do so. *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 963 (emphasis added). The Constitution in this respect states a rule that prevents transformation of States into subordinate arms of the Federal Government and "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920.

In *New York*, the Court applied this principle to hold unconstitutional a federal law that compelled States to provide for the disposal of radioactive waste generated within their borders. 505 U.S. at 177. In considering the federal statute's provision allowing States the "choice" between "accepting ownership of waste or regulating according to the instructions of Congress," the Court found that the provision violated the Tenth Amendment because it left the States no real choice at all: "No matter which path the State chooses, it must follow the direction of Congress." *Id.*

On the one hand, the States could accept "the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly." *Id.* at 174-175. But, standing alone, this option would be impermissible because the Court would not allow Congress to simply transfer radioactive waste to the States or direct the States to assume damages liability. This would " 'commandeer' state governments into the service of federal regulatory purposes." *Id.* at 175.

On the other hand, the other option left open to the States—"regulating pursuant to Congress's direction"—was "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. This also would amount to a commandeering of the state legislature, which the Court regarded as plainly prohibited by the Tenth Amendment. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

Thus, the Court held that the federal provision was unconstitutional because "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." 505 U.S. at 176. "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *Ibid.* (quoting *Hodel*, 452 U.S. at 288).

Likewise, in *Printz* the Court held that the Brady Act violated the Tenth Amendment because the Act commanded state executive officials—"without the consent of the States"—to participate in background checks of purchasers of handguns. 521 U.S. at 911. For handgun purchases made without a state permit and state background check, the Act required the "chief law enforcement officer" (CLEO) of the jurisdiction to "make a reasonable effort to ascertain

within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." *Id.* at 903 (internal quotations omitted). However, the Brady Act did "not require the CLEO to take any particular action if he determine[d] that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but [was] not required to do so." *Ibid.* If the CLEO found no basis for objecting to the sale, the Act required the CLEO to destroy the records relating to the purchase. *Id.* at 904.

In considering these provisions, this Court found that the Act "direct[ed] state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Ibid.* Such "forced participation of the States' executive in the actual administration of a federal program" (*id.* at 918) violated the Tenth Amendment's "anti-commandeering" prohibition. *Id.* at 935. As the Court put it: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Ibid.*

2. As both *New York* and *Printz* recognize, these federalism principles protect two fundamental features of our republican form of government: state autonomy and political accountability. Of course, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. By guaranteeing States a choice whether to enact or administer a federal program,

the Tenth Amendment preserves a sphere of political autonomy for States that is vital to the notion of a dual sovereign system. Indeed, "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921. As the Court explained recently in *Alden* v. *Maine*: "The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.' " 119 S. Ct. 2240, 2247 (1999) (quoting THE FEDERALIST No. 39 (C. Rossiter ed. 1961) (J. Madison)).[2]

At the same time, by preserving separate spheres of political autonomy for the federal and state governments, the Tenth Amendment furthers the ideal of political accountability that is central to the Framers' concept of democracy. Cf. *Alden*, 119 S. Ct. at 2265 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republi-

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[2] See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (the Framers established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it"); *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891) (the "distinguishing feature" of a dual sovereign system is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); THE FEDERALIST No. 20 (C. Rossiter ed. 1961) ("a sovereignty over sovereigns, a government over governments * * * as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity") (A. Hamilton and J. Madison); Deborah Jones Merritt, "Three Faces of Federalism: Finding a Formula for the Future," 47 VAND. L. REV. 1563, 1573-1584 (1994).

can form of government."). To hold their elected officials accountable, the voters must be able to know whether a particular law or regulation is the handiwork of their state or federal officials.

To that end, the "anti-commandeering" principle ensures that, when Congress seeks to effectuate a policy, "it is the Federal Government that makes the decision *in full view of the public*," so that it will "suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168 (emphasis added). Thus, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *Ibid.* In contrast, when the federal government compels States to enact or administer a federal program, the lines of political accountability are necessarily blurred. In essence, the two spheres of political autonomy between federal and state governments are merged, thereby leaving the public without "distinct and discernable lines of political accountability." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). State officials may be unjustly forced to "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. Similarly, "[m]embers of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *New York*, 505 U.S. at 169.

In the end, a rule that permits the Federal Government to intrude excessively into the area of state autonomy would do considerable damage to our dual system of governance. As Justice Kennedy explained in *Lopez:*

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see THE FEDERALIST No. 51, and hold each other in check by competing for the affections of the people, see THE FEDERALIST No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.

514 U.S. at 576-577 (other citations omitted).

"The resultant inability to hold either branch of the government answerable to the citizens," Justice Kennedy concluded, "is more dangerous even than devolving too much authority to the remote central power." *Id.* at 577. This danger is particularly grave in today's political environment, in which voters have become increasingly distrustful of their elected offi-

cials—thus making the need for transparency in government action more urgent than ever.

3. In arguing against the applicability of *New York* and *Printz* in the setting of this case, the United States offers a single ground of distinction: it argues that these decisions come into play only when the federal law "require[s] state governments or officers to regulate the primary activities of private parties or to participate in the enforcement of federal law against private actors." U.S. Br. 27. In contrast, the United States continues, under *New York* and *Printz* the Tenth Amendment can have no application to federal laws that regulate the activities only of the States themselves. See *id.* at 27-29.

As we explain below, the United States would not prevail even under its own reading of *New York* and *Printz* because the DPPA does, in fact, "conscript state governments into federal service." U.S. Br. 28. More fundamentally, however, the United States' crabbed interpretation of these decisions is flawed. The decisions quite plainly do not make "required active state participation in the enforcement of federal law against private parties" (*ibid.*) the be-all and end-all of the Tenth Amendment.

Thus, in *New York*, the Court made clear that the challenged "take title" provision—which operated directly on the States—would be unconstitutional even if it were wholly divorced from any attempt to regulate the primary activities of private parties. The Court explained:

> Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generator's damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

New York, 505 U.S. at 175.

The Court therefore concluded that "an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress." *Id.* at 176. The United States accordingly is wrong: It is the detrimental effect of a federal law on state autonomy—rather than the simple fact that the law does or does not use the States to regulate the conduct of third parties—that determines its constitutionality.

Indeed, there is a perverse quality to the United States' argument that the intrusion on state sovereignty is somehow greater when Congress uses the States to regulate private parties than when it directly regulates the States themselves. As the Court observed when rejecting a very similar contention by the United States in *Printz*, "we fail to see how that improves rather than worsens the intrusion into state sovereignty. * * * It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928.

II. THE DPPA VIOLATES THE TENTH AMENDMENT'S PROHIBITION AGAINST COMMANDEERING THE STATES TO ADOPT AND ADMINISTER A FEDERAL REGULATORY PROGRAM

1. Against this background, it would seem self-evident that the DPPA is inconsistent with fundamental constitutional principles. *First*, there is no doubt that the DPPA imposes mandatory obligations (and prohibitions) on the States. By prohibiting the States from having a "policy" that does not comply with the federal regulatory system (see 18 U.S.C. § 2723(b)), the DPPA effectively requires States to enact state laws that adopt the federal program. The only choice the States are given is to adopt the federal program or face a fine of $5,000 per day for noncompliance. But this is no real choice at all. Either way, States are given no opportunity to opt out of the federal program. See *Printz*, 521 U.S. at 904. Indeed, the United States does not contend otherwise.[3]

[3] In fact, many state legislatures have already taken steps to comply with the DPPA, thus confirming the DPPA's coercive nature. See CAL. VEH. CODE § 1808(e) (West 1999) ("[t]he department shall not make available or disclose personal information about any person unless the disclosure is in compliance with the Driver's Privacy Protection Act of 1994"); COLO. REV. STAT. ANN. § 42-1-206 note (West 1999) ("The general assembly hereby finds and declares that this act is mandated by the provisions of the federal 'Driver Privacy Protection Act of 1994' * * * and that the state may be subject to penalties if legislation to comply with the federal act is not enacted on or before September 13, 1997."); FLA. STAT. ANN. § 319.17 note ("such an exemption will conform state law to the requirements of the federal Driver's Privacy Protection Act of 1994"); IOWA CODE ANN. § 321.11 (West 1999) ("All records of the department, other than those made confidential or not permitted to be open in accordance with 18 U.S.C. § 2721 et seq. * * * shall be open to public inspection during office hours."); IND. CODE § 9-14-3.5-1 (West 1999) ("[t]his chapter implements the federal Driver's Privacy Protection Act of 1994"); ME. REV. STAT. ANN. § 256 ("The Secretary of State shall comply with the provisions of Title 18, United States Code, Chapter 123 in disclosing records."); MD. CODE ANN. STATE GOV'T § 10-616(7)(ii)(2) (Lexis 1998) ("[t]he regulations and procedures adopted under this subparagraph shall * * * conform with the waiver requirements in the federal Driver's Privacy Protection Act of 1994"); MINN. STAT. ANN. § 168.346(d) (West 1998) ("To the extent permitted by United States Code, title 18, section 2721, data on individuals provided to register a motor vehicle is public data on individuals and shall be disclosed as permitted by United States Code, title 18, section 272, clause (b)."); NEB. REV. STAT. § 60-2903 (West 1999) ("The Legislature hereby finds that the federal Driver's Privacy Protection Act of 1994, with an effective date of September 13, 1997, provides for mandatory release in some instances and restrictions on release and use in other instances of certain personal information from state motor vehicle records and also provides numerous exceptions from those restrictions. * * * the purpose of the Uniform Motor Vehicle Records Disclosure Act is to enact choices permitted under the federal legislation in the interest of ensuring that motor vehicle record information which is a matter of public record shall remain a matter of public record in this state to the maximum extent permitted under the federal law."); N.H. REV. STAT. ANN. § 260:14 (Lexis 1998); N.J. STAT. ANN. § 39:2-3.4d (West 1999) ("As provided by the federal 'Drivers' Privacy Protection Act,' * * * a person authorized to receive personal information under paragraphs (1) through (10) of subsection c. of this section may resell or redisclose the personal information only for a use permitted by paragraphs (1) through (10) of subsection c. of this section subject to regulation by the division."); N.Y. VEH. & TRAF. LAW § 313(h) (West 1999) ("information obtained by the department pursuant to this section shall not be disclosed * * * by the department * * * except in response

The DPPA thus stands in stark contrast to all the permissible means that Congress has at its disposal to encourage state action. For instance, in *Hodel* the Court upheld a federal statute (the Surface Mining

Act) against a Tenth Amendment challenge because the Act did not "compel[] [States] to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." 452 U.S. at 228. The Act gave the States the option of implement[ing] [the federal program] itself or else yield[ing] to a federally administered regulatory program." *Id.* at 289. Likewise, Congress may use its spending power to encourage state participation through the placement of certain conditions on state use of federal funds. See, *e.g.*, *New York*, 505 U.S. at 167; *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Of course, the

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to a specific, individual request for such information authorized pursuant to the federal driver's privacy protection act"); N.D. CENT. CODE § 39-02-05 note (Lexis 1999) ("This Act becomes ineffective on the date the attorney general certifies to the legislative council that the Federal Driver's Privacy Protection Act of 1994 * * * has been declared unconstitutional by the United States Supreme Court or is otherwise void."); OHIO REV. CODE. ANN. § 4501.27(E) (West 1999) ("The registrar of motor vehicles may adopt any forms and rules, consistent with but no more restrictive than the requirements of Public Law No. 130-322, Title XXX, 18 U.S.C. 2721-2725, that are necessary to carry out the registrar's duties under this section on and after September 13, 1997."); R.I. GEN. LAWS § 27-49-3.1(a) (Lexis 1998) ("The purpose of this section is to implement the federal driver's privacy protection act of 1994 ("DPPA"), 18 U.S.C. § 2721."); *id.* at note (the section "shall remain in effect so long as the DPPA remains effective"); TENN. CODE ANN. § 55-25-102 (1998) ("The purpose of this chapter is to implement the federal Drivers' Privacy Protection Act of 1994 ("DPPA") * * * in order to protect the interest of individuals in their personal privacy of prohibiting the disclosure and use of personal information contained in their motor vehicle records * * *."); TEXAS TRANS. CODE ANN. § 731.001 et seq. (West 1999); W. VA. CODE § 17A-2A-2 (Lexis 1998) ("The purpose of this article is to implement the federal Driver's Protection Act of 1994.").

essential ingredient in both situations is that the States ultimately have the ability to opt out of the federal program.

Here, that is not so. The obligations imposed on the States by the DPPA are unavoidable for so long as the statute remains on the books, leaving the States "no choice at all" but to follow the federal program. See *New York*, 505 U.S. at 176.

Second, the DPPA expressly imposes direct, *affirmative* obligations on the States. The United States describes the statute in modest terms, stating that it "permits," "authorizes," or "allows" the disclosure of information by DMVs in certain circumstances (U.S. Br. 7, 8), and 'simply forbid[s] DMVs from taking action (dissemination of information) that contravenes the substantive restrictions on disclosure put in place by the federal law to protect personal privacy." U.S. Br. 28. In a significant respect, however, this construction of the DPPA is far too modest. In fact, the statute provides that certain categories of information "shall be disclosed" by DMVs. 18 U.S.C. § 2721(b). There is no doubt that Congress meant this disclosure obligation to be mandatory and prescriptive, because Congress immediately contrasted these categories of information (which "shall" be disclosed) with other categories that "may be disclosed." *Ibid.*

The Court left no doubt in *New York* that such a federal statute, which requires States to affirmatively exercise governmental authority in aid of a federal regime, "clearly 'commandeer[s]' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 170 (citation omitted). As the Court expressly held in *New York*, such a statute is invalid

under the Tenth Amendment, and that holding is dispositive here.

Third, even if its imposition of express affirmative obligations on the States were not itself fatal to the DPPA, the statute would have to fail because it effectively incorporates the States into a federal regulatory regime. It thus violates the Tenth Amendment's prohibition against "forced participation of the States' executive in the actual administration of a federal program" (*Printz*, 521 U.S. at 918). Indeed, the entire regulatory scheme established by the DPPA is directed at, and predicated on, the requirement that state officials administer provisions of the DPPA.

In arguing to the contrary, the United States analogizes the DPPA to standard preemption. See U.S. Br. 38. But that is not the appropriate analogy. The DPPA does not displace state *laws* that regulate private behavior; it requires particular action (both affirmative and negative) by the *States* themselves.

Nor does the DPPA present a situation, like that considered in *FERC*, where Congress offered the States the option of regulating in the prescribed manner or withdrawing from regulation of a preemptible field. See *FERC* v. *Mississippi*, 456 U.S. 742, 765-766 (1982). See also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) ("that a State wishing to engage in certain activity must take administrative and sometime legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect").

Given the ubiquity of the automobile in our society, it is essential to have a system of registration of drivers. See *Reitz* v. *Mealey*, 314 U.S. 33, 36 (1941) ("The universal practice is to register ownership of

automobiles and to license their drivers."), *overruled on other grounds*, *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971). This important responsibility has long been entrusted to the States. See *United States* v. *Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) ("there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens"); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.").

And as a practical matter, of course, it is impossible for the States to dissolve their DMVs and withdraw from the regulation of motor vehicle registration. This means that the DPPA effectively requires the States to create—and administer—programs for the release of driver information in accordance with the federal mandate. Cf. *South Carolina*, 485 U.S. at 511 (where statute "effectively requires" state action, for Tenth Amendment purposes, it is treated as if it directly mandated that action). As the United States puts it (Br. 8), "[t]he Act permits [State] DMVs to disclose personal information from motor vehicle records in circumstances in which Congress found that the public interest in disclosure for a particular use outweighs concerns about invasion of privacy."

The practical obligations imposed by the DPPA on state officers are manifest. After all, the DPPA does not establish a national department of motor vehicles to administer the federal program. Nor does

it provide federal employees or federal funding to administer the DPPA—including its labyrinthine set of "permissible use" provisions that authorize (and, in certain circumstances, require) disclosure of information contained in drivers' licenses. 18 U.S.C. §§ 2721(b)(1)-(14). That heavy burden is imposed squarely on the States.

Thus, on the front lines of the administration of the DPPA are state, not federal, officials. State officials will be the ones who receive the requests for information from the public, and they will be forced to make the judgment calls on numerous such requests regarding whether they fall within DPPA's general prohibition against disclosure (§ 2721(a)) or within some permissible use (§ 2721(b)). Because the DPPA mandates disclosure in some circumstances, state officials may not refuse to respond to the request. See *id.* § 2721(b).

It thus is readily apparent that the States have numerous *affirmative* obligations to administer the DPPA: *first*, to establish a policy or practice in "substantial compliance" with the Act, or be subject to a fine of $5,000 a day; *second*, to process requests for information and make a determination of permissible or non-permissible use according to the federal standards set by the DPPA; and *third*, to provide the necessary manpower, funding, and training to process all requests for information in accordance with the DPPA.

In this regard, the DPPA is even more coercive of state officials than the provisions of the Brady Act that the Court found unconstitutional. The Brady Act required state officials "to provide information that belongs to the State and is available to them only in their official capacity." 521 U.S. at 932 n.17.

Unlike the DPPA, however, the Brady Act required the state official only to make a "reasonable effort" in conducting the background check, and did "not require the [state official] to take any particular action if he determine[d] that a pending transaction would be unlawful." 521 U.S. at 903. The participation of the state officials in the federal program was forced, but it was only "temporary." *Id.* at 904.

Here, however, the participation of state officials is not only forced, it is permanent. The DPPA provides that state officials "shall not disclose" information in certain circumstances, "shall * * * disclose[]" such information in other circumstances, and "may * * * disclose[]" such information in still other circumstances. 18 U.S.C. § 2721(b). Unlike the Brady Act, there is nothing in the DPPA that gives state officials a safe harbor if they make "reasonable efforts" or if they simply are unable to process the request for information. This forced participation of state officials in the federal program established by the DPPA squarely violates the Tenth Amendment. See *Printz*, 521 U.S. at 933, 935.

2. In arguing that the Federal Government may impose obligations on the States, the United States relies almost exclusively on *South Carolina*, *supra*. See U.S. Br. 30-31, 37-38. But that reliance is fundamentally misplaced. *South Carolina*, of course, did not involve a statute that affirmatively directed the States to take particular governmental action (*i.e.*, providing that state officials "shall" take specified steps); as we have explained, the DPPA does. This requirement that state officials "participate * * * in the administration of a federally enacted regulatory scheme" (*Printz*, 521 U.S. at 904) makes all the difference.

There is another basic distinction between the cases: while *South Carolina* concerned a generally applicable statute that affected private parties (and, for that matter, the United States), as well as the States,[4] the DPPA is directed exclusively at the States. The United States argues at length that this distinction is immaterial. U.S. Br. 34-39. It is apparent, however, that federal laws that single out States enable the Federal Government effectively to eliminate the States as meaningful participants in the federal system and are of necessity constitutionally suspect.

The Supremacy Clause unquestionably gives valid federal laws primacy when they conflict with state enactments. See *Alden*, 119 S. Ct. at 2255. But if (as the United States maintains) the Federal Government may single out the States, and impose on them whatever affirmative obligations and negative prohibitions it wishes—so long as it does not require them to enact or administer laws that regulate private parties in particular ways, which the United States regards as the entirety of the holdings of *New York* and *Printz*—the States surely will not "remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. Because the United States offers no stopping point for its expansive theory, its approach offends "the

[4] See *South Carolina*, 485 U.S. at 510; see also *id.* at 526-527 ("Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations."). The Court has since characterized *South Carolina* as addressing "the authority of Congress to subject state government to generally applicable laws." *New York*, 505 U.S. at 160.

very principle of separate state sovereignty" (*id.* at 932), and should be dismissed out of hand.

3. Viewed against this background, the DPPA does considerable damage to the notions of state autonomy and political accountability. By forcing States to adopt and administer a federal regulatory program, the DPPA blurs the lines of accountability and leaves the public without a clear indication of the Federal Government's responsibility in enacting the DPPA.

This is no small matter to state governments. As written, the DPPA essentially is an open invitation for errors and incorrect disclosures of information. The Act provides not a single word of guidance or instruction on "the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor* v. *Reno*, 171 F.3d 1281, 1286 (11th Cir. 1999). Disclosures of information may occur that turn out to have been made without verification, as appears to be permitted by DPPA. At the same time, it is easy to imagine that a non-disclosure or delayed disclosure of such information could result in adverse consequences if the need for the information is legitimate and pressing. Inevitably, any criticism by the public about the DPPA or its implementation will be directed at those government officials who are forced to administer it: state officials. Cf. *Printz*, 521 U.S. at 930 ("[the States] are put in the position of taking the blame for [the federal regulation's] burdensomeness and for its defects").

4. In the end, the United States falls back on the arguments that Congress acted with careful consideration to enact a measured and balanced program

(U.S. Br. 4-7, 20-23, 39-42), that Congress should not be denied the opportunity "to experiment in addressing regulatory concerns in complex fields such as this one" (*id.* at 42), that it might be awkward and difficult for Congress to have to legislate with due regard for state interests (*id.* at 43); and that the DPPA is supported by the Necessary and Proper Clause. *Id.* at 44. Surely, however, the Constitution gives the States the right to object to being made the servants of experiments in governance conducted by the Federal Government.

In any event, whether or not the DPPA is sensible legislation, the Court already has rejected arguments of precisely the sort advanced by the United States in this case. In *Printz*, the Court observed that the Necessary and Proper Clause is "the last, best hope of those who defend *ultra vires* Congressional action." 521 U.S. at 923. As the Court there explained, the United States' argument in *Printz*—and its parallel contention here—is tautological:

> When a 'La[w] * * * for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions * * * mentioned earlier, * * * it is not a 'La[w] * * * proper for the carrying into execution [of] the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] active usurpation' which 'deserve[s] to to be treated as such.'

Printz, 521 U.S. at 923-924 (quoting THE FEDERALIST No. 33, at 204 (A. Hamilton)).[5]

[5] The United States unpersuasively argues (Br. 45-48) that it is irrelevant whether a federal statute is one of general applicability: "If particular state activity in or affecting commerce may, consistent with the Constitution, be brought within the reach of a regulatory law of the United States when that law *is* generally applicable, then the power to address that particular state activity necessarily *does* lie within the powers 'delegated to the United States by the Constitution.'" U.S. Br. 45.

The Court, of course, regards the distinction between generally applicable laws and those directed exclusively at the States as relevant, carefully noting that its decisions upholding the exercise of federal authority over States did involve "generally applicable laws." *New York*, 505 U.S. at 160.

It is a commonplace in many areas of constitutional analysis that a law that is perfectly innocuous when generally applicable is subject to a wholly different analysis when it targets particular entities or individuals. See, *e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 633 (1996) (state constitution violated Equal Protection Clause because it singled out one group for disqualification of protection); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (state tax that singled out press violated First Amendment); *United States* v. *Brown*, 381 U.S. 437, 450 (1965) (federal statute that did "not set forth a generally applicable rule" but instead singled out members of the Communist Party for prohibition from labor union violated Bill of Attainder Clause); see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 838-839 (1995) ("Establishment Clause would not permit the use of public funds to support 'a specifically religious activity in an otherwise substantially secular setting'" but would permit "general state law benefits to all its citizens").

By the same token, that Congress finds legislation like the DPPA expedient is quite beside the point. While a balancing of state and federal interests might be relevant "if we were evaluating whether the incidental application to the States of a federal law of

general applicability excessively interfered with the functioning of state governments" (*Printz*, 521 U.S. at 932), "no comparative assessment of the various interests" is appropriate when a law such as the DPPA is at issue. *Ibid.* After all, " '[t]he question is not what power the Federal Government ought to have but what powers in fact have been given by the people.' " *New York*, 505 U.S. at 157. As the Court thus has observed, seemingly with this case in mind:

> The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187.

III. THE REGULATION OF DISCLOSURES OF INFORMATION CONTAINED IN STATE DRIVERS' LICENSES AND MOTOR VEHICLE RECORDS IS A MATTER BEST ENTRUSTED TO THE STATES

One of the hallmarks of the federal system is that the States are expected to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co.* v. *Liebmann*, 285 U.S. 261, 311 (1932) (Brandeis, J., dissenting)). Prior to enactment of the DPPA, that is precisely what the States were doing. Although

the Federal Government unquestionably has an important role in addressing societal problems, it may not do so in a way that simply commandeers the States or violates principles of federalism.

As we note above, the regulation of drivers—and the responsibility for regulating the disclosure of information contained in driver's license and motor vehicle records—has long been left to the States. The DPPA, however, stands as a notable federal incursion into the operation of state DMV's. In 1994, Congress enacted the DPPA to address two kinds of concerns: first, safety concerns about the disclosure of information that may end up facilitating criminal acts, such as the well-publicized case of actress Rebecca Shaeffer (who was murdered by a stalker who obtained her address through a private investigator, who in turn procured the information from the state DMV); and second, privacy concerns about the sale of information primarily to mass marketers. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran); 139 Cong. Rec. S14381-04, 1993 WL 433130 (1993) (statement of Sen. Boxer); see also Thomas H. Odom & Gregory S. Feder, "Challenging the Federal Driver's Privacy Protection Act," 53 U. MIAMI L. REV. 71, 88 (1998).

Reasonable people may disagree on whether the DPPA struck the right balance between access and privacy, however. Some individuals may prefer more information, not less. Before the DPPA was enacted, many States treated drivers' licenses as a matter of public record to which the people should have open access, at least in certain circumstances. See Odom & Feder, *supra*, at 98-99 ("the overwhelming majority [of States] historically have treated motor vehicle

records as public records[;] * * * a vast majority of States have long recognized the public good that flows from open records and open government").

For instance, in North Carolina, the information associated with an application for a driver's license was considered open to the public. See N.C. GEN. STAT. § 20-27 (West 1998). Despite this general policy of openness, North Carolina law prohibited the Division of Motor Vehicles from selling or furnishing selective listings (*i.e.*, by age, sex, etc.) in bulk for commercial purposes. See Opinion of the Attorney General to Mr. Zeb Hocutt, Driver License Section, Division of Motor Vehicles, 47 N.C.A.G. 59 (1977), 1977 WL 26196.

Likewise, Wisconsin has historically been governed by an open-records law. Wisconsin Satute § 19.35 provides that "except as otherwise provided by law, any requester has a right to inspect any record." WIS. STAT. § 19.35(1)(a) (West 1999). Wisconsin law, however, does not make this right of public access absolute: it exempts from public inspection "any record containing personally identifiable information that, if disclosed, would * * * endanger an individual's life or safety." WIS. STAT. § 19.35(1)(a)(2). Furthermore, prior to the DPPA, Wisconsin allowed individuals to "opt-out" of having the personal information they provided on a driver's license or vehicle registration form from being disclosed to the public in certain cases. See Odom & Feder, *supra*, at 106 (citing Analysis by the Legislative Reference Bureau, 1997 Assembly Bill 338). Anyone registering a car or applying for a driver's license could direct that his or her "personal identifiers" (*i.e.*, name, street address, post-office box number, and

nine-digit extended zip code) be kept confidential from anyone requesting the personal information of ten or more people. See *ibid.*

Other States, in contrast, have had in place tighter restrictions on the disclosure of information—some even more restrictive than those created by the DPPA. Alaska, for instance, has treated drivers' licenses as "confidential and private," and does not allow disclosure of such information except to government agencies or the driver. ALASKA STAT. § 28.15.151 (1998). Virginia, too, has treated information contained in drivers' licenses as "privileged records" and has allowed disclosure only in narrowly defined circumstances. VA. CODE ANN. § 46.2-208 (1999). Several States, such as Kansas, prohibited the release of driver's license information for commercial use even before DPPA was enacted. See KAN. STAT. ANN. § 74-2012(b) (West 1998); Kansas State Attorney General Op. No. 84-106.

Likewise, California has prohibited the disclosure of residential addresses from drivers' licenses, except to government agencies. See CAL. VEH. CODE § 1808.21(a) (West 1999). Furthermore, as a result of the Rebecca Schaeffer tragedy, California added a provision to protect a person from stalking and other threats by suppressing the registration or driver's license record of any person if the person requesting the suppression submits verification that he or she is the subject of stalking or other threats of death or great bodily injury. See CAL. VEH. CODE § 1808.21(d). The California Attorney General has concluded that the DPPA now requires disclosures of information that the state statute had not previously permitted. See 79 Op. Cal. Att'y. Gen. 76 (95-805), 1996

WL 343305 (1996) ("Existing California law is generally more restrictive than the new federal requirements concerning the release of addresses contained in motor vehicle records.").

What these state laws demonstrate is not that one particular approach is better than the rest, but instead that no single one may be the best—at least not for the entire nation. States have had different views on how best to balance the interests of driver privacy and open access to information for their own citizens. Not all States have struck this balance in the same way, but that is to be expected in a federal system. The United States has offered no reason to believe that the operation of usual mechanisms of federalism is somehow inappropriate in this setting—and it has failed to reconcile its approach with the Tenth Amendment principles announced by the Court. The DPPA accordingly should be held invalid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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