No. 98-1464

**IN THE SUPREME COURT OF THE UNITED STATES**

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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.*

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# BRIEF OF AMICI CURIAE THE STATES OF ALABAMA, COLORADO, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, UTAH, VIRGINIA, AND WISCONSIN, IN SUPPORT OF THE RESPONDENTS

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Filed September 3, 1999

## QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25, contravenes constitutional principles of federalism?

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## INTEREST OF AMICI CURIAE[1]

*Amici Curiae* State of Alabama and eleven other States submit this brief in support of Respondents because the States have a manifest interest in the questions presented by this challenge to the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25 ("DPPA"). That Act has displaced their public policies to no less an extent than the policy of South Carolina, the State that brought this action. The DPPA singles out the States for a burden not imposed upon the private- or federal-sector entities that develop and maintain databases containing "personal information." Affirming the court of appeals and holding the DPPA unconstitutional will preserve each State's ability to set its own policy regarding public information.

The Court's determination of this case will have repercussions beyond the statute at issue here. The *amici* States have a substantial interest in pursuing the process-oriented protections of this Court's federalism jurisprudence. Congress may not single out States through laws that are not generally applicable; laws targeting States isolate them in the political process. Because the Court has held that judicial review under the Tenth Amendment is available when States demonstrate a failure in the national political process, the Court must carefully scrutinize a law, like the DPPA, that denies States their natural allies by targeting States for a unique burden. Accordingly, the *amici* States respectfully submit this brief to assist the Court in the determination of the federalism issues in this case.

## SUMMARY OF ARGUMENT

As shown in the Brief of Respondents Charlie Condon and the State of South Carolina, the DPPA is unconstitutional under *Printz v. United States*, 521 U.S. 898 (1997), and *New York v.*

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[1] Letters evidencing the parties' consent to the filing of this brief were lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* States affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief, other than the designated *amici* States.

*United States*, 505 U.S. 144 (1992), because it requires the States to administer a federal regulatory scheme in violation of the Tenth Amendment and this Court's Tenth Amendment jurisprudence. Even if the Court finds that the DPPA does not "commandeer" the States, the DPPA is unconstitutional under the Tenth Amendment for yet another reason: because the DPPA singles out States for the imposition of a unique burden. This Court's Tenth Amendment decisions of the past fifteen years can be understood as establishing a jurisprudence of process-oriented federalism that looks to the ability of the political process to protect the States' interests. First, the Court has upheld laws that it considered (or the parties conceded) were generally applicable with only incidental application to the States on the ground that the political process is presumed to limit federal encroachment under those circumstances. Second, the Court has analyzed and invalidated federal laws that targeted States without imposing similar burdens on parties engaged in similar conduct throughout the private and federal sectors. The political process affords States little, if any, protection from federal encroachment under those circumstances. If the process-based protection is removed by allowing States to be targeted for discriminatory burdens simply because another law may or may not address a similar substantive area, to a greater or lesser extent, now or in the uncertain future, the States are left with neither substantive nor process-based protection.

The DPPA is such a law which targets States and it is therefore, as the court of appeals held, unconstitutional. Private- and federal-sector databases containing "personal information" are not subject to laws like the DPPA. Even if sectoral, *ad hoc* regulation of personal information theoretically could be aggregated to form a generally applicable scheme of laws, the statutes the United States cites do not carry the day, as a factual matter. The DPPA is not a law of general applicability even when considered in light of other existing privacy regulation. While other laws purport to regulate the dissemination of personal information held by certain private parties, they neither cover the same information nor apply in the same way to private parties as the DPPA applies to the States. Moreover,



disclosure of personal information held *by the federal government* is the rule rather than the exception. Thus, the DPPA cannot be characterized as a law of general applicability and must be held unconstitutional.

## ARGUMENT

### I. The Court Has Developed a Jurisprudence of Process-Oriented Federalism

Prior to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court protected State interests through substantive limitations on federal power. Thus, in *National League of Cities v. Usery*, the Court reserved certain "core areas" or "traditional governmental functions" of the State from federal interference. 426 U.S. 833, 845, 852-54 (1976). In *Garcia*, the Court overruled *National League of Cities*, 469 U.S. at 531, 546-47, and rejected the substantive approach in favor of process-oriented bases of protection:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than dictate a "sacred province of state autonomy."

469 U.S. at 554 (citing *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).[2] Because the Court asserted only that the "national political process" provided "the *principal and basic* limit on

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[2] The United States suggests that "[t]he question here, then, is whether the particular legislation the respondents challenge – the DPPA – impermissibly interferes with the 'residuary and inviolable sovereignty' of the States." Pet. Br. at 45-46. The United States seems to silently assume either that passing such a test provides the only basis for affirming the court of appeals or that laws targeting States pass that test. Both assumptions are incorrect.

the federal commerce power," 469 U.S. at 556 (emphasis added) – rather than the exclusive safeguard – *Garcia* expressly reserved a judicial role for the enforcement of Tenth Amendment limitations upon Congress in those cases where a "process failure" undermined the primary safeguard. *See also id.* at 550 ("Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, *the principal means* chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.") (emphasis added); *id.* at 552 ("In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered *principally* in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.") (emphasis added). In this respect, *Garcia* may be viewed as inviting the development of a new process-oriented jurisprudence of Tenth Amendment limitations. One may read the Court's post-*Garcia* cases as accepting that invitation.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court reaffirmed both that *Garcia* left the door ajar for judicial review and that *Garcia* contemplated evidence of a possible process failure as a prerequisite to judicial intervention. *Id.* at 512-13. The Supreme Court rejected South Carolina's challenge to section 310 of the Tax Equity and Fiscal Responsibility Act of 1982[3] because the State "ha[d] not even alleged that it was deprived of any right to participate in the national political process or that it was *singled out* in a way that left it *politically isolated* and powerless." *Id.* (emphasis added). In rejecting the challenge, the Court thus identified potential process failures that might justify judicial involvement: congressional action that "singled out" States or left them "politically isolated" in the national political process. Moreover, the Court cited as support for this proposition the famous footnote four of its decision in *United States v. Carolene Products Co.*, which laid the process-based foundation for judicial doctrines

[3] Pub. L. No. 97-248, 96 Stat. 596, *codified at* 28 U.S.C. § 103(j)(1) (1982).



protecting individual rights. 485 U.S. at 512-13 (citing *Carolene Products,* 304 U.S. 144, 152 n.4 (1938)).

In *Baker*, the Court also rejected an argument presented by the National Governors' Association ("NGA"), an intervenor in the case. NGA argued that the statute at issue constituted a "commandeering" that violated the Tenth Amendment "by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme." 485 U.S. at 513. In rejecting NGA's argument, however, the *Baker* court did not close the door to such a challenge in an appropriate setting, noting that the availability of such a "commandeering" claim "is far from clear" and that the Court did not need to address the constitutional issue because the statutory provision at issue, section 310, did not present it. 485 U.S. at 513.

The Court rejected NGA's argument for two reasons. *First*, the Court characterized section 310 as a law that did not commandeer the State in any meaningful manner because administrative and sometimes legislative action to comply with federal standards regulating activity is a commonplace that presents no constitutional defect. *Baker*, 485 U.S. at 514-15. In light of the Court's reservation of judgment regarding the commandeering issue in the context of some other statute, however, this explanation does not seem to stand on its own. *Second*, the Supreme Court analyzed the legislation as a law of general applicability:

> 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. Accordingly, the Federal Government has directly imposed the same registration requirement on itself that it has effectively imposed on States.

*Baker,* 485 U.S. at 526-27 (citation omitted).

In both *Garcia* and *Baker* the Court declined to intervene, but both cases involved statutes that the Court analyzed as laws of general applicability with only incidental application to States and local governments. *Garcia* addressed application of the Fair Labor Standards Act ("FLSA") to local municipal

transit workers when the FLSA was also applicable to federal and private sector employees. *Baker* addressed application of a tax-exemption provision for the issuance of bonds that was applicable to both federal and private sector bonds.[4]

Process-oriented federalism moved from the realm of theory to the realm of applied law in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* referred to a line of federalism cases in which the Court protected State interests under the Eleventh Amendment only months following the *Garcia* decision. 501 U.S. at 460-61 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). *Gregory* adopted *Atascadero*'s "plain statement rule" as the natural corollary to *Garcia*'s "process-based" rationale:

> We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause [by *Garcia*]. But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

*Gregory*, 501 U.S. at 464 (citations omitted). In *Gregory*, the Court thus moved from discussing a Tenth Amendment jurisprudence involving some theoretical process-oriented constraints to actually identifying and enforcing such a constraint.

[4] Neither *Garcia* nor *Baker* analyzed the issue of whether an extension of a previously-enacted statute to cover States posed a question different from that where the statute, as originally enacted, applies generally and only incidentally to the States. This case does not present that issue either.



In doing so, *Gregory* weakens any view that *Garcia* foreclosed judicial review.

The Court further developed its federalism jurisprudence with its decision in *New York v. United States*, 505 U.S. 144 (1992), in which the Court struck down certain provisions of a statute enacted pursuant to the Commerce Clause. The statute required States either to regulate the disposal of radioactive waste by a statutory deadline, or to take title to the waste. Much of the majority opinion in *New York* focused on the "co-option" of State legislatures through the "regulate or take title" provisions at issue:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation.

505 U.S. at 180. The majority's emphasis may be explained as a response to Justice Stevens' dissent. *Id.* at 210-13 (Stevens, J., dissenting) (asserting the Constitution permits the federal government to issue direct commands to States). Because the majority's discussion of "co-option" may be so understood, *New York* may be read as relying on a different, process-oriented rationale. The *New York* decision did not purport to overrule either *Garcia* or *Baker*; instead the Court explained the "legislate or take title" provisions did not present "a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

In *Printz v. United States*, 521 U.S. 898 (1997), the Court reaffirmed *New York* and struck down provisions of the Brady Act. *Printz* also extended the rule against co-option of State legislatures to include "commandeering" of States' executive officials. *See* 521 U.S. at 934. In doing so, the Supreme Court distinguished the situation presented by laws of general

applicability that apply only incidentally to States.[5] As in *New York*, the *Printz* Court explained that the Brady Act applied to the States exclusively and intentionally: "[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate." 521 U.S. at 932.

There is much scholarly debate regarding the continuing validity of *Garcia* and *Baker*. One camp views *Garcia* and *Baker* to be effectively overruled or severely limited by *New York* and *Printz*.[6] A second camp views *New York* and *Printz* as creating a substantive anti-commandeering exception to *Garcia* and *Baker*.[7]

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[5] 521 U.S. at 932 ("Assuming all the mentioned factors were true, they 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.").

[6] *E.g.*, Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does New Federalism Really Matter?*, 32 IND. L. REV. 11, 13 (1998) ("*Garcia* appears to have died a horrible, but suitably inconspicuous, death."); Maxwell A. Miller & Mark A. Glick, *The Resurgence of Federalism: The Case for Tax-Exempt Bonds*, 19 MUN. FIN. J. 46, 64 (Winter 1999) ("*South Carolina*'s Tenth Amendment holding is simply no longer good law. . . . [R]ecent cases, notably *New York v. United States* and *United States v. Lopez*, have effectively overruled *South Carolina's* narrow view of Tenth Amendment guarantees." Those recent cases "are firmly based upon the premise that the Tenth Amendment embraces substantive, not merely procedural, states' rights."); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1322 (1997) ("In these more recent cases, I conclude, the Court appears to have overruled *Garcia* sub silentio.").

[7] *E.g.*, Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549, 555 n.33, 557-58 (1994) (observing that *New York* "represents a clear shift from the message of *Garcia*" toward a substantive protection like that of *National League of Cities* at least for commands to State legislatures); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 B.Y.U. L. REV. 329, 345 (1996) (asserting *New York* "ruled that Congress could not ' "commandeer" state governments



This case presents an opportunity to *harmonize* the Court's precedents by following a third approach. *Garcia* and *Baker* expressly contemplate the development of process-oriented limitations. *Gregory* is the natural first step in constructing a new Tenth Amendment jurisprudence grounded in this process-oriented approach. The clear statement rule ensures fair notice so that State and local governments have the opportunity to oppose legislation in the national political process before it is enacted. *New York* and *Printz* recognize a distinction between laws of general applicability that incidentally apply to States, on the one hand, and laws that do not apply in the same way to private parties as they do to States, on the other hand. The emphasis on the "commandeering" language of *New York* and *Printz* clouds this line of distinction.

*Baker* rejected a "commandeering" argument directed at a law the Court viewed as one of general applicability that had only incidental application to States while recognizing that some other form of commandeering might be improper. *New York* and *Printz* invalidated laws that "commandeered" the States in the context of statutes that were not generally applicable and that did not apply to States only incidentally. Thus, a dividing line may be drawn between generally applicable laws and laws that single out or target States; commandeering is valid or invalid depending on which side of that line it falls.

The "process-oriented" rationale underlying *New York* and *Printz* is more readily apparent when one considers the political effect of laws targeting constitutionally significant entities, such as the States. When laws target constitutionally significant entities, "the political constraints that prevent a legislature from passing crippling [laws] of general applicability are weakened, and the threat of burdensome [laws] becomes acute." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983). A review of the holding in *Baker* shows that the Supreme Court recognized that when the class of States "is singled out in a way that left it

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into the service of federal regulatory purposes' " but suggesting the decision "alter[s] the *Garcia* regime but little").

politically isolated and powerless" there was a claim that the national political process had failed. 485 U.S. at 512-13.

Another attraction of a "process-oriented" approach is that it accounts for a third set of cases – as yet unaddressed in the Court's Tenth Amendment jurisprudence – involving laws that neither rise to the level of a commandeering nor constitute laws that generally apply to private parties and the States in the same way. This third category of cases must exist, at least in theory, because even if a federal law does not command States to regulate individuals on behalf of Congress, that fact alone does not establish that the law is one of general applicability that only incidentally applies to States. The United States' suggestion that any statute that does not "commandeer" is one of general applicability was previously advanced by the United States in *Printz* as a basis for limiting the scope of *New York*. The United States argued:

> [The Petitioners cite] this Court's observation in *New York* that the statute then before it did not involve Congress's "subject[ing] a State to the same legislation applicable to private parties." 505 U.S. at 160. From that sentence, they infer that *any* federal statutory obligation falling particularly on state or local officials is unconstitutional. That argument, however, misapprehends the Court's concerns in *New York*, and it does not explain *why* constitutional principles of federalism are not implicated when the States are subjected to generally applicable legislation.
>
> What is significant for constitutional purposes about a statute of general application is that such enactment, by its nature, cannot constitute a directive to the States to formulate state policy in response to a federal command. Rather, by such a provision, the States (along with private parties) are required to adhere to a clearly articulated federal policy.

Brief for the United States at 23, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478 & 95-1503), *available in* 1996 WL 595005. This Court declined to accept the United States' argument in *Printz* and the Court should not now accept the



United States' double-speak as a means of limiting both *New York* and *Printz*. Rather, the constitutionally significant feature is precisely that such laws apply "in the same way" to constitutionally protected entities or activities as well as to the population at large.[8]

*New York* and *Printz* may be harmonized with *Garcia*, *Baker*, and *Gregory* as establishing a Tenth Amendment protection against laws that "target" States for a unique burden, rather than simply creating an "anti-commandeering" rule. "When a regulation applies both to state and private activity, the political checks on Congress' power to regulate private activity provide vicarious protection for state interests and make Congress politically accountable. . . . [S]tate interests are protected because they are included in the representation of private interests." D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L. REV. 779, 1000-01 (1982).

More textual support for this view is found in both *New York* and *Printz*. In *New York*, the Supreme Court noted that the "legislate or take title" provisions did not present "a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. In *Printz*, the Supreme Court used similar language to make clear that its analysis focused on the intentional and exclusive imposition of burdens on States by the Brady Act: "[I]t [was] the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the entire structural framework of dual sovereignty." *Printz*, 521 U.S. at 932.

In an accompanying footnote, the *Printz* Court addressed the dissent's assertion that Congress could have placed reporting obligations on the States' police officers if Congress had legislated generally so that those requirements fell only *incidentally* upon States' officers. The Court adopted that suggestion as "undoubtedly true" but explained that the Brady Act

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[8] The United States proposed this standard below. U.S. Brief at 19, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998).

imposed additional burdens on State officers for which there was no private-sector counterpart. *Id.* at 932 n.17. That dialogue demonstrates that the Brady Act was not a law that merely subjected States to the same obligations as private parties.

The law at issue in *Printz* did apply to private individuals. It simply did not apply to them *in the same way* that it applied to State and local officials:

> The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 et seq., establishes a detailed federal scheme governing the distribution of firearms. *It prohibits firearms dealers from transferring handguns* to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). *It also forbids possession of a firearm by, and transfer of a firearm to,* convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or have been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

*Printz*, 521 U.S. at 902 (emphasis added). The 1993 amendments, specifically the Brady Act's amendments to the Gun Control Act of 1968, similarly imposed obligations on private individuals. However, the Brady Act did not apply *in the same way* to private individuals and States:

> Under the interim provisions, *a firearms dealer* who proposes to transfer a handgun must first: (1) receive from the transferee a statement . . . ; (2) verify the identity of the transferee . . . ; and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form. . . . With some exceptions, the dealer must then wait five business days before consummating the sale, *unless the CLEO earlier notifies the dealer* that he has no reason to believe the transfer would be illegal.



*Printz*, 521 U.S. at 902-03 (emphasis added). Adopting that reading makes clear that the protection of State interests reaches the set of laws that single out States rather than the set of laws that "commandeer" States. It was not necessary to show a commandeering in *Printz*. The Court's focus was as much on the Brady Act's dissimilar application to public and private parties.

This view is further consistent with First Amendment jurisprudence. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (upholding application of promissory estoppel to the press because that law imposes similar burdens on everyone); *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872, 878-80 (1990) (upholding application of prohibition of drug use to "religiously inspired peyote use" because that law imposes similar burdens on everyone).[9] When broadly applicable laws are applied to protected entities or activities they may be upheld as long as such applications are merely "incidental effects." *Cohen,* 501 U.S. at 669; *Smith*, 494 U.S. at 878. Thus, in *Minneapolis Star & Tribune*, the Supreme Court held that a law which "singled out the press for special treatment" was not merely a law of "general applicability . . . to all businesses" and, instead, placed "a heavier burden of justification" on the government. 460 U.S. at 582-83. When the press is singled out, "the political constraints that prevent a legislature from passing crippling [laws] of general applicability are weakened, and the threat of burdensome [laws] becomes acute." *Id.* at 585.

Laws that target religion are also constitutionally suspect. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court unanimously agreed with that proposition. Justice Kennedy's opinion for the Court explained that "the principle of general applicability was violated because the secular ends asserted in defense of the laws were

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[9] The Court unanimously agreed with this proposition in *Smith* and split only on the issue of whether the Constitution required *additional* protection of the targeted group.

pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524. The prohibition "only against conduct motivated by religious belief" gave " 'every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself' " and that "precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545-46.

The analogy between First Amendment jurisprudence and Tenth Amendment jurisprudence further illustrates that a nexus is required between the harm sought to be addressed and the law adopted in order for a law to be properly classified as a law of general applicability. In *City of Hialeah,* Justice Kennedy observed that laws were not generally applicable when they were substantially (and not inconsequentially) underinclusive of the governmental interests identified in support of the laws. 508 U.S. at 543 (Kennedy, J.). Other sources of the harm were not covered by the laws there challenged. Similarly, neither the DPPA nor any other federal law purports to limit disclosure of names and residential addresses broadly throughout the private sector. Congress did not limit access to federal governmental sources of the same information that were identified at the congressional hearings. *See* Part II(A) *infra.* Moreover, the fact that the DPPA sweeps so broadly, "proscrib[ing] more . . . conduct than is necessary to achieve their stated ends," *id.* at 538, further demonstrates that it invalidly imposes unique burdens on the targeted entities, States. The failure to permit States to allow access to records by the press and government watchdog groups, for example, has no discernable relation to the harms Congress sought to address.

From *Garcia* to *Baker*, to *Gregory*, to *New York* and *Printz*, the Court has developed a jurisprudence of process-oriented federalism which imposes procedural requirements on Congress not specifically spelled out in the text of the Tenth Amendment but nevertheless necessary to preserve the autonomy of the States. Congress may not single out the States for a unique burden, but is required to promulgate its policies through laws of general applicability that apply to States and private actors in the same way. Because the DPPA is not such a law, the court of appeals properly found it unconstitutional.



## II. The DPPA Is Unconstitutional under the Tenth Amendment Because it Singles out States for a Unique Burden

Even if the DPPA does not "commandeer," it clearly targets the States for unique burdens. The DPPA purports to instruct States how to control dissemination of information from State motor vehicle records compiled through the licensing of drivers and the registration of automobiles. The legislative history demonstrates that the impetus for the DPPA was to close access to names and residential addresses that could be used by stalkers. However, the law does not address the same information – names and residential addresses – when that information is disseminated from private-sector and federal databases. The text and history of the DPPA show that the imposition of that unique burden was intentional rather than incidental.

### A. Federal Regulation of Personal Information Is Sectoral, Not Generally Applicable, and Does Not Aggregate to Form a Law Of General Applicability[10]

The overwhelming majority of the sources of personal information are left unregulated by the United States'

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[10] The United States asserts that the rule adopted by the court of appeals requires Congress "to address privacy concerns in all private and public records *in a single statute*." Pet. Br. at 43 (emphasis added); see *id.* at 34. The United States further asserts that the court of appeals simply dismissed as "irrelevant" the asserted similarity between the DPPA and other laws purportedly regulating data protection. *Id.* at 14, 24. These assertions misread the approach of the court of appeals and interject an issue not presented by this case. The court of appeals never reached the issue of whether "Congress may enact a statute regulating the States if it has already enacted a statute regulating the same conduct by private parties." Pet. App. 19a. The court found that it did not need to decide that legal issue because even considering the congressional regulation of certain narrow categories of private actors, the most that could be said was that

"sector-by-sector" approach to data protection. The DPPA's legislative history shows that Congress was advised that State motor vehicle records were only one of many sources of similar information potentially subject to misuse by criminals. The testimony before Congress made clear that other records contained much of the same information as motor vehicle records and had been similarly misused to facilitate stalking and other crimes. Congress was well-informed that it was the relatively easy access to "government records" that facilitated stalking. For example, Subcommittee hearings demonstrated that "the post office and the DMV will divulge the address of the victim's hiding place – no questions asked." Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, *available in* 1994 WL 14168013 (Feb. 3, 1994) (statement of David Beatty). Yet Congress responded with a provision imposing upon States the burden to restrict access to motor vehicle records while ignoring many of the federal- and private-sector sources of the same information.

The primary sponsor of the DPPA made express reference to a book entitled "You Can Find Anyone" that was found in a stalker's possession. 139 Cong. Rec. S15,762 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer). The Senator expressed her concern that the book "spelled out how to do just that using someone's license plate." *Id.* The Senator did not mention, however, that the very same book identified numerous federal sources that supply the same information to potential stalkers, including the Federal Communications Commission, Federal Aviation Administration, Internal Revenue Service, Interstate Commerce Commission, Civil Service Commission,

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"Congress has enacted several laws of limited applicability." *Id.* Thus, even if one could aggregate numerous laws to form one scheme that was generally applicable, that factual predicate is absent in the context of data protection. *See id.* Demonstrating this very different explanation than that offered by the United States, the court of appeals observed: "we seriously doubt that the Supreme Court would have applied either the FLSA or the ADEA to the States had Congress applied those Acts only to video stores, cable providers, and credit bureaus." *Id.*



and the Armed Services Locators. *See* EUGENE FERRARO, YOU CAN FIND ANYONE, § 4.5, at 76-79, 81 (10th ed. 1989).

Perhaps the most telling and most analogous source of disclosure is the Federal Aviation Administration ("FAA"). A database of the operators of vehicles licensed by the federal government (in this case, aircraft) is available on the Internet, providing names, home addresses, and information regarding physical examinations. *See* Pet. App. 25 n.9 (citing AVweb, U.S. Certified Airman Database (visited Aug. 13, 1999) <http://www.avweb.com/database/airmen/>). A related database permits anyone to obtain the name and address of the owner of an airplane simply by providing the "N-number" required to be displayed on the airplane's tail. *Id.* (citing AVweb, U.S. Registered Aircraft Database (visited Aug. 13, 1999) <http://www.avweb.com/database/aircraft/>). This information originates with the FAA and is disseminated by a company under contract with the FAA.

Similarly, when individuals register certain boats with the United States Coast Guard, it appears that the federal government discloses the information collected. CAROLE A. LANE, NAKED IN CYBERSPACE: HOW TO FIND PERSONAL INFORMATION ONLINE 160 (1997). If the Coast Guard fails to do so, the FCC may disclose the information if the boat owner registers a ship-to-shore radio. *Id.*

The United States Postal Service ("USPS") remains an easy source of forwarding addresses. Although the USPS recently discontinued its disclosure to individuals of a list of all requests to forward mail, it still discloses the information one entry at a time. To obtain a forwarding address, one need only send a letter to the former address with instructions on the envelope not to forward the mail and to provide address correction. RICHARD S. JOHNSON, HOW TO LOCATE ANYONE WHO IS OR HAS BEEN IN THE MILITARY 236 (7th ed. 1996). Moreover, the Postal Service continues to sell data collected from Change of Address forms to mailing-list firms, direct mailers, and credit bureaus. BETH GIVENS, THE PRIVACY RIGHTS HANDBOOK: HOW TO TAKE CONTROL OF YOUR PERSONAL INFORMATION 128 (1997).

In some instances, the United States orders private parties to disclose residential addresses to other private parties. For example, the federal government routinely mandates disclosure of names and residential addresses to collective bargaining representatives. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 (1969); *Lear Siegler, Inc. v. NLRB*, 890 F.2d 1573, 1580-81 (10th Cir. 1989). Although the Court has held that collective bargaining representatives of federal employees may not compel disclosure of names and residential addresses, the Court indicated that there was no constitutional bar to such disclosure. *See United States Department of Defense v. FLRA*, 510 U.S. 487, 503 (1994) ("Congress may correct the disparity" in treatment of classes of unions). In that context, the federal government orders the disclosure of less-public information such as home telephone numbers and even Social Security numbers. *See NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377-78 (7th Cir. 1991) (Social Security numbers in addition to names and addresses); *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 833 (7th Cir. 1988) (telephone numbers in addition to names and addresses); *Lucky Markets, Inc.*, 251 N.L.R.B. 836, 840 (1980) (names, ages, race, sex, and marital status).

The federal government provides virtually no protection for medical and health care records. *See* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 308 (1996) ("SCHWARTZ & REIDENBERG"). There is no comprehensive federal legislation regarding how employers must treat personal information they collect regarding their employees. *Id.* at 350. Further, there is no federal law addressing data protection specifically in the context of direct marketing. *Id.* at 308.

Ironically, in some ways, the federal government is acting to make personal information more available. For example, while the Fair Credit Reporting Act, Pub. L. No. 91-508, Tit. VI, § 601, 84 Stat. 1129, *codified at* 15 U.S.C. §§ 1681a-1681b (1994) ("FCRA"), limits information that may be disclosed about individuals, it does not prohibit the disclosure of names, residential addresses, or other personal information. The Federal Trade Commission ("FTC"), which is charged with administering the FCRA, specifically



excludes such data from its definition of "consumer reports" and permits unrestricted dissemination of this information so long as the data is not linked to credit information through "pre-screening." *See FTC v. TRW, Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991), *amended, FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1 (Jan. 14, 1993). The FTC defines "pre-screening" as "the process whereby TRW, utilizing credit information, compiles or edits for a client a list of consumers who meet specific criteria." 784 F. Supp. at 362. The "header information" that the FTC permits to be freely disclosed includes "name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof." *FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1.[11] The FTC policy thus allows this information to be sold without limitation by credit bureaus. *See* Leslie Byrne, *Who's Selling Your Secrets? Government Units Sell or Give Away Personal Data*, CHRISTIAN SCIENCE MONITOR, June 17, 1997, at 19.

The Postal Service now proposes to *require* disclosure of name and address information of individuals who use commercial mail boxes in lieu of home addresses. *See* 64 Fed. Reg. 14,385 (1999); *see also* David Keene, *Postal Competitors Beware; The Mailman Cometh*, THE HILL, June 23, 1999, at 18. One wonders how that requirement can be harmonized with a concern to guard against stalkers.

Federal agencies do not limit their disclosures to names and residential addresses. Despite the fact that an individual's Social Security number is often used as proof of permission to access other records, the federal government discloses Social

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[11] Moreover, credit reports may be purchased by anyone with a "permissible business purpose." *See* 15 U.S.C. § 1681b. "The FCRA defines permissible purposes broadly, encompassing employers, landlords, private investigators, and others." Information Policy Committee, National Information Infrastructure Task Force, *Options for Promoting Privacy on the National Information Infrastructure*, at 41 (Apr. 1997 draft), available at <http://www.iitf.nist.gov/ipc/ipc-pub.html> (visited Jan. 31, 1999) [hereinafter NIITF Draft].

Security numbers with little hesitation. "Since June 1974, the [Department of Veterans' Affairs] has used Social Security numbers as VA Claim numbers." JOHNSON, *supra*, at 89; *see also id.* at 6-7, 87-88, 206-07. Similarly, "the Armed Forces switched from using Service Numbers to using Social Security numbers as a means of identification" in July 1969 (Army and Air Force), July 1972 (Navy and Marine Corps) and October 1974 (Coast Guard). *Id.* at 135. Consequently, the name and Social Security number of individuals are published in unit orders, reassignment orders, orders for promotions, awards, and numerous other orders. *See id.* at 138. Moreover: "The Social Security numbers of many retired officers and warrant officers may be obtained from the Officer's Registers." *Id.* at 81.

Indeed, one need not go any farther than a law library to find a list of individuals' names and Social Security numbers. For decades, the United States Department of Labor has published the Social Security numbers correlated together with the names of claimants under the Black Lung Benefits Act. The Department of Labor assigns each claimant's Social Security number as its case number, resulting in public disclosure whenever a decision is designated for publication.[12] The United States government also makes a debtor's Social Security number a matter of public record when it petitions for a writ of garnishment to collect a debt. *See* 28 U.S.C. § 3205(b)(1)(A).

Other information frequently used as a means to test authorization to receive data is itself freely disclosed. For

[12] Comparison of the "OWCP number" in published decisions with the claim filed in several of those cases confirms that practice. For example, the OWCP number reported in *Hite v. Eastern Associated Coal Corp.*, 21 Black Lung Rep. (MB) 1-47 (Ben. Rev. Bd. 1997), matches the miner's Social Security number as reflected in Director's Exhibit 3 filed therein. Similarly, the OWCP number reported in *Church v. Eastern Associated Coal Corp.*, 21 Black.Lung Rep. 1-52 (Ben. Rev. Bd. 1997), correlates with the miner's Social Security number as reflected in Director's Exhibit 1 filed therein.



example, the National Personnel Records Center, in responding to individuals' Freedom of Information Act requests, provides a person's date of birth. *See* JOHNSON, *supra*, at 98, 146-47. That information is sufficient to permit the person to be located through a computer database. *See id.*; *see also id.* at 8-9, 11. Date of birth information is also publicly available from Selective Service classification records of men who registered for the draft from 1940 to 1975. *Id.* at 92.

These examples of sectors not subject to data protection limitations rebut the Seventh Circuit's mistaken impression that virtually all collections of data already are regulated by the federal government. *Travis v. Reno*, 163 F.3d 1000, 1005 (7th Cir. 1999). In fact, the federal government's own studies and scholars in the field generally reject this view. *See* Joseph I. Rosenbaum, *Privacy on the Internet: Whose Information is it Anyway?*, 38 JURIMETRICS J. 565, 569 & n.6 (1998) (citations omitted); *see also* SCHWARTZ & REIDENBERG, *supra*, at 215, 382 (federal data protection laws applicable to the private sector address only discrete issues; "existing legal protections tend to focus on access [by the subject of the record] and correction"); NIITF Draft, *supra*, at i ("Information privacy policy in the United States consists of various laws, regulations and practices, woven together to produce privacy protection that varies from sector to sector. . . . Sometimes this approach leaves holes in the fabric of privacy protection."). This consensus is not surprising in light of our strong political tradition of resisting limits on information dissemination. *See* Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 500-01 (1995). In the private sector, the United States generally favors the free flow of information. *See id.* at 503-06. Thus, even viewed as a whole, federal regulation of personal information in the private sector does not aggregate to form a generally applicable scheme.

### B. The Statutes the United States Cites Do Not Impose Similar Burdens on Private or Federal Actors

The statutes the United States cites to suggest that there is a general scheme of personal information regulation do not support the premise. As the preceding examples demonstrate, federal limitations on the disclosure of information constitute exceptions rather than the general rule.[13] Moreover, even the few statutes frequently cited as imposing disclosure limitations "similar" to the DPPA generally fail to fulfill that claim. The cited statutes do not regulate in the same manner as the DPPA and none of the statutes imposes the same burdens on private actors as the DPPA imposes upon the States. Therefore, the sectoral approach to privacy regulation does not aggregate into a single generally applicable scheme even if such aggregation were sufficient to pass constitutional muster under the Court's process-oriented jurisprudence.

Arguing that Congress is not required to promulgate laws of general applicability, but may regulate privacy on a sector-by-sector basis, the United States invites the Court's attention to several laws purported to regulate personal information in specific commercial fields and the federal sector. *See* Pet. Br. at 40 nn.20, 21. These laws only prove the point that Congress has singled out the States for a burden it did not similarly impose on private actors or the federal government.

The Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, *codified at* 18 U.S.C. § 2710 ("VPPA"), prohibits the disclosure of "personally identifiable information." 18 U.S.C. § 2710(b)(1). "Personally identifiable information" is defined as "information which identifies a

[13] One author noted that the private sector in the United States is "virtually unregulated" for privacy, with the exception of the credit reporting industry, which is governed by the FCRA. COLIN J. BENNETT, IMPLEMENTING PRIVACY CODES OF PRACTICE 8, 42 (1995). Even that statute, however, has been interpreted to permit disclosure of personal information. *See supra* pages 18-19.



person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). The definition of the protected information, however, parallels that of the FCRA: names and addresses may be disclosed as long as not pre-sorted or otherwise linked to convey additional information (such as credit history or tapes rented, respectively). In addition to exempting names and addresses from the definition of protected information, the VPPA also expressly allows the disclosure of names and addresses, so long as they are not tied to the title, description, or subject matter of the video tapes. *Id.* § 2710(b)(2)(D). Moreover, there is an express exception under which such information, including the subject matter of video rentals, may be released to direct marketers. *Id.* § 2710(b)(2)(D)(ii). Thus, even the law upon which the DPPA purportedly was based apparently does not restrict disclosure of names and residential addresses alone, unlike the DPPA.

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2(c), 98 Stat. 2794, *codified at* 47 U.S.C. § 551(c) ("CCPA"), limits the disclosure by cable providers of "personally identifiable information" regarding cable subscribers. The statute notes that names and addresses of subscribers may be disclosed "to any cable service or other service" so long as the subscriber has the opportunity to prohibit or limit the disclosure and, like the similar VPPA provision, the disclosure does not reveal viewing or usage information. 47 U.S.C. § 551(c)(2)(C).

The Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, Tit. V, § 513, 88 Stat. 571, *codified at* 20 U.S.C. § 1232g ("FERPA"), prohibits the release of "educational records" by public and private educational institutions which receive funds from the federal government. 20 U.S.C. § 1232g(b). "Educational records" are defined as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* at § 1232g(a)(4)(A). But Congress specifically excluded from FERPA's nondisclosure provisions the student's name,

address, telephone listing, and date and place of birth, the type of information that the DPPA covers. *Compare* 20 U.S.C. § 1232g(a)(5) (defining "directory information" under FERPA) *with* 18 U.S.C. § 2725 (defining "personal information" under the DPPA). Moreover, Congress relied on its spending power for the FERPA; it did not *impose* the provision upon unwilling states.

As discussed *supra* page 18, unlike the DPPA, the FCRA has been construed by the FTC to permit disclosure of names and addresses.

The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. IX, 92 Stat. 3697, *codified at* 12 U.S.C. §§ 3401-22 ("RFPA"), prohibits financial institutions from disclosing to any agency or department of the United States, or to any federal agent, officer, or employee certain "financial records." 12 U.S.C. §§ 3401, 3402. There are numerous exceptions to the general prohibition on disclosure, mainly for law enforcement purposes, *see, e.g.*, 12 U.S.C. §§ 3402, 3404, 3405-08, 3413, 3414, and no provision prevents disclosure to private persons.

The Privacy Act of 1974, *codified at* 5 U.S.C. § 552a, applies only to the federal government itself. It does not purport to regulate individuals. Even within this scope of applicability, however, it does not function as written. "The enforcement, oversight, and scope of the Act are inadequate." George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U.L. REV. 521, 530 n.4 (1990) (citation omitted). Even on its face, the "Act is also riddled with broad exceptions that severely limit its usefulness." *Id.* Few of the laws self-imposed upon the federal government produce general compliance. For example, in 1990, the General Accounting Office reported that only 35% of federal databases containing personal data had been identified in the Federal Register as required. WAYNE MADSEN, HANDBOOK OF PERSONAL DATA PROTECTION 109 (1992). Of the computer systems engaged in "computer matching" of information, very few complied with federal regulations and procedures. *Id.*



The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Tit. I, § 102, 104 Stat. 331, *codified at* 42 U.S.C. §§ 12101-12213 ("ADA"), prohibits the release of a job applicant's medical information except to supervisors, first aid and safety personnel – if the applicant's disability may require emergency treatment – and government officials investigating ADA compliance. 42 U.S.C. § 12112(d)(3). It does not purport to restrict the dissemination of names and residential addresses alone.

The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, *codified at* 18 U.S.C. § 2511 ("ECPA"), is the federal wiretap statute. The United States cites subsection 2511(3) as providing protections analogous to the DPPA, but that subsection merely provides limitations on the disclosure of *the contents* of electronic communications[14] by the electronic communication service provider. There is no provision addressing personally identifying information of the type covered by the DPPA.

Similarly, the Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, § 9, 102 Stat. 652, *codified at* 29 U.S.C. § 2008 ("EPPA"), provides that a person "may not disclose information obtained during a polygraph test" except to the subject of the test, her employer, or a judicial body pursuant to a court order. The EPPA does not address personal information of the sort covered by the DPPA, but instead, is limited to the specific context of polygraphy and the information obtained during such a test.

The laws the United States cites differ from the DPPA in that they do not prohibit disclosure of names and addresses

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[14] " '[E]lectronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include – (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device . . . ; or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage of such funds." 18 U.S.C. § 2510(12).

alone. The DPPA attempts to prohibit the disclosure of the name, address, and telephone number of the subject of the record, while the FCRA, FERPA, VPPA, and CCPA allow disclosure of that same information. The ADA, EPPA, ECPA, and RFPA do not purport to regulate such information. The United States contends that different contexts require different approaches, but has failed to explain why, on the one hand, names, addresses, and Social Security numbers should be available from credit reporting agencies, but, on the other hand, dissemination of the same information from motor vehicle records is criminalized. Likewise, the United States fails to explain why names, addresses, and medical information linked to displayed registration numbers on vehicles should be available from the federal government but the same information cannot legally be obtained from the States.[15]

An analysis of the laws the United States cites reveals that they are not similar to the DPPA so that they could be considered individual "panels" in an aggregated "quilt" of federal privacy regulation. *See* Pet. Br. at 21. Rather, the DPPA is the stain that stands out on a quilt of an entirely different background color.

### C. Congress May Not Justify Burdens upon the States As the "First Step" in a Purported *Ad Hoc* Regulatory Scheme

When enacting laws which implicate State autonomy, Congress may not impose unique burdens upon States under the pretext that such regulation is merely the first step in

[15] Moreover, the statutes do not impose similar burdens upon the parties affected. The DPPA requires States to determine whether a particular request falls into the "may disclose," "may not disclose," or "must disclose" categories, and to act accordingly. Under the DPPA, the States may not, as the United States has asserted in the appellate courts, simply do nothing. The ECPA, EPPA, and ADA require the nondisclosure of information obtained in certain narrow circumstances, but they do not appear to call for any similar disclosure/nondisclosure determination by States.



developing a scheme of regulation that will apply more broadly. This Court has never upheld laws that target newspapers or the media or religion for a unique burden simply because the government claims it will eventually expand its regulation. Laws that burden constitutionally significant entities and activities must be examined as they are enacted, not as they might appear at some future date in the context of other hypothetical enactments. To permit otherwise eviscerates the distinction based upon laws of general applicability. The United States' citation to *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), is simply misguided. *See* Pet. Br. at 39. That case involved a challenge under the Equal Protection Clause, not a challenge based on the Tenth Amendment. The *Lee Optical* principle has not been applied in the context of regulation of constitutionally protected activities or entities, like religion, the press, or States. The United States' argument that *Lee Optical* permits Congress to experiment upon States before imposing regulations upon the private sector (or the federal government itself) turns the traditional view of federalism on its head. It is the States which serve as laboratories, experimenting with different approaches.[16] *See Garcia*, 469 U.S. at 546 (quoting *New State Ice Cream Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). When Congress purports to instruct all States what standard must be applied, experimentation is terminated.

The process protections of this Court's Tenth Amendment jurisprudence do not permit Congress to "experiment" by singling out States for a unique burden, but rather require Congress to regulate by means of laws of general applicability that only incidentally affect the States. Thus, at the very most, Congress may regulate broadly throughout the

[16] Moreover, the experimentation argument appears to be only a *post hoc* rationale for a law enacted as an eleventh-hour amendment to an omnibus bill comprising thirty-three different titles. The proposed DPPA generated no committee reports and the scant hearings were never published.

private and federal sectors, and then regulate the States.[17] After *Garcia,* States appear limited to process-based protections under the Tenth Amendment, rather than substantive review. If the process-based protection is removed by allowing States to be targeted for discriminatory burdens simply because another law may or may not address a similar substantive area, to a greater or lesser extent, now or in the uncertain future, the States are left with neither substantive nor process-based protection.[18] The Supreme Court's post-*Garcia* Tenth Amendment cases make clear that the Court recognizes that the Constitution imposes limitations on the Commerce Clause for the protection of States, even if the protection provided "is one of process rather than one of result." *Garcia,* 469 U.S. at 554. The United States' suggestion that the Court abandon process-based protections as well would eviscerate this Court's Tenth Amendment jurisprudence and leave States with no type of protection from congressional encroachment. For that reason, the United States' arguments must fail.

## III. Congress Could Have Passed a Different Law That Would Pass Constitutional Muster to Reach the Same Result

Instead of singling out the States in violation of the Tenth Amendment, Congress could have enacted its policy in ways that do not run afoul of the Constitution. Under existing law, Congress could have used its spending power to give additional funding to States that administer their records in accordance with federal policy. Such an exercise of Congress' spending power would, of course, have to comply with *South Dakota v. Dole*, 483 U.S. 203 (1987). But Congress did not do

[17] The Court need not, and should not, address that situation here, because, as shown *supra*, Congress has left many sectors unregulated. Thus, the factual predicate is not present in this case while other pending cases may require resolution of that hypothetical issue.

[18] Respondents and several other *amici* resolve this dilemma by calling for a revival of substantive protection of States.



that here. *See* Pet. App. 20a n.6. Alternatively, Congress could have preempted the field, taking over the entire process of licensing drivers and registering motor vehicles. *New York*, 505 U.S. at 167. But it did not do so here. Congress could have enacted a generally applicable law of personal information regulation that applied only incidentally to States and State records. *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 160. In framing such a general law, however, Congress would have to act more consistently than its current *ad hoc* regulation. Thus, to the extent Congress perceives some legitimate need to regulate the dissemination of names and residential addresses, Congress has the tools to do so. Those tools, however, protect State autonomy.

The United States suggests that the "court of appeals' rule is also difficult to square with this Court's preemption jurisprudence." Pet. Br. at 38. Congress did not, however, preempt the field in this case. The *amici* States do not contend that the Tenth Amendment bars congressional enactment of a national system of licensing and registration. Congress could even go so far as to occupy that entire field. The Supremacy Clause would then result in preemption of State laws. Instead, Congress purported to leave licensing and registration to States while telling States how to do so.

There are two problems with the United States' effort to characterize this case as one about routine preemption. Normal preemption does not require an express directive to States. There is a fundamental difference between requiring State judges to adhere to the Supremacy Clause and instructing State legislatures that they may not legislate (or commanding State executives that they must, or must not, act). *See Printz*, 521 U.S. at 928-29. Because valid federal law will be enforced by the judiciary without the need for statutory directives, the congressional command directed to the State legislature or executive is of no (or very little) legal effect. Consequently, few States would bother to challenge mere surplusage of language. The fact that States may not find it an effective use of resources to challenge federal legislation that has little practical impact, however, does not provide a basis for assuming that the States have no legal basis for such a

challenge when an egregious case arises. *Cf. Printz*, 521 U.S. at 906, 910-11, 917 (voluntary State cooperation is allowed). Thus, when federal legislation contains language directed to State legislatures and executives, it may reflect the imposition of a unique and heavy burden and States may appropriately challenge such facial targeting.

Moreover, only federal laws "made in pursuance" of the Constitution are the "supreme law of the land." U.S. Const. art. VI. Thus, the preemption approach itself raises the threshold issue of whether the DPPA violates the Constitution; it is not a basis for ignoring the serious flaws in the DPPA. *Alden v. Maine*, 119 S. Ct. 2240, 2255 (1999) (citing *Printz*, 521 U.S. at 924-25). The United States' argument to the contrary simply employs circular reasoning.

## CONCLUSION

The Court should affirm the judgment.

Respectfully submitted,

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