

NOTES

WIDENING THE LANE: AN ARGUMENT FOR BROADER INTERPRETATION OF PERMISSIBLE USES UNDER THE DRIVER'S PRIVACY PROTECTION ACT

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The Driver's Privacy Protection Act of 1994 (DPPA) was passed as part of an omnibus crime bill to protect the privacy of individuals from the violent stalking crimes that had been perpetrated through access to the automated records of state departments of motor vehicles. Congress generally prohibited the release of personal information contained in the records. However, Congress also recognized that the general prohibition needed to contain certain limits to allow for the legitimate needs of business and government to have access to the personal information. In order to accomplish this balance of interests, Congress included in the statute various permissible uses that accounted for a wide range of legitimate disclosures.

This Note argues that the recent judicial interpretations of the DPPA by the Supreme Court and the Seventh Circuit have improperly limited the scope of permissible uses. The imposition of reasonableness limitations on disclosure, and the judicial analysis of disclosure to determine the exclusive predominant purpose, were novel judicial interpretations of a longstanding and established statute. Courts' narrow interpretations of the permissible uses of the DPPA are contrary to the text of the statute and do not advance the statute's central goals. The courts' approaches are also likely to have significant practical effect contrary to general policy aims. Such changes are better considered by Congress than in the courts.

Part I of this Note details the origins of the DPPA and identifies the congressional intent underlying the text of the statute. Part II provides a

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brief history of the constitutional challenges to the DPPA and notes the past treatment of the statute's permissible uses in various circuits. Parts III and IV give a detailed account of two recent court cases that have imposed new limits on permissible uses of personal information. Part V argues against these interpretations and explores their likely practical implications. The argument highlights the plain language of the statute and its relationship with the Act's legislative history and purpose, while remarking on the implications of civil liability, the role of the rule of lenity, and the need to ensure proper notice of violations falling under the statute. The Note concludes that if new constraints are to be placed onto the scope of permissible uses under the DPPA, the limitations should arise from congressional action and should not be imposed through judicial usurpation of the lawmaking role.

I. THE DRIVER'S PRIVACY PROTECTION ACT OF 1994

The Driver's Privacy Protection Act of 1994 regulates the disclosure of personal information found within the records of state departments of motor vehicle (DMV).¹ With a stated purpose "to protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government,"² the Act is a general prohibition on knowingly disclosing, obtaining, and using personal information or highly restricted personal information from a motor vehicle record.³ The Act's sponsors sought to respond to the violence connected to incidents of stalking in which the perpetrator obtained the victim's address through DMV records.⁴ In one high-profile incident, television actress Rebecca Schaeffer was shot and killed outside of her apartment by a man who had obtained the address of her private residence by hiring a private investigator who purchased the information from the California DMV.⁵ At the time of the Act's introduction to Congress, there were thirty-four states that allowed any member of the public to go to a DMV office and pay a fee to obtain the personal information of any individual.⁶ Many of these states also allowed for the mass sale of personal information to direct marketers.⁷ Throughout congressional debate over the bill, members of Congress highlighted the need for the Act by describing

1 Driver's Privacy Protection Act, 18 U.S.C. §§ 2721–25 (2012).

2 139 CONG. REC. 29,465 (1993).

3 18 U.S.C. §§ 2721(a), 2724. Personal information includes "an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information." 18 U.S.C. § 2725(3). "[H]ighly restricted personal information" includes "an individual's photograph or image, social security number, medical or disability information." 18 U.S.C. § 2725(4).

4 See 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran) (listing several incidents of violence perpetuated through the release and use of DMV records); see also 139 CONG. REC. 29,466 (1993) (statement of Sen. Boxer) (same).

5 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

6 140 CONG. REC. 7924 (1994) (statement of Rep. Moran).

7 See 139 CONG. REC. 29,468 (1993) (statement of Sen. Boxer).

numerous incidents of violence that had been accomplished through the use of DMV records.⁸ The focus of the bill could not have been summarized more clearly than when Representative Goss stated: “[T]he intent of [the] bill is simple and straightforward: We want to stop stalkers from obtaining the name[s] and address[es] of their prey before another tragedy occurs.”⁹

Although the Act protected the privacy of certain personal information, its sponsors stressed that it was “essential” for the government to “[b]alanc[e] the interests of public disclosure with an individual’s right to privacy.”¹⁰ Congress was careful to account for the legitimate needs for the use and disclosure of the personal information in certain cases. Congress recognized several instances that could give rise to the necessity to disclose or use the protected personal information that would not give rise to the privacy concerns that were the target of the bill. The language of the Act takes these legitimate needs into account by statutorily recognizing several “permissible uses” that are not subject to the general prohibition on disclosure and use.¹¹ As the floor debate over the DPPA indicated, members of Congress saw the permissible uses as a means to “strike[] a critical balance between the legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety.”¹² The fourteen permissible uses allow for disclosure for use by government agencies,¹³ for legitimate business reasons,¹⁴ in connection with legal proceedings (including “service of process”),¹⁵ with express consent,¹⁶ and for solicitation with consent.¹⁷ The

8 See 139 CONG. REC. 29,469 (1993) (statement of Sen. Robb) (listing incidents of a case in Virginia where a woman received antiabortion literature and black balloons at her home after her license plate number had been taken outside a health clinic that performed abortions, and also noting a situation in Georgia where an obsessive fan acquired the address of a model and assaulted her at her home); 139 CONG. REC. 29,466 (1993) (statement of Sen. Boxer) (noting a California man who copied down license plate numbers to obtain the home address of five young women and then sent each woman threatening letters); 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran) (stating that a group of teenagers in Iowa used license plates of expensive cars to get information on potential burglary targets).

9 140 CONG. REC. 7929 (1994) (statement of Rep. Goss).

10 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

11 18 U.S.C. § 2721(b) (2012).

12 139 CONG. REC. 29,468 (1993) (statement of Sen. Boxer) (describing the exceptions allowed under the Act so as not to impede the operation of business and government functions); see 140 CONG. REC. 7925 (1994) (statement of Rep. Moran) (assuring that the Act would allow for the continued access to the information by “insurance companies, law enforcement professionals, attorneys, and all other authorized users”).

13 18 U.S.C. § 2721(b)(1) (“For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.”).

14 *Id.* § 2721(b)(3) (“For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—(A) to verify the accuracy of personal information submitted . . . and (B) if such information as so submitted is not correct . . . to obtain the correct information . . .”).

15 *Id.* § 2721(b)(4) (“For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regula-

statute also permits uses concerning vehicle safety,¹⁸ the operation of towing and toll roads,¹⁹ insurance activities,²⁰ and private investigation.²¹

In an effort to enforce the DPPA, Congress included two penalties that may be imposed upon violation of the Act and a civil cause of action for those whose information is wrongfully disclosed. Any “person who knowingly violates” the statute is subject to a criminal fine and any state DMV that is in “substantial noncompliance” with the statute is subject to a civil penalty of up to \$5,000 per day.²² Additionally, “[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted . . . shall be liable to the individual to whom the information pertains.”²³ That individual may then bring a civil action in federal court to recover actual damages with a liquidated value not less than \$2,500, punitive damages, reasonable attorneys’ fees, and “such other preliminary and equitable relief” as found appropriate by the court.²⁴

II. CONSTITUTIONAL CHALLENGES TO THE DPPA

After becoming law in 1994, the Act gave rise to several constitutional challenges as to the validity of Congress’s powers to impose such a measure upon the states.²⁵ Different states and private actors argued for the courts to overturn the Act under the Commerce Clause and the Tenth, Eleventh, and

tory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.”).

16 *Id.* § 2721(b)(11) (“For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.”).

17 *Id.* § 2721(b)(12) (“For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.”).

18 *Id.* § 2721(b)(2) (“For use in connection with matters of motor vehicle or driver safety and theft . . .”).

19 *Id.* § 2721(b)(7) (“For use in providing notice to the owners of towed or impounded vehicles.”); *id.* § 2721(b)(10) (“For use in connection with the operation of private toll transportation facilities.”).

20 *Id.* § 2721(b)(6) (“For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.”); *id.* § 2721(b)(9) (“For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver’s license . . .”).

21 *Id.* § 2721(b)(8) (“For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.”).

22 *Id.* § 2723(a)–(b).

23 *Id.* § 2724(a).

24 *Id.* § 2724(b).

25 *See generally A Survey of Federal Cases Involving the Constitutionality of the Driver’s Privacy Protection Act*, 8 B.U. PUB. INT. L.J. 555 (1999) (listing cases with contradictory outcomes within the Fourth Circuit, Seventh Circuit, Tenth Circuit, and the Middle District of Alabama).

Fourteenth Amendments.²⁶ The matter was eventually settled when the Supreme Court held the Act constitutional in *Reno v. Condon*.²⁷ The Court held that the information regulated by the DPPA is an item of interstate commerce that is sold or released within the interstate stream and is “therefore a proper subject of congressional regulation.”²⁸ Additionally, the Court held that the DPPA does not violate principles of federalism because the Act does not require the states to regulate in a specific manner, but rather regulates the states themselves as participants in the market for data information.²⁹ Until 2012, *Reno v. Condon* was the singular case in which the Supreme Court heard a controversy on an issue centrally involving the DPPA.³⁰

After the Court upheld the constitutionality of the DPPA, there were several instances of lower court litigation as to the scope and applicability of the permissible uses under the Act. The district and circuit courts have applied the fourteen named permissible uses in a traditionally broad manner, with an eye towards allowing the justifiable operation of legitimate business and other needs for the protected information.³¹ The broad approach to judicial enforcement continued to be the norm for nearly a decade after the Supreme Court’s consideration of the Act in *Reno*, and for almost twenty years after the passage of the Act, until two court cases unexpectedly and significantly changed the treatment of use and disclosure of personal information under the DPPA.

III. SENNE V. VILLAGE OF PALATINE, ILLINOIS: A REASONABLE DISCLOSURE LIMITATION

On August 20, 2010, Jason Senne parked his vehicle on a public roadway in violation of the Village of Palatine’s ordinance imposing an overnight parking ban.³² During the night, a Palatine police officer cited the vehicle for violating the ordinance and placed the parking citation under a windshield wiper on the front of the vehicle.³³ The citation had been on the windshield, open to public access, for approximately five hours when Mr. Senne discovered it.³⁴ The ticket, which had been electronically printed on a form, included the date, time, parking offense, and officer information. The ticket also included the “make, model, color, year, license number and vehicle identification number” of Mr. Senne’s vehicle, as well as personal data about Mr. Senne himself including his “full name, address, driver’s license

26 *Id.*; see also William J. Watkins, Jr., Note, *The Driver’s Privacy Protection Act: Congress Makes a Wrong Turn*, 49 S.C. L. REV. 983 (1998).

27 528 U.S. 141 (2000).

28 *Id.* at 148 (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

29 *Id.* at 151.

30 Katherine Hutchison, *That’s the Ticket: Arguing for a Narrower Interpretation of the Exceptions Clause in the Driver’s Privacy Protection Act*, 7 SEVENTH CIR. REV. 126, 151 (2012).

31 See *infra* note 133 and accompanying text.

32 *Senne v. Vill. of Palatine*, 695 F.3d 597, 599–600 (7th Cir. 2012) (en banc).

33 *Id.* at 600.

34 *Id.*

number, date of birth, sex, height and weight.”³⁵ The information that had been automatically filled into the form was obtained from the automated motor vehicle records maintained by the Illinois Secretary of State.³⁶ The citation was also created in such a way so as to allow the ticket to act as an envelope for the recipient to mail the fine to the Village. The personal information that had been included on the citation would be viewable on the outside of the envelope if the payment was mailed. The citation also included instructions concerning the manners in which payment could be made and the ability to request a hearing to contest the ticket.³⁷

After receiving the citation, Mr. Senne brought action in the district court, on behalf of himself and a putative class, claiming that the information contained in the citation was private information and, as such, was disclosed in violation of the requirements of the DPPA.³⁸ In defense, the Village of Palatine filed for dismissal for the plaintiff’s failure to state a claim on the ground that the citation was a permissible disclosure of personal information under three of the permissible uses listed in § 2721(b)—if it was a disclosure at all.³⁹ The district court dismissed the case, holding that the citation did not even constitute disclosure because the information had not been turned over to someone else.⁴⁰ Additionally, the court held that even if the citation constituted a disclosure, § 2721(b)(1), which permits use by a law enforcement agency, legitimized this disclosure in the circumstances.⁴¹ Mr. Senne appealed to the Seventh Circuit.⁴²

The appeals court affirmed the district court’s decision to dismiss Mr. Senne’s action for failure to state a claim.⁴³ Though disagreeing with the lower court that no disclosure had been made,⁴⁴ Judge Flaum, writing for the majority, concluded that, under § 2721(b)(4), disclosure of information on the parking citation was permissible due to its role as service of legal pro-

35 *Id.*

36 *Senne v. Vill. of Palatine*, 645 F.3d 919, 921 (7th Cir. 2011), *rev’d en banc*, 695 F.3d 597 (7th Cir. 2012).

37 *Senne*, 695 F.3d at 600.

38 *Id.*

39 *Id.* The Village asserted permissible disclosure under sections (b)(1) use by a government agency in carrying out its functions, (b)(2) “use in connection with matters of motor vehicle” safety, and (b)(4) “use in connection with any civil . . . proceeding . . . including the service of process.” 18 U.S.C. § 2721(b) (2012).

40 *Senne*, 695 F.3d at 600–01.

41 *Id.* at 601.

42 *Id.* at 599.

43 *Senne v. Vill. of Palatine*, 645 F.3d 919, 921 (7th Cir. 2011), *rev’d en banc*, 695 F.3d 597 (7th Cir. 2012).

44 *See id.* The court held that by common definition, to disclose means to “expos[e] [the information] to view” or “hand[] it over to someone” and that the placing of the citation on a windshield open to public viewing constituted disclosure under the DPPA. *Id.* at 922. The court stated that this also satisfied the mens rea element of *knowing* disclosure under the act, as the “disclosure was done voluntarily and purposely.” *Id.* at 923.

cess.⁴⁵ Recognizing Mr. Senne’s argument that the extent of the information provided on the citation may be more than necessary for service of process, Judge Flaum focused on the express language of the DPPA statute, simply saying that “[t]he statute does not ask whether the service of process reveals no more information than necessary.”⁴⁶ The opinion went on to assert that though the relevant parts of the DPPA may be “marked by inartful drafting . . . that does not make it ambiguous.”⁴⁷ The opinion stated that the court’s interpretation of the DPPA is a product of analysis of the purpose of Congress in enacting the legislation. The best place to look for evidence of congressional intent, Judge Flaum asserted, is in the plain language of the statute and the language must be analyzed in relation to the “context of the statutory scheme in which [it] appear[s].”⁴⁸

In a quite contradictory view, Judge Ripple dissented from the majority’s interpretation of the DPPA and asserted that the permissible uses should be read in light of the “[c]ongressional judgment” instead of merely the plain language.⁴⁹ Judge Ripple asserted that the Village of Palatine violated the DPPA through “excessive disclosure,” as there was no need to disclose the amount of personal information that had appeared on the citation.⁵⁰ Although he agreed that a permissible use could be applicable to these circumstances, he reasoned that the different permissible disclosures should be interpreted in light of Congress’s goal in passing the DPPA, which was “to balance individual privacy/security needs and the legitimate operational and administrative needs of the government.”⁵¹ He argued that the permissible uses are not there to provide wide loopholes to the privacy concerns but rather to permit legitimate functions to proceed by only allowing disclosure of information *reasonably related* to the government functions asserted.⁵² In conclusion, the dissent noted the extent to which the majority’s decision could lead to “horrendous crimes of violence” in communities where the police departments do not voluntarily take measures to limit the amount of information available on parking tickets.⁵³ Judge Ripple concluded that

45 *Id.* at 924; *see* 625 ILL. COMP. STAT. ANN. 5/11-208.3(b)(3) (West 2013); COOK COUNTY, ILL., VILLAGE OF PALATINE CODE OF ORDINANCES ch. 2, art. XXX, § 2-707(b)(3) (2012). The Illinois statute and the Village of Palatine authorize municipalities to serve process for parking violations by affixing the notice to the vehicle.

46 *Senne*, 645 F.3d at 924.

47 *Id.* (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)).

48 *Id.* at 922 (citing *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004)).

49 *Id.* at 925 (Ripple, J., concurring in part and dissenting in part).

50 *Id.* at 926 (emphasis omitted).

51 *Id.*

52 *Id.* Judge Ripple relied on support from a statement by Senator Harkin noting that agencies are to “‘*reasonably determine*’” the need for disclosure, which Judge Ripple saw as an indication that the standard of reasonableness should be extended beyond the instance of disclosure to the extent of the information disclosed. *See id.* at 926 n.2 (citing 139 CONG. REC. S15,962 (daily ed. Nov. 7, 1993) (statement of Sen. Harkin) (emphasis added)).

53 *Id.* at 928.

such an interpretation is contrary to Congress's intent to limit criminal activity that would be aided through disclosure of DPPA-protected information.⁵⁴

Judge Ripple's dissent encouraging the imposition of a reasonableness standard onto the scope of the DPPA permissible uses was to become the basis for a new controlling interpretation when the majority's opinion was vacated with the granting of a rehearing en banc for Mr. Senne's claim.⁵⁵ The Seventh Circuit, with a seven to four majority, held that the permissible uses of the DPPA were limited in scope to information that was actually used for the purpose set forth in the permissible use clause.⁵⁶ Judge Ripple, in writing for the majority, reasserted the importance that he believed should be placed on the overall statutory scheme and the goal of the bill as a "public safety measure."⁵⁷ However, he redefined his approach to an argument for limited permissible uses by focusing additionally on the need to "give meaning to every word of the statute," thereby stressing the importance of the phrase "for use" as a constraint on the scope of a permissible use.⁵⁸ The argument posited by the court was that the phrase "for use" imposes a limiting principle on the section so that a legitimate disclosure of the information is allowable, but only to the extent required "in effecting a particular purpose."⁵⁹ The opinion does caveat this holding, however, by stating in a footnote that it is not reading "use" to be equivalent to "necessary use."⁶⁰ It appears that this approach ultimately provides for an outcome equivalent to the reasonableness standard asserted in Judge Ripple's previous dissent as the majority opinion stated that the permissible uses provide latitude in disclosure only to the extent that it is done within the purpose of the statute—i.e., the information is "used in effectuating" the purpose.⁶¹

Authoring the joint dissent, Judge Flaum reaffirmed his opinion that he had set forth in the initial Seventh Circuit hearing of the case. The dissent took strong opposition to the majority by expressly stating that "[n]either the text nor the legislative history conveys Congress's intent to limit the information that may be disclosed in connection with a particular [permissible use]."⁶² Positing that the best way to gain evidence of legislative intent is by looking to the plain language of the statute, Judge Flaum looked to the

54 *Id.*

55 *Senne v. Vill. of Palatine*, 695 F.3d 597 (7th Cir. 2012) (en banc).

56 *Id.* at 606 ("[T]he disclosure as it existed in fact—must be information that is *used* for the identified purpose.").

57 *Id.* at 605, 607.

58 *Id.* at 605. Relevant to this case, the opinion focuses on the exceptions under 18 U.S.C. § 2721(b)(1) "[f]or use by any . . . law enforcement agency[] in carrying out its functions" and § 2721(b)(4) "[f]or use in connection with any civil . . . proceeding . . . including the service of process." (emphasis added).

59 *Id.* at 606.

60 *Id.* at 606 n.12.

61 *See id.* at 608 (citing congressional statements of the various purposes of the DPPA and the need for logical relation between exceptions and the original aims in passing the statute).

62 *Id.* at 612 (Flaum, J., dissenting).

whole of the DPPA and found no indication that disclosure should be limited to “no more information than necessary.”⁶³ The parking ticket provided service of legal process and was therefore a permissible use allowing for disclosure under § 2721(b)(4). Additionally, the dissent argued that the majority’s interpretation of the words “for use” was incorrect, and that the phrase merely denotes that disclosure is allowable if it is used for one of the purposes (i.e., printed on a citation ticket).⁶⁴ Congress did not include a qualifier onto the permissible disclosures and therefore it is not the role of the courts to do so.⁶⁵ Though recognizing that its approach may be “over-or under-inclusive at times,” the dissent argued that the majority’s approach provides no guidance for judging the majority’s limitation.⁶⁶ Finally, the dissenters stated that any hypothetical dangers that could be imagined as arising from this type of disclosure were not the dangers that Congress aimed to prevent with the statute. Rather, Congress enacted the DPPA as a direct response to stalking concerns and preventing the disclosure of personal information “upon request” from DMV records.⁶⁷

Though he joined Judge Flaum’s dissent, Judge Posner added an individual dissent, which highlighted additional reasons against the restriction of disclosure to the majority’s reasonableness standard. After generally agreeing with the joint dissent’s literal reading analysis of permissible use,⁶⁸ Judge Posner stressed the need for an in-depth recognition of the practical implications of the majority’s decision on the potential liability to which municipalities would now be exposed.⁶⁹ He argued that the statute does not provide notice that the information disclosed under a permissible use should be limited to that which the majority asserts. Due to the civil suit provision of the statute, Judge Posner stated that “every police department in the Seventh Circuit that has [issued similar citations] . . . faces, as a result of today’s decision, liability” of not less than \$2,500 per citation issued.⁷⁰ The Village of Palatine alone would face “a potential liability of some \$80 million in liquidated damages.”⁷¹ He concluded that the majority’s choice to not consider the potential liability was a large oversight as the court should not make a decision without considering the consequences.⁷²

Ultimately, the back-and-forth debate about the correct interpretation and application of the (b)(4) permissible use in this case will not be heard or debated by the Supreme Court in the foreseeable future, as the Supreme

63 *Id.* at 613.

64 *Id.*

65 *Id.* at 614.

66 *Id.* at 615.

67 *See id.* at 614 (emphasis omitted) (listing some of the instances of violence cited in the congressional record and Congress’s desire to disallow criminals to obtain the information of potential victims by request).

68 *Id.* at 610 (Posner, J., dissenting).

69 *See id.* at 611.

70 *Id.*

71 *Id.*

72 *Id.* at 612.

Court opted to deny the Village of Palatine's petition for a writ of certiorari.⁷³ This denial to hear a controversial issue that has divided judges within a circuit may have been a result of Palatine's anticipated narrowed argument upon appeal,⁷⁴ which centered around a challenge to the constitutionality of the Act under the Commerce Clause rather than a claim of appeal to overturn the Seventh Circuit's novel limitations on permissible uses.⁷⁵ It is also possible that the denial of writ was due to the Court's recent consideration of the DPPA statute in *Maracich v. Spears*.⁷⁶

IV. MARACICH V. SPEARS—ASSESSING PERMISSIBLE USE DISCLOSURES FOR PREDOMINANT PURPOSE

In 2006, people complaining that local car dealerships were conducting business using unfair practices contacted a group of South Carolina attorneys, including Michael E. Spears. These complaints were eventually combined into class action lawsuits that were asserted under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the Dealers Act).⁷⁷ As the attorneys began to prepare for the cases, they made a Freedom of Information Act (FOIA) request to the South Carolina DMV to release the name, address, and telephone number of the buyer of the vehicle, the dealership where it was purchased, the type of vehicle purchased, and the date of purchase for all of the private vehicle purchases during the week of May 1–7, 2006 in Spartanburg County.⁷⁸ The attorneys asserted that the information was being sought, and should be released, pursuant to the DPPA's recognized permissible use for disclosure "in anticipation of litigation."⁷⁹ The FOIA request stated that the disclosure request was an attempt to determine if the unfair practices were common practice among the local automobile dealers.⁸⁰ Consenting that the request fell under the clause (b)(4)'s permissible use, the South Carolina DMV provided the requested information.⁸¹ Approximately one month later, the attorneys made another FOIA request for the same information on vehicle purchases made in five other South Carolina counties during that time period.⁸² The attorneys

73 *Vill. of Palatine v. Senne*, 133 S. Ct. 2850 (2013) (denying writ of certiorari).

74 *See Senne*, 695 F.3d at 620 (discussing on motion for stay of mandate the possible arguments that the Village would assert upon grant of the writ).

75 As noted in Part II, the constitutionality of the DPPA, including under the Commerce Clause, was decided in *Reno v. Condon*, 528 U.S. 141 (2000).

76 133 S. Ct. 2191 (2013).

77 S.C. CODE ANN. § 56–15–110 (West 2013); *Maracich v. Spears*, 675 F.3d 281, 283 (4th Cir. 2012).

78 *Maracich*, 675 F.3d at 284.

79 *Id.* at 283–84; *see also* 18 U.S.C. § 2721(b)(4) (2012) (allowing disclosure of information "[f]or use in connection with any civil, criminal . . . proceeding in any . . . court or agency or before any self-regulatory body, including . . . investigation in anticipation of litigation, and the execution or enforcement of judgments and orders. . . ." (emphasis added)).

80 *Maracich*, 675 F.3d at 284.

81 *Id.*

82 *Id.* at 284–85.

again invoked the permissible use for litigation and the DMV provided the information.⁸³ After placing the requests, the lawyers filed their case in state court representing four specific clients and “for the benefit of all others” as allowed under the Dealers Act.⁸⁴ Included in the suit were fifty-one different area automobile dealers, many who quickly moved to dismiss because they had not sold cars to the named plaintiffs.⁸⁵ With these motions in mind, the attorneys made three additional FOIA requests to the DMV, broadening the request to include the information for people who bought cars from local dealerships ranging over the months of May to December 2006.⁸⁶ The request was made in anticipation of the state court’s ultimate holding that the Dealers Act suit would only have standing against defendants with whom named plaintiffs had engaged in transactions.⁸⁷

After obtaining the information from the DMV, the attorneys mailed letters to the people who were identified as having purchased a car during the specified time.⁸⁸ The letter contained a statement to the effect that the attorneys represented a group of people in a pending lawsuit concerning dealership practices of charging additional fees and that they believed those dealerships were violating state law.⁸⁹ The letter went on to state that the person was receiving the letter because a FOIA request to the DMV revealed that they may have recently bought a car.⁹⁰ After stating that legal situations are dependent on person-specific facts, the letter recipient was given “the opportunity [to] discuss [their] rights and options” through free consultation by sending in the included postcard.⁹¹ The reply postcard contained questions about contact information for the recipient and information about his or her car purchase.⁹² It also contained an affirmative statement that the recipient who returned a signed card was “interested in participating” in the litigation.⁹³ The letters that were mailed sought to comply with the solicitation requirements under the South Carolina Rules of Professional Conduct by including the subheading of “ADVERTISING MATERIAL” and general language informing recipients of their rights and positions.⁹⁴ As a result of these mailings, the attorneys sought to amend their present complaint to add an additional two hundred and forty-seven plaintiffs who had responded to the letters.⁹⁵ Though the court denied leave to amend, the lawyers filed two

83 *Id.* at 285.

84 *Id.* at 285 (citation omitted).

85 *Id.*

86 *Id.* at 285–86.

87 *Id.* at 287.

88 *Id.* at 285–287. Mailings were sent to over 34,000 car purchasers in total. *Maracich v. Spears*, 133 S. Ct. 2191, 2197 (2013).

89 *Maracich*, 675 F.3d at 285.

90 *Id.* at 285–86.

91 *Id.* at 286.

92 *Maracich*, 133 S. Ct. at 2197.

93 *Id.*

94 *Maracich*, 675 F.3d at 285–86; *see also* S.C. Rules of Prof'l Conduct 7.3(d) (2013).

95 *Maracich*, 133 S. Ct. at 2197.

new lawsuits on behalf of the new clients and ultimately the cases were consolidated with the original suit.⁹⁶ The resulting suit dropped claims against all defendant dealerships that did not have “a corresponding plaintiff-purchaser.”⁹⁷

Mr. Maracich was one of the recipients of the letters whose personal information had been acquired through the requests to the South Carolina DMV.⁹⁸ Interestingly, though his information was gained because he had purchased a car, he was also a Director of Sales and Marketing at an involved defendant dealership.⁹⁹ He, along with a group of other buyers, filed a putative class action in district court against the group of lawyers who had filed the Dealers Act claims, alleging that the disclosure and use of the personal information had violated the DPPA because it did not fall under any permissible use.¹⁰⁰ The group of buyers sought damages of the statutory minimum \$2,500 per involved individual, along with punitive damages, fees, and other awards.¹⁰¹ The defendant-attorneys responded by moving to dismiss the complaint because the information obtained from the DMV fell under two permissible uses of the DPPA¹⁰²—the anticipation of litigation permissible use¹⁰³ and the use by a government agency permissible use.¹⁰⁴

After much back and forth between the group of attorneys and the plaintiff-letter recipients, the district court ultimately held that the lawyers’ “acquisition and use of [the] personal information” fell within both the “investigation in anticipation of litigation” permitted use, due to the personal information being acquired after the commencement of the Dealers Act suits, and the state action permitted use, because the attorneys’ role in the Dealers Act suits were “adequately analogous to that of a state attorney general.”¹⁰⁵ Additionally, the district court held that the letters were not solicitations as described in another DPPA permissible use because the attorneys had a representative relationship to all the consumers who could be implicated in the Dealers Act suits.¹⁰⁶

96 *Id.*

97 *Id.*

98 *Maracich*, 675 F.3d at 287.

99 *Id.*

100 *Id.* at 288.

101 *Id.* at 287.

102 *Id.* at 288–89.

103 18 U.S.C. § 2721(b)(4) (2012) (allowing for permissible use of DMV information “[f]or use in connection with any civil . . . proceeding in any . . . court or agency . . . including . . . investigation in anticipation of litigation”).

104 *Id.* § 2721(b)(1) (allowing for permissible use of DMV information “[f]or use by any government agency . . . in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions”). This argument was asserted on the basis that the Dealers Act suits were “for the benefit of all” under South Carolina law. *See* S.C. CODE ANN. § 56-15-110 (West 2013).

105 *Maracich*, 675 F.3d at 290–91.

106 *Id.* at 292.

Upon the letter recipients' appeal, the Fourth Circuit affirmed the district court's holding. The court held that the defendant-attorneys' acquisition and use of the personal information was permissible under the DPPA use for litigation.¹⁰⁷ However, it also stated that the letters could be deemed solicitation, but "the solicitation was integral to, and inextricably intertwined with, conduct clearly permitted" under the permissible use.¹⁰⁸ The court reasoned that the attorneys' compliance with the solicitation regulations under South Carolina's Code of Professional Conduct was not dispositive of the classification that the letters should be treated under the clause (b)(12)'s permissible use, which requires express consent of the person whose information is used.¹⁰⁹ Because the use of the information was also employed fully in accordance with the litigation clause, the attorneys' actions were not violations of the DPPA. Citing caselaw from the Eleventh Circuit, the court agreed that the fact that the solicitation was present did not alter the "scope or meaning of the separate and independent" permissible use that would be otherwise applicable (i.e., action taken in anticipation of litigation).¹¹⁰ Further, the court held that, in these types of cases, "solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal."¹¹¹

Once reaching the Supreme Court, however, the controversy of *Maracich* was decided under a much different understanding. The Court held that "[i]n light of the text, structure, and purpose of the DPPA," the attorneys' use of personal information was not permissible under the Act because the predominant purpose was solicitation and solicitation "is not a permissible purpose covered by the (b)(4) litigation [permissible use]."¹¹² The Court reached this decision by analyzing the phrases "in connection with" and "investigation in anticipation of litigation" that are found within clause (b)(4). Wary of interpreting the exception too broadly, and therefore contravening the purpose that Congress had in enacting the statute, the Court stated that the permissible use "must have a limit" and that the "logical and necessary conclusion" is that solicitation of new clients is not within that limit.¹¹³ The Court saw the act of solicitation as a distinct form of conduct that was separate from actions "in connection with" litigation because there is a large difference between the commercial role of solicitation and an attorney's role as an officer of the court.¹¹⁴ The Court also depended on the argument that words take meaning from those around it and that the exam-

107 *Id.* at 291.

108 *Id.*

109 *Id.* at 293; *see also* 18 U.S.C. § 2721(b)(12).

110 *Maracich*, 675 F.3d at 295 (quoting *Rine v. Imagitas*, 590 F.3d 1215, 1226 (11th Cir. 2009) (internal quotation marks omitted)).

111 *Id.* at 299.

112 *Maracich v. Spears*, 133 S. Ct. 2191, 2196 (2013).

113 *Id.* at 2200.

114 *Id.* at 2201 (noting that "solicitation by a lawyer of remunerative employment is a business transaction" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (internal quotation marks omitted))).

ples provided within the statute under the litigation clause show the intended breadth. The indicated breadth would, the Court argued, not logically include solicitation, which was otherwise provided for under clause (b) (12).¹¹⁵ The Court asserted: “[I]nvestigation in anticipation of litigation is best understood to allow background research to determine whether there is a supportable theory for a complaint, a theory sufficient to avoid sanctions for filing a frivolous lawsuit, or to locate witnesses for deposition or trial testimony.”¹¹⁶

In a more policy-centered argument, the Court stated that if the litigation permissible use was to stretch in scope to include the solicitation of clients, the conclusion would need “language more clear and explicit” from Congress.¹¹⁷ This argument was extended to make the point that Congress exhibited its awareness of privacy concerns with solicitation practices by including a specific provision that expressly accounted for the circumstances where solicitation is permissible.¹¹⁸ The Court’s parallel to other provisions of the statute showed the majority’s emphasis on construing each individual permissible use as a part of the DPPA context as a whole instead of treating each provision independently. The Court explicitly stated that “other [permissible uses] should not be construed to interfere with [the whole] statutory mechanism unless the text commands it.”¹¹⁹ A broad interpretation of “in connection with,” the Court argued, would lead to redundancy within the statute and would frustrate the Act’s formation.¹²⁰ Additionally, the Court noted that attorneys needing to find plaintiffs for a class action have alternatives that would not violate the DPPA’s protection of privacy such as getting a court order or limiting solicitation to those who had given express consent to the DMV for their information to be released.¹²¹ Finally, anticipating an argument against the holding due to the imposition of excessive civil liability, the Court held that the rule of lenity did not apply, because it saw the text and structure as unambiguous and certain.¹²²

In dissent, Justices Ginsburg, Scalia, Sotomayor, and Kagan argued that the limited scope attributed by the majority to the permissible uses does not follow from what Congress intended in enacting the DPPA.¹²³ The dissenters highlighted the purposes stated in congressional remarks as the DPPA was passed to close a “loophole” that allows access to personal information

115 *Id.* at 2201–02 (explaining that all of the uses given as examples in § 2721(b)(4) “involve an attorney’s conduct when acting in the capacity as an officer of the court, not as a commercial actor”).

116 *Id.* at 2202 (internal quotation marks omitted).

117 *Id.*

118 *See* 18 U.S.C. § 2721(b)(12) (2012) (allowing solicitation only with express consent by the person whose information is disclosed).

119 *Maracich*, 133 S. Ct. at 2204.

120 *Id.* at 2205.

121 *Id.* at 2207.

122 *Id.* at 2209.

123 *Id.* at 2216 (Ginsburg, J., dissenting).

without a legitimate purpose.¹²⁴ Here, the dissent asserted, the legitimate purpose was to gain information on prospective plaintiffs, which were necessary to the Dealers Act charges,¹²⁵ and therefore was effective in serving an investigative purpose. This point allowed the current case to fall within the plain language of clause (b)(4)'s permissible use in the dissenters' eyes.¹²⁶ To further their broader interpretation of permissible use, the Justices noted the frequent use of the word "any" within the statutory provisions and the fact that Congress did not place express limits onto the litigation of permissible use.¹²⁷ The best interpretation was therefore that clause (b)(4) is limited to those matters "tied to a concrete, particular proceeding."¹²⁸ The dissenters then stated that the "clear language" interpretation of "in anticipation of litigation" included "an actual claim or a potential claim following an actual event . . . that reasonably could result in litigation."¹²⁹ Further, the dissent asserted that the majority's approach to having the DPPA permissible uses interplaying with each other would lead to tension within the statute and would cloud the uses that would otherwise be permissible.¹³⁰ Finally, the dissent posited that the rule of lenity requires the court to determine any ambiguity in the statute to be interpreted in favor of the attorneys¹³¹ and that the "novel interpretation" of the majority should not be applied as there was no fair warning of the limited nature that the Court would impose.¹³²

V. ARGUING FOR BROADER INTERPRETATION

This Note argues that the decisions in *Senne* and *Maracich*, which interpret the permissible uses as having a narrow and limited construction, are improper restraints on permissible disclosures and uses under the DPPA. The courts instead should give credence to the interpretative approaches set forth in the dissenting opinions and continue with the historically broad treatment of disclosures allowed under the permissible uses.¹³³ Though this

124 *Id.* at 2213.

125 *See id.* at 2214–15 & n.2.

126 *Id.* at 2215 ("Respondent-lawyers' use of the DMV-supplied information falls within the plain language of this provision.").

127 *Id.* at 2215–16.

128 *Id.* at 2217.

129 *Id.* at 2217–18 (quoting *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (internal quotation marks omitted)) (noting the common knowledge definition of this phrase in the work-product privilege circumstance).

130 *Id.* at 2219 (stating that the approach which requires the exceptions to apply to each other would "frustrate the evident congressional purpose to provide a set of separate exceptions, any one of which makes permissible the uses therein").

131 *Id.* at 2222 (explaining that it was proper to apply the rule of lenity even though it was not a criminal case because the DPPA is a criminal statute).

132 *Id.*

133 *See generally* *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (allowing obtainment in bulk under a permissible use even if all of the information is not actually used); *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009) (allowing use of information by direct mail marketing in company's mailing of advertising inserts along with registration

Note argues that a “plain language” approach to statutory interpretation necessitates a broad reading of the permissible uses, the below discussion of legislative history and purpose also suggests that the purposivism or intentionalism approaches to interpretation may also support a broadened scope.¹³⁴

A. *The Plain Language*

When determining whether a particular statute applies to a case, courts typically begin by analyzing the plain language of the statute to determine clear meaning.¹³⁵ If the language of a statute is clear, and the clear meaning does not give rise to impracticable results, then the clear meaning is to be the dispositive interpretation of the statute.¹³⁶ The language within the DPPA appears to be nontechnical in nature and subject to definition through common usage.¹³⁷ Both of these aspects arguably provide a clear meaning of the statute in the instances of permissible use application.¹³⁸ If there can be a clear meaning of the statute, it is generally recognized as unambiguous. Even so, the majorities in the recent cases insist that the DPPA statute is ambiguous in the scope of the uses allowed¹³⁹ and the interdependencies of the statutory clauses.¹⁴⁰

Congress’s choice in using inclusive language that incorporates all “uses” falling under the different permissible use clauses gives rise to a broad scope of permissible disclosures under the statute. Additionally, the plain language of the statute supports a broad reading of the permissible uses when one

renewal notices); *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008) (allowing attorney to use vehicle records to identify potential witnesses in automobile dealership litigation); *Welch v. Jones*, 770 F. Supp. 2d 1253 (N.D. Fla. 2011) (allowing disclosure to a for-profit company that allows secondary disclosure to identified subscribers who swear under penalty of perjury that their use is one of the permissible uses); *Atlas Transit, Inc. v. Korte*, 638 N.W.2d 625 (Wis. Ct. App. 2001) (allowing public schools to disclose the names and commercial driver’s license numbers of school bus drivers).

134 For general examples of these three statutory interpretation approaches, see *Zuni Pub. Sch. Dist. v. Dep’t of Educ.*, 550 U.S. 81 (2007).

135 *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.”).

136 *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) (“[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”).

137 See *Senne v. Vill. of Palatine*, 695 F.3d 597, 612–13 (7th Cir. 2012) (en banc); see also *Maracich v. Spears*, 133 S. Ct. 2191, 2217 (2013) (Ginsburg, J., dissenting).

138 See *Senne*, 695 F.3d at 612–13; see also *Maracich*, 133 S. Ct. at 2217 (Ginsburg, J., dissenting).

139 See *Senne*, 695 F.3d 597, 603–08.

140 See *Maracich*, 133 S. Ct. 2191, 2219–20 (Ginsburg, J., dissenting).

takes note of Congress's extensive use of the word "any"—commonly defined as "one or some *indiscriminately* of whatever kind"¹⁴¹—so as not to impose a measure of limit to each category of permissible use.¹⁴² This is even more noticeable when one compares the clauses employing the expansive wording with those clauses, such as § 2721(b)(3), which limits disclosure for use in the normal course of business "*only . . . to verify accuracy of . . . information submitted . . . and . . . to obtain the correct information.*"¹⁴³ This clear difference in chosen language between the various permissible uses exemplifies Congress's awareness of the wide scope of the clauses by providing examples of explicit placement of scope limitations on those areas which Congress so desired.

Congress gave further specificity in the language of the Act by including phrases that have historically established meanings within the judiciary. The most obvious example of this—and one that Justice Ginsburg focuses on in her dissent¹⁴⁴—is the use of the phrase "in anticipation of litigation" in the clause (b)(4)'s permissible use.¹⁴⁵ As noted in the dissent, the phrase "in anticipation of litigation" is a term commonly associated with the work-product doctrine, which limits the discoverability of materials that an attorney prepares.¹⁴⁶ Although Justice Ginsburg uses the point to note that Congress did not intend for the permissible uses to have unlimited scope, the use of the phrase here would also indicate Congress's intent to make the scope of the permissible use comparable to the traditionally broad meaning associated with the work-product doctrine.¹⁴⁷

Perhaps more subtle, but infinitely more suggestive in clear text implications, was Congress's decision to call the exclusionary clauses "permissible uses" instead of the more commonly employed designation as "exceptions." The courts in both *Senne* and *Maracich* seemed to take for granted that a permissible use under the DPPA is equivalent to an exception to a general statute, and in turn imposed canons of statutory interpretation on the basis of the "exceptions" being present.¹⁴⁸ One of these canons of construction—the need to read exceptions narrowly to preserve the primary function of the

141 *Any Definition*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/any (last visited Nov. 7, 2014) (emphasis added).

142 18 U.S.C. § 2721(b)(1), (4), (6), & (8) (2012) (allowing disclosure for use by "*any* government agency," "*any . . . proceeding*," "*any* insurer or insurance support organization," and "*any* licensed private investigative agency." (emphasis added)).

143 *Id.* § 2721(b)(3) (emphasis added).

144 *Maracich*, 133 S. Ct. at 2212 (Ginsburg, J., dissenting).

145 *Id.* at 2213.

146 *Id.* at 2217; *see also* FED. R. CIV. P. 26(b)(3)(A).

147 *See* *United States v. Adlman*, 134 F.3d 1194, 1197–1200 (2d Cir. 1998) (noting that a broader interpretation of the phrase is called for by the procedural rule and is more preferable in light of related policy concerns).

148 *See Maracich*, 133 S. Ct. at 2200 (framing the (b)(4) permissible use as an exception to the DPPA's general ban on disclosure and applying a canon calling for a narrow reading due to this status).

statute¹⁴⁹—was central to the courts’ reasoning that the permissible uses should not operate to the full extent allowed by the express language.¹⁵⁰ However, the courts should not overlook Congress’s express classification of the clauses as “permissible uses” in order to apply the canon of interpretation associated with statutory exceptions.¹⁵¹ This view of permissible uses not being equal to statutory exceptions is further bolstered by the civil action section of the statute, which grants a cause of action for obtaining, disclosing, or using information “for a purpose not permitted under this chapter.”¹⁵² This seemingly small semantic argument should not be overlooked because the semantics employed are the result of a careful consideration of the democratic legislature. Statutory interpretation requires that the courts give meaning to each word of Congress’s statutory text,¹⁵³ and the words here do not carve out exceptions to the general prohibition on release of personal information, but instead state that the law simply does not reach to those areas that are included in the permissible uses.

Finally, the fact that each of the permissible uses may allow for many different scenarios to fall under it, which appears to be a large concern of the majorities here, does not necessarily indicate that Congress would have wanted the statute to be read more narrowly than the common language usage would allow: “If Congress had made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.”¹⁵⁴ If applied in compliance with these generally accepted first principles of statutory interpretation, the plain language of the DPPA would allow for disclosure in both of the above cases.¹⁵⁵ The majorities’ apparent dismissal of the possibility that the statute could be read in its plain language effectively goes around the canon that analysis of legislative history is to be examined as only a secondary resort.¹⁵⁶

149 *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

150 *See Senne v. Vill. of Palatine*, 695 F.3d 597, 605 (7th Cir. 2012) (en banc); *see also Maracich*, 133 S. Ct. at 2200.

151 *Cf. Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1112 (11th Cir. 2008) (stating that the court cannot “alter statutory structure and language for the purpose of triggering application of a rule of construction”).

152 18 U.S.C. § 2724(a) (2012); *see also Thomas*, 525 F.3d at 1112.

153 The en banc majority in *Senne* itself recognizes that giving meaning to every word of a statute is a “basic canon of construction,” but then only applies the canon to the specific permissible use at issue and does not look to the words of the other sections of the statute. *Senne*, 695 F.3d at 605–06.

154 *Sears, Roebuck & Co. v. United States*, 504 F.2d 1400, 1402 (C.C.P.A. 1974) (citing *Barr v. United States*, 324 U.S. 83, 90 (1945)).

155 Both defendant groups obtained and used the personal information in ways that would bring the situation within the language of the statute. Using information to identify the recipient of a parking ticket is a use for a governmental function, 18 U.S.C. § 2721(b)(1) (2012), and contacting possible plaintiffs for a legal proceeding is activity “in anticipation of” that litigation. *Id.* § 2721(b)(4).

156 *See United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history.”); *Ratzlaf v. United*

B. *Legislative History and Purpose*

Nevertheless, even if one found the statute ambiguous and therefore looked to the legislative history for clarification, the associated legislative commentary also supports a broad reading of the permissible uses consistent with Congress's purpose and intent. When looking to the legislative history for interpretation of a statute, there is a strong presumption towards accommodating the natural reading. "[N]either the legislative history nor the reasonableness of the [interpretation] . . . would be determinative if the plain language of the statute unambiguously indicated" a certain result.¹⁵⁷ Here, in order to support the majorities' limiting constructions placed on the permissible use provisions of the statute, the courts would need evidence of ambiguity within the statute and a legislative history that clearly shows Congress's intent to severely limit the scope and application of the permissible disclosures. The courts discussed above argued that there was sufficient indication that the permissible uses should be read narrowly.¹⁵⁸

However, a look into the congressional statements surrounding the passage of the bill gives rise to questions surrounding the court's use of the intent or purpose as a limiting principle upon the permissible uses. As detailed at the beginning of this Note,¹⁵⁹ the Act was in response to many crimes of violence related to stalking that had been in part perpetrated through the use of DMV personal information.¹⁶⁰ However, the majorities generally overlooked the congressional caveat that was repeatedly attached to the desire to protect privacy. In debating the passage of the DPPA, legislators noted the importance of striking a key balance between protection of privacy and the legitimate needs of personal information for the operation of governments and businesses.¹⁶¹ The inclusion of the permissible uses was an

States, 510 U.S. 135, 147–48 (1994) (noting that the court "do[es] not resort to legislative history to cloud a statutory text that is clear"); *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) ("Where the language of a statute is unambiguous, as it is here, we need not, and ought not, consider legislative history.").

157 *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 93 (2007).

158 *See Senne v. Vill. of Palatine*, 695 F.3d 597, 607 (7th Cir. 2012) (en banc) (stating that the legislative history provides support for its constriction of the permissible uses and that the purpose of the Act was a public safety measure dissuading "excessive disclosures of personal information"). The court there saw the congressional intent as being key to interpreting the permissible uses and that the allowed disclosures should be "compatible with the overall purpose." *Id.* at 608; *see also Maracich v. Spears*, 133 S. Ct. 2191, 2203–04 (2013).

159 *See supra* notes 4–9 and accompanying text.

160 *See Maracich*, 133 S. Ct. at 2198 (describing the Court's interpretation of Congress' two main concerns when passing the Act).

161 *See, e.g.*, 139 CONG. REC. 29,470 (1993) (statement of Sen. Biden) (noting that the DPPA is "narrowly tailored . . . [to] preserve[] the right of States to disseminate this private information for legitimate purposes"); 139 CONG. REC. 29,468 (1993) (statement of Sen. Boxer) (offering the Act as "striking a critical balance between legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety"); 139 CONG. REC. 29,465 (1993) (positing the purpose of the Act as

elemental part of striking this balance. It is plausible, and even logical, to come to the conclusion that the legislature included the permissible uses as a way to combat any unintentional, overinclusive consequences that may arise as a result of the statute's general prohibition. The Act's sponsors wanted to combat the violent crimes, and due to the nature of the information, needed to do so in a way that would foreseeably create restrictions on legitimate uses. The permissible uses may have been Congress's answer to dampen the unavoidable reaches of the crime-preventing statute. The fact that there are fourteen different permissible uses explicitly included into the statute should show that Congress sought to do everything it could to continue to allow for legitimate, noncriminal uses of the DMV information.

The importance that members of Congress attached to these permissible uses is indicated by the careful consideration and evolution of the text of the section. In an early version of the statute introduced in the House of Representatives, the statute's drafters gave the permissible uses a narrow scope. For example, clause (b) (4) first appeared as allowing disclosure "[f]or use in any civil or criminal proceeding in any Federal or State court."¹⁶² Also, clause (b) (1)'s government function permissible use was limited to disclosure "[f]or use by any Federal or State agency in carrying out its functions."¹⁶³ However, as the bill proceeded through Congress, each of these permissible uses was expanded to include broader circumstances.¹⁶⁴ This expansion in scope of each of the permissible uses as the Act advanced through the legislative process is easily understood to be an indication by Congress of a desire to have broad application of the permissible uses going forward.

Further, the goal in reaching the balance of privacy and legitimate use was supported expressly by Senator Biden, when speaking in support of the Act, who stated that the "amendment [or Act] is narrowly tailored"¹⁶⁵ This statement is explicit in its recognition that the scope of the act itself — i.e., the prohibition on disclosure of personal information from DMV

"protect[ing] the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government"); 139 CONG. REC. 27,327–28 (1993) (statement of Rep. Moran) (noting that "[b]alancing the interest of public disclosure with an individual's right to privacy is a delicate, but essential, task for government" and stating that "this bill does not limit those legitimate organizations in using the information"); see also 139 CONG. REC. 29,468–69 (1993) (statement of Sen. Warner) (listing the many legitimate disclosures that the Act will allow for without reservation).

162 139 CONG. REC. 27,328 (1993); see also 139 CONG. REC. 29,466 (1993) (stating a version of the Act where the language limits the litigation exception to any civil or criminal proceedings where "the case involves a motor vehicle").

163 139 CONG. REC. 27,328 (1993).

164 See 18 U.S.C. § 2721(b) (2012). The "courts and litigation" exception expanded beyond merely allowing use in civil or criminal proceedings and included administrative or arbitral proceedings, service of process, investigation in anticipation of litigation, and use pursuant to court order. *Id.* at § 2721(b)(4). The government function use was similarly expanded to not only account for use "by any government agency" but also for those people or entities that were acting in carrying out the government functions. *Id.* at § 2721(b)(1) (emphasis added).

165 139 CONG. REC. 29,470 (1993) (statement of Sen. Biden).

records—is to be narrowly interpreted. This, in turn, would suggest that the permissible uses are to be liberally construed as a check on the restrictiveness of the Act. Representative Moran furthered this expansive reading of disclosure not being inhibited by the bill when he assured that “insurance companies, law enforcement professionals, attorneys, and all other authorized users would continue to have access to this information.”¹⁶⁶

The preceding evidence is sufficient indication of legislative intent to allow for a broad range of situations to be permissible under the provisions of § 2721(b). This evidence supports the same interpretation that is initially indicated by the plain language of the text as discussed above. The consistency between the express language and the secondary resort to legislative intent and purpose calls into question courts’ ability to impose new restrictions onto the use and disclosure allowed under the statute. Courts should “not [be] at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. . . . [W]here no ambiguity exists there is no room for construction.”¹⁶⁷ Even with resort to alternate methods of statutory interpretation, such as focusing on purpose or intent, the circumstances surrounding this Act suggest a lack of ambiguity from the meaning given by a “clear language” interpretation.

C. Possibility of Vast Liability

Besides ensuring that Congress’s purpose and aims in passing the DPPA are legitimately carried out, a broader interpretation of the permissible uses serves the much more practical and immediate function of properly limiting the vast liabilities that are possible under the statute. The Act allows for the imposition of criminal fines for any knowing violation¹⁶⁸ and also provides a cause of action, for the individual whose information is involved, against the “person who knowingly obtains, discloses or uses personal information.”¹⁶⁹ While this civil cause of action may first appear quite standard with similar statutes, the blunt force of the liability becomes apparent when the statute allows for remedies of actual damages that are “not less than liquidated damages in the amount of \$2,500.”¹⁷⁰ Further, additional remedies permitted include awards of punitive damages, reasonable attorneys’ fees and costs, and other equitable relief as the court deems appropriate.¹⁷¹

While \$2,500 does not initially appear to be an exorbitant amount, when it is applied to claims like those in *Maracich* and *Senne* the possible penalties

166 140 CONG. REC. 7925 (1994) (statement of Rep. Moran); see also *Protecting Driver Privacy: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. (1994) (statement of Rep. Moran) (“Careful consideration was given to the common uses now made of this information and great efforts were made to ensure that those uses were allowed under this bill.”).

167 *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 277–78 (1929).

168 18 U.S.C. § 2723(a) (2012).

169 *Id.* § 2724.

170 *Id.* § 2724(b)(1).

171 *Id.* § 2724(b)(2)–(4).

faced become astronomical.¹⁷² The summation of civil damages of this size cannot logically have been the intent of Congress when passing this law. If the permissible uses were intended to be interpreted in a narrow fashion, resulting in many borderline cases being subject to liability, Congress could have reasonably imposed a much lower individual remedy amount and still have provided a deterrent and punitive result. Rather, the specific remedy amount found in the statute provides an additional indication that Congress was aiming to restrain individual instances of disclosure facilitating crime, instead of the legitimate business uses that would foreseeably be more substantial in the number of individuals' information disclosed and used.

The *Maracich* Court disregarded the need to consider the possible liabilities because of what it perceived as the discretionary nature of the liabilities to be imposed.¹⁷³ It reasoned that the lack of mandatory imposition of penalties provided a caveat to the liability amounts to be awarded and justified the finding of violation in the borderline cases.¹⁷⁴ However, this does not account for the fact that there is an all-or-nothing nature to the remedies a court can grant. A court does not have to award damages, but if the court grants an award for actual damages, it *must* provide a minimum of \$2,500 for each individual whose information was disclosed in violation of the statute. This is particularly disturbing when considering that the question of whether a claimant must show actual damages before he or she can recover under the DPPA remains a debated topic. Various circuits have held that plaintiffs do not need to show actual damages in order to receive the \$2,500 minimum liquidated damages.¹⁷⁵ Though the Supreme Court has never resolved this issue, some Justices have indicated that the potential of mass liability in DPPA cases, which “turns on a question of federal statutory interpretation,” is a significant question worthy of their consideration.¹⁷⁶

The general lack of clarity as to whether liabilities will be imposed and the vast possible amounts of damage awards bolsters arguments in favor of

172 The defendant's attorneys in *Maracich* obtained information of approximately 34,000 individuals (some included in multiple disclosures), totaling a possible remedy amount of more than \$200 million. *Maracich v. Spears*, 133 S. Ct. 2191, 2197 (2013); *id.* at 2222 (Ginsburg, J., dissenting). The defendant in *Senne* could incur liability for each similar parking ticket it has issued within the statute of limitations, a total possible remedy imposition of around \$80 million. *Senne v. Vill. of Palatine*, 695 F.3d 597, 611 (7th Cir. 2012) (en banc) (Posner, J., dissenting).

173 See 18 U.S.C. § 2724(b) (“Remedies.—The court *may* award” (emphasis added)).

174 See *Maracich*, 133 S. Ct. at 2209 (leaving open whether the civil damages provision would permit an award of that amount); see also *Wiles v. Worldwide Info., Inc.*, 809 F. Supp. 2d 1059, 1078 (W.D. Mo. 2011) (“There is no reason to expect that if courts enforce the DPPA as written that they will make large (or any) damage awards.”).

175 See *Pichler v. UNITE*, 542 F.3d 380, 393 (3d Cir. 2008); *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005).

176 See *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring) (recognizing the importance of considering liability under the DPPA where there is a potential liability of \$1.4 billion while denying writ of certiorari due to ripeness concerns).

limiting the circumstances that are deemed to be violations of the statute and broadening the interpretation of the permissible uses. Further, the uncertainty over whether actual damages must be proven before liquidated damages will be imposed circumvents the main intent of the bill to prevent the dangers associated with the release of the information. If there are no negative consequences of the disclosure and use of the personal information, it may indicate that the circumstances of the use or disclosure were more likely to fall under a permissible use.

D. *Application of the Rule of Lenity*

Though the above discussion argues that the statute is unambiguous, the fact that reasonable minds on the Supreme Court and lower judiciaries have differed on the intended and actual scope of the statute indicates a doubt over what Congress has expressed through the permissible uses. However, this doubt would not automatically concede that the permissible uses should then be interpreted narrowly. Instead the doubt surrounding the expressions by Congress allows for the introduction of considerations under the rule of lenity. Throughout the recent cases there were wide differences of opinion as to the relevance and application of the lenity rule under the DPPA statute.¹⁷⁷ In general, the rule of lenity dictates that when a statute is reasonably susceptible to two interpretations, courts should “construe the law as favorably to . . . defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law in issue.”¹⁷⁸ The rule, typically applied to penal statutes, is employed as a tiebreaker principle¹⁷⁹ when ambiguity and uncertainty persist after an analysis of the “text, structure, history, and purpose” of the statute.¹⁸⁰ In the case of the DPPA, the application of the rule would effectively give the benefit of the doubt to the users of the information and broaden the scope of the permissible uses to include those actions that could be reasonably argued to be contained within each permissible use.

The majority in *Maracich* argued that the lenity rule should not apply for two reasons. First, the Court stated that the rule of lenity does not reach beyond the criminal context and that the current case did not involve the section of the DPPA imposing criminal liability.¹⁸¹ Second, the Court

177 In *Maracich* the applicability of the rule of lenity is a main point of contention between the majority and the dissent. Compare *Maracich*, 133 S. Ct. at 2209 (reasoning that the rule of lenity does not apply in this context), with *Maracich*, 133 S. Ct. at 2222 (Ginsburg, J., dissenting) (reasoning that the rule of lenity should apply and be imposed in those circumstances). However, neither the majority nor dissent in *Senne* even mentioned the possible application of the rule. See *Senne v. Vill. of Palatine*, 695 F.3d 597 (7th Cir. 2012) (en banc).

178 See 73 AM. JUR. 2D *Statutes* § 188 (2013).

179 See *id.*; *The Supreme Court—Leading Cases: Money Laundering*, 122 HARV. L. REV. 475, 475 (2008).

180 73 AM. JUR. 2D § 188 (2013).

181 *Maracich*, 133 S. Ct. at 2209.

claimed the rule had no role to play because the statute was no longer ambiguous after the Court's consideration of the language and history.¹⁸² Both arguments fail to take into account the underlying premises of the rule of lenity. As to the first argument, as the dissent extensively pointed out,¹⁸³ the DPPA at its base is a criminal statute that happens to also incorporate civil penalties and the interpretation of criminal statutes permits consideration of the rule of lenity even if the circumstances of the case are civil.¹⁸⁴ Further, the criminal and civil penalties enforced under the DPPA require equal willfulness requirements that the penalties are imposed on action that was done "knowingly."¹⁸⁵ The Court's second argument is also challenged by the simple fact that reasonable minds disagree as to the meaning of the statute. The majority and dissent in both *Maracich* and *Senne* provide what may be deemed as reasonable interpretations of the statute and the rule of lenity would serve its essential role by providing a tie-breaker between these reasonable options. The basis of the rule of lenity is to provide a "safety valve" for the due process of the adversarial system.¹⁸⁶ It also serves to protect individuals from "arbitrary discretion by officials and judges and guard[] against judicial usurpation of the legislative function" when the penalties being enforced were not clearly ordered in the circumstances.¹⁸⁷ By interpreting the permissible uses of the DPPA in a broader fashion, the courts can ensure that they are not wrongfully imposing excessive liabilities in circumstances that Congress did not intend to reach.

E. Right to Notice

Finally, and coextensive with each of the arguments asserted above, is the important legal principle of the need to provide sufficient notice to those who take action that may subject them to liability, whether civil or criminal. In the DPPA context, with the uncertainty associated with the scope of the permissible uses and the tremendous potential liability, the role of notice is even more important. The standard to establish prior notice is "objective

182 *Id.*

183 *Id.* at 2222 (Ginsburg, J., dissenting).

184 See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) ("[T]he rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context."); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (plurality opinion) (recognizing the application of lenity to a civil action involving a tax statute that had both criminal and civil applications); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (applying the rule of lenity in a civil action which involved a criminal statute).

185 18 U.S.C. §§ 2723–24 (2012) (imposing criminal fines on those "who knowingly violate[] [the] chapter" and granting a cause of action against those "who knowingly obtain[ed], disclose[ed] or use[d] personal information"); see also *Thompson/Ctr. Arms Co.*, 504 U.S. at 517 (noting that lenity applies when the statute's criminal applications require no additional willfulness requirements).

186 See *The Supreme Court—Leading Cases*, *supra* note 179, at 475.

187 73 AM. JUR. 2D § 188 (2013).

reasonableness.”¹⁸⁸ In order to determine whether notice was reasonably available to the defendant before the action that constitutes the violation was taken, the court often looks to statutory language as well as prior caselaw.¹⁸⁹

As discussed above, the statutory language of the DPPA, particularly in the permissible use provisions, has been interpreted by the courts through many different forms of construction. Moreover, the caselaw interpreting and applying the permissible uses in civil actions has also been fairly inconsistent. The Supreme Court has only heard one other case concerning the DPPA and it did not interpret the scope of the permissible uses within the boundaries of the holding.¹⁹⁰ *Reno v. Condon* solely put individuals on notice that any person knowingly violating the DPPA may be subject to criminal fine or civil liability, but said nothing about what circumstances will be specifically determined to be violations.¹⁹¹ In the lower courts, there have been many differences in holdings as to what circumstances fall within or outside of the permissible uses.¹⁹² The problems associated with notice in the face of this inconsistency of opinion become more apparent when one compares the holding in *Maracich* with that of cases like *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*¹⁹³ In *Thomas*, the Court of Appeals for the Eleventh Circuit held that the defendants’ use of DMV records to identify potential witnesses for litigation against automobile dealerships was permissible under the DPPA.¹⁹⁴ The court went on to state that it could “not see how pre-suit investigation can be considered per se inapplicable to the litigation clause.”¹⁹⁵ When faced with this persuasive precedent, it is understandable that the lawyers in *Maracich* could reasonably have assumed that their use of the personal information would be accepted by the courts and not be deemed a statutory violation. A similar argument was made by Judge Posner in his dissent in *Senne*, where he noted that there was no case precedent or official opinion for the Village of Palatine to depend on to reasonably know that printing personal information on parking tickets would violate the DPPA.¹⁹⁶ In civil actions surrounding statutory imposition of liability,

188 *Collier v. Dickinson*, 477 F.3d 1306, 1311 (11th Cir. 2007).

189 *See id.* at 1311–12 (finding sufficient notice that the sale of DMV records to mass marketers was a violation by analyzing the statutory language and caselaw).

190 *See generally* *Reno v. Condon*, 528 U.S. 141 (2000) (holding the DPPA constitutional).

191 *Id.* at 146–47.

192 *See, e.g.*, *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1226 (11th Cir. 2009) (allowing disclosure to company sending advertising inserts with vehicle registration notices); *Wiles v. Worldwide Info., Inc.*, 809 F. Supp. 2d 1059, 1061 (W.D. Mo. 2011) (finding violation of disclosure requirements to resellers of personal information); *Welch v. Jones*, 770 F. Supp. 2d 1253, 1254–55 (N.D. Fla. 2011) (allowing disclosure to for-profit company who redistributes the information to secondary buyers subject to perjury).

193 525 F.3d 1107 (11th Cir. 2008).

194 *Id.* at 1109.

195 *Id.* at 1115 n.5.

196 *See Senne v. Vill. of Palatine*, 695 F.3d 597, 611 (7th Cir. 2012) (en banc) (Posner, J., dissenting).

the court “should hesitate to adopt a novel interpretation of a federal statute that subjects parties to crushing liability.”¹⁹⁷ Instead, fair warning should be given to possible defendants. “The DPPA has been in effect for over 15 years, and yet the Court points to no judicial decision interpreting the statute in the way it does today.”¹⁹⁸

CONCLUSION: A CALL FOR CONGRESSIONAL INVOLVEMENT

The indication by the statute’s plain language that Congress expressly included broad permissible uses, the intent and purpose of Congress to combat violent crime perpetrated through use of personal information, and considerations of the rule of lenity and the unanticipated imposition of immense monetary liability all demonstrate that the courts’ recent narrow interpretations of the permissible uses of the DPPA should not be perpetuated. Instead, the permissible uses should be read broadly and any constraint to be placed on the scope of the disclosures should come directly from Congress. Congress is best able to respond to the needs and goals of the statutory scheme. Without an express statement by the legislature that certain legitimate business uses of the personal information will not be included within the scope of the permissible uses, the general business public and municipalities are not put on sufficient notice that they have now been exposed to extensive civil liability.

When it passed the DPPA, Congress would have assessed the costs and benefits of the statute in light of the statute’s intended scope. If this Note is correct regarding Congress’s intent, then the courts’ narrowing restrictions on permissible uses impose unanticipated costs in instituting the programs of protection. For example, villages and municipalities, particularly within the Seventh Circuit, now need to assess independently what they believe a future court would deem to be reasonable information to include on tickets or record releases and then institute new procedures and possibly develop new technology that would comply with these vague standards. Additionally, attorneys and other groups are now forced to consider what will be seen as the predominant purpose of their uses and disclosure of personal information. If there is any uncertainty as to which permissible use the disclosure may fall under, the user may be forced to not obtain the information for fear of a court determining that though the user’s stated purpose may be true, another underlying purpose prohibits the disclosure. In contrast, if a prospective user of the information, whether a government body or individual, chooses not to implement new procedures and technologies to comply or does not take additional care in identifying all possible purposes that may be attributed to their use, they are now open to massive liabilities, the fear of which could lead to significant lack of rightful disclosure. The nondisclosure of information in circumstances that had initially been intended by Congress to allow for rightful disclosure could have a negative effect on the function-

197 *Maracich v. Spears*, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting).

198 *Id.*

ing of legitimate business and governmental organizations that rightfully require use of this information.

The extent of the implications of the holdings in *Maracich* and *Senne* have yet to be seen, but the courts have now left a door open to a method of statutory interpretation that significantly changes the scope and application of the Driver's Privacy Protection Act. While interpreting whether an existing law applies to a certain circumstance fulfills the traditional judicial role, the role does not include the effective creation of new statutory violations. The consideration and creation of new laws is and should be the role of the legislature as a representative body. Though a court may view the statute as leaving gaps that may allow for a wrongful disclosure in certain circumstances, it is Congress's role to determine the value of including those so-called "gaps" in the law, and it is only Congress that can change the statute to have a different effect.¹⁹⁹

199 "Inconvenience . . . that result[s] from following [a] statute as written, must be relieved by legislation." *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 277–78 (1929).

