No. 07-197

IN THE

Supreme Court of the United States

FRED O. DICKINSON, III, *et al.*,
Petitioners,

v.

MARY ANN COLLIER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE IMAGITAS, INC. IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICUS CURIAE IMAGITAS, INC. IN SUPPORT OF PETITIONERS

Imagitas, Inc. respectfully submits this brief in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS

Imagitas, Inc. is a private contractor retained by Florida, Massachusetts, Minnesota, Missouri, New York, and Ohio to design and distribute motor vehicle registration notices to owners of vehicles registered within each state. The cost of distributing registration materials is defrayed by in-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than Imagitas, Inc. and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the clerk.

cluding state-approved advertising inserts in the mailings. On behalf of the states, Imagitas prepares the registration renewal notices, develops and inserts private advertisements, and mails the packets to motorists.

This program, known as DriverSource, has helped cash-strapped states alleviate the operational and financial burdens associated with producing and mailing vehicle registration renewal notices. As a contractor that provides these state services, Imagitas will be affected by the court of appeals' decision to the extent it unnecessarily dissuades state governments from using private contractors to assist in the registration renewal process. If state officials face even a remote risk of catastrophic personal liability for obtaining the benefits of these programs, they may well forgo programs like DriverSource—even if convinced that the programs are entirely consistent with state and federal law.

Imagitas is also a defendant in numerous lawsuits alleging that the DriverSource program violates the Drivers' Privacy Protection Act (DPPA). In addition, lawsuits related to DriverSource have been filed against state officials, nominally in their "personal capacities," and thus exert a substantial chill on DriverSource and similar programs. Indeed, one state has already refrained from signing a contract with Imagitas pending resolution of DPPA litigation.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is not only mistaken but carries broad ramifications that will likely affect the ability of the states to administer cost-efficient vehicle registration renewal programs like DriverSource. Although the facts of this case differ markedly from the DriverSource program, the impact of the court of appeals' interpretation of the DPPA will inevitably extend well beyond the present litigation. By allowing "personal capacity" suits seeking massive damages against state officials who merely administer a state program, the decision—if allowed to stand—will exert a chilling effect on all state activity that poses even the remotest risk of liability under the DPPA.

The courts of appeals' construction of the DPPA is at odds with both the structure of the Act and common sense. The Act specifically limits remedies for a state's violation of the DPPA to civil suits brought by the Attorney General of the United States, with liability capped at $5,000 per day. Yet the court of appeals' interpretation would allow private plaintiffs to evade this limitation by prosecuting putative class-action lawsuits against state officials for their official acts, seeking statutory damages of $2,500 for each member of a class that, if certified, could number in the millions. It is implausible—to put it mildly—that Congress intended to cap the liability of state departments of motor vehicles at $5,000 per day, while permitting claims for *billions* of dollars against the officials who work there for doing nothing more than implementing state policy.

Imagitas is engaged in activities that benefit taxpayers and that do not violate the DPPA. Yet the threat of massive personal liability—and the *in terrorem* effect of the court of appeals' decision—will inescapably cause state officials to reassess their participation in these programs and to look askance at new initiatives. The Court should not allow this mistaken interpretation of the DPPA to stand where the decision undermines valuable, and entirely lawful, state programs throughout the country.

I. THE SPECTER OF MASSIVE DAMAGES ON STATE OFFICIALS UNDER THE DPPA IMPERILS VALUABLE STATE PROGRAMS

A. Public-Private Partnerships In Sending Registration Mailings To Drivers Provide Significant Benefits To States And Motorists Alike

In order to promote public safety, all states have laws governing the registration and licensing of motor vehicles. Given the ubiquity of motor vehicles and the dangers that they can pose, this is an important—and expensive—state activity.

To carry out this responsibility as efficiently as possible, nearly all states send mailings to registered drivers reminding them to renew their vehicle registrations. And to save scarce dollars, certain states hire third-party contractors to

send out their vehicle registration or driver's license renewal forms. In some states, the private contractor designs, develops, and produces motor vehicle registration renewal notices, informational brochures, and remittance envelopes. The contractor then mails the registration renewal notice along with other informational material required by the state, plus—to defray the cost of the program—advertising inserts.

Florida, Massachusetts, Minnesota, Missouri, New York, and Ohio, for instance, have contracted with Imagitas to produce and to send out the vehicle registration renewal envelopes on behalf of the state and to include advertisements in those official mailings.[2] Indiana contracts with another vendor, Allison Payment Systems, to insert advertisements for local businesses in their registration renewal envelopes. *See* Patrick Guinane, *State selling ads to offset cost of BMV renewal letters*, The Times, Apr. 15, 2006, *available at* http://www.nwitimes.com/articles/2006/04/15/news/lake_county/454d052701eac09b86257150007f31a1.txt. In addition, at least five other states—Connecticut, Pennsylvania, Texas, Virginia, and Wisconsin—have issued requests for proposals for private vendors to administer similar programs. *See* Connecticut RFP No. RFP023-A-15-0560-C (Jan. 24, 2003); Pennsylvania RFP No. 353R09 (Apr. 14, 2004); Texas RFP No. B442006011856000 (Feb. 23, 2007); Virginia RFP No. 154:5-073 (June 3, 2005); Wisconsin RFP No. 261774 (Dec. 26, 2006).

Such public-private partnerships serve an important purpose. Faced with budget shortfalls and public resistance to tax increases, states must seek inventive ways to deliver excellent services to the public while controlling costs. States that contract with a third party to provide a govern-

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[2] Certain Florida counties have also contracted with at least one other vendor. *See* Declaration of Andrea Kloehn Naef in Support of Def.'s Mot. for Leave to Correct Def.'s Mem. in Supp. of Mot. for S.J. and to Correct Exhibit, *Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla. Nov. 5, 2007), Ex. Z (Deposition of Patricia Ryan), 54:3-58:24.

ment service and to defray costs with advertising revenue advance these twin goals.

Since 2005, for instance, the Ohio Bureau of Motor Vehicles has saved $1.5 million through its partnership with Imagitas. *See Ad deal saves BMV $1.5M in first year*, Business First, Sept. 20, 2006, *available at* http://Columbus.bizjournals.com/columbus/stories/2006/09/18/daily17.html. Before contracting with Imagitas, the State of Missouri spent $1.1 million each year to print and mail registration renewal notices. *See State to include ads in vehicle registration notices*, Hannibal Courier-Post, June 29, 2006, *available at* http://www.hannibal.net/stories/062906/news_20060629034.shtml. Now, Missouri saves $530,000 each year and is also entitled to a share of the advertising revenue. *See id.* In total, the states that have contracted with Imagitas have saved over $12 million in printing expenses through January 2007 and have received over $4 million in additional revenue. *See* DriverSource Program Fact Sheet, *available at* http://www.imagitas.com/images/imagitas/documents/Imagitas%20Program%20Materials2.pdf. The court of appeals' mistaken interpretation of the DPPA, however, threatens to undo those savings.

B. DPPA Lawsuits Such As *Collier* Threaten The Viability Of These Public-Private Partnerships

These programs have provoked numerous lawsuits alleging that the disclosure of motor vehicle registration information to state contractors and the use of that information for marketing purposes without express consent from each motorist violates the DPPA.[3] Several of these suits,

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[3] *See Rine* v. *Imagitas, Inc.*, No. 3:06-cv-690-J-32HTS (M.D. Fla.); *Rine* v. *Dickinson*, No. 3:07-cv-156-VMC-HTS (M.D. Fla); *Gentile* v. *Imagitas, Inc.*, No. 3:07-cv-525-TJC-HTS (S.D. Fla.); *Kendron* v. *Imagitas, Inc.*, No. 1:06-cv-11893-NMG (D. Mass.); *Mathias* v. *Imagitas, Inc.*, No. 1:06-cv-12061-NMG (D. Mass.); *Kracum* v. *Imagitas, Inc.*, No. 06-cv-3817-JRT-FLN (D. Minn); *Landree* v. *Imagitas, Inc.*, No. 06-cv-3995-JRT-FLN (D. Minn); *Kracum* v. *McCormack*, No. 07-cv-1462-JMR-FLN (D. Minn.); *Ressler* v. *Imagitas, Inc.*, No. 06-cv-775-HFS (W.D. Mo.); *Poynter* v. *Vincent*, No. 07-cv-047-NKL (W.D. Mo.); *Joao* v. *Imagitas, Inc.*, No. 06-

like the present case, are nominally "personal capacity" suits seeking billions of dollars in statutory damages from current or former state officials. *See Rine* v. *Dickinson*, No. 3:07-cv-156-VMC-HTS (M.D. Fla.); *Kracum* v. *McCormack*, No. 07-cv-1462-JMR-FLN (D. Minn.); *Poynter* v. *Vincent*, No. 07-cv-047-NKL (W.D. Mo.); *Bogard* v. *Morckel*, No. 5:07-cv-671 (N.D. Ohio).

Although these programs have generated much litigation, Congress never intended either to preclude the states from using motor vehicle registration information to carry out state programs or to preclude the disclosure of this information to contractors assisting the state. Indeed, the DPPA expressly authorizes disclosures made by "any government agency . . . in carrying out its functions," 18 U.S.C. § 2721(b)(1), and expressly contemplates disclosures to state "contractor[s]," *id.* § 2721(a), or to "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions," *id.* § 2721(b)(1).[4] Although the

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cv-1367-SHS (S.D.N.Y); *Mathias* v. *Imagitas, Inc.*, No. 1:06-cv-2118 (N.D. Ohio); *Bogard* v. *Imagitas, Inc.*, No. 1:06-cv-2868 (N.D. Ohio); *Bogard* v. *Morckel*, No. 5:07-cv-671 (N.D. Ohio). All of these cases are now proceeding in the U.S. District Court for the Middle District of Florida pursuant to Orders of the Judicial Panel on Multidistrict Litigation. *See* Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (May 8, 2007); Conditional Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (May 21, 2007); Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (Oct. 10, 2007); *see also* Order Granting Stipulation to Consolidate Case No. 06-cv-3817 and Case No. 06-cv-3995 (D. Minn. Nov. 22, 2006).

[4] In the litigation pending against Imagitas in Florida, *see Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla.), the plaintiffs have argued that the government-function exception of Section 2721(b)(1) does not apply. Instead, they point to a separate provision of the DPPA that permits disclosures "[f]or . . . marketing or solicitation if the State has obtained the express consent of the person to whom such personal information pertains," 18 U.S.C. § 2721(b)(12), and argue that this section implies that "express consent" is required for any marketing activity, even if part of a state program. *See* Pls.' Mot. for Partial S.J., *Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla. Jan. 19, 2007), 9-10. Plaintiffs further contend that the DPPA applies to the mere "use" of personal information.

ultimate merits of these cases are not before this Court, what matters here is that the mere threat of billion-dollar liability, even if very remote, will affect the decisions made by the state officials who are charged with administering state programs.

For this reason, the disposition of this petition carries national ramifications. If the decision of the court of appeals is allowed to stand, then state officials across the country will be on notice that they could face claims for billions of dollars simply by implementing state law.[5] A reasonable

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See id. at 8-9 (citing 18 U.S.C. §§ 2724(a) and 2725(2)). These contentions not only disregard the plain language of the DPPA, but prove too much. Plaintiffs' position would make it a crime for a state official to implement a state policy to include charitable solicitations in vehicle registration mailing. Ohio, for example, solicits donations to the Children's Save Our Sight program, *see* Ohio Rev. Code Ann. § 4503.104, Kentucky solicits contributions for a state-sponsored, low-income child care assistance program, *see* Ky. Rev. Stat. Ann. § 186.040(4), and Washington solicits donations for state parks, *see* Wash. Rev. Code § 46.16.076. Other states use their vehicle registration forms as marketing devices. Many states use vehicle registration renewal mailings to market specialty license plates. *See, e.g.*, Mass. Gen. L. ch. 90 § 2E; N.Y. Veh. & Traf. Law § 404-c. In addition, Pennsylvania includes promotional tourism information in its vehicle registration renewal mailings, targeted to certain geographic audiences. *See PennDOT & DCED Team Up to Promote Governor Rendell's Tourism Initiative* (Feb. 2005), *available at* http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=440835. All of these activities would be subject to challenge under the *Rine* plaintiffs' reading of the statute. And, more importantly for present purposes, all of these activities are threatened if the court of appeals' decision is allowed to stand.

[5] The Court has often granted certiorari to review cases imposing substantial liability on federal or state governments. *See, e.g., United States* v. *Mitchell*, 463 U.S. 206, 211 (1983) (granting certiorari where lower court decision raised "issues of substantial importance concerning the liability of the United States"); *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 & n.5 (1977) (accepting review where more than $100 million in revenue was in dispute); *Territory of Alaska* v. *American Can Co.*, 358 U.S. 224, 225 (1959) (granting certiorari due to "fiscal importance of the question" to state of Alaska); *see also Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("This enormous potential liability, which turns

state official would be extremely wary of doing *anything* that could possibly be challenged under even an implausible reading of the DPPA. If the decision is overturned, by contrast, then state officials will once again be empowered to reduce the burden on the public fisc, while taking proper heed of the DPPA and the penalties it imposes upon state DMVs that violate it.

Unless this Court restores Congress's carefully calibrated remedy against state agencies, state officials will be substantially overdeterred and will needlessly forgo opportunities to save taxpayers money. The risk that an expansive interpretation of the DPPA will have a chilling effect is far from speculative, and indeed DPPA litigation is already causing real-world effects. *See* Def's Mot. for S.J., *Rine* v. *Imagitas, Inc.*, No. 3:06-cv-690-J-32HTS (M.D. Fla. Oct. 19, 2007), Ex. H (Deposition of Tamara Dukes) 27:4-11 (describing decision by Virginia to refrain from signing contract with Imagitas pending resolution of DPPA litigation). If states ultimately choose to modify their activities rather than subject their officials to litigation of this sort, this Court might not have another opportunity to address the questions presented in the petition.

It is no answer to suggest that law-abiding state officials have no reason to worry since they will ultimately prevail on the merits, if not on a qualified immunity defense. To the contrary, the risk of billions of dollars of *personal* liability, even if highly unlikely, would inevitably influence the officials' actions. Nor is the possibility of indemnification by the state the answer: a responsible state official would be loath to risk burdening his or her employer with a billion-dollar judgment. In any event, nothing in the text, structure, or purpose of the DPPA suggests that Congress intended to impose such risks on either the states or their employees.

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on a question of federal statutory interpretation [of the DPPA], is a strong factor in deciding whether to grant certiorari.").

Finally, the impact of the court of appeals' decision will extend beyond programs like DriverSource. Indeed, as explained above, any form of state "marketing or solicitation" that makes use of vehicle registration or driver's license information—including charitable programs—is now at risk. *See supra* n.4. If state officials are personally liable for massive damage awards, then even claims based on erroneous constructions of the DPPA would chill the activity of understandably risk-averse state officials. Absent this Court's review, the court of appeals' interpretation of the DPPA will effectively subject the states to regulation by threat of private class action.

II. NOTHING IN THE DPPA SUGGESTS THAT CONGRESS CONTEMPLATED SUCH AN OUTCOME, WHICH WOULD RAISE SERIOUS ELEVENTH AMENDMENT CONCERNS

The DPPA establishes two separate regimes for the imposition of civil penalties or damages: First, a "person" who "knowingly" violates the Act is subject to private suit. 18 U.S.C. § 2724(a). The court "may award . . . actual damages, but not less than liquidated damages in the amount of $2,500." *Id.* § 2724(b). That standard, however, does not apply to states or state agencies. *Id.* § 2725 (definition of "person" excludes "a State or agency thereof"). Instead, a "State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of *not more than* $5,000 a day for each day of substantial noncompliance." *Id.* § 2723(b) (emphasis added). By permitting private plaintiffs to file "personal capacity" suits against state officials alleging only that the state officials implemented state law or policy, the court of appeals' decision threatens to undo the balance that Congress struck.

As an initial matter, the approach adopted by the court of appeals defies both the structure of the Act and common sense. While the DPPA caps damages for Attorney General actions against state DMVs at "not more than" $5,000 a day, the court of appeals' decision would permit private actions against the officials who run those agencies, without any cap

on damages. As discussed above, the former reading suitably deters unlawful conduct, while the latter reading will lead to overcompliance by risk-averse state employees. Similarly, while the Act requires "substantial noncompliance" before a state DMV may face liability, the court of appeals' decision would not impose this limitation where the defendant is a state official, as opposed to the DMV. Yet there is not a hint of evidence that Congress intended such anomalous results.

Furthermore, it exalts form over substance to permit private parties to bring massive claims against state officials merely by incanting the phrase "personal capacity." Neither the present case nor the other pending DPPA "personal capacity" suits allege that the individual state officials acted for *personal* gain or based on any *personal* animus. Rather, the officials face suit simply because of the positions they hold in state government. If the current defendants in any of the DPPA suits pending in the lower courts were to leave state government, the plaintiffs in those cases could just as easily assert their multi-billion-dollar claims against the successors to those officials. Congress declined to subject the states to exposure of this sort, and neither that decision nor state sovereign immunity should fall victim to artfully pled "personal capacity" suits that are mere substitutes for actions brought directly against the states.

As a result, the state officials sued in those actions are, in effect, nothing more than proxies for the states they serve. *Cf. Brandon* v. *Holt*, 469 U.S. 464, 470 (1985) (substituting successor official as defendant demonstrates that suit was brought against defendant in official, not personal capacity); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986) (allegation that suit was against state employee in personal capacity did not control where proceedings made it clear that action was against defendant in official capacity only). Recent developments prove this very point. In the lawsuit filed against current and former Florida state officials challenging the use of DriverSource, the parties signed a letter of understanding to settle the case.

Plaintiffs agreed to drop their personal-capacity claims against the officials in exchange for a promise from the State of Florida—which is not even a party to the lawsuit—to suspend temporarily a portion of its vehicle registration renewal program. *See* Letter of Understanding, *In RE: MDL 1828 Imagitas, Inc., Drivers' Privacy Protection Act Litigation*, No. 3:07-md-00002-TJC-HTS (Oct. 31, 2007), at 3-4. The fact that the plaintiffs sought and obtained equitable relief *from the state itself* indicates the true nature of their suit and the impact of the court of appeals' decision.

Indeed, no matter how it is captioned, "a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101, n.11 (1984) (internal quotation marks omitted). Yet, if allowed to stand, the court of appeals' decision would inevitably have just that result: states would face an unpalatable choice of (1) continuing a program that would subject its officials to the risk (even if remote) of billion-dollar personal liability, (2) indemnifying the officials and thereby saddling taxpayers with a litigation risk that Congress declined to impose, or (3) scrapping a worthwhile and cost-effective state program.

It is therefore inescapable that such suits would in effect operate against the states. And, of course, the Eleventh Amendment precludes suit for money damages against state officers in their official capacities. *See, e.g.*, *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985). This case thus presents an opportunity not only to interpret the proper scope of the DPPA but to determine whether, and under what circumstances, a plaintiff can evade the Eleventh Amendment's bar by simply suing a state official in his or her personal capacity for acts performed purely as a matter of that individual's

official duties.[6] For these reasons and the reasons stated in the petition, this case presents a significant question of the scope of the Eleventh Amendment.

* * *

Without review from this Court, states will be forced to curb beneficial and lawful programs or risk massive liability for themselves or their officials. Congress did not intend such a dramatic intrusion on the administration of state governments—and, indeed, affirmatively cabined the exposure of the states. That considered judgment should govern resolution of this case and future cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[6] This question has produced varying answers in the courts of appeals. The Fourth Circuit, considering a claim brought under the Family and Medical Leave Act (FMLA), held that all personal-capacity suits under that statute are barred by the Eleventh Amendment. *See Lizzi* v. *Alexander*, 255 F.3d 128, 136-138 (4th Cir. 2001), *overruled in part on other grounds by Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003). The Seventh Circuit, considering a Fair Labor Standards Act claim, barred an personal-capacity suit where the plaintiffs (1) sued state officials merely for implementing a state policy, (2) sought to "accomplish *exactly* what they would accomplish were they allowed to maintain this suit against the state," and (3) sought such astronomical damages that indemnification would "not be an *option*" but a necessity. *Luder* v. *Endicott*, 253 F.3d 1020, 1022-1025 (7th Cir. 2001) (Posner, J.). The Tenth Circuit, by contrast, has held that personal-capacity suits under the FMLA raise no Eleventh Amendment concerns. *See Cornforth* v. *University of Okla. Bd. of Regents*, 263 F.3d 1129, 1132-1133 (10th Cir. 2001).

Respectfully submitted.

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