No. 07-

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

PETITION FOR A WRIT OF CERTIORARI

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August 13, 2007

QUESTIONS PRESENTED

1. Whether the Drivers' Privacy Protection Act ("DPPA") creates a private right of action for damages against State officials for enforcing State laws, policies and practices that allegedly violate the DPPA.

2. Whether a cause of action for billions of dollars in damages against State officials for enforcing State law for the sole benefit of the State and in compliance with State law requirements violates the Eleventh Amendment to the United States Constitution.

3. Whether a federal right is "clearly established" for purposes of qualified immunity when it arises under a federal statute never previously held to create a private cause of action against state actors and when the State officials' conduct complies with mandatory State law obligations.

PARTIES TO THE PROCEEDING

The parties to the proceeding were Defendants-Appellees Fred O. Dickinson, III, Carl A. Ford, Sandra Lambert, Michael D. McCaskill, Boyd Walden, Phillip Shelton, David M. Perryman, and Lawrence J. Bilbo, and Plaintiffs-Appellants Mary Ann Collier, Arthur L. Wallace, Roy McGoldrick, and Robert Pino. The Florida Department of Financial Services was a Defendant below.

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PETITION FOR CERTIORARI

Petitioners, Fred O. Dickinson III, Sandra Lambert, and Carl Ford (collectively "petitioners" or "Florida officials") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) was entered on February 12, 2007, and is reported at 477 F.3d 1306 (11th Cir. 2007). The order denying petitioners' petition for panel rehearing and rehearing en banc (App. 56a-57a) was entered on May 4, 2007, and is not reported. The opinion and order of the United States District Court for the Southern District of Florida granting petitioners' motion to dismiss plaintiffs' Second Amended Complaint (App. 12a-44a) was entered on March 30, 2006, and is not reported.

JURISDICTION

The court of appeals entered its opinion and judgment on February 12, 2007. Petitioners filed a timely petition for panel rehearing and rehearing en banc. That petition was denied on May 4, 2007. Petitioners timely filed an application for extension of time for the filing of their petition for certiorari on July 23, 2007. That motion was granted on July 25, 2007, extending the time for filing until September 4, 1007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Sections 2723 and 2724 of Title 18 of the United States Code, the Drivers' Privacy Protection Act ("DPPA"), provide as follows:

§ 2723. Penalties

(a) **Criminal fine. –** A person who knowingly violates this chapter shall be fined under this title.

(b) **Violations by State department of motor vehicles. –** Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter 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.

§ 2724. Civil action

(a) **Cause of action.** – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in the United States district court.

(b) **Remedies.** – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

The DPPA is produced in full at App. 58a-65a.

The Florida Constitution, Article I, § 24, provides in pertinent part as follows:

Access to public records and meetings.

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

. . . .

(c) This section shall be self-executing.

Section 119.07(3)(aa) (2000) of the Florida Statutes provides in pertinent part as follows:

Personal information contained in motor vehicle records exempted by an individual's request pursuant to this paragraph shall be released by the department for any of the following uses:

12. For bulk distribution for surveys, marketing, or solicitations when the department has implemented methods and procedures to ensure that:

a. Individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

b. The information will be used, rented, or sold solely for bulk distribution for survey, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have timely requested that they not be directed at them.

INTRODUCTION

The Drivers' Privacy Protection Act ("DPPA") poses a sensitive federalism problem because it directly regulates States and State agencies with respect to their own public records – specifically, driver's license and motor vehicle registration information (hereafter "driver's license information"). Petitioners are one former and two current officials of the Florida Department of Highway Safety and Motor Vehicles. These Florida officials are being sued nominally in their personal capacity in a class action seeking tens of *billions* of dollars in money damages, solely because they fulfilled their obligations under the Florida Constitution and Florida public records laws to disclose driver's license information. What is more, this is just one of many massive private class actions against state officials attempting an end run around the structure of the DPPA and the Eleventh Amendment limitations on raiding the State's fisc.

Although plaintiffs allege that Florida's laws violated the DPPA, plaintiffs did not sue the State in this action. To avoid the DPPA's carefully-drawn limits on suits against the States for policies and practices that are not in compliance with the Act, plaintiffs instead purported to sue Florida officials in their *individual capacities* for literally billions in damages solely for complying with state law. The court of appeals allowed the claims for money damages to go forward. The magnitude of the putative liability imposed on State officials, by itself, warrants this Court's review. See *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of petition for certiorari). The State officials strongly dispute plaintiffs' claims, but the *in terrorem* effect of the ruling is breathtaking. If the Eleventh Circuit's interpretation of the DPAA stands, States will not be able to adopt or implement any law or policy that even arguably violates the DPPA. If State officials can be sued for billions of dollars for implementing otherwise constitutional State law and policies, none will agree to serve. While such consequences may not

facially violate the Constitution, they strongly point to a reading of the statute that does not impose private liability on government agents, acting pursuant to state law.

The court of appeals' decision is the product of three erroneous legal holdings on important issues of federal law – each of which is in substantial tension with decisions of other courts of appeals and this Court.

First, under the DPPA, the United States Attorney General is authorized to seek civil penalties against any State "that has a policy or practice of substantial noncompliance with" the DPPA. 18 U.S.C. § 2723. This is the exclusive penalty that Congress authorized against States and State agencies whose policies or practices do not comply with the DPPA. Indeed, the DPPA's private civil cause of action may be brought only against "persons," and the Act defines "persons" to *exclude* States and State agencies. *Id.* § 2725(2). The court of appeals, however, held that plaintiffs may evade the carefully calibrated statutory structure simply by suing the State officials in their individual capacities for enforcing the "state polic[ies] and practice[s]" that violate the DPPA.

This interpretation cannot survive any integrated reading of the remedial provisions of the DPPA. But as long as it stands, private plaintiffs are free to bring – and are bringing – massive class actions against state officials individually, seeking billions of dollars based on the officials' enforcement of state laws, policies and practices, thereby exposing the States that indemnify their officials to crippling liability. Alternatively, if States do not indemnify their officers, these lawsuits effectively ensure that State officials will *not* enforce state laws if there exists any possibility of inconsistency with the DPPA. Other courts of appeals have recognized that individual-capacity suits may not be brought where doing so would contravene Congress's purpose in an underlying statute. The Eleventh Circuit's interpretation of the DPPA, however, destroys the reasonable balance Congress clearly intended to implement.

Second, if the DPPA authorizes suits for money damages against Florida officials based solely on their compliance with state law obligations, the DPPA violates the Eleventh Amendment. Plaintiffs may seek declaratory or injunctive relief from State officials for enforcing state laws that violate the Constitution or federal statutes under *Ex Parte Young*, 209 U.S. 123 (1908); but, plaintiffs are forbidden to seek money damages from State officials acting in their official capacities. See *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945), *overruled on other grounds*, *Lapides* v. *Bd. of Regents*, 535 U.S. 613 (2002). The court of appeals here allowed plaintiffs to circumvent the constitutional limitations on suits seeking damages from the States by the mere incantation of the term "individual capacity." This is contrary to this Court's teaching that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading[s]." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997). When a state official acts to comply with a state law obligation, he or she is acting in an official capacity as a matter of law. Moreover, a class action suit that seeks *billions* in damages is self-evidently not directed against individuals, but instead challenges and effectively prevents implementation of state policies and practices that are widely applicable. Unlike the Eleventh Circuit, other courts of appeals confronted with similar allegations have looked behind and *rejected* individual-capacity allegations. See, *e.g.*, *United States ex rel. Gaudineer & Comito, L.L.P.* v. *Iowa*, 269 F.3d 932, 937 (8th Cir. 2001); *Luder* v. *Endicott*, 253 F.3d 1020, 1022-23 (7th Cir. 2001).

This Court should grant review here to make clear that bare individual-capacity allegations are not conclusive, and that claims against state officials for obeying otherwise constitutional state law are official-capacity claims.

Finally, assuming *arguendo* that plaintiffs can bring individual-capacity claims against the State officials for compliance with their state law obligations, the Eleventh

Circuit's denial of qualified immunity from this potential liability for billions of dollars rested on two legal errors worthy of this Court's attention. First, the court below gave no weight to the fact that the State officials were complying with state law obligations, saying that these officials should have known that state law would be preempted. App. 10a n.3. This cavalier treatment of clear state law is in substantial tension with this Court's jurisprudence that conflicting state and local laws and policies are critically important to the qualified-immunity inquiry. In this setting, a court should apply a strong presumption that the alleged violation of federal law is not "clearly established."

Second, the court of appeals simply ignored that, far from being "clearly established," the question whether plaintiffs had any federal right to bring a DPPA action against State officials had *never* been decided until the Eleventh Circuit ruled in this case. See App. 37a (district court held that the State officials lacked "'fair warning'" for this reason). The Eleventh Circuit apparently does not believe that legal uncertainty about whether a cause of action exists is relevant to the question whether the federal right is "clearly established." This view is in significant tension with this Court's cases, but it remains an issue that has not been directly addressed. The answer will have important ramifications in all cases where federal rights seem clear, but it is entirely unclear whether private plaintiffs have a cause of action to enforce those rights. This Court should grant review and hold that in determining whether government officials have qualified immunity, the law is not "clearly established" if it is unclear whether plaintiffs have a cause of action over which the federal courts have jurisdiction.

STATEMENT OF THE CASE

1. *The Legal Framework.* To obtain a Florida driver's license, an individual must provide (i) full name and date of birth, (ii) gender, (iii) social security number (whose general disclosure was forbidden as of Oct. 1, 2002), (iv) residence, (v)

mailing address, and (vi) birth country. Fla. Stat. §§ 322.08(2), 322.05(1). To register a motor vehicle in Florida, an individual must provide a permanent street address or place of business, and personal information including a driver's license number. *Id.* § 320.02(2)(a).

Once submitted to the government, this information is presumptively a matter of public record under Florida law. See Fla. Const. art. I, § 24. By statute, public records are documents "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Fla. Stat. § 119.011(11).

Florida's Constitution and Public Records laws require the State's agencies and officials to disclose public records. Specifically, Florida's Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf," with exceptions not relevant here. Fla. Const. art. I § 24. In addition, until October 1, 2004, Fla. Stat. § 119.07(3)(aa) (2003) required State officials to disclose driver's license information unless the person to whom it pertained affirmatively requested confidentiality. See *supra* at 3 (quoting provision in full). After October 1, 2004, Florida law authorized the disclosure of driver's license information if the individual providing that information authorized its disclosure. See Fla. Stat. § 119.07(3)(aa) (2004).

Florida officials in the Department complied with their obligations under Florida law both before and after October 1, 2004. Under Florida law, the failure to comply with state public records laws and policies subjects the individual official to removal from office, criminal sanctions, and civil suit. See Fla. Stat. §§ 119.10, 119.12. Indeed, in Florida, state officials who fail to comply with open-records laws are subject to mandamus, and the relevant agency is assessed the other party's fees if records are not furnished when requested. See

Douglas v. *Mitchell*, 410 So. 2d 936 (Fla. Dist. Ct. App. 1982); *Mills* v. *Doyle*, 407 So. 2d 348 (Fla. Dist. Ct. App. 1981).

Enacted in 1994, the DPPA generally prohibits State departments of motor vehicles from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity . . . personal information . . . about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The DPPA defines "personal information" as information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address . . . , telephone number, and medical or disability information." *Id.* § 2725(3).

The DPPA does not prevent States from disclosing driver's license information if drivers consent. As originally enacted, "the DPPA provided that a DMV could obtain that consent either on a case-by-case basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity." *Reno* v. *Condon*, 528 U.S. 141, 144 (2000). On October 9, 1999, however, Congress amended the Act to "change[] this 'opt-out' alternative into an 'opt-in' requirement," requiring States to "obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 144-45. That provision took effect on June 1, 2000.

As noted above, Florida passed legislation to amend its public records law to comport with the DPPA on May 13, 2004. See Fla. Stat. § 119.07(3)(aa)(12); 2004 Fla. Sess. Law Serv. 2004-62 (West). That amendment was effective October 1, 2004. See Fla. Stat. § 119.0712(3).

DPPA's remedial provisions both authorize penalties against the States and State agencies and create a private cause of action. Section 2723 provides that a State or State agency that

maintains a "policy or practice" of substantial noncompliance with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5,000 per day. 18 U.S.C. § 2723(b) (quoted in full *supra* at 2). Section 2724 creates a private cause of action, stating that any "person" who knowingly obtains, discloses or uses information from a state motor vehicle record for a use other than those specifically permitted by the DPPA may be liable in a civil action brought by the affected driver. *Id.* § 2724 (quoted in full *supra* at 2).

2. *The Parties.* When this action was filed, petitioners Dickinson, Ford, and Lambert were three executive-level officials at the Florida Department of Highway Safety and Motor Vehicles ("the Department"). Specifically, Dickinson was the Department's Executive Director; he no longer serves in that position. Ford was and remains the Director of the Division of Motor Vehicles, and Lambert is still the Director of the Division of Driver Licenses. App. 14a (citing Second Amended Complaint ("SAC") ¶¶ 5-7). All are "custodia[ns]" of public records within the meaning of Fla. Stat. § 119.021.

Plaintiffs represent a class of individuals who have owned one or more vehicles registered with the Department and who have held Florida driver's licenses issued by the Department. App. 13a-14a. To obtain their registrations and licenses, plaintiffs provided the Department with certain "'personal information,'" as defined in the DPPA. *Id.* at 14a. Plaintiffs claim there may be as many as 15 million persons in the class, see SAC ¶ 12.A(iii), and seek $2,500 for each plaintiff, *id.* ¶ 34.

At issue in this case is the individual or personal liability of the officials of the Department for fulfilling their state law obligation to disclose driver's license information.

3. *District Court Proceedings.* In their class action complaint, plaintiffs alleged that commencing June 1, 2000, the Florida officials compiled the personal information that

plaintiffs had provided to the Department and that, for the financial benefit of the State, Florida sold that information to third parties for bulk distribution for purposes not permitted by the DPPA. App. 14a (citing SAC ¶ 11).[1] Plaintiffs sought money damages against the State officials in their individual capacities for violations of (i) their constitutional right to privacy under 42 U.S.C. § 1983, and (ii) the DPPA, by itself and as enforced through § 1983.

On July 15, 2004, the State officials filed a motion to dismiss, asserting, *inter alia*, that this action is barred by the Eleventh Amendment because the State is the real party in interest, that plaintiffs failed to state a claim under the DPPA, and that the State officials were entitled to qualified immunity from damages. App. 46a.

On January 3, 2005, the district court ordered discovery on questions related to whether the State officials were entitled to qualified immunity from suit. See App. 54a. The court explained that:

> [g]iven the state of the law at the time of the alleged wrongful conduct, it is unclear whether Defendants are entitled to qualified immunity for the DPPA claim. For example, Florida law conflicted with the DPPA at the time of the alleged wrongful conduct, *Compare*, *e.g.*, 18 U.S.C. § 2721, to § 119.07(aa), Fla. Stat. (2000). In addition, Defendants assert that they "had no discretion under state law to refuse to release public records when requested." [App. 53a-54a.]

After discovery, the State officials again moved to dismiss the complaint. Declining to address the other constitutional and statutory arguments that the State officials made, the district court granted the motion to dismiss, holding that

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[1] This case was brought as a federal companion to a state action against Florida for damages and injunctive relief based on the same alleged violations. *See Collier* v. *State*, 943 So. 2d 945 (Fla. Dist. Ct. App. 2006).

plaintiffs' claims were barred by the doctrine of qualified immunity.

As relevant here, the district court held that the DPPA does create a private cause of action against all persons, including the State officials. App. 36a-37a. Nonetheless, the court held that the State officials were entitled to qualified immunity because "the state of the law was not sufficiently clear to provide [the officials] with 'fair warning' that their conduct violated a statutory right," *id.* at 37a, or "expose[d] [them] to personal liability." *Id.* at 40a.

> [The State officials] were faced with a difficult executive-level policy decision, indeed they were stuck between a proverbial "rock and a hard place." On the one hand, there was an amendment to the DPPA that arguably mandates an "opt in requirement," *see Condon*, 528 U.S. at 669 . . . . On the other hand, the Florida Constitution contains language regarding public records that describes itself as "self-executing" and presumes . . . public records . . . must be disclosed absent an express constitutional or legislative exemption that precludes disclosure. *See* Fla. Const. Art. I, § 24. Furthermore, at the time of [the State officials'] conduct, a Florida statutory provision governed the release of records by the [Department]. *See* Fla. Stat. § 119.07(aa) (2003). [App. 40a-42a (footnote omitted).]

4. *The Court of Appeals.* The Eleventh Circuit reversed. Again, as relevant here, the court of appeals held that the DPPA does authorize individuals to bring a private cause of action against "persons" who disclose their motor vehicle records without consent. App. 6a. Thus, the court found that the State officials were "persons" even though they were sued for complying with state law obligations, policies and practices. The court also held that the statutory right created by the DPPA could be enforced under § 1983. The court rejected the State officials' arguments that Congress did not intend to authorize

any private cause of action based on State officials' compliance with state law, policies and practices. *Id.* at 6a-9a.

Finally, the court rejected the district court's determination that the law was not clearly established when the State officials acted, holding that the language of the DPPA and this Court's decision in *Reno* gave the State officials' fair warning that their disclosures were unlawful. App. 9a-10a. The court dismissed the State officials' reliance on their conflicting state law obligations, saying that these officials – two of whom were not lawyers while the other was not practicing law – should have known "that the DPPA preempted any conflicting state law." *Id*. at 10a n.3.[2]

The State officials sought rehearing and rehearing en banc. The petition was denied on May 4, 2007.

REASONS FOR GRANTING THE PETITION

I. THE DECISION THAT THE DPPA CREATES A PRIVATE CAUSE OF ACTION FOR DAMAGES AGAINST STATE OFFICIALS FOR COMPLYING WITH STATE LAW IS WRONG AND WILL HAVE DISASTROUS CONSEQUENCES FOR THE STATES.

The DPPA's remedial scheme reflects Congress's solicitude for State sovereignty. This respect was particularly appropriate in light of the fact that Congress was regulating in the highly sensitive area of the States' treatment of their own public records. The DPPA creates a private cause of action,

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[2] The court acknowledged that the challenged acts of the State officials were "undertaken pursuant to the performance of [their] duties," and "within the scope of [their] authority," and therefore that the State officials were acting within the scope of their discretionary authority. App. 2a n.1 (quoting *Lenz* v. *Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995)). Although the actions were within the officials' discretionary authority, their content was dictated by state law – that is, Florida law required the disclosure of the driver's license information at issue. *See supra* at 8.

but makes clear both that there is no private cause of action for money damages against States or State agencies, *and* that only the United States Attorney General can enforce the DPPA against state "polic[ies] and practice[s]" that are alleged not to comply with the Act.

The DPPA provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record" in violation of the Act may be liable for "actual damages, but not less than liquidated damages in the amount of $2,500," plus punitive damages and attorneys' fees. 18 U.S.C. § 2724. The DPPA's definition of "person," however, expressly *excludes* States and State agencies. *Id.* § 2725(2). The DPPA, accordingly, establishes no private cause of action against States and State agencies.

In addition, the DPPA specifies that the Attorney General is the entity responsible for enforcing the Act against "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance." *Id.* § 2723. This section limits the States' potential liability to "not more than $5,000 a day." *Id.* Thus, the Act contemplates that challenges to State laws, policies and practices that violate the DPPA will be brought by the Attorney General and will be punishable only by a daily fine. See *Reno*, 528 U.S. at 147 ("[w]hile the DPPA defines 'person' to exclude States and state agencies, § 2725(2), a state agency that maintains a 'policy or practice of substantial noncompliance' with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5000 per day of substantial noncompliance").

Under Florida law (both its Constitution and a state statute), the State officials here were required to disclose driver's license information upon request. Clearly, this was a State "policy or practice" within the meaning of the DPPA, and its validity was incontestable, but for the DPPA. The Attorney General could have sought from Florida a penalty of "not more than $5,000 a day" had he determined that Florida's policy or practice was not in "substantial compliance" with the Act.

This case, however, was filed by a class of private plaintiffs who sued Florida officials under the DPPA's private civil cause of action.

The DPPA by its remedial structure makes clear that Congress intended *only* the Attorney General to address State laws, policies and practices that violate the Act. The DPPA's express exclusion of the States and State agencies from the private cause of action and its specification of Attorney General enforcement and limited penalties for States with substantially non-compliant policies and practices would be eviscerated if private plaintiffs could challenge state laws, policies and practices and obtain massive damages simply by naming State officials individually as defendants. It makes no sense to interpret § 2724 to authorize suits that circumvent fundamental limitations in the Act, particularly in an area of federalism that is as sensitive as the enforcement of federal law directly against State law and practices. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002) (once Congress selects an appropriate remedy, there is no private right of action for the same claim).

Despite the structure of the DPPA's remedial provisions, the Eleventh Circuit allowed plaintiffs to bring this suit. The court decided that the State officials were "persons" within the meaning of § 2724, because they were sued *in their individual capacities*. As shown above, this decision is contrary to congressional intent as manifested in the design of the statute. Under the DPPA, State officials may be treated as "persons" for some purposes (*i.e.*, if they used their position to disclose driver's license information for personal reasons). But, clearly, State officials are not "persons" under the DPPA when they are sued for implementing State laws, policies and practices and when the only beneficiary of the use of information is the State.

Other courts of appeals have confronted the same question – whether Congress intended that a State official sued individually be subject to suit as a "person" within the meaning of the federal statute at issue. In some instances, the courts

have refused to interpret federal statutes authorizing suits against "persons" to allow suits against *any* individual State officials. See *Butler* v. *City of Prairie Vill., Kan.*, 172 F.3d 736, 744 (10th Cir. 1999) (holding that "the ADA precludes personal capacity suits against individuals who do not otherwise qualify as employers," and noting that multiple circuits had reached the same conclusion under the ADEA) (citing numerous cases).

Other courts of appeals have refused to allow individual-capacity suits in particular circumstances when doing so would circumvent Congress's limits on suits against the States. Thus, in *Lizzi* v. *Alexander*, 255 F.3d 128, 136-37 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2000), the court held that an individual-capacity suit against State officials as "persons" under the FMLA was barred, explaining that "[t]he complaint made no showing of any ultra vires action taken by any individual employee." *Id.* at 136. Otherwise, the court opined, private plaintiffs "would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." *Id.* at 137. But see *Cornforth* v. *Univ. of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) (allowing individual-capacity suits under FMLA).

As these cases illustrate, a statute's use of the word "person" cannot be interpreted in a vacuum. Here, the statutory context makes clear that under the DPPA, that word does not include State officials enforcing State law, policy and practice for the benefit of the State.[3]

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[3] Some of the confusion on this point is engendered by the lower courts' overreading of *Hafer* v. *Melo*, 502 U.S. 21 (1991) – which held that State officials, sued in their individual capacities, are "persons" within the meaning of § 1983. *Id.* at 27-28. Some lower courts have concluded that *Hafer* applies to all federal statutes authorizing suits against "persons," while others recognize that *Hafer* was based on the "'broad language of

The consequences of the Eleventh Circuit's erroneous holding cannot be overstated. The DPPA is directed not only at private parties but also at States in their capacity as States and in connection with their laws and policies related to their own public records. If private plaintiffs can evade the Act's limits on enforcement and penalties vis-à-vis States simply by asserting that they are suing State officials in their individual capacity, the States and their officials face liabilities in the tens of billions of dollars. A class action such as this one, involving almost all Florida drivers and seeking $2,500 in liquidated damages *per driver*, gives rise to a potential, crippling liability of billions of dollars. "This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." See *Fid. Fed. Bank & Trust*, 547 U.S. at 1051 (Scalia, J., concurring in denial of petition for certiorari) (describing billions in potential liability arising from Florida's period of delay before amending its laws in response to the 2000 amendments of the DPPA).

The ruinous liability confronting Florida and its officials is not, however, the sole reason for urgency. There is a *second* suit pending against Florida officials seeking money damages for alleged disclosures in violation of the DPPA and § 1983 that occurred *after 2004*. See *Rine et al.* v. *Dickinson et al.*, No. 3:07-cv-00156 (M.D. Fla. filed Mar. 6, 2007). Again, the putative class seeks $2,500 per class member, as well as compensatory damages and attorney's fees, and asserts that the class includes a substantial portion of Florida's 13.7 million drivers and 15 million registered car owners. Compl. ¶¶ 6.3, 7.1.3., *id*. In addition, other private plaintiffs have filed similar class actions against State officials in Minnesota, Missouri, and Ohio. See *Kracum* v. *McCormack et al.*, No. 0:07-cv-01462 JMR/FLN (D. Minn. filed Mar. 8, 2007); *Poynter et al.* v. *Vincent et al.*, No. 2:07-cv-04047-NKL (W.D. Mo. filed

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§ 1983,'" *Lizzi*, 255 F.3d at 137. The DPPA's use of the word "person" must be interpreted in the context of all of its remedial provisions.

Mar. 6, 2007); *Bogard* v. *Morckel et al.*, No. 5:07-cv-00671 (N.D. Ohio filed Mar. 8, 2007).

Individually and in combination, these claims threaten to impose hundreds of billions in liability for the States' implementation of policies and practices alleged to violate the DPPA even though the Act does not authorize such a claim and, indeed, limits enforcement activity challenging State policies and practices to the Attorney General. Equally to the point, the existence of a private cause of action under the DPPA will prevent States from establishing or enforcing any State law or policy that could arguably violate the DPPA. The States generally indemnify employees for fulfilling State law duties and implementing state law and policies. Thus, as a practical matter, States will face potentially bankrupting liabilities when every driver has a claim worth a minimum of $2,500. Certainly, unindemnified State officials could not risk such exposure. Allowing suits for billions against State officials is both absurd and abusive; it is inconceivable that Congress meant to put government officials in such a predicament.

This Court should, accordingly, grant the petition to address whether plaintiffs may bring private causes of action against State officials for their compliance with or implementation of State laws, policies and practices alleged to violate the DPPA.[4]

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[4] Plaintiffs' claim under § 1983 of the Civil Rights Act is barred for the same reason as the DPPA claim – because the text and structure of the DPPA reveal that individuals have no private right of action against State officials who are implementing State law, policies and practices. *See Gonzaga*, 536 U.S. at 283 ("the inquiries [in actions arising under § 1983 or directly under a statute] overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a federal right*"); *id* at 285 ("the initial inquiry [in a § 1983 claim] – determining whether a statue confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statue 'confers rights on a particular class of persons'") (alteration omitted).

II. A SUIT AGAINST A STATE OFFICIAL SEEKING MONEY DAMAGES SOLELY FOR THE OFFICIAL'S COMPLIANCE WITH OR IMPLEMENTATION OF STATE LAW IS BARRED BY THE ELEVENTH AMENDMENT.

The incantation of the term "individual capacity" is not sufficient to transform an official-capacity action into litigation against a private person. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986). Where, as here, a State official is sued for billions of dollars based on nothing more than his or her compliance with State law and when the beneficiary of the official's action is the State, that lawsuit is one against the State itself as a matter of law. Indeed, other than altering State policy and obtaining State money, there is no point to a massive class action for billions of dollars of relief against a few officials who cannot possibly provide such relief. Plaintiffs' real target is the State. In such an action, any claim for money damages is barred by the Eleventh Amendment. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 72 (1996). The Eleventh Circuit's contrary decision – which looked solely at the individual-capacity label plaintiffs placed on their claims – did not comply with this Court's teachings and conflicts with the approaches adopted by other courts of appeals.

The State officials freely acknowledge that under *Ex Parte Young*, 209 U.S. 123 (1908), plaintiffs generally may seek injunctive relief from State officials to require them to comply with federal law and to preserve the supremacy of federal law. In addition, plaintiffs may generally seek damages from government officials in their individual capacities when the claim is against the individual and not against the State. *Alden* v. *Maine*, 527 U.S. 706, 757 (1999). But, however a complaint is styled – as a claim for injunctive relief or damages or as against officials in their official or individual capacities – it is the federal court that must decide whether that claim is *in actuality* a claim against the state. *Coeur d'Alene*, 521 U.S. at

270. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Id.* Accordingly, the fact that the plaintiffs here characterize their suit as one seeking money damages from State officials *in their individual capacities* does not govern.

There is a marked tension between the decision below and decisions arising under the analogous statutory structure of the False Claims Act ("FCA"). Like the DPPA, the FCA authorizes claims against any "person" who knowingly violates the Act; and like the DPPA, the FCA excludes States and State agencies from the definition of "person," thus forbidding any FCA claim against the States. See *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). Several courts of appeals have held that plaintiffs may not circumvent the FCA's prohibition of suits against the States by suing State officials in their individual capacities when those officials have simply implemented State law and policies and have not acted for personal gain.

The Eighth Circuit, for example, has held that in determining whether a State official has been sued in his or her individual capacity under the FCA, a court "should look at whether the alleged conduct of the defendant was 'outside of [his] official duties.'" *Gaudineer & Comito*, 269 F.3d at 937 (alteration in original) (quoting *Bly-Magee* v. *California*, 236 F.3d 1014, 1016 (9th Cir. 2001)). The court of appeals first recognized that it "should not rely wholly on 'the elementary mechanics of captions and pleading,'" and then held that the plaintiff had not alleged that the State official engaged in any conduct outside of his official duties, and therefore that the plaintiff had not alleged a claim against the State official in his individual capacity. *Id.* The court pointed out that the plaintiffs "claim against [the State official] in his individual capacity [was] for the same acts it had previously alleged he was performing in his official capacity." *Id.* See also *Smith* v. *United States*, 287 F.2d 299, 303-04 (5th Cir. 1961) (suggesting that FCA claims against government officials in their personal capacities must

contain allegations of personal gain); *United States ex rel. Dunleavy* v. *County of Del.*, 279 F.3d 219, 221 (3d Cir. 2002) (agreeing with the district court that personal benefit is necessary to subject a government to individual liability under the FCA), *vacated on other grounds*, 538 U.S. 918 (2003).

Other courts of appeals have reached similar conclusions under other federal statutes authorizing suits against "persons." For example, both the FLSA and the FMLA define an employer as "any *person* who acts, directly or indirectly, in the interest of an employer." 29 U.S.C. §§ 203(d), 2611(4)(A)(ii)(I) (emphasis supplied). Several courts of appeals have concluded that plaintiff employees may not circumvent the prohibition on claims for money damages from States simply by asserting that the government employees who are their supervisors are "persons" who can be sued in their individual capacities.

Thus, in *Luder* v. *Endicott*, 253 F.3d 1020 (7th Cir. 2001), the plaintiffs sued State officials in their individual capacities seeking back pay based on allegations that "the State of Wisconsin d[id] not share the plaintiffs' interpretation of the [FLSA]." *Id.* at 1024. The Seventh Circuit explained that plaintiffs are "seeking to force the state to accede to their view of the Act and to pay them accordingly." *Id.* The court concluded that while State officials may be "persons" under the Act, "a suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state, is, we think, barred." *Id.* at 1023 (emphasis omitted). Indeed, the court observed that "[a]ny other position would be completely unrealistic and would make a mockery of the Supreme Court's heightened sensitivity to state prerogatives." *Id.*

Finally, in both *Lizzi*, and *Montgomery* v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 1075 (2002), the Fourth Circuit held that individual-capacity suits against State officials as "persons" for backpay under the FMLA are, in reality, suits against the State that are barred by

the Eleventh Amendment. As the court explained, "the state is the real party in interest when an official is sued for damages for official acts under the FMLA." *Id.* at 340 (citing *Lizzi*, 255 F.3d at 136-38). The court based its conclusion "on the fact that private plaintiffs [otherwise] 'would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer.'" *Id.* at 137. See also *Lizzi*, 255 F.3d at 136 ("[t]he complaint made no showing of any ultra vires action taken by any individual employee").

The courts of appeals have held that a State does not become the real party in interest simply because it chooses to indemnify State officials. See, *e.g.*, *Duckworth* v. *Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985) *abrogated on other grounds by Farmer* v. *Brennan*, 511 U.S. 825 (1994). But, a claim against State officials based on their fulfillment of State law obligations, particularly when the damages are so large that they could not conceivably be paid by a State official and when the result would inevitably alter State policy, should be treated as a claim against the State itself – whether or not the complainant labels the claim an individual-capacity claim. See *Edeman* v. *Jordan*, 415 U.S. 651, 663-65 (1974). The fact that this case is a class action challenging a State law that broadly regulates virtually all Florida citizens underlines this point. Moreover, suing State officials for billions is meaningless unless the plaintiffs' real target is the State. It is also abusive of those officials.

In sum, the State is the real party in interest when individual officials are doing nothing more than complying with otherwise constitutional State law or official State policy and the State alone stands to benefit from the official's actions. If what Florida did here had been undertaken by Illinois or Maryland, this litigation would be over. This Court should grant the petition to hold that claims based on such actions by State officials are not individual-capacity claims as a matter of law. The court of appeals' contrary rule, permitting

individual-capacity suits in these circumstances, "adhere[s] to an empty formalism and . . . undermine[s] the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene*, 521 U.S. at 270.

III. THE STATE OFFICIALS DID NOT VIOLATE CLEARLY ESTABLISHED LAW AND WERE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Even if plaintiffs could otherwise state a valid claim under the DPPA and § 1983, the State officials were entitled to qualified immunity. Qualified immunity shields public officials from damages claims for actions taken in their individual capacities "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The statutory rights at issue here were not "clearly established." The court of appeals' contrary determination was based on two errors of law. Its decision contravenes this Court's teachings with respect to qualified immunity, as well as the decisions of other courts of appeals, and should be reviewed by this Court.

First, the court of appeals denied the State officials qualified immunity based on their decision to comply with undisputed State law, saying that the State law was irrelevant because the officials should have known that the State law was preempted based on this Court's decision in *Reno*. App. 10a n.3. This back-of-the-hand treatment of State law – and the position of individual State officials confronted with State law obligations that may ultimately be deemed contrary to federal law – is inconsistent with this Court's jurisprudence and a number of decisions by other courts of appeals.

Reno held only that the DPPA was a constitutional exercise of Congress's regulatory power under the Commerce Clause; it did not address the scope of preemption or discuss the

preemption of particular State laws. Indeed, this Court observed that "[t]he DPPA's prohibition of nonconsensual disclosures is . . . subject to a number of statutory exceptions," some of which require disclosure and others of which permit disclosure. 528 U.S. at 145. Moreover, critically here, this Court specifically noted that the DPPA applies different penalties "to be imposed on States and *private actors* that fail to comply with its requirements," and appeared to explain that even a State that maintained a policy or practice of *substantial* noncompliance was subject *only* to a civil penalty imposed by the Attorney General. *Id.* at 146-47 (emphasis supplied). In this setting, the State officials confronted with a conflict between their State law obligations and the DPPA reasonably believed that they were not "private actors"; that there was no private cause of action against them for fulfilling those State law obligations; and that the question whether the State was in "substantial noncompliance" would be addressed by the Attorney General.

This Court has routinely recognized the importance of positive law in assessing whether a government official is entitled to qualified immunity for a constitutional or statutory violation. In *Pierson* v. *Ray*, 386 U.S. 547, 555-57 (1967), the Court held that law enforcement officers were entitled to qualified immunity "for acting under a statute that [the officers] reasonably believed to be valid that was later held unconstitutional." Similarly, in *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999), the Court noted that a Marshals Service policy authorizing the government officials' actions was "important" to the conclusion that those officials were entitled to immunity. Cf. *Hope* v. *Pelzer*, 536 U.S. 730, 744-45 (2002) (denying Alabama officials qualified immunity in part because of a U.S. Department of Justice memorandum condemning Alabama's policy).

Other courts have recognized the import of this Court's teachings and held that, in assessing whether federal law is clearly established, the existence of other laws and policies is

important. See, *e.g.*, *Roska ex rel. Roska* v. *Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) ("'the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional'") (quoting *Grossman* v. *City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)); *Connecticut ex rel. Blumenthal* v. *Crotty*, 346 F.3d 84, 102 (2d Cir. 2003) (considering "particularly persuasive" that "the challenged conduct involved enforcement of a presumptively valid statute"); *Sullivan* v. *Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (zoning officials have qualified immunity when they are "simply implementing an established policy of the town").

Where, as here, State law imposes obligations on State officials, the courts should presume that the officials are entitled to qualified immunity. This presumption would be overcome only if it were absolutely clear that the plaintiffs had a federal right that compliance with State law would violate. That is plainly not the case here, where it was entirely uncertain whether plaintiffs even had a private cause of action against the State officials. These State officials were literally torn between obeying State law and defying State law to address the DPPA when that Act did not appear to have any private enforcement mechanism against the State.

Second, the court held that the law governing plaintiffs' claim was "clearly established" because the DPPA made unlawful the State's disclosures of driver's license information without affirmative driver consent. But, it was far from "clearly established" – indeed, no court had ever addressed – whether private plaintiffs have a cause of action against State officials for damages under the DPPA. For precisely this reason, the district court expressly held that the law was not clearly established. See App. 42a. The district court's conclusion should have led the court of appeals to find that the relevant law was not clearly established. See *Wilson*, 526 U.S. at 618 ("[i]f judges . . . disagree on a constitutional question, it

is unfair to subject [officials] to money damages for picking the losing side of the controversy"). The court's refusal to do so was based on a legal error.

Specifically, the court of appeals appeared to believe that the only relevant question for qualified immunity is whether a substantive prohibition of federal law – here, the DPPA – had been violated. This argument totally misapprehends the nature of the qualified immunity defense. The question whether the plaintiffs even have a cause of action against State officials is equally relevant to qualified immunity. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). The fact that certain conduct is prohibited does not show that plaintiffs have an individual right to money damages against State officials for complying with State law that violates that right. In determining whether an official should have known that his or her actions violated a clearly established statutory right, the Court must examine the entirety of the statutory cause of action. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon"). Cf. *Starlight Sugar, Inc.* v. *Soto*, 253 F.3d 137, 144-45 (1st Cir. 2001) (holding that, even if the Commerce Clause violation were clearly established, "the applicability of the dormant Commerce Clause to Puerto Rico is disputed, and, thus appellees' attendant constitutional right is not clearly established").

The State officials here were confronted with a State law duty requiring one course of conduct and a federal statute purporting to forbid the conduct required by State law. The Attorney General had not sought to impose penalties upon Florida for substantial non-compliance. In this setting, it is clear that the Florida officials reasonably could decide to fulfill

their State law obligations (and avoid potential criminal prosecution) based on the belief that private plaintiffs did not have an enforceable right to seek damages against State officials for compliance with State law. Put differently, it was far from clearly established that "the text and structure" of the DPPA indicat[ed] that Congress intend[ed] to create new individual rights" against State officials implementing State laws, policies and practices. *Gonzaga*, 536 U.S. at 285-86. Qualified immunity is "intended to provide government officials . . . the ability . . . to anticipate when their conduct may give rise to liability for *damages*." *Anderson*, 483 U.S. at 646 (emphasis supplied) (internal quotation marks and alteration omitted).

When it is not "clearly established" that private parties have any cause of action against government officials, then the relevant federal law is not clearly established and government officials are entitled to qualified immunity, even if a legal prohibition has been violated. This Court should grant the petition to clarify this important element of qualified immunity for government officials.

* * * *

This case poses as sensitive a federalism issue as this Court can confront. Congress imposed liability on the States, which itself makes this a very sensitive problem. To protect State prerogatives, Congress expressly limited the federal government's ability to intrude into the State's administration of its laws and practices to situations where the Attorney General has made the decision that litigation is the only recourse. The holding of the court of appeals that private plaintiffs can strip the States of the clear protection that Congress meant to confer simply by suing State officials individually creates an intolerable situation. This diminishes the standing of the States in our federalist system in a way that Congress most certainly did not intend, which is reason enough for this Court to grant certiorari. The fact that this comes with

a price tag in the tens of billions of dollars makes the case for further review unassailable.

CONCLUSION

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

Respectfully submitted,

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