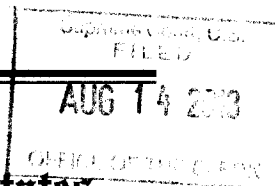


13-218
No. 13-218

IN THE
Supreme Court of the United States



MARCY A. JOHNSON, individually and
on behalf of all others similarly situated,

Petitioner,

v.

WEST PUBLISHING CORP., a Minnesota corporation,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Driver's Privacy Protection Act to protect the privacy of Personal Information provided by drivers to state DMVs. The obtainment of Personal Information is prohibited under the DPPA unless it is for a purpose permitted by one of the statute's 14 exceptions for obtaining such information. In *Maracich v. Spears*, 133 S. Ct. 2191, 2202–03 (2013), the Court held that none of the DPPA's exceptions "are written to authorize private individuals to acquire the most restricted personal information in bulk merely to propose a commercial transaction for their own financial benefit." Did the Eighth Circuit err in holding that Personal Information may be obtained in bulk for any reason, so long as the information is eventually used by a person under one of the DPPA's 14 exceptions?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit reversing the denial of West's motion for judgment on the pleadings is an unreported decision, *Johnson v. West Publishing Corp.*, 504 Fed. App'x 531 (8th Cir. Apr. 9, 2013), *rehearing and rehearing en banc denied* May 16, 2013. *See* Appendix ("App.") A, B. The memorandum opinion and order of the District Court denying West's motion for judgment on the pleadings is unreported, but is available at *Johnson v. West Publishing Corp.*, No. 2:10-cv-04027, 2011 WL 3490187 (W.D. Mo. Aug. 9, 2011). *See* App. C.

BASIS FOR JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eighth Circuit entered its opinion on April 9, 2013, and denied Johnson's petition for rehearing and rehearing en banc on May 16, 2013.

STATUTE INVOLVED

The statute at issue is the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* *See* App. D.

STATEMENT OF THE CASE

West obtains the Personal Information—information contained in motor vehicle records, *see* 18 U.S.C. § 2725(1)–(3)—of millions of individuals in bulk (including Johnson) for the sole purpose of reselling that information to third

parties for a profit. App. at 5a–6a; 68a. West does not obtain the Personal Information for any of the express exceptions outlined in § 2721(b), and West does not use the Personal Information. App. at 29a. Rather, West asserts that it is an “authorized recipient” of Personal Information under section 2721(c), and is merely a reseller of Personal Information. *Id.*

West’s conduct in obtaining Johnson’s Personal Information violates the DPPA because the DPPA prohibits obtaining Personal Information unless the obtainment falls under one of the 14 exceptions set forth in § 2721(b). *See* App. at 61a–67a.

West moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), but the District Court denied its motion. App. at 7a; 22a. West claimed that although it met none of section 2721(b)’s 14 exceptions, its conduct was lawful because it was an “authorized recipient” under section 2721(c). App. at 29a. The DPPA does not set forth a definition for “authorized recipient.” App. at 64a–65a. The District Court rejected West’s interpretation of the DPPA, concluding that “Congress used the term ‘authorized recipient’ in section 2721(c) to refer to those persons or entities that *obtained the information pursuant to one or more of the fourteen exceptions immediately preceding the reference to ‘authorized recipient.’*” App. at 30a (emphasis added).

The District Court found that the DPPA, “in accordance with its plain language and legislative purposes,” generally prohibits disclosure, while section 2721(b) lists 14 exceptions to nondisclosure. App. at 27a; 30a. “One would expect that if Congress had intended

to make a fifteenth exception to the nondisclosure rule, it would have mentioned it while listing the exceptions to the rule of nondisclosure.” *Id.* at 30a.

Congress linked “authorized recipient” in each sentence of 2721(c) to the specific exceptions in 2721(b) authorizing the recipient to obtain the information. App. at 31a. “Congress intended authorized recipients to . . . [qualify] to receive the information by the terms of section 2721(b).” App. at 31a. Any other reading of section 2721(c) would lead to the “absurd result that resellers could obtain all of the personal information in the database simply by calling themselves resellers, while everyone else—including law enforcement—would have to justify their receipt of personal information under” one of section 2721(b)’s exceptions. App. at 31a. “Given the strict linkage between the method of obtainment and the restrictions on resale, Congress could not have intended to create a gaping hole in the [DPPA] for resellers by authorizing them to obtain the entire driver’s license database simply by identifying themselves as a reseller.” App. at 32a.

The District Court correctly concluded that West’s flawed interpretation of the DPPA would lead to the following absurd result:

A potential stalker cannot walk into a Missouri DMV to obtain every Missouri driver’s name, address, height, weight, eye color, driver’s license number, and social security number without a specific permissible use under the DPPA. *See Taylor*, 612 F.3d at 336 (explaining that the immediate impetus for the DPPA was “the murder of actress Rebecca Schaeffer at

the hands of a stalker”). It is not enough for him to smile, nod, and promise to comply with the DPPA in the future. Rather, he must at least be able to articulate a specific permissible use from among the closed universe of permissible uses under section 2721(b), beyond which all uses are impermissible. If the same standard is not applied to resellers, then the DPPA does not prevent them from selling everyone’s personal information on websites such as www.publicdata.com, so long as the purchaser promises not to misuse it.

App. at 45a. Congress could have, for instance, added an additional exception to section 2721(b)(3) to allow companies to obtain Personal Information in bulk for the sole purpose of resale; “[i]t did not.” App. at 32a.

The Eighth Circuit reversed. *Id.* at 15a. The Eighth Circuit held that a person can obtain Personal Information in bulk for any reason, and that bulk obtainment need not meet one of section 2721(b)’s exceptions. App. at 13a. The Eighth Circuit referenced its decision in *Cook v. ACS State & Local Solutions, Inc.*, 663 F.3d 989 (8th Cir. 2011). App. at 11a–15a. Quoting *Cook*, the Eighth Circuit held that Johnson “cannot establish a DPPA violation by alleging that Defendants obtained personal information with the sole purpose of selling it to third parties who have permissible section 2721(b) uses for the information.” App. at 13a. *Cook* relied on interpretations of “authorized recipient” set forth by *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010), and *Graczyk v. West Publishing Corp.*, 660 F.3d 275 (7th Cir. 2011). App. at 14a–15a. In sum, the Eighth Circuit’s opinion allows obtainment of Personal

Information for any reason, so long as the information is eventually used by a person under one of section 2721(b)'s 14 exceptions. App. at 13a.

The District Court had jurisdiction under 28 U.S.C. § 1331, because Johnson sued West under the DPPA, 18 U.S.C. §§ 2721 *et seq.*

REASONS FOR GRANTING THE PETITION

The Court recently held that none of the DPPA's "exceptions are written to authorize private individuals to acquire the most restricted personal information in bulk merely to propose a commercial transaction for their own financial benefit." *Maracich v. Spears*, 133 S. Ct. 2191, 2202–03 (June 17, 2013). The Eighth Circuit's opinion, as well as the opinions of the Fifth Circuit, Sixth Circuit, and Seventh Circuit in *Taylor, Wiles*, and *Graczyk*, respectively, directly conflict with *Maracich* because they allow persons and entities like West to obtain Personal Information from DMV records in bulk for the sole purpose of reselling that information for a commercial profit—or for any reason at all. The Eighth Circuit's opinion must therefore be reversed or, at a minimum, vacated and remanded for further consideration in light of *Maracich*. See, e.g., *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (reversing and remanding case in light of recent decision).

The Eighth Circuit's interpretation of the DPPA—which ignored the plain language and structure of the DPPA—also violates long-standing principles of statutory interpretation, some of which the Court most recently reiterated in *Maracich*. Under the Eighth

Circuit's opinion, a reseller of Personal Information need not meet one of section 2721(b)'s exceptions to obtain Personal Information—even though persons such as law enforcement must still meet one of the required exceptions. App. at 31a. The core purpose of the DPPA—providing control over disclosing individuals' Personal Information—is frustrated, if not destroyed, under the Eighth Circuit's interpretation of the DPPA, which eviscerates the statute's goal of privacy protection. This result, as the District Court characterized it, is absurd.

The Court should grant this petition to resolve this gross misinterpretation of the DPPA by the Eighth Circuit and provide the bright line of protection to society granted by Congress through the DPPA.

I. The Eighth Circuit's Opinion Conflicts with this Court's Opinion in *Maracich v. Spears*.

In *Maracich v. Spears*, 133 S. Ct. 2191, 2202–03 (June 17, 2013)—a case interpreting the text of the DPPA—the Court held that none of the DPPA's “exceptions are written to authorize private individuals to acquire the most restricted personal information in bulk merely to propose a commercial transaction for their own financial benefit.” This is precisely the conduct in which West engages and which the Eighth Circuit condoned in its opinion.

West obtains Johnson's and Class Members' Personal Information in bulk to resell that information to third parties for its own financial benefit. West does not dispute that it does not meet any of section 2721(b)'s exceptions in its obtainment of Personal Information. *See Maracich*, 133 S. Ct. at 2208 (“Each distinct disclosure or use of

personal information acquired from a state DMV must be permitted by the DPPA.”) (citing 18 U.S.C. §§ 2724(a), 2721(c)). West’s obtainment, therefore, is unlawful under the DPPA. *See* 18 U.S.C. § 2722 (“It shall be unlawful for any person knowingly *to obtain* or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.”) (emphasis added).

Regarding section 2721(b)’s exceptions, *Maracich* held that “[u]nless commanded by the text, however, these exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design.” 133 S. Ct. at 2200. The statutory design and purpose of the DPPA is highlighted by the opening paragraph of *Maracich*: “Concerned that personal information collected by States in the licensing of motor vehicle drivers was being released—even sold—with resulting loss of privacy for many persons, Congress provided federal statutory protection. It enacted the [DPPA] . . .” *Id.* at 2197 (citing 18 U.S.C. §§ 2721–25). And, later, the Court reemphasizes “the DPPA’s purpose of protecting an individual’s right to privacy in his or her motor vehicle records.” *Id.* at 2200.

The Eighth Circuit’s opinion gives a green light to running over this core privacy protection, as West need not meet one of section 2721(b)’s exceptions to obtain Johnson’s and Class Members’ Personal Information. But such decisions regarding “policy” matters are for the legislative bodies, not the courts, particularly as to those already made and lawfully codified by Congress. The Eighth Circuit’s opinion should be reversed in light of the Court’s ruling in *Maracich*.

II. The Eighth Circuit's Opinion Conflicts with Established Rules of Statutory Interpretation and the Plain Language of the DPPA.

The plain text of the DPPA is clear: “[i]t shall be unlawful for any person knowingly *to obtain* or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.” 18 U.S.C. § 2722(a) (emphasis added). West violated the DPPA by obtaining Johnson’s Personal Information without meeting one of section 2721(b)’s 14 exceptions; resale for a profit is not an exception. Because West does not meet any of the 14 exceptions, it cannot be an “authorized recipient” of the information. *See* 18 U.S.C. § 2721(c) (“An authorized recipient of personal information . . . may resell or redisclose the information only for a use permitted under subsection (b) . . .”). Despite this plain text, the Eighth Circuit refused to apply the text of the DPPA, as written, absolving West of its liability under the express language of the statute. Continuation of West’s and others’ conduct violates fundamental, statutorily protected privacy rights and walks through the door Congress closed to stalkers and the like.

Courts “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). “[I]n the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.” *United States v. Turkette*, 452 U.S. 576, 580 (1981). As set forth in *Maracich*, it is clear what Congress intended with its passage of the DPPA: Congress identified fourteen (14) exceptions under which a person can obtain Personal Information. The Eighth

Circuit points to no legislative intent to the contrary indicating Congress intended there to be a fifteenth exception—reselling Personal Information for a profit. The reach of the Eighth Circuit’s opinion therefore goes beyond not only the text of the DPPA, but also the Court’s holding in *Maracich*. The DPPA’s ban on unlawful obtainment of Personal Information found in sections 2722(a) and 2724(a) cannot be ignored.

The Eighth Circuit’s interpretation of the plain text of the DPPA conflicts with the Court’s rulings on statutory interpretation because the Eighth Circuit’s Opinion writes a new provision into the statute, while ignoring and writing other provisions out of the statute. While the Eighth Circuit recognizes that there is no definition of “authorized recipient” in the DPPA, the Eighth Circuit never defines the phrase, and assumes West’s conduct is lawful. *Cook*, 663 F.3d at 996; App. at 10a. In doing so, the Eighth Circuit goes beyond the text of the statute and creates a fifteenth “data repository” exception for West that has no support in either the plain text of the DPPA or its legislative history. The Eighth Circuit’s opinion imposes no limitation on the release of Personal Information to anyone who merely promises to resell such information to those with an alleged permissible purpose under section 2721(b).

West cannot save its conduct by relying on section 2721(c). The proper definition of “authorized recipient” is that set forth by the District Court: “any individual or entity, or their agent, that obtains personal information from DMV records for one of the permissible uses under section 2721(b).” App. at 40a. In *Reno v. Condon*, the Court, in *dicta*, equated “authorized recipients” in section

2721(c) with “private persons who have *obtained drivers’ personal information for one of the aforementioned permissible purposes* to further disclose that information for any one of those purposes.” *Reno v. Condon*, 528 U.S. 141, 146 (2000) (citing 18 U.S.C. § 2721(c)) (emphasis added). These consistent definitions illustrate a proper reading and interpretation of the DPPA. The Court now has the opportunity to adopt the proper definition. The ruling in *Maracich* gains completion by correcting the erroneous rulings of other courts regarding their interpretations of the DPPA and making its prior pronouncement in *Condon* more than *dicta* to be disregarded by inferior courts.

Section 2721(c), which deals with “authorized recipients,” immediately follows section 2721(b), which sets forth the various permissible purposes for obtaining (or receiving) Personal Information. As the statutory maxim dictates, “a word is known by the company it keeps—a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *Dolan v. United States Postal Serv.*, 546 U.S. 481, 485–86 (internal quotation omitted); *see also Maracich*, 133 S. Ct. at 2203 (“It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.”) (citation omitted).

The DPPA’s statutory structure illustrates Congress contemplated that a recipient of Personal Information is only authorized by way of obtaining said information under one of the express exceptions in section 2721(b). A person cannot be an “authorized recipient” unless he or she obtains the Personal Information under one of

section 2721(b)'s exceptions. No other interpretation can reasonably or logically follow from the express placement of these provisions within the DPPA. *See* App. at 30a–32a. No other interpretation fits the experience that brought about the passage of the DPPA.

Any other interpretation of “authorized recipient” reads a meaning into the statute that is not there. As the District Court concluded:

It does not follow from this linguistic structure that Congress intended that anyone could obtain every driver's personal information so long as they did not misuse it. Otherwise, Congress could have written a shorter statute prohibiting only the *use* of personal information (except for the fourteen permissible uses), and there would have been no need to prohibit obtainment and disclosure as well.

Id. at 39a (emphasis in original). The DPPA's ban on obtainment and disclosure of Personal Information without meeting one of section 2721(b)'s exceptions is meaningless if all that matters is the *use* of the Personal Information. Simply put, it cannot be. The District Court and *Maracich* have it right; rulings to the contrary do not.

Congress drafted the DPPA and the exceptions in 2721(b) with full knowledge of the presence of resellers. Congress considered conduct such as West's, as illustrated by section 2721(c), and decided to only allow the obtainment of Personal Information under 14 exceptions, none of which West meets. *See Dolan*, 546 U.S. at 490 (“By instead carefully delineating just three types of harm

... Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery.”) (internal quotation omitted). “It is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (internal quotations omitted). If Congress wanted to provide for the bulk obtainment of Personal Information from third parties for the sole purpose of reselling that information for a profit, it could have created an additional exception in section 2721(b). Congress did not. *See* App. at 32a. It is not within the province of the Eighth Circuit (or any court), however, to amend the statute on its own. *Badaracco v. Comm’r of Internal Revenue*, 464 U.S. 386, 398 (1984).

“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). While the Eighth Circuit recognizes the phrase “authorized recipient” is not defined in the DPPA, *Cook*, 663 F.3d at 996, it violated this canon of statutory interpretation by failing to give the phrase its ordinary meaning, or any meaning at all—other than “no meaning”—whereas the District Court, after careful and painstaking analysis, properly did.

Finally, the Eighth Circuit's failure to define "authorized recipient" extended a series of erroneous rulings, a series that is as potentially viral as it is wrong. Each successive court has relied on a baseless and erroneous definition established by the Fifth Circuit in *Taylor v. Acxiom*, 612 F.3d 325 (5th Cir. 2010), which absolves companies of liability for unlawful conduct under the DPPA. See, e.g., *Graczyk v. W. Publ'g Co.*, 660 F.3d 275, 280 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 2391 (2012) ("At least one of our sister circuits [the Fifth Circuit,] has addressed precisely the question at issue here and has concluded that the DPPA does not prohibit a reseller, such as West Publishing, from reselling personal information to others with permissible uses."); *Wiles v. Ascom Transp. Sys., Inc.*, 478 Fed. App'x 283, 293 (6th Cir. 2012) ("We find persuasive the analysis and conclusions of the Eighth Circuit . . . [and] the Fifth and Seventh . . . , and we hold that obtaining personal information solely for the purpose of reselling such information is permitted under the DPPA, so long as the personal information will ultimately be used only for purposes permitted under Section 2721(b).").

But no court has *expressly* adopted *Taylor's* definition of authorized recipient: "an authorized recipient is authorized to resell to individuals for one or more of the specific purposes under section 2721(b)." *Taylor*, 612 F.3d at 338. Rather, each court—other than the District Court—merely cites to *Taylor* and, without due consideration and analysis, approves of bulk obtainment for resale.

This is an important issue with far-reaching impact on society, the safety and privacy of its citizens, and their

entitlement to rights and protections created for them by Congress. The District Court is the only known court in the country to have performed such a comprehensive analysis of the DPPA, as illustrated by its detailed and well-reasoned opinion, particularly regarding the definition of “authorized recipient.” The Court’s action is required to correct and end the ripple effect of courts relying on a gross misinterpretation of the DPPA.

The Eighth Circuit’s opinion frustrates, if not defeats, the intent and purpose of the DPPA because it allows for the excessive and unfettered obtainment and disclosure of Personal Information with nothing more than a promise to resell said information under one of section 2721(b)’s exceptions—an interpretation found nowhere in the text of the DPPA or the statute’s legislative history. Left standing, the Eighth Circuit’s opinion, and those it has followed, represent a reckless disregard of important societal safeguards enacted by Congress.

This conflict with Court precedent on statutory interpretation is an issue of great importance and warrants acceptance of this petition by the Court to correct the conflict and manifest misinterpretation of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 14, 2013

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