

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD F. MARACICH, ET AL., :

4 Petitioners : No. 12-25

5 v. :

6 MICHAEL EUGENE SPEARS, ET AL. :

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8 Washington, D.C.

9 Wednesday, January 9, 2013

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:16 a.m.

14 APPEARANCES:

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16 Petitioners.

17 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

18 Respondents.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-25, Maracich v. Spears.

5 Mr. Guerra?

6 ORAL ARGUMENT OF JOSEPH R. GUERRA

7 ON BEHALF OF THE PETITIONERS

8 MR. GUERRA: Mr. Chief Justice, and may it
9 please the Court:

10 The DPPA requires express consent when personal
11 information in the DMV databases is used for bulk
12 solicitation. The express consent requirement is
13 Congress's considered response to one of the core
14 problems that the DPPA targets, and the litigation
15 exception creates no exception for lawyers.

16 In fact, when Congress intended to create an
17 explicit exception --

18 JUSTICE SOTOMAYOR: Does it create an
19 exception for research? Let's assume that a university
20 wanted to do a research project, and it needs subjects.
21 I get solicited for it all the time.

22 Does this exception apply to them, too?

23 MR. GUERRA: Our view, Your Honor, as we
24 indicated in our reply brief, is it would not because we
25 believe (b)(12)'s consent requirement governs commercial

1 bulk use of DMV information, which is clear from the
2 fact that it's focusing on marketing and solicitation
3 and also from the history behind the statute, which is
4 very much aimed at use of DMV information --

5 JUSTICE SOTOMAYOR: It says, "surveys," not
6 just marketing or solicitations.

7 MR. GUERRA: Yes, it does, Justice
8 Sotomayor.

9 JUSTICE SOTOMAYOR: I mean, there is a
10 commercial component, but there appears to be a
11 noncommercial component as well.

12 MR. GUERRA: We -- we think, Justice
13 Sotomayor, that this statute is sensibly construed to --
14 under the noscitur a sociis principle that we are
15 relying on elsewhere in our argument with respect to
16 (b)(4). That that same principle applies to the three
17 things that -- that the bulk solicitation -- the bulk
18 use provision governs and, particularly, when you look
19 at the history underlying the statute which was very
20 much aimed at use of the information for direct
21 marketing.

22 And so -- as I was saying, Congress made
23 clear --

24 JUSTICE SOTOMAYOR: Does that apply to the
25 States, too, when they want to market against drunk

1 driving, they want to market against -- for their health
2 insurance processes versus private processes for State
3 drug provided --

4 MR. GUERRA: Justice Sotomayor, I believe
5 what your first question sounded -- your first example
6 sounded like it was a noncommercial use. I think that
7 in the -- in the case where the State is acting as a
8 commercial entity, the same rules we would -- we would
9 apply with respect to lawyer solicitation would apply
10 there.

11 And the reason I say that -- and the reason
12 I think it's so clear that Congress intended that really
13 lies in the language of Subsection (b)(2) because,
14 there, Congress made clear that it understood that these
15 provisions are not wholly independent permissions and,
16 in fact, that the consent requirement governs all
17 commercial bulk use, absent an explicit exception.

18 And, if you take a look, it's in the second
19 page of the addendum to our opening brief. And it says
20 that, "Personal information may be used in connection
21 with matters of motor vehicle market research activity,
22 including survey research."

23 Congress included the survey research clause
24 because a commercial bulk survey using personal
25 information would otherwise be governed by (b)(12)'s

1 consent requirement, and so Congress had to make clear
2 that it was creating an exception for one industry to
3 engage in this one particular type of bulk use.

4 And the reason we know that the survey
5 research clause means that is because, under
6 Respondent's interpretation, it has no affect
7 whatsoever. If -- if, as they say, each of these
8 clauses is wholly independent and sufficient to
9 authorize whatever it covers, a phrase covering "in
10 connection with matters of motor vehicle market research
11 activities" would, in and of itself, cover the subset of
12 motor vehicle market research survey research.

13 So to give that clause any effect, you must
14 understand that it's overriding the express consent
15 requirement of (b)(12) and -- such that you now have to,
16 when you look at the other provisions that might
17 authorize bulk commercial use, find a comparably
18 explicit authorization, and you can't find that in
19 (b)(4). (B)(4) says nothing about solicitation, much
20 less bulk solicitation. And --

21 JUSTICE GINSBURG: It says, "anticipation of
22 litigation in connection" --

23 MR. GUERRA: Yes.

24 JUSTICE GINSBURG: Not only ongoing
25 litigation, but it can be used in connection with

1 anticipation of litigation.

2 MR. GUERRA: Yes, Justice Ginsburg. But my
3 point is that, in (b)(2), you find an explicit
4 authorization for survey research, which is one of the
5 very three topics covered in (b)(12) itself. When you
6 look at (b)(4), you don't see anything about
7 solicitation, which is the kind of explicit override
8 that (b)(2) indicates Congress wanted or -- or is
9 necessary in order to conclude that another subsection
10 overrides (b)(12)'s express consent requirement.

11 JUSTICE KAGAN: Mr. -- Mr. Guerra, I have to
12 admit that, given what a mess this statute is, those
13 three words don't quite do it for me. So, I mean,
14 the -- the argument against you, right, is -- as to
15 using (b)(12) to define (b)(4), is that, look, this is
16 just a list of exceptions to a general prohibition, and
17 no one is more general or specific than any other, and
18 all you have to do is fit within one of them. And it
19 doesn't matter whether you don't fit within two of them,
20 if you don't fit within one of them.

21 So then the question would be: Are you
22 covered by (b)(4) or not? If not, are you covered by
23 (b)(12) or not?

24 MR. GUERRA: Well, Justice Kagan, with
25 respect, number one, I don't think you can so readily

1 dismiss the -- the interpretive import of those three
2 words because they don't have any function other than to
3 override the express consent requirement in (b)(12).
4 And, if there is no need -- if (b)(12) doesn't apply to
5 any other subsection, there is no need to be overriding
6 it in (b)(2).

7 But we don't rely solely on that -- the
8 force of those three words. It's also the case that
9 (b)(2) -- excuse me, (b)(12) is one of the core
10 provisions of the statute, in the sense that it's aimed
11 at one of the fundamental problems that prompted passage
12 of the Act in the first place, which was DMVs collecting
13 information, then making it available to direct
14 marketers.

15 And so you are in a situation where you've
16 got a core restriction aimed at a core problem this
17 Statute

18 is designed to -- to resolve, but -- whereas (b)(4) is
19 one of the few subsections that authorize access to the
20 most sensitive information that Congress -- excuse me,
21 that DMVs were -- were collecting.

22 CHIEF JUSTICE ROBERTS: It's kind of hard to
23 argue, when you have (b)s (1) through (14), that (b)(12)
24 is the core provision. Usually, it's -- it's 1 of 14
25 items in a list.

26 MR. GUERRA: Mr. Chief Justice, what I mean

1 by that is that we know it's -- it's core in the sense
2 that it's aimed at one of the core problems that
3 Congress was addressing. And (b)(4), by contrast, is
4 one of the few provisions in which Congress authorized
5 access to the most sensitive information DMVs collect,
6 such as medical and disability status and Social
7 Security numbers.

8 And we submit it's simply implausible to
9 think that a Congress concerned with undue
10 public/private access to DMV information would, in the
11 same statute, grant lawyers the right -- a unique right,
12 to use that highly sensitive information in order to
13 engage in bulk solicitation.

14 And, in fact, the legislative record here is
15 devoid of any evidence that Congress was aware that
16 lawyers ever made use of DMV information for
17 solicitation, much less that -- or that they
18 contemplated it, much less that Congress made a
19 conscious decision to allow them to --

20 JUSTICE GINSBURG: Do you recognize that you
21 could use (b)(4) to identify class members?

22 MR. GUERRA: We do, Your Honor. And -- and
23 that's -- that is because that is not a solicitation.
24 That class notice is advising people who are not aware
25 that there is pending litigation that could affect their

1 rights.

2 JUSTICE GINSBURG: So -- so if it's -- if
3 it's a solicitation, suppose this information was a -- the
4 recent automobile purchaser was asked: Did you buy a
5 car recently? Were you charged this additional fee?
6 Period. That would be okay?

7 MR. GUERRA: Your Honor, yes. It would be
8 okay -- well, let me just say if -- if the person --

9 JUSTICE GINSBURG: That would come under
10 (b)(4)?

11 MR. GUERRA: Justice Ginsburg, if I may just
12 qualify my answer, yes, if you were investigating claims
13 on behalf of a potential client. I don't think -- I
14 don't think people can just go down to the DMV and
15 answer questions of personal interests to themselves --
16 or lawyers, for that matter. But that is an instance in
17 which you are simply engaging in investigation, assuming
18 that you are investigating a possible lawsuit, and not a
19 circumstance in which you are engaging in solicitation.
20 And that is a fundamental difference.

21 JUSTICE KENNEDY: Well, aren't we going to
22 be told the whole essence of the class action is you
23 have to see if there is an injury that goes beyond some
24 particular clients that you know. And isn't this --
25 isn't this investigation in anticipation?

1 MR. GUERRA: Your Honor -- Justice Kennedy,
2 if they had limited their activities to conducting an
3 investigation, to determine the scope of a potential
4 claim, we would have no quarrel with that.

5 JUSTICE KENNEDY: Well, the anticipation is,
6 are -- are you willing to join the class?

7 MR. GUERRA: But that --

8 JUSTICE KENNEDY: Isn't that critical?

9 MR. GUERRA: No -- no, Justice Kennedy, I
10 don't think so. And I think the point of (b)(4) is it's
11 focused on proceedings, not on lawyers. And it's
12 asking -- its basic goal is to ensure that tribunals can
13 do their job.

14 JUSTICE KENNEDY: Well, I do think you are
15 helped somewhat by the -- the chronological progression
16 here, is it including the service of process, which
17 means the case has already started, and then
18 investigation in anticipation of the litigation that
19 follows the service of process.

20 So it -- it is true that there is a
21 chronological aspect. In order, it seems to me, for the
22 Respondents to prevail, they have to say that
23 investigation in anticipation of litigation also
24 precedes service of process.

25 MR. GUERRA: They would, and I think they do

1 make that argument, Justice Kennedy. My point is that
2 the focus of (b)(4) is on the tribunals, in ensuring
3 that they have -- they can have the information, that
4 they can do their job, which is to make and enforce
5 judgments. Lawyers get information under (b)(4) when
6 they act as officers of these tribunals, not for their
7 own commercial benefit. When --

8 JUSTICE KAGAN: Mr. Guerra, where do you get
9 that from, in (b)(4), this focus on tribunals, rather
10 than lawyers? Because -- you know, the -- the
11 investigation is done by lawyers, right? And that's a
12 critical part of (b)(4), so where -- where does that
13 come from in the statute?

14 MR. GUERRA: It comes from the phrase "for
15 use in connection with any civil, criminal,
16 administrative or arbitral proceeding in any Federal,
17 State, or local court or agency." And --

18 JUSTICE KAGAN: But then it includes things
19 that are clearly done by lawyers.

20 MR. GUERRA: Right. My point is that
21 lawyers get access when they act as officers of those
22 tribunals, not for their own commercial self-interests.
23 And an investigation in anticipation of litigation is an
24 obligation that all lawyers have, to ensure that they
25 have a well-founded factual basis for bringing a lawsuit

1 in the first instance.

2 JUSTICE KENNEDY: Well, are -- are you
3 saying that the study must be either a solicitation or
4 an investigation? It can't be both? Why can't it be
5 both?

6 MR. GUERRA: Because, Justice Kennedy, the
7 DM -- the DPPA is designed to -- it was aiming at a
8 fundamental problem of private individuals obtaining DMV
9 information for commercial solicitation purposes. And
10 Congress, we know, wanted to stop that in the absence
11 of consent. So -- by the same token, they wanted to
12 make sure that they weren't intruding on the information
13 that courts and other tribunals need to do their jobs.

14 And so the -- the distinction is you can
15 engage in an investigation because that's acting as an
16 officer of the court, in order to help the court
17 ultimately render its judgment.

18 JUSTICE GINSBURG: That's why -- would
19 you -- I want to make sure I understood your prior
20 answer. You said, I thought, that it would have been
21 okay to get the information from the bureau and then
22 ask, did you buy a car recently? Did you have this
23 additional charge? Now, suppose -- you said that was
24 all right?

25 MR. GUERRA: That -- Justice Ginsburg, I

1 apologize if I am not making myself clear enough. The
2 vital distinction is between investigative activity to
3 ensure that you have a well-founded basis to file a
4 lawsuit, versus solicitation --

5 JUSTICE GINSBURG: Well, isn't that --
6 wasn't that crystal-clear here? Because the dealers
7 were saying, you can't go forward unless you have a
8 plaintiff to match every dealer. You're trying to bring
9 a representative action, but your list of plaintiffs,
10 none of them bought from Dealer Z. So we are
11 investigating to see if we can have a representative
12 action with a line-up of plaintiffs, each of whom has
13 purchased from a list of defendants.

14 MR. GUERRA: Justice Ginsburg, determining
15 that there are -- there are enough plaintiffs to justify
16 a class or group action is the -- the investigative
17 activity, but, when you go on to invite them -- and the
18 Fourth Circuit ruled that these letters were
19 solicitations, and that ruling is not before this Court
20 at this point --

21 JUSTICE GINSBURG: Well, suppose we had --
22 what -- it was limited to did you buy the car, did you
23 pay the fee? And then somebody who --

24 MR. GUERRA: Justice Ginsburg -- I'm sorry
25 to interrupt, but something distracted my -- I couldn't

1 hear the beginning of your question.

2 JUSTICE GINSBURG: We -- we have just those
3 questions, no -- are you interested in joining a
4 lawsuit, please call us. But somebody who receives this
5 notice, it just asks, did you buy a car, did you pay the
6 charge, then calls the lawyer's office and says, tell me
7 something about this letter that you told me -- that
8 you -- you sent to me.

9 And how does the lawyer answer?

10 MR. GUERRA: If the lawyer answers by asking
11 investigative questions, when did you buy the car, were
12 you charged these fees, were -- were you advised, were
13 they prominently displayed, all of which is in gathering
14 information for the lawsuit, then the lawyer is engaging
15 in permissible investigative prefiling activity --

16 JUSTICE SOTOMAYOR: If the lawyer had said
17 more -- did you buy a car, did you get charged the fee,
18 we're investigating this to determine whether this is --
19 violates the law -- is that okay?

20 MR. GUERRA: It still is, Your -- Your
21 Honor. The critical line --

22 JUSTICE SOTOMAYOR: So the only -- the only
23 thing that's bad is to say, come call us for a
24 consultation?

25 MR. GUERRA: If you were interested in

1 participating as -- in this proceeding. And --

2 JUSTICE SOTOMAYOR: So what's the difference
3 between that and how you answered Justice Ginsburg, when
4 she said class notice would be okay?

5 MR. GUERRA: Because class notice is not a
6 proposal of a -- of a relation -- a commercial
7 transaction. It is noticed --

8 JUSTICE SOTOMAYOR: Wait a minute. It's
9 joining the class or opting out.

10 MR. GUERRA: Correct.

11 JUSTICE SOTOMAYOR: And, when you join the
12 class, you have a commercial relationship with the
13 lawyer no different than being a named plaintiff.

14 MR. GUERRA: But the function of class
15 notice is not to enable class lawyers to solicit
16 clients. It is to enable courts to render binding
17 judgments and to satisfy due process requirements, so
18 that people unaware of a litigation do not have their
19 rights forfeited. That is fundamentally different
20 than -- than soliciting clients.

21 And I realize that --

22 JUSTICE KAGAN: Mr. Guerra, that
23 distinction -- I understand that you are deriving some
24 of it from (b)(12), but if I -- just -- just assume with
25 me that (b)(12) has nothing to do with anything, and you

1 were just limited to (b)(4), can you find that
2 distinction in (b)(4)?

3 MR. GUERRA: Your Honor, I think the point
4 here is that, if you look at the conduct that is
5 specified in the three examples, it is all activity that
6 lawyers would be engaging in as officers of a court.
7 And this Court has repeatedly recognized that there is a
8 fundamental difference between lawyers acting in their
9 own commercial capacities, as opposed to officers of a
10 court.

11 And --

12 CHIEF JUSTICE ROBERTS: How -- how is
13 somebody conducting an investigation in anticipation of
14 litigation -- it hasn't started yet -- acting as an
15 officer of the court?

16 MR. GUERRA: Because they're discharging
17 their responsibility to ensure that they bring
18 well-founded claims and don't file suits without -- I
19 mean, under Rule 11, you have to have a well-founded
20 factual basis for the allegations in the complaint.

21 So you need to do --

22 CHIEF JUSTICE ROBERTS: Well, that just
23 seems to me to be saying a lawyer is always acting
24 as an officer of the court.

25 MR. GUERRA: Mr. Chief Justice, with

1 respect --

2 CHIEF JUSTICE ROBERTS: When you're
3 preparing a discovery request, when you're --
4 anything -- anything that the officer functions --

5 MR. GUERRA: I think most times, when you
6 are in -- engaging in litigation or pre-filing an
7 investigation, that would be true, and that's -- that
8 would be all protected under (b)(4). The difference
9 is -- there is a -- there is a distinction. This Court
10 has recognized that lawyers have multiple capacities.
11 They wear three hats. They are -- they represent
12 clients, they're officers of courts, and they're
13 commercial actors --

14 JUSTICE KAGAN: Mr. Guerra, don't you
15 think -- I mean, I understand the distinction. The
16 lawyer as commercial actor versus lawyer as officer of
17 the court. But, boy, it's hard to get that from the
18 words here. I mean, that -- that seems like the kind of
19 old-time legislative interpretation, where we just
20 figured out the statute that we hoped Congress would
21 have written, as opposed to the statute that it did.

22 I mean, tell me where that distinction is in
23 this -- in this provision.

24 MR. GUERRA: Well, Justice Kagan, for one
25 thing, I think that, even if you decide that (b)(12) is

1 not governing (b) -- (b)(4), it's still part of the
2 statute. And it still demonstrates that Congress was
3 concerned about people using DMV information in order to
4 engage in commercial activity.

5 And so the question then is, here's (b)(4),
6 which says, we're authorizing use of information for use
7 in tribunals. There's no mention of lawyers here. And
8 so the question is -- and this provision authorizes use
9 of the most sensitive information that -- that DMVs
10 collect.

11 So the question you have to ask yourself is:
12 In light of (b)(12) and the fact that we know Congress
13 was trying to stop use of DMV information for
14 non-consensual solicitations, is it reasonable to think
15 that this clause authorizes lawyers to use disability
16 status and medical information in order to go find and
17 solicit clients?

18 And I submit it is not, particularly if you
19 take the same broad reading that the Respondents argue
20 for, the "in connection with" language, and you apply
21 that to (b)(6) and (b)(10), then you have these truly
22 incongruous results, where this Court in Condon
23 recognized that insurers were one of the purchasers of
24 the information that DMVs were selling and using it to
25 direct market, and yet, in connection with underwriting,

1 we've demonstrated that would mean that that is an
2 activity in connection with the business of insurance.

3 JUSTICE KENNEDY: Well, I -- I understand
4 your argument about (12), but I -- I do think that you
5 ought to assume we might interpret this statute, so that
6 each of these is independent, and you have to
7 concentrate on (4). You keep going back to (12), when
8 we're talking about (4).

9 If you talk about (4) for a minute, it seems
10 to me that you might give away too much because the
11 statute says, "including service of process," which
12 means the suit has to begin and then investigation in
13 anticipation of the litigation that will follow after
14 that suit has come in.

15 But you seem to give that away. You seem to
16 think that investigation in anticipation of litigation
17 can be before the suit is filed. You -- you seem to
18 concede that.

19 MR. GUERRA: Justice Kennedy --

20 JUSTICE KENNEDY: I don't know why you
21 concede that.

22 MR. GUERRA: I guess I -- I've never
23 understood that -- after service of process, it's still
24 in anticipation of litigation. It's been my
25 understanding that service of process --

1 JUSTICE GINSBURG: It doesn't necessarily
2 follow --

3 MR. GUERRA: It initiates --

4 JUSTICE GINSBURG: -- that they -- they are
5 describing only what goes on in the court. If you just
6 took the phrase "investigation in anticipation of
7 litigation," "in anticipation of" sounds like before
8 litigation begins.

9 MR. GUERRA: I am not disputing that,
10 Justice Ginsburg. My point is, though, even the -- the
11 (b)(6) and (b)(10) examples I just gave,
12 Justice Kennedy, don't -- it's not a reliance on (b)(12)
13 anymore. It's just demonstrating why it's implausible
14 to think that the phrase "in connection with" should be
15 read so literally that it authorizes anything that can
16 be shown to have a connection with the subject matter.

17 JUSTICE SOTOMAYOR: You -- you said earlier,
18 and it set me to thinking, that why would in
19 anticipation of litigation permit access to all of this
20 very personal information? And I don't know that, yes,
21 it does permit access, but only in anticipation of
22 litigation. So you have to prove, before you get things
23 like Social Security number, driver -- anything else --
24 all they asked for was name and addresses, I understand.

25 MR. GUERRA: Justice Sotomayor, that's true

1 in this case, but if you -- if you read before, the way
2 Respondents are asking you to read it, there's no
3 limitation in the statute that says you can specify --

4 JUSTICE SOTOMAYOR: Well, yes, there is.
5 There is a limitation that you're actually going to use
6 it in relationship to the litigation, number one. And
7 the States are obligated to ensure that what they
8 release is actually covered by one of these exceptions.

9 MR. GUERRA: If you interpret (b)(4) to
10 authorize access by lawyers in connection -- based on
11 the theory that they are -- it's in connection with some
12 litigation, they will have access --

13 JUSTICE SOTOMAYOR: But they have to explain
14 why.

15 MR. GUERRA: You -- the -- the request in
16 this case simply said, "pursuant to (b)(4) of the
17 statute."

18 JUSTICE SOTOMAYOR: No, no, no. As I read,
19 the first one is: We want to see if there is a pattern
20 of overcharging; give us the names and addresses of
21 people who have recently bought a car. That seems, to
22 me, pretty specific as to what they want and why they
23 need it. And I think it's pretty easy for the State to
24 say this fits.

25 MR. GUERRA: Justice Sotomayor, two points:

1 The four requests that followed after the first two said
2 nothing of the sort, and the State gave me information.
3 It just said pursuant to the subsection that we're
4 talking about right now.

5 In addition, there is no reason why lawyers
6 couldn't go in and say, I would like to identify -- I am
7 investigating whether people have claims for a
8 disability claims or -- or based on their medical
9 status, and I would like information of that ilk from --
10 from the DMV. (B)(4) authorizes those -- that -- the
11 provision of that information. And it doesn't say that
12 there has to be some heightened showing by -- by the
13 lawyers in order to obtain it. So --

14 JUSTICE KAGAN: Mr. Guerra, suppose I am a
15 lawyer, and I want to bring a toxic tort case, and I am
16 really -- I am looking for witnesses who have the same
17 kind of symptoms as my client had. And so I put out a
18 letter saying -- you know, have you have been exposed
19 and -- and tell me about it, so that I can find out if
20 you are a good witness, and -- you know, if you have, I
21 would also like to represent you. Would -- would that
22 count?

23 MR. GUERRA: Two points, Justice Kagan. The
24 first is that you have highlighted why this is such a
25 unique loophole for one very discrete class of lawyers.

1 Most -- toxic tort lawyers cannot go to a DMV and say, I
2 need the names and address of people.

3 JUSTICE KAGAN: Well, I guess what I was
4 suggesting was that, if I was just asking for witnesses,
5 you would have to say that that was included by (b)(4);
6 is that right?

7 MR. GUERRA: I do. I do acknowledge that.

8 JUSTICE KAGAN: So, now, the court -- the
9 lawyer is saying, in addition to your help as a witness,
10 if you have the same symptoms -- you know, you can join
11 the suit.

12 MR. GUERRA: And I think that that's an
13 improper use. The Congress did not create this
14 authorization to go down to get the most sensitive
15 information in order to enable lawyers to find clients
16 more easily than they might otherwise find them. And so
17 investigation in anticipation of litigation is one use
18 that Congress authorized, and, as I have suggested, it's
19 a use that helps a lawyer discharge his or her
20 responsibility to a court.

21 Asking somebody --

22 JUSTICE GINSBURG: I don't know why this
23 case doesn't fit that description because the -- the
24 position that the dealers were taking was you can't --
25 you ought to maintain a representative action. The

1 State has such an animal, it's not quite a class action,
2 representative action. To qualify, the group must be
3 numerous.

4 So how am I going to find out if it's
5 numerous, without asking these questions?

6 MR. GUERRA: You -- you can ask every
7 question up to, "Would you like to be a plaintiff in the
8 lawsuit," and that would be fine. That's the dividing
9 line.

10 JUSTICE GINSBURG: Might that get the lawyer
11 into some difficulty with the Bar Association? They'll
12 look at this and say, look, we told you, if you are --
13 if you are seeking clients, then you have to put
14 advertising material. And a letter like that would tip
15 the recipient off to something is going on, I should
16 find out about it, and maybe I should join it.

17 MR. GUERRA: Justice Ginsburg, I think that
18 the -- the fact that that might trigger an obligation to
19 make a disclosure is not dispositive of whether it's a
20 solicitation. It would still be an objective factual
21 inquiry. And, if there were no indications in the
22 letter that someone is being invited to join a lawsuit,
23 then it would be permissible investigation.

24 I would like to point out, though, in terms
25 of why they needed this information, these lawyers filed

1 suits initially against dozens and, later, against
2 hundreds of defendants, where they had no client with
3 any claim against that defendant. Then they went to the
4 DMV, and they found over 30,000 names and addresses and
5 sent out what the Fourth Circuit determined were
6 solicitations, in order to get clients in the claims
7 they had already improperly asserted.

8 They did not need that information to
9 indicate the interest of the named plaintiffs they
10 already had. Those people had standing to sue --

11 JUSTICE GINSBURG: But then there is a whole
12 string of defendants who were doing the same thing --
13 the same allegedly unlawful practice, they couldn't
14 reach without getting additional plaintiffs.

15 MR. GUERRA: But their -- their clients have
16 no interest or need to reach those other dealerships.
17 They have a claim against the dealers with whom they
18 dealt --

19 JUSTICE GINSBURG: But their client is a --
20 is a group. This -- this is not an individual action --

21 MR. GUERRA: That's true, Justice Ginsburg.

22 JUSTICE GINSBURG: The statute says sue for
23 the benefit of the whole.

24 MR. GUERRA: And -- and the South Carolina
25 State court said that each named individual could sue

1 for the benefit of everyone who dealt with the same
2 dealer that that plaintiff dealt with, so there is no
3 inconsistency. And, of course, even if they want to try
4 to affect the conduct of the -- of the dealerships, with
5 whom their clients never dealt with, they could still
6 get declaratory relief.

7 I would like to reserve the balance of my
8 time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Clement?

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE RESPONDENTS

13 MR. CLEMENT: Mr. Chief Justice, and may it
14 please the Court:

15 The DPPA is an unusual statute. It directly
16 regulates the State's use of their own databases and
17 imposes massive civil liability and criminal penalties
18 for violations. It regulates it in a relatively
19 distinct way, which is it makes disclosures
20 presumptively unlawful, but then has 14 permissible use
21 provisions for which the State may, but does not must,
22 may disclose the information.

23 The scope of those 14 permissible use
24 provisions then becomes quite important for determining
25 whether or not a statute that was originally designed

1 primarily to regulate the commercial sale of DMV
2 information becomes intrusive into matters of
3 traditional State regulation or imposes massive
4 liability without the requisite clarity.

5 Now, I would have thought that it was fairly
6 clear that, but for a resort to the specific controls to
7 the general canon, that all of the activity at issue
8 here comes comfortably within the language of (b)(4)
9 because, if you look at that language, it is remarkably
10 broad. Congress uses the word "any" three times. It
11 uses "in connection with," which I think we all know is
12 a term of breadth. And then it uses "including" and
13 uses illustrative examples.

14 And I think the only thing that really
15 brings these examples together is Congress seems to be
16 covering the litigation process from cradle to grave.

17 CHIEF JUSTICE ROBERTS: One thing we also
18 know about the "in connection with" language is that we
19 have said, it can't really mean "in connection with," as
20 broadly as that -- the Morales case, I guess, it has to
21 have a more narrow meaning. Otherwise, everything would
22 be covered.

23 MR. CLEMENT: Mr. Chief Justice, that's
24 exactly right. But the whole reason it has to have
25 some limit is because it's presumptively quite broad.

1 And if -- I mean, for those who look at legislative
2 history, the evolution of this provision, as it -- it
3 was changed twice in the legislative process.

4 And it started out that Congress was going
5 to have a permissible use just for use in litigation
6 involving motor vehicles. Then they dropped "motor
7 vehicles" and just said, "use in litigation." And then,
8 in the final iteration, they said, "use in connection
9 with litigation." So, clearly, they were trying to
10 broaden it.

11 Now, I -- I would be the first to admit that
12 there has to be some limit, and we certainly wouldn't
13 say, for example, that if lawyers -- you know, decide in
14 this case, well -- you know, we got this DMV information
15 for perfectly legitimate purposes involved in a
16 litigation, but, now, we are sitting on a gold mine, so
17 we should try to sell -- sell these same people floor
18 mats or wiper blades or something. I mean, of course,
19 they can't do that. So there are limits, but I think --

20 JUSTICE BREYER: Can they do this: Can --
21 can Lawyer Smith say -- you know, there are some
22 products in this State that I really suspect are not
23 being properly made, and I have probably a tort suit;
24 and the damages are awfully small; I would like to get
25 10 or 20,000 plaintiffs. I wonder if there is anybody

1 interested?

2 And then what he does is -- I have to write
3 them a letter, and I know where I can get the names and
4 addresses, from the DMV.

5 So he goes to the DMV and says, I would like
6 the names of everybody who -- I'd like all your names
7 and addresses, and I intend to write them all and send
8 them a letter and say, I suspect there is some fishy
9 business going on here in the dress manufacturers; would
10 you like to tell me about what happened? Is that
11 possible? Can they do that?

12 MR. CLEMENT: It may or may not, depending
13 on where you draw the line.

14 JUSTICE BREYER: Well, what do you --

15 MR. CLEMENT: But can I say something before
16 we talk about that? You know, if they are really trying
17 to go after the dress manufacturers --

18 JUSTICE BREYER: Yes.

19 MR. CLEMENT: -- they can go to the phone
20 book, they can go to the title records office, there is
21 lots of places they can go, if what they want is just
22 general information about people. And the only State
23 database that Congress has seen fit to regulate is DMV
24 databases.

25 JUSTICE BREYER: Well, maybe they -- maybe

1 this is all passe. Maybe -- perhaps they could get this
2 information elsewhere, but I guess we have to deal with
3 this statute --

4 MR. CLEMENT: But, Justice Breyer, that's
5 part of the reason I'm pointing --

6 JUSTICE BREYER: So maybe what they want is
7 they want the names of all the people who've ever had a
8 car -- you know, because they think there's something
9 special about a car, and they think that's going to be
10 connected. But you see what I'm driving at.

11 MR. CLEMENT: I --

12 JUSTICE BREYER: You have no lawsuit, but
13 you are going to get one if you can, and you have
14 grounds for thinking that there is some suspicious
15 defendants, and what you are looking for is plaintiffs.
16 That's all.

17 MR. CLEMENT: Sure. And --

18 JUSTICE BREYER: All you are looking for is
19 plaintiffs. Now, can you, under this statute, go and
20 get the information, where all you are looking for is
21 plaintiffs for your lawsuit? So far, you know how many
22 plaintiffs you have? None.

23 MR. CLEMENT: I think, actually, the best
24 answer, at the end of the day, is it depends on whether
25 you are focused on a specific transaction, occurrence,

1 defect, so I think you might ultimately --

2 JUSTICE BREYER: All right. Is your answer
3 what I have in my mind -- I'm just repeating the same
4 question. I will do that -- I have some reason for
5 thinking there are a whole bunch of defendants here who
6 have done something wrong. All I am lacking is a
7 plaintiff, and what I want to do is get the names of
8 potential plaintiffs. It's the same question. I have
9 asked that three times. Either you can, in your view,
10 get it under this lawsuit, or you cannot.

11 MR. CLEMENT: I would say the best answer is
12 that you can. If you don't like that answer and you
13 want to draw the line in a different place --

14 JUSTICE BREYER: No, no. I'm not liking or
15 disliking. All I want to know is --

16 MR. CLEMENT: Well, here -- here's the
17 thing -- is I think there is a couple of places you
18 could draw the line, and I think there is a line drawing
19 question any time you have language like "in connection
20 with." The first would be, okay, I'm lawyers, and I
21 want to get clients for litigation.

22 You could say, well, that's enough of an "in
23 connection" requirement, so you can use that. I would
24 say that that's probably on the other side of the line,
25 but you could just say that's close enough.

1 The other place you could draw the line is
2 when you have a specific transaction, occurrence,
3 defect, so that there be would be a difference. If I --
4 if I get this information and send people letters and
5 say, I see you bought a new car in the last two years --
6 you know, there is a lemon law in this State --

7 JUSTICE BREYER: Wait, wait. Now, that's
8 your -- now, that's the line. As to some of these
9 defendants, what he's saying is, these lawyers had no
10 client that my defendant hurt, none.

11 MR. CLEMENT: Well --

12 JUSTICE BREYER: And as to some of these,
13 but not all the requests, all they were doing was they
14 were looking for somebody who bought a car from me. And
15 the reason they want that is to ask them what the
16 practice was, so they can get a plaintiff to do what the
17 complaint is about. So it's at least two -- or one or
18 two of the requests are like that.

19 MR. CLEMENT: No, they are not in the
20 following sense, Justice Breyer -- okay. Just to
21 understand kind of the chronology here, no request --
22 FOIA request is made at all here until my clients have
23 been approached by individuals who are complaining,
24 okay? No letter goes out until the litigation is
25 actually filed. Now, they want to say --

1 JUSTICE BREYER: Okay. So, now, repeat to
2 me -- I've got your point.

3 MR. CLEMENT: Okay.

4 JUSTICE BREYER: You have don't have to
5 prove it to me. All -- what I'm trying to get at is the
6 statement that I could write in an opinion that will
7 draw the boundary of this provision south of -- well,
8 the lawyer can go out when he has reason to believe that
9 a defendant has done something wrong and, to use a
10 pejorative, troll for clients.

11 MR. CLEMENT: Right.

12 JUSTICE BREYER: I want it south of that,
13 and, now, you will tell me the words I can use that will
14 both help your client because they will cover this case,
15 but will also be south of that. What are --

16 JUSTICE SCALIA: What is -- what is south?
17 I don't have a compass here.

18 (Laughter.)

19 JUSTICE BREYER: South means -- south means
20 it does not -- you can't just go and troll for clients,
21 simply because you think a defendant has done something
22 wrong, and you have no client.

23 MR. CLEMENT: If you want to draw the line
24 south of the trolling line, then I think what you would
25 say is this is an easy case because no communication

1 took place until my clients had a client. And then they
2 want to say, well, wait a second, your clients didn't
3 have a beef with the other dealers.

4 That's wrong. At all times in this suit,
5 they had a conspiracy claim against those other dealers.
6 So, even as to the individuals they already represented,
7 they had a beef with those dealers.

8 JUSTICE KENNEDY: I want -- I want to
9 interrupt just -- just one moment. I may have misheard,
10 or you may have misspoke. I thought you said that no
11 requests were sent until the suit was filed, but the
12 request was -- the first FOIA request was June 23rd,
13 2005; the second FOIA request was August 24, 2006; and
14 this Herron suit was filed August 29, 2006.

15 MR. CLEMENT: Justice Kennedy --

16 JUSTICE KENNEDY: So letters were sent
17 before the suit was filed.

18 MR. CLEMENT: A FOIA request was made before
19 the suit was filed. No letter to a potential
20 witness/client was sent until after it was filed.

21 JUSTICE KENNEDY: But the -- yes, but the
22 FOIA suit was made before the suit was filed.

23 MR. CLEMENT: Sure. And the FOIA -- the two
24 FOIA requests that were made beforehand were
25 specifically noted that they were in anticipation of

1 litigation, and they were investigating, as Justice
2 Ginsburg suggested, as they needed to under State law,
3 whether this was a widespread practice. And --

4 JUSTICE GINSBURG: Suppose you -- you said
5 that you had a few people came and complained to the
6 lawyers, and then the lawyers wanted to see how
7 widespread this was. Suppose the lawyer herself bought
8 a car recently, and she got this administrative fee.
9 And, now, she has -- no clients have approached her, but
10 she would like to find out how many similarly situated
11 people there are, so she can get one of these
12 representative actions going.

13 Could -- on that basis, would it be
14 permissible to use -- would that come under the
15 litigation exception?

16 MR. CLEMENT: I think it would,
17 Justice Ginsburg, because I think that, when you are
18 trying to figure out where to draw the line, you look to
19 the words in the statute, which you know that
20 "investigation in anticipation of litigation" is
21 covered, and I would think that would fit comfortably
22 within "investigation in anticipation of litigation."
23 And the --

24 CHIEF JUSTICE ROBERTS: It would be -- it
25 would be a very poor lawyer who couldn't figure out how

1 to write this -- the letter he's going to send out in a
2 way that it could not be said to be investigation, as
3 opposed to solicitation.

4 If you have a problem with the windshield
5 wipers, you just send a letter saying, there is this big
6 problem with windshield wipers. I am a lawyer, I'm
7 representing -- or I hope to represent, or I will
8 represent a group of people who have this problem, and I
9 think we will recover some damages. Would you like to
10 be a witness in that case?

11 That is in anticipation of litigation, but
12 it's also, quite plainly, an effort to solicit clients,
13 not just witnesses.

14 MR. CLEMENT: I couldn't agree more,
15 Mr. Chief Justice, which is why the line can't really be
16 between investigation in anticipation of litigation and
17 solicitation in anticipation of litigation because that
18 is too thin a line to make a \$200 million difference.

19 CHIEF JUSTICE ROBERTS: So where -- where is
20 the line?

21 MR. CLEMENT: The line is whether or not it
22 is in anticipation of litigation or in connection with
23 litigation --

24 CHIEF JUSTICE ROBERTS: No, that's the
25 words -- that's the words of the statute. I'm trying to

1 figure out what they mean. If you think there is some
2 type of solicitation that the statute was meant to
3 prohibit, how do you draw a line that prohibits that,
4 but allows the sort of thing that you want to do?

5 MR. CLEMENT: I think the way you do is you
6 would basically say that, when they are saying, "in
7 anticipation of litigation," they mean in anticipation
8 of a particular litigation, particular problem, and so
9 it's different --

10 CHIEF JUSTICE ROBERTS: That doesn't have to
11 be filed in court, that may just be --

12 MR. CLEMENT: Oh, absolutely not. I mean,
13 it seems to me --

14 CHIEF JUSTICE ROBERTS: -- residing in the
15 brain of any lawyer who's looking for work.

16 MR. CLEMENT: No. They are -- they are
17 concerned about a particular thing, and I think the "in
18 anticipation of litigation" language, I mean, that's not
19 the only time you have ever seen it before --

20 JUSTICE SCALIA: It's not just that
21 language. It's "investigation in anticipation of
22 litigation." If I understand you correctly, you are
23 saying investigation includes solicitation.

24 MR. CLEMENT: It --

25 JUSTICE SCALIA: Isn't that your position?

1 MR. CLEMENT: I think it is, though I guess
2 my point would be, even if you can identify some
3 solicitation that is not investigation, as long as it's
4 in connection with litigation, it's in (b)(4), and then
5 I think --

6 JUSTICE BREYER: Okay. So you are saying
7 that really this is a -- the way the statute works is it
8 says nobody can solicit, but for lawyers. And that's
9 not -- that makes more sense than you might think
10 because this was not a statute that was meant to
11 interfere with solicitation rules; it was meant to
12 interfere with commercial selling.

13 And -- and that's what this is about, and
14 there is a requirement, the requirement as to the
15 lawyer, in good faith, has to believe that, if he finds
16 a client, there's a case.

17 MR. CLEMENT: I agree with everything,
18 except the first thing you said --

19 JUSTICE BREYER: All right.

20 MR. CLEMENT: -- which is that this is a
21 prohibition on solicitation. If you look at the
22 structure of the statute, it says, presumptively, you
23 can't use this for anything. And then there are 14
24 permissions. And some of the permissions, like (b)(4),
25 are unconditional. If you come within (b)(4), you get

1 to use it.

2 Now, when you get to the end of the statute,
3 which is -- I respectfully suggest is not where you put
4 the core provisions, it's where you put the less favored
5 provisions -- then you have, in (b)(12), a conditional
6 permission that you can use it, but only if you get
7 consent.

8 Now, the thrust of their position is, if you
9 are in one of the unconditional permissions, but you
10 also are, presumptively, in one of the conditional
11 permissions, somehow, that condition from (b)(12) hops
12 over to (b)(12) -- (b)(4) and says --

13 JUSTICE SCALIA: I don't -- I don't think
14 that is fair. I think their position is, to harmonize
15 (b)(4) and (b)(12), you have to interpret investigation,
16 not to include solicitation, because, otherwise, you
17 have a conflict, that (b)(12) prohibits solicitation,
18 unless you have the consent; whereas, (b)(4), which
19 says, "investigation," does not require consent.

20 Now, the two exist in perfect harmony if
21 investigation does not include solicitation, but
22 there -- there is a discrepancy between the two if it
23 does include solicitation. And you have to say, well,
24 this is an exception from (b)(12).

25 MR. CLEMENT: No, you don't. There is no

1 discrepancy. A conditional -- like you get a green
2 light for use in litigation. You get a yellow light for
3 solicitation. If you have solicitation in connection
4 with litigation, you're covered by both, you take the
5 green light, there is no conflict.

6 And the premise for your discussion was we
7 have to harmonize. I would take issue with that. If
8 you look at these 14 exemptions, there is tons of
9 overlap in them. Congress is not telling you that each
10 of these 14 exceptions has an exclusive area, and you
11 have to find out which field is preempted by (1), (2),
12 (3), (4), (5), (6), (7). If you look at (b)(1) and
13 (b)(4), there is complete overlap.

14 One of the things I would take issue with is
15 my brother said that, well, (b)(4) is about the
16 tribunal. No, it's not. (B)(1) is principally about
17 the tribunal. (B)(1) is the provision that talks about
18 government actors and their functions, and it
19 specifically talks about torts.

20 JUSTICE ALITO: (B)(4) is about -- (b)(4) is
21 about very sensitive information. You're talking about
22 people's Social Security numbers. You're talking about
23 whether the person has a disability that they may not
24 want to disclose to the general public -- a person has
25 Parkinson's or -- or epilepsy or is diabetic.

1 And so you're just -- you're saying lawyers,
2 they -- they get all that stuff. Nobody else can, but
3 lawyers are a privileged class, and they get it.

4 MR. CLEMENT: Justice Alito, it is important
5 to recognize lawyers presumptively get it under Federal
6 law, but Federal law is only a floor. And so let's take
7 Social Security numbers, please, because, sure, as to
8 (b)(4) and (b)(1) and two other provisions, Congress
9 says, presumptively, you can get Social Security
10 numbers.

11 You know what -- you know what State -- the
12 State of South Carolina says? You never get Social
13 Security numbers, unless you have a court order. They
14 put that right in their State FOIA law. And so that is
15 just another example of how -- this is a Federal floor.
16 States can release this information. They don't have
17 to.

18 And, to Justice Breyer's point, it makes
19 sense that you would distinguish between an attorney who
20 is subject to the Bar discipline, is subject to
21 oversight and solicitation process, and treat that
22 solicitation differently from a solicitation by a direct
23 marketer, which is what (b)(12) is clearly aimed at, not
24 the practice of law.

25 JUSTICE BREYER: The difficulty that

1 Justice Alito brings out is -- I see your
2 interpretation, and I hope the other side will give me
3 some line because they have the same problem -- you
4 know, but in reverse. What is the line?

5 But your way, it doesn't become that much of
6 a privacy statute. It's sort of a misnomer. It's a --
7 it's a statute that is designed to prevent the
8 commercial use of your -- of this personal information.
9 It's not really a privacy statute.

10 MR. CLEMENT: It's certainly not an
11 all-purpose privacy statute. I do think that's fair.
12 And the principal thing that they were concerned about,
13 of course, is that you could look at somebody's license
14 plate and indiscriminately go down, pay a fee, and get
15 their home address.

16 Now, the one thing we know from (b)(4) is,
17 if a lawyer wants to do that exact thing, to serve
18 process, the lawyer gets to do it. You can get
19 somebody's license plate, go to the DMV, get an address,
20 and serve process. And they specifically preserve that.
21 So we know, as to the core of the statute, they treated
22 lawyers differently.

23 They were also concerned with direct
24 marketers taking this information and using it to market
25 people, but I don't think you'd lump lawyer solicitation

1 in anticipation of litigation, which may put some limit
2 on it, together with that.

3 JUSTICE KENNEDY: But in anticipation of
4 litigation does come after service of process, and an
5 additional way to harmonize this statute with (12) is to
6 say that, after the suit has been filed, then -- in
7 anticipation of the litigation that that suit will
8 engender, then you may get the information. But you
9 didn't do that.

10 MR. CLEMENT: There's two problems with that
11 way of looking at the statute, I think I would
12 respectfully suggest, Justice Kennedy. One is we are
13 talking about items on an inclusive list, so even if you
14 took your premise that -- that the anticipation of
15 litigation in that list somehow is anticipation post
16 service of process -- which I want to come back to --
17 even if you took that position, they are just things on
18 an inclusive list. And so it wouldn't stop you from
19 saying that the ultimate test here is whether it's in
20 connection with litigation.

21 But I guess I would go back to that and say
22 I've never once thought that investigation in
23 anticipation of litigation was something that would take
24 place after service of process. I thought -- I mean --

25 JUSTICE KENNEDY: That's the way the

1 statute's written.

2 MR. CLEMENT: Yeah, but I don't think that
3 that was an intentional thing on the Court's part, that
4 we're going to name these and we're going to name them
5 in chronological order. If they tried to do it, I think
6 they got it wrong.

7 JUSTICE SOTOMAYOR: Mr. Clement, I'm not
8 sure I'm satisfied with the answer you gave to
9 Justice Scalia. He said, look, we've got to harmonize;
10 instead of general-specific, solicitation of clients is
11 different than investigation, and we just say they're
12 mutually exclusive. It is a little bit of a general and
13 specific. And that's proven by (b)(2) because, when
14 (b)(2) wants to permit solicitation, it expressly says
15 it, and they didn't expressly say, "solicitation," in
16 (4).

17 That's, I think, your adversary's main
18 argument. And I'm -- I'm still not sure I'm comfortable
19 with the answer you're giving. You're saying they're
20 independent, but why are they necessarily conflicting?

21 MR. CLEMENT: Last word "conflicting"?

22 JUSTICE SOTOMAYOR: "Conflicting," exactly,
23 or -- or conflicting or overlapping.

24 MR. CLEMENT: I think --

25 JUSTICE SOTOMAYOR: I guess it's why are

1 they necessarily overlapping?

2 MR. CLEMENT: I think they are necessarily
3 overlapping, and I guess I would point to several
4 things. First of all, the language in (b)(2), I don't
5 think helps them nearly as much as they do. I think
6 that language in there about survey research, like much
7 language in many statutes, maybe avoids the marketers --
8 or the -- the motor vehicle marketers from having to be
9 here in a lawsuit because it removes all doubt about it.
10 But I think they would be covered, even without those
11 words.

12 But the point is -- you may say, well,
13 that's horrible, that's superfluous. But, no, if you
14 look at the way the statute operates generally, there's
15 lots of overlap. So this isn't a context where you want
16 to make sure that there is no overlap and everyone
17 operates independently.

18 I pointed to (b)(1) and (b)(4). They both
19 cover courts and litigation. If this Court uses DMV
20 information in its opinion, it's covered by (b)(1), it's
21 covered by (b)(4).

22 Or look at (b)(3). (B)(3) is a provision
23 that says, generally, companies can use DMV information
24 to verify somebody's identity. And then it specifically
25 says, and if somebody lies to you about their identity,

1 you can pursue legal remedies.

2 Okay. When you're pursuing that legal
3 remedy pursuant to (b)(3), you're also doing things in
4 connection with litigation pursuant to --

5 CHIEF JUSTICE ROBERTS: Well, that's --
6 well, that's right. I understand your point, that this
7 is -- they're not separate categories, and there's no
8 overlap. But the word is "harmonizing," and the problem
9 is we have to give some limiting construction to "in
10 connection with."

11 And it seems to me that, if you are involved
12 in that endeavor, it does make sense to see how what
13 you're going to cover under the "in connection with"
14 relates to what's exempt under the other provisions.

15 MR. CLEMENT: But, as we've discussed,
16 Mr. Chief Justice, if you -- if you are saying you are
17 not going to apply the specific controls the general,
18 but you may be using a junior varsity version of it to
19 harmonize the statute --

20 CHIEF JUSTICE ROBERTS: Exactly.

21 MR. CLEMENT: -- as -- as we suggested in
22 our colloquy, I think the line between solicitation in
23 anticipation of litigation and investigation in
24 anticipation is far too thin a line to
25 make a \$200 million difference.

1 And if I could direct the Court to page 93
2 of the Joint Appendix because that will show you just an
3 example of the postcard that is attached to these
4 letters. And the postcard does ask specifically, as
5 Justice Ginsburg was suggesting -- again, this is at 93
6 of the Joint Appendix -- it asks people to fill out
7 their name, address, the dealership they bought the car
8 from, the type of car, and then the administrative fee
9 or processing fee that was charged.

10 Now, I think it's common ground between the
11 parties that we get to ask about that administrative or
12 processing fee because that is investigation in
13 anticipation of the -- of the litigation. As I
14 understand where my clients arguably made a \$200 million
15 mistake is by adding the line "I'm interested" -- "I am
16 interested in participating" signature, that crosses the
17 line into solicitation.

18 JUSTICE BREYER: Well, the reason -- the
19 reason that would be so -- I agree with you, that it's
20 very hard to figure out what the line is here between
21 the investigation and solicitation.

22 But that's where the solicitation thing
23 comes into play because what it -- the words that go the
24 other way, in my mind, that cut against you, is that
25 this card could have asked for Social Security numbers,

1 I guess.

2 MR. CLEMENT: Not under South Carolina law,
3 it absolutely couldn't.

4 JUSTICE BREYER: Not under South Carolina
5 law. All right. But then, under another State, under
6 this statute, they could. Now, that's helpful, that
7 answer.

8 But if -- when I think of asking for Social
9 Security numbers, I -- the words -- exaggerated, but
10 they go through my mind -- are "identity theft run
11 wild."

12 MR. CLEMENT: Absolutely.

13 JUSTICE BREYER: And, if that is a
14 concern -- if that is a concern, then, by reading this
15 as a solicitation -- you know, the pure case -- and
16 throwing the other exception to cover it, you force the
17 State to focus on it.

18 And the State then has to decide whether
19 they are going to permit or not permit the solicitor,
20 who -- you see, might -- might include the lawyer here,
21 to ask for the Social Security number, and better to
22 have them focus on that decision. That's the connection
23 that I see between the two.

24 MR. CLEMENT: But, Justice Breyer, let me
25 try to help you this way, which, is first of all, every

1 State in the country is focused on identity theft. And
2 the only circumstances in which I can imagine a State
3 ever giving Social Security numbers to a lawyer is if
4 there case was -- you know, these car dealers are
5 putting the Social Security numbers on the forms and we
6 are --

7 JUSTICE BREYER: Okay. So are we -- do we
8 know -- by the way, that is helpful because do we know
9 under how many States' law the DMV would be forbidden to
10 give Social Security numbers?

11 MR. CLEMENT: I don't know that offhand. I
12 can get that to you in a supplemental letter. I just
13 know South Carolina, it says, right in their FOIA
14 statute, you can't get that information. And, like I
15 said, the only situation -- it's kind of --

16 JUSTICE SOTOMAYOR: Is there a Federal law
17 to that effect?

18 MR. CLEMENT: What's that?

19 JUSTICE SOTOMAYOR: There may be a Federal
20 law to that effect.

21 MR. CLEMENT: Right.

22 JUSTICE SOTOMAYOR: A separate one.

23 MR. CLEMENT: And it may be -- it may be
24 lawyers -- it may be the lawyers want to enforce that
25 Federal law against the dealers. And in enforcing that

1 Federal law against the dealers, they might ask for the
2 information. It's the same kind of thing.

3 The only circumstances in which I could
4 imagine a State would ever give a lawyer disability
5 information is if they were bringing an ADA suit. If
6 they were bringing an ADA suit against a dealer, you
7 might actually want them --

8 CHIEF JUSTICE ROBERTS: Well, if they are --
9 if they were thinking they might bring an ADA suit --

10 MR. CLEMENT: Fair point --

11 CHIEF JUSTICE ROBERTS: Your position does
12 create a special -- the point your friend makes -- it
13 does create a special exemption from a solicitation bar
14 for lawyers. Lawyers can solicitate -- you know, Acme
15 Products can't.

16 MR. CLEMENT: Well, sure, but they can --
17 they can solicit for their legal services in connection
18 with litigation. And that, I think, is different --

19 CHIEF JUSTICE ROBERTS: In connection with
20 something they hope might someday become litigation,
21 depending upon the answers they get.

22 MR. CLEMENT: Well, again, if you're going
23 to draw a line -- there's two things here -- you know,
24 there's -- there's an impulse to draw a line with "in
25 connection with," and, at some point, you will have to.

1 But I don't think solicitation provides the line because
2 the --

3 JUSTICE KAGAN: Can I ask about your line,
4 Mr. Clement?

5 MR. CLEMENT: Sure.

6 JUSTICE KAGAN: Let me just see if I
7 understand it, and I'll give you two things --

8 MR. CLEMENT: Sure.

9 JUSTICE KAGAN: -- and I think one falls on
10 one side of your line --

11 MR. CLEMENT: Yeah.

12 JUSTICE KAGAN: -- and the other falls on
13 the other, but this is just to clarify where your line
14 is.

15 One is -- you know, I'm a lawyer, have you
16 ever been in a car accident lately? If you have,
17 contact me, and I would love to represent you. That --
18 the other is, I'm a lawyer, I think that there's a -- a
19 real -- I'm -- I'm bringing a lawsuit about these red
20 light cameras and saying that they're unlawful, and
21 would you like to join me in that litigation?

22 Am I right to think that the first falls on
23 one side of the line, it's not enough, there's no
24 litigation there; and the seconds falls on the other
25 side, according to you?

1 MR. CLEMENT: I think that's right, Justice
2 Kagan. And I just want to emphasize that my -- my
3 clients fall on the other side of even yet another line,
4 which is they already had clients before they asked DMV
5 anything.

6 JUSTICE KAGAN: But your line --

7 JUSTICE SCALIA: They're north of that line,
8 right?

9 (Laughter.)

10 JUSTICE KAGAN: -- is a contemplated
11 litigation.

12 MR. CLEMENT: Yes.

13 JUSTICE KAGAN: A specific contemplated
14 litigation.

15 MR. CLEMENT: Exactly. Or to put -- you
16 know, to give just another sort of example, this seems
17 to be what clearly surely should be covered is, okay, I
18 understand there's a defect with the particular make and
19 model of a car. I've used the DMV records, consistent
20 with State law, to get access to the fact that you've
21 bought one of these cars; do you want to join the suit?

22 I don't think there's anything nefarious
23 with that. There's certainly nothing --

24 CHIEF JUSTICE ROBERTS: Would you want to
25 start the suit? It doesn't matter in your position.

1 MR. CLEMENT: Yeah, that's -- that's not my
2 case because this -- these people came to us before we
3 did anything. But I don't think there's anything wrong
4 with that, Your Honor. And, yes, you might say it's
5 solicitation, but I don't think, if you look at these
6 provisions, that you would interpret them that way when
7 they're all permissive uses. And --

8 JUSTICE ALITO: Well, if Congress wanted to
9 draw the line between possible -- you know, some unknown
10 lawsuit and an actual lawsuit that's in the mind of the
11 lawyer, why did it use the term "litigation," when it
12 had already used earlier, in the same subsection,
13 "proceeding," civil, criminal, administrative, or
14 arbitral proceeding?

15 MR. CLEMENT: Well, Justice Alito, I think
16 when it uses "in anticipation of litigation," it
17 actually wants to cover activity that takes place before
18 there's an actual proceeding. And what I was going to
19 say is -- you know, that language doesn't come out of
20 the ether. I mean, that's the language you use in
21 attorney work product.

22 And, as I understand it -- I've looked into
23 this a little bit, the basic rule there is you
24 distinguish between litigation in the abstract and the
25 point at which you've identified a particular

1 transaction, occurrence, defect. And, at that point, if
2 you're doing something, it's in -- it's in anticipation
3 of litigation.

4 The one other point I haven't yet made,
5 which is, to the extent you're going to resort to the
6 specific controls of the general, I think it is worth
7 noting that this would be the first time, that I'm aware
8 of, that the Court would ever have applied that canon to
9 impose this kind of massive civil liability and even
10 potentially criminal liability.

11 JUSTICE SCALIA: I don't know which is
12 specific and which is general. I mean, that's the
13 problem I have with that.

14 MR. CLEMENT: I agree, and I think that's
15 the best reason why the canon doesn't work. These are
16 equally specific. And, in the case of an overlap
17 between the two that you have here -- and you have in
18 (b)(1) and (b)(4) and (b)(3) and (b)(4) -- you just say,
19 okay, Congress thought it was okay, and you just call it
20 a day.

21 JUSTICE KAGAN: But what you say,
22 Mr. Clement, that you and your varsity version of the --
23 which is stronger than the other one is --

24 MR. CLEMENT: Paradoxically.

25 JUSTICE KAGAN: -- is something like, if

1 (b)(4) is hard, we have to draw a line someplace, we can
2 look to (b)(12) as expressing some kind of concern that
3 we can use to draw that line.

4 MR. CLEMENT: Yeah. And the reason I think
5 that --

6 JUSTICE KAGAN: It's not a conflict, we
7 don't have to -- you know, it's not inconsistent, it's
8 just this is an expression of what Congress was thinking
9 about, we're going to use it as a clue.

10 MR. CLEMENT: Right. But the line-drawing
11 problem is really drawing the line about "in connection
12 with." The line-drawing problem -- drawing the line
13 between solicitation in anticipation of litigation and
14 investigation in -- in anticipation of litigation just
15 doesn't work. They're two sides of the same coin.

16 As Justice Ginsburg pointed out, if my
17 clients had sent a letter that nobody objects to, that
18 says, we're bringing a lawsuit, we think you may have
19 been charged the same kind of fee, I think what the
20 State Bar would have said -- the natural next question
21 for anybody getting that letter is, will you represent
22 me? And precisely because of that, we want you -- we
23 want to treat this like it's solicitation, and we want
24 to add these additional bells and whistles.

25 And part of the irony here is, I think, the

1 things that make our letter look most like it's
2 advertisement or solicitation are the things that are
3 required by the State Bar.

4 And, keep in mind, that's another reason why
5 treating attorney solicitation differently from general
6 solicitation makes perfect sense because they're subject
7 to --

8 JUSTICE SCALIA: I don't understand what
9 you're saying. You're saying the State Bar requirements
10 would have required you to say, are you interested in
11 joining the lawsuit?

12 MR. CLEMENT: Well, and -- they would --
13 it's so natural that somebody will say, can I join your
14 lawsuit --

15 JUSTICE SCALIA: Yes.

16 MR. CLEMENT: -- that they would require all
17 the language that says, you have alternatives, other
18 people can -- can -- can hire you.

19 JUSTICE KENNEDY: Well, that's because --
20 that's because the State is allowing solicitation, and
21 it puts certain conditions on what your solicitation --

22 MR. CLEMENT: Exactly.

23 JUSTICE KENNEDY: You point to page 94, you
24 say, oh, it's just the last line, the whole thrust of
25 the letter was solicitation. You have to be fair about

1 that.

2 MR. CLEMENT: Exactly.

3 JUSTICE KENNEDY: You have to be fair about
4 that.

5 MR. CLEMENT: And, Justice Scalia, the last
6 thing you can infer from the statute is that Congress
7 wanted, for the first time ever, get in the business of
8 managing attorney solicitation, a subject they'd always
9 left to the States. And --

10 JUSTICE SOTOMAYOR: Counsel, I just want to,
11 before you leave, because -- in response to
12 Justice Kagan, I think you've changed positions a little
13 bit. You started by saying there were three ways to
14 draw a line. Getting clients is okay; getting clients
15 is okay if you get a specific treatment, occurrence, or
16 defect. And you didn't mention what the third was.

17 So what's your preferred reading?

18 MR. CLEMENT: My -- my preferred reading is
19 that transaction, occurrence, defect -- which I took her
20 red light camera to be an example of a particular
21 identified defect. But I do want to emphasize, before I
22 sit down -- it's the last thing I'll emphasize, that my
23 case is a little bit better because we had a client and
24 a specific defect before anything happened.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Guerra, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF JOSEPH R. GUERRA

3 ON BEHALF OF THE PETITIONERS

4 MR. GUERRA: Thank you.

5 First of all, I'd just like to point out
6 that the consequence of Respondent's argument is that --
7 is they gave the example of going to get the license
8 plate and then getting the name and address to serve
9 process.

10 But, on their theory, you can also go down
11 and -- you can witness an accident on the side of the
12 road, you can go down to DMV, get the name and
13 license -- use the license plate to get the name and
14 address and send a solicitation letter. And that is
15 trolling.

16 And I think everybody -- as I understand it,
17 the line seems to be everybody wants it somewhere south
18 of trolling. And yet --

19 JUSTICE BREYER: Well, why don't you give us
20 the line that's north?

21 (Laughter.)

22 MR. GUERRA: My line -- my line --

23 JUSTICE SCALIA: North of trolling?

24 JUSTICE BREYER: No, not north of trolling,
25 but you understand the point. What's your line?

1 MR. GUERRA: Our line is solicitation,
2 Justice Breyer, and there are two ways to get that.
3 There is the -- we -- I submit, is the strong textual
4 evidence in (b)(2), that Congress did, in fact,
5 understand that the consent requirement governs all bulk
6 solicitation or surveys or marketing, and it had to give
7 an explicit override in (b)(2) because, otherwise,
8 (b)(12) would have restricted the ability to do
9 nonconsent --

10 JUSTICE BREYER: In the middle of the -- in
11 the middle of the class action, several of the clients,
12 the only ones who brought -- who bought the cars --
13 which there is loads of evidence they're defective, from
14 Dealer Smith, died, and they want to see if they can
15 find three others, so they don't have to dismiss them
16 from the class, they're almost certain -- and has loads
17 of evidence there is the -- you know, the harm caused by
18 the defendant. They are missing a client. They died.

19 And so can they get it then?

20 MR. GUERRA: I'm not sure I understand the
21 question.

22 JUSTICE BREYER: Can they go to the board
23 and say, look, Dealer Smith here -- we're in the middle
24 of the case, we're finished with discovery. We're
25 just -- he just died and --

1 MR. GUERRA: Are you talking about --

2 JUSTICE BREYER: -- we want to find three
3 others, and I'm sure there's loads of evidence here that
4 there were a hundred thousand others, who bought this
5 defective thing from this defendant, we want to find out
6 the names and addresses. Can they get it or not?

7 MR. GUERRA: For purposes of soliciting new
8 class representatives, I think not.

9 JUSTICE BREYER: Not.

10 MR. GUERRA: And I think -- and there are
11 loads of ways to find class representatives without
12 going to DMVs. And, in fact, that's what most class
13 action lawyers have to do, is advertise in one fashion
14 or another. So that's not, to my mind, in Congress's
15 conclusion.

16 But I would just point out that, according
17 to Respondents, the phrase "survey research" is
18 surplusage, and this Court says that's -- you're not
19 supposed to reach that conclusion, if you can avoid it,
20 and you can avoid it by understanding it to be the
21 meaning -- the meaning -- its effect is to override the
22 consent requirement, so that -- that you can do
23 commercial bulk surveys in (b)(2), which would otherwise
24 require consent as a -- as a consequence of (b)(12).

25 And then there is the so-called "junior

1 varsity" harmonization basis for reaching solicitation.
2 And I would point out that Respondents are saying, it
3 can't be that you -- that some -- certain statements in
4 a letter means you crossed the line into solicitation
5 and that that has all kinds of massive civil liability
6 consequences.

7 Congress used the word "solicitation" in
8 this statute. Congress meant to draw some kind of line
9 around solicitation. Now, admittedly, we're saying that
10 the harmonization means that that's the same line you
11 would draw in (b)(4). But it's not inconceivable to
12 think that Congress was -- was drawing a line at
13 solicitation and that liability would flow, depending
14 upon whether somebody crossed it or not.

15 JUSTICE KAGAN: But, Mr. Guerra, it didn't
16 draw the line at solicitation in (b)(4), and the
17 advantage of Mr. Clement's argument is that the line
18 that he sets up actually has a textual basis in (b)(4)
19 because it focuses on words like "what is a litigation,"
20 and "what is a proceeding," and "are we there yet." And
21 that seems to be what the language of (b)(4) indicates.

22 MR. GUERRA: Your Honor, our point is --
23 sort of, if you step back, and you -- and this is the
24 question for the harmonization purpose: (b)(4) covers
25 solicitation only because of the indeterminacy of the

1 phrase "in connection with." Without that language,
2 there's no basis for saying (b)(4) is authorizing
3 lawyers' solicitations. So it is, I would submit, at
4 the periphery of the authorization that (b)(4) provides.

5 (B)(12) solicitation is at the core of what
6 that provision is about and that -- the -- the mass
7 marketing of using DMV information is one of the
8 fundamental problems Congress was addressing.

9 And I just think it's implausible to
10 conclude that the -- at the periphery concept in
11 (b)(4) should take precedence over the core function of
12 (b)(12).

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:17 p.m., the case in the
16 above-entitled matter was submitted.)

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