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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014AP001938

NEW RICHMOND NEWS and
STEVEN DZUBAY,

Plaintiffs-Respondents,

v.

CITY OF NEW RICHMOND,

Defendant-Appellant.

On Appeal from St. Croix County Circuit Court
The Honorable Howard W. Cameron, Presiding
St. Croix County Case No. 13-CV-000163

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

The accident and incident reports at issue in this lawsuit are basic and routine records indistinguishable from official reports generated daily by law enforcement agencies across Wisconsin. Like all government records, they are subject to disclosure under the Public Records Law, which is founded on this state's longstanding policy that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31 (2013-14).[1] This policy is nowhere more important than in public oversight of law enforcement.

The New Richmond News and Steve Dzubay (the "Newspaper") brought this enforcement action to compel the City of New Richmond (the "City") to fulfill its obligations

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

under the Public Records Law and release, without redaction, three such law enforcement records. The New Richmond Police Department (the "Department") began redacting names and addresses from its reports in 2012 because it uses state Department of Motor Vehicles ("DMV") records to verify the identities of persons named in those reports. The City argues that Congress—back in 1994—prohibited it from re-disclosing personal information contained in accident or incident reports by enacting the Drivers' Privacy Protection Act (the "DPPA"), which restricts public access to motor vehicle records held by a state DMV.

The City maintains that congressional intent to dramatically alter the application of state public record laws to law enforcement reports went unrecognized for nearly two decades. Moreover, the City's expansive interpretation of the DPPA is neither applied in any other state nor compelled by any federal or state court decision involving the disclosure of

law enforcement reports in compliance with a state public records law. The circuit court correctly rejected the City's interpretation as contrary to the DPPA's plain language.

Nothing in the statute or its legislative history suggests that Congress intended the DPPA to supersede state public records laws, except with respect to motor vehicle records maintained by a state DMV. Congress intended the DPPA to remedy two abuses:

> The DPPA was enacted as a public safety measure, designed to prevent stalkers and criminals from utilizing motor vehicle records to acquire information about their victims. Prior to the law's enactment, anyone could contact the department of motor vehicles in most states and, simply by providing a license plate number and paying a nominal fee, obtain the corresponding driver's address and other pertinent biographical information—no questions asked.
>
> A secondary purpose of the DPPA [was] . . . to protect against "the States' common practice of selling personal information to businesses engaged in direct marketing and solicitation."

Dahlstrom v. Sun-Times Media, LLC, No. 14-2295, 2015 WL 481097, at *4-5 (7th Cir. Feb. 6, 2015), (*quoting Maracich v. Spears*, 133 S. Ct. 2191, 2198 (2013)).

The Newspaper does not dispute that the DPPA preempts Wisconsin law where the two conflict—indeed, the DPPA is the reason Wisconsin's DMV no longer sells personal information of licensed drivers and vehicle owners. However, the DPPA *explicitly* authorizes the use of personal information "by any government agency, including any court or law enforcement agency, in carrying out its functions," 18 U.S.C. § 2721(b)(1) (2013), and the disclosure of incident and accident reports is an essential function of law enforcement agencies under Wisconsin law. Additional exceptions provide further bases for disclosing accident reports and other law enforcement records related to motor vehicle safety.

The City's hyper-cautious reading of *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012), the basis for its

sudden policy change, is insupportable. The circuit court agreed that *Senne* is inapplicable, choosing instead to follow our attorney general's analysis in an informal opinion that specifically addresses the DPPA's effect on Wisconsin's Public Records Law. *See* Informal Opinion of Wis. Att'y Gen. to Robert J. Dreps and Jennifer L. Peterson, Godfrey & Kahn, S.C., I-02-08, 2008 WL 1970575 (Apr. 29, 2008). This court should do the same.

STATEMENT OF ISSUES

The Newspaper disagrees with the City's statement of the issues presented. The issue is not whether the City "may" redact personal information from law enforcement reports "under the federal Driver's Privacy Protection Act." Brief of Respondent-Appellant City of New Richmond ("City Br.") at 1. The issue is whether it "must" do so based upon federal preemption. *See* Wis. Stat. § 19.36(1) ("Any record which is specifically exempted from disclosure by state or federal law

or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1) . . . .").

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Newspaper agrees with the City that the court should grant oral argument and publish its decision.

STATEMENT OF THE CASE

I. RELEVANT STATUTES

A. The Driver's Privacy Protection Act.

1. History and Purpose

The Driver's Privacy Protection Act, or DPPA, was enacted in 1994 to restrict the disclosure or sale of personal information by state departments of motor vehicles, or DMVs. Congress adopted the statute, in part, in response to the 1989 murder of actress Rebecca Schaeffer by a stalker who procured her unlisted address from the California DMV. *Senne*, 695 F.3d at 607.

Whereas the privacy concerns of today arise from sophisticated hacking attacks against companies like Sony Pictures, Target, and Anthem, the DPPA addresses a far simpler problem: DMV service counters that literally sold personal information—either individually or in bulk—to anyone willing to pay for it. As the U.S. Supreme Court has explained,

> The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs. State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Congress found that many States, in turn, sell this personal information to individuals and businesses.

Reno v. Condon, 528 U.S. 141, 143 (2000); *see also id.* at 144 (noting that the Wisconsin Department of Transportation had

been earning "approximately $8 million each year from the sale of motor vehicle information.").

The immediate accessibility of a driver's personal information to anyone who enters the DMV was the problem Congress sought to eliminate. As DPPA sponsor California Sen. Barbara Boxer explained,

> In 34 States, someone can walk into a State Motor Vehicle Department with your license plate number and a few dollars and walk out with your name and home address. Think about this. You might have an unlisted phone number and address. But, someone can find your name or see your car, go to the DMV and obtain the very personal information that you may have taken painful steps to restrict.
>
> Mr. [Senate] President, the American people think that is wrong.

139 Cong. Rec. 29,466 (1993).

Congress consciously singled out state DMVs for regulation because the ubiquity of license plates rendered DMV records uniquely susceptible to abuse:

> The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual. Anyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the person who owns that vehicle. Other public records are not vulnerable to abuse in the same way.
>
> Unlike with license plate numbers, people concerned about privacy can usually take reasonable steps to withhold their names and addresses from strangers, and thus limit their access to personally identifiable information. By contrast, no one is free to conceal his or her license plate while traveling by automobile.
>
> Recognizing this distinction, this amendment applies only to specified categories of personal information contained in motor vehicle records. It does not apply to any other system of public records maintained by States or local governments.

140 Cong. Rec. 7,925 (1994) (statement of Rep. James P. Moran); *see also* 139 Cong. Rec. 29,469 (1993) (statement of Sen. Joe Biden) (emphasis added) ("By protecting the privacy of addresses and telephone numbers—which would otherwise

be available *at the mere mention of a license plate or driver's license number*—the amendment is another weapon against [stalking].").

2. The Statute

The DPPA is organized into three basic components: the prohibition, the exceptions, and the enforcement procedures and remedy.

First, the prohibition:

> In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any ***person*** or entity:
>
> (1) ***personal information*** . . . about any individual obtained by the department in connection with a ***motor vehicle record***, except as provided in subsection (b) of this section . . .

18 U.S.C. § 2721(a) (emphasis added).[2] The italicized terms above are all defined in the statute:

> (1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;
>
> (2) "person" means an individual, organization or entity, but does not include a State or agency thereof;
>
> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

18 U.S.C. § 2725.

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[2] The DPPA includes a separate, stricter prohibition against the disclosure of "highly restricted personal information," 18 U.S.C. § 2721(a)(2), which encompasses only "an individual's photograph or image, social security number, medical or disability information," 18 U.S.C. § 2725(4). The provisions governing "highly restricted personal information" are not at issue here, because no such information appears in any of the records requested.

The prohibition, far from absolute, is qualified by fourteen exceptions. "Against the backdrop of the general rule prohibiting disclosures in subsection (a), subsection (b) provides . . . several categories of permissive disclosures." *Senne*, 695 F.3d at 605. Personal information "may be disclosed" by DMVs in fourteen circumstances, three of which are relevant here:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
>
> (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
>
> . . .

> (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

18 U.S.C. § 2721(b).

The prohibition and its exceptions also extend to authorized *recipients* of personal information from the DMV, who "may resell or redisclose the information only for a use permitted under subsection (b)," subject to certain exceptions not applicable here. 18 U.S.C. § 2721(c).

Finally, the DPPA's enforcement provisions include a criminal fine for intentional violations, and daily civil fines against any state DMV that has a policy or practice of substantial noncompliance. 18 U.S.C. § 2723(a) and (b). The City's principal concern, however, is that the DPPA creates "a private right of action for any individual whose personal information has been obtained or disclosed in violation of the

Act." *Dahlstrom*, 2015 WL 481097, at *2 (citing 18 U.S.C. § 2724(a)); *see* City Br. at 15, 22-23.

B. The Public Records Law.

The Wisconsin legislature has declared the state's official policy of virtually unfettered public access to government records:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. § 19.31. The legislature reinforced that official public policy with a statutory presumption that all

government records are open to public inspection, upon request, by any person.

> To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Id. The Supreme Court has emphasized the power of this legislative command, calling it "one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.

Only three exceptions qualify the Open Records Law's strong presumption of public access: (1) specific statutory exceptions; (2) specific common law exemptions; or (3) a judicial determination, supported by factual findings, that the public interest in secrecy outweighs the public interest in disclosure under the common law balancing test. *Hathaway*

v. Joint Sch. Dist., 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). Because the City claims that the DPPA prohibits its disclosure of personal information obtained or verified from DMV records, this case involves the first of these exceptions:

> Any record which is *specifically* exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1)....

Wis. Stat. § 19.36(1) (emphasis added). Exceptions to the Public Records Law must be "narrowly construed," moreover, which means that "unless the exception is explicit and unequivocal, it will not be held to be an exception." *Hathaway*, 116 Wis. 2d at 397.

C. **Section 346.70, Wis. Stat.**

Wisconsin law requires "[e]very law enforcement agency investigating or receiving a report of a traffic accident" to "forward an original written report of the accident or a report of the accident in an automated format to

the department [of transportation] within 10 days after the date of the accident." Wis. Stat. § 346.70(4)(a). Those reports are open to public inspection:

> [A]ny person may with proper care, during office hours, and subject to such orders or regulations as the custodian thereof prescribes, examine or copy such uniform traffic accident reports, including supplemental or additional reports, statements of witnesses, photographs and diagrams, retained by local authorities, the state traffic patrol or any other investigating law enforcement agency

Wis. Stat. § 346.70(4)(f). Furthermore, any law enforcement agency that investigates or receives such a report is required to forward it to the county traffic safety commission or another appropriate body, depending on where the accident occurred. Wis. Stat. § 346.70(4)(h).

II. RELEVANT AUTHORITY

Three opinions are central to this appeal. The Wisconsin Attorney General addressed the application of the

DPPA to law enforcement reports under Wisconsin's Public Records Law in a 2008 informal opinion. The City disputes that opinion based on two recent federal court decisions, neither of which addressed the DPPA's application to law enforcement reports disclosed in compliance with a state public records law. The Newspaper briefly reviews these opinions below.

A. The Attorney General's 2008 Opinion.

In his April 29, 2008 informal opinion, Attorney General J.B. Van Hollen addressed "the interaction between" the DPPA and Wisconsin's Public Records Law "in the context of public records requests to law enforcement agencies." Appendix of Respondent-Appellant City of New Richmond ("App.") at 13. He concluded that the DPPA does not constrain law enforcement agencies in responding to open records requests: "after a law enforcement officer has written

a report or citation, including certain personal information obtained from the DMV, the officer's agency may provide a copy of the report or citation in response to a public records request." *Id.* at 17. This is principally because, "[j]ust like writing the report or citation, responding to a related public records request is a function of the law enforcement agency", *id.*—a function expressly mandated by state law—and the DPPA expressly allows personal information to be disclosed "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions . . . ." 18 U.S.C. § 2721(b)(1).

Closely examining this "agency functions" exception, Attorney General Van Hollen observed that the DPPA neither defines nor limits the "functions for which another government agency permissibly may use personal information." App. at 15. The statutory language is not "limited to one 'function' for which the agency initially might

have requested the information—the permissible use is for the agency 'in carrying out its functions.'" *Id.* at 15-16. Furthermore, "Congress is presumed to be aware of existing law—including state law—when it passes legislation, particularly if the existing law is pertinent to the legislation." *Id.* at 16.

> Therefore, it is appropriate to construe the "functions" of a state governmental agency to include, at a minimum, *all duties imposed by state law*. Legislative history further indicates that the scope should not be narrowly drawn, so as not to impede the abilities of law enforcement and other government agencies to carry out their duties—whatever those might be.

Id. (emphasis added).

In addition to relying on the "agency functions" exception, the Attorney General concluded that several "additional DPPA provisions also authorize public records access to personal information in law enforcement records related to vehicular accidents, driving violations, and driver

status." *Id.* at 18. First, the definition of "personal information" excludes such records from the DPPA's disclosure prohibitions: "personal information" is defined as "information that identifies an individual . . . but *does not include information on vehicular accidents, driving violations, and driver's status.*" *See* 18 U.S.C. § 2725(3) (emphasis by attorney general). Second, Wisconsin law specifically requires access to Uniform Traffic Accident Reports, *see* Wis. Stat. § 346.70(4)(f), disclosure of which falls within the exception "[f]or any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety," 18 U.S.C. § 2721(b)(14). Finally, the Attorney General found that accident reports, traffic citations, and similar records "facially constitute uses in connection with a matter of motor vehicle and/or driver safety" and are

therefore exempt from the prohibition under 18 U.S.C. § 2721(b)(2). App. at 19.

B. Senne v. Village of Palatine.

The City contends the *Senne* decision compels its conclusion that the DPPA requires it to redact personal information before disclosing law enforcement records under the Public Records Law. *Senne* arose out of the Village of Palatine's practice of serving parking citations containing personal information derived from DMV records by placement under a vehicle's windshield wiper. The plaintiff had received such a ticket and argued that placing a printed citation on a car parked on a public street, where any person might see his personal information, is a disclosure prohibited by the DPPA. 695 F.3d at 601-03.

The Seventh Circuit, reviewing *en banc* the district court's dismissal of the lawsuit, which a panel of the court

had initially affirmed, held that the citation's placement on the windshield constitutes a "disclosure" under the DPPA. The court did not determine whether the Village had violated the DPPA, however, because that question hinged on whether any exceptions authorized the disclosure. The court remanded for further proceedings to determine "whether all of the disclosed information actually *was used* in effectuating" an exempt purpose. *Id.* at 608.

On remand, the district court observed that the en banc majority had been "less than clear regarding how a court should go about determining whether the disclosed information is actually used for the purpose stated in the statutory exception." *Senne v. Vill. of Palatine*, 6 F. Supp. 3d 786, 795 (N.D. Ill. 2013). The court concluded that "the correct reading is that the *ultimate* or *potential* use of personal information qualifies as acceptable use under the DPPA if it is for a permissible purpose listed in section 2721(b)." *Id.*

Since the evidence presented on remand established that the Village, in some situations, "uses the personal information that it discloses on parking tickets to void erroneously issued tickets and to help identify drivers lacking other identification," the district court found that its justifications for "disclosure of DPPA-protected personal information are sufficient under subsection 2721(b)(1)." *Id.* at 797. The plaintiff's appeal from that decision is pending before the Seventh Circuit.

C. Maracich v. Spears.

In *Maracich v. Spears*, the U.S. Supreme Court considered the DPPA exception that allows a DMV to disclose personal information for "use in connection with any civil, criminal, administrative, or arbitral proceeding . . . , including . . . investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). The defendants in *Spears* were trial

lawyers who had "obtained names and addresses of thousands of individuals from the South Carolina DMV in order to send letters to find plaintiffs for a lawsuit they had filed against car dealers for violations of South Carolina law." *Spears*, 133 S. Ct. at 2196. The lower courts held this was a lawful use of the (b)(4) exception. The Supreme Court reversed, however, holding that the "in connection with" language "must have a limit," and "that an attorney's solicitation of prospective clients falls outside of that limit." *Id.* at 2200. Among other issues, the Court directed the lower courts to consider on remand "whether [the lawyers'] conduct was permissible under the (b)(1) governmental-function exception." *Id.* at 2210. That issue has not yet been decided by the district court.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Request and Response.

The Newspaper, exercising its rights under the Public Records Law, regularly requests law enforcement reports related to activity appearing on the St. Croix County Dispatch Center's daily log. *See* App. at 6. This lawsuit arises out of a request for complete copies of four such records—concerning two car accidents, one theft, and one act of property damage—that the Newspaper made of the Department on January 15, 2013. *Id.* The Department denied the request less than a week later. *Id.* at 7.

The Department acknowledged it had historically disclosed accident and incident reports to the media and other requesters, without redacting names and addresses, even though DMV records are used to prepare the reports. *Id.* at 6, 7. The police chief's response explained that officers produce accident reports and citations from their vehicles using a computer system called "Tracs," which automatically incorporates a driver's personal information from

"information contained in the State of Wisconsin DMV Records." *Id.* at 7. Officers also use DMV records to obtain and verify the "personal information" of persons identified in "incident reports." *Id.* Before late 2012, the Department's release of unredacted reports in compliance with the Public Records Law was never seen as inconsistent with the DPPA.

The Department changed its disclosure policy in response to the ruling in *Senne*, which it said "is 'binding' on the State of Wisconsin and does change Wisconsin's Open Records Law." App. at 7. Based on the *en banc* majority's reasoning, the Department concluded that the DPPA prohibits public disclosure of any reports containing personal information obtained or verified using DMV records. The Newspaper asked the Department to reconsider its interpretation of the DPPA based on the attorney general's 2008 opinion, *id.* at 9-12, but the Department refused.

As a result, three of the four records the Newspaper requested were produced with extensive redactions. For the two accidents, the City concealed the names, birth dates, addresses, telephone and driver's license numbers of the drivers, vehicle owners and witnesses from the standard Wisconsin Motor Vehicle Accident Report form. App. at 25-35; *see* Wis. Stat. § 346.70. The incident report for the theft omitted the name, address, and phone number of the complainant, suspect, and one "other" person; the name of the "Victim" still appeared, but only because it was a business, "Kwik Trip." *Id.* at 36-37. Personal information in the fourth report was not redacted because it was neither obtained from nor verified using DMV records. *See* App. at 27.

B. Proceedings Below.

The Department's interpretation of the DPPA prevents the public from learning the identity of *any person*—whether a driver, passenger, witness, victim or suspect—involved in

traffic accidents, crimes, or any other official police action or investigation in which DMV records are used to obtain or verify personal information. The Newspaper brought this enforcement action under the Public Records Law, Wis. Stat. § 19.37(1)(a), to challenge that interpretation. App. at 1-37.

With no material facts in dispute, the Newspaper moved for judgment on the pleadings, which the circuit court granted on March 20, 2014. App. at 38-45. The court found *Senne* inapplicable and concluded that the exception for "use by any government agency . . . in carrying out its functions," 18 U.S.C. § 2721(b)(1), permitted full disclosure of all three records at issue here. The circuit court recognized that the requested records "all relate to the official acts of police officers responding to and reporting on specific events in the City," and that "it is an official act of the City to respond to such records requests in compliance with the Open Records Law." *Id.* at 44. "As such," the court concluded, "the

umbrella of § 2721(b)(1) allows for such permissible disclosure to allow the City to carry out this 'essential function.'" *Id.*, (quoting Wis. Stat. § 19.31).

The court also found that two additional rationales support the disclosure of the two Uniform Traffic Accident Reports. First, they fall within the "broad exception for uses specifically authorized under 'the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.'" App. at 44 (quoting 18 U.S.C. § 2721(b)(14)). Second, the accident reports "do not fit the statutory definition of 'personal information' under § 2725(3)." *Id.*

The court held, accordingly, that the "DPPA does not require the redaction of the information requested by [the Newspaper] because such disclosure is permitted under § 2721(b) and the Wisconsin Open Records Law requires the City to respond to records requests and provide such

information in the performance of official duties by the City." App. at 45. The City timely appealed from that decision.

STANDARD OF REVIEW

The City appeals from the circuit court's ruling in favor of the Newspaper on its motion for judgment on the pleadings pursuant to Wis. Stat. § 802.06(3). "[I]n reviewing an order granting judgment on the pleadings," appellate courts in Wisconsin follow "the methodology for reviewing summary judgments . . . ." *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). "[A]n appellate court will reverse a summary judgment only if the record reveals that material facts are in dispute or if the circuit court misapplied the law." *Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 48, 235 Wis. 2d 700, 612 N.W.2d 297.

ARGUMENT

This appeal is not, as the City claims, about "balancing two competing laws." City Br. at 10. There is no balancing[3] to perform: Wisconsin law expressly mandates broad access to government records, subject to exceptions specifically provided by law, and the DPPA imposes only a "targeted restriction" on "the acquisition of personal information from a single, isolated source." *Dahlstrom*, 2015 WL 481097, at *8. Wisconsin long ago deferred to the DPPA's targeted restriction by terminating the DMV's sale of personal information to marketers and anyone else who asked. However, the Public Records Law does not conflict with the DPPA with respect to law enforcement reports; rather, the

[3] The Department did not deny the Newspaper's request based on the common law balancing test. App. at 7. The issue is federal preemption. *See* § II below.

DPPA expressly defers to state law as to the disclosures at issue here.

The City's hyperbolic insistence that the Newspaper is demanding "total access" or "blanket disclosure" is not only incorrect but confuses the issues. City Br. at 11, 31.[4] The Newspaper's request is narrow: it seeks access to unredacted reports of law enforcement agencies that concern the performance of official duties. Only three such records are at issue here, and there is no evidence that Congress intended to preempt Wisconsin's authority to open them to public inspection as a means to hold law enforcement officers and agencies accountable for their official acts.

[4] So, too, is the City's repeated references to "highly restricted information," like social security numbers, which does not appear in any of the records at issue. City Br. at 13, 30, 31.

I. MULTIPLE EXCEPTIONS TO THE DPPA PERMIT THE DISCLOSURE OF LAW ENFORCEMENT RECORDS PURSUANT TO WISCONSIN'S OPEN RECORDS LAW.

The circuit court and attorney general both concluded, correctly, that the DPPA's "agency functions" exception allows the Department to disclose all three disputed records, without redacting personal information, because doing so fulfills an agency function expressly mandated by state law. They also found several additional provisions of the DPPA specific to motor vehicle safety authorize the disclosure of the two Uniform Traffic Accident Reports, again without redacting personal information. These conclusions are correct as a matter of law, and the circuit court should be affirmed.

A. The "Agency Functions" Exception Allows the Department to Disclose Personal Information in Carrying Out its Functions Under the Public Records Law.

1. The plain language of the "agency functions" exception supports its application here.

The DPPA's "agency functions" exception permits disclosure of personal information "[f]or use by *any* government agency, including any court or *law enforcement* agency, *in carrying out its functions*." 18 U.S.C. § 2721(b)(1) (emphasis added). The exception is broad: it applies to *any* agency at *any* level of government and requires only that the information be used by the agency "in carrying out its functions." It is also specific, singling out courts and law enforcement agencies since they are most likely to use DMV records in the course of their duties. Congress did not define or limit the "functions" for which a law enforcement agency or court may use or redisclose personal information from DMV records.

Defining agency functions is a matter of state law, and Wisconsin's Public Records Law could not be more explicit:

It is "an *essential function* of a representative government" to furnish the public with information "regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31 (emphasis added). Like every other law enforcement agency in this state, the Department is an "authority" subject to the Public Records Law and shares the responsibility to carry out that "essential function." *See* Wis. Stat. § 19.32(1) (defining "authority").

The City misconstrues the "agency functions" exception by arguing it requires the Newspaper to show how *it* intends to "use" the personal information included in the reports at issue. City Br. at 25. Quite the contrary, Congress expressly intended this exception to authorize the "use" of personal information "by any government agency . . . in carrying out its functions." 18 U.S.C. § 2721(b)(1). By releasing incident and accident reports in response to a public

records request, a Wisconsin law enforcement agency "uses" the personal information within its reports to carry out its *statutorily mandated* function to provide "all persons . . . the greatest possible information [concerning] . . . the official acts of [its] officers." Wis. Stat. § 19.31.

The public's right to monitor "the official acts" of law enforcement officials would be eviscerated if personal information had to be removed from reports before disclosure. The public could not verify and, conversely, law enforcement officials could not demonstrate that traffic and criminal laws are fairly enforced, without favoritism, against all persons. Congress never intended the DPPA to preclude the routine operation of this vital state policy. As the Wisconsin Supreme Court has recognized, "the process of police investigation is one where public oversight is important":

> The ability of police to investigate suspected crimes is an official

> responsibility of an executive government agency, and much like the ability to arrest, it represents a significant use of government personnel, time, and resources. The investigative process is one that, when used inappropriately, can be harassing or worse.

Linzmeyer v. Forcey, 2002 WI 84, ¶ 27, 254 Wis. 2d 306, 646 N.W.2d 811 (citation omitted); *see also Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 435-36, 279 N.W.2d 179 (1979) (This "strong public-policy interest . . . is particularly significant where arrest records are concerned"); *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996) ("The public has a compelling interest in monitoring the use of deadly force by police officers . . . .").

The redaction of names and addresses from routine law enforcement reports like those at issue here would, as the attorney general's 2008 opinion notes, "subvert the important governmental objective of facilitating public oversight of

police" conduct. App. at 17. Nothing in the DPPA or its legislative history indicates any congressional intent to end this longstanding state policy.

The City never disputes that state law can define and mandate a local law enforcement agency's functions, but it argues the Department's statutory disclosure duties somehow do not qualify as "government agency . . . functions" under 18 U.S.C. § 2721(b)(1). It expressly acknowledges that "police departments perform a legitimate law enforcement function when they discharge their statutory duty to investigate and report on traffic accidents," as Wis. Stat. § 346.70(4)(a) requires, while denying that they perform a legitimate law enforcement function when disclosing those reports to the public under subsection (4)(f) of the same statute. City Br. at 29. There is, of course, no principled basis to distinguish among a law enforcement agency's statutory duties under 18 U.S.C. § 2721(b)(1). All statutory

duties qualify as agency functions, exempt from the DPPA's prohibition, as the attorney general and circuit court correctly concluded.

2. *The City relies on inapposite federal case law to argue for a limited reading of the "agency functions" exception.*

Since the DPPA itself never defines an agency's "functions," the City turns to the dictionary: a "function" is an "activity that is appropriate to a particular business or profession," an "office[or] duty," or "the occupation of an office." City Br. at 26 (quoting Black's Law Dictionary 787 (10th ed. 2014)). The Newspaper agrees—responding to open records requests is a function—*i.e.* a "duty" of or "activity that is appropriate" to—the Department. Indeed, the City's definition is far more expansive than the attorney general's interpretation that "the 'functions' of a state

governmental agency . . . include, at a minimum, *all duties imposed by state law*." App. at 16 (emphasis added).

The City cites this definition only to ignore it, however, arguing instead that the circuit court should have deferred "to federal guidance" and adopted "a more restrictive reading of this exception."[5] City Br. at 26. To support its "restrictive reading," the City relies on *Spears* and *Senne*—neither of which addressed the disclosure of law enforcement records in compliance with a state public records law.

Spears deals with a different exception—authorizing disclosure of personal information for "use in connection with any . . . proceeding . . . , including . . . investigation in

[5] This is wrong on two levels: neither the DPPA's text nor anything in *Senne* or *Spears* suggests Congress intended a restrictive reading of "government agency . . . functions" in exception (b)(1), especially for courts and law enforcement agencies. Moreover, federal preemption principles preclude finding congressional intent to override, by implication alone, state laws governing disclosure of law enforcement reports. *See* § II below.

anticipation of litigation," 18 U.S.C. § 2721(b)(4)—that has no bearing here. Recognizing that "connections, like relations, stop nowhere," the Court insisted that the language "in connection with" "must have a limit" and determined "that an attorney's solicitation of prospective clients falls outside of that limit." *Spears*, 133 S. Ct. at 2200 (internal quotation marks omitted). This court does not need to consider the outer limits of the "agency functions" exception at issue here, however, because it must "include, at a minimum, all duties imposed by state law," as the attorney general concluded. App. at 16.

The City draws from *Spears* the lesson that "the conduct of the requester must be examined." City Br. at 28. But the "requester" here is the Department, which first obtained personal information from the DMV based on the "agency functions" exception, which authorizes the "use [of personal information] *by any government agency* . . . in

carrying out its functions." 18 U.S.C. § 2721(b)(1) (emphasis added). The same exception authorizes the Department to fulfill its obligations under the Public Records Law and Wis. Stat. § 346.70(4)(f). No further explanation or justification for redisclosure is necessary when a government agency uses personal information to fulfill a statutory duty.

Neither *Spears* nor *Senne* dealt with a scenario in which the disclosure was mandated by state law. *Senne* involved a *voluntary* disclosure of personal information, since no statute required the Village of Palatine to serve parking tickets in a manner that publicly exposed that information.[6] That is why the court required the Village to explain and justify on remand how each item of personal information it

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[6] Nor did any law require the Village to include a vehicle owner's height and weight on the citation. The Newspaper agrees that "it is difficult to see a law enforcement purpose for disclosing a person's height and weight to a newspaper, City Br. at 31, but none of the records at issue here included such personal data. If they did, it would properly be redacted under the common law balancing test, not the DPPA.

disclosed "actually *was used* in effectuating" a law enforcement function. 695 F.3d at 608. Here, by stark contrast, state law both mandates disclosure *and* explains the permissible purpose—the records at issue are presumptively open to public inspection so the public can hold law enforcement officers and agencies accountable for their official acts. *See* Wis. Stat. § 19.31.

Far more relevant is the Seventh Circuit's recent decision in *Dahlstrom*,[7] which arose from a newspaper's reporting about the Chicago Police Department's investigation of a man's death following an altercation with the former mayor's nephew, R.J. Vanecko. *Dahlstrom*, 2015 WL 481097, at *1. The department declined to recommend charges against Vanecko after witnesses failed to identify him from a lineup in which five Chicago police officers served as

[7] *Dahlstrom* was decided February 6, 2015, after the City filed its initial brief in this appeal.

"fillers." The *Chicago Sun-Times* questioned the lineup's validity in a story highlighting "the physical resemblance between Vanecko and the lineup 'fillers' in an effort to demonstrate that the Officers resembled Vanecko too closely for the lineup to be reliable." *Id.*

The officers named in the article filed suit claiming the *Sun-Times* violated the DPPA "by acquiring and publishing" personal details that it "knowingly obtained" from "motor vehicle records maintained by the Secretary of State"[8]—namely "the months and years of [the officers'] birth, their heights, weights, hair colors, and eye colors." *Id.* at *1-2.

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[8] In Illinois, the Secretary of State performs the functions of a state department of motor vehicles. *See* 625 Ill. Comp. Stat. 5/2-101 (2015) (vesting the Secretary of State "with powers and duties and jurisdiction of administering Chapters 2, 3, 4, 5, 6, 7, 8 and 9 of The Illinois Vehicle Code"); 625 Ill. Comp. Stat. 5/2-106 ("The Secretary of State shall prescribe or provide suitable forms of applications, certificates of title, registration cards, driver's licenses and such other forms requisite or deemed necessary to carry out the provisions of this Act and any other laws pertaining to vehicles the enforcement and administration of which are vested in the Secretary of State.").

The newspaper also obtained lineup photographs and the names of each officer used as a "filler" from the Chicago Police Department pursuant to a request under the Illinois Freedom of Information Act. *Id.* at *1.

The court ruled that determining the *source* of the information at issue is critical in applying the DPPA.

> The DPPA proscribes only the publication of personal information that has been obtained from motor vehicle records. The origin of the information is thus crucial to the illegality of its publication . . . .

Id. at *9. Even the plaintiff officers did *not* challenge the publication of their photographs or names, information they conceded was "lawfully obtained . . . pursuant to [a] FOIA request." *Id.* at *2. The court agreed, noting in rejecting the newspaper's First Amendment defense that much of the personal information it unlawfully obtained from the DMV "can be gathered from physical observation of the Officers or

from other lawful sources (including, of course, a state FOIA request) . . . ." *Id.* at *8.

In short, none of the "federal guidance" the City claims to follow alters the attorney general's thorough assessment of this issue in his 2008 opinion. City Br. at 26. The City's criticisms of this opinion are unfounded. The City disputes his conclusion that the term "functions" includes "all duties imposed by state law," *id.* at 32, but how could it not? Are statutory mandates not "functions" under the City's own definition? Of course they are. This court should adopt the attorney general's straightforward analysis:

> Just like writing the report or citation, responding to a related public records request is a function of the law enforcement agency. *Cf.* Wis. Stat. § 19.31. The DPPA does not require redaction of the personal information from law enforcement records provided in response to the public records request.

App. at 17.

B. The Accident Reports and Similar Records Related to Motor Vehicle or Driver Safety Are Exempt from the Prohibition.

Additional provisions of the DPPA and Wisconsin law support the disclosure of accident reports and other records related to motor vehicle safety, which account for two of the three records at issue here. The attorney general and circuit court both concluded that "personal information" contained in accident reports and driving citations is excluded from the DPPA's definition of that term, and is properly disclosed under exception 18 U.S.C. § 2721(b)(14) in any event. *See* App. at 18-19, 44.[9]

[9] The circuit court did not address the attorney general's further conclusion that exception (b)(2) also authorizes the disclosure of personal information in Uniform Traffic Citations and Uniform Traffic Accident Reports. *See* App. at 18.

The DPPA expressly excludes "information on vehicular accidents" from its definition of "personal information":

> "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, *but does not include information on vehicular* accidents, driving violations, and driver's status.

18 U.S.C. § 2725(3) (emphasis added). This exception to the statutory definition would not have been necessary if Congress intended to treat "personal information" on a citation or accident report the same way the DPPA expressly does "personal information" on a motor vehicle record held by the DMV. The attorney general correctly concluded this exception "mean[s] that information such as a driver's name, address and telephone number are not encompassed in the personal information protected by the DPPA when that

information is incorporated into . . . an accident report or citation." App. at 19. The City's interpretation, by contrast, gives the exception no effect whatsoever. City Br. at 37.

In addition, Wisconsin law mandates that law enforcement agencies provide complete public access to uniform traffic accident reports:

> [A]ny person may with proper care, during office hours, and subject to such orders or regulations as the custodian thereof prescribes, examine or copy such uniform traffic accident reports, including supplemental or additional reports, statements of witnesses, photographs and diagrams, retained by local authorities, the state traffic patrol or any other investigating law enforcement agency.

Wis. Stat. § 346.70(4)(f).[10] This disclosure mandate provides further support for the conclusion that the Department's disclosure of accident reports is an "agency function" exempt

[10] This statutory mandate is separate from the presumptive right of access state law extends generally to all government records in the Public Records Law.

from the DPPA's general prohibition. The statute's purpose also fits the DPPA's exception "[f]or use in connection with matters of motor vehicle or driver safety," 18 U.S.C. § 2721(b)(2), which necessarily encompasses the documentation of traffic accidents using Wisconsin's Uniform Traffic Accident Reports. Likewise, the broad exception for "any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety," applies with equal force to the accident reports. 18 U.S.C. § 2721(b)(14).

The City mistakenly relies on *Camara v. Metro-North Railroad Co.*, 596 F. Supp. 2d 517 (D. Conn. 2009) to argue that the DPPA requires a requester to provide the driver's name and other personal information in order to obtain information on accidents, violations, and driver's status. City Br. at 38. That court correctly interpreted the exception to the

statutory definition of "personal information," holding that "[t]he DPPA does not, in any way, restrict public access to information regarding an individual's vehicular accidents, driving violations, and driver's status." *Id.* at 524. Contrary to the City's assumption, however, it was Connecticut law—not the DPPA—that the court held restricted access to "such information" to those who can provide "the driver's name, license number, address, and date of birth." *Id.*

Other states have similar restrictions on public access to accident reports. *See, e.g.,* Cal. Veh. Code § 20012 (2013) (accident reports are for the confidential use of the California DMV and only persons with "a proper interest" in the report, including the drivers involved, may obtain access). Wisconsin's legislature adopted a different policy, authorizing "any person" to "examine or copy . . . uniform traffic accident reports" maintained by any "investigating law enforcement agency." Wis. Stat § 346.70(4)(f). The

exception to the DPPA's definition of "personal information" plainly demonstrates that Congress did not intend to prohibit that public policy choice.

The City also claims that accident reports do not fall within the (b)(2) exception for "matters of motor vehicle or driver safety," which "must be read in its entirety and by the company it keeps (the doctrine of *noscitur a sociis*)." City Br. at 33. The full exception shows this doctrine does not apply because the list of exempt purposes are not all associated with "matters of motor vehicle or driver safety and theft."

> For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

18 U.S.C. § 2721(b)(2). Their variety demonstrates that each exempt purpose stands alone; they are not intended as subcategories of the first.

Equally flawed is the City's argument that the exception in 18 U.S.C. § 2721(b)(14)—for "any other use . . . related to the operation of a motor vehicle or public safety"—does not apply because "[a]ll of the personal information in the records requested by the Newspaper cannot be related back to the 'operation of a motor vehicle or public safety.'" City Br. at 35. The City is right—the (b)(14) exception does not apply to the gas theft—but the Newspaper does not rely on this exception as a basis for obtaining the unredacted incident report. The Newspaper never argued that this exception applied to "all" of the records it requested and even the City does not deny that accident reports are "related to the operation of a motor vehicle or public safety." It cannot, since state law requires "[e]very law enforcement agency

investigating or receiving a report of a traffic accident . . . [to] forward a copy . . . to the county traffic safety commission . . . ." Wis. Stat. § 346.70(4)(h).

II. CONGRESS DID NOT INTEND THE DPPA TO PREEMPT STATE PUBLIC RECORDS LAWS

The question before this court is ultimately one of preemption: does the DPPA preempt the application of Wisconsin's "presumption of complete public access" to routine law enforcement records? Wis. Stat. § 19.31. The law presumes it does not and the City has found nothing in the statute's text or legislative history to overcome that presumption.

Under the Supremacy Clause of the U.S. Constitution, "state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Although the Constitution grants Congress the authority to preempt state law, "analysis of preemption claims begins with

the presumption that 'Congress does not intend to supplant state law.'" *Miezin v. Midwest Express Airlines, Inc.*, 2005 WI App 120, ¶ 9, 284 Wis. 2d 428, 701 N.W.2d 626 (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). Whether Congress intended the DPPA to supplant Wisconsin's transparency laws presents a question of law. *See Miller Brewing Co. v. DILHR*, 210 Wis. 2d 26, 33, 563 N.W.2d 460 (1997).

The City appears to agree that conflict preemption is the *only* kind of preemption at issue here. *See* City Br. at 42. "Conflict preemption occurs 'to the extent that there is an actual conflict between federal and state law.'" *M&I Marshall & Ilsley Bank v. Guar. Fin.*, 2011 WI App 82, ¶ 25, 334 Wis. 2d 173, 800 N.W.2d 476. A conflict exists when "'compliance with both the federal and state laws is a physical impossibility or when a state law is a barrier to the

accomplishment and execution of Congress objectives and purposes.'" *M&I*, 334 Wis. 2d 173, ¶ 25. To satisfy this standard, "'courts typically require clear evidence of legislative intent to preempt.'" *Megal Dev. Corp. v. Shadof*, 2005 WI 151, ¶ 37, 286 Wis. 2d 105, 705 N.W.2d 645.

The DPPA *does* expressly conflict with Wisconsin's Public Records Law, but only as applied to motor vehicle records maintained by the DMV. Before the DPPA's passage, our DMV "sold its records for use in creating mailing lists," bringing in "approximately $8 million in annual revenue." *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). Because of the DPPA, that practice is no longer allowed. Likewise, the DMV's compliance with the Public Records Law's presumption of complete public access to driver license or vehicle title records and with the DPPA's prohibition of such disclosure, except for an exempt purpose,

"is a physical impossibility"—which means the DPPA must prevail.

With respect to routine law enforcement records, however, the City cannot overcome the "strong presumption" against federal preemption because there is no "'clear evidence of legislative intent to preempt'" state law. *Megal*, 286 Wis. 2d 105, ¶ 37. The DPPA neither creates a broad, general right of privacy for drivers or vehicle owners, nor expressly mandates any change in state laws governing access to routine law enforcement reports. Personal information remains widely available in property records, voter registration records, and numerous other sources, and the DPPA's sponsors expressly stated it "does not apply to any other system of public records maintained by States or local governments." 140 Cong. Rec. 7,925 (1994). The attorney general's 2008 analysis got it exactly right:

> Reading § 2721(b)(1) so restrictively that law enforcement agencies would be

> precluded from carrying out public records functions . . . would serve neither of the specific purposes identified by Congress for enacting the DPPA: crime-fighting, and controlling commercial use of driver information in driver records held by DMVs. Instead, it would subvert the important governmental objective of facilitating public oversight of police investigations, impair public confidence in law enforcement activities, and do exactly what Congress intended to avoid -- impede execution by law enforcement officers of their legitimate public duties and responsibilities.

App. at 17 (citations omitted).

As the attorney general recognized, public access to accident and incident reports is simply not the wrong that the DPPA was devised to remedy. Congress was clear about its intent: to prevent the abuse of driver registration records by criminals and direct marketers. *Dahlstrom*, 2015 WL 481097, at *4-5. Nothing suggests Congress was concerned that marketing firms or stalkers might identify and target individuals based on accident or incident reports. If there were such a risk for any individual, Wisconsin law already

provides adequate protections under the common law balancing test—if "the release of some police records might endanger the safety of persons involved in that report," that presents a "strong public policy reason which would work against release." *Linzmeyer*, 254 Wis. 2d 306, ¶ 30.

The congressional record offers no hint that Congress was even aware that police officers did or would use DMV records to automatically populate accident and incident reports. What Congress did recognize is that states can and do use information originating with the DMV for a variety of legitimate functions—and the "agency functions" exception allows such practices to continue unhampered by the DPPA. Thus it is not a "physical impossibility" to comply with the DPPA and the Public Records Law's presumption of complete access to law enforcement records, because disclosure in compliance with a state-law mandate fits well within the DPPA's exceptions.

The City's interpretation, if endorsed, would result in an ever-expanding barrier to access as records are shared among government agencies. When an arrested person whose identity is verified by police using DMV records is prosecuted, is that defendant's personal information forever tainted as he advances through the criminal justice system? Assume that the police forward the incident report to the district attorney, who drafts a charging document and files it with the circuit court. The defendant is identified in court records, including the Wisconsin Circuit Court Access system, and his name—originally verified using DMV records—is now available to the public at the click of a few keys. Under the Newspaper's reading of the DPPA, the "agency functions" exception allows each of these uses as well as the ultimate disclosure to the public, because each is a function of the agency that "uses" the name.

Under the City's theory, by contrast, public disclosure is unlawful because the "agency functions" exception, which expressly singles out law enforcement agencies and courts, somehow does not allow public access to personal information in their records. Would every clerk of court need to assess, with respect to every court record containing personal information, whether that information was originally obtained or verified by police using DMV records? How could they even make such a distinction?

The problems with the City's theory multiply as the hypothetical defendant advances from arrest to prosecution to conviction and incarceration. Did Congress intend the DPPA prohibit public identification of arrested persons or jail inmates? Of course not, for that would contradict the very foundations of our judicial system.

> From at least the time of the Magna Carta and the formalization of the writ of habeas corpus, the concealment of the reason for arrest has

> been as odious as the concealment of the arrest itself. It is fundamental to a free society that the fact of arrest and the reason for arrest be available to the public.

Breier, 89 Wis. 2d at 438 (holding the reason for arrest, as well as the name of the arrested person, is always public information under the Open Records Law); s*ee also* Wis. Stat. §§ 59.27(2) and 62.09(13)(c) (requiring maintenance of a public record containing the name and authority for committing all persons in a city or county jail). Under the City's interpretation of the DPPA, however, a jailer could avoid that statutory duty by verifying all inmates' personal information with the DMV. Only those persons who have no DMV record, or whose identity a jailer chose not to verify this way, would be identified on a public jail register.

What if a municipality considers it an appropriate function to use DMV records to verify the identity of a "final candidate" for a public position? Does the DPPA override

the Public Records Law's provision that the names of final candidates are subject to disclosure? *See* Wis. Stat. § 19.36(7). And when one of those candidates is hired, can the government not announce who it is because her identity was previously confirmed by a DMV record? The ramifications of the City's argument quickly devolve into the absurd.

The presumption against federal preemption in this context mirrors the Public Records Law's presumption in favor of public access to law enforcement agency records—"[w]hen it is not clear whether an exception to the open records law exists, we are to construe exceptions to the open records law narrowly." *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996); *see also Hathaway*, 116 Wis. 2d at 397 ("[U]nless the exception is explicit and unequivocal, it will not be held to be an exception."). Since the DPPA creates no "explicit and unequivocal" exception to

the Public Records Law, except with respect to motor vehicle records maintained by the DMV, this Court should find the DPPA does not otherwise preempt its routine operation.

CONCLUSION

The City displays its misperception of preemption principles by arguing that federal pupil and medical record privacy laws are somehow relevant here. City Br. at 53. Each is, indeed, a privacy law "passed by Congress due to the growing concern [over] public access to personal information gathered and stored by governments." *Id.* Accordingly, our state and presumably all others have given each federal law its full, intended preemptive effect over any conflicting state laws, just as they do for the DPPA. But other states have not, and Wisconsin should not, expansively construe the DPPA beyond its full, intended preemptive effect, as the City has, simply because it is a privacy law.

Congress knows how to specifically override state public records laws, as the DPPA does for motor vehicle records held by state DMVs. To extend that law's preemptive effect to routine law enforcement records that Congress chose not to specifically address, however, would itself violate federal law—the presumption that Congress does not intend to supplant state law. Far from endorsing "a cavalier attitude to privacy laws," *id.*, the circuit court's ruling in this case respects the expressed intent of the DPPA as well as Wisconsin's Public Records Law. That ruling should be affirmed.

Dated: February 20, 2015.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with a proportional font. The length of this brief is 10,242 words.

Dated: February 20, 2015.

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