No. 12-573

IN THE

Supreme Court of the United States

VILLAGE OF PALATINE, ILLINOIS,
Petitioner,

v.

JASON M. SENNE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA services as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects from and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. NLC advocates on behalf of local governments on a variety of issues in order to protect municipal interests and

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief. Counsel of record for petitioner and respondent received notice of *amici curiae*'s intent to file this brief by November 30, 2012. *Amici curiae* certify that counsel of record for both Petitioner and Respondent have consented to this filing in letters on file with the Clerk's office.

to ensure that national attention is focused on the needs of municipalities across the country.

IMLA and NLC are committed to ensuring that their members maintain authority to manage how they perform quintessentially local governmental functions, including parking enforcement and other exercises of local police power. The *en banc* Seventh Circuit, however, has adopted an unnatural interpretation of the Drivers' Privacy Protection Act that could impose massive federal liability on local governments for disclosing information in the performance of core governmental functions that Congress clearly removed from the scope of the statute's prohibitions. This interpretation, if left uncorrected, would unduly constrain the ability of local governments to execute their responsibilities and threaten countless towns and cities across the country with potentially ruinous liability. IMLA and NLC have a strong interest in ensuring that this Court corrects the Seventh Circuit's error and safeguards both the economic viability and governmental autonomy of the nation's local governments.

INTRODUCTION AND SUMMARY

At issue in this case is an extraordinary interpretation of the Drivers' Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, that could expose local governments to unprecedented and crippling liability based solely on how much information they include when writing their parking tickets. Such exposure comes as a shock to many local governments: Municipal parking enforcement has not traditionally been an area of federal concern, and the DPPA expressly permits the use of drivers' personal information for, among other things, carrying out governmental functions and the service of process.

Id. § 2721(b)(1), (4). Notwithstanding these exceptions, the Seventh Circuit held that a local government violates the DPPA if, in carrying out its functions or serving process (or both), it discloses *too much* information. The Seventh Circuit has declined to say how much information is too much, and the statute—which contains no such requirement to begin with—certainly sheds no light. But given the risk of massive, potentially debilitating liability, many municipalities within the Seventh Circuit and elsewhere will have no choice but to begin immediately trying to find ways to comply with this nebulous federal requirement. If left uncorrected, the Seventh Circuit's decision will threaten the economic security and regulatory autonomy of municipalities across the country, both immediately and well into the future.

This sweeping outcome arises out of a $20 parking ticket issued by the Village of Palatine, Illinois, to Jason Senne. Within a week of receiving the parking ticket, Mr. Senne filed a lawsuit on behalf of not only himself, but a putative class that includes the recipients of more than 32,000 parking tickets issued by Palatine. His novel argument was that Palatine violated the DPPA because the parking ticket, which contained personal information such as Mr. Senne's name and address, was left on his car while it was parked in a public location. Mr. Senne sought damages of at least $2,500 for each and every parking ticket issued by Palatine over a four-year span, for a total of more than $80 million.

Suits of this nature have never been the purview of the DPPA. To the contrary, Congress took pains to protect local governments from these suits, by expressly permitting personal information to be disclosed "[f]or use by any government agency . . . in carrying out its functions," 18 U.S.C. § 2721(b)(1),

and by allowing disclosures for other specific uses, such as service of process, *id.* § 2721(b)(4). Such exceptions, as the United States has recognized, make the DPPA "particularly respectful of state prerogatives" by ensuring that it "does not prevent state and local governments from using the information contained in DMV records for governmental purposes." Brief of the United States at 33, *Reno* v. *Condon*, 528 U.S. 141 (2000); see *id.* at 8 ("[T]he DPPA expressly accommodates safety and law enforcement needs of public authorities.").

The Seventh Circuit, however, has transformed this "particularly respectful" scheme into a trap for unwary governments. Even though the court of appeals acknowledged that Mr. Senne's parking ticket was "part of the function of the Village's police department" and "constitute[d] service of process," App. 24, it held that Palatine might nevertheless be held liable if the disclosure of information on the parking ticket was somehow "[in]compatible with the purpose of the exception." *Id.* at 19. The court declined, however, to explain the test by which a district court—or a local government—might assess whether a particular disclosure fits within the "purpose" of a permitted use.

But, although the standard may be unclear, the consequences of falling on the wrong side of it are not. The claim in this case is for $80 million, and other local governments may face significant litigation expenses defending against even non-meritorious claims. These potential costs are likely to cause many municipalities to review and potentially revise all of their information-related practices, including not just parking enforcement, but also functions such as drafting police and accident reports and

responding to public requests under freedom of information laws.

There is no reason to presume that Congress intended that federal courts would oversee such a massive restructuring of local government functions—and certainly not based on a statute in which Congress expressly *preserved* local governmental authority. See, *e.g.*, *Jones* v. *United States*, 529 U.S. 848, 858 (2000). Review is warranted to guard against this unintended expansion of federal authority and to ensure that local governments do not suffer significant immediate burdens.

REASONS FOR GRANTING THE PETITION

This Court should review the Seventh Circuit's *en banc* decision to ensure that a federal statute designed to preserve local governments' autonomy in carrying out their functions does not instead impose significant pecuniary, administrative, and political burdens. By coupling the potential for massive damages with an ill-defined legal standard, the Seventh Circuit has exposed local governments to new litigation risks that are all but certain to induce *in terrorem* settlements, high discovery costs for those unwilling or unable to settle, and policy changes in areas of traditionally local concern. Many governments, both within the Seventh Circuit and elsewhere, may be forced to take proactive steps immediately, rather than to wait for the views of other courts. Indeed, because the contents of the Seventh Circuit's standard will need to be filled in through case-by-case adjudication, local governments will be subjected to precisely the sort of federal judicial oversight that this Court has held may not be imposed absent clear congressional intent.

I. THE SEVENTH CIRCUIT'S NOVEL INTERPRETATION OF THE DPPA EXPOSES LOCAL GOVERNMENTS TO MASSIVE UNEXPECTED COSTS.

Local governments may be subject to suit in federal court, under the Seventh Circuit's reading of the DPPA, even when carrying out governmental functions that Congress excepted from the statute's reach, whenever the disclosure at issue was arguably incompatible with the statute's "purpose." See App. 20. Neither the DPPA nor the Seventh Circuit's opinion explains how a local government should, under this standard, determine whether a particular disclosure is or is not consistent with the statute's purpose, or otherwise "distinguish between necessary and extraneous information." *Id.* at 41 (Flaum, C.J., dissenting). This uncertainty will impose significant costs on local governments, which now face the potential of massive liquidated damages and the need to revise programs and practices in a wide variety of areas not limited to parking enforcement.

The all-but-certain result of the Seventh Circuit's decision, if not reviewed by this Court, will be increased litigation against local governments across the country, as putative classes come forward to test the validity of any policy that might conceivably be construed as falling on the wrong side of the line. The uncertainty as to how a federal judge might rule on a particular disclosure will only magnify "the risk of 'in terrorem' settlements that class actions entail," *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011), and many responsible governments will determine that they have no choice but to settle—even if they believe that their use of personal information is permitted. Moreover, because a plaintiff can survive a motion to dismiss so long as

her complaint "put[s] in issue whether all of the disclosed information actually *was used* in effectuating" the purpose of a statutory exception, App. 24, a government that is willing to litigate such a suit will need to be prepared to bear the costs of protracted civil discovery. See *id.* at 25 ("Further proceedings will permit the parties to explore this question.").

The problem will be worse for municipalities that follow the parking enforcement practices similar to those adopted by Palatine.[2] The potential liability that might be imposed in such a suit, if successful, would be devastatingly high—to the point that a municipal defendant might face bankruptcy as a result. In that situation, *each person* who received a parking ticket over the course of four years could seek liquidated damages *not less than* $2,500. See 18 U.S.C. § 2724(b); see also 28 U.S.C. § 1658(a) (requiring civil actions created by Congress to be brought within four years of when the cause of action accrued). An enterprising class action plaintiff seeking to transform a minor parking violation into a major payday thus could wreak havoc on a municipal budget. Here, for example, Palatine—a village of

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[2] There are almost certainly a number of other municipalities across that country that also follow this approach. Unsurprisingly, a number of States have expressly authorized local governments to issue parking tickets on uniform traffic citation forms that call for the same personal information as Palatine included on the parking ticket at issue in this case. *See, e.g.*, Ala. R. Judicial Admin. 19, attach. 1, Uniform Traffic Ticket and Complaint, *available at* http://judicial.alabama.gov/library/rules/JA19_UTTC1.pdf; Iowa Code §§ 805.6, 805.8A; State of Neb., Uniform Citation and Complaint, *available at* http://court.cdc.nol.org/sites/supremecourt.ne.gov/files/rules/forms/5A_front_CourtCopy.pdf; Supreme Court of Ohio, Ohio Traffic R. 3(C), app. Uniform Traffic Ticket, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/traffic/Traffic.pdf; S.C. Code Ann. §§ 56-7-10, 56-7-80; Wis. Stat. § 345.11.

twelve square miles and fewer than 70,000 people—faces potential damages of approximately $80 million based on the allegation that it issued parking tickets in violation of the DPPA to over 32,000 individuals during the relevant time period. Pet. 27. As Judge Posner noted in dissent, this figure comes out to over $1,000 *per resident*. App. 32. Liability of this magnitude is simply not sustainable.[3]

The decision will also impose costs unrelated to parking enforcement. Because the holding applies to *any* governmental function in which drivers' personal information may be disclosed, see App. 20, local governments seeking to avoid massive liability will need to undertake compliance reviews and then potentially revise a variety of practices, including the drafting of police and accident reports, the compilation of driving records, and the policing of moving violations. And because the Seventh Circuit's standard turns on the fact-dependent question of whether "the disclosure as it exi[s]ted in fact" is being "*used* for the identified purpose," *id.* at 18, each practice—and, potentially, each individual disclosure—will require independent review.

State and local governments will also need to address difficult questions regarding how to ensure compliance with state freedom of information laws. In Illinois, for example, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying," 5 Ill. Comp. Stat. 140/1.2, and a document subject to disclosure can be

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[3] Palatine's entire budget for 2012 is slightly more than $105 million. Vill. of Palatine, *CY 2012 Adopted Budget: Budget Overview* (Dec. 2011), http://www.palatine.il.us/assets/1/budget2012/01_Budget_Overview_2012.pdf. The Seventh Circuit's decision puts nearly 80 percent of that budget at risk.

redacted—but not withheld entirely—if it contains information that is "specifically prohibited from disclosure by federal . . . law," *id.* 140/7(1)(a). Under the rule adopted by the Seventh Circuit, every time a record containing a driver's personal information is requested, the responsible governmental responder will face the task of determining how much personal information federal law permits be disclosed and redacting the document accordingly—a significant undertaking in light of the high volume of requests that many governments face.[4]

In all these ways, and many others, the Seventh Circuit's decision will impose substantial financial and administrative costs on local governments across the country, and otherwise materially affect the policy choices available to them. Review by this Court is warranted and necessary to ensure that such burdens are not imposed contrary to congressional intent.

II. MUNICIPALITIES IN THE SEVENTH CIRCUIT AND ELSEWHERE MAY BE COMPELLED TO ACT IMMEDIATELY TO GUARD AGAINST LIABILITY.

Many municipalities cannot afford to delay altering their law enforcement and other policies to ensure that they align with the Seventh Circuit's decision. The magnitude of the liability threatened by the

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[4] In Illinois alone, the State's Public Access Counsel received nearly 5,000 requests for assistance with *disputed* requests under the Illinois Freedom of Information Act during 2011, representing only a fraction of the total requests received by various governmental bodies throughout the State. *See* Ill. Attorney Gen., *Public Access Counselor Annual Report: An Overview of 2011*, at 2 (Mar. 2012), *available at* http://foia.ilattorneygeneral.net/pdf/Public_Access_Counselor_Annual_Report_2011.pdf.

Seventh Circuit's decision—which, for Palatine, could amount to nearly 80 percent of its entire annual budget, see *supra* note 3—is too great for most any municipality to ignore. Indeed, the devastating impact of such liability is great enough that many local governments outside the Seventh Circuit may reasonably conclude that the most prudent course is to revise their practices now rather than to wait for copycat suits within their own regional circuits.

These costs are particularly coercive because, in many cases, the potential liability will dwarf any revenue expected from the practice in question. With respect to parking enforcement, fines are set universally at levels that come nowhere close to approaching the $2,500 *per ticket* that could be imposed under the Seventh Circuit's decision. In Palatine, for instance, fines for parking violations currently range from $30 to $75, depending on how long the violator waits to pay off his debt. See Vill. of Palatine Code of Ord. § 18-173(a); Vill. of Palatine Code of Ord., *Fee Schedule Supplement* 6 (2012); see also Mun. Code of Chicago § 9-100-020(b) (setting penalties ranging between $25 and $200 for parking violations). Even if a change in practices were to result in additional parking tickets going unpaid, the cost would be minor when compared to potential damages.

The decision's immediately coercive effect is likely to be felt even more strongly in today's bleak economic climate.[5] Under these circumstances, many

[5] Municipalities across the country are currently facing their *sixth* straight year of declining revenues, a trend likely to continue through 2013. Michael A. Pagano et al., *City Fiscal Conditions in 2012,* Research Brief on America's Cities (Nat'l League of Cities, Wash. D.C.), Sept. 2012, at 2, *available at* http://www.nlc.org/Documents/Find%20City%20Solutions/

local governments simply cannot afford to expose themselves to additional liabilities. For some governments, the threat of civil discovery may be enough to prompt immediate action. The safest way for a local government to protect against such costs, of course, is to overhaul its processes quickly and comprehensively in an effort to avoid disclosing drivers' personal information whenever possible. Again, the Village of Palatine is a prime example: It has already altered the manner in which it issues parking tickets. Pet. 27.

The Seventh Circuit, in a footnote, casts aside concerns about the measure of damages as "premature." App. 26 n.20. For a responsible municipal government, however, the possibility of catastrophic liability is a matter of immediate concern. If every parking ticket or open-records response that violates the Seventh Circuit's standard comes with a potential $2,500 price tag, many governments simply will not have the luxury of waiting for a greater body of case law to develop before revising their practices.

III. THE SEVENTH CIRCUIT'S VAGUE STANDARD IMPERMISSIBLY SHIFTS THE BALANCE OF FEDERALISM.

Quite aside from the problems it poses for local governments' pocketbooks and policy options, the Seventh Circuit's decision warrants review because it significantly shifts the balance of power from local governments to the federal judges who will be tasked with determining how much information can be disclosed when carrying out any given function. Because the Seventh Circuit's novel reading of the

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Research%20Innovation/Finance/city-fiscal-conditions-research-brief-rpt-sep12.pdf ("Revenue and spending shifts . . . continue to paint a stark fiscal picture for America's cities.").

phrase "for use" is hardly compelled by the statute, it should have been rejected under the well-settled rule of construction that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones*, 529 U.S. at 858 (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).[6] The court's failure even to address this clear-statement rule is not only error, but, if uncorrected, will lead to a significant federal incursion into areas of decidedly local concern.

If a clear legal standard cannot be articulated (as the Seventh Circuit was unable to do), judges will be required to develop it on a case-by-case basis, subjecting local governments to constant federal intrusion and second-guessing. The result would be a "permanent judicial intervention in the conduct of governmental operations" of the same degree that this Court has recognized in other contexts as "inconsistent with sound principles of federalism and the separation of powers." *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006).

Examples abound. For instance, federal courts might be called upon to determine whether a municipality's practice of including drivers' names

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[6] *See also Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation marks omitted); *Owasso Indep. Sch. Dist. No. I-001* v. *Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting [a] statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940) ("An intention to disturb the [federal-state] balance is not lightly to be imputed to Congress.").

and addresses on their parking tickets could be properly justified by its belief that drivers are more likely to pay parking tickets that address them personally, or whether that justification is too attenuated to the actual function of parking enforcement to be "compatible" with the relevant statutory "purpose." Or courts might be asked to determine whether that practice could be justified if, in the alternative, the municipality's stated purpose was to facilitate eventual debt collection, should the ticket go unpaid. Would such a "use" be sufficient to satisfy § 2721(b)(1), or would the municipality be required to modify its debt collection practices? Whatever the answers to these questions, the judges called upon to address them will find themselves in the position of crafting a new body of case law on the mechanics of municipal parking enforcement.

The Seventh Circuit's decision poses even greater problems for State open records laws, which involve a governmental function—responding to public requests for documents—that is in direct tension with the DPPA's goal of keeping certain information private. It is entirely unclear how the Seventh Circuit's standard, which purports to judge the permissibility of a disclosure based upon the "purpose" of the relevant DPPA exception, see App. 19, would apply to § 2721(b)(1) when the entire "purpose" of the governmental function at issue is to *disclose information*. When federal courts are called upon to address the issue (as they inevitably will be), they will end up having to craft—through case-by-case adjudication—a set of federal requirements governing disclosures under state open records laws.[7]

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[7] Most States have adopted privacy exceptions to their open records laws, *see, e.g.*, 5 Ill. Comp. Stat. 140/7(1)(c), which reflect a range of views regarding how to balance the goal of

These intrusions into areas of local concern would be unwarranted under any statute that does not expressly require them. *E.g.*, *Jones*, 529 U.S. at 858. But under the DPPA, which was drafted with the goal of preserving the authority of local governments to carry out their functions, such intrusions are shocking. This Court should step in now to preserve the traditional bounds of federal power, and to protect local governments' ability to regulate and govern according to their peculiar needs and particular abilities.

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governmental transparency against the need to protect personal privacy. *See generally* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1160-64 (2002) (describing varying privacy protections in open records laws). To the extent these considered choices conflict federal courts' conceptions of which disclosures are permissible, the Seventh Circuit's decision will effectuate yet another shift in the balance of power—this time in the delicate area of how state and local governments share their own records with their citizens.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case and reverse the decision of the Seventh Circuit.

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