

No. _____

**In the
Supreme Court of the United States**

**DEREK ALLEN, LEANDRE BISHOP,
AND JOHN BURNS,**

Petitioners,

v.

VERTAFORE, INCORPORATED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Driver's Privacy Protection Act of 1994 makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title." 18 U.S.C. § 2722(a).

Did the Fifth Circuit err in finding that Petitioners' allegation that Respondent exposed their DPPA-protected personal information to public view was insufficient to allege a disclosure within the meaning of the DPPA?

PARTIES TO THE PROCEEDINGS

Petitioners

Derek Allen, Leandre Bishop, and John Burns were plaintiffs in the district court and appellants before the Fifth Circuit.

Respondent

Respondent Vertafore, Incorporated (“Vertafore”) was the defendant in the district court and the appellee before the Fifth Circuit.

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit
No. 21-20404

Derek Allen; Leandre Bishop; John Burns, *Plaintiffs-Appellants*, v. Vertafore, Incorporated, *Defendant-Appellee*.

Final Judgment Date: March 11, 2022

United States District Court Southern District of
Texas Houston Division

Civil Action No. 4:20-cv-04139

Derek Allen, et al., *Plaintiffs*, v.
Vertafore, Inc., *Defendant*.

Final Judgment Date: July 23, 2021

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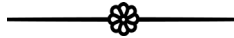
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PETITION FOR A WRIT OF CERTIORARI

Derek Allen, Leandre Bishop, and John Burns petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.



OPINIONS BELOW

The Fifth Circuit's opinion (App.1a) is reported at 28 F.4th 613 (5th Cir. 2022). The order of the United States District Court for the Southern District of Texas Houston Division (App.10a) granting Vertafore's motion to dismiss Plaintiffs' Class Action Complaint is reported at 2021 U.S. Dist. LEXIS 138464.



JURISDICTION

The Fifth Circuit's opinion was entered on March 11, 2022. (App.1a). In the district court, Petitioners-Plaintiffs invoked subject-matter jurisdiction under 28 U.S.C. § 1331 and venue under 28 U.S.C. § 1391. (App.33a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

This case involves the Driver’s Privacy Protection Act of 1994, 18 U.S.C. § 2721, *et seq.* (the “DPPA”). The following statutes are reproduced in the appendix:

- 18 U.S.C. § 2721 (App.22a)
- 18 U.S.C. § 2722 (App.27a)
- 18 U.S.C. § 2723 (App.27a)
- 18 U.S.C. § 2724 (App.28a)
- 18 U.S.C. § 2725 (App.28a)



STATEMENT OF THE CASE

A. Factual Background

This case stems from Vertafore’s disclosure of Petitioners’ DPPA-protected personal information to public and unauthorized view.

Petitioners are residents of Texas whose personal information was improperly disclosed. (App.31a). Between March 11, 2020, and August 1, 2020, Vertafore knowingly disclosed Petitioners’ and approximately 27.7 million other individuals’ (“Class Members”) personal information by placing the information on an unsecured external storage service. (App.32a). The information that was stored on the server included Texas driver’s license numbers, names, birth dates, addresses, and vehicle registration history (collectively “Driver’s License Information”). (App.33a). The servers,

consistent with the way they were programmed, then transferred Petitioners' and Class Members' Driver's License Information to unknown, unauthorized third parties. (App.37a). Vertafore eventually sent a notice to Petitioners and Class Members, notifying them that their information had been disclosed to unauthorized third parties. (App.33a).

B. The Driver's Privacy Protection Act of 1994

The Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721, *et seq.* ("DPPA") was enacted in 1994 "in response to safety and privacy concerns stemming from the ready availability of personal information contained in state motor vehicle records." *Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009). *See also Senne v. Vill. of Palatine*, 695 F.3d 597, 607 (7th Cir. 2012) ("[I]t is clear that safety and security concerns associated with excessive disclosures of personal information held by the State in motor vehicle records were the primary issue to be remedied by the [DPPA]").

The DPPA was passed against the backdrop of the murder of actress Rebecca Schaeffer, whose murderer "obtained her unlisted address through the California DMV." *Senne*, 695 F.3d at 607. Additional concerns were raised when witnesses testified in hearings before Congress regarding the privacy of Department of Motor Vehicle information of domestic violence victims and law enforcement officers, among other safety concerns surrounding driver information. *Id.* The DPPA addresses these concerns by limiting the disclosure of this personal information to purposes that are explicitly enumerated in § 2721(b) of the statute.

The DPPA provides citizens with a right of action in the event that their private information is knowingly obtained, disclosed, or used in a manner other than for one of the enumerated permissible purposes. The DPPA states, “[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter [18 USCS §§ 2721 *et seq.*] shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.” 18 U.S.C. § 2724(a).

Courts have devised a three-part test in line with the statute: “(1) the defendant knowingly obtains, discloses or uses personal information; (2) from a motor vehicle record; and (3) for a purpose not permitted.” *Taylor v. Acxiom Corp.*, 612 F.3d 325, 335 (5th Cir. 2010). The DPPA defines personal information as “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(2).

C. Procedural History

1. District Court Proceedings

On December 4, 2020, Petitioners brought a lawsuit against Vertafore, alleging that the disclosure of their information was a violation of the DPPA. (App.36a). Petitioners alleged that “Vertafore knowingly disclosed the Driver’s License Information of Plaintiffs and approximately 27.7 million other Class Members by storing that information on unsecured external servers”

and that “[i]n response to the commands of unauthorized individuals and consistent with the manner in which they were programmed and configured by Vertafore, the unsecure servers disclosed Plaintiffs’ and Class Members’ Driver’s License Information to the unauthorized individuals.” (App.37a). Petitioners further alleged that they were entitled to damages because of the violation of the DPPA. *Id.*

On January 9, 2021, Vertafore filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. *Allen v. Vertafore, Inc.*, Case No. 4:20-cv-4139 (S.D. Tex.), Dkt. 38.¹ Petitioners responded to the Motion to Dismiss on February 19, 2021. Dkt. 40. Magistrate Judge Andrew M. Edison submitted a Memorandum and Recommendation on June 14, 2021, correctly finding that Petitioners had established standing, but granting Vertafore’s Motion to Dismiss under Rule 12(b)(6). Dkt. 55. Petitioners submitted objections to the Order on July 16, 2021. Dkt. 59. On July 23, 2021, District Judge George C. Hanks, Jr., approved and adopted the Order, granted Vertafore’s Motion to Dismiss, and entered a final judgment. Dkt. 64. Petitioners timely appealed this decision to the Fifth Circuit Court of Appeals.

2. The Decision Below

The Fifth Circuit held that Petitioners’ allegation that Vertafore disclosed their information by placing

¹ All references to “Dkt.” are to the docket in Case No. 4:20-cv-04139 (S.D. Tex.).

it on an unsecured computer network device was insufficient to allege a violation of the DPPA. (App.7a).

The Fifth Circuit reasoned that the facts “that Vertafore stored personal information on ‘unsecured external servers’ and that ‘unauthorized users accessed that information’ . . . do not plausibly state a ‘disclosure’ consistent with the plain meaning of that word.” (App.6a). The Fifth Circuit further reasoned that “[n]othing about the words ‘unsecured’ or ‘external’ implies exposure to public view, and the mere fact that unauthorized users managed to access the information does not imply that Vertafore granted or facilitated that access.” (App.6a–App.7a).



REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The decision below is squarely in conflict with the Seventh Circuit’s decision in *Senne*, generating a circuit split between the Fifth and Seventh Circuits.

In *Senne*, a police officer left a parking ticket containing the plaintiff’s personal information on the windshield of the plaintiff’s car on the side of the road. *Senne*, 695 F.3d at 600. Mr. Senne brought suit alleging that placing the ticket on his windshield where it was exposed to the public view constituted a violation of the DPPA. *Id.* The village filed a motion to dismiss pursuant to Rule 12(b)(6), arguing that, *inter alia*, placing the ticket on the windshield did not constitute a disclosure. *Id.* The district court agreed with the village and dismissed the case on the basis that there had been

no disclosure because “what the statute is talking about is what people would commonly call a disclosure, which is turning something over to somebody else.” *Id.* at 600-601.

On appeal, the Seventh Circuit held that this placement of the ticket on the windshield constitutes a knowing disclosure under the DPPA because a publication of information does constitute a disclosure. The Seventh Circuit rejected the argument by the defendant that it could not be a knowing disclosure because the plaintiff did not prove that anyone else read the information. *Id.* at 603.

The Seventh Circuit specifically rejected the argument that disclosure required the officer to intend for others to access the information, holding the argument that for there to be a disclosure “there must be an identified recipient” was an “erroneous notion.” *Id.* The Seventh Circuit held that all the DPPA’s element of a knowing *mens rea* requires is “[v]oluntary action, not knowledge of illegality or potential consequences.” *Id.*

In the decision below, the Fifth Circuit attempted to distinguish *Senne* on the basis that the allegations in that case amounted to placing the protected information in plain view of any passer-by, while the allegations in this case did not. (App.6a). In fact, the allegations of Petitioner’s complaint cannot be properly distinguished from the allegations at issue in *Senne*.

Petitioners alleged that Vertafore knowingly placed the information onto a server that was readily accessible to the public—which is simply the digital equivalent of the officer in *Senne* placing a ticket on a windshield.

Vertafore argued below that the conduct alleged in the complaint is “the equivalent of moving stored information from a locked cabinet to an unlocked cabinet.” *Allen v. Vertafore, Inc.*, Case No. 21-20404 (5th Cir.), Appellee’s Br. (Oct. 29, 2021) at 22. This analogy is inapt because the “unlocked cabinet” suggests some degree of protection from the public view, as an unlocked cabinet would presumably be located in a private place. Instead, Petitioners’ allegations are equivalent to moving stored information from a locked cabinet to a public sidewalk where it can be viewed by anyone—precisely the conduct at issue in *Senne*.

Petitioners’ allegations of disclosure are more comprehensive than the allegations in *Senne* in one critical respect: not only do Petitioners allege that the Driver’s License Information of Petitioners and 27.7 million other Class Members was stored on unsecured network devices (which is analogous to the conduct in *Senne*), their allegations go farther in alleging that this information was actually disclosed to unauthorized third parties—an allegation absent from *Senne*. *Compare* App.32a–App.33a. (“Plaintiffs’ and other Class Members’ Driver’s License Information was disclosed to and accessed by unknown third parties.”), *with Senne*, 695 F.3d at 603 (noting that the plaintiff “failed to allege that anyone other than he, the subject of the record, actually saw it”). While such a fact is not required to allege a violation of the DPPA, it bolsters and substantiates Petitioners’ allegations that Vertafore’s conduct constitutes a disclosure.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT ON THIS RECURRING AND IMPORTANT ISSUE.

The DPPA is of even greater importance today than it was when Congress enacted it. Petitioners and Class Members, like other citizens, cannot simply opt out of states maintaining and disclosing their personal information. Increasingly, this personal information is falling into the wrong hands and is being weaponized against them. The number of identity theft reports received by the Federal Trade Commission has grown from 86,250 in 2001 to 1,434,676 in 2021.² The number of reports has more than doubled from 2019 to 2021. *Id.*

By prohibiting the sale or obtainment of Driver's License Information except under those limited circumstances enumerated in the statute, the DPPA has the capacity to afford significant protection if courts enforce it to its terms.

Increasingly, district courts throughout the United States are grappling with the question of what constitutes a knowing disclosure pursuant to the DPPA. *See e.g. Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 670 (E.D. Pa. Sept. 29, 2015) (considering whether storing protected information on unsecured laptops constituted a knowing disclosure); *Dahlstrom v. Sun-Times Media, LLC*, 346 F. Supp. 3d 1162, 1170 (N.D. Ill. 2018) (considering whether newspaper knowingly disclosed

² *Consumer Sentinel Network Data Book 2021*, FEDERAL TRADE COMMISSION (February 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf.

protected information it obtained from the Illinois Secretary of State where the Secretary of State had determined the information was not covered by the DPPA); *Wiles v. Worldwide Info., Inc.*, 809 F. Supp. 2d 1059, 1080 (W.D. Mo. 2011) (considering whether defendant knowingly disclosed information for an impermissible purpose where it disclosed information in bulk but had a permissible purpose for only a subset of the information it disclosed); *Sistrunk v. TitleMax, Inc.*, No. 5:14-CV-628-RP, 2017 U.S. Dist. LEXIS 131241, at *31 (W.D. Tex. Aug. 17, 2017) (subsequently vacated as part of a settlement) (considering whether defendant knowingly obtained information where he was not aware that his purpose for accessing information is not permitted by the DPPA).

With the creation of a newly formed circuit split on the issue and the increasing proliferation of cybercrime in our world, application of the DPPA is becoming more challenging at the very time it is becoming more important. District courts need guidance as to whether exposing Driver's License Information to public view constitutes a knowing disclosure pursuant to the DPPA.

This case presents an ideal vehicle for the resolution of this newly formed circuit split. The Fifth Circuit's decision affirmed the district court's dismissal upon considering only this basis for dismissal. This case does not involve the application of complex facts, procedural issues, or collateral legal issues. Instead, it squarely presents the question presented in a manner ideal for providing guidance to lower courts on the application of a statute of increasing public importance.



CONCLUSION

For the reasons explained herein, Petitioner's petition for writ of certiorari should be granted.

Respectfully submitted,

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