No. 98-1464

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF AUTHORITIES

This Supplemental Brief is filed in response to the Supplemental Brief filed by the Government on October 20, 1999, and for the purpose of bringing to the attention of the Court additional authorities relative to the situation created by the enactment of Section 350 of Public Law No. 106-69, 113 Stat. 986 (DOT Act).

Respondents agree with the Government that the enactment of the DOT Act does not render the issues in this case moot, nor does it require that the writ of certiorari be dismissed as improvidently granted. Respondents also agree with the Government's suggestion that the Court may wish to remand the case. Respondents do not, however, agree that the Spending Clause issues implicated by the passage of the DOT Act are likely to result in a favorable decision for the Government. The DOT Act gilds the DPPA with only the thinnest veneer of constitutional legitimacy, a veneer which will not likely withstand even mild scrutiny by the courts below.

The sections of the DOT Act of primary constitutional concern are Sections 350(a), 350(b), 350(e) and 350(f).[1] Section 350(a) provides that "no recipient of [DOT] funds . . . shall disseminate driver's license personal information" as defined in the Driver's Privacy Protection Act (DPPA) for any use not permitted by the DPPA. Section 350(b) places other disclosure restrictions, some tied to the DPPA and some of which are new, on recipients of DOT funds. Recipients of DOT funds, of course, include State governments. Section 350(e), without reference to

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[1] Sections 350(c) and 350(d) amend the DPPA in a manner which does not appear to affect any issue relevant to the DPPA's constitutionality. Section 350(g) deals with the DOT Act's various effective dates.

recipients of federal funds, prohibits the States from conditioning the issuance of motor vehicle records on a citizen's agreement to opt in to permit public disclosure of his or her personal information. Finally, Section 350(f) provides that

> notwithstanding subsections (a) and (b), the Secretary shall not withhold funds provided in this Act for any grantee if a State is in noncompliance with this provision.

The effect of the DOT Act on this case is that it adds Spending Clause issues to the Tenth Amendment issues raised in this case. Respondents submit that the Spending Clause issues will prove to be utterly meritless, but their existence makes it unlikely that this case in its present posture can resolve all constitutional challenges to Congress's efforts to legislate with respect to state DMV records. In other words, assuming without conceding that there is any arguable merit at all to the Government's suggestion, U.S. Supp. Br. at 8, that the DOT Act has converted the DPPA into valid legislation enacted under the Spending Clause, the existence of that issue means that the present case cannot now resolve all constitutional issues surrounding Congress's efforts to legislate with respect to state DMV records. A decision by the Court of the issues now before it would therefore not now result in a complete adjudication of all constitutional issues pertaining to the DPPA and, as of October 9, 1999, the DOT Act.

Respondents join in the Government's suggestion with reluctance because, as the Government itself states, the Tenth Amendment challenge to the DPPA "is not moot, and

is fully briefed and ready for argument." U.S. Supp. Br. at 10. It is unfortunate that a remand appears to be necessary to resolve an issue which is likely to prove meritless. The DOT Act does not condition the receipt of federal funds on compliance with Sections 630(a) and (b); to the contrary, Section 630(f) specifically provides that a State which does not comply with its provisions will nevertheless continue to receive all DOT funds. It is therefore difficult to see how Section 630 can be upheld as a valid condition on federal spending when it is not a condition at all. Even if the DOT Act could somehow be viewed as a condition on federal spending, it would not be a valid one under *South Dakota v. Dole*, 483 U.S. 203 (1987), because issues about the disclosure of DMV information are "unrelated to the federal interest in particular national projects or programs." *Id.* at 208. By enacting the DOT Act, Congress may have succeeded in merely prolonging the DPPA's existence for a time, without in any way curing the constitutional defects of Congress's actions.

If this case is remanded, Respondents intend to take whatever procedural steps are necessary to challenge the constitutionality of the DOT Act. At this juncture, Respondents are uncertain whether these issues can be addressed by the court of appeals, or whether the case must be remanded by that court to the district court. Respondents would request that if the Court should decide to remand the case, such remand be made with leave to amend the pleadings if necessary. *See Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972)(remand to three-judge district court with leave to amend complaint "to attack the newly enacted legislation" where the ordinance originally under attack was mooted by enactment of new ordinance).

CONCLUSION

Respondents are prepared to argue the merits of this case on November 10, 1999, as scheduled, but join in the suggestion of the Government that the Court may wish to consider a remand of this case for consideration of issues raised by the DOT Act.

Respectfully submitted,

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