Only the Westlaw citation is currently available.

United States District Court, S.D. Florida,
Miami Division.
Mary Anne **COLLIER**, Arthur L. Wallace, Roy McGoldrick, and Robert Pino, Plaintiffs,
v.
Fred O. **DICKINSON** III, Carl A. Ford, and Sandra Lambert, Defendants.
No. 04-21351-CIV.

March 30, 2006.

Barbara Perez, Aronovitz Trial Lawyers, Joel Stephen Perwin, Anthony Sanchez, Lawrence Dean Goodman, Devine, Goodman, Pallot & Wells, Steven R. Jaffe, Tod N. Aronovitz, Aronovitz Jaffe, Miami, FL, David Dickey Welch, Welch, Finkel & Schuyler, Pompano Beach, FL, Mark S. Fistos, Aronovitz Trial Lawyers PA, Tallahassee, FL, Peter A. Portley, Portley & Sullivan, Lighthouse Point, FL, for Plaintiffs.

Helen Ann Hauser, Anna Volkova, Restani, Dittmar & Hauser, Coral Gables, FL, Elizabeth Mercedes Rodriguez, Ford & Harrison LLP, Lawrence D. Smith, Walton Lantaff, Miami, FL, for Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

JOSE E. MARTINEZ, District Judge.

***1** THIS CAUSE came before the Court upon the Defendants' Motion to Dismiss the Second Amended Complaint (D.E. No. 69). The Plaintiffs in this lawsuit are individuals who own one or more vehicles registered in the State of Florida and have Florida driver licenses, as well as the putative class of all other similarly situated individuals. The Plaintiffs' two-count Second Amended Complaint (D.E.65) ("Complaint"), which is the operative complaint, sues three Defendants, who are each executive-level officials at the Florida Department of Highway Safety & Motor Vehicles ("DHSMV"), a Florida state administrative agency. Defendants Dickinson, Ford, and Lambert (collectively "Defendants") are being sued in their individual capacity for: 1) alleged violations of 42 U.S.C. § 1983, and 2) alleged violations of the Driver Privacy Protection Act ("DPPA" or "Act"), 18 U.S.C. § 2721 *et seq.*

The allegations arise from the DHSMV's compilation and sale of personal information related to driver licenses and motor vehicle registrations to various third parties for use in bulk distribution in surveys, marketing, or solicitations. In essence, Plaintiffs allege that Defendants developed policies at the DHSMV that ignored the congressional requirements contained in the DPPA, which regulates the release and sale of driver records to third parties and requires the explicit consent of individuals in order to release certain records. Plaintiffs assert that from June 1, 2000 until September 30, 2004, as a result of policies developed by Defendants, driver records were released by the DHSMV to third parties in contravention of the DPPA. On the other hand, Defendants argue that in developing the policies of the DHSMV they were bound to follow the language of the Florida Constitution, as implemented by Florida state legislation.

Defendants' Motion to Dismiss, Plaintiffs' Response in Opposition, Defendants' Reply, and the associated memoranda, attempt to open a pandora's box of constitutional issues and unnecessary arguments regarding the DPPA. This Court declines to accompany the parties on their wild ride through constitutional law. However, Defendants' motion to dismiss appropriately raises the defense of qualified immunity as to both counts of the Complaint. As is discussed in this Order, this Court finds that, under an established body of case law, both Plaintiffs' claim for alleged violations of constitutional and statutory rights pursuant to § 1983 and Plaintiffs' direct statutory claim under the civil action provision of the DPPA should be barred according to principles of qualified immunity. Thus, Defendants' motion to dismiss is granted in part, and this case is dismissed.

I. BACKGROUND

A. Relevant Factual Background

According to the Complaint, Plaintiffs have owned one or more vehicles registered with the DHSMV and have held Florida driver licenses issued by the DHSMV. (D.E. No. 65 at ¶ 4). To register their vehicles and obtain driver licenses, Plaintiffs were required to, and did, provide the DHSMV with certain "personal information," as defined in the DPPA. *Id.* The DHSMV entered this personal information into a computer database of motor vehicle records maintained and administered by the DHSMV, which contains personal information of all licensed drivers and registered motor vehicle owners in the State of Florida. *Id.*

***2** Defendant Fred O. Dickinson III ("Dickinson") is the Executive Director of the DHSMV. (D.E. No. 65 at ¶ 5). Defendant Carl A. Ford ("Ford") is the Director of the Division of Motor Vehicles, a branch of the DHSMV. *Id.* at ¶ 6. Defendant Sandra Lambert ("Lambert") is the Director of the Division of Driver Licenses, a branch of the DHSMV. *Id.* at ¶ 7.[FN1] Plaintiffs allege that during the period commencing June 1, 2000, and continuing to the present, Defendants, in their individual capacity, knowingly, repeatedly, and without Plaintiffs' consent, took Plaintiffs' "personal information," which had been maintained by the DHSMV, compiled and reformatted it into customized mailing lists, and sold these lists to various third parties for bulk distribution for surveys, marketing, solicitations, or other purposes not permitted by the DPPA. (D.E. No. 65 at ¶ 11). The information at issue is identified in the Complaint as "personal information," as defined by Florida Statute § 119.07(3)(aa) and by the DPPA, 18 U.S.C. § 2725. *Id.* at ¶ 4. The Complaint alleges that Defendants' sale of Plaintiffs' personal information has resulted in the State of Florida receiving over twenty-seven million dollars ($27,000,000.00) per year since June 1, 2000. *Id.* at ¶ 13.

> FN1. This Court takes judicial notice that Defendants are still each employed in the capacities described in the Complaint. Department Overview, Florida Department of Highway Safety & Motor Vehicles, http://www.hsmv.state.fl.us/html/overview.html. (last visited March 28, 2006).

B. Background on the Driver Privacy Protection Act

This Court first provides general background on the DPPA and discusses the Supreme Court's sole decision involving the constitutionality of the DPPA, *Reno v. Condon*, 528 U.S. 141, 144, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000).[FN2] In that case, the Supreme Court explained that the DPPA establishes a regulatory scheme that restricts a State's ability to disclose a driver's personal information without the driver's consent. *Id.* The DPPA generally prohibits any State department of motor vehicles ("DMV"), or officer, employee, or contractor thereof, from " 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.'" *Id.* (quoting 18 U.S.C. § 2721(a)). The DPPA defines " 'personal information' " as any 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 not including " 'information on vehicular accidents, driving violations, and driver's status.'" *Condon*, 528 U.S. at 144 (quoting 18 U.S.C. § 2725(3)). A " 'motor vehicle record' " is defined as " '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.'" *Condon*, 528 U.S. at 144 (quoting 18 U.S.C. § 2725(1)).

> FN2. As is discussed *infra*, the extent to which *Reno v. Condon* establishes the constitutionality of the DPPA and the operation of its liability provisions is germane to a determination of the qualified immunity of the Defendants.

The DPPA's ban on disclosure of personal information does not apply if drivers have consented to the release of their data. When the Supreme Court last considered the DPPA in *Reno v. Condon*, the Court noted that at the time it granted certiorari in that case, "the DPPA provided that a DMV could obtain that consent either on a case-by-case basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity."*Id.* However, the Court noted that an amendment to the Act, Public Law 106-69, 113 Stat. 968,

which was signed into law on October 9, 1999, "changed this 'opt out' requirement into an 'opt-in requirement.' "*Id.* The Court further noted, "[u]nder the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes."*Id.*

***3** The Court also explained that the DPPA's provisions do not apply solely to States. The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a State DMV. *Id.* at 146 (citing 18 U.S.C. § 2721(c)). The Court further noted that the DPPA establishes several penalties to be imposed on states and private actors that fail to comply with its requirements. *Id.* The Act makes it unlawful for any "person" knowingly to obtain or disclose any record for a use that is not permitted under its provisions, or to make a false representation in order to obtain personal information from a motor vehicle record. *Id.* (citing 18 U.S.C. §§ 2722(a) and (b)). Most notably for the purposes of the instant case, the Supreme Court noted, closely tracking the language of the Act, that any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use other than those specifically permitted by the DPPA may be subject to liability in a civil action brought by the driver to whom the information pertains. *Id.* (citing 18 U.S.C. § 2724). Furthermore, and again closely tracking the language of the statute, the Court noted: "While the DPPA defines 'person' to exclude States and state agencies, § 2725(2), a state agency that maintains a 'policy or practice of substantial noncompliance' with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5,000 per day of substantial noncompliance. § 2723(b)."*Id.*(citations in original).

In *Condon*, the State of South Carolina and its Attorney General had challenged the constitutionality of the DPPA and alleged that the Act violates the Tenth and Eleventh Amendments to the United States Constitution. *Id.* at 147.The District Court in that case concluded that the Act is incompatible with the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government. *Id.* The Court of Appeals for the Fourth Circuit affirmed, concluding that the Act violates constitutional principles of federalism. *Id.* However, the Supreme Court reversed the Fourth Circuit Court of Appeals.

The Supreme Court began its analysis in *Condon* by agreeing with the United States' contention that the DPPA was a proper exercise of Congress' authority under the Commerce Clause of the United States. *See id.* at 148.The Court explained:

The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

***4** *Id.* The Court then considered the argument that the DPPA is inconsistent with the principles of federalism. The Court noted: "In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."*Id.* at 149 (referring to *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120; *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914).

The Supreme Court specifically addressed South Carolina's argument that the DPPA " 'thrusts upon the States all of the day-to-day responsibility for administering its complex provisions,' and thereby makes 'state officials the unwilling implementors of federal policy.'"*Id.* (quoting Brief for Respondents at 10-11). The Supreme Court, relying on its decision in *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988), disagreed that the DPPA "violates the principles laid down in either *New York* or *Printz*."*Id.* at 150.The Supreme Court explained:

Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regu-

late their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz.*

Id. at 151.

In terms of the role of the DPPA in the context of Florida public records law, the Eleventh Circuit's recent decision in *Kehoe v. Fidelity Federal Bank & Trust* provides an excellent historical overview. 421 F.3d 1209, 1210-13 (11th Cir.2005), *cert. denied*,547 U.S. ---- (March 27, 2006). The Eleventh Circuit explained:

In 1994, Congress enacted the DPPA to limit the release of an individual's personal information contained in his driver's license record to those who had a legitimate and lawful need for the information. Originally, the DPPA implemented an opt-out procedure for driver's license information disclosed for marketing purposes. Under the opt-out procedure, a state could release or sell an individual's driver's license information without the individual's permission so long as the individual was given an opportunity to opt out by requesting that the information not be released.

On October 9, 1999, Congress amended the DPPA to require an opt-in procedure.[FN3] The effective date of this amendment was June 1, 2000. As a result of this amendment, a state's department of motor vehicles cannot disclose an individual's driver's license information without express permission from the individual about whom the information pertains. Forty-nine states immediately passed legislation to ensure compliance with this amendment to the DPPA. Florida was the only state that did not immediately comply. Instead, Florida waited until May 13, 2004, to amend its public records statute to comply with the DPPA. See Fla. Stat. § 119.07(3)(aa)(12); 2004 Fla. Sess. Law Serv.2004-62 (West).[FN4]

FN3. Plaintiffs' Complaint refers to this 1999 amendment as the "Shelby Amendment." See (D.E. No. 65 at ¶ 10).

FN4. Furthermore, in a recent denial of certiorari, the Supreme Court noted: that "... Florida-alone among the States-[did] not immediately [amend] its law to comply with Act."*Kehoe v. Fidelity Federal Bank & Trust*, 547 U.S. ---- (March 27, 2006) (Scalia, J., concurring).

***5** *Id.* at 1210.As is discussed *infra*, Plaintiffs' Complaint attempts to hold Defendants individually liable for damages allegedly resulting from Defendants' role in implementing DHSMV policies that were inconsistent with federal law.

II. LEGAL STANDARD OF REVIEW

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the allegations of the complaint as true. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir.1999). Moreover, the complaint must be viewed in the light most favorable to the plaintiff. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir.1986). To warrant a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. State of Ala.*, 30 F.3d 117, 120 (11th Cir.1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

Nonetheless, to survive a motion to dismiss, a plaintiff must do more than merely label his or her claims. *Blumel v. Mylander*, 919 F.Supp. 423, 425 (M.D.Fla.1996). Thus, dismissal of a complaint or a portion thereof is appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. *Marshall County Bd. of Educ.*, 992 F.2d 1171, 1174 (11th Cir.1993). Furthermore, the Eleventh Circuit has clearly stated that "the court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action."*Id.* (citing *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir.1991), *cert. denied*, 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

III. DISCUSSION

A. Overview of Defendants' Motion to Dismiss

Defendants move to dismiss the Complaint on the basis of the following arguments: 1) the Eleventh Amendment bars this action; 2) Plaintiffs have no private right of action under the DPPA to challenge the release of records arising from departmental policy or state law; [FN5] 3) the DPPA claim is defective because Plaintiffs failed to plead actual damages; [FN6] and 4) Defendants are entitled to qualified immunity. *See generally* (D.E. No. 69).

> FN5. This argument is addressed in Sections III(D) and (E) of this Order.
>
> FN6. This argument is moot in light of the Eleventh Circuit's clear holding in *Kehoe v. Fidelity Federal Bank & Trust* that "[a] plaintiff need not prove actual damages to recover liquidated damages for a violation of the DPPA." 421 F.3d 1209, 1217 (11th Cir.2005), *cert. denied*,547 U.S. ---- (March 27, 2006). In a Notice to the Court, the Defendants appear to concede the point. (D.E. No. 76).

It is a "well established principle of constitutional adjudication that courts should avoid deciding constitutional issues that need not be resolved in order to determine the rights of the parties."*See Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190, 1210 (11th Cir.1991), *cert. denied*, 500 U.S. 942, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991) (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-72, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), *Searcey v. Crim*, 815 F.2d 1389, 1394-95 (11th Cir.1987)). As is discussed *infra*, principles of qualified immunity resolve the instant case, and it is not necessary for this Court to evaluate the constitutionality of various aspects of the DPPA.

B. General Discussion of Principles of Qualified Immunity

***6** Federal courts have applied the common law defense of qualified immunity in the context of both alleged constitutional and statutory violations pursuant to § 1983 and in the context of direct causes of action under federal statutes. This Court first discusses general principles of qualified immunity that are applicable both in the context of actions pursuant to § 1983 and actions directly under federal statutes.

For executive branch officials in both state government and federal government, the form of immunity once known as "good faith" immunity and now called "qualified" immunity is generally deemed sufficient to vindicate the important public interest in allowing government officials to do their work without undue fear of being haled into court for perceived missteps. *Cullinan v. Abramson*, 128 F.3d 301, 308 (6th Cir.1997) (citing *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974);). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."*Id.* Thus, the Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation."*Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)).

The Supreme Court has noted the difficulty of balancing the reality that an action for damages may offer the only realistic avenue for vindication of an official's abuse of office with the fact that there are social costs associated with claims against a public official. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Court has explained that "[t]hese social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."*Id.* Furthermore, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"*Id.* (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d. Cir.1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950)).

The Supreme Court clarified the standard for evaluating qualified immunity in *Harlow v. Fitzgerald*,

where it rejected the inquiry into state of mind in favor of a wholly objective standard. *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) (explaining *Harlow v. Fitzgerald*). The Supreme Court in *Harlow* held that officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."*Id.* (citing *Harlow*, 457 U.S. at 818). The Court noted that: "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.'"*Id.* (quoting *Harlow*, 457 U.S. at 818). The Court explained that this standard "should avoid excessive disruption of government and permit the resolution of many insubstantial claims."[FN7] *Harlow*, 457 U.S. at 818. It further explained the application of the objective reasonableness standard:

> FN7. This Court recognizes that *Harlow* was decided in the context of a motion for summary judgment, as opposed to a motion to dismiss. However, federal courts have explained that qualified immunity issues should be resolved as early as possible. *See Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir.2001). This Court finds that *Harlow*'s rationale is applicable to the instant case.

***7** If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful .... If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.
Id.

Supreme Court decisions subsequent to *Harlow v. Fitgerald* further explained the practical need for qualified immunity for executive level government officials in particular, who "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. The Court noted:

> These officials are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively. In these circumstances, officials should not err always on the side of caution. Officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.
>
> *Id.* (internal quotation marks and citations omitted).

In *Anderson v. Creighton*, the Supreme Court explained that the operation of the objective reasonableness standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."483 U.S. at 639. It explained that applying the objective reasonableness test to more abstract rights increases the risk of undermining the purpose of qualified immunity. *See id.*The Court suggested a functional approach to the proper scale of "legal rule" to be applied:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.
>
> *Id.* at 640 (internal citations omitted). More recently, in the context of a constitutional right, the Supreme Court has noted: "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The Court indicated that the "salient question" is whether the "state of the law" at the time of the conduct giving rise to the suit gave the official in question "fair warning" that his or her conduct was in violation of a constitutional or statutory right. *See id.*

C. Analysis of Whether Defendants' Conduct was Within the Scope of Their Discretionary Authority

***8** When applying qualified immunity principles in the context of an alleged constitutional or statutory right pursuant to § 1983, or an alleged statutory violation directly under a federal statute, the Court must first determine whether the defendant public official has proved that he or she was acting within the scope of his or her discretionary authority when the alleged wrongful act occurred. *See Tapley v. Collins*, 211 F.3d 1210, 1214 (11th Cir.2000); *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1294-95 (11th Cir.1998); *Cullinan*, 128 F.3d at 304-05. To receive qualified immunity, the public official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir.2002) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir.2002)). The Eleventh Circuit has clearly explained that "if and only if" the defendant meets this initial burden will the burden shift to the plaintiff to establish that the defendant violated clearly established law. *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir.1998). The Eleventh Circuit in *Harbert* further defined this initial inquiry:

To determine whether the defendant has discharged his burden, it is critical to define properly the inquiry. The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an "untenable" tautology. "Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties. The scope of immunity 'should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.'"

Id. (internal citations omitted). Furthermore, the Eleventh Circuit in *Harbert* explained:
Exactly what will suffice to establish such objective circumstances will ... vary in proportion to the degree of discretion inherent in the defendant's office. Such objective circumstances necessarily must encompass the factual context within which the complained-of conduct took place. But also appropriate is a showing by the defendant of facts relating to the scope of his official duties-e.g., a showing of the circumstances through which he initially came to believe that his lawful authority included within its scope actions of the type that are complained of by the plaintiff.

Id. at 1282 (quoting *Barker v. Norman*, 651 F.2d 1107, 1124-25 (5th Cir. Unit A July 1981)).

With these principles in mind, this Court now considers whether each of the three Defendants were acting within the scope of their discretionary authority. A careful analysis of the Complaint leads to the inevitable conclusion that each of the Defendants were acting within his or her discretionary authority with regard to both the § 1983 and DPPA claims. The two counts in Plaintiffs' Complaint do not differentiate between the different Defendants. *See* (D.E. No. 65 at ¶¶ 24-35). Count I alleges that Defendants' "policies, procedures, practices and acts," as described in the Complaint "have subjected Plaintiffs and the Class Members, to the deprivation of their rights of privacy, as secured to them through the United States Constitution and the DPPA, and are therefore in violation of 42 U.S.C. § 1983."(D.E. No. 65 at ¶ 25). Similarly, Count II alleges that the Defendants have been "knowingly obtaining, disclosing, or using 'personal information' as defined in 18 U.S.C. § 2725(4), for purposes not permitted by the DPPA," as well as disclosing "personal information and highly restricted personal information for purposes not permitted by the DPPA without the express consent of the persons to whom the information pertains."(D.E. No. 65 at ¶¶ 30-32).

***9** The general gravamen of both counts is that Defendants "authorized, directed, ratified, approved, acquiesced in, committed or participated in" the development of policy decisions at the DHSMV that resulted in the compilation and formatting of personal information from motor vehicle records, which was ultimately sold to various third parties for bulk distribution. *See* (D.E. No. 65 at ¶ 11). This Court must first determine whether these actions, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of the Defendants' discretionary duties. *Harbert Int'l, Inc.*, 157 F.3d at 1281. This Court finds that, taking the allegations of the Complaint as true, as it must, each Defendant was a high level executive official who was required to exercise discretionary authority to develop and implement policy decisions that regulated the release and distribution of driver records through the DHSMV.

The Complaint clearly states that Defendant Dickin-

son "is ultimately in charge of all personal information contained in the driver license and motor vehicle registration records of approximately 15 million Florida residents."(D.E. No. 65 at ¶ 12(A)(i)). His "duties include overseeing all of the [DHSMV's] operations, departmental policy making, budgetary matters, and ensuring the Department's compliance with applicable laws and regulations."*Id.* at ¶ 12(A)(iv).

Similarly, the Complaint states that Defendant Ford: "[I]s in charge of motor vehicle records for the state of Florida. He oversees approximately 500 employees and supervises all operations of the Division [of Motor Vehicles], including the section that processes public information requests. He is responsible for the Division's budget, including the duty to ensure that adequate funding is available to pay for the costs of the Division's operations."*Id.* at ¶ 12(B)(ii).

Defendant Sandra Lambert's "duties and responsibilities include the overall operations of the Division [of Driver Licenses], issuing of driver licenses, maintaining the records of driver licenses in Florida, monitoring of the Court system and the overall budget of the Division as well as strategic and long-range planning."*Id.* at ¶ 12(C)(iii). Her "responsibilities include maintaining the information obtained from a Florida driver when the driver applies for a Florida driver's [sic] license."*Id.* at ¶ 12(C)(iv). Lambert "directs a major division of the [DHSMV]" and her responsibilities include "implementation of new or revised laws to insure compliance."*Id.* at ¶ 12(C) (v-vi).

The allegations of the Complaint, which must be taken as true, indicate that, at all times relevant to this action, each Defendant was employed in an executive-level positions that required him or her to participate in the development of policy decisions involving the compilation and formatting of personal information from motor vehicle records, and the sale to third parties by the DHSMV. *See* *Pemco Aeroplex, Inc.*, 195 F.3d at 1236, (D.E. No. 65). Thus, this Court concludes that the allegations of the Complaint, when read in conjunction with the Defendants' memoranda of law, clearly establish that the Defendants have met their burden of showing that their conduct was undertaken pursuant to their respective duties and that they were acting within the scope of their discretionary authority when the alleged violation of constitutional or statutory right occurred. *See* *Harbert Int'l, Inc.*, 157 F.3d at 1282; *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir.1982).[FN8]

FN8. This Court notes that the Eleventh Circuit's discussion in *Harbert Int'l, Inc.* was in the context of a motion for summary judgment. However, the Eleventh Circuit has also noted the appropriateness of resolving qualified immunity at the motion to dismiss phase. *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir.2001). This Court notes that in the instant case the Plaintiffs' Complaint clearly establishes that the Defendants' conduct was within the scope of their discretionary duties, and, thus, Defendants' claim that their actions were in the scope of their discretionary duties is more than a "bald assertion." *See* *Espanola Way Corp.*, 690 F.2d at 830.

***10** Since the Defendants have demonstrated that their conduct was within the scope of their discretionary authority, this Court now applies the appropriate analysis for a qualified immunity defense to each count of the Complaint. Because this Court observes that the Eleventh Circuit has engaged in a somewhat different qualified immunity analysis in the context of: 1) alleged violations of a constitutional and statutory rights *under* *§ 1983*, and 2) alleged violations of statutory rights *under a federal statute*, this Court completes its analysis of Count I (§ 1983 claims) and Count II (DPPA claim under 18 U.S.C. § 2724) separately.

D. Application of Qualified Immunity to Plaintiffs' § 1983 Claim of Constitutional and Statutory Rights

Plaintiffs allege that Defendants' "policies, procedures, practices and acts," as described in the Complaint "have subjected Plaintiffs and the Class Members, to the deprivation of their rights of privacy, as secured to them through the United States Constitution and the DPPA, and are therefore in violation of 42 U.S.C. § 1983."(D.E. No. 65 at ¶ 25). This Court first applies qualified immunity principles to Plaintiffs' 1983 claim under a constitutional "right to privacy" and then applies qualified immunity principles to Plaintiffs' § 1983 claim under the DPPA. *See* (D.E. No. 65 at ¶ 25).

The Eleventh Circuit has clearly established a two-part test for determining whether qualified immunity applies to a § 1983 claim for a violation of a constitutional right:

The Supreme Court has set forth a two-part test for the qualified immunity analysis. The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiffs allegations, if true, establish a constitutional violation. If a constitutional right would have been violated under the plaintiff's version of the facts, the next, sequential step is to ask whether the right was clearly established.

Vinyard, 311 F.3d at 1346 (internal citations and quotations omitted).

This Court first must consider whether the Plaintiffs' allegations that Defendants developed policies that were inconsistent with the DPPA and resulted in the improper release of driver records to third parties, if true, resulted in a violation of the Plaintiffs' constitutional right to privacy. The Eleventh Circuit has previously held that "there is no constitutional right to privacy in motor vehicle record information which the DPPA enforces." *Pryor v. Reno*, 171 F.3d 1281, 1288 n. 10 (11th Cir.1999), *rev'd other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000) (vacating judgment and remanding for further consideration in light of *Reno v. Condon*). This Court finds that the Eleventh Circuit's rationale in *Pryor v. Reno* is persuasive.

The Eleventh Circuit has explained: "[T]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir.1991) (quoting *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (footnotes omitted)). In *James v. Douglas*, the Eleventh Circuit "acknowledged a constitutional right to privacy *only for intimate personal information given to a state official in confidence.*" *Pryor*, 171 F.3d at 1288 n. 10 (citing *James*, 941 F.2d at 1544). Similarly, the Eighth Circuit, when considering a § 1983 action against police officers and a city for disclosure of information that the plaintiff had pleaded guilty, explained that "protection against public dissemination of information is limited and extends only to highly personal matters representing 'the most intimate aspects of human affairs.'" *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir.1996) (quoting *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir.1988), *cert. denied*, 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). The Eighth Circuit further noted: " '[T]o violate [a person's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information.'"*Id.* (quoting *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir.1993)).

***11** In the instant case, Plaintiffs allege that Defendants released "personal information" necessary for obtaining a driver license. See (D.E. No. 65 at 4). While this Court recognizes that the information in the Complaint is not insignificant, and individuals obviously have an interest in avoiding the dissemination of such information, this Court concludes that information contained in motor vehicle records does not constitute "intimate personal information given to a state official in confidence" that warrants a constitutional right to privacy. Thus, this Court concludes that there is no constitutional right to privacy in motor vehicle record information that the DPPA enforces. *See Pryor*, 171 F.3d at 1288 n. 10.

In addition to allowing plaintiffs to bring a cause of action under § 1983 for the alleged violation of a constitutional right, the Supreme Court has held that certain federal laws may be directly enforced through § 1983. *See generally Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). However, in order to have a viable cause of action under § 1983 based on the violation of a federal statute, a plaintiff must establish that the statute allegedly violated gives the plaintiff enforceable rights. *31 Foster Children v. Bush*, 329 F.3d 1255, 1268 (11th Cir.2003) (holding that language contained in the definitional section of the Adoption Assistance and Child Welfare Act did not confer rights that foster children could enforce in a § 1983 action) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (rejecting the notion that case law permits "anything short of an unambiguously conferred right to support a cause of action brought under § 1983")). The Eleventh Circuit has explained: "We take from

Gonzaga the lesson that we are to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights. If the text and structure 'provide no indication that Congress intends to create new individual rights, there is no basis for a private suit.'" *31 Foster Children*, 329 F.3d at 1270. The Eleventh Circuit explained that a court must consider whether the statutory provisions in question: 1) contain "rights-creating" language that is individually focused; 2) address the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and 3) lack an enforcement mechanism through which an aggrieved individual can obtain review. *Id.*

Applying these factors to the DPPA, this Court concludes that the statutory language does not confer a private right of action under § 1983. This Court agrees with Defendants' argument that the DPPA has a system wide or aggregate focus when it addressed the question of remedies for the disclosure of records *pursuant to a state policy or practice*.(D.E. No. 69 at 9). This Court agrees with Defendants' point that "[r]ather than leaving enforcement of DPPA in [the context of disclosure of records pursuant to a state policy or practice] under 42 U.S.C. § 1983, Congress set out explicit remedies in the act."(D.E. No. 69 at 9) (citing 18 U.S.C. § 2724(a)). The DPPA defines "person" to exclude "a State or an agency thereof."18 U.S.C. § 2725(2). As Defendants correctly note, the Act does not authorize a private right of action against a state or its agencies. Furthermore, only the U.S. Attorney General is authorized to seek relief for DPPA violations by "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter," and such a state "shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance."*Id.* § 2723(b). This Court finds that the text and structure of relevant provisions of the DPPA provide no indication that Congress intended to create new individual rights for enforcement of the disclosure of records *pursuant to a state policy or practice* and that there is no basis for a private suit pursuant to § 1983. *See 31 Foster Children*, 329 F.3d at 1270.

***12** This Court concludes that taking the alleged facts of the Complaint in the light most favorable to the Plaintiff, the alleged facts do not show that the Defendants' conduct violated a constitutional right or a statutory right for which they may sue pursuant to § 1983. *Saucier*, 533 U.S. at 201. Because this Court has determined that no constitutional right to privacy would have been violated if the allegations were established, "no further inquiries concerning qualified immunity" are required for Plaintiffs' § 1983 claim. *See id.*This Court finds that Plaintiffs have failed to sustain their burden of proof to demonstrate that qualified immunity is not appropriate for Count I of the Complaint, *Vinyard*, 311 F.3 at 1346, and it therefore finds that qualified immunity bars Count I of the Complaint.

E. Application of Qualified Immunity to Plaintiffs' Direct Statutory Claim under the Driver Privacy Protection Act

While issues regarding qualified immunity typically arise in the context of an alleged violation of a constitutional right pursuant to § 1983, several federal appellate cases have discussed the applicability of a qualified immunity defense to rights directly established by federal statutes. *See generally Tapley v. Collins*, 211 F.3d 1210 (11th Cir.2000) (analyzing a qualified immunity defense for city officials in the context of the Federal Electronics Communications Privacy Act); *see also Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290 (11th Cir.1998) (analyzing a qualified immunity defense for a county housing authority supervisor in the context of the Fair Housing Act); *see also Cullinan v. Abramson*, 128 F.3d 301, 309 (6th Cir.1997) (holding that city officials and outside counsel were entitled to qualified immunity against federal law claims under RICO). The Eleventh Circuit has noted that "the Supreme Court has placed few restrictions on the availability of the qualified immunity defense." *Tapley*, 211 F.3d at 1214 (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (explaining that the qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law")).

The Eleventh Circuit has acknowledged that Congress creates and controls statutory causes of action and has the power to abrogate defenses, including the common law defense of qualified immunity. *Tapley v. Collins*, 211 F.3d at 1214. Furthermore, the Eleventh Circuit has also explained that "the defense of qualified immunity is so well established, that if Congress wishes to abrogate it, Congress should spe-

cifically say so."*Id.* (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993); *Owen v. City of Independence*, 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)).

In *Gonzalez v. Lee County Housing Authority*, the Eleventh Circuit analyzed whether Congress had abrogated the qualified immunity defense under the Fair Housing Act through its inclusion of an explicit good faith defense. The Eleventh Circuit found that "[n]either the text nor the legislative history of section 3617 [of the Fair Housing Act] indicates that Congress intended to abrogate the qualified immunity to which executive-branch officials were entitled under common law." *Gonzalez*, 161 F.3d at 1299. The Eleventh Circuit explained that its conclusion was consistent with decisions of the Eleventh Circuit and other courts holding that public officials are entitled to qualified immunity when sued under a federal statute. *See id.* at 1300 n. 34.The Eleventh Circuit cited eleven federal appellate decisions holding that qualified immunity is available as a defense to claims arising under eight different federal statutes. *Id.*[FN9] Similarly, in *Tapley v. Collins* the Eleventh Circuit determined that qualified immunity was a defense to the Federal Wiretap Act, notwithstanding the existence of a statutory "good faith" defense. *See Tapley*, 211 F.3d at 1214-17. The Eleventh Circuit in that case held that district court had erred in finding otherwise and remanded the case to the district court to "apply qualified immunity principles." *Id.* at 1217.

> FN9. This Court recognizes the fact that the Eleventh Circuit made it clear in *Gonzalez v. Lee County Housing Authority* that its decision "should not be construed to address whether qualified immunity is available in actions brought under statutes other than [42 U.S.C.] § 3617." 161 F.3d 1290, 1294-95 (11th Cir.1998). However, after careful analysis of relevant Supreme Court and Eleventh Circuit case law, this Court finds that the Eleventh Circuit's rationale for applying qualified immunity principles to federal statutes in *Gonzalez v. Lee County Housing Authority* and *Lee v. Tapley* is applicable to the instant case.

***13** After a careful review of the text of the DPPA, this Court finds that there is no indication that Congress abrogated a qualified immunity defense. *See generally*18 U.S.C. § 2721 *et seq.*; *Gonzalez*, 161 F.3d at 1299. Thus, this court now applies "qualified immunity principles" and the Eleventh Circuit's test for determining qualified immunity to the DPPA. This Court notes that such an analysis differs slightly from the application of qualified immunity to a violation of a constitutional or statutory right pursuant to § 1983. This Court finds that it must first determine whether the Plaintiffs' allegations, if true, establish a statutory violation. *See Vinyard*, 311 F.3d at 1346; *Gonzalez*, 161 F.3d at 1294-95; *Cullinan*, 128 F.3d at 304-05. If a statutory right would have been violated under the plaintiffs version of the facts, the next, sequential step is to ask whether the right was clearly established. *See id.*

1. The Plain Language of the Driver Privacy Protection Act Establishes A Cause of Action Against All Persons

This Court must first determine whether 18 U.S.C. § 2724 establishes a statutory cause of action against state officials in their individual capacities. Defendants generally argue that the "DPPA does not give the [P]laintiffs a private cause of action to challenge the release of driver records *pursuant to a policy mandated by state law.*"(D.E. No. 69 at 8) (emphasis in original). This Court has already discussed this argument in the context in which it most logically fits: analyzing the availability of a private cause of action under the DPPA pursuant to § 1983. However, it should be noted that Defendants, although their filings make it clear that they seek qualified immunity for both Count I and Count II of the Complaint, never specifically address the issue of whether Plaintiffs are capable of enforcing alleged violations of the DPPA *directly* under 18 U.S.C. § 2724, the civil action provision of the DPPA, as opposed to attempting to enforce the DPPA *through § 1983*.Defendants' argument that "the DPPA does not create a private right of action to challenge the release of records arising from department policy or state law" relies on *Gonzaga University v. Doe* and *31 Foster Children v. Doe. See* (D.E. No. 69 at 8-10). As was discussed *supra*, these cases examine whether federal statutes create private rights that can be enforced pursuant to § 1983, as opposed to causes of action established directly in the statutes themselves.

This Court now considers the plain language of relevant portions of the DPPA.Section 2724, entitled

"Civil action," states: "A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court."*Id.* As was noted previously, the DPPA defines a "person" as "an individual, organization or entity, but does not include a State or agency thereof."*Id.*§ 2725(2). The term "agency" is not defined in the statute.[FN10]This Court concludes that, under the plain language of the 18 U.S.C. § 2724, "any person," including a state executive official, may be liable if he or she "knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter."This Court finds that the Plaintiffs' allegations, if true, establish a statutory violation. *See Vinyard*, 311 F.3d at 1346; *Gonzalez*, 161 F.3d at 1294-95; *Cullinan*, 128 F.3d at 304-05.

> FN10. Blacks law dictionary, in relevant part, defines "agency" as "[a] governmental body with the authority to implement and administer particular legislation."*Black's Law Dictionary*, 63 (7th ed.1999).

2. The Contours of the Statutory Right were Not Established with Sufficient Clarity to Provide Defendants with Fair Notice that their Individual Conduct Under the Circumstances Violated a Statutory Right

***14** However, this Court's qualified immunity inquiry does not end with the finding that Plaintiffs' allegations, if true, establish a statutory violation. This Court must "apply qualified immunity principles" to determine whether the "state of the law" at the time of the alleged conduct giving rise to the suit gave the official in question "fair warning" that his or her conduct was in violation of a statutory right. *See Tapley*, 211 F.3d at 1217; *Hope*, 536 U.S. at 740. After carefully considering the factual context of this case, as well as the relatively intricate body of case law regarding the level of legal clarity necessary for determining the "objective reasonableness of [Defendants'] conduct as measured by reference to clearly established law,' " *Harlow*, 457 U.S. at 818, this Court concludes the state of the law was not sufficiently clear to provide Defendants with "fair warning" that their conduct violated a statutory right under the novel circumstances of this case.

First, this Court notes that Plaintiffs' arguments as to why Defendants are not entitled qualified immunity rely on the premise that *Reno v. Condon* and the DPPA's plain language "clearly established" the relevant areas of the law. (D.E. No. 70 at 13). Indeed, much of the "facts" section of Plaintiffs' Complaint is devoted to delineating the "statements of facts and law" that *Reno v. Condon* purportedly establishes. This Court does not accept Plaintiffs' characterizations of *Reno v. Condon* at face value, and it is not required to accept as true allegations in Plaintiffs' Complaint that describe the Supreme Court's holding in that case. *See generally*, *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (noting in the qualified immunity context that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.' ").

Second, this Court notes that Plaintiffs' Complaint appears to attempt to establish, or at least imply, some level of *subjective* bad faith on the part of Defendants. For example, with regard to Defendant Dickinson, Plaintiffs' Complaint emphasizes the fact that Dickinson "worked directly" with Sherry Slepin "[i]n her capacity as Legislative Affairs Administrator," that he had numerous discussions with her "concerning the financial impact of the Shelby Amendment on the DHSMV." (D.E. No. 65 at ¶¶ 12(A)(xiv-xv)). The Complaint then notes:

In November, 2002, Sherry Slepin resigned from her position with DHSMV to become a private lobbyist. Among her clients were Auto Data Direct and R.L. Polk & Company, both of which have been long time bulk purchasers of personal information form DHSMV. After leaving DHSMV, Sherry Slepin continued a personal relationship with Defendant, [Dickinson], and eventually married him on May 19, 2003.

Id. at ¶¶ 12(A)(xvii). Such allegations are not relevant to the inquiry at hand. The Supreme Court has noted that *Harlow v. Fitzgerald*"rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Furthermore, the Supreme Court has noted that an allegation of subjective good faith cannot suffice to defeat qualified im-

munity. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (noting that an allegation of malice will not defeat an official's claim to qualified immunity); *see also Cullman*, 128 F.3d at 309. Thus, Plaintiffs' allegations that Defendants were in fact aware of *Reno v. Condon* and Congressional amendments to the DPPA, *see* (D.E. No. 65 at 12-14), are of no moment.

***15** As was discussed in Section III(B) of this Order, *supra*, there has been considerable Supreme Court case law devoted to discussing the appropriate level of clarity of "the state of the law" that is necessary for evaluating the "objective reasonableness" of an official's actions. As the Supreme Court noted in *Anderson v. Creighton*, the operation of the objective reasonableness standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."483 U.S. at 639. This Court finds it useful to reiterate three points that the Supreme Court has emphasized. First, the Supreme Court has explained:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640. Second, Supreme Court case law indicates that the a court's task of evaluating "the contours" of the law does not exist in an abstract factual vacuum, but, rather, in the context of factual circumstances that have been alleged. For example, in *Hope v. Pelzer* the Supreme Court held that there is sufficient legal clarity that a reasonable official would have "fair warning" that chaining prisoners to a "hitching post" for extended periods of time was unconstitutional due to the "obvious cruelty inherent" in the facts of the case. *See Hope*, 536 U.S. at 732. Third, the Supreme Court has recognized that there is a practical need for executive level government officials to "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. Such officials "are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory," and, by virtue of their executive role, such officials "should not err always on the side of caution."*Id.*

This Court concludes that, under the factual circumstances alleged in the Complaint, as well as the judicial landscape in which the Defendants' alleged conduct occurred, a reasonable official would not have had "fair warning" that his or her conduct would violate a statutory right under the DPPA. Nor would a reasonable official have "fair warning" that, under the "state of the law" at the time, such conduct could expose himself or herself to personal civil liability. Taking the allegations in the Complaint as true, as this Court must, the allegations indicate that the three Defendants were faced with a difficult executive-level policy decision, indeed they were stuck between a proverbial "rock and a hard place." On the one hand, there was an amendment to the DPPA that arguably mandates an "opt in requirement," *see Condon*, 528 U.S. at 669 (discussing Public Law 106-69), as well as language indicating that the Attorney General was authorized, if not required, to pursue civil damages against "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with [the DPPA]."18 U.S.C. § 2723(b). On the other hand, the Florida Constitution contains language regarding public records that describes itself as "self-executing," and presumes records to be public records that must be disclosed absent an express constitutional or legislative exemption that precludes disclosure. *See*Fla. Const. Art. I, § 24.[FN11]Furthermore, at the time of Defendants' conduct, a Florida statutory provision governed the release of records by the DHSMV. *See*Fla. Stat. § 119.07(aa) (2003); *Kehoe*, 421 at 1210-13.[FN12]

> FN11. The Florida Constitution states in relevant part:
>
> > § 24. Access to public records and meetings
> >
> > (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or de-

partment created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

* * *

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Fla. Const. Art. I, § 24.

FN12.Florida Statute § 119.07(aa) (2003) stated in relevant part:

Personal information contained in motor vehicle records exempted by an individual's request pursuant to this paragraph shall be released by the [DHSMV] for any of the following uses:

* * *

12. For bulk distribution for surveys, marketing, or solicitations when the department has implemented methods and procedures to ensure that:

a. Individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

b. The information will be used, rented, or sold solely for bulk distribution for survey, marketing, and solicitations will not be directed at those individuals who have timely requested that they not be directed at them.

Id.

***16** This Court notes that there are no Supreme Court or Eleventh Circuit cases, or any other federal cases for that matter, that discuss the application of the DPPA under any set of factual circumstances even remotely similar those of the instant case. Furthermore, without commenting on the merits of Defendants' constitutional law argument, this Court disagrees with Plaintiffs' broad statement that Defendants' constitutional arguments have been "squarely rejected by the Supreme Court."(D.E. No. 70 at 15-16).[FN13] Plaintiffs argue that their statutory right is " 'clearly established' by a federal statute of 'obvious clarity.' " (D.E. No. 70 at 13). However, this Court again notes that Act contains no clear abrogation of qualified immunity. *See* *Tapley*, 211 F.3d at 1214; *Buckley*, 509 U.S. at 268.

FN13. For example, Plaintiffs concede that *Reno v. Condon* was "decided six months before the effective date of the Shelby Amendment."(D.E. No. 70 at 11). Arguably, a constitutional challenge to the text of that amendment was not before the Supreme Court in *Reno v. Condon.*

This Court finds that the contours of the statutory rights in question are not sufficiently clear that a reasonable public official under the circumstances could have had "fair warning" that their actions, in their individual capacities, were violating a statutory right. Nor could a reasonable public official have had fair warning that, under the "state of the law" he or she could possibly be exposing himself or herself to personal civil liability. This finding does not provide any comment on the merits of the actions that were taken by the Defendants or the decisions that they reached

through their exercise of their inherent discretionary authority. However, this Court notes, as did the Supreme Court, that "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer*, 416 U.S. at 246. A long tradition of Supreme Court case law establishes that qualified immunity shields public officials from personal civil liability under the circumstances of the instant case. Thus, in conclusion, Plaintiffs have failed to sustain their burden of proof to demonstrate that qualified immunity is not appropriate for Count II of the Complaint. *Vinyard*, 311 F.3d at 1346. This Court finds that qualified immunity bars Count II of the Complaint.

For these reasons, it is hereby:

ORDERED AND ADJUDGED that

1. Defendants' Motion to Dismiss the Second Amended Complaint (D.E. No. 69) is **GRANTED in part,** consistent with the findings described in this Order.

2. The Second Amended Complaint is **DISMISSED with prejudice.**

3. This case is **CLOSED,** all pending motions are **DENIED as moot.**

DONE AND ORDERED.

S.D.Fla.,2006.
Collier v. Dickinson
Slip Copy, 2006 WL 4998653 (S.D.Fla.)

END OF DOCUMENT