No. 15-1081

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL **TANKERSLEY**,
Plaintiff - Appellant,

v.

JAMES W. **ALMAND**, in his official capacity as Trustee of the Client Protection Fund; DOUGLAS M. BREGMAN, in his official capacity as Trustee of the Client Protection Fund; WALTER S.B. CHILDS, in his official capacity as Trustee of the Client Protection Fund; JOSEPH B. CHAZEN, in his official capacity as Trustee of the Client Protection Fund; CECELIA ANN KELLER, in her official capacity as Trustee of the Client Protection Fund; PATRICK A. ROBERSON, in his official capacity as Trustee of the Client Protection Fund; LEONARD H. SHAPIRO, in his official capacity as Trustee of the Client Protection Fund; DONNA HILL STATEON, in her official capacity as Trustee of the Client Protection Fund; DAVID WEISS, in his official capacity as Trustee of the Client Protection Fund; CHIEF JUDGE MARY ELLEN BARBERA, in her official capacity; JUDGE SALLY D. ADKINS, in her official capacity; JUDGE LYNNE A. BATTAGLIA, in her official capacity; JUDGE CLAYTON GREENE JR., in his official capacity; JUDGE GLENN T. HARRELL JR., in his official capacity; JUDGE ROBERT N. MCDONALD, in his official capacity; JUDGE SHIRLEY M. WATTS, in her official capacity; BESSIE M. DECKER, in her official capacity as Clerk of the Court of Appeals,
Defendants - Appellees.

On appeal from the U.S. District Court for the District of Maryland
(Hon. Richard D. Bennett, U.S. District Judge)

APPELLANT'S OPENING BRIEF

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March 9, 2015

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 4th Cir. R. 26.1, appellant Michael Tankersley states he is a natural person who has no parent corporation and there is no publicly held corporation that owns 10% or more of his stock. Michael Tankersley knows of no publicly held corporation that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement. Appellant is not a trade association.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument. This case implicates an important federal right and a conflict between federal and state law, and it challenges the validity of state court rules. The enforceability of Section 7 of the Privacy Act is a question of first impression in this Court and one on which the courts of appeals have disagreed. The interpretations of the provisions of federal law relied upon below to dismiss the case are also questions of first impression.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from a district court's final judgment. 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 1331. The district court's judgment, entered December 23, 2014, disposed of all claims in the case, and this appeal was timely noticed on January 16, 2015, within thirty days after entry of judgment. *See* JA 130; Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

> Section 7 of the federal Privacy Act forbids "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number" unless the disclosure requirement was adopted prior to 1975, or "is required by federal statute." Pub. L. No. 93-579, § 7(a), *at* 5 U.S.C. § 552a note. This case presents the following questions:

1. Did the district court err in holding that 42 U.S.C. § 666, which directs states to require that the Social Security Number of an "applicant for a professional license" be recorded on the

application, abrogates the Privacy Act with respect to licensed professionals who are not required to submit any application?

2. Did the district court err in holding that 42 U.S.C. § 405, which permits the collection of Social Security Numbers in connection with the administration of a tax, overrides a licensed attorney's Privacy Act rights where the collection of the Social Security Numbers at issue is not part of the administration of a tax and is collected by an entity that does not administer any tax?

3. Where a state has suspended an attorney from practice solely because of his refusal to disclose his Social Security Number, is the attorney entitled to seek relief under 42 U.S.C. § 1983 and the Supremacy Clause for the violation of his rights under Section 7 of the federal Privacy Act?

STATEMENT OF THE CASE

In May 2014, Michael Tankersley sued the Trustees of the Client Protection Fund of the Bar of Maryland (CPF), the Judges of the Maryland Court of Appeals, and the Clerk of that Court, all in their official capacities, because they suspended Tankersley or contributed to his suspension from practicing law in Maryland.[1] The defendants suspended Tankersley based on his refusal to provide his Social Security Number (SSN) to the CPF. Tankersley claimed that his suspension, and the Maryland Rules of Procedure under which it was imposed, violated his rights under Section 7 of the federal Privacy Act. Tankersley sought declaratory and injunctive relief, plus attorneys' fees and costs. JA 13-14.

[1] Tankersley also sued the Court of Appeals and the CPF, which are not appellees here.

Shortly after filing the complaint, Tankersley moved for summary judgment, and the defendants cross-moved for summary judgment or in the alternative to dismiss. JA 4-6.

In December 2014, the district court denied Tankersley's motion for summary judgment and granted the defendants' motion to dismiss. JA 116-29.

STATEMENT OF FACTS

A. The Privacy Act and Identity Theft

In 1974, Congress enacted the Privacy Act, 5 U.S.C. § 552a. "[R]ecogniz[ing] the dangers of widespread use of SSNs as universal identifiers," *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993), and identifying this issue as "one of the most serious manifestations of privacy concerns in the Nation," S. Rep. No. 93-1183, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943, Congress included as Section 7 of the Privacy Act this prohibition: "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note.

In the intervening years, the risk to privacy has increased. According to the Social Security Administration, "[i]dentity theft is one of the fastest growing crimes in America." Soc. Sec. Admin., *Identity Theft And Your Social Security*

Number 1, SSA Publication No. 05-10064 (Dec. 2013).[2] Recent years have seen a number of high-profile corporate data breaches involving millions of compromised consumer records, including from the computer systems of Target, Home Depot, and JPMorgan Chase.[3] An annual study by Verizon, in tandem with national and international law enforcement agencies, confirmed 1,367 data breaches in 2013, *see* Verizon, *2014 Data Breach Investigations Rpt.* 2,[4] more than double the figure for the previous year, *see* Verizon, *2013 Data Breach Investigations Rpt.* 11.[5]

The consequences of misappropriated consumer information are wide-ranging and can extend far beyond mere inconvenience. As this Court has observed, "On average, victims of identity theft lose about $17,000 and must spend over $1,000 and 600 hours of personal time cleaning up their credit reports." *Ostergren v. Cuccinelli*, 615 F.3d 263, 279 (4th Cir. 2010). Victims "can spend

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[2] *Available at* http://www.ssa.gov/pubs/EN-05-10064.pdf.

[3] Maggie McGrath, *Target Data Breach Spilled Info on As Many As 70 Million Customers*, Forbes (Jan. 10, 2014), http://www.forbes.com/sites/maggiemcgrath/2014/01/10/target-data-breach-spilled-info-on-as-many-as-70-million-customers; Maggie McGrath, *Home Depot Confirms Data Breach, Investigating Transactions from April Onward*, Forbes (Sept. 8, 2014), http://www.forbes.com/sites/maggiemcgrath/2014/09/08/home-depot-confirms-data-breach-investigating-transactions-from-april-onward; Emily Glazer and Danny Yadron, *J.P. Morgan Says About 76 Million Households Affected by Cyber Breach*, Wall St. J. (Oct. 2, 2014), http://online.wsj.com/articles/j-p-morgan-says-about-76-million-households-affected-by-cyber-breach-1412283372.

[4] *Available at* http://www.verizonenterprise.com/DBIR/2014.

[5] *Available at* http://www.verizonenterprise.com/resources/reports/rp_data-breach-investigations-report-2013_en_xg.pdf.

years trying to resolve bad debt run up by thieves in their names." J. Craig Anderson, *Identity Theft Growing, Costly to Victims*, USA Today (Apr. 14, 2013).[6] Victims of identity fraud may also be denied loans for housing or education or lose employment opportunities, *see* Eric T. Glynn, *The Credit Industry and Identity Theft: How to End an Enabling Relationship*, 61 Buffalo L. Rev. 215, 225 (2013), be unable to rent an apartment, or be charged higher interest rates, *see* Experian, *Identity Theft Impact on Credit Score*.[7]

B. The CPF and the 2013 Maryland Bar Rules

The Client Protection Fund, or CPF, is a body created by the Maryland Legislature "to maintain the integrity of the legal profession by paying money to reimburse clients for losses caused by defalcation by lawyers." Md. Code, Bus. Occ. & Prof. Art. § 10-311(b). The CPF is administered by nine trustees who serve without compensation. *See* Md. R. Proc. 16-811.3.

In November 2013, the Maryland Court of Appeals adopted Maryland Rules of Procedure 16-811.5 and 16-811.6. Under Rule 16-811.5(a)(1)(A), "each attorney admitted to practice before the Court of Appeals . . . shall provide to the treasurer of the [Client Protection] Fund the attorney's Social Security number."

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[6] *Available at* http://www.usatoday.com/story/money/personalfinance/2013/04/14/identity-theft-growing/2082179.

[7] *Available at* http://www.protectmyid.com/identity-theft-protection-resources/identity-basics/credit-score-impact.aspx.

Under Rule 16-811.6(b)(1), the CPF shall notify any attorney who has failed to provide his or her SSN that he or she must do so within 30 days or be suspended from the practice of law in Maryland. Under Rule 16-811.6(d), if the attorney has not provided the SSN within 30 days of the notice of delinquency, the CPF shall propose to the Court of Appeals, and the Court of Appeals shall without further process enter, an order suspending the attorney from the practice of law.

In the same order adopting these rules, the Court of Appeals amended the rules governing attorney admissions to provide that the application for admission shall "require the applicant to provide the applicant's Social Security number." Rules Governing Admission to the Bar of Md. (hereinafter "Md. Admis. R."), Rule 2(b); *see* Rules Order (Md. Nov. 21, 2013), at 101.[8]

C. Tankersley's Suspension

Plaintiff Michael Tankersley has been licensed to practice law in Maryland since 1986 and in the District of Columbia since 1987. JA 15. Until March 2014, Tankersley had never been subject to discipline or suspension by any bar. *Id.*

Throughout the time since he became licensed to practice law in Maryland, Tankersley has been employed in the District of Columbia and has resided in either Virginia or the District. JA 114. Since 2004, he has been employed as an attorney

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[8] *Available at* http://www.courts.state.md.us/rules/rodocs/180ro.pdf.

with the Federal Trade Commission, located in the District. *Id.* All of this information is well-known to Maryland bar authorities: each year, in the course of paying dues and fees, Tankersley confirms his places of employment and residence to the Maryland State Bar Association, the CPF, and the Court of Appeals. *Id.* Indeed, the membership directory of the State Bar Association lists Tankersley as an out-of-state attorney with his business address at the Federal Trade Commission. JA 115. For the duration of his bar licensure in Maryland, Tankersley has not been subject to income tax in Maryland, has not been obligated to make unemployment insurance contributions to the Comptroller or Secretary of Labor, Licensing and Regulation, and has not owned property in Maryland. JA 114.

Tankersley avoids sharing his SSN unnecessarily because of concerns about privacy and identity theft. JA 15. Tankersley himself was a victim of identity theft in 2013 when someone else filed a federal tax return using Tankersley's SSN. *Id.* As a result, Tankersley had to take special measures to prove his identity to the IRS, his tax refund was delayed for several months, and he had to adopt special procedures to verify his identity when filing his tax return in 2014. *Id.*

On February 10, 2014, defendant James W. Almand, chair of the CPF, sent Tankersley a notice of delinquency informing him that he had not provided his SSN to the CPF and that he had 30 days to do so or be suspended from the practice of law in Maryland. JA 15-16, 17. On March 10, Tankersley replied with a letter

explaining that he would not provide his SSN because of concerns about privacy and identify theft and pointing out that suspending him as a result of his refusal would violate the federal Privacy Act. JA 16, 18-19. On March 20, the Court of Appeals, in an order signed by all of its Judges and its Clerk (all of whom are defendants here in their official capacities), suspended Tankersley from the practice of law for failing to provide his SSN. JA 16, 20-23.

On May 22, 2014, Tankersley filed this lawsuit under 42 U.S.C. § 1983 and the Supremacy Clause for violation of Section 7 of the Privacy Act. JA 8-14.

D. The Decision Below

The district court denied Tankersley's motion for summary judgment and granted the defendants' motion to dismiss on the basis of that court's decision several months earlier in *Greidinger v. Almand*, 30 F. Supp. 3d 413 (D. Md. 2014). *See* JA 124-26. In *Greidinger*, another Maryland bar member refused to provide his SSN to the CPF and was suspended as a result. Greidinger sued under Section 7(a) of the Privacy Act (as Tankersley does here) and also asserted violations of Section 7(b) of the Privacy Act and of his due process rights. *Greidinger*, 30 F. Supp. 3d at 418.

As relevant to the Section 7(a) claim, the court noted that Section 7 does not apply to disclosures of SSNs that are required by federal law, and the court held that 42 U.S.C. § 666 required the SSN disclosure to which Greidinger objected.

Specifically, § 666 requires that, to increase the effectiveness of child support collections, states have in place "procedures requiring that the social security number of any applicant for a professional license . . . be recorded on the application." 42 U.S.C. § 666(a)(13), *quoted in Greidinger*, 30 F. Supp. 3d at 421. The district court rejected the argument that the statutory term "applicant" limited the provision's applicability to those applying for a license. *Id.* at 422. According to the court, the word "applicant" must include someone who is already licensed, in order to give meaning to a provision of § 666 that "allows a state body to either 'withhold *or suspend*'" a license, because "applicants cannot be suspended, only those who already hold a license can." *Id.* (quoting 42 U.S.C. § 666(a)(16); emphasis added by the court). The court concluded that its reading of "applicant" was necessary to effectuate Congress's goals as expressed in the legislative history. *Id.* at 422-23. And because other Maryland professionals, unlike lawyers, must reapply for their licenses periodically, reading "applicant" literally would treat licensed attorneys differently from other Maryland licensed professionals, the court noted. *Id.* at 423. The court therefore "summarily reject[ed] any literal definition of 'applicant' which would obviously thwart the purpose of the statute." *Id.* at 424.

The court held in the alternative that the Privacy Act was superseded here by the Tax Reform Act of 1976, which permits the collection of SSNs by certain state entities "in the administration of any tax" and which supersedes contrary

provisions of federal law. *Id.* (quoting 42 U.S.C. § 405(c)(2)(C)(i) & (v)). As to the only argument of Tankersley's also made in *Greidinger* — that the CPF is not an agency that § 405 authorizes to collect SSNs — the district court found that the collection was permissible because § 405 authorizes a "political subdivision" of the state to collect SSNs, and the Court of Appeals, which directed the CPF to collect SSNs, qualifies as a "subdivision of the state of Maryland." *Id.* at 425.

In dismissing Tankersley's case, the court summarized its conclusions in *Greidinger* and accordingly held that Tankersley failed to state a valid claim for relief because 42 U.S.C. § 666 and 42 U.S.C. § 405 defeated application of the Privacy Act here. JA 125. Addressing Tankersley's Supremacy Clause cause of action separately, the court held that the Supremacy Clause was not implicated because, under the court's interpretation of 42 U.S.C. § 666 and 42 U.S.C. § 405, federal law affirmatively authorizes the state rules at issue. JA 126.

SUMMARY OF ARGUMENT

By suspending him for refusing to provide his SSN, the defendants violated Tankersley's right under Section 7 of the Privacy Act not to be denied "any right, benefit, or privilege" because of such refusal. The facts and the meaning of this statutory prohibition are undisputed. The issues presented are whether other federal statutes bar application of the Privacy Act here and whether Tankersley may sue to enforce his Section 7 rights.

The district court erroneously dismissed the case because it held that 42 U.S.C. § 666 (concerning the enforcement of child support obligations) and 42 U.S.C. § 405 (concerning tax administration) exempt defendants' actions from Privacy Act protections. The district court read and applied both § 666 and § 405 too broadly. Regarding § 666, the court candidly rejected a plain-language reading of the statutory text in favor of an interpretation driven by policy and legislative history even though the text is clear and unambiguous, and the district court's atextual reading was not necessary to effectuate the policy goals of the statute. Regarding § 405, the court too easily credited the defendants' assertion that the statute applies here despite several mismatches between the state regulatory scheme at issue and the requirements of § 405. In both instances, the court failed to read and apply each statute according to its plain meaning and as a result gave short shrift to the balance that Congress struck in pursuing its various goals, including the protection of privacy and the prevention of identity theft as well as tax administration and the enforcement of child support.

The district court also held that Tankersley could not enforce Section 7 via the Supremacy Clause because federal law and the state rules at issue do not, in the district court's view, conflict. This conclusion is just a restatement of the district court's holding that Section 7 does not apply because of 42 U.S.C. § 666 and 42 U.S.C. § 405. In fact, Tankersley may enforce his Section 7 rights under both the

Supremacy Clause and 42 U.S.C. § 1983. This Court has long recognized that the Supremacy Clause provides a cause of action for equitable relief against a state regulation that would infringe a federal right. Independently and in addition, enforceability under § 1983 is well-grounded in this Court's precedent: Section 7 of the Privacy Act uses right-creating language, is intended to benefit the plaintiff, is not vague, and imposes a binding obligation. In the only federal appellate decision to consider the question under the proper standards, the Eleventh Circuit held that § 1983 may be used to enforce Section 7 of the Privacy Act.

ARGUMENT

A dismissal for failure to state a claim is reviewed de novo. *Kenney v. Indep. Order of Foresters*, 744 F.3d 901, 905 (4th Cir. 2014). A denial of summary judgment is reviewed de novo, viewing the facts in the light most favorable to the non-moving party. *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 299 (4th Cir. 2008). Legal questions, including the application of law to fact, are also reviewed de novo. *Fonner v. Fairfax Cnty.*, 415 F.3d 325, 330 (4th Cir. 2005).

I. THE DISTRICT COURT ERRED IN HOLDING THAT 42 U.S.C. § 666 AND 42 U.S.C. § 405 BAR APPLICATION OF THE PRIVACY ACT HERE.

A. The Privacy Act Forbids Suspending Tankersley For Refusing To Disclose His SSN.

Tankersley's suspension and the Maryland Rules under which it was imposed are unlawful under Section 7 of the federal Privacy Act, which forbids

federal, state, and local government agencies from denying a person "any right, benefit, or privilege" because the person refused to share his or her SSN. Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note.[9]

Under the Privacy Act, cases throughout the country have sustained challenges to state SSN-collection requirements. *See Schwier v. Cox*, 340 F.3d 1284, 1286, 1297 (11th Cir. 2003) (reinstating claim for Privacy Act violation where a state required disclosure of SSNs as a condition of voter registration); *Ingerman v. Del. River Port Auth.*, 630 F. Supp. 2d 426, 428, 445 (D.N.J. 2009) (holding that disclosure of SSN could not be required as a condition of receiving a senior citizen discount on highway toll rates); *Szymecki v. City of Norfolk*, 2008 WL 4223620, *1-*2, *9 (E.D. Va. Sept. 11, 2008) (denying motion to dismiss Privacy Act claim where police ordered arrestee to provide his SSN as a condition of avoiding further detention and again as a condition of retrieving confiscated property); *Stollenwerk v. Miller*, 2006 WL 463393, *7 (E.D. Pa. Feb. 24, 2006) (holding that disclosure of SSN could not be required as a condition of purchasing

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[9] Although Section 7 was not codified in the United States Code, it is part of the enacted statute. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 448 (1993) ("Though the appearance of a provision in the current edition of the United States Code is prima facie evidence that the provision has the force of law, it is the Statutes at Large that provides the legal evidence of laws[.]" (citations and internal quotation marks omitted)); *see also United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he Code cannot prevail over the Statutes at Large[.]" (citation and internal quotation marks omitted)).

a handgun or of obtaining a license to carry a handgun); *Kentucky Rest. Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672, 686-87 (W.D. Ky. 2002) (holding that disclosure of SSN could not be required as a condition of obtaining a license for an adult entertainment establishment); *Russell v. Bd. of Plumbing Examiners*, 74 F. Supp. 2d 339, 347 (S.D.N.Y. 1999) (holding that disclosure of SSN could not be required as a condition of obtaining a plumber's license); *McKay v. Altobello*, 1997 WL 266717, *1-*3 (E.D. La. May 16, 1997) (holding that disclosure of SSN could not be required as a condition of voter registration); *Wolman v. U.S. Selective Serv. Sys.*, 501 F. Supp. 310, 311 (D.D.C. 1980) (holding that disclosure of SSN could not be required as a condition of draft registration), *legislatively overruled*, 50 App. U.S.C. § 453(b); *State v. Vickery*, 1991 WL 32153, *6 (Conn. Super. Ct. Feb. 15, 1991) (holding that disclosure of SSN could not be a bond condition imposed on defendants in state court); *Fla. Div'n of Workers' Comp. v. Cagnoli*, 914 So. 2d 950, 950-51 (Fla. 2005) (holding that disclosure of SSN could not be required as a condition of obtaining workers' compensation).

Two decades ago, this Court explained the rationale behind the Privacy Act's protection of SSNs against unnecessary disclosure: "[A]rmed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck. . . . Succinctly

stated, the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous." *Greidinger v. Davis*, 988 F.2d 1344, 1353-54 (4th Cir. 1993).

That risk is as real today as when the Privacy Act was passed. Over the past two years, cyberattacks on Maryland state and local agencies have compromised the personal information of thousands. *See, e.g.*, Mike Denison, *Maryland state agencies hit by cyberattacks, records show*, Md. Daily Record (Apr. 18, 2014) ("Maryland government entities have suffered at least six cyberattacks since the beginning of 2013[.]"); Steve Fermier, *Thousands Notified of Health Records Hacked*, WBAL 1090 (Mar. 17, 2014) ("[H]ackers hit Service Coordination Incorporated of Frederick, which provides case management services to nearly 14,000 Maryland residents."); Colin Campbell, *More than 309,000 identities exposed in University of Maryland cyberattack*, Balt. Sun (Feb. 20, 2014) ("The breached database held names, Social Security numbers, dates of birth and university identification numbers maintained by the university's information technology division . . . ."); Alison Knezevich, *Former employee of contractor obtained Balt. Co. workers' personal data*, Balt. Sun (Oct. 21, 2013) ("Baltimore County authorities say they found Social Security numbers and other personal information from more than 12,000 current and former county workers on the computer of a man who used to work for a county information-technology

contractor.”).[10] Thus, Tankersley — himself a past victim of identity theft — had good reason to exercise his rights under the Privacy Act.

It is undisputed that the defendants suspended Tankersley from the practice of law for refusing to provide his SSN. Because the Privacy Act forbids what Maryland Rules 16-811.5 and 16-811.6 require and what the defendants here have done, these rules are invalid on their face and the suspension of Tankersley was unlawful unless authorized by another federal statute that supersedes the Privacy Act. As the next two sections discuss, there is no such statute.

B. The Maryland Rules At Issue Sweep Beyond The Requirements Of 42 U.S.C. § 666, And The District Court’s Contrary Conclusion Ignores The Plain Language Of That Statute.

Section 7 of the Privacy Act contains an exception for “any disclosure which is required by Federal statute.” Pub. L. No. 93-579, § 7(a)(2)(A), *at* 5 U.S.C. § 552a note. The district court held that 42 U.S.C. § 666, which aims to facilitate enforcement of child support obligations, required the collection of Tankersley’s SSN by the CPF and therefore that the Privacy Act does not apply here. The

[10] The articles cited in this sentence are, respectively, available at: (1) http://thedailyrecord.com/2014/04/18/maryland-state-agencies-hit-by-cyberattacks-records-show; (2) http://www.wbal.com/article/106118/2/thousands-notified-of-health-records-hacked; (3) http://www.baltimoresun.com/news/maryland/bs-md-university-of-maryland-data-breach-20140219,0,2321285.story; and (4) http://articles.baltimoresun.com/2013-10-31/news/bs-md-co-county-employee-data-20131031_1_county-employee-baltimore-county-ellen-kobler.

court's statutory interpretation — laid out in *Greidinger* and incorporated by reference in the decision below, JA 124-25 — cannot withstand scrutiny.

1. The plain language of § 666 does not apply to licensed attorneys.

Statutory interpretation begins with the plain language of the statute. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 243 (4th Cir. 2009). Under 42 U.S.C. § 666, states must have "[p]rocedures requiring that the social security number of any applicant for a professional license, driver's license, occupational license, recreational license, or marriage license be recorded on the application." 42 U.S.C. § 666(a)(13)(A). Thus, by its express terms, § 666 applies only in the case of an "applicant for a professional license." The ordinary meaning of the word "applicant" is "someone who formally asks for something (such as a job or admission to a college): someone who applies for something." Merriam-Webster Online Dictionary, *at* http://www.merriam-webster.com/dictionary/applicant. Tankersley, having been admitted to practice law in Maryland in 1986 and having remained a member in good standing up to the time of his suspension for refusing to provide his SSN, was not an "applicant for a professional license" when the defendants demanded his SSN in 2014.

"It is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526,

534 (2004) (citation and internal quotation marks omitted). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (citation and internal quotation marks omitted); *accord Stone*, 591 F.3d at 243. Here, the absence of ambiguity in the term "applicant" — neither the district court nor the defendants have suggested any dictionary definition or ordinary usage for that word other than "someone who applies" — should have ended the inquiry.

The district court, however, held that "applicant" in § 666 covers not only "someone who applies" but also someone whose application has already been accepted — that is, a current licensee. *Greidinger v. Almand*, 30 F. Supp. 3d 413, 421-24 (D. Md. 2014). In support of its reading, the court first stated that "nothing in the Social Security Act or the Welfare Reform Act makes the distinction between 'applicant' and 'licensee.'" *Id.* at 422. But that assertion overlooks the use of the word "applicant" in the very provision at issue, § 666(a)(13). Congress could have added the word "licensee," but it did not, and courts presume that legislative word choices are deliberate. *Barnhart*, 534 U.S. at 461-62.

The court's only textual support for its reading was that another subsection of § 666 requires states to have procedures "to withhold or *suspend*" licenses for

failure to pay child support. 42 U.S.C. § 666(a)(16) (emphasis added). Based on this provision, the district court reasoned that the word "applicant" must include individuals already licensed so there would be a group of people whose licenses a state can suspend. *Greidinger*, 30 F. Supp. 3d at 422. The flaw in this argument is that a plain-language reading of "applicant" to mean "someone who applies for something" does not mean that there are no licenses the state can suspend. The statute does not require that a state check for outstanding child support obligations only when an application is tendered. The outstanding child support obligation might arise after an applicant has provided the SSN required by § 666(a)(13), or authorities may not discover a pre-application obligation until after a license has been granted. The ability of the state to "suspend" a license thus comes into play — and, in fact, is a logical corollary of its ability to withhold a license in the first place — when the state discovers the applicant's outstanding obligation after the license has issued. Therefore, giving the word "applicant" in § 666(a)(13) its ordinary meaning does not deprive § 666(a)(16) of its meaning.

The manner that the statute specifies for collecting the SSNs of "applicant[s]" — the SSNs must "be recorded on the application," 42 U.S.C. § 666(a)(13)(A) —underscores that Congress used "applicant" in the ordinary sense of the term. If "licensee" could be substituted for that word, the requirement of recording the SSN on the application would make no sense, because there would

be no "application" on which to record the SSN. The district court's unusual reading of "applicant" would raise additional problems: Does reading "applicant" to include "licensee" require reading "application" to include "license," so that licenses are required to bear the licensee's SSN? Congress surely did not intend to force every licensed lawyer — not to mention every licensed driver — to reveal her SSN to strangers whenever she needs to show her license to verify her bar status, driving privileges, age, or identity. Such troubling implications are easily avoided by sticking to the ordinary meanings of Congress's words, as the Supreme Court has instructed. *See Lamie*, 540 U.S. at 534; *Barnhart*, 534 U.S. at 461-62.

Even the Maryland Rules themselves distinguish between applicants and attorneys who are already licensed. Maryland law addresses applicants for the bar and licensed attorneys separately. Consequently, in order to compel disclosure of SSNs from both applicants and licensed attorneys, the Court of Appeals had to adopt both an amendment to its rules governing applications to the bar, *see* Md. Admis. R. 2(b), and a separate amendment applicable to licensed attorneys, *see* Md. R. Proc. 16-811.5(a)(1)(A).[11]

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[11] The Court of Appeals' Standing Committee on Rules of Practice and Procedure has also used the term "applicants" to describe a category distinct from licensed attorneys. In a letter to the Court of Appeals in November 2013, the Committee opined that "the collection and disclosure of SSNs from *applicants and attorneys* by [the] CPF . . . are compelled by Maryland statutes." JA 41 (emphasis added).

2. The district court erred in elevating purpose and legislative history over unambiguous statutory text.

The district court forthrightly admitted that in expanding the meaning of "applicant" to include "one already licensed," the court was eschewing a "literal definition" of the word. *Greidinger*, 30 F. Supp. 3d at 424. Instead, the court relied mainly on policy-based rationales and legislative history. *See id.* at 422-24. But "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation and internal quotation marks omitted). The fact that § 666 pursues the worthy goal of enforcing child-support obligations does not foreclose the possibility that Congress wanted to balance that goal against other worthy goals, such as protecting privacy and preventing identity theft. *See, e.g., Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993) (noting that Congress, in passing the Privacy Act, "recognized the dangers of widespread use of SSNs as universal identifiers"); S. Rep. No. 93-1183, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943 (identifying this issue as "one of the most serious manifestations of privacy concerns in the Nation").

Striking a balance between competing interests in deciding under what circumstances SSNs may be collected is the legislature's job, and courts should take Congress at its word concerning how it meant to strike that balance. *Barnhart*,

534 U.S. at 461-62 ("[A] legislature says in a statute what it means and means in a statute what it says[.]"); *accord Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (same). Reading absent words into a statute results "not in a construction of the statute, but, in effect, an enlargement of it by the court." *Lamie*, 540 U.S. at 538 (citation, internal quotation marks, and source's alteration marks omitted).

Citing *Abramski v. United States*, 134 S. Ct. 2259 (2014), the district court reasoned that reading "applicant" to include "licensee" was necessary "to avoid a 'reading [that] would undermine — indeed for all important purposes, would virtually repeal . . . the law's core provisions.'" *Greidinger v. Almand*, 30 F. Supp. 3d 413, 422 (D. Md. 2014) (quoting *Abramski*, 134 S. Ct. at 2267; alterations in *Greidinger*). But reading § 666 according to its plain language does no such thing. On any reading, § 666 provides for the collection of SSN from some individuals but not others. Even with the district's atextual understanding of "applicant," the statute's direction to collect SSNs from "any applicant for a professional license, driver's license, occupational license, recreational license, or marriage license." 42 U.S.C. § 666(a)(13)(A), cannot plausibly be read to require states to amass a database of *every* resident's SSN. If Congress thought that gaps in state data acquisition would "undermine" the effectiveness of the law, it would have written a completely different law providing for comprehensive collection of SSNs rather than partial collection through the five specific licensure processes enumerated in

§ 666(a)(13)(A) along with death certificates and certain family law proceedings, *see id.* § 666(a)(13)(B)-(C). But "[i]t is beyond [the judicial] province . . . to provide for what we might think . . . is the preferred result." *Lamie*, 540 U.S. at 542 (citation and internal quotation marks omitted).

A comparison with *Abramski*, on which the district court relied, is instructive. That case held that a federal law requiring firearms purchasers to provide detailed personal information to the seller in order to prevent unauthorized individuals from acquiring guns is violated if a "straw purchaser" — i.e., a person who buys a gun on behalf of another person — falsely denies that he is a straw purchaser and provides the requisite information about himself rather than the intended recipient of the weapon. 134 S. Ct. at 2266-72. The Court reasoned that reading the law as requiring information about the person initiating the transaction at the gun counter, rather than the intended recipient of the gun, would render the statute "utterly ineffectual, because the identification and background check would be of the wrong person" while "allowing every criminal (and drug addict and so forth) to escape that assessment and walk away with a weapon." *Id.* at 2268. Here, in stark contrast, the choice is not between a reading that would serve Congress's purpose and one that would defeat it. Rather, the choice is between two readings, both of which would serve Congress's purpose of collecting SSNs from some individuals (but not all) to assist in the collection of child support.

The district court expressed concern that a literal reading of "applicant" would treat Maryland lawyers differently from other Maryland professional licensees, who unlike lawyers must periodically reapply for their licenses. *Greidinger*, 30 F. Supp. 3d at 423. But given that the SSN collection system would not be comprehensive in any event, the differential treatment of one group is no reason to ignore the plain meaning of Congress's words. Moreover, the Supreme Court has long held that it is not irrational for Congress to pursue a goal in a piecemeal manner that stops short of using every tool at its disposal. *See, e.g., Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949). The fact that a ruling in Tankersley's favor here will not apply to a broad swath of Marylanders is no reason to reject a plain-language reading.

Finally, the fact that the House Report named uniformity in state tracking procedures as one of the goals of the Welfare Reform Act (of which § 666 was a part), *see Greidinger*, 30 F. Supp. 3d at 423, is beside the point, because the statutory term "applicant" is unambiguous. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

To apply faithfully the statute that Congress enacted, this Court should read "applicant" according to its ordinary meaning: "someone who applies for

something." Because Tankersley was not an "applicant" when defendants sought to collect his SSN, 42 U.S.C. § 666 does not apply to the CPF's attempted collection of Tankersley's SSN or the SSNs of licensed attorneys generally. The district court erred in holding the Privacy Act inapplicable here.

C. The Maryland Rules Do Not Fall Within The Statutory Criteria Of 42 U.S.C. § 405.

The Tax Reform Act provides:

> It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, [the individual's SSN].

42 U.S.C. § 405(c)(2)(C)(i). This policy overrides other provisions of federal law (including the Privacy Act) "to the extent" of any inconsistency. *Id.* § 405(c)(2)(C)(v).

Construing the scope of the Tax Reform Act, which limits Section 7 of the Privacy Act, requires the reconciliation of two federal statutes, and a court's duty in that circumstance is to "give full effect to both statutes." *In re Moore*, 907 F.2d 1476, 1479 (4th Cir. 1990). Here, this interpretive canon requires adherence to each condition in the statute authorizing states to compel disclosures that would

otherwise violate Section 7. The Court should avoid any construction that would effectively repeal the Privacy Act "unless such a construction is absolutely necessary." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (citation and internal quotation marks omitted).

The language of § 405 does not authorize a state to compel SSN disclosure for any purpose or to any entity it chooses. The statute applies only if the state law requires disclosure from particular individuals for one of a handful of enumerated purposes, and only if the SSNs are furnished to specified entities.

Again relying on its prior decision in *Greidinger*, the district court found that § 405 overrides the Privacy Act here. JA 124-25; *see Greidinger*, 30 F. Supp. 3d at 424-26. The district court's conclusion that the Maryland Rules fall within § 405 is mistaken for two independent but mutually reinforcing reasons: the CPF is not an entity authorized to collect SSNs under § 405, and the CPF's collection of SSNs is not undertaken in "the administration of [a] tax."

1. The Client Protection Fund is not an entity to which SSN disclosures may be required under § 405.

In providing that SSNs could be collected as part of the "the administration of any tax, general public assistance, driver's license, or motor vehicle registration law," Congress limited the entities to which an individual could be "require[d] . . . to furnish" his or her SSN. 42 U.S.C. § 405(c)(2)(C)(i). Specifically, the entities authorized to collect are the "State (or political subdivision thereof) or any agency

thereof having administrative responsibility for the law involved." *Id.* The statutory restriction on SSN acquisition in § 405 serves the important function of limiting the entities that are permitted to obtain SSNs through mandatory disclosure and thereby minimizing the opportunities for these sensitive numbers to be compromised through cyberattack, unauthorized disclosure, or misuse.

By requiring disclosure to the CPF, which is not responsible for the collection of any tax, *see* Md. Code, Bus. Occ. & Prof. Art. § 10-311(b) ("The purpose of the Fund is to maintain the integrity of the legal profession by paying money to reimburse losses caused by defalcations of lawyers."), the Maryland Rules at issue do not comply with § 405's limitation on entities to which individuals may be compelled to furnish their SSNs. The district court held otherwise only because it concluded that the Maryland Rules at issue fall within § 405's allowance of SSN collection by a "political subdivision" of the state. According to the court, Maryland bar members' SSNs are "requested at the behest of a subdivision of the state of Maryland" — specifically, the Court of Appeals — and therefore § 405 authorizes the Maryland Rules requiring SSN collection. *Greidinger*, 30 F. Supp. 3d at 425. This reasoning is doubly flawed.

First, the term "political subdivision" means a local government, as the legislative history of the Tax Reform Act itself makes clear. S. Rep. 94-938(I), 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 3438, 3821 (using "political

subdivision" and "local government" interchangeably in discussing the effect of the provision). That understanding is buttressed by the interpretive canon that courts must "give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous." *Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005) (citation and internal quotation marks omitted). If "political subdivision" included any state entity, then the very next clause of § 405, which authorizes SSN collection by a subset of state entities — specifically "agenc[ies] . . . having administrative responsibility for the law involved," 42 U.S.C. § 405(c)(2)(C)(i) — would be superfluous. Relatedly, by including an "agency . . . having administrative responsibility for the law involved" within the scope of § 405, Congress impliedly excluded entities — like the CPF and the Court of Appeals — *not* having such responsibility, according to the canon *expressio unius est exclusio alterius*. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general . . . rule by explicitly including a more limited one.").

The second problem with the district court's reasoning is that the statute speaks in terms of the entities *to which* the SSNs are furnished, not just the entities at whose "behest" they are furnished. Specifically, under § 405, a state (or political subdivision) "may require any individual who is or appears to be so affected to furnish *to*" specified entities. 42 U.S.C. § 405(c)(2)(C)(i) (emphasis added). For

the purpose of this limitation, then, it does not matter who orders the furnishing of SSNs, but to what entity they might be furnished. Particularly in light of the obligation to harmonize the two federal statutes at issue — the Tax Reform Act and the Privacy Act — courts should not read textual limitations on the scope of § 405 out of the statute.

Because the CPF, which sought to collect Tankersley's SSN, is not the state itself, a "political subdivision," or an "agency . . . having administrative responsibility for the [tax] law involved," *id.*, the Maryland Rules authorizing the SSN collection at issue do not come within the ambit of § 405, and so § 405 does not displace the Privacy Act here.

2. The Client Protection Fund is not administering a tax.

An independent problem with trying to shoehorn the SSN collection at issue here into the requirements of § 405 is that characterizing the CPF's collection of SSNs as "the administration of [a] tax," *id.*, defies the language of § 405.

Under § 405, a state may compel SSN disclosure from an individual "who is or appears to be . . . affected" by a tax law (among other types of law not relevant here). *Id.* The Maryland Rules reach beyond this category of individuals by mandating disclosure from each attorney "admitted to practice" without regard to whether the attorney appears to be subject to a tax law. Some Maryland bar members are not Maryland residents or are employed solely outside Maryland.

Consequently, these bar members are not, and do not appear to be, affected by state tax law.

The attempted collection of Tankersley's SSN is a case in point. Tankersley has been licensed to practice law in Maryland since 1986, but he has been a resident of Virginia or the District of Columbia and has been employed in the District throughout that time. JA 114. During this twenty-eight-year period, he has owned no property in Maryland and has not owed taxes or unemployment insurance contributions there. *Id.* The CPF knows where Tankersley lives and works, because he reports that information to the CPF; the Maryland State Bar Association directory lists Tankersley as living out of state and practicing in the District of Columbia. JA 114-15. In collecting the SSNs of attorneys such as Tankersley, who owes no taxes in Maryland, the CPF is not limiting its collection of SSNs to "individual[s] who [are] or appear[] to be . . . affected" by any state tax law, 42 U.S.C. § 405(c)(2)(C)(i), and so its SSN collection program falls outside § 405.[12]

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[12] Based on the information that the CPF routinely collects, the CPF has the ability to distinguish between attorneys who are or appear to be subject to taxation in Maryland and those who are not. Specifically, CPF regulations for identifying whether attorneys are subject to mandatory assessment look to whether an attorney has an out-of-state practice and whether she relies on bar admissions other than Maryland. *See* Regs. of the Client Protection Fund of the Bar of Md. Currently Effective, sec. (*i*)(1)-(3), *at* http://www.courts.state.md.us/cpf/pdfs/regulations.pdf.

The structure of the SSN-collection system reinforces that it is not a system for tax administration but instead part of the state's regulation of bar members. To begin with, the CPF is not a tax-collecting agency at all; rather, it is a fund that "reimburse[s] losses caused by defalcations of lawyers." Md. Code, Bus. Occ. & Prof. Art. § 10-311(b). Unsurprisingly, the Maryland Rule of Procedure requiring attorneys to provide their SSNs to the CPF does not mention taxes: "each attorney admitted to practice before the Court of Appeals . . . shall provide to the treasurer of the [Client Protection] Fund the attorney's Social Security number." Md. R. Proc. 16-811.5(a)(1)(A). A separate statute, directed not to taxpayers but to the CPF, orders that the CPF must, every year, "provide a list of lawyers who have paid an annual fee to the Fund during the previous fiscal year" to the State Department of Assessments and Taxation "to assist the Department in identifying new businesses within the State" and to the Comptroller "to assist the Comptroller in determining whether each lawyer on the list has paid all undisputed taxes and unemployment insurance contributions." Md. Code, Bus. Occ. & Prof. Art. § 10-313(a). For each person on the list, the list must include, among other information, "the federal tax identification number of the person or, if the person does not have a federal tax identification number, the Social Security number of the person." *Id.* § 10-313(b)(2)(ii). This game of telephone across state agencies does not look like a system designed for "the administration of [a] tax."

Other aspects of the patchwork statutory-regulatory structure here are also incongruous for a system of tax administration. The SSN-sharing requirement resides within the section of the state statutes regulating activities of the CPF (Title 10, Subtitle 3, Part II of the Business Occupations and Professions Code), rather than tax collection. The statutorily-suggested consequence for a lawyer found to be delinquent in payments is not (as one might expect from a system of tax administration) referral to prosecuting attorneys for underpayment of taxes but rather "refer[ral of] the matter to Bar Counsel under" the Maryland Rule governing professional misconduct by attorneys. Md. Code, Bus. Occ. & Prof. Art. § 10-313(c) (citing Maryland Rule of Procedure 16-731). These features strongly suggest that the chain of statutes through which a Maryland lawyer's SSN wends its way to state taxation authorities is not a system for "the administration of [a] tax" but is, rather, part of the state's regulatory structure for bar members. Maryland's desire to ensure that bar members are law-abiding individuals who have paid their taxes is perfectly reasonable, but it does not override the protections of the Privacy Act.

The CPF additionally discloses SSNs to the Child Support Enforcement Administration. *See* JA 32 (letter of then-Chief Judge Robert Bell). This disclosure, which is clearly not part of "the administration of any tax," independently demonstrates that the CPF's collection of SSNs falls outside the

specific criteria of § 405. In discharging its duty to "give full effect to both" the Privacy Act and the Tax Reform Act, *In re Moore*, 907 F.2d at 1479, the Court should not shortchange the former by enlarging the latter to cover the CPF's broad program of SSN collection and dissemination that does not fit squarely or exclusively within the purposes enumerated of § 405.

Indeed, finding § 405 satisfied here would not only contravene the language of § 405 but would also effectively rob Section 7 of the Privacy Act of its force. If the mere fact that SSNs collected by the CPF are shared with Maryland's taxation authorities were sufficient to turn the CPF's SSN-collection program into "the administration of [a] tax," a state could easily circumvent the protections of the Privacy Act by requiring that whatever SSNs it collects, for whatever purposes, are shared with its taxing authorities. Section 7 of the Privacy Act would become a dead letter. This Court should reject such a result.

II. TANKERSLEY'S PRIVACY ACT RIGHTS ARE ENFORCEABLE UNDER THE SUPREMACY CLAUSE AND 42 U.S.C. § 1983.

Because the facts are undisputed that defendants violated Tankersley's rights under Section 7 of the Privacy Act, and — as demonstrated in Part I — no exception renders the protections of Section 7 inapplicable here, Tankersley is entitled to summary judgment if he has a means to enforce his Privacy Act rights. And he does. Two sources of law provide Tankersley with a remedy: the Supremacy Clause and 42 U.S.C. § 1983. The district court erred in rejecting the

former basis for relief and did not address the latter. Either is sufficient to enable Tankersley to enforce his rights under Section 7 of the Privacy Act.

A. Under The Supremacy Clause, Tankersley May Seek Injunctive Relief For The Violation Of His Federal Rights.

The district court rejected Tankersley's Supremacy Clause action not because it denied the existence of such a cause of action but because it held that federal and state law do not conflict in this case. This conclusion flowed from the court's determination that 42 U.S.C. § 666 and 42 U.S.C. § 405 exempt the defendants from the commands of the Privacy Act here. JA 126. In other words, the court's reason for rejecting Tankersley's attempt to enforce his Privacy Act rights via the Supremacy Clause claim collapses into its basis for holding that defendants did not violate the Privacy Act at all. Because this holding was incorrect, as explained in the previous Part, the Court should follow its precedent recognizing the availability of a Supremacy Clause cause of action to seek injunctive relief for violations of federal law.

"A long line of cases confirms [a] right of action" for "private parties to seek injunctive relief from state statutes allegedly preempted by federal law." *United States v. South Carolina*, 720 F.3d 518, 525-26 (4th Cir. 2013) (citing as examples, among others, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 127 (4th Cir. 2008); and

Loyal Tire & Auto Center, Inc. v. Town of Woodbury, 445 F.3d 136, 149 (2d Cir. 2006) (Sotomayor, J., for the panel)). In accordance with these cases, this Court reaffirmed in *United States v. South Carolina* that the Supremacy Clause confers a right of action to challenge state laws and regulations alleged to conflict with federal law. *Id.* at 522, 526.

The contours of the Supremacy Clause right of action are currently being considered by the Supreme Court in *Armstrong v. Exceptional Child Care Center, Inc.*, No. 14-15 (U.S., argued Jan. 20, 2015). But the opposing parties to that case and the United States as amicus curiae all agree that the Supremacy Clause provides an action for a party to seek equitable relief against the enforcement of a state law or regulation that the party claims interferes with its federal rights or from which the party claims immunity under federal law. *See* Br. for Pet. at 41-43, *Armstrong* (filed Nov. 17, 2014); Br. for U.S. as Amicus Curiae at 8, *Armstrong* (filed Nov. 24, 2014); Br. for Resp. at 4-5, *Armstrong* (filed Dec. 17, 2014). That is the type of claim this Court recognized in *South Carolina*, as well. Because Tankersley's case falls squarely within that model — he seeks equitable relief (chiefly, invalidation of his suspension) from Maryland Rules of Procedure that conflict with his federal rights under the Privacy Act and are therefore preempted — he has stated a valid claim.

Conflict pre-emption exists "'where compliance with both federal and state regulations is a physical impossibility.'" *South Carolina*, 720 F.3d at 529 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)). Here, it is "physically impossib[le]" to comply both with the Privacy Act's prohibition against "deny[ing] to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number," Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note, and with the Maryland Rules' insistence that an attorney who does not disclose his SSN be suspended from the practice of law. *See* Md. R. Proc. 16-811.5(a)(1)(A) & 16-811.6(d). Therefore, the Supremacy Clause preempts these rules and provides a remedy for the violation of Tankersley's Privacy Act rights.

B. Section 7 Of The Privacy Act Is Enforceable Under 42 U.S.C. § 1983.

Independent of and addition to Tankersley's Supremacy Clause cause of action, he may also enforce Section 7 under 42 U.S.C. § 1983. The district court did not reach this issue.

Under *Blessing v. Freestone*, 520 U.S. 329 (1997), as elaborated upon in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the enforceability of a federal statutory right via § 1983 depends on two inquiries: first, whether Congress created an enforceable right, and second, whether Congress foreclosed the use of § 1983 as a remedy. *See Gonzaga*, 536 U.S. at 284-85 & n.4; *Blessing*, 520 U.S. at 340-41.

Once a plaintiff shows the former, the right in question is presumptively enforceable unless the defendant establishes the latter. *See Gonzaga*, 536 U.S. at 284 & n.4.

Regarding the first question — whether a statute creates a right enforceable under § 1983 — this Court has summarized the inquiry in these terms:

> A statute creates an enforceable right if: (1) Congress intended that the provision in question benefit the plaintiff; (2) the right ostensibly protected by the statute "is not so vague and amorphous that its enforcement would strain judicial competence"; and (3) the statute unambiguously imposes a binding obligation on the states. In analyzing these requirements, a court must be careful to ensure that the statute at issue contains "rights-creating language" and that the language is phrased in terms of the persons benefited, not in terms of a general "policy or practice."

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 210 (4th Cir. 2007) (quoting *Blessing*, 520 U.S. at 340-41, and *Gonzaga*, 536 U.S. at 284, 287, respectively). Illustrating what constitutes "rights-creating language," the Court in *Gonzaga* contrasted the language of the Family Educational Rights and Privacy Act ("FERPA") provision at issue in that case, with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Whereas the language common to Titles VI and IX focuses on individuals ("No person . . . shall . . . be subjected to discrimination") and thereby demonstrates congressional intent to create enforceable rights, the FERPA language (providing that "[n]o funds shall be made available" to any "educational agency or institution" that has a prohibited

"policy or practice") reflects an "aggregate" focus rather than a concern about "whether the needs of any particular person have been satisfied." *Gonzaga*, 536 U.S. at 288 (citation and internal quotation marks omitted). Only the former type of statute creates enforceable rights. *See id.* at 284, 287-88.

To answer the second question — whether Congress has foreclosed the use of § 1983 as a remedy — this Court looks to whether Congress has either explicitly forbidden recourse to § 1983 or has implicitly forbidden it by enacting a "'*comprehensive* enforcement scheme that is *incompatible* with individual enforcement under § 1983.'" *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (quoting *Blessing*, 520 U.S. at 341, with emphases added by this Court); *accord Gonzaga*, 536 U.S. at 284 n.4.

Applying the *Blessing*/*Gonzaga* two-step analysis, the Eleventh Circuit held in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), that Section 7 of the Privacy Act creates a right that may be enforced via § 1983. *Id.* at 1290-92. *Schweier* concerned whether Georgia could require individuals to disclose their SSNs as a prerequisite for registering to vote. *Id.* at 1285-86. Regarding the first *Blessing*/*Gonzaga* inquiry (whether the statute creates an enforceable right), the Eleventh Circuit considered whether the language of Section 7(a)(1) — which forbids the "den[ial] *to any individual* any right, benefit, or privilege provided by law because of *such individual's* refusal to disclose his social security account

number," Pub. L. No. 93-579, § 7(a)(1), *at* 5 U.S.C. § 552a note (emphasis added) — contains the "rights-creating language" required by *Gonzaga*. The court held that this language "clearly confers a *legal right on individuals*: the right to refuse to disclose his or her SSN without suffering the loss of any right, benefit, or privilege provided by law." *Schweier*, 340 F.3d at 1292 (citation and internal quotation marks omitted; emphasis in original). Furthermore, "the language of section 7 is clearly intended to benefit individuals . . . ; is specific rather than amorphous; and is clearly mandatory"; thus, "[t]o read the statute is to see that it easily meets the three criteria of *Blessing*." *Id.* Regarding the second *Blessing*/*Gonzaga* inquiry (whether Congress intended to foreclose the use of § 1983 as a remedy), the court held that because "Section 7 contains no enforcement scheme at all," it does not foreclose enforcement via § 1983. *Id.*

Although this Court has not considered whether Section 7 of the Privacy Act is enforceable via § 1983, the Eleventh Circuit's analysis of the language of Section 7 is consistent with this Court's applications of the *Blessing*/*Gonzaga* test. For instance, in *Doe v. Kidd*, 501 F.3d at 355-57, the Court held enforceable under § 1983 a provision of the Medicaid Act requiring that a "State plan for medical assistance must provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible

individuals." 42 U.S.C. § 1396a(a)(8). The Court held the provision enforceable via § 1983 because the requirement was intended to benefit "all individuals," was not vague or amorphous, and was mandatory. 501 F.3d at 356. Other cases are to similar effect. *See Hensley v. Koller*, 722 F.3d 177, 181-83 (4th Cir. 2013) (holding enforceable a provision of the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 673(a)(3), requiring that adoption assistance payments "shall be determined through agreement between the adoptive parents and the State . . . , which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents"); *Pee Dee Health Care*, 509 F.3d at 208, 210-12 (holding that a rural health clinic could invoke § 1983 to enforce a Medicaid Act provision, 42 U.S.C. § 1396a(bb)(1), under which a "state plan shall provide for payment for services . . . furnished by a rural health clinic").

Like these statutes that this Court has held enforceable, Section 7 of the Privacy Act uses mandatory language ("It shall be unlawful…"), its requirements are clear and not amorphous (states may not "deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number"), and the provision uses language that focuses on and is intended to benefit individuals ("deny to any individual . . . because of such individual's refusal"). As to the second step of the

Blessing/*Gonzaga* inquiry, the fact that Section 7 lacks a private enforcement mechanism shows that Congress has neither explicitly nor implicitly (via a "comprehensive" remedial scheme "incompatible" with private enforcement, *Doe*, 501 F.3d at 356) foreclosed reliance on § 1983.

The one court of appeals decision other than *Schweier* to address whether Section 7 of the Privacy Act is enforceable under § 1983 is *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999), on which defendants relied below. Like *Schweier*, *Dittman* held that section 7 creates an enforceable right, but *Dittman* then concluded that Congress had foreclosed § 1983 as a remedy by providing a private right of action for Section 3 of the Privacy Act but not Section 7. *See id.* at 1027-29 (relying on 5 U.S.C. § 552a(g)).

Dittman's second holding was erroneous. Its logic is inconsistent with the standard that the Supreme Court and this Court have prescribed for the second part of the *Blessing*/*Gonzaga* inquiry, which is whether Congress enacted a "'*comprehensive* enforcement scheme that is *incompatible* with individual enforcement under § 1983.'" *Doe*, 501 F.3d at 356 (quoting *Blessing*, 520 U.S. at 341, with emphasis added by this Court); *accord Gonzaga*, 536 U.S. at 284 n.4. A remedial scheme covering only a portion of the statute is plainly not "comprehensive," and enforcing Section 3 via the Privacy Act's own cause of

action is not incompatible with enforcing Section 7 through 42 U.S.C. § 1983.[13] As the Eleventh Circuit explained, "*Dittman* failed to recognize that the remedial scheme of section 3 applies only to section 3 and has no bearing on section 7. Thus, the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7." *Schwier*, 340 F.3d at 1289; *see also Szymecki v. City of Norfolk*, 2008 WL 4223620, *8-*9 (E.D. Va. Sept. 11, 2008) (following *Schweier* as more persuasive than *Dittman*).

Applying the methodology of *Gonzaga*, *Schweier*, and its own precedent, this Court should hold that Section 7 of the Privacy Act is enforceable under § 1983.

[13] That the Ninth Circuit erred in conflating distinct sections of the Privacy Act is underscored by *Blessing*, in which the Supreme Court made clear that statutory provisions must be considered individually for purposes of the § 1983 enforceability inquiry. *See Blessing*, 520 U.S. at 333 (rejecting the Ninth Circuit's blanket approach in deciding that an entire title of the Social Security Act was enforceable under § 1983, and admonishing that a "statutory scheme can[not] be analyzed so generally"); *see also Doe*, 501 F.3d at 355 ("[W]e analyze *the provision Doe invokes* . . . to determine whether that provision creates a private right enforceable under § 1983." (citing *Blessing*) (emphasis added)).

CONCLUSION

The district court's dismissal of the case and denial of summary judgment to Tankersley should be reversed.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 10,439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on March 9, 2015, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman