



COMMONWEALTH of VIRGINIA

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The Honorable Richard H. Black
Member, Senate of Virginia
Post Office Box 3026
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Dear Senator Black:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a portion of a Virginia civil identity protection statute, prohibiting the intentional communication of an individual's social security number, is federally preempted by the National Labor Relations Act, in light of a recent court decision in a North Carolina case, *Fisher v. Communications Workers of America*.¹

Response

While I am unable to render a definitive opinion due to a lack of knowledge of all the pertinent and particular facts of a future case arising in Virginia, I conclude that persuasive legal arguments exist to assert that the portion of the Virginia civil identity protection statute prohibiting the intentional communication of an individual's social security number, as contained in § 59.1-443.2(A)(1) of the *Code of Virginia*, is not preempted by the National Labor Relations Act. Under facts identical to those presented in *Fisher v. Communications Workers of America*, it is likely that Virginia's courts would reach the same result. In the more likely event of labor relations litigation arising on different facts, a much stronger prospect exists to successfully defeat a federal preemption claim.

Background

In *Fisher*, the Court of Appeals of North Carolina held that the federal National Labor Relations Act (hereinafter "NLRA") preempted an individual cause of action brought by civil suit pursuant to North Carolina's Identity Theft Protection Act, and thus affirmed the lower court's granting summary judgment on behalf of the defendants.² The North Carolina Supreme Court denied the plaintiffs' petition for appeal, and the United States Supreme Court subsequently denied plaintiffs' *writ of certiorari* in the case.³

¹ 721 S.E.2d 231 (N.C. App. 2012).

² *Fisher v. Comm'ns Workers of Am.*, 716 S.E.2d 396 (N.C. App. 2011).

³ *See Fisher*, 721 S.E.2d at 231, *cert denied* 184 L. Ed. 2d. 154 (2012).

The North Carolina Identity Theft Protection Act (hereinafter “the NC Act”) provides, in pertinent part, that a business may not, “[i]ntentionally communicate or otherwise make available to the general public an individual’s social security number.”⁴ The statute authorizes a civil cause of action for anyone aggrieved of such conduct and does not prescribe any criminal penalties.⁵ In *Fisher*, the plaintiffs sued their former labor union pursuant to the NC Act after the union posted the names and social security numbers of the plaintiffs on a bulletin board in order to publicize the recent renouncement of their membership from the organization.⁶ The plaintiffs filed a parallel complaint with the National Labor Relations Board (hereinafter “NLRB”) pursuant to the NLRA and claimed that the union’s actions exposed the plaintiffs to identity theft and amounted to a violation of Section 8(b)(1)(A) which prohibits attempted coercion by unions to prevent its members from leaving their groups.⁷ The NLRA provides for civil remedies in administrative proceedings before the NLRB, subject to federal judicial review, for aggrieved parties.⁸

The trial court in *Fisher* dismissed the plaintiffs’ claim after granting the defendants’ summary judgment motion; it held that the NLRA preempted the pertinent claim contained in the NC Act because the conduct at issue was subject to discipline under the NLRA.⁹ In its opinion affirming the ruling, the Court of Appeals analyzed the case in light of the U.S. Supreme Court case *San Diego Building Trades Council v. Garmon*.¹⁰ The *Garmon* doctrine focuses on the relationship between the NLRA and state law in the context of the Supremacy Clause of the U.S. Constitution.¹¹ It generally holds that the NLRA was designed to protect the collective bargaining process and to resolve labor disputes, and when federal and state law conflict, the conflict is resolved in favor of the federal statute.¹² *Garmon* also provides exceptions to such federal preemption, delineating when complainants may file claims under state law that might otherwise fall under NLRA jurisdiction.¹³ In its analysis, the North Carolina court examined the specific, violable conduct in the case and reasoned that if the claims under the NLRA and the NC Act involved substantially the same conduct, then the NC Act claim must be preempted.¹⁴ The court held that because both claims were based on the same instance of conduct, that plaintiffs presented an “arguable” case under the NLRA, that neither of the *Garmon* exceptions applied, and thus, the plaintiffs’ claims under the NC Act were preempted.¹⁵

⁴ N.C. Gen. Stat. § 75-62(a)(1).

⁵ N.C. Gen. Stat. § 75-62.

⁶ 716 S.E.2d at 399-400.

⁷ *Id.*

⁸ 29 U.S.C. §§ 151-69, 185. In *Fisher*, the proceedings before the NLRB had ended with a settlement between the plaintiffs and the union, without any finding by the board that the conduct at issue violated NLRA protections. See *Fisher* at 400, 402.

⁹ 716 S.E.2d at 400.

¹⁰ *Id.* at 400-09 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1955)).

¹¹ 359 U.S. 236.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Fisher* at 405.

¹⁵ *Id.* at 404.

Applicable Law and Discussion

Virginia's identity protection statutes include both civil and criminal provisions. Specifically, § 59.1-442, *et seq.*, of the *Code of Virginia* provide for civil protections and relief, and §§ 18.2-186.4 and 18.2-186.3 proscribe criminal conduct. The *Fisher* case is a North Carolina appellate decision that did not reach the North Carolina Supreme Court and represents, at best, persuasive authority with no binding precedent on Virginia courts.¹⁶ Furthermore, I located no other published state or federal opinions that address NLRA preemption over a state identity protection statute. Specifically, no Virginia court has addressed the *Fisher* scenario of competing claims under the NLRA and any provision within its identity protection statutes. While Virginia's courts may well follow the *Fisher* outcome on substantially similar facts, this opinion will explore the legal arguments available to potentially avoid such a result. Indeed, it is far more likely that such labor relations litigation would arise in Virginia's courts on facts different from those present in *Fisher*.

The Virginia Personal Information Privacy Act (hereinafter "VPIPA"),¹⁷ of the *Code of Virginia* provides civil remedies for misuse of social security numbers in a fashion similar to the NC Act under which the plaintiffs in *Fisher* filed their claim.¹⁸ The VPIPA expressly provides that a person shall not, "[i]ntentionally communicate another individual's social security number to the general public."¹⁹ The law characterizes such conduct as a "prohibited practice" under the Virginia Consumer Protection Act and thus subject to the remedies the latter provides.²⁰ Under the VPIPA, an aggrieved individual may file a civil cause of action for actual damages or \$500, whichever is greater, per incident.²¹ The Attorney General's Office also may investigate and file an action for injunctive relief or imposition of a civil penalty.²²

Section 8(b)(1)(A) of the NLRA provides that,

It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.^[23]

Section 7 of the NLRA "protects an individual's right to refrain from union organizing, union membership, and other union activities[.]"²⁴

¹⁶ *Fisher* involved only preemption issues respecting the NC Act's civil protections against the union representatives' alleged unlawful posting of the plaintiffs' social security numbers. *See Fisher* at 399-400, 406. Therefore, this opinion is confined to an analysis, in light of *Fisher*, of potential preemption of that portion of the Virginia identity protection statute that prohibits the intentional communication of "another individual's social security number to the general public." *See* VA. CODE ANN. § 59.1-443.2(A)(1) (Supp. 2012).

¹⁷ VA. CODE ANN. §§ 59.1-442 through 59.1-444 (2006 & Supp. 2012).

¹⁸ *See* § 59.1-444 (2006). *See also* §§ 59.1-200 (Supp. 2012) & 59.1-204 (2006).

¹⁹ Section 59.1-443.2(A)(1) (Supp. 2012).

²⁰ Sections 59.1-444 (2006); 59.1-196 through 59.1-207 (2006 & Supp. 2012).

²¹ Section 59.1-204(A) (2006). A willful violation may garner enhanced civil consequences. *Id.*

²² Sections 59.1-203 (Supp. 2012); 59.1-206 (Supp. 2012).

²³ 29 U.S.C. § 158.

²⁴ *See Fisher* at 403 9quoting 29 U.S.C. § 157).

The U.S. Supreme Court's decision in *Garmon* and its progeny control any potential analysis arising from parallel claims under the NLRA and Virginia's civil identity protection statutes. In *Garmon*, a union requested that a business hire only their members.²⁵ The business in turn refused, noting that none of its employees had expressed a desire to join a union and that the business would not negotiate until the employees designated the requesting union a collective bargaining agent.²⁶ The union responded by picketing in front of the business and pressuring customers and suppliers who patronized it.²⁷ The Court found that the purpose of the union pressure was to compel execution of a collective bargaining agreement.²⁸ The business ultimately filed a tortious interference suit in state court claiming unfair labor practices.²⁹

The suit was filed pursuant to a state law designed specifically to address labor disputes.³⁰ The state court ruled in favor of the business and granted damages.³¹ The U.S. Supreme Court vacated the state judgment and ruled that the NLRA preempted a claim under the state labor law. The Court held that preemption triggers, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."³² The Court further stated that this is true regardless of whether the state law itself is one of "broad general application" or one specifically designed to address labor disputes.³³ The Court nonetheless outlined two exceptions to preemption: 1) "when the activity regulated was merely a peripheral concern of the NLRA," or 2) "when the conduct regulated touches interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, one could not infer that Congress had deprived the States of the power to act."³⁴ The Court expanded on the second exception, explaining that states can act to maintain domestic peace, including to provide tort remedies, prevent violence, and protect against imminent threats to the public order.³⁵

As a threshold issue to preemption, *Garmon* held that it must be clear that the activities the state purports to regulate are not covered by the NLRA.³⁶ In *Garmon*, the state attempted to adjudicate a labor dispute by specifically interpreting state labor law as part of a tortious interference claim.³⁷ Such an explicit state attempt to address labor/management issues is nonexistent in a claim under the VPIPA. The *Garmon* Court further held that conduct adjudicated under state laws of "broad general application" may also be preempted.³⁸ The VPIPA is relatively narrowly tailored to protect the personal privacy interests of Virginia citizens. A mere text comparison of § 8 of the NLRA and the VPIPA reveals that the NLRA

²⁵ See *Garmon* at 237.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 239.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 244.

³³ *Id.*

³⁴ *Id.* at 243-44.

³⁵ *Id.* at 247.

³⁶ *Id.* at 244.

³⁷ *Id.* at 239.

³⁸ *Id.* at 244.

seeks to regulate coercion by labor organizations upon its members, and the VPIPA seeks to regulate intentional publication of social security numbers, regardless of whether it occurs in the labor context.³⁹ Nowhere within the VPIPA does its language suggest that Virginia purports to regulate union coercion in the labor context or address a worker's labor such as those set forth in Sections 7 and 8 of the NLRA.⁴⁰ Nor did the Court in *Fisher* find that the NLRA's scope definitively extend to intentional public communication of another's social security number.⁴¹ Even the title of the enactment, the "Virginia Personal Information Privacy Act," suggests the statute is focused solely on protecting the personal privacy of citizens.⁴²

Notwithstanding *Fisher's* contrary result on the facts and circumstance of that particular case, *Garmon* does not require preemption merely because the same instance of conduct could serve as a basis for both a state law claim and a claim under the NLRA.⁴³ The Supreme Court repeatedly has held that the same instance of conduct can indeed serve as a basis for both a state law claim and a claim under the NLRA as long as the issues or "controversies" are not identical. In *Linn v. United Plant Guard Workers of America*, a business owner filed a defamation lawsuit in state court against a union that repeatedly libeled the business.⁴⁴ The owner simultaneously filed a complaint with the NLRB under § 8 of the NLRA alleging coercive union tactics based on the exact same conduct.⁴⁵ The Court ruled that the state law claim was not preempted and stated,

Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statement does not in and of itself constitute an unfair labor practice....[The Board] looks only to the *coercive or misleading nature* of the statements rather than the defamation quality.^[46]

It later noted, "When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief."⁴⁷

Similarly, in *Sears v. San Diego County District Council of Carpenters*, Sears filed a state trespass suit seeking injunctive relief against a union based upon the union's picketing outside a local Sears store.⁴⁸ The union argued that any claim against the picketing was a matter of exclusive jurisdiction under the NLRA and thus the state action was preempted.⁴⁹ The Court ruled that the state law claim was not preempted and held that the "controversy" presented to the state court and potentially the NLRB was not the same, despite the claims arising from the same conduct.⁵⁰ It noted,

³⁹ See 29 U.S.C. §158; VA. CODE ANN. § 59.1-443.2(A)(1).

⁴⁰ See VA. CODE ANN. § 59.1-443.2.

⁴¹ See *Fisher* at 400, 403-404.

⁴² *Id.*

⁴³ *Fisher* at 405.

⁴⁴ 383 U.S. 53, 56 (1966).

⁴⁵ *Id.* at 56-57.

⁴⁶ *Id.* at 63 (emphasis added).

⁴⁷ *Id.* at 66.

⁴⁸ 436 U.S. 180, 182-83 (1978).

⁴⁹ *Id.* at 182-84.

⁵⁰ *Id.* at 198.

If Sears had filed a charge [with the NLRB], the federal issue would have been whether the picketing had a recognitional or work-reassignment objective;...Conversely, in the state action, Sears only challenged the location of the picketing, whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.^[51]

As in *Linn* and *Sears*, claims based on the same conduct under both the VPIPA and § 8 of the NLRA would involve two separate and distinct controversies. A claim under the VPIPA would focus solely on whether the actor had intentionally published another person's social security numbers. A parallel claim under § 8 of the NLRA would focus on whether these actions were attributable to union activity and indeed *coercive* in nature. In other words, and borrowing from *Sears*, whether the publication of a social security number had the objective of being coercive in nature is irrelevant to the state claim. Thus, a claim pursuant to VPIPA similar to the factual scenario presented in *Fisher* may not be federally preempted.⁵²

As a second prerequisite to preemption, the Supreme Court has held that, in addition to showing that a state is clearly regulating conduct, *i.e.* a "controversy," within NLRA purview, the party arguing preemption maintains the burden of showing at least an "arguable" case under the NLRA.⁵³ In the scenario presented in *Fisher*, plaintiffs presented an arguable claim before the NLRB given the conduct occurred within the labor context and the apparent coercive manner by which the union published the members' social security numbers. Indeed the plaintiffs in *Fisher* had filed a case before the NLRB prior to filing the state action.⁵⁴ The *Fisher* court discussed at some length the detailed factual circumstances of this issue in its opinion.⁵⁵ But while there appears to be a solid argument under the *Fisher* fact pattern to satisfy the "arguable case" requirement of preemption, as noted earlier, an argument that a claim under the VPIPA is clearly a regulated activity covered under the NLRA may prove unpersuasive.⁵⁶ Thus, preemption may not attach.

The inquiry, however, does not end there. Assuming, *arguendo*, that a court finds that Virginia clearly purports to regulate coercive labor tactics in a claim under the VPIPA, and that there exists an arguable case under the NLRA, it must then further address whether such conduct falls within one of two exceptions to preemption delineated in *Garmon*.

⁵¹ *Id.*

⁵² The *Fisher* court adopts a narrow view in this regard and distinguishes *Linn* because the conduct at issue involved defamation and not identity protection. 716 S.E.2d at 406. Yet, the Supreme Court has employed a methodology that distinguishes between the same instance of conduct and whether it is the same "controversy" in NLRA preemption cases decided in the wake of *Garmon*. See *Farmer v. United Bd. of Carpenters & Joiners*, 430 U.S. 290 (1977) (parallel claims allowed in same instance of conduct in an emotional distress case); *Belknap v. Hale*, 463 U.S. 491 (1983) (parallel claims allowed in same instance of conduct in a misrepresentation case); *Sears*, 436 U.S. 180 (parallel claims allowed in same instance of conduct in a trespass case).

⁵³ See *Int'l Longshoremen's Ass'n v. Davis*, 476 US 380, 396 (1986).

⁵⁴ 716 S.E.2d at 399-400.

⁵⁵ *Id.* at 402-04.

⁵⁶ Under *Garmon*, prior NLRB action can also serve as a basis for preemption, which is a procedural, factual inquiry in every case as to when a claim was filed and the manner in which a board ruled. 359 U.S. at 245-46. As noted above, in *Fisher*, the court found that the board did not give a "definite decision" to trigger such preemption, thus the court relied solely on the "arguable case" argument in finding preemption. 716 S.E.2d at 404.

In the first exception, *Garmon* holds that a state law claim shall not be preempted where “the activity is merely a peripheral concern of the NLRA.”⁵⁷ The Court in *Linn* addressed this particular exception in the context of the business owner’s defamation suit against the union.⁵⁸ It held that

the exercise of state jurisdiction here would be merely a peripheral concern of the [NLRA] provided it is limited to redressing libel issues with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that an overriding state interest in protecting its residents from malicious libels should be recognized in these circumstances.^[59]

Again, in the instant factual scenario, a state claim under VPIPA would be limited simply to whether a person intentionally published another’s social security number, not whether the union was being coercive in doing so. And while the publishing of social security numbers was the method by which the union sought to coerce its members, a Virginia court may view such conduct as of peripheral concern to the NLRA’s objectives to quell coercive activities. Furthermore, by establishing a private cause of action in tort, and authorizing causes of action on behalf of the Commonwealth for injunctive relief and for civil penalties, Virginia enunciates a strong public interest in ensuring the security of its citizens by reducing their risk of identity theft through protection of their social security numbers.⁶⁰

As the second exception, *Garmon* establishes that a state law shall not be preempted “when the activity regulated touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, one could not infer that Congress had deprived the States of the power to act.”⁶¹ This “local interest” exception has been expounded upon by the Court. In *Farmer v. United Brotherhood of Carpenters*, a union member filed a state claim against his union for intentional infliction of emotional distress, among other claims, based on conduct of abuse and harassment.⁶² The union argued that such a claim was preempted by the NLRA.⁶³ In ruling that preemption did not apply, the Court specifically addressed the “local interest” exception and held that there was a significant state interest in protecting citizens from harassment and stating that federal protection should not extend to such outrageous conduct in a civilized society.⁶⁴ The Court further found that, although the conduct occurred in the course of a labor dispute, the exercise of jurisdiction over the intentional infliction of emotional distress claim entailed little risk of interfering with a determination of the NLRB, namely whether the harassment was an unfair labor practice under § 8 of the NLRA.⁶⁵

Likewise, in *Belknap v. Hale*, former employees of a local hardware store filed a state breach of contract and misrepresentation claim against their former employer after the business promised them permanent employment upon hiring them as replacement workers during a strike of the business’ union workers.⁶⁶ Upon conclusion of the strike, the business fired the replacement workers.⁶⁷ On appeal, the

⁵⁷ 359 U.S. at 243.

⁵⁸ 383 U.S. at 61-62.

⁵⁹ *Id.* at 61 (citing *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1947)).

⁶⁰ See VA. CODE ANN. §§ 59.1-200, 203 and 206 (Supp. 2012), and 59.1-204 (2006).

⁶¹ 359 U.S. at 244.

⁶² 430 U.S. at 293.

⁶³ *Id.* at 294-95.

⁶⁴ *Id.* at 302-05.

⁶⁵ *Id.* at 305.

⁶⁶ 463 U.S. at 493-97.

business argued that the breach of contract and misrepresentation suit were preempted by the unfair labor practice provisions of the NLRA.⁶⁸ The Court disagreed and, focusing on the local interest exception, ruled that the state “surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.”⁶⁹ The Court also noted that, although consisting of the same conduct, the state claim would not interfere with an NLRB adjudication because it focuses on whether the business made a misrepresentation, not on whether an unfair labor practice infringed workers’ rights pursuant to the NLRA.⁷⁰

As in an emotional distress case or misrepresentation case, Virginia certainly has a significant interest in protecting its citizens from identity theft and ensuring their personal privacy. This is clearly evident in recent years as the General Assembly has enacted, in addition to the VPIPA, legislation preventing disclosure of social security numbers on public documents, preventing disclosure of credit card numbers on restaurant receipts, requiring notice of database breaches containing personal information, and increasing penalties for criminal identity theft.⁷¹ Furthermore, the U.S. Federal Trade Commission reported for the 2011 calendar year 1,810,013 consumer complaints in the U.S. related to identity theft and fraud, an increase of close to 1.5 million per year from the number of complaints ten years prior, with Virginia ranking in the top half at number five out of fifty in fraud and related complaints, and number twenty-one out of fifty in identity theft complaints.⁷² Identity theft and related fraud clearly is a rapidly growing problem. Insulating organized labor from the penalties set forth in the VPIPA and thereby denying its citizens the privacy protections afforded in the Act would set a dangerous precedent.

Finally, as an alternative argument, the VPIPA can be characterized as an exercise of Virginia’s police powers and not subject to NLRA preemption. In the wake of *Garmon*, the Virginia Supreme Court has held that Congress “has not occupied and closed the file” on labor relations affecting interstate commerce to the exclusion of the states’ traditional authority to exercise their police power, provided the state action “does not contravene the provisions of the NLRA.”⁷³ In *National Maritime v. Norfolk*, appellants, the National Maritime Union, AFL-CIO, argued that § 8 of the NLRA preempted a city ordinance requiring a use permit for their hiring hall in Norfolk.⁷⁴ The court held that, “[i]t is well settled that the powers of a state to legislate in the exercise of its police power is coordinate with the power of the Federal government to legislate in matters affecting interstate commerce.”⁷⁵ In upholding the city ordinance, the court ruled that an intention of Congress to exclude the states from exerting their police power must be “clearly manifested.”⁷⁶ Unless a statute seeks to control the “fundamental right to self-

⁶⁷ *Id.* at 496.

⁶⁸ *Id.* at 497.

⁶⁹ *Id.* at 511.

⁷⁰ *Id.* at 510.

⁷¹ See VA. CODE ANN. §§ 2.2-3808 (2010); 2.2-3808.1 (2007); 6.2-429 (2010); 18.2-186.6 (2008); 18.2-186.3(D) (2009).

⁷² See FEDERAL TRADE COMMISSION, *Consumer Sentinel Network Data Book for January - December 2011* at 5, 15 (Feb. 2012).

⁷³ See *Nat’l Mar. v. Norfolk*, 202 Va. 672, 677, 119 S.E.2d 307, 310 (1961).

⁷⁴ *Id.* at 673-75, 119 S.E.2d 308-10.

⁷⁵ *Id.* at 676-77, 119 S.E.2d 311.

⁷⁶ *Id.* at 677-78, 119 S.E.2d 311 (quoting *Reid v. Colorado*, 187 U.S. 137, 148 (1902)).

organization and collective bargaining” it must be upheld.⁷⁷ The court further stated that, when seeking to preempt a state’s statutory exercise of police power, “the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together.”⁷⁸

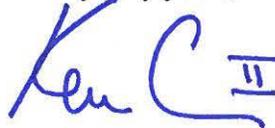
There is no evidence that Congress has “clearly manifested” an intent within the NLRA to preempt Virginia from exercising its police power to prohibit intentional public disclosure of social security numbers in furtherance of protecting its citizens.⁷⁹ As the court notes, the NLRA is designed to occupy the sphere of self-organization, labor disputes and collective bargaining.⁸⁰ It was not written to prevent potential identity theft through protection of social security numbers, as is the goal of the VPIPA. Furthermore, there is nothing to suggest a direct conflict between these statutes or that they cannot consistently stand together. One can comply with both statutes without conflict. Accordingly, the VPIPA arguably does not conflict with the NLRA and a state claim may not be preempted, as established by the ruling in *National Maritime*.

Conclusion

Accordingly, while I am unable to render a definitive opinion due to a lack of knowledge of all the pertinent and particular facts of a future case arising in Virginia, I conclude that persuasive legal arguments exist to assert that the portion of the Virginia identity protection statute prohibiting the intentional communication of an individual’s social security number, as contained in § 59.1-443.2(A)(1) of the *Code of Virginia*, is not preempted by the National Labor Relations Act. Under facts identical to those presented in *Fisher v. Communications Workers of America*, it is likely that Virginia’s courts would reach the same result. In the more likely event of labor relations litigation arising on different facts, a much stronger prospect exists to successfully defeat a federal preemption claim.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁷⁷ *Id.* at 678, 119 S.E.2d 311.

⁷⁸ *Id.* at 677, 119 S.E.2d 311 (quoting *Reid*, 187 U.S. at 148).

⁷⁹ Traditionally, police powers include anything that promotes the “health, safety, morals, comfort, prosperity or general welfare of the general public.” *Id.* at 678, 119 S.E.2d 311. *See also* *Joyner v. Centre Motor Co.*, 192 Va. 627, 636, 66 S.E.2d 469, 474 (1951) (discussing state’s police powers to promote public safety, health, morals or general welfare); *Sch. Bd. v. U.S. Gypsum Co.*, 234 Va. 32, 39, 360 S.E.2d 325, 329 (1987) (police powers designed to reduce a hazard to public health, safety, morals and general welfare). Prohibiting the public disclosure of a citizen’s social security number promotes the safety, prosperity and general welfare of the public by protecting such a valuable piece of personal identifying information. Thus, § 59.1-443.2(A)(1) logically can be characterized as an exercise of the Commonwealth’s police powers.

⁸⁰ 202 Va. at 678, 119 S.E.2d 311.