No. 11-

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

HONORABLE THOMAS A. BEDELL, JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY; LANA S. EDDY LUBY; AND CARLA J. BLANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

E. KAY FULLER,
MARTIN & SEIBERT, L.C.,
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405

LAURA A. FOGGAN
THOMAS R. MCCARTHY
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
HAYDEN A. COLEMAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
sheila.birnbaum@skadden.com

Attorneys for Petitioner

237733

QUESTIONS PRESENTED

The dispute in this case centers on a protective order entered in a personal injury lawsuit arising out of an automobile accident in West Virginia. West Virginia's insurance regulations – like similar regulations in almost every state – contain strict requirements that protect a policyholder's personal health information against improper use and dissemination to third parties. *See, e.g.*, W. Va. Code R. § 114-57-15.1 (2011). However, these regulations also contain a crucial exception which authorizes the use of "nonpublic personal health information . . . for the . . . detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity," W. Va. Code R. § 114-57-15.2 (2011), and impose an affirmative obligation on insurers like State Farm to report suspected fraud to the West Virginia Insurance Commissioner's Fraud Unit, W. Va. Code § 33-41-5(a) (2009).

Though contractually obligated to provide State Farm with access to her medical records in connection with her claim for reimbursement for personal injury, Plaintiff below refused to do so and filed a lawsuit. The West Virginia courts required Plaintiff to produce these records, but only upon the entry of a blanket protective order that: (i) conflicts with state and federal mandatory retention and reporting requirements (including the Medicare Act); (ii) reaches materials not obtained through discovery; (iii) mandates the destruction of lawfully maintained business records; and (iv) is wholly unnecessary to protect an insured's

interest in keeping his or her "medical information" confidential. The questions presented are:

1. Whether the protective order's prior restraints on speech and document destruction requirements survive First Amendment scrutiny under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

2. Whether the protective order violates the Full Faith and Credit Clause and the Due Process Clause when the order conflicts with multiple state and federal laws and regulations regarding document retention and reporting duties.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

State Farm Mutual Automobile Insurance Company is the Petitioner before this Court and a Defendant below. Pursuant to this Court's Rule 29.6, undersigned counsel state that Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company. It has no parent company and does not issue stock.

Lana S. Eddy Luby, as the Personal Representative of the Estate of Jeremy Jay Thomas, is a Respondent before this Court and a Defendant below.

The Honorable Thomas A. Bedell of the Circuit Court of Harrison County, West Virginia, is a Respondent before this Court.

Carla Jayne Blank, individually and in her capacity as the Personal Representative of the Estate of Lynn Robert Blank, is a Respondent before this Court and the Plaintiff below.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, RULES & REGULATIONS

MISCELLANEOUS

Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (App. 1a-64a), to be published in S.E.2d, is currently available at 2011 WL 1486100. A related opinion of the West Virginia Supreme Court is reported at 697 S.E.2d 730. (App. 65a-91a.)

STATEMENT OF JURISDICTION

The judgment of the West Virginia Supreme Court was entered on April 1, 2011. State Farm's petition for rehearing was denied on May 25, 2011. This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a). As this Court has repeatedly held, a "proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment" subject to review in this Court. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931) (collecting cases); *accord, e.g.*, *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *see also Bd. of Educ. v. Superior Court*, 448 U.S. 1343, 1345-46 (1980) (Rehnquist, J., denying stay application as Circuit Justice).

CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I.

The Full Faith and Credit Clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This petition presents a recurring issue of extraordinary importance to the property and casualty insurance industry, state insurance regulators, and consumers in West Virginia and throughout the United States: whether, consistent with the First Amendment, the Full Faith and Credit Clause, and due process, a trial court may enter a blanket protective order that: (i) conflicts with state and federal mandatory retention and reporting requirements (including the Medicare Act); (ii) reaches materials not obtained through discovery; (iii) mandates the destruction of lawfully maintained business records; and (iv) is wholly

unnecessary to protect an insured's interest in keeping his or her "medical information" confidential.

The West Virginia Supreme Court initially and unanimously found that the trial court exceeded its authority under Rule 26(c) of the West Virginia Rules of Civil Procedure[1] by entering a protective order that conflicted with the regulations promulgated by the West Virginia Insurance Commissioner. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 697 S.E.2d 730, 737 (W. Va. 2010) ("*State Farm I*"). (App. 84a-85a.) The trial court then issued a second order modifying two of the prior order's offending terms. Though the appellate court recognized that the second order (which is the Protective Order at issue here) was "substantially the same as the previous order," a sharply divided court nevertheless declined to strike down the second order by a 3-2 vote. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, No. 35738, slip op. at 4 (W. Va. Apr. 1, 2011) (to be published in S.E.2d) ("*State Farm II*") (App. 9a).

Review is warranted because the majority's decision is repugnant to the First Amendment and

---

[1] Rule 26(c) of the West Virginia Rules of Civil Procedure "is substantially equivalent to Rule 26(c) of the Federal Rules of Civil Procedure," *Truman v. Farmers & Merchants Bank*, 375 S.E.2d 765, 768 (W. Va. 1988), and is interpreted consistently with federal case law. *Id.*; *see also State ex rel. Paige v. Canady*, 475 S.E.2d 154, 160 (W. Va. 1996) (observing that W. Va. Rule 26(c) "is nearly identical to Rule 26(c) as contained in the Federal Rules of Civil Procedure" and that the court "look[s] to federal case law for guidance").

conflicts with this Court's decisions in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). By its plain terms, the Protective Order forbids State Farm from reporting instances of suspected insurance fraud to state and federal officials – which State Farm is required to do under state and federal law. It further mandates destruction of all State Farm business records containing Plaintiff's "medical information." The Protective Order itself makes clear that these prohibitions and destruction requirements reach material that State Farm obtained, or is contractually entitled to obtain, *outside of litigation*. *Seattle Times*, however, instructs that a protective order which restricts the dissemination of information "gained through means independent of the court's processes" is an impermissible prior restraint on speech. *Id.* at 34. Likewise, in *Sorrell*, this Court struck down a statute that "prohibit[ed] a speaker from conveying information that the speaker already possesse[d]." *Sorrell*, 131 S. Ct. at 2665 (internal quotation marks and citation omitted).

The West Virginia Supreme Court decision further conflicts with decisions of the Second, Third, Seventh, Ninth, and District of Columbia Circuits, which have each struck down on First Amendment grounds protective orders that – like the trial court's Protective Order here – restrict the use of information and materials not obtained through the discovery process. *See, e.g.*, *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-46 (2d Cir. 1983) (striking down overbroad protective order as "prior restraint on

the defendants' First Amendment right" and explaining that Rule 26(c) "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so").

State Farm II raises additional constitutional issues of full faith and credit and due process by creating conflicting obligations between the Protective Order and both federal law, such as the Medicare Act, and state law, such as West Virginia's mandatory fraud reporting regulations and Illinois' document retention requirements.

These multiple legal errors have significant practical consequences beyond the immediate litigation. In the past year, State Farm has seen a sharp increase in requests for protective orders in West Virginia and in other states that seek restrictions well beyond established privacy protections.[2] The result of these case-by-case protective orders is a patchwork of judicially constructed privacy requirements, often contravening state and federal laws and regulations and impinging on the ability of insurance regulators to govern the conduct of insurers. If left uncorrected, *State Farm II* will result in an unconstitutional abridgment of the First Amendment rights of State

---

[2] *See, e.g.*, *Huggins v. Woodward Video, LLC*, Civ. 10-C-176-1 (Cir. Ct. Harrison Cnty., W. Va. May 23, 2011) (entering substantially identical protective order) (App. 105a-111a); *Tracy v. State Farm Mut. Auto. Ins. Co.*, 10 CV 176 (Colo. Dist. Ct. July 1, 2010) (entering protective order that prohibits maintaining medical records in electronic database and limits their use for fraud reporting) (App. 112a-115a).

Farm and other insurers, which, in turn, will undermine the ability of governmental and law enforcement officials, insurance regulators, and the insurance industry to detect and prosecute otherwise preventable insurance fraud. Review by this Court is warranted.

STATEMENT OF THE CASE

A. Regulatory Background

Though the ostensible basis for the Protective Order is the protection of Plaintiff's privacy interest in her medical records, West Virginia insurance regulations already protect a policyholder's nonpublic personal health information against improper use and dissemination to third parties. West Virginia's regulations are not unique – they are derived from the National Association of Insurance Commissioners ("NAIC") Privacy of Consumer Financial and Health Information Regulation, which was developed to effect uniformity throughout the United States for the treatment of confidential information. Specifically, West Virginia insurance regulations provide that, with limited exceptions, an insurer "shall not disclose nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer whose non-public health information is sought to be disclosed." W. Va. Code R. § 114-57-15.1 (2011). Insurers like State Farm are required to "implement a comprehensive written information security program that includes administrative, technical and physical safeguards for the protection of consumer information." *Id.* § 62-3.1;

see also W. Va. Code § 33-6F-1(a) (2009) ("No person shall disclose any nonpublic personal information contrary to the provisions of Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999)."). In keeping with this mandate, State Farm has implemented company-specific policies and procedures designed to protect the privacy of medical information of claimants such as Plaintiff. Federal courts in West Virginia have recognized that these regulations and procedures are sufficient to protect a plaintiff's privacy interests. *See, e.g.*, *Warren v. Rodriguez-Hernandez*, Civ. A. No. 5:10CV25, 2010 WL 3668063, at *5 (N.D.W. Va. Sept. 15, 2010) (declining to enter order prohibiting dissemination of plaintiffs' medical records because there was no showing that existing protections were insufficient to secure plaintiffs' privacy interests).

At the same time, the regulations authorize the use of "nonpublic personal health information . . . for the . . . detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity." W. Va. Code R. § 114-57-15.2. Indeed, the insurance code affirmatively requires insurers like State Farm to report suspected fraud to the West Virginia Insurance Commissioner's Fraud Unit. W. Va. Code § 33-41-5(a) (2009).

In addition to the state requirement, there are also federal reporting requirements. For instance, section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), 42 U.S.C. § 1395y(b)(8), imposes mandatory obligations on responsible reporting entities (including automobile liability insurers such as State Farm) to report any payment

made to Medicare beneficiaries. There are severe penalties for not properly reporting such payments, *see id.* § 1395y(b)(8)(E)(i) ("$1,000 for each day of noncompliance"). Moreover, State Farm must maintain confidential medical records well after claims are resolved to determine when or whether there is a duty to report payments and later to demonstrate the basis for its determination.

B. Prevention and Detection of Insurance Fraud

Detecting and preventing insurance fraud is an issue of paramount importance to the federal government and to state governments alike. The Coalition Against Insurance Fraud estimates that insurance fraud costs Americans at least $80 billion a year,[3] or *nearly $950 per family on an annual basis*. State insurance regulators have created 37 fraud bureaus in 45 states – including West Virginia – to investigate insurance fraud largely through coordination with insurance companies like State Farm. State Farm and other insurers are called upon on a regular basis to respond to subpoenas of state and federal law enforcement seeking to investigate insurance fraud.

---

[3] *See* Coalition Against Insurance Fraud, Consumer Information, Insurance Fraud Backgrounder, http://www.insurancefraud.org/fraud_backgrounder.htm, last visited Aug. 14, 2011.

Given that criminals are adept at disguising their claims to look like routine and unobjectionable insurance claims, fraud detection and investigation require patience, careful scrutiny, and analytical tools capable of processing information across millions of claims. Indeed, on any given day, over 50,000 casualty insurance claims are filed with numerous insurers across the country.

One way insurers search for fraudulent claims is to utilize a national claim database maintained by the Insurance Services Office, Inc. ("ISO"). This database collects claims information (which does not include confidential medical records) from thousands of insurers and other sources. A comparison of new claim information with historic information in the database can often identify potentially fraudulent claims, or patterns of fraudulent claims, which are then investigated by State Farm. If, after this investigation, State Farm believes that the claim is probably fraudulent, it generally must report it to the state insurance commissioner. *See, e.g.*, W. Va. Code § 33-41-5(a); NAIC Model Laws, Regulations, and Guidelines 680-1, § 6(A) (2011). State Farm may also refer the claim to the National Insurance Crime Bureau ("NICB"), which is a not-for-profit organization that partners with insurers and law enforcement agencies to facilitate the identification, detection, and prosecution of insurance criminals.

The key for insurers, law enforcement, and the NICB is to piece together disparate pieces of information that, in and of themselves, appear quite innocent, but collectively indicate a pattern of fraud.

The necessity of this type of information sharing is expressly recognized by the NAIC's Model Rules, which permit "the disclosure of nonpublic personal health information . . . [for the] detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity." NAIC Model Laws, Regulations, and Guidelines 672-1, § 18(B) (2011); *see also* W. Va. Code R. § 114-57-15.2. West Virginia has an active fraud unit which has identified and prosecuted fraud cases resulting in significant savings to consumers.[4]

Protective orders like the one in this case, which are increasingly being sought, severely undercut the ability of regulators, law enforcement agencies and the NICB to detect and prosecute fraud effectively in two ways. First, they impose prior restraints that prevent fraud reporting in the first instance. Second, the restraints and mandatory document destruction requirements preclude law enforcement or others from access to impacted files should they become relevant to an investigation. If such orders become more prevalent, the damage to antifraud efforts will continue to grow until it reaches a tipping point where law enforcement action becomes realistically unsustainable, and otherwise preventable fraud will go undetected. The net result will be the creation of safe havens for

---

[4] *See* W. Va. Offices of the Ins. Comm'r, *2009 Annual Report*, *available at* http://www.wvinsurance.gov/LinkClick.aspx?fileticket=Hq-kLR14yKM%3d&tabid=207&mid=799 (last visited Aug. 16, 2011).

fraudfeasors to operate within, and the imposition of a "fraud tax" on all Americans.

C. The *Blank* Lawsuit

The *Blank* litigation arose out of a March 20, 2008, two-vehicle accident in which Lynn Robert Blank was killed and Plaintiff Carla Blank ("Plaintiff") was injured. Also killed was Jeremy Thomas, the driver of the other vehicle involved in the accident. Mr. Thomas and the Blanks were both insured by State Farm. State Farm offered all available liability and underinsured motorist ("UIM") limits with respect to Mr. Blank's death claim. Carla Blank asserted her own personal injury claim in the lawsuit, and initially provided State Farm with certain medical records concerning her claim. However, upon appearance of counsel, on July 31, 2008, Ms. Blank revoked the prior medical authorization forms she had executed. After counsel's revocation of the authorization, State Farm repeatedly requested medical records or an authorization as required under the terms of the policy. Ms. Blank refused each request.

1. Proceedings in the Trial Court

On February 12, 2009, Plaintiff filed suit in the Circuit Court of Harrison County against the Estate of Jeremy Thomas and State Farm, seeking, *inter alia*, UIM benefits. State Farm continued to seek the records or authorization after suit was filed, reminding Plaintiff that she was under a contractual duty to provide State Farm with a medical authorization and

failure to do so constituted a material breach of the insurance policy. Plaintiff steadfastly refused to provide any medical information unless State Farm executed the protective order that Plaintiff's counsel had drafted. State Farm responded that, though existing laws and regulations as well as State Farm's internal protocols were more than sufficient to safeguard the confidentiality of Plaintiff's medical records, the company was nevertheless willing to enter into a protective order, but simply could not agree to the onerous terms of the order sought by Plaintiff – such as a prohibition on scanning records into State Farm's electronic claim file, a blanket prohibition of use of the records to detect or prevent fraud, and a requirement to return or destroy the records at the conclusion of the litigation. As an alternative, State Farm proffered a protective order consistent with existing laws and regulations and without undue additional restrictions, which Plaintiff refused.[5]

State Farm also sought through formal discovery the medical authorization that she was required to

[5] Perversely, the West Virginia Supreme Court construed State Farm's good faith offer to enter into a reasonable protective order as a "conce[ssion] that a protective order is an appropriate means of protecting the privacy interests the Blanks have in their confidential medical records." App. 41a. This erroneous finding – which is the foundation of the majority's determination that Plaintiff had demonstrated "good cause" under Rule 26(c) – is contradicted by the record, which demonstrates that State Farm consistently argued that the existing laws and protocols are sufficient to protect Plaintiff's privacy interests.

provide under the policy; Plaintiff again refused. State Farm moved to amend its Answer as it was clear Plaintiff was in breach of her contractual obligation to provide a medical authorization. The trial court denied that Motion.

On February 11, 2010, after additional motion practice, the trial court ordered Plaintiff to provide her medical records, but entered a protective order that adopted most of Plaintiff's requested restrictions.

2. *State Farm I*

State Farm sought a writ of prohibition from the West Virginia Supreme Court to prevent the trial court from enforcing the first protective order, arguing it was invalid because it: (i) ignored Plaintiff's contractual obligation to provide State Farm with a medical authorization; (ii) was issued without a proper showing of good cause; (iii) was contrary to the West Virginia Insurance Commissioner's mandatory document retention and fraud reporting requirements; (iv) prohibited State Farm from storing documents electronically, when such electronic storage was expressly provided for by regulation; and (v) frustrated State Farm's ability to comply with other obligations, such as litigation-related record retention requirements, and coordinating private and public payments to Medicare beneficiaries. *See, e.g.*, MMSEA, 42 U.S.C. § 1395y(b)(7).

The court unanimously granted State Farm's petition, holding that the issuance of improper protective orders had become a "reoccurring issue" in

West Virginia which warranted immediate relief. App. 84a-85a. The court further found that: (i) the requirement that State Farm return or destroy Ms. Blank's medical records at the conclusion of the case conflicted with the West Virginia Insurance Commissioner's regulations, which required a minimum record retention period of approximately five to six years, *id.*; and (ii) the trial court exceeded its authority by prohibiting electronic storage of Ms. Blank's medical records. *Id.* at 91a.

3. *State Farm II*

On remand, State Farm objected to Plaintiff's renewed demand for a protective order on the grounds that the second proposed order: (i) was unconstitutional under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984), Objection at 3; (ii) was issued without a proper showing of good cause, *id.*; (iii) conflicted with State Farm's duty to report suspected fraud under the West Virginia Fraud Prevention Act, *id.* at 6; (iv) conflicted with the Medicare Act, *id.*; and (v) would impose an unworkable system of *ad hoc* record retention rules that would be contrary to the public interest. *Id.* at 7-8.

Notwithstanding State Farm's objections, the trial court entered a second protective order (which is the Protective Order at issue here) that was virtually identical to the first order, except that the second order eliminated the prohibition on electronic storage and extended the mandatory return or destruction period to parallel the Commissioner's minimum retention periods. Other than these two modifications, the

second order was "in all other respects, substantially the same as the previous order," App. 9a, and continued to "severely restrict[] the manner in which State Farm could use the medical records and information," *id.* In particular, the Protective Order explicitly forbids State Farm from disclosing any medical records that State Farm possesses, including records that State Farm obtained prior to the litigation or was contractually entitled to under the insurance policy:

> [A]ny medical records *previously received* by or on behalf of any party in this case . . . *even if received prior to the Court's ruling* on this Protective Order, are Protected regarding the confidentiality and privacy of such records in accordance with the Court's ruling herein.

App. 100a. (emphasis added).

The Protective Order further prohibits State Farm from reporting suspected insurance fraud to any entity, including the West Virginia Insurance Commissioner, the Department of Justice, or the NICB.

> [T]his Order hereby PROHIBITS the Defendants from sharing any confidential, non-public medical information to the NICB, or any third party in general, without the Plaintiffs' consent.

Id. at 101a (emphasis in original).

Finally, the Protective Order requires State Farm to return or destroy all of Plaintiff's medical records now in State Farm's files, and to delete any of Plaintiff's "medical information" that is included in State Farm's own documents in order to prevent any dissemination of such information or use in ways that are lawful and mandated under state and federal law. In addition, it turns West Virginia's minimum document *retention* requirement into a mandatory document *destruction* requirement, and imposes a new and unprecedented duty on lawyers defending insurance companies to certify compliance with these destruction requirements:

> [U]pon the conclusion of the appropriate period established by [the West Virginia Insurance regulation], all medical records, and medical information, or any copies or summaries thereof, will either be destroyed with a certificate from Defendants' counsel . . . or all such material will be returned to Plaintiff's counsel . . . .

Id. at 98a.

State Farm again petitioned the West Virginia Supreme Court for a writ of prohibition, arguing, *inter alia*, that the second order: (i) was unconstitutional under *Seattle Times*, Pet. at 10; (ii) was issued without a proper showing of good cause, *id.*; (iii) was contrary to

West Virginia insurance regulations requiring State Farm to report suspected instances of fraud, *id.* at 11-12; (iv) improperly transformed West Virginia's *retention* regulations into a mandatory *destruction* requirement, *id.* at 16-17; and (v) conflicted with the document retention requirements of State Farm's home state, Illinois. *Id.* at 18.

Despite recognizing these severe restrictions, a 3-2 majority ignored the Protective Order's constitutional deficiencies. It further sidestepped the clear conflicts between the Protective Order and state and federal mandatory reporting and retention requirements, erroneously holding that these issues were not properly before the court. Instead, the majority relied upon the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, which does not even apply to casualty insurance claims,[6] to affirm the nondisclosure and return or destruction requirements. App. 47a-48a.

---

[6] *See Warren*, 2010 WL 3668063, at *5 ("HIPAA does not apply to automobile insurance, which is at issue in this case. Because automobile insurance is a benefit excepted from the scope of the statute, the plaintiffs' argument that HIPAA applies to the present action is misplaced and must be rejected." (citation omitted)). In fact, HIPAA's inapplicability to a casualty insurance claim is underscored by the very cases the majority cites in support of its position. *See, e.g.*, *Law v. Zuckerman*, 307 F. Supp. 2d 705, 710-11 (D. Md. 2004) ("The rules [of HIPAA] define and restrict the ability of *health care providers* to divulge patient medical records . . . ." (emphasis added)); *A Helping Hand, LLC v. Balt. Cnty., Md.*, 295 F. Supp. 2d 585, 592 (D. Md. 2003) (discussing the application of HIPAA to "patient data" held by a drug and alcohol treatment program).

Justice Benjamin dissented, opining that there was no principled way to reconcile *State Farm I* with *State Farm II* because the second order's record destruction and nondisclosure requirements were still in direct conflict with the West Virginia Code:

> The order, by its explicit language, excludes the disclosure of the medical records or medical information to parties not listed in the order, namely the Insurance Commissioner. Should the Insurance Commissioner suspect fraudulent behavior and demand that State Farm produce information protected by this order, State Farm will be required to choose between violating statutory law or violating this order. In addition to placing State Farm "between a rock and a hard place," this protective order and others like it have the potential to frustrate the policy goals of fraud prevention sections of the West Virginia Code.

App. 60a. Justice Benjamin thus concluded: "As the potential for conflict with existing law was sufficient to issue a writ of prohibition in *State Farm I*, I fail to see how the potential for conflict with existing law is now insufficient to issue a writ of prohibition in *State Farm II*." *Id.* at 62a.

Justice Benjamin also challenged the majority's refusal to consider this potential conflict between the Protective Order and the regulations, explaining that

the majority's reliance on State Farm's purported waiver was misplaced as a matter of law. *Id.* at 60a-62a.

Justice Ketchum wrote a separate dissent, opining that the Protective Order would frustrate the insurance industry's ability to detect and prevent insurance fraud. App. 55a. He also criticized the majority for: (i) basing its decision on HIPAA, which is facially inapplicable, *id.* at 56a; and (ii) imposing a new duty on defense lawyers and insurance companies to "destroy lawfully-obtained medical records and any summaries of these records," *id.* at 57a.

State Farm sought reconsideration of *State Farm II* on the grounds that the majority's assertion – that the patent conflicts with state and federal retention and reporting requirements were not properly before the court – was belied by the record and the law, and raised serious constitutional problems of full faith and credit and due process. Pet. for Reh'g at 6-9. In addition, State Farm argued that reconsideration was appropriate because it was not afforded an opportunity to brief the inapplicability of HIPAA, as the statute was first put at issue by Plaintiff in her brief opposing State Farm's Petition and no reply brief is permitted under the West Virginia rules. *Id.* at 3-4. State Farm further pointed out the Protective Order's constitutional infirmities, including the serious First Amendment, full faith and credit and due process concerns. *Id.* at 11-12. The court denied State Farm's petition by the same 3-2 split. App. 103a-104a.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to review the import and reoccurring issues presented by this case regarding the intersection of the First Amendment and a trial court's authority to manage discovery. The Protective Order entered by the trial court in this case far exceeds any authority conferred by Rule 26(c). In one fell swoop, the trial court entered an order that simultaneously violates State Farm's right to free speech as guaranteed by the First Amendment and imposes arbitrary restrictions that are contrary to state and federal law.

First, the West Virginia Supreme Court's majority decision endorsing the trial court's Order conflicts with every pertinent decision of this Court, including *Seattle Times* and *Sorrell*. It also conflicts with decisions of the Second, Third, Seventh, Ninth, and District of Columbia Circuits, which have each struck down on First Amendment grounds protective orders that – like the trial court's Order here – restrict the use of information and material not obtained through the discovery process.

Second, the Protective Order unnecessarily creates potential conflicts with state and federal law, such as the Medicare Act, and raises serious constitutional issues of full faith and credit and due process which the West Virginia Supreme Court did not address.

To make matters worse, the Protective Order's unconstitutional restrictions are utterly unnecessary – there is already a comprehensive and largely uniform

regulatory system in place to protect confidential medical information from unwarranted disclosure. Moreover, West Virginia has recognized a private cause of action for unauthorized release of medical records in "outrageous" circumstances. *Allen v. Smith*, 368 S.E.2d 924, 928 (W. Va. 1988). The Protective Order only frustrates the carefully constructed regulations governing privacy of medical records by introducing an *ad hoc* patchwork of judicially constructed requirements which do nothing to advance already existing protections.

If the opinion below is not corrected, the ultimate loser will be the American public. By shutting down the ability of insurance companies to share claims information with state and federal agencies, law enforcement officials and industry watch groups, the Protective Order – and countless others like it that have been entered or will be entered – unnecessarily hinders state insurance commissioners from discharging their duties and provides a huge boost to criminals engaging in insurance fraud.

The Protective Order's requirements are particularly intolerable given that State Farm, like many other insurance companies, conducts business in all fifty states and responds to lawsuits in both state and federal courts. State Farm and other insurers now face irreconcilable legal obligations depending entirely on the particular state in which a lawsuit is filed and whether the suit is litigated in state or federal court.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT, THIS COURT'S PRECEDENTS, AND THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEALS

A. The Protective Order Conflicts with *Seattle Times* and Its Progeny

On its face, the Protective Order is a content-based prior restraint on speech that far exceeds the trial court's authority to manage discovery. Specifically, the Protective Order explicitly forbids State Farm from disclosing "any medical records *previously received* by or on behalf of any party in this case . . . *even if received prior to the Court's ruling*." App. 100a (emphasis added). This necessarily includes Plaintiff's medical records voluntarily produced by Plaintiff that State Farm possessed prior to the litigation and those that State Farm was contractually entitled to in connection with the adjustment of Plaintiff's UIM claim. The Protective Order also prohibits State Farm from reporting suspected insurance fraud to any entity, including the West Virginia Insurance Commissioner, federal law enforcement officials, and the NICB, *id.* at 101a, and singles out "medical information" for mandatory destruction, *id.* at 98a.

This Court has repeatedly held that such "[c]ontent-based regulations are presumptively invalid," *Sorrell*, 131 S. Ct. at 2667 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992))

(internal quotation marks omitted), and must be struck down unless the prior restraint "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Capital Cities Media Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (internal quotation marks omitted)). Here, the trial court and the majority brushed aside all First Amendment concerns without even acknowledging them. This was clear legal error that is at odds with this Court's long-standing First Amendment jurisprudence.

Plaintiff will no doubt argue that the First Amendment is not an impediment because the trial court was merely exercising its discretion to enter a protective order under Rule 26(c)(a). This argument is foreclosed by this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), where this Court held that a protective order entered after a showing of good cause did not offend the First Amendment, because the party "gained the information [it] wish[ed] to disseminate only by virtue of the trial court's discovery processes." *Id.* at 32. The Court emphasized that the party had no other claim to the information and would not have received it but for the discovery rules, and the order did "not restrict the dissemination of the information if gained from other sources." *Id.* at 37. In contrast, a "party may disseminate the identical information covered by the protective order *as long as the information is gained through means independent of the court's processes*." *Id.* at 34 (emphasis added).

Similarly, in *Butterworth v. Smith*, 494 U.S. 624 (1990), this Court struck down a Florida statute that prevented a grand jury witness from ever disclosing his testimony. The Court specifically rejected the government's argument that the statute's speech restrictions were justified under *Seattle Times*:

> Florida argues that our decision in *Seattle Times* . . . governs the validity of its prohibition. In [*Seattle Times*], we held that a protective order prohibiting a newspaper from publishing information which it had obtained through discovery procedures did not offend the First Amendment. Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury. In such cases, *where a person "lawfully obtains truthful information about a matter of public significance," we have held that "state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."*

Id. at 631-32 (emphasis added) (citations omitted). Indeed, just last term the Court struck down a statute that "prohibit[ed] a speaker from conveying information that the speaker already possesse[d]."

Sorrell, 131 S. Ct. at 2665 (internal quotation marks and citation omitted).

In light of *Seattle Times*, it is unsurprising that the Second, Third, Seventh, Ninth, and District of Columbia Circuits have all struck down as unconstitutional protective orders analogous to the one entered by the trial court in this case. For instance, the Second Circuit held that Rule 26(c) provides no authority for the issuance of protective orders purporting to regulate the use of information or documents obtained through means other than discovery in the pending proceeding. *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-45 (2d Cir. 1983). In granting a writ of mandamus invalidating the offending protective order, the court explained that Rule 26(c) "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on *discovery* in order to prevent injury, harassment, or abuse of the court's processes[,]" *id.*, and that the protective order was an impermissible "prior restraint on the defendants' First Amendment right to disseminate documents obtained outside the discovery process," *id.* at 946.

Similarly, the District of Columbia Circuit issued a writ of mandamus vacating a protective order on First Amendment grounds that proscribed disclosure of materials not obtained through discovery. *See In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (Mikva, J.). The court explained that mandamus was warranted because the protective order constituted a prior

restraint on speech that "exceeded [the court's] delegated powers, which were limited to supervising the discovery process." *Id.* The court further admonished that a litigant may not "use the happenstance of a discovery proceeding to place under a protective order materials not obtained through discovery." *Id.*

The Third, Seventh, and Ninth Circuits have likewise struck down protective orders that were not limited to discovery material. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (Posner, C.J.) ("The [protective] order in this case is invalid for the additional reason that it is not limited to pretrial discovery . . . ."); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1080-81 (9th Cir. 1988) (vacating a protective order purporting to regulate documents obtained by counsel in prior litigation); *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1006-07 (3d Cir. 1976) (issuing a writ of mandamus vacating a protective order on the grounds that it prohibited, in part, disclosure of information obtained from sources other than the court's process, which "constitute[d] a prior restraint on . . . speech . . . in violation of the First Amendment"). And the First Circuit has held that a protective order must not "restrict the dissemination of information obtained from other sources." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 14 (1st Cir. 1986).

The West Virginia Supreme Court's opinion in this case conflicts directly with *Seattle Times*, *Sorrell*, and the decisions of the Second, Third, Seventh, Ninth, and District of Columbia Circuits. Here, *all* of the medical

information that is subject to the Protective Order comes from sources totally independent of the court's discovery process: (i) information that Plaintiff provided to State Farm prior to filing her lawsuit; or (ii) information that State Farm is contractually entitled to under the plain terms of Plaintiff's insurance policy under which she is seeking UIM benefits. Specifically, Plaintiff's policy places an affirmative obligation on her to provide State Farm with an authorization to obtain her medical information as an express condition precedent for making a claim for medical or UIM benefits. Pertinent policy language – which was reviewed and approved by the West Virginia Insurance Commissioner – states:

> **6. Other Duties Under Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage** . . .
>
> A ***person*** making claim under:
>
> a. Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, Death, Dismemberment and Loss of Sight Coverage, or Loss of Earnings Coverage must:
>
> . . .
>
> (3) provide written authorization for us to obtain:

(a) medical bills; [and]

(b) medical records . . . .

State Farm Car Policy Booklet at 29 (emphasis in original).

Neither the Commissioner's regulations nor applicable policy language permit a court to impose additional restrictions such as those contained in the Protective Order. Under West Virginia law (and the law of nearly every other jurisdiction), Plaintiff's refusal to provide State Farm with the required authorization constitutes a willful, material breach under the policy, which voids coverage.[7] The trial court and the majority of the West Virginia Supreme Court simply ignored the fact that Plaintiff was contractually obligated to provide State Farm with a medical authorization, treating the release of this information as solely a function of the discovery process. In so doing, the lower courts made a crucial error, which, in turn, led them to ignore both State Farm's rights under the First Amendment and the inherent limitations of Rule 26(c).

---

[7] *See Stover v. Aetna Cas. & Sur. Co.*, 658 F. Supp. 156, 159 (S.D.W. Va. 1987) ("Courts have generally viewed compliance with insurance policy provisions as a condition precedent to recovery. Hence, the failure of an insured to cooperate with the insurer has been held to be a material breach of the contract and a defense to a suit on the policy." (citation omitted)); *Bowyer ex rel. Bowyer v. Thomas*, 423 S.E.2d 906, 907 (W. Va. 1992) (an insured who willfully fails to cooperate with an insurance company, preventing proper adjustment of a claim, forfeits coverage under the policy (syllabus points 1-4)).

Plaintiff might seek to distinguish *Seattle Times* and its progeny by arguing that many of the documents at issue here were not yet in State Farm's possession when the lawsuit was filed. This argument should be rejected for at least two reasons. First, Plaintiff should not be permitted to benefit from her own willful breach of contract. More fundamentally, this Court has recently recognized that physical possession of the information subject to the prior restraint is immaterial. In *Sorrell*, the Court invalidated a Vermont statute that, among other things, "imposed a restriction on access to information in private hands." *Sorrell*, 131 S. Ct. at 2665. Relying, in part, on *Seattle Times*, the Court observed: "It is true that the respondents here, unlike the newspaper in *Seattle Times*, do not themselves possess information whose disclosure has been curtailed," *id.* at 2666, but concluded that this distinction was irrelevant because the information the petitioner sought to regulate "is in the hands of pharmacies and other private entities." *Id.* The same is true here.

B. The Protective Order Is Not Narrowly Tailored or Necessary to Further a Compelling Government Interest

The Protective Order cannot withstand scrutiny under the First Amendment because the prior restraints on speech imposed on State Farm are neither narrowly tailored nor necessary to "further a state interest of the highest order." *Butterworth*, 494 U.S. at 632 (internal quotation marks and citation omitted). To the contrary, the Protective Order is by design as broad as possible, restricting "sharing *any*

confidential, non-public medical information [with] *any* third party," App. 101a, and culminating in the mandatory destruction of business documents that contain amorphously defined "medical information." While state and federal governments have made legislative judgments that strike a proper balance between privacy and fraud prevention, the trial court disregarded and intruded upon this balance by requiring the return or destruction of Plaintiff's medical records and the deletion of undefined medical information from State Farm's records. The Protective Order is not narrow or tailored in any way, and would prevent all dissemination of the information at issue (even with Plaintiff's name redacted) for use in fraud investigations and in compliance with mandatory reporting obligations.

Likewise, the Protective Order does not serve a compelling government interest. Rather, it frustrates law enforcement efforts to combat insurance fraud and regulate insurers by imposing arbitrary and contradictory nondisclosure and destruction requirements.

This point was underscored by the West Virginia Insurance Commissioner, who submitted an amicus brief in both *State Farm I* and *State Farm II*. Urging the West Virginia Supreme Court to strike down the second order, the Commissioner stated:

> By forbidding State Farm from releasing certain claim information to the Insurance Commissioner, the Circuit Court contravened the reporting

> requirement of W. Va. Code § 33-41-5(a) and thus potentially undermined the Fraud Unit's ability to detect and investigate fraudulent activity occurring in this State. Medical information is particularly important in the detection of insurance fraud because such information may reveal that a claimant has presented with the same injuries after multiple staged accidents or that a medical provider is connected to a number of dubious claims involving similar scenarios. Without such information to expose and verify a pattern of suspicious activity, certain fraud cases may not get prosecuted. While the likelihood of the Plaintiff in the instant matter perpetrating insurance fraud may be remote, the possibility of future plaintiffs committing undetected fraud rises with every protective order having overreaching language like the one in the case *sub judice*. Therefore, this Court should set a clear precedent for all West Virginia trial courts to follow by prohibiting the enforcement of the Protective Order.

Amicus Curiae Brief of the W. Va. Ins. Comm'r at 6. As the head of the governmental agency charged with regulating the insurance industry in West Virginia, the Insurance Commissioner's interpretation of the

agency's regulations is entitled to substantial deference. *Princeton Cmty. Hosp. v. State Health Planning*, 328 S.E.2d 164, 171 (W. Va. 1985). Astonishingly, the majority ignored the Commissioner's concerns.

The Protective Order and others like it also call upon State Farm to defy Congress's mandate to report to the government pursuant to the Medicare Act and therefore frustrate the federal government's ability to recoup Medicare payments. Section 111 of the MMSEA imposes mandatory obligations on responsible reporting entities (including automobile liability insurers such as State Farm) to report any payments made to Medicare beneficiaries. If Medicare has made conditional payments for medical services related to an injury for which a Medicare beneficiary has obtained a settlement or judgment, Medicare can recover the amount of those conditional payments from the beneficiary, his or her counsel, the insurer, and other individuals and entities. *See* 42 C.F.R. § 411.24 (2011). The conditional payment recovery process requires insurers to report medical information and maintain records for well over the five- to six-year period contemplated by the Protective Order. By prohibiting reporting and requiring destruction of records prior to the end of the potential collection process, the Protective Order jeopardizes the government's interest in obtaining information necessary to pursue reimbursement of Medicare funds.[8]

---

[8] The conflict between the Protective Order and State Farm's Medicare obligations is not an abstract one. First, the Protective Order endorsed by *State Farm II* has already become *(cont'd)*

Moreover, any argument that the Protective Order can be justified by Plaintiff's general assertion of a privacy interest in her medical records is unavailing. As the Fourth Circuit held under analogous circumstances, the government's interest in identifying illegal activity outweighs a patient's privacy interest in his or her medical records. *United States v. Bailey* (In re Subpoena Duces Tecum), 228 F.3d 341, 351 (4th Cir. 2000). In rejecting the argument that a patient's privacy interest shielded medical records from investigative review, the court explained:

> [A]ny disclosure of information in the files of Bailey's patients is not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Whalen v. Roe*, 429 U.S. 589, 602 (1977). *The government has a compelling interest in identifying illegal activity and in deterring future misconduct. And this interest outweighs the privacy rights of those whose records were turned over to the government.*

(cont'd from previous page)
a model in similar litigation throughout the state. Second, although Plaintiff is not yet age-eligible for Medicare because she is under 65 years of age, there are other factors triggering Medicare eligibility (such as certain types of disability), a fact which makes it possible that Plaintiff is presently a Medicare beneficiary or could become one in the future.

228 F.3d at 351 (emphasis added) (citation omitted). So, too, here.[9]

II. BY IGNORING CONFLICTS BETWEEN THE PROTECTIVE ORDER AND STATE AND FEDERAL LAW, *STATE FARM II* RAISES FURTHER ISSUES OF FULL FAITH AND CREDIT AND DUE PROCESS

The Protective Order raises further constitutional issues of full faith and credit and due process. The Protective Order conflicts with record retention requirements under State Farm's Illinois domiciliary state's insurance laws, thus disregarding the constraints imposed under full faith and credit and the need to respect the interests and laws of other states. The Protective Order also impermissibly places State Farm in a situation in which it is impossible to know which of two conflicting legal commands to follow, in violation of due process. This problem is greatly exacerbated by the fact that the Protective Order does not clearly delineate what "medical information" must

---

[9] Though the Protective Order cannot satisfy even intermediate scrutiny, it should be subject to strict scrutiny because the speech it prohibits is not merely commercial speech. In *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993), this Court held that the category of "commercial speech" receiving lessened First Amendment protection is limited to statements that propose a commercial transaction. The speech that is being restrained here addresses the crucial issue of the detection and prevention of insurance fraud; it does not propose a commercial sale and thus falls outside the category of commercial speech.

be destroyed. *See* App. 62a-64a. In addition, by ordering the deletion of lawfully obtained information from State Farm's claim files, the Protective Order deprives State Farm of a fundamental property interest protected by due process.

As a national insurer, State Farm must adhere to record retention statutes in every state in the country. In particular, State Farm, an Illinois domiciliary, is subject to Illinois statutes and administrative codes governing insurers domiciled in Illinois. The Illinois Insurance Code prohibits the destruction of an insurer's "books, records, documents, accounts and vouchers, or such reproductions thereof" unless "authority to destroy or otherwise dispose of such records is secured from the [Illinois] Director [of Insurance]." 215 Ill. Comp. Stat. 5/133(2) (2000). The Illinois Administrative Code sets out a particular detailed process for the destruction of such records, *see* Ill. Admin. Code tit. 50, §§ 901.5, 901.20 (2011), and violations of these obligations will "subject the company to a fine or other appropriate regulatory action." Letter from Illinois Department of Insurance to Charles M. Feinen, Counsel, State Farm Insurance, dated April 29, 2011. The Protective Order requires State Farm to return or destroy Plaintiff's and Plaintiff's Decedent's medical records and to delete medical information from its own documents and files, thus directly conflicting with Illinois law governing retention of insurance company records.[10]

---

[10] While the Protective Order in this case was modified to conform to West Virginia's regulation for minimum record *(cont'd)*

The conflict between the Protective Order and the Illinois insurance statute raises constitutional concerns of full faith and credit. By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 1, the United States Constitution establishes "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 & n.16 (1996). Under the Full Faith and Credit Clause, each state's power is "constrained by the need to respect the interests of other States." *BMW*, 517 U.S. at 571.

Insurance companies are subject to the laws of every state in which they do business. However, each insurance company's home state has a special interest in regulating the company's business practices and financial affairs. Regulation of insurance companies generally entails periodic examinations of the companies' records. Effective regulation and examination depend on the companies' retention of their records. Protective orders such as the one at

---

(cont'd from previous page)
retention, it failed to consider requirements of Illinois law. Because state laws mandating retention of insurance records vary from state to state, and because computerized data increasingly is not segregated by state, insurance companies like State Farm generally make a business decision to avoid potential conflicts in retention periods by following the longest of the periods mandated under the relevant state statutes.

issue here threaten the substantial interest of an insurance company's home state in requiring insurance companies to retain records for specified periods of time, or (as in the case of Illinois) until permission is granted to dispose of them.

The issuance of the Protective Order here was based on the insured's vaguely expressed expectation of privacy with regard to her medical and health information. As discussed above, the privacy rights of insureds are already protected by West Virginia law. Plaintiff's purported need for additional privacy protection should not outweigh the constitutional concerns of full faith and credit and due process that are implicated by the Protective Order. If the Protective Order in this case is permitted to stand, similar protective orders seeking destruction of an insured's medical records and deletion of information from the insurer's own documents could be sought by insureds across the country. The aggregate effect of such orders could be extremely harmful to each state's interest in regulating insurance companies, and to the entire system of insurance regulation.

The Protective Order also raises substantial issues of due process and fundamental fairness that merit examination by this Court. The Protective Order potentially places State Farm in the untenable position of being forced to choose between violating the Protective Order or violating the insurance laws and regulations of Illinois. *See Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1345 (9th Cir. 1997); *see also North Carolina v. Pearce*, 395 U.S. 711, 738-39 (1969) (Black, J., concurring in part and dissenting in part)

("[M]aking it impossible for persons to know which one of . . . two conflicting laws to follow . . . would . . . violate one of the first principles of due process."), *superseded on other grounds by statute as stated in Alabama v. Smith*, 490 U.S. 794 (1989). The situation in which State Farm is placed gives rise to the potential for punishment or penalties in West Virginia if it disobeys the Protective Order, and in other jurisdictions if it obeys the Protective Order. In either event, such penalties or punishment would punish State Farm for doing what the law requires and would constitute arbitrary and capricious punishment in violation of State Farm's due process rights. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (due process prohibits imposing "arbitrary punishments").

In addition, State Farm has a fundamental property and liberty interest in its records and in keeping information contained therein. *Cf. Sovereign News Co. v. United States*, 690 F.2d 569, 577-78 (6th Cir. 1982). The Protective Order does not merely limit the ways in which State Farm may use records and information; rather, it requires their destruction, permanently depriving State Farm of them. Claims information is the lifeblood of the insurance business. Insurance companies use claims information in underwriting, setting rates, researching public safety, and making other business decisions. Plaintiff's policy required her to provide an authorization to permit access to information and medical records in support of her claim. Such records and information properly become part of State Farm's claim files. The arbitrary,

unreasonable and permanent deprivation of property that will be effectuated by the Protective Order contravenes due process. *Cf. Spence v. Zimmerman*, 873 F.2d 256, 258, 260 (11th Cir. 1989); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Moore v. City of E. Cleveland*, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring).

The Court should grant certiorari to address these fundamental issues of full faith and credit and due process raised by the Protective Order.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTIONS PRESENTED

This case is an appropriate vehicle for review of the questions presented because whether the Protective Order comports with federal law is an issue that "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975). Thus, "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice." *Id.* at 477-78 (citation omitted).

Moreover, the issues that the West Virginia Supreme Court declined to address are squarely before this Court. Although the majority declined to consider the critical conflicts between the Protective Order and state and federal law, this was a volitional act. Indeed, *Whitlow v. Board of Education of Kanawha County*, 438 S.E.2d 15 (W.V. 1993), the case cited by the majority in declining to consider these issues, *see* App. 28a, demonstrates that the West Virginia Supreme

Court may consider issues not raised before the trial court and that doing so may be especially appropriate with regard to constitutional issues. *See id.* at 28a-29a. Perhaps more importantly, this case was before the West Virginia Supreme Court on a writ of prohibition, which is not an appeal but rather an action invoking that court's *original* jurisdiction. *See* W. Va. Const., art. VIII, § 3 ("The supreme court of appeals shall have original jurisdiction of proceedings in . . . prohibition."). And it is always the case that a petitioner seeking such a writ may raise new issues before the West Virginia Supreme Court. *See Hatfield v. Ferguson*, 177 S.E. 192, 193 (W. Va. 1934) ("Prohibition lies as a matter of right in all cases of usurpation and abuse of power. And a party whose rights have been so invaded need not, as a prerequisite, give the court sought to be prohibited an opportunity to pass on questions raised."); *see also* App. 60a-61a. The Supreme Court of Appeals could have properly considered and resolved these issues. Moreover, the record reflects that State Farm actually raised these issues before the trial court, where they were also ignored.[11]

---

[11] *See* Objection at 6 ("State Farm has a statutory duty to report potential insurance fraud. The West Virginia Fraud Prevention Act requires State Farm to report suspected fraudulent acts and include a listing of documents supporting the suspicion. The viability of any successful anti-fraud claim rests with the ability to retain necessary information which Plaintiff seeks to be destroyed."); *id.* at 7 ("State Farm must . . . comply with every state's statute of limitations and record retention policies," as well as its litigation-related "duty to suspend routine retention/destruction policies to ensure the preservation of relevant documents.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
HAYDEN A. COLEMAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
sheila.birnbaum@
skadden.com

E. KAY FULLER
MARTIN & SEIBERT, L.C.
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405

LAURA A. FOGGAN
THOMAS R. MCCARTHY
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006

August 19, 2011