No. 11-238

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

REPLY BRIEF

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Plaintiff's Opposition is most noteworthy for what it fails to address. First, Plaintiff completely ignores the fact that State Farm's right to Plaintiff's medical records is derived from the express language of her insurance contract; it does *not* depend on the trial court's discovery process. These medical records are, accordingly, information "gained through means independent of the court's processes," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984), and cannot be subjected to prior restraints without offending the First Amendment. *Id.* Plaintiff similarly ignores the conflict between the West Virginia Supreme Court's decision to uphold the Protective Order and decisions of the Second, Third, Seventh, Ninth, and District of Columbia Circuits striking 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.

Unable to defend the West Virginia Supreme Court's decision on the merits, Plaintiff instead seeks to avoid review of the constitutional deficiencies of *State Farm II* by arguing jurisdiction and waiver. Contrary to Plaintiff's assertions, the state court's decision to deny the writ is "final" as to that proceeding and thus reviewable under 28 U.S.C. § 1257. Nor was there a waiver. State Farm repeatedly argued in the trial court and the West Virginia Supreme Court that the Protective Order violated the First Amendment. These significant constitutional issues are preserved for and warrant review by this Court.

I. The West Virginia Supreme Court's Denial of State Farm's Petition for a Writ of Prohibition Is a Final Judgment Subject to Review Under 28 U.S.C. § 1257(a)

Plaintiff argues that this Court lacks jurisdiction to grant State Farm's Petition because the opinion below is not a final judgment. Plaintiff is mistaken. State Farm's request for a writ of prohibition was a separate proceeding before the West Virginia Supreme Court. The state court's decision to deny the writ – which resulted in a 54-page majority decision and two separate dissenting opinions – is "final" as to that proceeding and thus reviewable under 28 U.S.C. § 1257. This straightforward jurisdictional rule is well established, uncontroversial, and supported by the three cases cited in State Farm's jurisdictional statement. *See* Pet. at 1.

Plaintiff does not address these precedents or cite any of her own. Instead, she argues that the matter is interlocutory because her liability claims are still pending and the trial judge could theoretically revise the Protective Order. This argument ignores the fact that writ actions "are often filed in state courts as *independent* cases, even though they relate to a pending lawsuit." *See* Robert L. Stern, et al., SUPREME COURT PRACTICE 170-71 (9th ed. 2007) (emphasis added). "Such proceedings may be carried forward to conclusion before the primary litigation has come to an end." *Id.* Where, as here, the state court judgment "conclusively determines the right of the applicant to the writ," the order is final for the purposes of section 1257. *Id.*

II. The Constitutional Issues Presented in State Farm's Petition Were Preserved in the West Virginia Courts

State Farm fully preserved its First Amendment claim below by repeatedly presenting it to the trial court and the West Virginia Supreme Court.[1] In both its brief to the trial court and its petition to the state Supreme Court, State Farm argued:

> It is well settled that the imposition of a Protective Order under Rule 26 raises concerns under the First Amendment of the United States Constitution. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). There, the Supreme Court of the United States recognized that restrictions on the ability of a party to use information obtained in civil discovery raises constitutional concerns again reiterating that such Orders are to be entered only upon an appropriate good cause showing because the Order is not a mere formality, but an infringement of the opposing party's constitutional rights. Such an imposition, the Court held, requires a hard showing of the likelihood of a real threat of injury.

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[1] *See* Objection to Plaintiff's Proffered Medical Confidentiality Protective Order at 3 (objection in trial court); Petition for Writ of Prohibition in *State Farm I* at 19 & n.3; Petition for Writ of Prohibition in *State Farm II* ("WV Pet.") at 11-12.

> Unsubstantiated or unarticulated "fears" or hypotheticals do not suffice.

WV Pet. at 11-12; Objection to Plaintiff's Proffered Medical Confidentiality Protective Order at 3.

The authorities that Plaintiff cites in her brief demonstrate conclusively that State Farm properly preserved its claim under the First Amendment. For example, in *Howell v. Mississippi*, 543 U.S. 440 (2005), this Court found that the petitioner had waived his federal claim because "he did not cite the Constitution or even any cases directly construing it." *Id.* at 443. This Court went on to explain that a litigant could "'easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal ground.'" *Id.* at 444 (alteration in original) (citation omitted). Similarly, in *Adams v. Robertson,* 520 U.S. 83 (1997), the Court held that petitioner's federal due process claims were waived because (i) the only due process case was cited "in the context of an entirely different argument" regarding the right to a jury trial and (ii) their briefs could have been construed as raising only state law due process arguments. *Adams*, 520 U.S. at 88-89.

The *Howell/Adams* standard is readily met in this case: State Farm's state court briefs cited *both* "the First Amendment of the United States Constitution," WV Pet. at 10, *and Seattle Times*, which is the leading case addressing the First Amendment limitation on a court's authority to oversee discovery under Rule 26(c). Likewise, State Farm expressly invoked its free speech

right under the United States Constitution, not the West Virginia Constitution.

Plaintiff also contends that State Farm waived its constitutional arguments by not specifically listing them as points of error in its writ petition. Opp. at 2. This argument appears to be based on a footnote in *Adams*, which observed that the *Adams* respondents "argued that . . . petitioners failed to list their federal claim in the 'statement of issues' section of their appellate brief" in the Alabama state court and this failure prevented the Alabama court from addressing the due process issue. *Adams*, 520 U.S. at 88 n.1. But whatever the rule is in Alabama, there is no corresponding requirement in West Virginia. Former Rule 14(a) of the West Virginia Rules of Appellate Procedure – which was in effect when State Farm filed its Petition – only required that State Farm file a memorandum of law citing the relevant authorities supporting the petition. As noted, State Farm cited both the First Amendment of the United States Constitution and *Seattle Times* as relevant authorities supporting the Petition. Thus, Plaintiff's contention that State Farm waived this argument when it was set forth in its memorandum of law is misplaced.

Nor can Plaintiff defeat review by arguing that State Farm is making additional First Amendment arguments in its Petition. In First Amendment cases, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 893 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (internal

quotation marks omitted). Having preserved the issue through repeated citations to the United States Constitution and *Seattle Times*, State Farm's First Amendment arguments are properly before this Court.[2]

III. The Protective Order Is an Impermissible Prior Restraint on Speech

Seattle Times sets out a clear dichotomy between "information obtained through use of the discovery process," *Seattle Times*, 467 U.S. at 34, and "information . . . gained from other sources." *Id.* at 37. Upon a showing of good cause, a trial court *can* subject information gained through the discovery process to a protective order. *Id.* In contrast, a trial court *cannot* subject information obtained from other sources to a

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[2] State Farm's constitutional arguments regarding due process and full faith and credit were also properly presented and preserved below. Those arguments were presented to the West Virginia Supreme Court in State Farm's petition for rehearing and were "maturely considered" by that Court, with Justices Benjamin and Ketchum dissenting from the Court's decision to deny rehearing. *See* App. at 103a. Under West Virginia law, a federal constitutional issue may be raised for the first time in a petition to the West Virginia Supreme Court of Appeals, especially where the issue is controlling, does not concern disputed facts, and is of substantial public interest. *See Richmond v. Levin*, 637 S.E.2d 610, 613 n.3 (W. Va. 2006); *Whitlow v. Bd. of Educ. of Kanawha County*, 438 S.E.2d 15, 18-19 & 19 n.5 (W. Va. 1993). State Farm's due process and full faith and credit arguments satisfy these criteria because they implicate issues of constitutional law that, if resolved in State Farm's favor, would render the Protective Order manifestly improper.

protective order without offending the First Amendment. Fed. R. Civ. P. 26(c). *See also In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (Mikva, J.).

Plaintiff cannot explain how the Protective Order – which broadly prohibits State Farm from disclosing any and all medical records, including those obtained outside of litigation – can withstand First Amendment scrutiny under *Seattle Times*. Instead, Plaintiff attempts to blur the line between permissible and impermissible restrictions by arguing – without any supporting authority whatsoever – that State Farm's claims adjustment process is actually "part of the pre-trial procedures." Opp. at 4. This argument is factually and legally incorrect. First, the adjustment of an insurance claim is an independent process governed by contract and pertinent state law. It has nothing to do with the court's process or any "pre-trial procedures."

More fundamentally, Plaintiff's attempt to merge the claims adjustment process into her lawsuit ignores the fact that *all* of the medical information that is subject to the Protective Order comes from sources totally independent of the trial 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 the insurance policy under which Plaintiff is seeking UIM coverage.

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protective order under Rule 26." Opp. at 7. This superficial distinction ignores the fact that the Vermont statute at issue was struck down because it (i) "imposed a restriction on access to information in private hands" and (ii) "prohibit[ed] a speaker from conveying information that the speaker already possesse[d]." *Sorrell*, 131 S. Ct. at 2657 (internal quotation marks and citation omitted). The Protective Order at issue in this case goes much further than "impos[ing] a restriction" on State Farm's documents – it orders State Farm to destroy them. The Protective Order similarly forbids State Farm from "conveying [medical] information" that State Farm possessed prior to the litigation to state or federal officials. *Id*. The fact that the offending prohibition is contained in a court's order as opposed to a state statute is a distinction without a difference.

Tellingly, Plaintiff completely ignores the decisions of the Second, Third, Seventh, Ninth, and District of Columbia Circuits striking 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. Plaintiff's failure to address these Court of Appeals precedents is a tacit acknowledgement that the West Virginia Supreme Court opinion is irreconcilable with them.

Plaintiff makes several subsidiary arguments, none of which have any merit. For example, Plaintiff argues that State Farm is at fault for not seeking "clarification from the Trial Court" as to whether the Protective Order reached documents obtained outside of litigation. Opp. at 10. The Protective Order,

however, is unambiguous and plainly prohibits 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* on this Protective Order." App. 100a (emphasis added). Contrary to Plaintiff's assertion, there is simply nothing to "clarify" regarding the expansive reach of the Protective Order.

IV. HIPAA Does Not Create an Inviolate Federal Privacy Right

Plaintiff concedes that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, does not even apply to casualty insurance claims. Opp. at 8. Plaintiff nevertheless argues that HIPAA reflects a broad federal policy "prohibiting insurance companies from using or disclosing protected health information for any purpose" outside of litigation. Opp. at 13. According to Plaintiff, this unwritten federal policy – which is also the philosophic foundation of the West Virginia Supreme Court's opinion in *State Farm II* – reflects a compelling government interest of the highest order and is sufficient to overcome State Farm's First Amendment rights. Plaintiff and the West Virginia Supreme Court have it exactly backwards.

By its plain terms, "HIPAA does not apply to automobile insurance, which is at issue in this case." *Warren v. Rodriguez-Hernandez*, No. 5:10CV25, 2010 WL 3668063, at *4 (N.D. W. Va. Sept. 15, 2010). Rather, the federal policy applicable to this case is expressed through Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, which specifically

tasks the "State insurance authorities," 15 U.S.C. § 6805(a), with the responsibility of promulgating regulations "to insure the security and confidentiality of customer records and information." 15 U.S.C. § 6801(b)(1). Crucially, the Act specifically *permits* "the disclosure of nonpublic personal information when necessary 'to protect against or prevent actual or potential fraud,'" 15 U.S.C. § 6802(e)(3)(B), the very dissemination the Protective Order prohibits.

In furtherance of Gramm-Leach-Bliley, the West Virginia Insurance Commissioner promulgated regulations containing strict requirements that protect an individual's personal health information against improper use and dissemination to third parties, *see* Pet. at 6-7, but expressly authorizing 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). West Virginia law further imposes 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) (2011).

Plaintiff argues unconvincingly that State Farm's ability to report insurance fraud to state and federal officials is not compromised by the Protective Order because State Farm and other insurers can still "advise[]" state and federal officials that it suspects fraud without providing any documents or any other information to support that suspicion. Opp. at 13-14. The *amicus curiae* brief submitted by the West Virginia Insurance Commissioner in support of State Farm's Petition outlines the fallacy of this argument and

identifies numerous conflicts between the Protective Order and West Virginia law:

> The public policy of the State of West Virginia is that there be a cooperative effort between the Insurance Commissioner and those in the insurance industry to detect, investigate, and prosecute potential insurance fraud. Any protective order that frustrates the detection and reporting of potential insurance fraud – such as the one endorsed by the WVSCA in this case – violates the public policy of the State of West Virginia.

Amicus Curiae Brief of W. Va. Ins. Comm'r at 16. These points were made to – and ignored by – the West Virginia Supreme Court.

There is similarly no basis for Plaintiff's contention that the Insurance Commissioner is not entitled to medical records submitted in conjunction with an insurance claim unless he first obtains a warrant or a grand jury subpoena. As set forth above, Gramm-Leach-Bliley expressly *permits* an insurance company to disclose nonpublic personal information when necessary "to protect against or prevent actual or potential fraud." 15 U.S.C. § 6802(e)(3)(B). Contrary to Plaintiff's argument, this is a *federal* law and cannot be judicially overruled by the West Virginia courts.

Notably, Plaintiff's argument is predictive of what will happen if *State Farm II* is not vacated by this Court: The Protective Order and others like it will be

routinely entered in cases throughout West Virginia and in other states. The result will be to thwart the Congressional mandate expressed through Gramm-Leach-Bliley vesting state regulators – not state courts – with the authority to balance policyholders' privacy interests with the strong societal interest in detecting and preventing insurance fraud. The Protective Order replaces this balanced approach with a patchwork of judicially constructed requirements.

Finally, Plaintiff urges this Court to avoid the issue altogether by arguing that insurance fraud is not a federal issue. Opp. at 14. This argument ignores the fact that fraud prevention is an issue in this case because it is directly related to whether Plaintiff can demonstrate a compelling government interest sufficient to support the Protective Order's broad speech restrictions. State Farm has argued that the Protective Order does not serve a compelling government interest. Rather, it frustrates government efforts to combat insurance fraud. Pet. at 30-32. Alternatively, Plaintiff suggests there is an unyielding and absolute right to medical privacy that can be divined from HIPAA's penumbras and emanations. This conflict presents a federal issue that is appropriately before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Plaintiff argues unconvincingly that State Farm's ability to report insurance fraud to state and federal officials is not compromised by the Protective Order because State Farm and other insurers can still "advise[]" state and federal officials that it suspects fraud without providing any documents or any other information to support that suspicion. Opp. at 13-14. The *amicus curiae* brief submitted by the West Virginia Insurance Commissioner in support of State Farm's Petition outlines the fallacy of this argument and

identifies numerous conflicts between the Protective Order and West Virginia law:

> The public policy of the State of West Virginia is that there be a cooperative effort between the Insurance Commissioner and those in the insurance industry to detect, investigate, and prosecute potential insurance fraud. Any protective order that frustrates the detection and reporting of potential insurance fraud – such as the one endorsed by the WVSCA in this case – violates the public policy of the State of West Virginia.

Amicus Curiae Brief of W. Va. Ins. Comm'r at 16. These points were made to – and ignored by – the West Virginia Supreme Court.

There is similarly no basis for Plaintiff's contention that the Insurance Commissioner is not entitled to medical records submitted in conjunction with an insurance claim unless he first obtains a warrant or a grand jury subpoena. As set forth above, Gramm-Leach-Bliley expressly *permits* an insurance company to disclose nonpublic personal information when necessary "to protect against or prevent actual or potential fraud." 15 U.S.C. § 6802(e)(3)(B). Contrary to Plaintiff's argument, this is a *federal* law and cannot be judicially overruled by the West Virginia courts.

Notably, Plaintiff's argument is predictive of what will happen if *State Farm II* is not vacated by this Court: The Protective Order and others like it will be

routinely entered in cases throughout West Virginia and in other states. The result will be to thwart the Congressional mandate expressed through Gramm-Leach-Bliley vesting state regulators – not state courts – with the authority to balance policyholders' privacy interests with the strong societal interest in detecting and preventing insurance fraud. The Protective Order replaces this balanced approach with a patchwork of judicially constructed requirements.

Finally, Plaintiff urges this Court to avoid the issue altogether by arguing that insurance fraud is not a federal issue. Opp. at 14. This argument ignores the fact that fraud prevention is an issue in this case because it is directly related to whether Plaintiff can demonstrate a compelling government interest sufficient to support the Protective Order's broad speech restrictions. State Farm has argued that the Protective Order does not serve a compelling government interest. Rather, it frustrates government efforts to combat insurance fraud. Pet. at 30-32. Alternatively, Plaintiff suggests there is an unyielding and absolute right to medical privacy that can be divined from HIPAA's penumbras and emanations. This conflict presents a federal issue that is appropriately before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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