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.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONER

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MOTION OF DRI—THE VOICE OF THE DEFENSE BAR TO FILE A BRIEF AS AMICUS CURIAE SUPPORTING PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, DRI—The Voice of the Defense Bar ("DRI")—respectfully moves this Court for leave to file the accompanying brief, as amicus curiae in support of petitioner State Farm Mutual Automobile Insurance Company.

Pursuant to Rule 37.2(a), Counsel of Record for all parties were notified of DRI's intention to file an amicus curiae brief at least 10 days prior to the due date for the amicus curiae brief. Letters from counsel for petitioner State Farm Mutual Automobile Insurance Company, respondents Honorable Thomas A. Bedell, and respondent Lana S. Eddy Luby consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.2(a). Respondent Carla J. Blank has withheld consent.

This case involves a significant discovery issue: whether, consistent with the First Amendment, a court can impose a protective order that governs the dissemination, retention, and destruction of documents obtained outside of discovery. DRI's members, comprising over 23,000 civil defense attorneys, are directly affected by the issue before this Court. In particular, DRI seeks to participate in this case because the protective order upheld by the West Virginia Supreme Court imposes new burdens on

DRI's members and their clients. In conflict with this Court's precedent, the ruling below precludes the dissemination of—and ultimately requires the destruction of—confidential information obtained outside the scope of discovery. Not only is this an unconstitutional prior restraint on speech that undermines DRI members' ability to provide effective legal representation to their clients, but the state court decision in this case requires attorneys to certify—or else face contempt sanctions—to the destruction of documents they may have never seen and may not even know to exist.

Accordingly, DRI respectfully requests leave to file the accompanying brief.

Respectfully submitted,

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONER

DRI—the Voice of the Defense Bar respectfully submits this brief as amicus curiae in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

DRI—the Voice of the Defense Bar ("DRI") is an international organization comprised of more than 23,000 civil defense attorneys. DRI strives to improve the civil justice system by addressing issues of importance to the civil defense bar. For more than a half-century, DRI has worked to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. DRI promotes these objectives by participating as amicus curiae in cases

[1] Pursuant to Supreme Court Rule 37.2(a), Counsel of Record for all parties were notified of DRI's intention to file an amicus curiae brief at least 10 days prior to the due date for this brief. Letters from counsel for petitioner State Farm Mutual Automobile Insurance Company, respondent Honorable Thomas A. Bedell, and respondent Lana S. Eddy Luby consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.2(a). Respondent Carla J. Blank has withheld consent. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that have direct and significant impacts on DRI's members and their clients.

DRI seeks to participate in this case because the protective order upheld by the West Virginia Supreme Court imposes new burdens on DRI's members and their clients. In conflict with this Court's precedent, the ruling below precludes the dissemination of—and ultimately requires the destruction of—confidential information obtained outside the scope of discovery. Not only is this an unconstitutional prior restraint on speech that undermines DRI members' ability to provide effective legal representation to their clients, but the state court decision in this case requires attorneys to certify—or else face contempt sanctions—to the destruction of documents they may have never seen and may not even know to exist.

SUMMARY OF ARGUMENT

The issues raised in the petition are of significant import to DRI's members and their clients. DRI recognizes that protective orders are a necessary mechanism to protect sensitive and confidential material of parties in litigation. Frequently, DRI's members obtain protective orders to prevent the unnecessary disclosure of trade secrets and other confidential business information that might be obtained through discovery from their clients. To that end, Rule 26(c) of the Federal Rules of Civil Procedure—as well as corresponding state court rules—ensures that parties can seek protection, on a showing of good cause, for certain materials *prior* to their disclosure. *EEOC v. Nat'l Children's Ctr.,* 98 F.3d 1406, 1411 (D.C. Cir. 1996); *Cipollone v. Liggett Group, Inc.,* 822 F.2d 335, 340-45 (3d Cir. 1987).

But overbroad protective orders can undermine the adversarial process, and can have unintended consequences that affect far more than the judicial system. In this case, the West Virginia Supreme Court sanctioned a broad protective order that precludes the disclosure and requires the destruction of confidential material that was already lawfully in the defendant's possession. That decision constitutes a prior restraint on speech, and is in clear conflict with the precedent of this Court and several federal courts of appeals. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). On that basis alone, this Court should grant review.

Moreover, the West Virginia court's protective order comes at the request of the *plaintiff*. It involves evidence that forms the foundation of the plaintiff's affirmative case and is critical to State Farm's and the Thomas Estate's defense. Thus, absent review, State Farm and the Thomas Estate (as well as other defendants subject to similar protective orders) face the dilemma of mounting a defense to charges brought against them or giving up important business information that it already rightfully possesses.

ARGUMENT

REVIEW IS WARRANTED BECAUSE THE PROTECTIVE ORDER, WHICH EXTENDS TO MATERIAL OBTAINED OUTSIDE OF CIVIL DISCOVERY, CONSTITUTES AN IMPERMISSIBLE PRIOR RESTRAINT ON SPEECH

A. The Ruling Below Conflicts With The Decisions Of This Court And Several Federal Courts Of Appeals

As the petition demonstrates, this Court should grant review and reverse the West Virginia Supreme Court. In conflict with the precedent of this Court and a number of federal courts of appeals, the protective order at issue in this case constitutes an impermissible prior restraint on speech because it precludes the dissemination of (and ultimately requires the destruction of) documents obtained outside of discovery.

1. The West Virginia protective order mandates that "any medical records previously received by or on behalf of any party in this case or any other person * * * , *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." Pet. App. 100a (emphasis added). Under the terms of the protective order, no counsel can disclose any of plaintiff's "medical records, or medical information, to any person other than their clients, office staff, and experts necessary to assist in this case" (Pet. App. 97a)—a prohibition which precludes providing these records or information, even as may be required by federal or state law, to any governmental agency to combat fraud (Pet. App. 100a-101a). Moreover, the protective order requires that "all medical records, and medical information, or any copies or summaries thereof, will either be destroyed with a certificate from Defendants' counsel as an officer of the Court that the same has been done, or all such material will be returned to Plaintiffs counsel without retention." Pet. App. 98a.

The West Virginia Supreme Court ignored the First Amendment implications of the protective order, even though it acknowledged the "worries expressed by the defendants." Pet. App. 41a. Instead, the state court concluded that the mere fact that "a protective order is an appropriate means of protecting * * * privacy interests" justified the expansive order at issue in this case. Pet. App. 41a.

2. The protective order and the West Virginia Supreme Court's ruling cannot be reconciled with the precedent of this Court and other appellate courts.

This Court consistently has held that information obtained outside of civil discovery cannot be subject to a protective order which precludes publication of that information under the First Amendment. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), this Court clearly distinguished protective orders that dealt only with material obtained by parties through the course of discovery from those that did not.

The Court determined that the protective order in that case, which prohibited disclosure of a donor list *produced* during discovery, was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 33. The Court explained that the protective order did no more than "prevent[ ] a party from disseminating only that information obtained through use of the discovery process." *Id.* at 34. Significantly, the protective order allowed the dissemination of "identical information covered by the protective order as long as the information [was] gained through means independent of the court's processes." *Ibid.*

The Court affirmed this distinction in *Butterworth v. Smith*, 494 U.S. 624 (1990). The Court expressly rejected the argument that restrictions on a grand jury witness's disclosure of his testimony were subject to a lesser scrutiny under *Seattle Times*. The *Butterworth* Court applied strict scrutiny because the

restriction "deal[t] only with [witness's] right to divulge information of which he was in possession of *before* he testified before the grand jury." *Id.* at 632 (emphasis added). The Court then struck down the restriction as violative of the First Amendment. *Id.* at 636.

3. Not surprisingly, other courts have consistently struck down protective orders like the one at issue in this case—which apply to information received outside the scope of discovery—on First Amendment grounds.

The Second Circuit has held that a protective order cannot enjoin a party in litigation from disclosing trade secret information obtained outside of discovery. *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983). The court of appeals explained that, "in light of First Amendment considerations, the court generally has no * * * power to prohibit dissemination of the information itself * * * if that information has been gathered independently of judicial processes." *Id*. at 946.

The Third Circuit reached the same conclusion in *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976). There, the court held that a district court's order prohibiting the disclosure of information—not obtained through discovery—regarding back pay in an employment discrimination suit "constitute[d] a prior restraint on the speech of petitioners' counsel in violation of the First Amendment." *Id*. at 1006.

Similarly, the Seventh Circuit held that a protective order prohibiting from disclosure "any document 'believed to contain trade secrets or other confidential or governmental information'" was invalid. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999). The Seventh Circuit reasoned that the order could not stand because it was "absurdly overbroad" and "not limited to pretrial discovery." *Id.* at 945 (*citing Seattle Times*, 467 U.S. at 36-37).

Finally, the D.C. Circuit struck down a protective order that prevented the disclosure of confidential business information that "had [been] obtained before the litigation began." *In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988). The court of appeals held that a party may not "use the happenstance of a discovery proceeding to place under a protective order materials not obtained through discovery." *Ibid*.

Unlike the West Virginia Supreme Court's ruling, these decisions universally show that the scope of a protective order cannot, consistent with the First Amendment, extend to information that was not produced in discovery. That alone justifies this Court's review.

B. The Overbroad Protective Order Disrupts The Ordinary Function Of The Judicial System

Absent this Court's review, the ruling below constitutes a subtle, but important, shift in the

balance of power in civil discovery—*from* the party seeking disclosure *to* the party that seeks to resist it. The West Virginia court's decision will have an onerous effect on personal injury actions, employment disputes, trade secret lawsuits, and other cases where a *plaintiff's* confidential records lie at the heart of the dispute. Rather than appropriately imposing a choice on the plaintiff facing a discovery request—i.e., disclose the information or forgo suit—the West Virginia Supreme Court has imposed a new burden on defendants: forgo your right to collect information to develop your defense or give up your right to keep important records and information that you already lawfully possess.

1. DRI's members recognize that protective orders are a necessary component of civil litigation. Since the advent of pre-trial discovery in the Federal Rules of Civil Procedure (as well as in state law analogs), "civil trials * * * no longer need be carried on in the dark" because "parties [may] obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). The light that liberal discovery brings, however, can be uncomfortable and costly. And, because "discovery provisions are to be applied as broadly and liberally as possible," *id.* at 506, litigants have the power to engage in fishing expeditions into the most sensitive areas of their adversary's business.

Protective orders can obviate many discovery concerns regarding confidentiality by limiting disclosure and requiring destruction of the copies at the

conclusion of the case. DRI's members have found that most protective orders (such as those restricting confidential material provided by an opposing party to attorney's eyes only)—which are unlike the expansive order sanctioned in this case—provide the necessary assurances for clients to disclose even the most sensitive and valuable business information. But, even in those cases, protective orders effectively give the party that seeks to *resist* disclosure of sensitive information a choice. Instead of producing the sensitive information, the party could offer a stipulation as to the facts that might obviate the need for production. *See Searcy v. eFunds Corp.*, No. 08 C 985, 2010 WL 183362, *5 (N.D. Ill. Jan. 20, 2010) (Defendants electing to stipulate to the numerosity of the proposed class in lieu of producing records with potentially sensitive consumer information). Or, in the absence of an acceptable stipulation, a plaintiff can forgo a claim or a defendant can abandon a defense in order to avoid disclosing the sensitive information. Thus, in *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985), a district court ordered defendant Coca-Cola to produce its closely-guarded, top secret formulas to its syrup. *Id.* at 297-99. Rather than produce those secret formulas pursuant to a protective order, Coca-Cola privately settled the dispute and thereby forwent its right to seek vindication. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 470 (1991).

2. The ruling below, however, alters this calculus. To be sure, the party resisting discovery still produces the confidential material pursuant to a protective order. But, because the protective order also extends to records and information obtained or created *outside* of litigation (Pet. App. 100a), the party seeking discovery also must give up (and not disclose) whatever copies of that information it might have previously obtained—or not accept the discovery being produced.

Not only does this raise significant First Amendment concerns that warrant the Court's review (*see* pp. 3-7 *supra*), but absent review the ruling below will have real and practical consequences to DRI's members and their clients. In personal injury lawsuits, defendants must have access to a plaintiff's medical records and information in order to mount a defense because these materials are necessary to issues of causation, fault, and the nature and extent of damages. Yet, in order to obtain full access to this critical information, the West Virginia Supreme Court has forced defendants—such as petitioner—to give up their right to all pre-existing medical records they obtained outside of discovery and already lawfully possessed. Pet. App. 100a. Indeed, depending on the nature of the suit, a defendant such as State Farm might decide to abandon a defense rather than become bound by a protective order that requires the destruction of business records or the violation of record retention policies mandated by other state laws. Pet. 34-35. And, as the petition explains, the

West Virginia court's ruling precludes State Farm from using this information—regardless of whether it was obtained outside of the discovery process—to seek redress from the government regarding potential fraud. Pet. 15; *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 524 (2002) ("[R]ight to petition [is] one of the most precious of the liberties safeguarded by the Bill of Rights . . . [and] extends to all departments of the Government.") (internal citations omitted).

Moreover, the West Virginia Supreme Court's decision will adversely affect other types of cases where a *plaintiff's* confidential records lie at the heart of the dispute. For example, in suits involving the alleged misappropriation of trade secrets, a plaintiff may demand a protective order to preclude the dissemination of its trade secrets. But an overbroad protective order—such as the one at issue in the present case—could require a defendant to sacrifice its right to use business information and records it might have previously obtained outside of discovery, in order for the defendant to gain discovery regarding the trade secret it was accused of stealing. Similarly, in an employment discrimination action, an overbroad protective order that applies to materials obtained outside of discovery might force defendants to abandon their right to maintain and use information they already possessed about their employees from their human resources departments in their defense of future lawsuits.

A plaintiff should not gain a litigation advantage merely by filing suit and then demanding a broad

protective order to guard the very information he placed at issue in the suit and to displace information that might already be in the hands of the defendant. *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000); *cf. General Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011) (noting that when state secrets would be disclosed "neither party can obtain judicial relief"). DRI maintains that a protective order (and the discovery process in general) is not the appropriate means for a plaintiff to enjoin its adversary's use of information already disclosed outside of litigation.

3. Finally, the West Virginia Supreme Court's "certification requirement" of documents subject to the overbroad protective order places DRI's members at substantial risk in future cases.

In this case, the protective order mandates that defense counsel cannot obtain confidential records absent a willingness to certify that "all medical records, and medical information or any copies or summaries thereof" have either been returned or destroyed five or six years after the termination of the case. Pet. App. 98a. By its express terms, this necessarily includes not only records the defense counsel received in discovery (and can readily account for), but also records and information in the possession of third parties—who may have possessed these records or the information in these records *prior to* the commencement of litigation—that defense counsel is without authority to bind or control. *Ibid.*

And, if defense counsel fails to certify that third parties have destroyed all of the materials or this certification is made in error, that counsel is subject to sanctions for violating a court order. As the dissent below recognized, such counsel (and their clients) may be subjected to lawsuits years later "when plaintiffs' lawyers discover a copy of a medical record buried in an insurance company's archives." Pet. App. 55a (Ketchum J., dissenting).

This is nothing like the certification requirements in other protective orders, where an attorney must certify only to his own return or destruction of documents received in discovery. *See, e.g.*, 10 W.D. Pa. Local Rule App. LPR 2.2, *Protective Order*, at ¶¶ 3, 15 (stating that a party may designate certain documents disclosed "during the course of this litigation" as containing "Confidential Information" or "Highly Confidential Information," and that "each party or other person subject to the terms of this Protective Order shall be under an obligation to destroy or return to the producing party all [such] materials and documents * * * and to certify to the producing party such destruction or return."); S.D. Tex. Local Rules, Patent Cases, *Protective Order*, at ¶¶ 4, 10 (same). Absent this Court's review, attorneys subject to such certification requirements will find themselves in conflict with their clients, at the end of a case, when the client and third-party records that were never produced in litigation will be subject to a return or destruction requirement and attorney

certification—where the failure of compliance might be significant penalties from the court.

C. This Case Is An Excellent Vehicle To Resolve An Important Discovery Issue That Often Evades Review

As DRI has found, discovery issues, particularly those raising the scope of a protective order, are unlikely to come before this Court with any regularity. The petition thus presents a unique opportunity to address an important First Amendment issue that profoundly affects the discovery process.

Moreover, because discovery disputes, regardless of how important they may be to the parties, often are not appealable under the collateral order doctrine, *see Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009), this case is the rare discovery dispute that properly comes before this Court for review.

Because discovery already imposes a significant burden on DRI's members and their clients—the cost of which sometimes compels defendants simply to settle the suit, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007), the cost of litigating collateral issues (such as protective orders) is often impractical for many clients. DRI's members often advise their clients to not pursue expensive appeals over the scope of overbroad discovery orders. Accordingly, important questions concerning discovery—even though those issues affect the everyday practice of law—too often evade this Court's review. And

impermissible lower court rulings, such as the decision below, often become the model rule to resolve future discovery disputes. Pet. App. 103a-115a.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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