No. 11-238

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Petitioner,

v.

HONORABLE THOMAS A. BEDELL, JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of West Virginia

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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September 26, 2011

MOTION OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Counsel for Petitioner lodged a letter with the Clerk of the Court consenting to the filing of this brief. Likewise, separate counsel for Respondents Bedell and Luby both lodged a letter with the Clerk of the Court consenting on behalf of their clients to the filing of this brief. Counsel for Respondent Blank, however, has not responded to repeated requests for consent. Accordingly, this motion for leave to file is necessary.

WLF is a public interest, law and policy center headquartered in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and related topics. WLF has appeared as *amicus curiae* in numerous cases before this Court involving issues of public importance, including cases impacting the First Amendment rights of the business community. While WLF believes that government has an appropriate role to play in ensuring that commercial speakers do not provide false or misleading information to the public, WLF has consistently opposed government efforts to silence or otherwise prevent the dissemination of

truthful speech. See, e.g., *Sorrell v. IMS Health, Inc.* 131 S. Ct. 2653 (2011); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with Petitioner that the extraordinarily broad protective order imposed below warrants further review by this Court. Simply put, the First Amendment does not permit a court to issue a protective order purporting to regulate the retention or dissemination of information obtained independently of discovery in the pending litigation. As such, the protective order sustained below is a content-based prior restraint on speech that goes well beyond the trial court's authority to manage discovery under *Seattle Times* and its progeny.

In the face of Petitioner's valid First Amendment concerns, the court upheld the protective order without citing a single case that so much as suggests that the compilation, retention, and dissemination of truthful data about individuals *obtained outside discovery* does not constitute First Amendment-protected speech. Nevertheless, the court upheld the trial court's extraordinarily broad protective order without even attempting to balance or contend with Petitioner's First Amendment interests. Review is warranted because the decision

below conflicts with numerous decisions of this Court.

Amici believe that the arguments set forth in this brief will assist the Court in determining and resolving the issues presented by the Petition. *Amici* have no direct interest, financial or otherwise, in the outcome of this case. Because of their lack of a direct interest, *amici* believe that they can provide the Court with a perspective that is distinct from that of the parties.

For the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

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QUESTION PRESENTED

Whether the district court's protective order, which imposes a prior restraint and document destruction requirements on information obtained outside the discovery process, survives 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).

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INTERESTS OF *AMICI CURIAE*[1]

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are more fully set forth in the accompanying motion for leave to file this brief.

Amici agree with Petitioner that the extraordinarily broad protective order imposed below warrants further review by this Court. Simply put, the First Amendment does not permit a court to issue a protective order purporting to regulate the retention or dissemination of information obtained independently of discovery in the pending litigation. As such, the protective order sustained below is a content-based prior restraint on speech that goes well beyond the trial court's authority to manage discovery under *Seattle Times* and its progeny.

In the face of Petitioner's valid First Amendment concerns, the court upheld the protective order without citing a single case that so much as suggests that the compilation, retention, and dissemination of truthful data about individuals *obtained outside discovery* does not constitute First Amendment-protected speech. Nevertheless, the court upheld the trial court's extraordinarily broad

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of intent to file this brief.

protective order without even attempting to balance or contend with Petitioner's First Amendment interests. Review is warranted because the decision below conflicts with numerous decisions of this Court.

STATEMENT OF THE CASE

Following the death of her husband in an automobile accident, Carla Blank brought a personal injury and wrongful death action against the estate of Jeremy Thomas, the driver of a vehicle that collided with the Blanks' car. Both Mr. Thomas and the Blanks were insured by Petitioner State Farm. Though contractually obligated to turn over her medical records to State Farm in connection with her policy, Ms. Blank refused to do so. After Ms. Blank rescinded a medical authorization form she had previously executed, State Farm renewed its request for a medical authorization per the express terms of Ms. Blank's policy.

Through her counsel, Ms. Blank refused to provide any medical records unless State Farm agreed to an extraordinarily broad protective order that, *inter alia*, would prohibit State Farm from scanning records into State Farm's electronic claims file or otherwise using the records to detect or prevent fraud, and would require the return or destruction of all medical records once the litigation concluded.

Although State Farm was willing to enter into a protective order, it was unwilling to agree to the restrictive terms demanded by Ms. Blank. Among other things, State Farm demonstrated that the

confidentiality of Ms. Blank's medical records was already fully safeguarded by existing laws and regulations as well as by State Farm's own internal protocols. State Farm also reminded the trial court that West Virginia law 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). Moreover, West Virginia's insurance code affirmatively requires all insurers, including State Farm, to report suspected fraud to the West Virginia Insurance Commissioner's Fraud Unit. *See* W. Va. Code § 33-41-5(a)(2009). Accordingly, State Farm objected that the protective order demanded by Ms. Blank was contrary to the document retention and fraud reporting requirements of state law.

Notwithstanding State Farm's objections, the trial court ordered Ms. Blank to provide her medical records but imposed a protective order imposing substantially the same restrictions demanded by Ms. Blank. State Farm sought a writ of prohibition from the West Virginia Supreme Court.

A unanimous West Virginia Supreme Court issued the writ, prohibited the trial court from entering the protective order, and found that the requirement that State Farm return or destroy Ms. Blank's records at the conclusion of litigation conflicted with the West Virginia Insurance Commissioner's minimum period of five to six years for record retention. Pet. App. at 84a-86a, 91a. The court also found that the trial court exceeded its authority by prohibiting the electronic storage of Ms. Blank's medical records. *Id.*

On remand, Ms. Blank renewed her demand for a protective order. State Farm objected on the grounds that, *inter alia*, the proposed protective order was unconstitutional under *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984). Pet. App. at 6a-8a. As before, State Farm also objected that the proposed order conflicted with State Farm's duty to report suspected fraud under West Virginia law. *Id.* Over State Farm's objections, the court entered a second protective order nearly identical to the first, albeit eliminating the prohibition on electronic storage and extending the return or destruction period to mirror the period required by the West Virginia Insurance Commissioner, which period was created for the purpose of market conduct examinations. *Id.* at 98a-101a.

That protective order, which is the basis for the Petition, expressly forbids State Farm from disclosing not only medical records obtained in the course of discovery, but also any medical records State Farm obtained independently or that State Farm was otherwise contractually entitled to receive under the Blanks' insurance policy. *Id.* The order also prohibits State Farm from reporting suspected insurance fraud to *any* entity, including the West Virginia Insurance Commissioner, the U.S. Department of Justice, or the National Insurance Crime Bureau. *Id.* Further, the order not only requires State Farm to return or destroy all of Ms. Blank's medical records currently in State Farm's files, but actually compels State Farm to destroy any "medical information" pertaining to Ms. Blank contained in State Farm's *own* documents. *Id.* By its own terms, the order does not allow for the lawful

dissemination of information by State Farm as required by state and federal law.

Once again, State Farm petitioned the West Virginia Supreme Court for a writ of prohibition, in part on the grounds that the order was (1) unconstitutional under *Seattle Times*, (2) issued without good cause, and (3) contrary to West Virginia's insurance regulations. *Id.* at 10a-18a. Relying on the Health Insurance Portability Act of 1996 ("HIPAA"), which is facially inapplicable to automobile casualty insurance claims, a 3-2 divided court upheld the protective order. *Id.* at 47a-48a. In doing so, the court failed to address the constitutional deficiencies raised by State Farm and further ruled that the issues surrounding the order's apparent conflict with state and federal reporting and document retention requirements were not properly before the court. *Id.*

Justice Benjamin dissented on the grounds that the second protective order still conflicted with State Farm's obligations under West Virginia law. *Id.* at 60a-62a. In other words, the order forced State Farm "to choose between violating statutory law or violating [the court's protective] order." *Id.* at 60a. Because this untenable choice was sufficient grounds for the West Virginia Supreme Court to prohibit the first protective order, Judge Benjamin reasoned, it merited a writ of prohibition for the second order. *Id.*

Justice Ketchum dissented separately on the grounds that the protective order would seriously impede the insurance industry's ability to detect and police against insurance fraud. *Id.* at 55a-57a. He

also criticized the majority's reliance on HIPAA, which is wholly inapplicable. *Id.* Justice Ketchum called into question the wisdom of imposing a new affirmative duty on insurance companies and their attorneys to "destroy lawfully-obtained medical records and any summaries of these records." *Id.* at 57a.

State Farm unsuccessfully sought rehearing on the grounds that the protective order's stringent requirements raise serious constitutional issues under the First Amendment, the Full Faith and Credit Clause, and the Due Process Clause. State Farm also sought an opportunity to brief the inapplicability of HIPAA, which was raised for the first time by Ms. Blank in her final responsive brief (no reply brief is allowed under the applicable rules). The West Virginia Supreme Court denied State Farm's request for rehearing by an identical 3-2 split. *Id.* at 103a-104a.

REASONS FOR GRANTING THE PETITION

The Petition raises issues of great importance affecting the rights of litigants to retain and disseminate information obtained independently of discovery. Certiorari is warranted because only this Court can now vindicate Petitioner's First Amendment rights below. At a deeper level, however, there is a greater issue presented in this case: the fundamental unfairness inherent in a plaintiff attempting to selectively use the legal process as both a sword and a shield as she sees fit. *Amici* urge review of the West Virginia Supreme Court's decision because it sets a dangerous precedent for business defendants who are regularly

involved in litigation, especially for insurers who have a duty to retain and disseminate information in order to monitor and combat insurance fraud and satisfy other mandated reporting requirements.

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), this Court applied heightened judicial scrutiny to a trial court order prohibiting a newspaper's disclosure of information it learned through coercive discovery. The Court ultimately held that a trial court could "not restrict the dissemination of the information if gained from other sources." *Id.* at 37. Indeed, the Court went on to clarify that 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.

The protective order upheld below does violence to *Seattle Times* by seeking to expand the reach of protective orders far beyond their permissible limits. On its face, the order purports to apply to materials obtained by State Farm *outside* of the discovery process. Specifically, the protective order at issue requires State Farm to destroy or return *any* of Ms. Blank's medical information contained in State Farm's files and to delete any such information included in State Farm's own internal documents. The order encompasses more than simply the fruits of discovery; it requires the destruction of information, including any information previously contained in State Farm's own files, any mental impressions or notes about Ms. Blank's medical records inserted by the insurance adjuster found in State Farm's files, and any other document referencing Ms. Blank's medical condition.

It also includes any medical records that State Farm received prior to litigation, as well as important medical information that State Farm was contractually entitled to receive under Ms. Blank's insurance policy.

The First Amendment simply does not permit a court to issue a protective order purporting to regulate the retention or dissemination of information obtained independently of discovery in the pending litigation. As such, the protective order sustained below is a content-based prior restraint on speech that goes well beyond the trial court's authority to manage discovery under *Seattle Times*.

Remarkably, the West Virginia Supreme Court opted to completely side step the important First Amendment issues raised by the protective order in this case. In the face of Petitioner's valid First Amendment concerns, the court upheld the protective order without citing a single case that so much as suggests that the compilation, retention, and dissemination of truthful data about individuals *obtained outside discovery* does not constitute First Amendment-protected speech. Nevertheless, the court upheld the trial court's extraordinarily broad protective order without even attempting to balance or contend with Petitioner's First Amendment interests. Review is warranted because the decision below conflicts with numerous decisions of this Court.

This Court recently held in *Sorrell v. IMS Health, Inc.* that the creation and dissemination of information are "speech" within the meaning of the First Amendment. Because insurance companies

enjoy a First Amendment right to use truthful health information obtained lawfully to fulfill their valid fraud-fighting obligations, especially when those obligations are imposed by state and federal law, the protective order below must be subjected to heightened scrutiny.

The goals of fairness, predictability, and an appropriate balancing of First Amendment and litigation interests were all severely injured in this case. Only this Court can now vindicate those goals. *Amici* join with Petitioner in urging this Court to grant the petition for a writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *SEATTLE TIMES* AND ITS PROGENY

In *Seattle Times Co. v. Rhinehart*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper's disclosure of information it learned through coercive discovery. The Court ultimately held that where "a protective order is entered on a showing of good cause as required by Rule 16(c), *is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources*, it does not offend the First Amendment." 467 U.S. at 37 (emphasis added). *Amici* ask this Court to vindicate that venerable holding in this case.

Seattle Times makes clear that the good cause standard relied on below can justify a protective

order only in those cases where the restrained party "gained the information [it] wish[ed] to disseminate only by virtue of the trial court's discovery process." *Id.* at 32. The Court explicitly acknowledged that a trial court could "not restrict the dissemination of the information if gained from other sources." *Id.* at 37. Indeed, the Court went on to clarify that 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.

The protective order sustained below does violence to *Seattle Times* by seeking to expand the reach of protective orders far beyond their permissible limits. On its face, the order purports to apply to materials obtained by State Farm *outside* of the discovery process. Specifically, the protective order at issue requires State Farm to destroy or return all copies of Ms. Blank's medical records. The order expressly 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*." Pet. App. 100a (emphasis added). The order also purports to restrain State Farm from reporting suspected insurance fraud to any entity: "[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.

This broad language encompasses more than simply the fruits of discovery; it requires the destruction of information, including any information previously contained in State Farm's

own files, any mental impressions or notes about Ms. Blank's medical records inserted by the insurance adjuster found in State Farm's files, and any other document referencing Ms. Blank's medical condition. It also includes any medical records that State Farm received prior to litigation, as well as important medical information that State Farm was contractually entitled to receive perforce Ms. Blank's policy agreement. As such, the protective order is a content-based prior restraint on speech that goes well beyond the trial court's authority to manage discovery under *Seattle Times*.

This Court has granted certiorari in the past to vindicate the principles set forth in *Seattle Times*. In *Butterworth v. Smith*, 494 U.S. 624 (1990), the Court struck down a state law that sought to prohibit grand jury witnesses from publicly disclosing their testimony. When the government sought to justify the law by relying on *Seattle Times*, the Court was quick to point out the crucial distinction between information obtained through discovery and information obtained by other means. As here, the case involved a prior restraint on the right to disseminate information obtained independently of discovery. "In such cases, where a person 'lawfully obtains truthful information about a matter of public significance,' [this Court] ha[s] held that 'state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" *Butterworth*, 494 U.S. at 631-32.

Simply put, the First Amendment does not permit a court to issue a protective order purporting to regulate the retention or dissemination of

information obtained independently of discovery in the pending litigation. *See, e.g., In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (issuing a writ of mandamus because the protective order "exceeded [the court's] delegated powers, which were limited to supervising the discovery process"); *Anderson v. Crayovac, Inc.*, 805 F.2d 1, 14 (1st Cir. 1986) (emphasizing that a protective order may not "restrict the dissemination of information obtained from other sources"); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 946 (2d Cir. 1983)(issuing a writ of mandamus because protective order constituted a "prior restraint on the defendants' First Amendment right to disseminate documents obtained outside the discovery process").

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S LONGSTANDING PRECEDENTS EXTENDING FIRST AMENDMENT PROTECTION TO THE COMPILATION, RETENTION, AND DISSEMINATION OF INFORMATION

Remarkably, the West Virginia Supreme Court opted to completely side step the important First Amendment issues raised by the protective order in this case. In the face of Petitioner's valid First Amendment concerns, the court upheld the protective order without citing a single case that so much as suggests that the compilation, retention, and dissemination of truthful data about individuals *obtained outside discovery* does not constitute First Amendment-protected speech.

Nevertheless, the court upheld the trial court's extraordinarily broad protective order without even attempting to balance or contend with Petitioner's First Amendment interests. Review is warranted because the decision below conflicts with numerous decisions of this Court.

A. The Decision Below Conflicts With This Court's Recent Holding In *Sorrell v. IMS Health, Inc.*

This Court has explained that "[a]s a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Indeed, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Id.* at 527 (internal citations and quotations omitted).

Only last term, the Court recognized in *Sorrell v. IMS Health, Inc.* that "speech in aid of pharmaceutical marketing" is "a form of expression protected by the Free Speech Clause of the First Amendment." 131 S. Ct. at 2659. In light of *Sorrell*, speech in aid of combating insurance fraud is deserving of no less protection. *Id.* at 2667 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."). Because insurance companies enjoy a First Amendment right to use truthful health information obtained lawfully to fulfill their valid fraud-fighting obligations, especially when those obligations are imposed by state and federal

law, the protective order below "must be subjected to heightened scrutiny." *Id.*

In *Sorrell*, this Court overturned a statute that, like here, "prohibit[ed] a speaker from conveying information that the speaker already possesse[d]." *Id.* at 2665 (internal quotations and citations omitted). At issue was a Vermont statute that prohibited pharmacies from selling to "data miners" information about the prescription practices of individual physicians. The law also prohibited pharmacies from permitting the use of such information for the marketing of drugs by pharmaceutical companies. Finally, it also prohibited pharmaceutical companies, which obtained this information from data miners, from using it to market their products to doctors. While one avowed purpose of the law was to lessen the effectiveness of marketing to physicians by drug makers of brand-name prescription drugs, the State also claimed an interest in protecting the privacy interests of doctors.

Recognizing that information itself is vital to free speech, the Court reaffirmed that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 2657 (citing *Bartnicki*, 532 U.S. at 527). The Court went on to explain that "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* at 2667.

Relying in part on *Seattle Times*, the *Sorrell* Court confirmed that "[a]n individual's right to speak is implicated when information he or she

possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id.* at 2665-66 (quoting *Seattle Times*, 467 U.S. at 32). The Court even recognized that "[i]t 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 the Court concluded that physical possession prior to governmental restraint was immaterial, as the information the government sought to regulate was "in the hands of pharmacies and other private entities." *Id.*

Nor was the State's purported interest in safeguarding physician's privacy sufficient to outweigh the speakers' First Amendment rights. Instead, the Court reminded the government that "[s]peech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.'" *Id.* at 2670 (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011)). In words that seem eerily applicable here, the Court observed:

> The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination . . . .

Id. at 2672.

Here, as in *Sorrell*, this is "a case in which the government is prohibiting a speaker from conveying

information that the speaker already possesses." *Id.* at 2665 (internal citation and quotation omitted). The West Virginia trial court has "imposed a restriction on access to information in private hands." *Id.* at 2657. As in *Sorrell*, the protective order upheld below "imposes more than an incidental burden on protected expression." *Id.* at 2665. Indeed, "[b]oth on its face and in its practical operation, [the order] imposes a burden on the content of speech and the identity of the speaker." *Id.* Nor is there any question that here, as in *Sorrell*, the "threat of prosecution . . . hangs over" State Farm's head. *Id.* 2666 (quoting *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999)).

The trial court below does not contend that the protective order is necessary to prevent the dissemination of false or misleading speech within the meaning of this Court's First Amendment precedents. Nor does it suggest that the order will somehow prevent false or misleading speech. Accordingly, the extraordinarily broad protective order imposed by the trial court has unduly burdened a form of protected expression under the First Amendment. Only this Court can now vindicate that right.

B. The Decision Below Conflicts With This Court's Longstanding First Amendment Precedents

Sorrell by no means announced a new rule, but rather merely reaffirmed this Court's longstanding view. *See Sorrell,* 131 S. Ct. at 2666 (acknowledging that all of the Court's precedents

recognize that restrictions on the disclosure of information "can facilitate or burden the expression of potential recipients and so transgress the First Amendment."). Indeed, every prior decision of this Court that has addressed the issue has concluded (or at least strongly suggested) that the compilation, retention, and dissemination of truthful data is indeed protected by the First Amendment, regardless whether the information itself is deemed a matter of public or private concern.

For example, the Court has stated that although it is a matter of public concern that the crime of rape has occurred, a mere list of names of rape victims is not a matter of public concern but rather is only a matter of "private concern." *Florida Star v. B.F.J.*, 491 U.S. 524, 536-37 (1989). The Court nonetheless held that the listing of such names by a commercial newspaper is speech entitled to substantial First Amendment protection and noted pointedly that "our decisions have *without exception* upheld the press' right to publish" information of only private concern. *Id.* at 530 (emphasis added).

Similarly, this Court has upheld the First Amendment right of a commercial newspaper to publish the names of juvenile offenders (at least where it has lawfully obtained the names), even though States routinely treat such names as a matter of strictly private concern that must be kept confidential. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979). Given that compiling and disseminating personal data constitutes "speech" when performed by commercial newspapers, there can be no logical grounds for stripping it of all

constitutional protection simply because other types of commercial entities, such as Petitioner, might seek to do the same.

This Court has further made clear, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), that First Amendment protections apply to aggregated financial data disseminated for profit by a credit reporting agency. In that case, the plaintiff sued for libel, alleging that unfavorable financial data disseminated by the credit reporting agency was false. The only issue that divided the Court was the degree of First Amendment protection to which the credit reporting agency was entitled; the Court unanimously agreed that the dissemination of aggregated financial data was speech that was entitled to *some* amount of First Amendment protection. *See, e.g.,* 472 U.S. at 759-60 (plurality opinion).

In yet another case, *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, all nine members of the Court concluded that regulation of the dissemination of aggregated data should be deemed regulation of speech. 528 U.S. at 32. *United Reporting* involved plaintiffs who facially challenged a California statute that prohibited disclosure of police department arrest records to firms that refused to agree not to use those records for commercial purposes (e.g., sales to attorneys who were interested in soliciting business from arrestees). A majority of the Court rejected the facial challenge, finding that the First Amendment was not implicated when a government allows some citizens to public records but denies access to others.

But all nine justices agreed that if the plaintiffs could gain access to the records *without government assistance*, any government effort to prevent their use would implicate the First Amendment. *See United Reporting*, 528 U.S. at 40 ("This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses."); *id.* at 42-43 (Ginsburg, J., with whom O'Connor, Souter, and Breyer, JJ., joined, concurring) ("Anyone who comes upon arrestee information in the public domain is free to use the information as she sees fit. [Once the information is published, the challenged statute] *would indeed be a speech restriction* if it then prohibited people from using that published information to speak to or about arrestees.") (emphasis added); id. at 46 (Stevens, J., with whom Kennedy, J., joined, dissenting).

The court below upheld a drastic protective order that was challenged on First Amendment grounds without discussing or even citing *Sorrell*, *Florida Star*, *Smith*, *Dun & Bradstreet*, *United Reporting*, or any of the numerous federal appeals court decisions that have concluded that the creation, retention, and dissemination of data is entitled to First Amendment protection. This case is an excellent vehicle for addressing the First Amendment issues implicated by such protective orders because, in all likelihood, Petitioner's speech interests are entitled to significantly more First Amendment protection than are the speech interests of commercial newspapers and credit reporting agencies. When newspapers and credit reporting agencies disseminate information, they undoubtedly are engaging in commercial speech, a form of speech

receiving a somewhat reduced level of First Amendment protection.

In contrast, Petitioner's fraud retention and reporting activities, which are required by State law, do not so easily fit into the commercial speech mold. When State Farm provides, either affirmatively or in response to a subpoena, information to the West Virginia Insurance Commissioner, for example, it is not proposing any sort of commercial transaction, but the transfer takes place "outside a traditional advertising format, such as a brief television or newspaper advertisement." *Nike v. Kasky*, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting from dismissal of the writ). As Justice Breyer has explained, such noncommercial characteristics of speech by a business entity only strengthen that entity's claim to heightened First Amendment protection. *Id.*

Several members of the Court have expressed dissatisfaction with the Court's current approach to speech restrictions on commercial entities, particularly where the speech at issue arises outside the context of traditional advertising, or where the government seeks to restrict the speech for reasons other than its potential falsity. *See, e.g., Thompson v. W. States Med Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517-18 (1996) (Scalia, J., concurring in part and concurring in the judgment). Given the context within which Petitioner's speech arises (speech arising outside the traditional advertising context, with no suggestion that Petitioner's speech is false), this case would be an ideal vehicle for the Court to establish the contours

of the free speech rights it most recently recognized in *IMS Health, Inc.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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