IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

IN THE MATTER OF THE CONSERVATION OF NEXTLEVEL HEALTH PARTNERS, INC.	**)** **)** **)**	**No. 2020 CH 4431**

PEOPLE OF THE STATE OF ILLINOIS' RESPONSE TO INTERVENOR'S AMENDED MOTION TO RECONSIDER

On June 13, 2022, this Court denied Intervenor Jacqueline Stevens' First Amended Motion to Vacate Orders Denying Access to Hearings and Records in this Proceeding and Declare Unconstitutional 215 ILCS 5/188.1(b)(4,5). In its order, this Court recognized that—while judicial proceedings are generally open to the public—this presumption of access does not attach to conservation proceedings. And included within this finding, this Court determined that Section 188.1 of the Illinois Insurance Code (the "Code"), 215 ILCS 5/188.1, is not unconstitutional. This historical confidentiality effectuates the goals of conservation while protecting all parties involved.

But Intervenor is once again attempting to upend the function of conservation proceedings by asking this Court to reconsider its June 13, 2022, Order. Intervenor's Amended Motion to Reconsider is based upon perceived errors in this Court's ruling that reflect a misanalysis of the presumption of access to court proceedings and records. *First*, this Court did not err by finding that the presumption of access does not apply to conservation proceedings. *Second*, the confidentiality requirements imposed by this Court on the documents that remain sealed do not violate Intervenor's equal protection rights. *Third* and finally, if this Court considers Intervenor's argument that the Court's confidentiality order was not based upon Section 188.1, then Intervenor's arguments challenging the statute are moot. For these reasons, Plaintiff's Amended Motion to Reconsider must be denied.

ARGUMENT

Intervenor's Amended Motion to Reconsider must be denied because this Court did not err in its application of the law. The purpose of a motion to reconsider is to alert the court of newly discovered evidence that was unavailable at the time of the hearing, changes in the law, or errors in the court's application of the law. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. Although Intervenor's Amended Motion to Reconsider at times relies on the recent United States Supreme Court decision in *N.Y. State Rifle & Pistol Association v. Bruen*, nothing in *Bruen* changes the analysis of the presumption of access to records that is at issue in this case. Nor has there been any new evidence discovered between this Court's ruling and Intervenor's Amended Motion to Reconsider. Thus, the entire basis of Intervenor's Amended Motion to Reconsider rests upon her belief that this Court erred in its application of the law. For the reasons set forth below, this Court did not make such error.

I. This Court did not err by finding that there is no presumption of access to conservation proceedings.

This Court did not err in finding that there is no presumption of access to conservation proceedings. The presumption of public access derives from common law and the First Amendment. In its June 22, 2022, Order, this Court analyzed the presumption of access to conservation proceedings under both the common law and the First Amendment to find that Section 188.1 of the Code, 215 ILCS 5/188.1, is constitutional. This finding was not in error.

A. Section 188.1 abrogates any common law presumption of access to conservation proceedings.

This Court did not err by finding that Section 188.1 abrogates the common law presumption of access to court proceedings. *See* June 13, 2022 Order ("The powerful and indeed inspiring language [Intervenor] cites concerning common law … was issued in cases that do not involve a statute such as ours."). In common law, there is a presumption of access that permits

the inspection and copying of public records and documents by the general public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). But this right of access in not absolute as "[e]very court has supervisory power over its own records and files, and access [may be] denied where court files might become a vehicle for improper purposes. *Id*. at 598. And in addition, statutory provisions will abrogate well-established common law rules if the statutes "speak directly to the question[s] addressed by the common law" and demonstrate a statutory purpose not to apply the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotations omitted).

Section 188.1 abrogates this common law presumption of access. This section mandates that "all records of the company, other documents, and all insurance department files *and court records and papers*, so far as they pertain to and are a part of the record of the conservation proceedings, *shall be and remain confidential*." 215 ILCS 5/188.1(5) (emphasis added). According to this plain language, Section 188.1 directly addresses the common law right of access and demonstrates a clear, legislative intent not to apply the common law by instead explicitly requiring that all court records and papers relating to a conservation proceeding be confidential. *See Father M. v. Various Tort Claimants (In re Roman Catholic Archbishop)*, 661 F.3d 417, 430 (9th Cir. 2011) ("A 'statutory purpose to the contrary is evident' when there is a divergence between the statute's direction and the common law."). Accordingly, this language falls squarely within the standards for abrogation of common law as the section's language establishes the divergent purpose of Section 188.1 from any common law presumption of access.

Based on the foregoing, the Court did not err by holding that Intervenor's common law arguments were insufficient to supersede the effect of Section 188.1. Given the explicit mandate

of the legislature regarding the confidentiality of these proceedings, Section 188.1 abrogates any common law presumption of access in this case.

B. The Court correctly held that Section 188.1 does not violate any constitutional presumption of access to court proceedings.

This Court also correctly held that Section 188.1 also does not violate any constitutional presumption of access to court proceedings. A parallel right of access to court records and proceedings exists within the First Amendment to U.S. Constitution. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000), *citing Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). This "first amendment right presumes a right to inspect court records which have 'historically been open to the public' and disclosure of which would further the court proceeding at issue." *Id*. "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986).

However, even when this right of access attaches, the right is not absolute. *Id., citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Some courts have held that this "presumption can be rebutted by demonstrating that suppression is 'essential to preserve higher values and is narrowly tailored to serve that interest.'" *Skolnick*, 191 Ill. 2d at 232, *citing Grove Fresh Distributors, Inc.*, 24 F. 3d at 897. And other courts have incorporated a strict scrutiny analysis by requiring "a showing of a 'compelling' or similarly stringent interest to overcome the constitutional right to review court records." *Id., citing Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 203 (Minn. 1986).

i. This Court correctly held that conservation proceedings have not historically been open to the public.

As to the first prong, the Court correctly held that the constitutional presumption does not apply because conservation proceedings have not historically been open to the public. Since its creation in 1937, confidentiality has been an integral component of Article XIII of the Code. Specifically, Section 132 of the Code provided as follows:

> (1) The Director, for the purpose of. ascertaining the assets, conditions and affairs of any company, may examine the books, records, documents and assets of
> (a) any company transacting, or being organized to transact, business in this State;
>
> * * *
>
> (3) The examiners designated by the Director pursuant to section 402, shall make a full and true report of every examination made by them, which shall comprise only facts ascertained from the books, papers, records or documents, examined by them or ascertained from the testimony of officers or agents or other persons examined under oath concerning the business and affairs and the assets of such company or person. The report of examination shall be verified by the oath of the examiner in charge thereof, and said report so verified shall be prima facie evidence in any action or proceeding in the name of the State against the company, its officers or agents upon the facts stated therein.
>
> (4) The Director shall grant a hearing to the company or person, its officers or agents, upon any, facts contained in such examination report before filing the. same, and before making such report public or any matters relating thereto; and he may withhold any such report from public inspection for such time as he may deem proper and may, after filing the same, publish any part or all of such report as he may deem to . be in the interest of the public in one or more newspapers in this State without expense to the company.

Additionally, the Generally Assembly granted the Director the power to determine whether information should be confidential:

> § 404. Office of Director—a Public Office. The office of the Director shall be a public office and. the records, books, and papers thereof on file therein shall be accessible to the inspection of the public, except as the Director, for good reason, may decide otherwise, or except as may be otherwise provided in this Code.

As the General Assembly has added to the Code, it has continued to expand the confidentiality provisions. *See, e.g.,* 215 ILCS 5/131.22 (documents, materials and other information obtained in the course of a company examination are "confidential by law and privileged, shall not be subject to the Illinois Freedom of Information Act"); 215 ILCS 5/155.35 ("An insurance compliance self-evaluative audit document is privileged information and is not admissible as evidence in any legal action"); 215 ILCS 5/186.1 ("All administrative and judicial proceedings arising [in respect of corrective orders] shall be held privately unless a public hearing is requested by the company, and all records of the company, and all records of the Department concerning the company, so far as they pertain to or are a part of the record of the proceedings, shall be and remain confidential, unless the company requests otherwise. Such records shall not be subject to public disclosure under the 'Illinois Freedom of Information Act'").

Moreover, these confidentiality provisions are not unique to Illinois as many other states have similar provisions in their insurance codes. *See* Ohio Rev. Code Ann. § 3903.11(A) (added in 1982 by H 830), M.C.L.A. 500.8111(1) (added in 1990 by P.A. 1989, No. 302 § 1), 18 Del. C. § 5944(a) and (b) (added in 1984 by 1964 Del. Laws, ch. 420 § 2). And the National Association of Insurance Commissioners ("NAIC") included confidentiality provisions in their Insurance Receivership Model Act. *See* NAIC Insurance Receivership Model Act (2007), Section 206.

As the Court noted in its order, Intervenor did not dispute this history. And Intervenor similarly fails to dispute it in her Amended Motion to Reconsider, instead relying on bankruptcy proceedings to show that *similar* proceedings have historically allowed for public access. *See* Amended Motion to Reconsider, page 12. As an initial matter, Intervenor's argument is irrelevant because the question before the Court is not whether *similar* court proceedings have

been historically open to the public. To the contrary, this right only presumes a right to inspect court records that have historically been public. *See Skolnick*, ("This "first amendment right presumes a right to inspect court records which have 'historically been open to the public.'"). This implies an analysis of the historical traditions of the specific type of proceeding at issue as nothing in the court's statement qualifies the presumption analysis through the inclusion of the modifier 'similar' to necessitate a comparison of similar proceedings.[1] *See First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 484-85 (3d Cir. 1986).

But even if similarity to other proceedings was a factor for consideration, Intervenor's comparison of conservation and bankruptcy proceedings supports this Court's finding. As an initial matter, insurance companies have been explicitly excluded from "federal bankruptcy law since the enactment of the Federal Bankruptcy Act of 1898 ("the 1898 Act")." 9 New Appleman on Insurance Law Library Edition § 96.01 (2022). The NAIC created the NAIC Insurer Receivership Model Act, which over time has been enacted in one form or another in most states. *Id*. The NAIC used Wisconsin's receivership laws as its model, which were based largely on the original Federal Bankruptcy Act of 1898. *Id*. Notably, Wisconsin's confidentiality provision is identical to Section 188.1. *Cf.* Wis. Stat. § 645.24(3) ("In all summary proceedings and judicial

[1] Courts have taken somewhat inconsistent approaches in their application of this presumption analysis. While some courts have drawn analogies with established proceedings when analyzing historical traditions, other courts have examined the history of the specific proceeding at issue. *Compare Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985) *with First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 484-85 (3d Cir. 1986).

But with respect to this issue, Justice Burger's dissent in *Globe Newspaper Co. v. Superior Court* is instructive. In his dissent, Justice Burger defended this historical inquiry and emphasized the importance of limiting this right of access when there was no tradition of openness. *Globe Newspaper Co.*, 457 U.S. at 613. Justice Burger urged that the focus be on the historical tradition of the exclusion of the public from criminal rape trials, rather than simply generalizing criminal rape trials with all other criminal trials. *Id*. Justice Burger's dissent is particularly salient to this issue because he wrote the majority opinion in *Richmond Newspapers*, which was the first case to establish a First Amendment right of access to governmental information. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 590 (1980). Accordingly, this Court should follow the approach advanced by Justice Burger.

reviews thereof, all records of the company, other documents, and all office of the commissioner of insurance files and court records and papers, so far as they pertain to or are a part of the record of the summary proceedings, shall be and remain confidential except as is necessary to obtain compliance therewith."). Thus, even if this Court were to use bankruptcy proceedings for comparison, the confidentiality provisions for receiverships that exist in most states, including Illinois, have been modeled after the 1898 Federal Bankruptcy Act.

And notably, bankruptcy courts are specifically permitted under their statute and rules to restrict access to bankruptcy documents when certain conditions apply. Pursuant to the Federal Rules of Bankruptcy Procedure, "the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) *to protect governmental matters that are made confidential by statute or regulation.*" USCS Bankruptcy R 9018 (emphasis added), *see also* 11 USCS § 107(b). Accordingly, the very proceedings that Intervenor cites as support for accessing documents has provisions that similarly restrict access, particularly when it involves matters made confidential by statute or regulation, such as the statute this case.

Based on the foregoing, this Court did not err when it held that the constitutional presumption of access does not apply because conservation proceedings have not historically been open to the public.

ii. The historical analysis does not require a history dating back to 1776.

This Court did not err by not extending its historical analysis to 1776. Because Intervenor cannot dispute the lengthy history of confidentiality, she instead relies on *Bruen*—which

involved the Second Amendment, not the First Amendment—to argue that "the time frame for ascertaining if a statute or case law is *historical* for purposes of denying constitutional relief is that of the founders." Amended Motion to Reconsider, page 11 (emphasis in original), *relying on N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

But the Court in *Bruen* did not make the narrow holding advanced by Intervenor. The Court instead simply held that a regulation needed to be within the historical tradition of firearm regulation, which spanned from the amendment's ratification through post-Civil War era regulations. *N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. at 2127-27. And further, when comparing this analysis to an analysis involving freedom of speech, the Court noted that in those instances "the government must generally point to historical evidence about the reach of the First Amendment's protections." *Id*. at 2130. Nothing in that holding limits the historical analysis to the time of the founders. Indeed, the Court even recognized that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*. at 2132. Based on the foregoing, it stands to reason that if the Court had intended to limit historical analysis to only 1776, the Court would have specifically identified this time frame in its ruling rather than holding that the "government must *generally* point to historical evidence." *Id*. at 2130.

iii. The Court correctly held that there is a compelling reason for the Privacy Provision.

This Court did not err when it held that "disclosure would not further the purpose and function of conservation proceedings." June 13, 2022 Order, page 4. In *Press-Enterprise*, the Court held that "it takes it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enterprise Co.*, 478 U.S. at 8-10.

Conservation proceedings are exactly the type of government operations envisioned by the

Court in *Press-Enterprise*. When Congress enacted the Federal Bankruptcy Act of 1898, Courts believed that insurers were exempted from it because insurers are affected with a public interest and "are regulated by state regulators possessing specialized knowledge and insurance expertise." 9 New Appleman on Insurance Law Library Edition § 96.01 (2022). Accordingly, it has been recognized that insurance "insolvencies are better handled by state insurance receivers." *Id*. In keeping with this recognition, Section 188.1 involves the State's procedure for handling insurance proceedings and its corresponding confidentiality provisions for conservation proceedings. As previously argued and as recognized by this Court, the purpose of conservation is to maintain the status quo while the Director ascertains the condition and situation of the insurance company and determines whether the condition requiring conservation can be resolved. *See* 9 New Appleman on Insurance Law Library Edition § 96.03 (2021), *relying on* 215 ILCS 5/188.1; National Association of Insurance Commissioners, Receiver's Handbook for Insurance Company Insolvencies, page 7 (April 2021), https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf.

Intervenor's sole argument focuses almost exclusively on the use of the phrase "run on the bank." Intervenor claims that this Court erred because "[a] 'run on the bank' is not a reason, but here a meaningless cliché." Amended Motion to Reconsider, page 17. The use of a common phrase does not remove the widely understood meaning behind the phrase. And here, this phrase succinctly explains the need for confidentiality in conservation proceedings because disclosure of the proceeding would lead to the company's creditors prematurely filing claims out of fear of insolvency. This would have drastic consequences because it would wholly prevent the Director from ascertaining the condition and situation of the company. *See* National Association of Insurance Commissioners, Receiver's Handbook for Insurance Company Insolvencies, page 7

(April 2021), https://content.naic.org/sites/default/files/publication-rec-bu-receivers-handbook-insolvencies.pdf. And it may cause the insurer to suffer irreparable harm even if the condition requiring conservation has been removed. *Id*.

Based on the foregoing, this Court did not err by finding that "disclosure would not further the purpose and function of conservation proceedings." June 13, 2022 Order, page 4. And as the purpose for conservation proceedings demonstrates, disclosure would ultimately frustrate the functions of the conservation proceedings.

II. Intervenor's equal protection argument fails.

Intervenor's equal protection argument fails. As previously stated, "[t]he purpose of a motion to reconsider is to bring to a court's attention: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law." *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25. But motions to reconsider are not vehicles for raising new arguments or factual allegations. *Id*. Illinois courts have long held that "[t]rial courts should not allow litigants to stand mute, lose a motion and then frantically gather new material to show that the court erred in its ruling." *Id*.

Intervenor's equal protection argument is not appropriate for a motion to reconsider. In her Amended Motion to Reconsider, Intervenor claims that she has "pointed out discrepancies between statements in the court's Lift and Seal Order of November 29, 2021[,] and the actual records filed and available to the public" since January 5, 2022. Amended Motion to Reconsider, page 18. But despite being aware of this fact for months prior to this Court's order, at no time did Intervenor timely raise this equal protection argument. Because Intervenor did not raise this equal protection argument in the original briefing, she cannot raise it now as part of her Amended Motion to Reconsider. *See Liceaga*, 2019 IL App (1st) 181170 at ¶ 25.

However, Intervenor's equal protection argument fails even if this Court considers it. Under equal protection, "*similarly situated individuals* will be treated similarly, unless the government demonstrates an appropriate reason to do otherwise." *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 81 (emphasis added). Equal protection is intended to prohibit "the state from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation." *Id.*

A threshold analysis for an equal protection claim is "ascertaining whether the individual is similarly situated to the comparison group." *People v. Destiny P. (In re Destiny P.)*, 2017 IL 120796, ¶ 15, *relying on People v. M.A. (In re M.A.)*, 2015 IL 118049, ¶ 26; *In re Derrico G.*, 2014 IL 114463, ¶ 92. For this analysis, "[t]wo classes are similarly situated only when they are in all relevant respects alike." *Id.* Accordingly, evidence showing different treatment of unlike groups will not support an equal protection claim. *Id*. And "[w]hen a party bringing an equal protection claim fails to show that he is similarly situated to the comparison group, his equal protection challenge fails." *M.A. (In re M.A.)*, 2015 IL 118049, ¶ 26.

Intervenor's equal protection claim fails at the outset because she cannot demonstrate that she is similarly situated to her comparison group. Intervenor argues that "[l]eaving in place an order that prohibits Intervenor but not others from publishing the records ordered sealed or redacted is exactly the sort of 'underinclusivenesss' that raises a 'red flag' for violations of the First Amendment" because "there is no substantive or functional difference between *Intervenor* Stevens and any other reporter … who has or will access the publicly released documents." Amended Motion to Reconsider, pages 20- 21 (internal citations omitted) (emphasis added). The mere fact that Intervenor has chosen to become a party to this litigation inherently separates her from other reporters who are not parties to this litigation and who are not bound by this Court's

orders. And Intervenor's recognition of her status in this litigation through her reference to herself as an intervenor belies her argument that she is similarly situated to other non-party reporters.

To the extent that Intervenor claims that she is also a reporter and therefore similarly situated to "any other reporter, attorney, or citizen who has or will access the publicly released documents," this fact is irrelevant because it does not change the fact that her status as a litigant creates a key distinction between her and other reporters. Intervenor's reliance on *Williams-Yulee v. Florida Bar* illustrates this irrelevance. In *Williams-Yulee,* a judicial candidate challenged a Florida law that prevented her from campaign solicitation, arguing that it violated her equal protection rights because other candidates were not prevented from similar campaign solicitation. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 440-41 (2015). Although both the petitioner and her comparison group were candidates for elected positions, it was the petitioner's additional role as a candidate for judicial office that inherently distinguished her from the other candidates. *Id*. at 450 ("In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees" because the two solicitations present markedly different appearances to the public, even though they may be similar in substance.).

Intervenor's position is no different than the judicial candidate's position in *Williams-Yulee*. While Intervenor may also be a journalist like those in her comparison group, Intervenor has the additional role as a party to this litigation, who is therefore bound by this Court's orders unlike her comparison group. Moreover, by seeking to focus solely on her role as a journalist, Intervenor's argument essentially asks this Court to grant her the rights and access of a party to this litigation while simultaneously seeking to evade the responsibilities and requirements to follow orders that result from that status as a litigant. This is not how litigation works. Nor could

it as such a position would strip courts of their inherent power and constitutional obligations by allowing litigants to pick and choose which orders they follow and which ones they do not.

III. If the Court's previous order was not based on Section 188.1, then Intervenor's arguments challenging the statute are moot.

Finally, Intervenor seems to argue that this Court erred by finding that its order to leave certain documents sealed and redacted was pursuant to Section 188.1, as opposed to the Court's inherent power to control its docket. *See* Amended Motion to Reconsider, page 16 ("The discrepancy indicates that the order to substitute the redacted documents is pursuant to the court's inherent power, as NextLevel and DOI claim in their briefings, and not the sequestration statute.") (internal citations omitted). To the extent that this Court reconsiders its order based on this argument, the Director renews the arguments in her Opposition to Intervenor's Motion to Declare Section 188.1 Unconstitutional. *See* Opposition to Intervenor's Motion, page 6 (Because the confidentiality portion of Section 188.1 of the Code no longer applies to the case as the Order of Sequestration has been vacated, this Court should not reach the question of whether Section 188.1 is constitutional), *citing Lyon v. Dep't of Children & Family Servs.*, 209 Ill. 2d 264, 271 (2004), *People v. Bass*, 2021 IL 125434, ¶ 30 ("[C]ases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort.").

If the Court's order redacting and sealing certain documents after vacating its Order of Sequestration was not based on Section 188.1, then the question of whether Section 188.1 is constitutional is moot as nothing remaining in this case has been withheld from the public based upon that provision. When a statute is no longer at issue in a case, a court should not rule on its constitutionality because such a ruling would be answering a moot question. *People v. Mosley*, 2015 IL 115872, ¶ 11 (quoting *In re Luis R.*, 239 Ill. 2d 295 (2010)). And if this Court finds that

one of the exceptions to mootness applies to this case, then the Director refers to her arguments *supra* that Section 188.1 is not unconstitutional.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully requests that this Honorable Court deny Intervenor's Amended Motion to Reconsider.

Respectfully submitted

KWAME RAOUL
Attorney General
State of Illinois
Attorney Code: 99000

By: /s/ Maggie Jones
Maggie Jones
Assistant Attorney General
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-4061
(872) 272-0772 (cell)
Margaret.Jones@ilag.gov