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No. 1-23-0803

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE MATER OF CONSERVATION OF NEXTLEVEL HEALTH PARTNERS, DR. JACQUELINE STEVENS, Intervenor-Appellant, v. PEOPLE OF THE STATE OF ILLINOIS *ex rel.* DANA POPISH SEVERINGHAUS *et al.,* Plaintiffs-Appellees.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 2020 CH 4431 The Honorable PAMELA McLEAN MEYERSON, Judge Presiding.

REPLY BRIEF OF INTERVENOR-APPELLANT DR. JACQUELINE STEVENS

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INTRODUCTION

Intervenor-Appellant Jacqueline Stevens sought access to circuit court records in this case because she was investigating a matter of public importance: suspicious circumstances surrounding the state's award of a contract to Appellee NextLevel Health Partners ("NextLevel") without normal procurement oversight and the sale of NextLevel (including its State contracts) soon afterward to another entity to which individuals associated with Next Level had undisclosed ties. *See* Appellant's Br. 9-14.

The circuit court denied her access to those records—and still prohibits her from accessing and disseminating some of them—because of the "Confidentiality Provisions" of 215 ILCS 5/188.1(4), (5), which shield insurance conservation proceedings and records from public access unless the insurance company requests otherwise or the court decides otherwise.

This denial of access violates the First Amendment because such court records are presumed to be open to public access, and Appellees cannot justify keeping them confidential. Contrary to Appellees' arguments, insurance conservation proceedings are not like grand jury proceedings, which have been kept secret always and everywhere in this country. When Illinois enacted its Confidentiality Provisions, there was no historical tradition of denying the public access to insurance-related proceedings. And the statute's blanket, default confidentiality is not necessary to serve the State's purported interest in avoiding unnecessary "bank runs" against insurance companies. If a company or the State has an interest in shielding

particular proceedings, it may seek to do so by the same means by which other litigants protect sensitive information. Or, at least, the statute could achieve its end by means that require courts to find confidentiality specifically justified in a given case and exempt cases where, as here, the "bank run" concern does not exist.

In addition, the circuit court's order that prohibits Stevens from disclosing court records that were inadvertently made available to her—even as every other member of the public is free to disseminate those records—violates her right to equal protection because it irrationally discriminates against her exercise of a fundamental right. Contrary to Appellees' arguments, she has also presented meritorious claims, all of which this Court may hear, arguing that the Confidentiality Provisions violate due process, the Illinois Constitution's prohibition on special legislation, and the constitutional separation of powers.

ARGUMENT

I. Stevens's claims are not moot.

Stevens's claims are not moot, as Defendant NextLevel asserts, because she is still subject to sanctions, particularly being held in contempt of court, for publishing records that the circuit court ordered be sequestered.

NextLevel argues that Stevens's claim is moot because the records she seeks to make public "have *already* been made public (through inadvertence in the clerk's office in the lower court)." NextLevel Br. 6. As a result, NextLevel asserts, "she has already secured what she seeks," though it admits she "cannot publish them due to sequestration." *Id.* at 7.

But Stevens's ability to see the information, despite its continued sequestration, does not moot her claim. The First Amendment provides individuals with a qualified right to access court proceedings and documents so they *can publicly write and speak about them* and the issues they raise. *See Globe Newspaper Co. v. Superior Court*, 547 U.S. 596, 604-05 (1982) ("[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that [the] . . . discussion of governmental affairs' is an informed one."); *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018) (public access to judicial proceedings "serves to . . . bring to bear the beneficial effects of public scrutiny upon the administration of justice"). By NextLevel's admission, the sequestration order—entered in accordance with the "Confidentiality Provisions" Stevens challenges—still prohibits Stevens from disclosing the documents, just as though she had never seen them at all.

NextLevel also asserts that the case is moot for a second (incorrect) reason: Stevens supposedly cannot obtain effective relief because the insurance conservation proceedings for which she seeks access have been closed, which means that "there are no proceedings that this case can be remanded to." NextLevel Br. 8. But of course in any case in which a circuit court has entered a final judgment, the circuit court proceedings are closed unless and until an appellate decision revives them. Moreover, the very statute on which NextLevel relies provides that the circuit court "may reopen the proceedings for good cause shown," not only for "the marshaling of additional assets" but also to "enter any such orders as may be

deemed appropriate." 5 ILCS 5/211.1(c). And indeed the circuit court's final order of April 18, 2023, cites that provision of law as it states that "the Court shall retain jurisdiction in this cause for such other and further relief as the nature of this cause and the interests of the Director, [NextLevel], its policyholders and creditors, *or the public*, may require." C 1923 V3 (emphasis added). Thus, the circuit court's order does not work the extraordinary irrevocable closure preventing remand that NextLevel says it does, and Stevens's claims are not moot for that reason.

Moreover, even if Stevens's claims were moot, the "public interest" exception to mootness would apply. To fall under that exception, "(1) the question must be of a public nature; (2) an authoritative determination of the question must be desirable for the purpose of guiding public officers; and (3) the question must be likely to recur." *People v. Kelly*, 397 Ill. App. 3d 232, 249 (1st Dist. 2009).

In *Kelly*, this Court held that the public-interest exception warranted hearing a question of public access to certain court proceedings and records—criminal pretrial hearings, a pretrial motion to allow evidence of other crimes, a supplemental answer to discovery, and the parties' witness lists. *Id.* at 256. First, the Court readily concluded that the question was "of a public nature" because "'publication of newsworthy information' is an issue of 'surpassing public concern.'" *Id.* at 250 (quoting *In re A Minor*, 127 Ill. 2d 247, 256 (1989)). Second, the Court concluded that determination of the question would guide public officers—namely trial court judges. *Id.* Third, the Court found that the issue was likely to recur. *Id.*

The public-interest exception would apply here for the same reasons: it implicates the public's right to access newsworthy information; a decision would guide the circuit courts in future conservation proceedings; and individuals (including Stevens) are likely to seek access to such proceedings again.

In addition, even if this case were moot, which it is not, the Court could still hear it under the mootness doctrine's exception for issues that are "capable of repetition yet evading review." Under that exception, a party must "demonstrate that (1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again." *Id.* at 249 (quoting *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998); *In re A Minor*, 127 Ill. 2d at 258). If NextLevel is correct that appeal from an insurance conservation proceeding is impossible upon the proceeding's closure (it is not), then this exception to the mootness doctrine is the only way Stevens can obtain appellate review of the important First Amendment question presented here. And, as she has pointed out, there is no dispute that she, as a scholar and author of investigative journalism, will continue to remain interested in—and barred from—insurance conservation proceedings as long as the Confidentiality Provisions remain in effect. *See* Appellant's Br. 48.

II. The Confidentiality Provisions violate the First Amendment right to access.

As Stevens has explained in her opening brief, the "Confidentiality Provisions" of 215 ILCS 5/188.1(4), (5) violate the First Amendment right to access court proceedings.

The First Amendment protects a right to access court records; it 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." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000). Where that presumption applies, it can only be overcome through "a showing of a 'compelling' or similarly stringent interest." *Id.*

Here, the presumption applies, and Appellees have not rebutted it.

A. Proceedings of this sort have historically been open to the public.

Contrary to Appellees' arguments, court records of the sort Stevens seeks have historically been open to the public. In general, the complete "court file" of *any* civil case has historically been presumptively open to the public. *See id.* at 232 (presumption of public access attached to counterclaim "once the trial court granted leave to file the pleading" and it "became part of the court file"); *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 997 (1st Dist. 2004) ("[P]leadings, motions and other papers filed with the court assume the presumption of public access."); *In re Marriage of Johnson*, 232 Ill. App. 2d 1068, 1073-74 (4th Dist. 1992) ("a presumption in favor of access" exists for "civil court files based on the first amendment"); *In re Continental Ill. Sec. Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (presumption of access applies to civil proceedings). The key cases on which Appellees rely, which denied public access to court proceedings or records, involved facets of *criminal prosecution* historically not open to the public. *See Kelly*, 397 Ill. App. 3d at 256-60 (criminal pretrial hearings, other crimes evidence, supplemental discovery answer, witness

lists); *In re Gee*, 2011 IL App (4th) 100275 ¶ 36 (warrant application). These are exceptions to the general rule of openness that are unique to the criminal context. In the civil context, courts have been especially liberal in recognizing that proceedings are presumptively open, with exceptions generally determined on a case-by-case basis, for specific reasons. *See, e.g., A.P.*, 354 Ill. App. 3d at 995 (presumption of public access applied to any documents in court file, and closure would only be proper if the court articulated privacy interest and specific reasons); *In re Continental Ill. Sec. Litigation*, 732 F.2d at 1309 (recognizing presumption of access for civil cases, rejecting party's arguments as to particular proceedings).

Appellees assert that insurance conservation proceedings have not historically been open to the public because they have been private since 1967, when the Illinois General Assembly enacted the preliminary conservation proceeding and, at the same time, the Confidentiality Provisions. State Br. 24. But the statute's mere existence cannot justify its own denial of access. If someone had raised Stevens's claim immediately after the statute's enactment, there would have been no history of keeping such court records private to justify it at that time—so a court could not have used the statute's own existence as evidence that such records were "historically" open to the public. There is no reason why the statute's persistence since then—in the apparent absence of any First Amendment challenges until now—should give it a self-justifying "history" that did not exist at the time of its enactment. If the statute's denial of public access was unconstitutional at the time

of its enactment, it is still unconstitutional now. *Cf. Wolfson v. Avery*, 6 Ill. 2d 78, 95 (1955) ("Age . . . does not immunize a statute from constitutional attack.").

Appellees also rely heavily on the idea that insurance conservation hearings are analogous to grand jury proceedings, describing both as "investigatory" in nature. But grand jury proceedings are unique and quite different from the proceedings at issue here. Grand jury proceedings have been closed to the public, and their records have been kept from the public, *since the seventeenth century*—before the founding of the Republic. *Douglas Oil Co. of Cal. v. Petrol Stops N.W.*, 441 U.S. 211, 218 n.9 (1979). And, as a case on which the State relies explains, grand jury secrecy is the most important of the "few limitations to the First Amendment right of access to criminal proceedings" because it is essential to the functioning of the grand jury and thus to our very system of criminal justice. *Impounded: New York Morning Ledger Co.*, 260 F.3d 217, 221 (3d Cir. 2001) (citing *Douglas Oil*, 441 U.S. at 218).

Secrecy in insurance conservation court proceedings has no similar history; by the State's own account, upon the Confidentiality Provisions' enactment in 1967, it was novel. *See* State Br. 24-26. The State notes sweeping powers given to the Director under the 1937 version of the Insurance Code, but that version of the Code did not bar public access to any court proceedings, and the State has not identified any other law enacted before 1967 that barred public access to insurance conservation or similar court proceedings.

And, unlike secret grand jury proceedings, secret insurance conservation proceedings are not essential to the functioning of the legal system, nor are they

necessary for regulation of the insurance industry. The State attempts to create the impression that secrecy is a necessary and thus *universal* feature of insurance conservation proceedings, citing laws of Wisconsin and some other states that provide for such proceedings' confidentiality. State Br. 26-28. But the State ignores the existence of other states that do *not* automatically close such proceedings. Some states have laws providing that insurance company records in the possession of the state department of insurance or its director are confidential—but those statutes do not make *court proceedings* confidential. *See* Cal. Ins. Code § 1077.3; Fla. Stat. § 624.82 (providing for confidentiality, terminating one year after conclusion of supervision); Mo. Rev. Stat. § 375.1160. Other states' laws provide for commencement of conservation proceedings in a state court but nowhere provide that those proceedings or their records must be closed to the public. *See* Ariz. Rev. Stat. § 20-613; Md. Ins. Code § 9-226; N.Y. Ins. L. § 7417; Va. Code §§ 38.2-1502, 38.2-1505.

As Stevens explained in her opening brief (Appellant Br. 37-38), insurance conservation proceedings are best compared to bankruptcy examinations, to which the public has long had a presumptive right of access. Like insurance conservation proceedings, bankruptcy examinations are an "investigatory tool," "inquisitorial rather than accusatory." *In re Symington*, 209 B.R. 678, 684 (D. Md. Bankr. 1997). But because they "seek information relevant to the conduct of the debtors, identify assets of the estate, and investigate matters concerning the administration of the bankruptcy case and the right of the debtor to receive a discharge," "[t]here is a

compelling need for the discovery of such information to be readily available to other creditors, interested parties, and the public at large." *Id.* at 694. In recognizing this, a federal bankruptcy court noted Justice Brennan's warning that "[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law," which means that "[p]ublic access is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Id.* (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 594-95 (1997) (Brennan, J., concurring)).

The State argues that insurance conservation proceedings are not comparable to bankruptcy proceedings because insurance firms have "long been excluded from federal bankruptcy law" and, supposedly, "insurance conservation proceedings were not historically open to the public." State Br. 14. But federal bankruptcy law *did* encompass insurance firms until the 1898 Bankruptcy Act, and court records of those proceedings *were* open to the public at that time. *See Scammons v. Kimball, Assignee*, 92 U.S. 362, 363 (1875) (bankrupt insurance firm subject to Bankrupt Act); *Turnbull v. Payson*, 95 U.S. 418, 419 (1877) (bankruptcy court "entered a decree that a call or assessment of sixty percent upon the stock of the stockholders was necessary for the purpose of raising funds to pay losses incurred by the bankrupt company in its insurance business"); *id.* at 424-45 ("Bankruptcy proceedings are in all cases deemed matters of record, and are to be carefully filed and numbered; but they are not required to be recorded at large. Short memoranda

of the same shall be made in books provided for the purpose, and kept in the office of the clerk; and the provision is that the books shall be open to public inspection.").

Although the 1898 Bankruptcy Act exempted insurance firms from its jurisdiction, Appellees have presented no evidence that this was motivated by their "run on the bank" theory or by any desire to keep such proceedings confidential. In fact, Congress's purpose in exempting insurance companies from the Bankruptcy Act was to prevent federal bankruptcy courts from disrupting states' comprehensive regulatory schemes governing the liquidation and rehabilitation of insurance companies and the rights of insureds. *See Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 595 (5th Cir. 1998) (exclusion from Bankruptcy Act reflects "public interest in having the States continue to serve their traditional role as the preeminent regulators of insurance in our federal system and indicates the special status of insurance in the realm of state sovereignty"); *In re Estate of Medcare HMO*, 998 F.2d 436, 440-41 (7th Cir. 1993).[1] If Congress had been concerned specifically with preserving such proceedings' confidentiality, then it could have mandated confidentiality of insurance companies' federal bankruptcy proceedings, rather than leave the matter to the states–which, at that time, did *not* protect insurance companies' confidentiality, as *none* had a law shielding insurance-related court proceedings and records from public access.

[1] Exclusion of insurance firms from Congressional legislation goes back to *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (holding Interstate Commerce Clause does not apply to insurance firms) ("[I]ssuing a policy of insurance is not a transaction of commerce ... These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.")

B. Disclosure would serve the proceedings' purpose.

As a general matter, courts have found that public access to court proceedings serves their purpose—that is, the purpose of our legal system generally—because public access "enhances the quality and safeguards the integrity of the factfinding process"; "fosters an appearance of fairness"; "heightens 'public respect for the judicial process'"; "permits the public to participate in an serve as a check upon the judicial process—an essential component in our structure of self government"; and "plays an important role in the participation and the free discussion of government affairs." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (quoting *Globe Newspaper Co.*, 457 U.S. at 606); *see also In re Continental Ill. Sec. Litigation*, 732 F.2d at 1308 (recognizing presumptive right to access civil cases, noting that it "relate[s] to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system").

That is true here as well.

The state makes much of the supposed potential harm that might befall an insurance company if its conservation proceedings were made public. Yet, as noted above, some states do not provide for blanket default confidentiality of insurance conservation proceedings—and Appellees have presented no evidence that insurance companies, their shareholders, their policyholders, or the public in those states have suffered as a result. Moreover, Appellees have not shown that insurance companies—or their shareholders or clients—are uniquely threatened by open court proceedings. Of course, the filing of a lawsuit against *any* business could cause its

shareholders and clients to flee and thus ruin the business. "[I]n many lawsuits, plaintiffs place a defendant's reputation at risk merely by alleging that the defendant is guilty of negligence of misconduct." *Skolnick*, 191 Ill. 2d at 235. And if a lawsuit's claims ultimately prove to lack merit, the harm already done to the defendant as a result of public access could be an injustice of a sort—and thus, in a sense, contrary to the purpose of our justice system. Nonetheless, this potential is insufficient reason to deny public access, as openness serves the greater ends of our justice system. *See id.* Moreover, even though banks themselves are not subject to federal bankruptcy, they nonetheless participate in bankruptcy proceedings—and can protect themselves from the "bank run" threat that public access might present by the usual means on a case-by-case basis. *See In re EPIC Assocs. V*, 54 B.R. 445 (E.D. Va. Bankr. 1985) (entering protective order for a limited time after considering "[l]ess restrictive alternatives to a closure order" and finding them inadequate).

C. The State and NextLevel have not rebutted the presumption of access.

With the presumption of access established, the State and NextLevel can only rebut it by showing that "suppression is essential to preserve higher values and is narrowly tailored to serve that interest." *Skolnick*, 191 Ill. 2d at 232. Appellees have not done so here.

The protection of insurance companies—and *only* insurance companies—from the potential consequences of open court proceedings and records is simply not a higher value than having a court system in which proceedings and records are open

to the public. Again, as the Illinois Supreme Court has noted, "in many lawsuits, plaintiffs place a defendant's reputation at risk merely by alleging that the defendant is guilty of negligence of misconduct," but that is not enough to justify denying the public access. *Skolnick*, 191 Ill. 2d at 235. "The mere fact a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file." *Id.* at 234; *see also, e.g., Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong . . . presumption in favor of public access to court proceedings and records."). The public's interest in information about the operation of the courts is greater.

In *Symington*, the bankruptcy court allowed media access to court records containing information about the debtor's mother's personal finances and private matters between the debtor and his mother, rejecting the argument that it should be shielded because exposure would cause her "embarrassment, emotional distress or other non-monetary injury." *Id.* at 694-95. The "overriding public interest in maintaining confidence in the bankruptcy system and the right to know the truth about allegations of corruption against [her son,] Arizona's highest elected state official, . . . outweigh[ed] whatever privacy interests [she] might have had in her personal financial information." *Id.* at 695.

Here, too, access is warranted to preserve public confidence in court proceedings, and insurance conservation proceedings in particular. And, as in *Symington*, public

access is especially important, and overrides any purported privacy concerns, because of the public's interest in knowing the truth about potential impropriety of public officials and government contractors that the proceedings could reveal. *See* Appellant's Br. 10-14.

Moreover, even if the government does have an interest in preventing insurance conservator proceedings from unnecessarily disrupting the business of insurance firms, the statute is not narrowly tailored to serve that interest. The statute denies the public access to *all* insurance conservation proceedings and records unless and until the court decides otherwise or the company requests it be made public. 215 ILCS 5/188.1(5). This extreme measure is not necessary to achieve the government's purported interest and inevitably results in keeping significantly more proceedings and records than necessary from the public. Appellees have not shown that the government could not serve the same interest by simply giving a company the opportunity to move to make particular proceedings or records confidential for reasons particular to its case, as in ordinary litigation. Or, even if the statute were to make proceedings confidential at the outset, out of an abundance of caution, it could place a burden on the company to, after a certain number of days, show why they should remain confidential under the usual criteria. The statute could also better respect the public's First Amendment rights—while still serving its supposed interest—by giving individuals the right to seek to open the proceedings by filing a motion or petition that would require the court to then make a case-specific determination. And the statute could exempt proceedings where the state's

purported "run on the bank" concern does not apply—as here, where the insurance company receives all its money from government contracts, making a "run" by policyholders impossible. *See* Appellant's Br. 11.

It is not enough, as the State suggests, that "the confidentiality provisions preserve the court's discretion to make all or part of the proceeding or records public." State Br. 46. That's not how the right of access works: where the right presumptively applies, confidentiality cannot be the default, and the public does not have to hope the court will decide—*sua sponte*, or at the request of the very company whose information is being shielded—to exercise its discretion in a way that favors access. Rather, the default is public access. And, to keep records private despite the presumption of public access, the court must identify the *specific* privacy interest involved and make *specific* findings as to why it deems confidentiality appropriate. *See A.P.*, 354 Ill. App. 3d at 996. The statute does not require any of this. Appellees have not shown why it could not.

Appellees have therefore failed to show that the statute is narrowly tailored to serve its purported interest and have thus failed to overcome the presumption that public has a First Amendment right to access the proceedings and records.

D. The Privacy Provisions also fail First Amendment scrutiny under a facial or as-applied challenge.

Illinois courts typically analyze First Amendment arguments regarding public access to court proceedings through the framework discussed above, set forth in decisions such as *Skolnick*, 191 Ill. 2d at 231-32 and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10 (1986). As Stevens has explained above and in her

opening brief, her challenge to the Confidentiality Provisions succeeds under that analysis.

Stevens's challenge also succeeds if analyzed in the manner of an ordinary facial or as-applied challenge to a statute. As she has explained in her opening brief, the statute fails a facial First Amendment challenge because it is overbroad. *See* Appellant's Br. 23-24. As discussed above, the Confidentiality Provisions reach much farther than necessary to serve the state's purported interest and deny access not only in cases where it serves that interest, but also in other cases, such as this one, where it could not serve the state's interest at all.

The statute is also unconstitutional as applied here because, again, closure of proceedings involving a company that makes all its money from government contracts, not from premium payments by policyholders, cannot even arguably serve the state's purported interest in avoiding a "run on the bank."

E. Stevens did not waive any of her First Amendment arguments.

NextLevel argues that, in the circuit court, Stevens only challenged 215 ILCS 5/188.1(5), which provides for confidentiality of records and others documents in conservation cases without any request by the parties, so she cannot now additionally challenge 215 ILCS/188.1(4), which allows a party to request that hearings be held privately in chambers. NextLevel Br. 8. In fact, however, Stevens challenged both subsections before the circuit court. She did so in her initial petition, C 454-460; and in her motions seeking relief, C 463, 888; 1133. Moreover, in ruling on her First Amendment challenge, the circuit court correctly treated it as

a challenge to both subsections, which it referred to collectively as the statute's "Privacy Provision." C 1402 V2.

The State argues that Stevens waived her argument that bankruptcy proceedings were historically open to the public because she did not develop it until her motion for reconsideration in the circuit court. State Br. 39. But it is undisputed that Stevens *did* preserve her argument that the Confidentiality Provisions violate the First Amendment right of access. *See* State Br. 9; C 475-76; C 913-14; C 1404 V2. That is enough to allow her to make the comparison to bankruptcy proceedings here: although a party may not raise new issues on appeal, a party may raise new points in support of an issue preserved below. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a . . . 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."); *Horne v. Elec. Eel Mfg. Co.*, 987 F.3d 704, 717 (7th Cir. 2021) (appellate court "may review arguments related to preserved claims, and a challenge below is sufficient to preserve an argument even if it is a new twist based upon additional authority on appeal"). Stevens has not raised a new issue on appeal but has properly bolstered the issue she preserved below with additional authority.

Besides, an appellate court may consider an issue not raised below if it presents "an issue of public importance" or doing so "will achieve a just result," unless the opposing party "could have introduced evidence to contest or refute the assertions made on appeal" if it the argument had been made in the trial court. *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 279 (1989). Here, even if Stevens had not preserved

the issue (she did), the Court could still consider it because Stevens presents a constitutional issue of public importance, considering her issue would "achieve a just result" if the court agrees that her claim has merit, and the Appellees will not be prejudiced by the Court's consideration of this question of law.

II. The Confidentiality Provisions violate the common law right of access.

The State acknowledges that the First Amendment's protection of public access to court proceedings and common law's protection of that access are "parallel." State Br. 34. It therefore argues that Stevens's argument for access under the common law must fail for the same reasons they say her First Amendment argument should fail. Stevens, of course, maintains that both succeed for essentially the same reasons.

The State argues that the common law does not apply here because the General Assembly abrogated it by statute. *See* State Br. 35-36. But if Stevens prevails on her First Amendment claim, the abrogation of common law was invalid and does not matter. Thus, her First Amendment and common law claims rise or fall together—and because she should prevail on the First Amendment claim, she should prevail on both.

III. Stevens should prevail on her equal protection claim.

Stevens should prevail on her argument that the circuit court's refusal to vacate its Seal and Redact order violates her right to equal protection under the law. *See* Appellant's Br. 43-44. The basis of this argument is that, among members of the public, *she alone* is prohibited from disseminating the records that remain

sequestered in this case. Any other member of the public who is not a party to this litigation—and who might obtain them as a result of their inadvertent public disclosure, directly or indirectly—may disseminate them because they are not subject to the court's order. This creates the absurd result that the individual who is *most* interested in disseminating this information is the only one prohibited from doing so—through no fault of her own. This discriminatory treatment thus violates her right to equal protection even under the rational-basis standard. *See People v. Reed*, 148 Ill. 2d 1, 9 (1992) (equal protections requires "a rational basis for distinguishing the class to which the law applies from that to which it does not").

Moreover, the equal protection claim should be subject to strict scrutiny because it interferes with free speech, a fundamental right. *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019) Appellees have not even begun to meet their burden under strict scrutiny, which requires them to show that their infringement of the right is narrowly tailored to serve a compelling governmental interest. *People v. Austin*, 2019 IL 123910 ¶ 40. They have not established that the State has a compelling interest in silencing Stevens alone, let alone that this is a narrowly tailored means of serving such an interest.

NextLevel's argument that Stevens is not "similarly situated" with respect to other members of the public (NextLevel Br. 16-17) fails. Of course parties to litigation and non-parties are not always similarly situated. But here they are: Stevens is simply an interested citizen, and the state has no greater or different interest in restraining her speech on this matter than restraining anyone else's.

That Stevens cannot name other individuals who possess and want to disseminate the information is irrelevant; NextLevel cites no authority for its premise that a party bringing an equal protection claim must identify specific individuals who are similarly situated, rather than a class that is similarly situated. *See Reed*, 148 Ill. 2d at 9 (noting that equal protection concerns discrimination between *classes* of individuals).

IV. Stevens preserved, and should prevail on, her due process claim.

Contrary to the State's argument (State Br. 48), Stevens preserved her claim that the Confidentiality Provisions violate due process. She raised it in her motion of August 30, 2021, C 477-78, and in her first amended intervenor motion of January 1, 2022, C 915-16. That her argument was concise does not mean it was waived. And the argument has merit for the reasons presented in her initial brief. Appellant Br. 44-46.

V. Stevens should prevail on her special legislation claim.

Stevens should prevail on her claim that the Confidentiality Provisions violate Article IV, Section 13 of the Illinois Constitution, which forbids "special" legislation "when a general law is or could be made applicable."

The State argues Stevens waived this argument by not presenting it to the circuit court, and it is true that she did not raise it below. State Br. 48-49. Nonetheless, an appellate court may consider it because it presents "an issue of public importance" and doing so "will achieve a just result," unless the opposing party "could have introduced evidence to contest or refute the assertions made on

appeal" if it the argument had been made in the trial court. *In re Marriage of Rodriguez*, 131 Ill. 2d at 279. Appellate consideration of this claim will not prejudice the State because it presents a pure question of law; indeed the State does not argue otherwise. *See* State Br. 48-49.

Stevens's claim has merit. The State cannot rationally justify singling out insurance companies for the privilege of having their court proceedings shielded from public access. As noted above, many businesses could be devastated by the mere filing of litigation against them, but their legal proceedings are nonetheless all presumptively open to the public. And even if the state could justify *some* distinct treatment of insurers based on their nature as highly regulated entities, it cannot justify the *extreme* shield against public access imposed here, which, as discussed above, is not necessary to serve the government's purported interest.

VI. Stevens preserved, and should prevail on, her separation-of-powers claim.

The State is also incorrect in asserting that Stevens failed to preserve her separation-of-powers claim. State Br. 48. As Stevens explains in her initial brief, Appellant Br. 35, the Confidentiality Provisions "unduly encroach[] upon the inherent power of the judiciary," *Kunkel v. Walton*, 179 Ill. 2d 519, 528 (1997). Courts and judges inherently have the authority to determine whether particular proceedings and records will be open to the public, subject to constitutional constraints. *Cf. Lepore v. United States*, 27 F.4th 84, 88-90 (1st Cir. 2022) (discussing courts' inherent powers, providing a non-exhaustive list of examples).

The imposition of a default on circuit courts—with restrictions on the conditions under which they may reverse the default—infringes on that inherent authority.

CONCLUSION

For the reasons stated above and in her opening brief, this Court should reverse the circuit court's order.

Dated: January 28, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Jacob Huebert, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or rules contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 5,898 words.

/s/ Jacob Huebert

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, James McQuaid, an attorney, certify that on January 28, 2025, I electronically filed the foregoing Reply Brief of Intervenor-Appellant Dr. Jacqueline Stevens with the Clerk of the Court for the Illinois Appellate Court, First Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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