No. 129097

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

JOHN DOE, Plaintiff-Appellee, v. BURKE WISE MORRISSEY & KAVENY, LLC, AN ILLINOIS PROFESSIONAL LIMITED LIABLITY COMPANY, AND ELIZABETH A. KAVENY, Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First District, No. 1-21-1283 Heard in that Court on Appeal from the Circuit Court of Cook County, Illinois, No. 17 L 4610 Honorable Margaret A. Brennan, Judge Presiding

AMICUS CURIAE BRIEF OF ILLINOIS DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Illinois Defense Counsel is a bar association comprised of Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and individual defendants in civil litigation. The IDC is the largest state defense bar organization in Illinois. For more than 50 years, the IDC has endeavored to ensure civil justice with integrity, civility, and professional competence.

The IDC has a substantial interest in this case because the decision of the Illinois Supreme Court in this case is likely to have a direct impact on IDC members who intend to exercise their First Amendment right to free speech about public matters and issues, including jury trials. The IDC also has a strong interest in this case because this Court's decision regarding the issues involved will affect the legal representation provided by IDC members and the clients represented by IDC members who handle matters involving privilege and the applicable laws and regulations on a frequent basis.

The IDC is respectful of the fact that it is a privilege, not a right, to appear as an *amicus curiae* and respectfully requests permission to appear in this case. The IDC submits that the perspective provided by the experience of its members in this area of law will provide valuable insight as this Court considers the important issues presented.

ARGUMENT

A patient who reveals private information to a mental health provider in a treatment setting rightfully has a statutory privilege to maintain the confidentiality of that communication and prevent a mental health provider from sharing confidential information absent consent or a statutory exception. But a statutory privilege does not prevent a patient from voluntarily sharing their own information with others. A public courtroom is far from a therapist's office when it comes to confidentiality. The appellate court here declined to differentiate these dissimilar settings and audiences in holding that attorney speech about a concluded public trial is actionable under the Mental Health and Developmental Disabilities Confidentiality Act.

Generally, a statutory privilege precludes persons other than a privilege holder from divulging privileged information. A statutory privilege benefits a privilege holder; it does not regulate how a privilege holder may voluntarily use their own information. So, when a privilege holder openly discloses information in a public forum, no privilege applies to the communication. Even if a statutory privilege could be construed to apply to a privilege holder's voluntary disclosure in a public forum, the end result would be waiver of the privilege.

Yet, the Illinois Appellate Court reached the unprecedented conclusion that a circuit court properly entered a discovery protective order that expansively prohibits an attorney from speaking about information that has been openly shared at a public trial. The HIPAA Privacy Rule does not compel this result. To the contrary, the appellate court conflated distinct disclosures in separate settings to wholly different audiences. Truthful speech about information that was voluntarily disclosed at a public trial falls far outside

the HIPAA Privacy Rule.

Finally, a protective order that prohibits an attorney from truthfully speaking about a concluded public trial is inconsistent with established First Amendment rights. Jury trials are public events, and evidence admitted at trial is part of the public sphere. A circuit court discovery protective order that prohibits attorney speech about events at a concluded public trial is a prior restraint that can only be upheld when necessary to prevent a clear and present danger or a serious and imminent threat to the fairness and integrity of a trial. The appellate court here erred in concluding that the circuit court order in the medical malpractice action could prohibit attorney speech without regard to the First Amendment of the United States Constitution.

I. Applicability of a Statutory Privilege and Waiver

A statutory medical privilege exists for the benefit of the patient. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 576 (2002). When applicable, a statutory privilege generally precludes persons other than the privilege holder from disclosing confidential information. See, *e.g.*, 735 ILCS 5/8-802 ("No physician or surgeon shall be permitted to disclose ***."); 735 ILCS 5/8-803 ("A clergyman or practitioner of any religious denomination *** shall not be compelled to disclose ***."); 735 ILCS 5/8-803.5 ("a union agent ** shall not be compelled to disclose ***."). Even the unique accountant-client privilege, which is held by the accountant, "does not bar the client from voluntarily producing the information." *Brunton v. Kruger*, 2015 IL 117663, ¶ 47.

The statutory privilege provided by the MHDDCA is no different. 740 ILCS

110/10 ("a recipient *** has the privilege to refuse to disclose and to prevent the disclosure ***."). This privilege does not regulate how a patient may choose to voluntarily provide their own information to others. See *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 35 (recognizing that a privilege holder may voluntarily testify about otherwise confidential matters).

A privilege holder involved in litigation may expressly or impliedly consent to sharing information in a public forum in multiple ways, including through pleadings, motions, briefs, and trials. First, these disclosures are not privileged under the MHDDCA, as the statutory privilege does not apply to voluntary, public communications either by the privilege holder or with the implied consent of the privilege holder. Second, even if a privilege applied under these circumstances, any privilege would be waived as to the information shared at a public trial.

Absent an exception, a privilege holder who shares information with a mental health professional in a confidential setting may invoke the MHDDCA statutory privilege. But even the same statements in a public forum are not confidential, and a privilege holder cannot transform a public courtroom into a therapist's office. Here, the appellate court erred in concluding that attorney speech about a public trial is actionable even if the speech relates to information that was voluntarily disclosed by the privilege holder at a public trial.

A. A Statutory Privilege Does Not Apply to a Voluntary Public Disclosure by a Privilege Holder.

Under subsection 10(a) of the MHDDCA, a patient who receives mental health treatment is granted a statutory privilege to prevent disclosure of confidential records and communications, except as provided in subsection 10(a)(1)-(12). 740 ILCS 110/10(a), *et*

seq. This privilege is invoked when a privilege holder chooses to "refuse to disclose and to prevent the disclosure" of confidential information. 740 ILCS 110/10(a). But the privilege does not apply when a patient who voluntarily shares their own information (personally, by counsel, or through opposing litigants who proceed with the patient's implied consent) at a public trial in a case brought by the patient. *Johnston v. Weil*, 241 Ill. 2d 169, 182-83 (2011) (MHDDCA only applies to mental health treatment setting).

A patient who voluntarily shares their own treatment information at a public trial does not do so pursuant to one of the exceptions under subsection 10(a) of the MHDDCA. The patient is not invoking the statutory privilege in the first place. Section 2 of the MHDDCA defines a "confidential communication" as a communication that is made "during or in connection with providing mental health or developmental disability services to a recipient." 740 ILCS 110/2. A privilege holder who voluntarily provides information during a public trial is not communicating in connection with mental health services. A confidential communication to a medical provider in a treatment setting cannot be transposed with a statement shared to all who would hear in a public courtroom.

Section 5 of the MHDDCA further clarifies this point. 740 ILCS 110/5, *et seq*. A patient who voluntarily shares their own treatment information does not need to first provide written consent to themselves under subsection 5(a). 740 ILCS 110/5(a). In enacting subsection 5(c), the legislature did not limit how a patient may voluntarily share their own information with other individuals. 740 ILCS 110/5(c). When a patient voluntarily shares information at a public trial, the disclosure is made independently of—not pursuant to—section 5 and therefore does not fall within subsection 5(d). 740 ILCS

110/5(d) (restricting application to information "disclosed under this Section").

A patient who voluntarily shares their own information is not subject to the damages provided by section 15, 740 ILCS 110/15, or criminal prosecution under section 16. 740 ILCS 110/16. Again, this is because a voluntary or consensual disclosure by a patient is made independent of—not pursuant to—a statutory privilege. *Norskog v. Pfiel*, 197 Ill. 2d 60, 72 (2001) (recognizing that the MHDDCA places restrictions on "anyone seeking the nonconsensual release of mental health information ***" from a mental health provider).

The MHDDCA privilege expressly applies to records and communications that occur in connection with mental health services. If a patient voluntarily shares the details of mental health treatment with a neighbor or friend, then the patient cannot maintain an action under the MHDDCA if the neighbor or friend proceeds to share that information with others. Similarly, when an attorney, litigant, member of the press, or member of the public attends a public trial, any of these individuals may speak freely about information shared at the public trial without being subject to liability under the MHDDCA. A statutory privilege does not apply to a voluntary disclosure by a privilege holder.

B. A Statutory Privilege Is Waived By Voluntary Disclosure in a Public Forum.

"[W]aiver is an intentional relinquishment or abandonment of a known right or privilege." *People v. Lesley*, 2018 IL 122100, ¶ 36. For many decades, this Court has recognized that "a voluntary revelation by the holder (of the privilege) of the communication, or of a material part, is a waiver. [Quotation]." *People v. Simpson*, 68 Ill. 2d 276, 281 (1977) (marital privilege); *Turner v. Black*, 19 Ill. 2d 296, 309 (1960) (recognizing that attorney-client privilege "may be waived by the person whom the

privilege is intended to benefit" and that waiver occurs when a privilege holder voluntarily testifies about privileged matters).

"A clear example of an express waiver is when a [privilege holder] voluntarily testifies about privileged communications." *Center Partners*, 2012 IL 113107, ¶ 66. A privilege holder may also relinquish a right through waiver by conduct, *Lesley*, 2018 IL 122100, ¶ 36, or implied consent. *Palm v. Holocker*, 2018 IL 123152, ¶ 33 (waiver by implied consent is a "near-universally recognized principle"). And counsel's actions in representing a privilege holder may result in waiver of a statutory privilege. *People v. Wagener*, 196 Ill. 2d 269, 278 (2001) ("This court has previously allowed trial counsel to waive a client's privilege."); *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 211-12 (1994) (filing medical malpractice complaint waived privilege against hospital); *People v. Newbury*, 53 Ill. 2d 228, 234 (1972) (privilege waived where counsel elicited statements on direct examination at trial).

This Court has not hesitated to find waiver when a privilege holder has voluntarily shared information in a manner that is inconsistent with the privilege. *Wagener*, 196 Ill. 2d at 276-78; *Simpson*, 68 Ill. 2d at 281-82; *Turner*, 19 Ill. 2d at 309. This aligns with the "general rule that protection from disclosure is available only when the party asserting a privilege has maintained confidentiality" as there is "little interest in the confidentiality of documents which have been publicly discussed by their custodian." *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984).

Rule 1.6 of the Illinois Rules of Professional Conduct does not change this result. "Rule 1.6 only prohibits an attorney from revealing secret or confidential matters." *Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd.*, 309 Ill. App.

3d 289, 300 (2d Dist. 1999) (holding attorney did not violate Rule 1.6 where the privilege holder had already waived the privilege both by testifying on the subject and allowing information to be introduced in court proceeding).

In sum, even if a statutory privilege could be considered applicable to a voluntary disclosure by a privilege holder at a public trial, this Court has consistently found waiver of the privilege under similar circumstances.

II. The HIPAA Privacy Rule

The Illinois Appellate Court reached the unprecedented conclusion that a circuit court may enter a protective order that restricts an attorney from speaking about information after the information was openly shared at a concluded public trial. *Doe v. Burke Wise Morrissey & Kaveny, LLC*, 2022 IL App (1st) 211283, ¶ 17 ("the complaint sufficiently alleged that the information shared at the medical malpractice trial had restrictions on its use, such that Doe did not waive the Act's protections by testifying."). The crux of that conclusion was the entry of a HIPAA Privacy Rule qualified protective order in the medical malpractice litigation. *Doe*, 2022 IL App (1st) 211283, ¶ 17.

The HIPAA Privacy Rule applies to covered entities—health plans, health care clearinghouses, and specified health care providers—and business associates. 45 C.F.R. § 160.102(1)(a)-(b); see also 45 C.F.R. § 160.103 (defining business associate). The Department of Health and Human Services uses the HIPAA Privacy Rule to regulate how a covered entity or business associate may use a patient's protected health information. 45 C.F.R. § 164.502(a); *Coy v. Washington County Hospital District*, 372 Ill. App. 3d 1077, 1080-81 (5th Dist. 2007).

A covered entity is required to allow an individual to access and obtain a copy of the individual's own medical records. 45 C.F.R. § 164.524(a)(1). Like a statutory privilege, the HIPAA Privacy Rule does not thereafter regulate what an individual may choose to do with their own medical information once received from a covered entity. Additionally, a covered entity is expressly permitted to use or disclose PHI including with patient authorization under section 164.508 or without patient authorization in compliance with section 164.512. 45 C.F.R. §§ 164.502(a)(1)(iv), (vi); 164.508(a); 164.512.

"[The] HIPAA [Privacy Rule] does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a 'covered entity.'" *People v. Bauer*, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010); see also *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004) ("All that 45 C.F.R. § 164.512(e) should be understood to do *** is to create a procedure for obtaining authority to use medical records in litigation.").

Section 164.512 of the HIPAA Privacy Rule is titled: "Uses and disclosures for which an authorization or opportunity to agree or object is not required." 45 C.F.R. § 164.512. As the title suggests, the section provides 12 standards whereby a patient's PHI may be disclosed by a covered entity without giving the patient an opportunity for the patient to agree or object. 45 C.F.R. § 164.512 *et seq*. These standards encompass disclosures for uses required by law, health oversight activities, research, and workers' compensation purposes. *Id*. Subsection 164.512(e) allows for disclosure of PHI in judicial and administrative proceedings. 45 C.F.R. § 164.512(e).

Under the judicial and administrative proceedings standard, a covered entity is

permitted to disclose PHI in response to a subpoena or discovery request when the patient receives notice of the request—or where the requesting party makes a good-faith attempt to provide notice—and the remaining conditions are met. 45 C.F.R. § 164.512(e)(1)(ii)(A), (iii). In the vast majority of cases, particularly in Illinois, the patient receives notice of the subpoena or discovery request as a party to the litigation in accordance with the notice provisions in applicable court rules or laws. Once notice is provided to the patient, nothing further is needed to comply with the HIPAA Privacy Rule. By definition, satisfactory assurance by notice to the patient is the exact equivalent of entering a QPO under the HIPAA Privacy Rule. 45 C.F.R. § 164.512(e)(1)(ii)(A)-(B).

However, if a litigant chooses not to provide the patient with notice of the request for PHI, then a HIPAA QPO may be used to obtain the patient's PHI without ever notifying the patient or permitting the patient an opportunity to object. 45 C.F.R. § 164.512(e)(1)(ii)(B). In that case, the HIPAA Privacy Rule provides that PHI (a) must not be used or disclosed for any purpose other than the litigation, and (b) must be returned or destroyed at the conclusion of the litigation. 45 C.F.R. § 164.512(e)(1)(v)(A)-(B). Because the HIPAA Privacy Rule allows a nonparty patient's PHI to be obtained in litigation without ever notifying the nonparty patient or giving the nonparty patient the opportunity to object to disclosure of their PHI, stringent restrictions are placed on information obtained through this method.[1]

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[1] PHI is more likely to be requested without notice to the patient where a party seeks either *ex parte* physician interviews or discovery of nonparty medical records. See, *e.g.*, *Wellstar Health System, Inc. v. Jordan*, 293 Ga. 12, 13-15 (2013) (entry of QPO permitted litigant to conduct *ex parte* interview with physician, and nothing in the HIPAA Privacy Rule required litigant to provide transcript of interview to the patient); *Haywood v. Wexford Health Sources, Inc.*, No. 16 CV 3566, 2021 WL 2254968, at *5 (N.D. Ill. June 3, 2021) (covered entity could disclose nonparty inmate PHI under Privacy Rule if patients were notified of request or, alternatively, if QPO was entered);

The HIPAA Privacy Rule only governs how a covered entity or business associate may use or disclose PHI in its possession. 45 C.F.R. § 164.502(a); see also 45 C.F.R. § 164.500(a) (unless otherwise provided, "the standards, requirements, and implementation specifications of this subpart apply to covered entities with respect to protected health information."). These entities are squarely within the purview of the Department of Health and Human Services. But the HHS Secretary, in enacting the HIPAA Privacy Rule, presumably did not aim to oversee matters traditionally left to the States, such as regulating the legal profession. *Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008) ("federal law rarely interferes with the power of state authorities to regulate the practice of law ***."). Moreover, nothing in the HIPAA Privacy Rule governs how individuals may choose to share their own medical information.

The Department of Health and Human Services uses the HIPAA Privacy Rule to direct how covered entities and business associates may share PHI—not how patients may share their own information. 45 C.F.R. §§ 160.304 (Secretary will work with "covered entities and business associates" to obtain compliance); 160.310 (detailing responsibilities of "covered entities and business associates"); 160.402 (civil penalties may be imposed on "a covered entity or business associate" that violates an administrative simplification provision). And nothing in the HIPAA Privacy Rule prohibits an attorney from speaking about information that was voluntarily shared at a concluded public trial.

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but see *In re D.H. ex rel. Powell*, 319 Ill. App. 3d 771, 776 (1st Dist. 2001) (nonparty medical records are not discoverable in Illinois); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 609-10 (1st Dist. 1986) (*ex parte* conferences between opposing counsel and treating physician are not permissible in Illinois).

III. The First Amendment

The First Amendment prohibits state action abridging the freedom of speech and must be interpreted "as a command of the broadest scope" that courts can reasonably allow. *Bridges v. State of California*, 314 U.S. 252, 263 (1941). The First Amendment "reflects a national commitment to the principle that debate on public issues should be robust and uninhibited. Accordingly, speech on public issues occupies the highest position of the hierarchy of first amendment values and is entitled to special protection." *People v. Austin*, 2019 IL 123910, ¶ 53. Here, the appellate court erred in concluding that a circuit court discovery protective order can restrict any speech about certain content that was shared at a public trial—including the truthful reporting of events and opinions about what transpired—because this state action prohibiting speech is inconsistent with the First Amendment of the United States Constitution.

This Court has recognized that a presumptive right of public access applies to court proceedings. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230-33 (2000). Based in both the First Amendment and the common law and codified in Illinois, the presumptive right of public access "is essential to the proper functioning of a democracy *** and the public's right to 'monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.'" *Skolnick*, 191 Ill. 2d at 230-33 (quoting *Continental*, 732 F.2d at 1308-09). Historically, both civil and criminal trials have also been presumptively public proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, n. 17 (1980); *Continental*, 732 F.2d at 1308-09.

When a patient confides in a mental health provider in a professional setting, such

as a therapist's office, the communication is plainly a private matter. See, *e.g.*, *Austin*, 2019 IL 123910, ¶¶ 53-55. Conversely, a "trial is a public event. What transpires in the court room is public property. *** Those who see and hear what transpired can report it with impunity." *Craig v. Harney*, 331 U.S. 367, 374 (1947); see also *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992) (citation omitted) (upholding public right of access to all documents filed with the court and transcripts of proceedings because such materials "lose their private nature" and become "'public component[s]' of the judicial proceeding to which the right of access attaches.").

Judicial public records and proceedings are matters of public interest to citizens concerned with government institutions, and "a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Accordingly, "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox*, 420 U.S. at 495.

A prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *In re A Minor*, 127 Ill. 2d 247, 264-65 (1989) (quoting *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). A prior restraint operates as an "immediate and irreversible sanction" that "freezes" speech. *Nebraska Press*, 427 U.S. at 559. "Prior restraints are particularly suspect when they prevent the timely disclosure of truthful information." *In re A Minor*, 127 Ill. 2d at 265.

A protective order that prohibits speech related to judicial proceedings is an unconstitutional prior restraint unless it is "(1) necessary to obviate a 'serious and

imminent' threat of impending harm, which (2) cannot adequately be addressed by other, less speech-restrictive means." *Id*. "[A]ny prior restraint upon speech, while not unconstitutional *per se*, bears a heavy presumption against its validity." *Id*.

Here, the appellate court held that the circuit court in the medical malpractice action entered a discovery protective order that operated as a prior restraint on any attorney speech related to a category of information shared at a concluded public trial. To reach the same conclusion, this Court would be required to either abandon settled law that requires a serious, imminent threat to support such an order or else conclude that a serious, imminent threat existed in the medical malpractice action and could not have been addressed by less-restrictive means. *Id*.; accord *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 244 (1986) ("a trial court can restrain parties and their attorneys from making extrajudicial comments about a pending civil trial *only* if the record contains sufficient specific findings by the trial court establishing that the parties' and their attorneys conduct poses a *clear and present danger or a serious and imminent threat to the fairness and integrity of the trial.*") (emphasis in original).

In *Seattle Times*, the United States Supreme Court held that where "a protective order is entered on a showing of good cause [], is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Seattle Times v Rhinehart*, 467 U.S. 20, 37 (1984). Importantly, the protective order at issue was expressly limited to information obtained through use of the court's discovery process. *Seattle Times*, 467 U.S. at 27, n. 8.

The appellate court decision here does not align with *Seattle Times*. Evidence

admitted at a public trial is not within the context of pretrial discovery, and information shared voluntarily by a privilege holder at trial is obtained from a source separate from the discovery process. Yet the appellate court held that a discovery protective order could prohibit attorney speech about a concluded public trial despite these key differences.

The United States Supreme Court has recognized in a similar context that "[t]ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." *Nebraska Press*, 427 U.S. at 559. Freedom of the press, too, may be impaired by a protective order that restricts sources of information about events that transpired at a public trial. See *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975).

Attorneys retain protected First Amendment rights, even though those rights may be constrained in certain circumstances. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073-74 (1991) (Rehnquist, C.J., opinion of the Court). To address the unique role that lawyers play in the justice system, the United States Supreme Court established that "the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Gentile*, 501 U.S. at 1075 (Rehnquist, C.J., opinion of the Court). Under this standard, free speech will rarely present a substantial risk of material prejudice where the case is no longer in the hands of the jury. *Id*. at 1077 (Rehnquist, C.J., opinion of the Court).

Finally, any restraining order which denies parties and counsel their first amendment rights in the interest of a fair trial must be neither vague nor overbroad." *Kemner*, 112 Ill. 2d at 244. To pass constitutional muster, a protective order must be

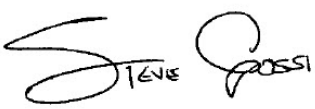
"narrowly drawn so as not to prohibit speech within first amendment rights that would not be prejudicial to a fair trial ***." *Id*. at 247. In *Kemner*, this Court held that an order prohibiting any speech about a case was an "extreme example of a prior restraint upon freedom of speech." *Id*. at 246. Under the appellate court decision here, a circuit court discovery order can categorically prohibit an attorney from factually stating what occurred in open court and offering any opinion about a concluded public trial. The First Amendment does not permit this type of prior restraint on attorney speech.

CONCLUSION

A privilege holder who voluntarily shares information at a public trial does not disclose that information publicly pursuant to a statutory privilege. And even if a privilege could be found, this Court's precedents direct the conclusion that testifying and permitting information to be shared at a public trial constitutes waiver of a statutory privilege.

The HIPAA Privacy Rule is an administrative regulation that governs covered entities and business associates, not a prohibition on attorney speech about a public trial. The Illinois Appellate Court erred in holding that a circuit court discovery protective order restricted attorney speech about information shared at a concluded public trial without a clear and present danger or serious threat of impending harm and accordingly should be reversed.

Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages or words.

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CERTIFICATE OF SERVICE

On April 3, 2023, I electronically filed a copy of this certificate and Motion for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants with the Clerk of the Supreme Court's Office and served a copy of this certificate and *Amicus Curiae* Brief of Illinois Defense Counsel in Support of Defendants-Appellants upon the following parties or their attorneys by the method indicated:

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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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