No. SC-2025-0918

IN THE SUPREME COURT OF ALABAMA

Ex Parte State Farm Fire and Casualty Company,
Petitioner.

(In re: James M. Foor and Krystina Foor v. State Farm Fire Mutual Insurance Company)

From the Circuit Court of Bullock County
(No. 09-CV-2025-900001)
(The Honorable Burt Smithart, presiding)

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION

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STATEMENT REGARDING ORAL ARGUMENT

Amici curiae Chamber of Commerce of the United States of America and American Tort Reform Association defer to Petitioner's judgment on whether oral argument is necessary in this case. *Amici* will not file a motion to participate in oral argument. *See* ALA. R. APP. P. 29(f).

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases, like this one, raising issues of concern to the Nation's business community.

The American Tort Reform Association is a national, nonpartisan, nonprofit coalition of large and small businesses, trade associations, and professional firms. ATRA is dedicated to improving the civil justice system with a focus on promoting fairness, balance, efficiency, and predictability in civil litigation. In addition to legislative efforts and public education outreach, one of ATRA's important functions is to file

[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

amicus curiae briefs in cases, like this one, involving important civil justice issues.

SUMMARY OF THE ARGUMENT

The discovery-sharing provision in the circuit court's protective order is astonishing. It gives Plaintiffs' counsel upfront permission to use State Farm's most sensitive information in future cases, based purely on speculation that it might be relevant to the claims of hypothetical future plaintiffs. The vast majority of courts around the country refuse requests for sharing provisions like the one at issue here, and the national consensus is consolidating around that position. Even judged by the outdated pro-sharing opinions Plaintiffs relied upon below, this sharing provision takes things to a new level. Approving the circuit court's order would make Alabama a national outlier.

If sharing provisions like the circuit court's become the norm, Alabama's business environment will suffer. Trade secrets are among the most valuable assets for businesses across many industries. And weak protective orders with gaping holes like the sharing provision at issue threaten to erase the value of those assets in the blink of an eye. Businesses forced to produce confidential information pursuant to sharing protective orders have no recourse; it is almost impossible to do

even minor damage control in other jurisdictions. The Court should grant State Farm's petition for a writ of mandamus.

ARGUMENT

It is almost impossible to call the circuit court's order a "protective order" with a straight face. The "sharing" provision in the order relinquishes near-complete control of some of State Farm's most sensitive information to Plaintiffs' counsel for their unfettered, nationwide use. Permitting such an order to stand would undermine the governing rules that require discovery to be reasonable and proportional, making Alabama an extreme outlier jurisdiction. And because the consequences of producing confidential materials under such a worthless protective order are almost impossible to mitigate, the circuit's court approach to discovery sharing will force businesses to think carefully before entering the state. The Court should grant State Farm's petition.

I. Allowing the circuit court's so-called "sharing protective order" to stand would make Alabama a significant national outlier.

Amici do not doubt that discovery sharing may be appropriate in certain narrow circumstances, but the circuit court's order is beyond the pale. An overwhelming majority of courts around the country to consider similar sharing provisions have rejected them. That majority position is

only growing stronger with time. The decisions Plaintiffs primarily relied upon below are products of a bygone era, and even those outdated decisions cannot support a sharing provision under the circumstances of this case.

Plaintiffs' assertion to the circuit court that discovery sharing is widely favored by courts is patently untrue. In recent years, a dizzying array of state and federal courts have rejected sharing provisions like the one imposed by the circuit court. *See, e.g.*, *Shaw v. Shandong Yongsheng Rubber Co.*, No. 1:18-CV-00867, 2019 WL 5593305, at *3 (D. Colo. Oct. 30, 2019); *Biazari v. DB Indus., LLC*, No. 5:16-CV-49, 2017 WL 1498122, at *3 (W.D. Va. Apr. 26, 2017); *Clippard ex rel. Clippard v. Yamaha Motor Corp.*, No. 5:14-CV-83-R, 2015 WL 1208551, at *2 (W.D. Ky. Mar. 17, 2015); *Byrd v. U.S. Xpress, Inc.*, 26 N.E.3d 858, 866 (Ohio Ct. App. 2014); *McKellips v. Kumho Tire Co. Inc.*, No. 13-CV-2393, 2014 WL 3541726, at *1 (D. Kan. July 17, 2014); *Beavers-Gabriel v. Medtronic, Inc.*, Civ. No. 13-00686, 2014 WL 7882099, at *2 (D. Haw. June 20, 2014); *Ramos v. Cooper Tire & Rubber Co.*, No. 10-CV-198, 2011 WL 13266815, at *6 (D.N.M. Mar. 8, 2011); *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209, 2010 WL 1740831, at *1 (D. Ariz. Apr. 29, 2010)); *Zappe*

v. Medtronic USA, Inc., No. C-08-369, 2009 WL 792343, at *1 (S.D. Tex. Mar. 23, 2009); *Cordis Corp. v. O'Shea*, 988 So. 2d 1163, 1168 (Fla. Dist. Ct. App. 2008); *Harris v. Kellogg, Brown & Root Servs., Inc.*, No. Civ. 08-563, 2008 WL 5246017, at *4 (W.D. Pa. Dec. 15, 2008); *Massachusetts v. Mylan Labs., Inc.*, 246 F.R.D. 87, 91 (D. Mass. 2007); *Gil v. Ford Motor Co.*, No. 1:06CV122, 2007 WL 2580792, at *6 (N.D. W.Va. Sept. 4, 2007); *Petersen v. DaimlerChrysler Corp.*, No. 1:06 CV 00108, 2007 WL 914738, at *1 (D. Utah Mar. 5, 2007).

In the proceedings before the circuit court, Plaintiffs supported their assertion about the popularity and efficiency of sharing orders with extensive quotations from a 1987 decision by the District of Maryland, a 1980 decision by the Western District of Texas, a 1998 decision by the New Mexico Court of Appeal, a 1981 decision by the Western District of New York, a 1982 decision by the District of Colorado, and a 1987 decision from the Texas Supreme Court. (*See* App. D at 4–6, 11 (quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987), *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153–54 (W.D. Tex. 1980), *Krahling v. Executive Life Ins. Co.*, 959 P.2d 562, 568 (N.M. App. 1998), *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981), *Ward v.*

Ford Motor Co., 93 F.R.D. 579, 580 (D. Col. 1982), and *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987)).)

Even before reading the opinions cited in the preceding two paragraphs, an obvious difference jumps off the page: Whereas Plaintiffs' best cases are aging opinions from the 1980s, contemporary decisions support State Farm's position. That difference in citations reflects an obvious real-world trend. The smattering of cases from the 1980s and 1990s that Plaintiffs quoted to the circuit court "do indeed show that sharing provisions have, in the past, been endorsed by jurisdictions across the country," *Rosas v. Goodyear Tire & Rubber Co.*, No. 5:18-CV-101, 2019 WL 3308481, at *5 (S.D. Tex. June 3, 2019), and that courts once believed that sharing provisions could foster efficiency. "But contrary to [Plaintiffs'] intimations, the trend appears to be away from inclusion of sharing provisions in protective orders." *Id.* (internal quotation marks omitted). Indeed, the Texas Supreme Court opinion Plaintiffs rely upon has been so limited as to be practically overruled. *See In re Cooper Tire & Rubber Co.*, No. 04-18-00005-CV, 2018 WL 1511774, at *7 (Tex. App. Mar. 28, 2018) ("We conclude *Garcia*[*v. Peeples*, 734 S.W.2d 343,] is still good law but is limited by [*In re*] *Continental General*

Tire[, 979 S.W.2d 609 (Tex. 1998)].”). The permissive minority approach to sharing provisions urged by Plaintiffs is not even an emerging view, but a dated and increasingly uncommon one.

Judicial support for sharing provisions is declining because experience has not borne out the pro-sharing optimism in the dated opinions cited by Plaintiffs. Technology makes disclosure of confidential information far riskier today than it was in the mid-1980s. “An increasingly digitized and interconnected world seems more treacherous for confidential data than the bygone era of hard copies and certified mail.” Zakary A. Drabczyk, *Share with Caution: The Dangers Behind Sharing Orders*, 65 WAYNE L. REV. 401, 422 (2020).

Moreover, the idea that sharing could increase judicial economy stood on shaky footing to begin with. Even if sharing makes litigation cheaper, “[t]he likely result is more litigation without the offsetting efficiency of class aggregation,” not an overall increase in efficiency. *Id.* at 427–28. And it is not at all clear that sharing decreases litigation costs. “[A]ny savings the use of sharing orders accrues are likely to be offset by the costs of contentious discovery disputes.” *Id.* at 428. When protective orders do not place guardrails on the future use of sensitive information,

defendants must fight disclosure tooth and nail. And in addition to increasing the intensity of discovery disputes, sharing also increases the number of disputes by creating incentives for plaintiffs' lawyers to seek broader discovery that "would not be economically rational" in the absence of sharing. *Id.*

In fact, the circuit court's approach is such an extreme outlier that it would have even been an outlier even at the high-water mark of sharing provisions represented by the old cases Plaintiffs cite. The old pro-sharing opinions Plaintiffs cite relied on the fact that the materials to be shared were not sensitive. *See, e.g.*, *Hooker Chem. & Plastics*, 90 F.R.D. at 425 ("No specific instances are cited where trade secrets will be disclosed or where Hooker will be put at a competitive disadvantage."). But Plaintiffs do not dispute that the confidential and trade-secret materials they seek from State Farm are protected from disclosure. They nonetheless seek to freely share them.

The old pro-sharing opinions Plaintiffs cite also relied on the fact that the discovery was to be shared in a particular set of known cases involving identical shared facts. *See, e.g.*, *Ward*, 93 F.R.D. at 579 (discussing plaintiffs' desire to share discovery between "[s]everal

hundred . . . cases . . . filed in various courts throughout the United States" involving the same product design defect). But Plaintiffs do not attempt to point to a defined universe of cases, and any other insurance-claim cases will inevitably involve diverging facts and policy forms. *See* Pet. at 20–21.

None of this is to say that Alabama law permits sharing outside of the trade-secrets context or based on the existence of collateral lawsuits. But the fact that the sharing order Plaintiffs seek cannot even be justified by the outdated decisions they cite is powerful evidence of how extreme the circuit court's order really is. Affirming the circuit court's order likely would make Alabama the most pro-discovery-sharing jurisdiction in the country.

II. Allowing "sharing protective orders" in Alabama will expose any business operating in Alabama to nationwide disadvantages that cannot be alleviated by other courts.

If Alabama becomes a hotbed of discovery sharing, businesses will have to think long and hard before entering the state. Trade secrets and other confidential and propriety information are valuable assets, and that value can evaporate in the blink of an eye once that information is disclosed. Almost every industry relies heavily on trade secrets of some

kind, not just insurers like State Farm. And if one state becomes an unusual discovery-sharing outlier, there is no real way to limit the fallout in other states other than by avoiding the outlier jurisdiction.

The consequences of disclosing confidential and trade-secret information without the security of a genuine, non-sharing protective order are severe. "[F]ew assets are more valuable to defendants than confidentiality in litigation." Drabczyk, *supra*, at 421. That is especially true for businesses, like State Farm, whose most valuable assets are secret processes and information that competitors easily could capitalize upon if discovered. "Trade secrets . . . receive greater protection from discovery because they derive economic value from being generally unknown and not readily ascertainable by the public." *Ex parte Miltope Corp.*, 823 So. 2d 640, 645 (Ala. 2001) (alteration adopted) (internal quotation marks omitted). "If a trial court orders the discovery of trade secrets and such are disclosed, . . . [t]he proverbial bell cannot be unrung." *Id.* at 644–45 (internal quotation marks omitted).

State Farm's petition makes it clear why disclosure of trade secrets is so dangerous for an insurance company. *See* Pet. at 9-11. But insurance is hardly the only industry where trade secrets and other confidential

information are among a company's most valuable assets. Courts have protected the full spectrum of confidential and proprietary information against discovery sharing, from "technological innovation" in the medical industry, *Cordis Corp.*, 988 So. 2d at 1166, to the nuts-and-bolts operational details of trucking and retail companies. *See Byrd*, 26 N.E.3d at 860 (preventing sharing of trucking company's "'proprietary and commercial information, including documents with financial, marketing, research, and customer information'"); *Menendez ex rel. Menendez v. Wal-Mart Stores E. LP*, No. 1:10-CV-53, 2012 WL 90140, at *3 (N.D. Ind. Jan. 11, 2012) (preventing sharing of retailer's "equipment and building blueprints, engineering documents, specifications, designs, and construction layouts that are kept secret from their competitors"). Indeed, it is difficult to imagine a business that would be comfortable operating in a state that routinely permitted its inner workings to be exposed in litigation and potentially to competitors across the country.

A business that is forced to disclose confidential information under an Alabama "sharing" protective order will have no way to mitigate that damage by turning to other courts in other jurisdictions. Even setting aside the real-world futility of unringing the bell once confidential

information is disclosed, there is no realistic procedural path to even try. Once one court has required documents to be produced without the benefit of a genuine protective order, there is no real mechanism for another court to limit the use of those documents in the separate cases before it. *Cf. Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 76 (S.D.N.Y. 2010) ("[T]he Federal Rules of Civil Procedure[ ] create no automatic prohibition against using discovery obtained in one litigation in another litigation.").

The circuit court was mistaken if it believed that it was avoiding any of the problems with sharing provisions by limiting the use of State Farm's information to other cases in which the plaintiffs are represented by these Plaintiffs' counsel. There is no functional difference between Plaintiffs' counsel selling State Farm's confidential information to other parties and Plaintiff's counsel selling their services—which they may provide by using State Farm's confidential information—to other parties. Even if Plaintiffs' counsel were not barred in multiple jurisdictions, it would be trivially simple for them to affiliate with local lawyers in any jurisdiction in the country. The lawyer-specific limitation in the circuit

court's order is no limitation at all, and it does not address any of *amici*'s concerns.

None of this is to say that *amici* oppose discovery sharing in all circumstances. The central problem with sharing is that it permits future collateral plaintiffs to "obtain discovery" that is not "proportional to the needs of the case," in violation of Alabama Rule of Civil Procedure 26(b)(1) (and, for that matter, in violation of Federal Rule of Civil Procedure 26(b)(1) and the similar rules in numerous other jurisdictions). This Court revised Rule 26(b)(1) in 2018 to incorporate proportionality factors into the definition of the scope of discovery, a change designed to "highlight the need to size discovery to the needs of a particular case." Advisory Committee Comments to Amendment to Rule 26(b)(1), Ala. R. Civ. P., Effective December 1, 2018. The revised Rule makes it the "court's responsibility" to make "a case-specific determination of the appropriate scope of discovery." *Id.* Discovery sharing of the kind approved by the circuit court—which permitted discovery to be used in future cases without any case-specific determinations—totally undermines the proportionality policy embodied in Rule 26 by giving

future plaintiffs unlimited access to sensitive information regardless of their needs.

Enforcing Rule 26's proportionality requirement in this case will not prevent the Court from doing justice in an exceptional future case. Refusing to permit an upfront sharing provision does not prevent future plaintiffs with a legitimate need for past discovery to seek modification of a prior protective order. For example, the United States Court of Appeals for the Second Circuit has developed an approach to discovery sharing under which a "presumption against modification"—the strength of which is determined by "the nature of the protective order and whether it invited reasonable reliance"—may be overcome by a collateral plaintiff's "***extraordinary*** circumstance or compelling need." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 317-19 (D. Conn. 2009) (emphasis added). This approach permits modifications when collateral plaintiffs "could access the same materials . . . by conducting [their] own discovery," but not when they seek "to gain access to materials [they] would otherwise have no right to access." *Id.* at 324. Upfront sharing provisions, however, are not tailored and case-specific as mandated by Rule 26's proportionality requirement.

CONCLUSION

The Court should grant State Farm's petition and issue a writ of mandamus directing the circuit court to vacate its order and issue a new order that does not include a "sharing" provision exposing State Farm's confidential material to third parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the font and word limitations of Rules 21(d), 29(c), and 32(a)(7). According to the word-count function in Microsoft Word, the pertinent parts of this document contain 2,872 words. This document uses Century Schoolbook font in 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of *Amici Curiae* Chamber of Commerce of the United States of America and American Tort Reform Association was electronically filed on the 12th day of December, 2025, with the Clerk of the Court, and that a copy of the same will be served upon the Circuit Court and listed counsel of record by email:

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