No. _____

In The

Supreme Court of the United States

JANIE L. ROBINSON,

Petitioner,

v.

STATE COMPENSATION
MUTUAL INSURANCE FUND,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Montana law authorizes workers compensation insurers to "doctor shop" by compelling repetitive medical examinations without demonstrating good cause.

1. Is this practice an unreasonable "search," conducted under state authority?

2. Does it improperly condition governmental benefits upon a waiver of constitutional rights?

3. Does this practice exceed the limits of the "Grand Bargain" of the workers compensation system by *New York Central Ry. Co. v. White*? *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917).

PARTIES TO THE PROCEEDING

Petitioner, who was Plaintiff and Appellant below, is Janie L. Robinson. Respondent, which was Defendant and Appellee below, is the State Compensation Mutual Insurance Fund.

In addition, the Montana Department of Labor and Industry was originally a defendant in the trial court. Plaintiff's claims against the Department were dismissed by stipulation of the parties.

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PETITION FOR A WRIT OF CERTIORARI

Janie Robinson respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Montana Supreme Court (App. 1-19) is reported at 2018 MT 259, 393 Mont. 178, 430 P.3d 69 (2018). The order of the Montana Supreme Court denying rehearing (App. 48-49) is unreported. The orders of the trial court (App. 20-47) are unreported.

JURISDICTION

The Montana Supreme Court entered judgment on October 23, 2018. Robinson petitioned for rehearing, and the Montana Supreme Court denied the petition on November 27, 2018. Robinson invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

Robinson fully preserved her constitutional arguments below. She argued that the State Fund, acting pursuant to Montana law, had violated her rights against unreasonable search and her rights to substantive due process. The district court denied these arguments (App. 27-29, 43-47), as did the Montana Supreme Court. (App. 15-18)

The decision below is a final adjudication of Petitioner's constitutional rights, and the judgment is not supported by adequate and independent state law. Jurisdiction lies because "the federal issue has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution and of the Montana Code Annotated, § 39-71-605, M.C.A. are reproduced at App. 50-53.

STATEMENT OF THE CASE

Janie Robinson was injured on the job. She received workers compensation benefits for years. The State Fund, her insurer, then required an independent medical examination (IME) by a physician of its choosing.

The physician diagnosed a traumatic brain injury and recommended ongoing treatment. He observed that Robinson's current treatment had been "masterfully performed." (App. 64) The State Fund, dissatisfied with this report, required Robinson to submit to a

second IME by another doctor who constantly works for insurers and bills them hundreds of thousands of dollars. (*Id*.)

The second doctor questioned Robinson very aggressively. She stated afterward: "One doctor in perticuler [sic] was very hard on me, demanding answers, or questioning repeated [sic] about many things that were sexual . . . I was very scared to stop it I felt trapped & powerless." (App. 65) Robinson suffered an acute psychological breakdown. (App. 65-68)

Predictably, the second doctor gave a dramatically different diagnosis and recommended curtailing treatment. (App. 64-65) Robinson sued, alleging that repetitive IMEs without showing good cause are an unreasonable "search" that violates Fourth Amendment standards. She cited this Court's opinions in *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) and other pertinent cases.

The Montana Supreme Court affirmed a summary judgment for the State Fund. (App. 1) It made no mention of *Skinner* or of seven other decisions of this Court which Robinson had cited. Robinson brings this petition to challenge the Montana statute that authorizes repetitive IMEs and doctor-shopping by insurers.

Petitioner's Injury and the Repetitive Examinations

Petitioner Janie Robinson worked on a remote ranch in Montana. She suffered heat stroke in an

enclosed tractor cab on a midsummer day. This caused acute neurological impacts which have persisted for many years. (App. 63)

Robinson was treated by a team of four physicians (a neurologist, a neuropsychologist, a psychiatrist, and a psychologist). (App. 69) When her symptoms did not abate, her workers compensation insurer required an IME by another neuropsychologist of its own choosing, Dr. Paul Bach.

Dr. Bach concluded that the heat event had caused a traumatic brain injury. He found no sign of preexisting conditions. He recommended continuing psychotherapy, stating that therapy "has been masterfully performed by her current therapist." (App. 63-64)

The insurer (the State Fund) was not satisfied with Dr. Bach's diagnosis. It scheduled a second IME with Dr. William Stratford. (App. 64) Dr. Stratford is retained by workers compensation insurers on a constant basis. *See New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶¶ 11-14, 18, 30 (Dr. Stratford performs 60-70 IMEs a year, charging $4,200 to $11,500; these facts "can be used to show bias at trial").

Dr. Stratford made findings which contradicted those of Dr. Bach. He stated that he did *not* believe that Robinson "has suffered from any organic brain difficulty." He found that elements of her disorder were preexisting, and he recommended curtailing her psychotherapy. (App. 64-65)

Dr. Stratford's interview with Robinson was aggressive. His intrusive sexual questions traumatized her, triggering a psychological breakdown. (App. 65-68) Her treating physicians deplored this episode, stating that Robinson had been "overwhelmingly stressed" and "was contemplating suicide;" that the insurer had acted "inappropriately;" and that the outcome was "catastrophic." (App. 66-70)

The Litigation

Robinson sued the State Fund in Montana district court. She argued that § 39-71-605, M.C.A., is unconstitutional under both the state and the federal constitutions. The district court awarded the State Fund summary judgment. (App. 20-47)

Robinson argued that repetitive IMEs without good cause are unreasonable searches that violate the Fourth Amendment. (Pl. Br. in Support of Motion for Partial S.J. Re Violations of 4th Amendment, Nov. 23, 2016) The district court rejected that claim on grounds that she had consented to the search. It cursorily rejected her argument that this consent was involuntary because she depended upon her compensation benefits for her livelihood. (App. 28-29)

Robinson also argued that she had been denied substantive due process, citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will City*, 391 U.S. 563 (1968); and *Speiser v. Randall*, 357 U.S. 513 (1958). (App. 44) The district court stated that it would

"ignore" those cases, since Robinson's Complaint had cited the due process clause of Montana's state constitution, but not of the federal constitution. (*Id*.)

Robinson appealed to the Montana Supreme Court. She argued both the unreasonable search issue (App. 85-90) and the substantive due process issue. (App. 90-93)

The Montana Supreme Court affirmed the district court. It questioned whether an IME is a "search" for constitutional purposes. It held that, in any event, a workers compensation claimant "waive[s] confidentiality" and "agree[s] to submit to medical examinations appropriate to the history of her claim." (App. 17, ¶¶ 29-30)

The Court acknowledged that a claimant who refuses a repetitive IME may have her benefits suspended. (App. 13, ¶ 24) But it held that claimants are adequately protected against abusive use of IMEs. It noted that claimants can apply to the State for an interim benefit order, and that ultimately they can bring a common law tort claim for bad faith. (App. 13, 16-17, ¶¶ 24, 28, 30)

Robinson filed a petition for rehearing. (App. 107) She pointed out that the Montana Supreme Court had failed even to mention eight U.S. Supreme Court cases discussed in her briefs. (App. 114-121) The Montana Supreme Court summarily denied a rehearing.

REASONS FOR GRANTING THE PETITION

Workers compensation is the second largest governmental benefit program in America, after only the Social Security Act programs. It affects millions of injured workers. Their claims are assessed and their benefits determined through fifty independent state systems.

This Court approved the "Grand Bargain" of workers compensation, whereby employers and employees surrender common law rights, a century ago. Since then, the Court has addressed no constitutional issues in this field.

The present case presents a bright-line constitutional issue. That issue is whether insurers, empowered by state law, can compel repetitive IMEs *after* a definitive diagnosis, without any showing of good cause. This practice of "doctor shopping" infringes claimants' rights of autonomy and privacy. It is an unreasonable search, which violates the Fourth and Fourteenth Amendments.

The search in the present case incontestably was state action. Montana's State Fund has the status of "a state agency." *Birkenbuel v. Mont. State Comp. Ins. Fund*, 212 Mont. 139, 147, 687 P.2d 700, 704 (1984).

The state action paradigm applies, moreover, where *private* insurers compel IMEs pursuant to the statute. The state pervasively regulates workers compensation, and *Skinner*'s analysis militates for finding state action. This will be explained below.

A. Historical Background[1]

Workers compensation systems first were devised in Europe in the 1880s and 1890s. American legislatures examined those systems in the early 1900s. Diverse groups (including the U.S. Department of Labor, the National Association of Manufacturers, the National Civic Foundation, academic groups and private foundations) intensively studied the issue.

The common law tort system was inadequate to redress industrial injuries. Workers and their families had no means of support in the course of litigation, and common-law defenses (contributory negligence, assumption of risk, and the fellow-servant rule) often barred their claims. Employers meanwhile complained that juries were prone to award excessive verdicts.

Workers compensation was perceived as a "Grand Bargain" whereby labor and industry jointly surrendered their common law rights and exchanged a quid pro quo. Workers gave up the right to damages; employers gave up their common law defenses; and benefits were made promptly payable on a fixed schedule, without regard to fault.

The Grand Bargain raised fundamental constitutional questions. It was in tension with the

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[1] *See* E. Relkin, *et al., The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century*, 69 Rutgers U. L. Rev. 881, *et seq.* (2017) (proceedings of a conference sponsored by the Pound Civil Justice Institute, the Rutgers Center for Risk and Responsibility, and Northeastern University School of Law).

jurisprudence of the *Lochner* era, which tended to absolutize contract rights and to reject state action limiting those rights.

In 1910, New York enacted a workers compensation law. The New York Court of Appeals promptly struck it down in *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911). *Ives* held that depriving employers of property without fault or contract violated "ancient and fundamental principles" predating the Constitution.

The day after *Ives* was decided, the terrible Triangle Shirtwaist fire killed 146 New York garment workers. The New York legislature responded with reform legislation, including a new workers compensation law. That law came before the U.S. Supreme Court in *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917).

B. *White*'s Analysis of the "Grand Bargain"

In *White*, the employer raised standard *Lochner*-era objections to the workers compensation paradigm. *See Lochner v. New York*, 198 U.S. 45 (1905). It argued that the paradigm deprived it of property without due process of law, in violation of the Fourteenth Amendment.

White agreed that the paradigm fundamentally departs from common-law standards. The Court reiterated *Lochner*-era constitutional norms. *White*, 243 U.S. at 206. But it upheld the workers compensation law as

"a just settlement of a difficult problem," and "a reasonable exercise of the police power." *Id.*, at 202, 206.

White repeatedly invoked "reasonableness" as its due process standard. It held that workers compensation is a "reasonably just substitute" for common law rules. It held repeatedly that New York's law was not "arbitrary and unreasonable." *Id*., at 202-05.

The Court applied the same standards to workers compensation laws in two subsequent challenges in 1919. *See Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919) (workers compensation law was "based upon reasonable grounds affecting the public interest . . . not arbitrarily or fundamentally unjust"); *New York Central R. Co. v. Bianc*, 250 U.S. 596 (1919) (workers compensation provision "was not unreasonable, arbitrary, or contrary to fundamental right").

For a century since those cases, the Court has not given constitutional scrutiny to any workers compensation issue. During those years, the compensation system has grown much more complex. The tort system which was supplanted by the Grand Bargain has evolved as well.

This case presents a bright-line issue, framed by numerous precedents under the Fourth and the Fourteenth Amendments. The case is well suited as an occasion for the Court to update its jurisprudence on workers compensation.

C. Doctor-Shopping as a Fourth Amendment "Search"

White's standard of "reasonableness" for assessing workers compensation issues corresponds to the standard applied to searches under the Fourth Amendment. That Fourth Amendment search jurisprudence is pertinent here.

Skinner sets out an analysis closely on point. In *Skinner*, as here, the Court reviewed compulsory medical examinations in a non-criminal context. The threshold issue was whether such examinations are a "search."

Skinner dealt with regulations that "do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules." 489 U.S. at 606. The Court held that such tests are a "search," attributable to the Government, even though compelled by private actors.

As to the "search," *Skinner* held, in part:

> Our precedents teach that *where, as here, the Government seeks to obtain physical evidence from a person*, the Fourth Amendment may be relevant at several levels. . . . *Obtaining and examining the evidence may be . . . a search*, [citations omitted], if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable.

* * * * *

> Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Id. at 616-17 (emphasis added).

Applying this reasoning to the present case, repetitive IMEs should be deemed a "search." They are purely a means of obtaining evidence. The doctor is chosen by an adverse party, and the IME thereby "intrudes upon expectations of privacy" (*a fortiori*, where, as here, a doctor very aggressively questions a claimant about sexual matters).

Skinner addressed the other Fourth Amendment criterion of governmental agency as follows:

> *Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities*, [citations omitted], a question that can only be resolved "in light of all the circumstances." [citation omitted] The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a

> passive position toward the underlying private conduct.

Id. at 614-15 (emphasis added).

In the present case, the State Fund is a governmental agency, and the search thus incontestably is state action. IMEs, moreover, constitute state action under *Skinner* even if conducted by private insurers.

The workers compensation system is regulated pervasively by the State. *See* § 39-71-101, *et seq.*, M.C.A. and Chap. 24.29, Admin. Rules of Montana (including some 293 regulations). As in *Skinner*, "[t]he Government has removed all legal barriers to the testing. . . . These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment." *Skinner*, 489 U.S. at 615-16. The Fourth Amendment (as incorporated in the Fourteenth Amendment) therefore clearly applies.

The issue is whether the search is "reasonable" both under the Fourth Amendment and under the quid pro quo analysis of *White*. The Court should hold that a repetitive IME without showing good cause is *not* reasonable, stating a bright-line test.

D. Doctor-Shopping is Unreasonable

Petitioner raises a constitutional challenge to a specific class of IMEs. She objects to *repetitive* IMEs, imposed without a showing of good cause, where a prior IME has yielded a definite diagnosis.

Repetitive IMEs of this sort are "doctor shopping," and that practice is unreasonable per se. The insurer chose the initial doctor. It cannot reasonably reject that chosen doctor's diagnosis to look for one that it likes better, without demonstrating a flaw.

Compelling a claimant to visit doctor after doctor, without good cause, is arbitrary by definition. That is the touchstone of analysis under this Court's precedents in *White*, *Arizona Copper Co.* and *Bianc*. And it is central to this Court's Fourth Amendment precedents as well.

This Court has held that warrantless searches "are per se unreasonable . . . subject to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patal*, ___ U.S. ___, 135 S.Ct. 2443, 2452 (2016). The Court has required "that a disinterested party warrant the need to search." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532-33 (1967). "The essential purpose of the warrant requirement is to . . . assur[e] citizens subject to a search . . . that such intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 621-22.

In the present context, "arbitrary acts" can be foreclosed by requiring good cause for repetitive IMEs. Insurers should be compelled to show a disinterested party (a workers compensation judge) that the first diagnosis was flawed, and that they are not merely doctor-shopping.

Montana's Workers Compensation Act does not require a good cause showing. It allows repetitive IMEs at the discretion of insurers. *See* § 39-71-605, M.C.A. The Court should grant certiorari to hold that this is unreasonable, under its Fourth Amendment jurisprudence and under a contemporary application of *White*.

E. Contemporary Quid Pro Quo Analysis

White carefully assessed the workers compensation quid pro quo "from the standpoint of the employee as well as from that of the employer." 243 U.S. at 197. The Court reviewed the common law rights that were surrendered by each side, and found the bargain reasonable. "[A] reasonably just substitute" was provided by the State for the former tort rules. *Id*. at 201.

In the century since *White*, *Arizona Copper Co.* and *Bianc*, the common law of torts has changed profoundly. Most of the changes would primarily work to the benefit of workers, had the Grand Bargain never occurred. Contributory negligence has given way to comparative negligence; foreseeability is more broadly construed; and causation of cumulative injuries is far more easily proved.

An especially pertinent change is embodied in Fed. R. Civ. P. 35 and the many corresponding state rules. Those rules require that good cause be shown to justify *any* IME. That requirement protects the privacy interest of litigants and corresponds to the Fourth Amendment's warrant requirement to bar abusive conduct.

The Court should take note of these developments to update its holding in *White*. The Court should confirm that "reasonableness" is the standard for judging the quid pro quo. That standard should be applied with reference to contemporary tort law.

The general framework of the Grand Bargain remains reasonable in that context. And it is reasonable that claimants forego a Rule 35 good cause hearing as to an initial IME, for efficiency of administration. But it is *not* reasonable that repetitive IMEs be imposed on claimants without any showing of good cause.

Applying *White*'s reasonableness analysis, the Court should state a bright-line rule. Workers compensation claimants must submit to an initial IME. But if that IME yields a definite diagnosis, insurers must show a neutral decision-maker good cause to impose a further IME.

F. Rights Against Unreasonable Search are Not Subject to Waiver

The State Fund argued that Robinson waived her rights when she consented to the second IME. The district court concurred, observing: "Robinson can hardly claim she has an expectation of privacy regarding a consented-to search." (App. 28) The Montana Supreme Court concurred. (App. 14, 17, ¶¶ 25, 29-30)

Robinson argued that her consent was coerced, and that a coerced consent waives no rights. (App. 76-77, 89-90, 117-118) She cited this Court's Fourth

Amendment holdings in *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-34 (1973) ("if under all the circumstances it has appeared that the consent was not given voluntarily – that it was coerced by threats or force, or granted only in submission to a claim of lawful authority – then we have found the consent invalid and the search unreasonable"); and in *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) ("The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent."). The Montana courts did not mention those holdings.

Bumper and *Schneckloth* govern the situation here. The statute is *mandatory*. It states that a claimant "shall . . . submit" from "time to time" to examinations paid for by the insurer. § 39-71-605, M.C.A. If she "fails or refuses to submit," her right to compensation *must be suspended*." *Id*. (emphasis added).

Obviously, this is coercive. By definition, claimants for workers compensation have lost their livelihood. Suspension of benefits practically compels acceptance of an IME.

Robinson asserts that a State Fund agent expressly threatened loss of benefits if she refused the second IME. (*See* App. 118) At minimum, this should have raised a fact issue with regard to consent and waiver. But the Montana courts held that there was waiver as a matter of law. (App. 17, 28-29)

This Court should confirm that *Bumper* and *Schneckloth* apply to workers compensation cases. A

coerced consent waives no rights. At minimum, there is a fact issue as to whether Robinson consented here.

On a more fundamental level, this Court has held repeatedly that governmental benefits cannot be conditioned on waivers of constitutional rights. That is a principle of due process. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Robinson cited *Perry*, *Pickering* and *Speiser* to the Montana courts. The district court overtly stated that it would "ignore" those cases. (App. 44) The Montana Supreme Court did not mention them.

Conditional benefit analysis is crucial where a state actor is empowered to dictate terms of a waiver of constitutional rights. That is exactly what happened here. The State Fund conditioned Robinson's benefits on her submission to a second IME by a partisan and aggressive doctor.

This Court should hold that, in the context of repetitive IMEs, conditioning benefits on a waiver of Fourth Amendment rights denies a claimant due process. It is unreasonable and arbitrary, under the rule of *White*.

G. The Fourth Amendment Violation Cannot be Justified

The Montana Supreme Court found no Fourth Amendment violation. In any event, it held that the

Workers Compensation Act "provide[s] a remedy for a claimant to contest an abusive IME." (App. 17, ¶ 30) That remedy, it held, was to apply to the Department of Labor and Industry for an order awarding interim benefits, and ultimately to sue the insurer under the common law of bad faith. (*See* App. 13-14, ¶ 24)

This Court should reject the Montana Court's reasoning. The putative remedy is inadequate to protect Fourth Amendment rights in the context of workers compensation.

The Montana Supreme Court itself noted that the workers compensation system is meant to "be primarily self-administering" and "to minimize reliance upon lawyers and the courts." (App. 13, ¶ 23) Unsophisticated claimants like Janie Robinson are unlikely to know that they can petition for interim benefits if they contest an IME.

By contrast, the claims examiners representing insurers have a thoroughgoing knowledge of the system in which they operate day after day. The asymmetrical relationship enables them to use the system in arbitrary ways. One such way is doctor-shopping by scheduling repetitive IMEs.

The possibility of a tort claim for bad faith insurance adjusting does not redress this flaw in Montana's system. A claim can only be brought after Fourth Amendment rights have been infringed. Since the system discourages attorneys, claimants rarely will be aware that they have Fourth Amendment rights or that they have potential tort claims.

This Court should take account of the asymmetrical nature of the system. It should hold that the remedies proposed by the Montana Supreme Court do not safeguard Fourth Amendment rights. Montana's Workers Compensation Act is not reasonable in that respect.

In sum, this Court should grant certiorari to update *White*'s jurisprudence. It should apply *White*'s "reasonableness" test to the workers compensation quid pro quo in the contemporary context.

The Court should announce a bright-line rule forbidding repetitive IMEs without a showing of good cause. It should ground that holding, in part, on its precedents in *Skinner*, *Patal*, *Camara*, *Schneckloth*, *Bumper*, *Perry*, *Pickering*, and *Speiser*. The Montana Supreme Court's failure even to mention those cases is an additional reason for granting certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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