No. _____

IN THE

Supreme Court of the United States

WILBUR-ELLIS COMPANY LLC,
Petitioner,

v.

BLUE BUFFALO COMPANY LTD., ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may override the order of a state court sealing a court filing necessary to resolve a motion in the state court, by compelling production in federal court of that sealed filing, without requiring that the request for access be made to the state court consistent with principles of comity, federalism, and the State's ability to perform its judicial functions.

PARTIES TO THE PROCEEDING BELOW

Wilbur-Ellis Company LLC is the petitioner here, was the petitioner before the court of appeals, and is a defendant before the federal district court in the proceedings below.

Blue Buffalo Company Ltd. is a respondent here and is a plaintiff before the federal district court in the proceedings below.

Diversified Ingredients, Inc., is a defendant before the federal district court in the proceedings below.

Custom Ag Commodities, LLC is a third-party defendant before the federal district court in the proceedings below.

RULE 29.6 STATEMENT

Petitioner Wilbur-Ellis Company LLC is a California limited liability company. It has no parent company, and the sole member of Wilbur-Ellis Company LLC is Wilbur-Ellis Holdings II, Inc., a private Delaware corporation. No publicly held corporation owns 10% or more of the stock of Wilbur-Ellis Company LLC.

DIRECTLY RELATED PROCEEDINGS

- *In re: Wilbur-Ellis Company*, No. 19-2448 (8th Cir.) (judgment entered and mandate issued July 12, 2019);

- *The Blue Buffalo Company, Ltd. v. Wilbur-Ellis Company LLC, et al.*, No. 4:14-cv-00859 (E.D. Mo.) (order granting motion to compel issued Jan. 4, 2019; order denying motion for reconsideration issued June 6, 2019);

- *Ironshore Specialty Insurance Company v. Wilbur-Ellis Company, et al.*, No. CGC-15-549583 (S.F. Super. Ct.) (sealing order issued June 10, 2016; order staying case issued June 20, 2016).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wilbur-Ellis Company LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

This case presents a question rooted in core principles of comity, federalism, and a State's ability to perform its judicial function. Those principles are undermined when a district court overrides a state trial court order that had sealed a court filing necessary to resolve a motion in a state court proceeding. The lower federal courts are in disagreement as to their authority to review such sealing or similar protective-type orders entered by other trial courts. The issue typically evades appellate review due to the interlocutory nature of such orders. Thus, disagreement among district courts persists unreviewed.

This petition arises out of an order by the district court compelling a state court sealed filing by Petitioner, Wilbur-Ellis Company, be produced to Respondent, Blue Buffalo Company—its adversary in this federal court action. The state court required the filing be sealed to allow Petitioner to provide that court with arguments that were necessary for the court to rule on a pending motion to stay the state proceeding that had been brought against Petitioner by an insurer, until after conclusion of this federal court litigation for which the insurer disputed coverage.

The sealing order was relevant to the state court's ability to decide the stay motion based on an adequate record. A longstanding California state court doctrine, the *Montrose* doctrine, supported such an order to allow Petitioner to provide the court with its analysis of the potential factual and legal arguments and strategy in this federal court litigation that could cause unfair prejudice if the state court insurance coverage litigation were not stayed until after the federal litigation. The district court invalidation of the state court sealing order undermined that state court ability to perform its judicial function to rule on the stay motion. The district court's failure to direct Respondent to request the state court to unseal the court filing, as Petitioner indicated was the appropriate relief, violated principles of comity and federalism. The district court compounded that usurpation of state court authority by sitting in appellate review on the substance of state law and reversing the state trial court on those grounds, also thwarting the appropriate functioning of state appellate court review.

Review by this Court is warranted to ensure that lower federal courts adhere to the same legal standards in their review of requests to override state court sealing orders.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The order and memorandum of the district court compelling production of the court filing sealed by the state trial court (App., *infra*, 2a–9a) and

the district court's order and memorandum denying reconsideration (App., *infra*, 10a–14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

A. Factual And Procedural Background

1. The instant federal court litigation

This federal court action was originally brought by Nestlé Purina against Respondent for false advertising, commercial disparagement, unfair competition, and unjust enrichment.[1] Nestlé Purina alleged that Respondent had convinced consumers to purchase its pet food by falsely marketing its own products as, among other things, healthier and more nutritious than competing brands. A year later, Respondent impleaded Petitioner and one of

[1] Throughout the litigation, the federal district court has exercised jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

Respondent's brokers, Diversified Ingredients, claiming they were responsible for one of the alleged misrepresentations.

Respondent ultimately settled Nestlé Purina's claims, *see* 14-cv-00859 (E.D. Mo.), Dkt. No. 1145, and this suit is now captioned with Respondent as the plaintiff against the impleaded entities. Respondent seeks recovery from Petitioner and Diversified Ingredients of the amounts it paid to settle Nestlé Purina's claims (and also the amounts it paid to settle parallel class action claims), along with tens of millions of dollars in attorneys' fees, and potentially hundreds of millions of dollars in alleged lost profits.

2. The state court insurance coverage litigation

Several months after Petitioner was impleaded into this federal suit, its general liability insurer, Ironshore Specialty Insurance Company, sued it in San Francisco Superior Court. *See* CGC-15-549583 (S.F. Super. Ct.). The insurer sought, among other relief, a declaration that it has no obligations to defend or indemnify Petitioner in this federal court litigation.

Petitioner promptly moved to stay that state court insurance coverage litigation pursuant to the state-law *Montrose* doctrine, which provides that, in order to avoid prejudice to the insured, an insurer's declaratory relief action may be stayed pending the resolution of the underlying action over which the insurer disputes coverage. *See Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 301, 24 Cal. Rptr. 2d 467 (1993). Consistent with the reasoning of *Montrose*,

Petitioner argued to the state court that it would be subjected to unfair prejudice if it were forced to litigate the dispute about insurance coverage in state court while at the same time defending against the liability claims in this federal court litigation.

The California Superior Court held a hearing on Petitioner's stay motion. The insurer argued that, while it did not object to a stay of discovery, any stay should exclude dispositive motions so that it could immediately move for summary judgment on insurance coverage. App., *infra*, 27a–29a. Based on the oral arguments at the hearing, however, the state court ordered the parties to provide the court with supplemental briefs on what prejudice could arise if summary judgment proceeded simultaneously with the federal action. *See* App., *infra*, 18a.

In response to that court order, Petitioner lodged with the state court (but did not file) a supplemental brief in support of its stay motion, which detailed the prejudice it could suffer if the insurer was permitted to bring its summary judgment motion. The court determined that it could not consider the supplemental brief as a lodging, however, and instead ordered Petitioner to file a motion so that the supplemental brief could be filed under seal. Petitioner and the insurer then filed a joint submission expressing opposing viewpoints on whether portions of Petitioner's supplemental brief should be redacted and filed under seal. *See* App., *infra*, 30a–40a.

After considering that submission, the state trial court entered an order finding that an "overriding

interest" warranted redaction of Petitioner's supplemental brief on the public record and directed that an unredacted version of the supplemental brief be sealed for filing with the court. *See* App., *infra,* 20a–23a. The court's sealing order applied the longstanding *Montrose* doctrine, and was based on the fact that, to demonstrate it is entitled to a stay of insurance coverage litigation, a policyholder will often be required to play "devil's advocate," predicting the arguments and legal theories that the plaintiffs in the underlying action will make and the prejudice the policyholder will suffer if the coverage action is not stayed. The state court explained that it had "scoured the material to determine the extent to which plaintiffs in the underlying litigation [Respondent here] might be able to use it to defendant's [Petitioner's] great disadvantage," and found that "valid reasons for sealing are the very principles of law which, in the appropriate case, allow insureds such as defendant here [Petitioner] to secure a stay of the coverage case pending resolution of the underlying litigation." *Id*. at 21a.

Petitioner then filed its supplemental brief unredacted and under seal, as ordered. Petitioner filed a redacted version of the brief on the public record. One week later, the state trial court entered an order staying that insurance coverage litigation until resolution of this federal court litigation. *See* App., *infra*, 24a–25a.

B. The Proceedings Below

1. Several months after Petitioner filed its supplemental brief unredacted and under seal at the

order of the state court, Respondent sought the production of that sealed filing through a discovery request to Petitioner under Federal Rule of Civil Procedure 34. Petitioner objected to production on the basis of the state court's sealing order, asserting that Respondent should seek relief from the state trial court through a petition filed in that insurance coverage litigation. *See* 14-cv-00859 (E.D. Mo.), Dkt. No. 1371-1 at 10-13. Respondent did not do so, and instead, moved the district court to compel production of the state court sealed filing.

The district court ultimately ordered Petitioner to produce to Respondent the state court sealed filing. *See* App., *infra*, 2a–9a. The district court noted that it would not "undermine or affect California's interest in the stayed California Superior Court's proceeding." App., *infra*, 5a. The district court reasoned that it was "not ruling on the propriety of the *Montrose* doctrine in California courts," and it viewed its decision as having "no impact on the stayed California dispute." *Id.* The district court discerned no reason why California's interests would constrain the federal court from "applying Rule 26 to determine whether the document is discoverable." App., *infra*, 6a (citations omitted).

Petitioner moved for reconsideration of the production order or, in the alternative, for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). The district court denied the motion. App., *infra*, 10a–14a. The court acknowledged that it had given "little weight to the state court's application of California's interest," but indicated that the interest was "specifically designed

to help [Petitioner] avoid discovery in this case." App., *infra*, 12a. The court stated that the "appropriate effectuation of the *Montrose* Doctrine is a stay, not a protective order." App., *infra*, 12a. It concluded that the sealing order "appears to be a novel, or at best rarely used, application of the *Montrose* Doctrine." App., *infra*, 12a–13a. The district court did not address numerous cases cited by Petitioner holding that the appropriate procedure was for the district court to instruct Respondent to seek relief from the issuing court. *See* 14-cv-00859-RWS (E.D. Mo.), Dkt. No. 1371-1 at 10-13. App., *infra*, 11a-13a.

2. Petitioner sought a writ of mandamus in the United States Court of Appeals for the Eighth Circuit directing the district court to vacate or reverse its order compelling production of the state court sealed filing. App., *infra*, 41a–75a. The court of appeals denied the petition. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because the lower federal courts are in disagreement as to their authority to override state court orders that seal a filing in state court, and similar protective-type orders.

Some lower federal courts recognize the core principles of comity and federalism at issue and hold that overriding another court's sealing or protective order is not appropriate, and that the requesting party should seek such relief from the issuing court. That analysis aligns with the approach in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), and *Ex Parte Uppercu*, 239 U.S. 435, 440

(1915). But the courts below in this action and many other district courts disregard those principles and override such orders, essentially sitting in appellate review over other trial court orders and thereby interfering with the judicial functions of those courts.

This disagreement among district courts persists because such production orders are generally interlocutory, and therefore evade review in the courts of appeals.

Review by this Court therefore is appropriate to ensure consistent treatment throughout the federal courts of state court sealing orders. Without this Court's guidance, district courts have been left to sift through various tests or to craft their own ad hoc approaches. This Court should resolve these long-simmering contradictions by granting certiorari and reversing the judgment below.

I. THE LOWER COURTS ARE IN DISAGREEMENT ABOUT THEIR AUTHORITY TO REVIEW SEALING ORDERS BY OTHER COURTS.

A. Some Federal Courts Correctly Rely On Comity And Federalism To Refuse To Override State Court Sealing Orders, And Recognize Issuing Courts Should Decide.

1. Principles of comity and federalism support the authority of state courts to enter sealing orders that are necessary to their ability to carry out their judicial functions based on an adequate record. Some federal courts recognize those principles and appropriately refrain from overriding state court sealing orders.

Such federal courts treat state court protective orders similarly because they are similarly necessary for judicial functioning. *See, e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) ("Protective orders and orders of confidentiality," such as sealing orders, "are functionally similar, and require similar balancing between public and private concerns" by the issuing court).

In one recent case, the court explained that it would "not exercise what amounts to appellate jurisdiction and effectively overrule or vacate a state court protective order shielding documents from the public." *Feinwachs v. Minn. Hosp. Ass'n*, 2018 WL 882808, at *4 (D. Minn. Feb. 13, 2018). The court specifically ruled that "[c]omity between state and federal courts and constraints placed on a federal district court's jurisdiction dictate nothing less." *Ibid.* That court has long held that "[t]he Federal courts are not empowered to review the propriety of protective discovery orders in State court proceedings." *Glickman, Lurie, Eiger & Co. v. I.R.S.*, 1975 WL 706, at *4 (D. Minn. Oct. 14, 1975)). Indeed, the court has specifically cautioned that "[t]he contrary position], if accepted, would result in deep and repeated intrusions by the Federal courts into the discovery process in State courts." *Ibid.*

The question of a district court's authority to override the sealing or protective order of another trial court also has arisen when the issuing court is another federal district court. Some district courts have ruled that interests of comity and a court's ability to carry out its judicial function are significant enough to preclude overriding the issuing court's

order, even without the heavy weight of federalism that applies where a state court order is involved. One court has explained that it "may well lack jurisdiction to modify the orders of other federal courts, but even if it has such jurisdiction, the Court would, as a matter of comity, refuse to modify those orders." *Doe v. Doe Agency*, 608 F. Supp. 2d 68, 71 (D.D.C. 2009) (footnote omitted). Another court directly held that it "does not have the authority to modify the protective orders entered" by another district court. *Axcan Scandipharm Inc. v. Ethex Corp.*, 2008 WL 11349882 at *9 (D. Minn. Dec. 31, 2008). And yet another court ruled directly that it had "no power to modify the protective orders of other district judges." *Smith v. Ford Motor Co.*, 1981 WL 380687 at *1 (N.D. Ga. Apr. 2, 1981).

Courts that recognize that it is improper to override the sealing order of another court direct litigants to seek such relief through the appropriate channel—*i.e.*, from the issuing court itself. *See Doe,* 608 F. Supp. 2d at 71 ("Therefore, the appropriate action is for them to seek such relief in the issuing courts rather than to collaterally challenge those courts' orders here."); *Axcan*, 2008 WL 11349882 at *9 ("[I]f Axcan seeks to modify the terms of the protective orders issued in the prior *Solvay* suits . . . it must . . . move to modify the protective order in that case."); *Dushkin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334, 335-36 (D.D.C. 1991) ("To the extent that the plaintiff should desire to obtain those additional documents, that request should be addressed to the issuing court[.]"). At least one court has undertaken this task itself and, rather than requiring the party to file a motion in the other court, determined that it

would "first send the attached letter" to the other judge, "asking whether the court . . . has any objection to my granting the motion to compel under these circumstances, or would prefer that a motion be filed" in that court. *Air Cargo, Inc. Litig. Tr. v. i2 Techs. US, Inc.*, 2010 WL 348492, at *2 (D. Md. Jan. 22, 2010).

2. The court of appeals in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), directed an approach be followed that respects such principles. The court of appeals held that a party seeking documents subject to the sealing or protective order of another court should petition the issuing court for modification of the order. That issuing court can then, for example, make a "threshold determination of whether duplicative discovery will be avoided by modifying the protective order" and weighing on the other hand "the countervailing reliance interest of the party opposing modification." *Id.* at 1132. Only if the issuing court modifies its order, can the court in the collateral matter determine whether the moving party is entitled to production under its discovery rules. *Id.* This approach "preserve[s] the proper role of each of the courts involved." *Id.*

Various district courts within the Ninth Circuit have applied *Foltz* to preclude them from overriding another court's sealing or protective order. *See, e.g.*, *Thunder Studios, Inc. v. Kazal*, 2018 WL 5099748, at *3 (C.D. Cal. Jul. 25, 2018) (applying *Foltz* and holding "to gain access to protected materials for use in outside litigation, a collateral litigant must request a modification of the protective order from the issuing court."); *Heartland Payment Sys., Inc. v. Mercury Payments Sys. LLC*, 2015 WL 4776339, at *3 (N.D.

Cal. Aug. 13, 2015) (denying motion to compel based on *Foltz* because the court "lack[ed] authority to modify the protective order in the [state court] Colorado Action"); *Guisasola v. Crossmark, Inc.*, 2014 WL 4187127, at *1 (W.D. Wash. Aug. 25, 2014) (applying *Foltz* to deny a motion to compel "until the issuing courts modify those protective orders").

3. Directing requests to unseal court-sealed materials to the court that issued the sealing order also aligns with the procedure endorsed by this Court in *Ex parte Uppercu*, 239 U.S. 435 (1915). In *Uppercu*, a district court had sealed certain deposition transcripts upon settlement of a lawsuit. A litigant in a different case in state court sought access to one of the transcripts, and the issuing court was asked to allow such access. The issuing court denied the request, however, on the ground that the litigant was not a party to the original action. *Id.* at 440. This Court issued a writ of mandamus, holding that the issuing court could not condition access on participation in the initial action and that production was warranted "unless some exception is shown to the general rule." *Id.* The Court explicitly confirmed that the request for access to the sealed material was properly made to the court that had issued the sealing order. The Court explained that "the orderly course" is to have the court that issued the sealing order determine whether to allow access and to have the restriction removed by "the source from which it came"—*i.e.*, the issuing court. *Id.*

B. Many Federal Courts Disregard Significant Interests Of The Court That Issued A Sealing Order And Override Such Orders Themselves.

The district court below and many other district courts have overridden another court's sealing or protective order, under a variety of ill-defined circumstances, and regardless of whether the sealing order was issued by a state or federal court. Contrary to the decisions cited above—and principles of comity and federalism—many "courts asked to issue discovery orders in litigation pending before them . . . have not shied away from doing so, even when it would modify or circumvent a discovery order by another court." *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499–500 (D. Md. 2000).

The decisions of those district courts do not present a uniform line of authority. Rather, there is significant disagreement as to what circumstances are sufficient to warrant overriding another court's protective or sealing order. One court has compared various "exceptions" and "test[s]" from other courts where those courts have held "there are circumstances under which modifications of other courts' restrictions are justified." *Santiago v. Honeywell Int'l, Inc.*, 2017 WL 3610599, at *2 (S.D. Fla. Apr. 6, 2017) (citation omitted). As a result, the treatment of another court's sealing or protective order depends on the ad hoc approach of the court presented with the motion to compel.

Some district courts focus on the single factor of whether the case in which the issuing court entered

the protective or sealing order has concluded. Those courts have held that "courts may vacate protective orders issued by another court where the case has been closed or otherwise dismissed[.]" *Mugworld, Inc. v. G.G. Marck & Assocs., Inc.*, 2007 WL 2229568, at *1 (E.D. Tex. June 15, 2007) (citations omitted); *see also Ford Motor Co. v. Versata Software, Inc.*, 316 F. Supp. 3d 925, 947 (N.D. Tex. 2017); *Holland v. Summit Tech., Inc.*, 2001 WL 1132030, at *4 (E.D. La. Sept. 21, 2001); *Puerto Rico Aqueduct & Sewer Auth. v. Clow Corp.*, 111 F.R.D. 65, 67 (D.P.R. 1986); *Ohio Willow Wood Co. v. ALPS S., LLC*, 2010 WL 3470687, at *2 (S.D. Ohio Aug. 31, 2010), *aff'd and adopted*, 2011 WL 1043474 (S.D. Ohio Mar. 18, 2011).

Other district courts apply a loose, four-factor framework. They generally weigh (1) whether the order was the result of a deliberative process sealing particular documents for a specified reason (as opposed to a rubber-stamp consent order); (2) the identity of the party from whom discovery is sought; (3) whether the action in which the court issued the sealing or protective order is still pending; and (4) whether it is possible to incorporate terms of the original sealing or protective order to effectuate the same purposes. *See Tucker*, 191 F.R.D. at 500-502; *see also Franklin United Methodist Home, Inc. v. Lancaster Pollard & Co.*, 909 F. Supp. 2d 1037, 1044-46 (S.D. Ind. 2012) (applying *Tucker* factors); *City of Rome, Ga. v. Hotels.com, LP*, 2011 WL 13232091, at *3 (N.D. Ga. Sept. 12, 2011) (same); *Abel v. Mylan, Inc.*, 2010 WL 3910141, at *3 (N.D. Okla. Oct. 4, 2010) (same); *Donovan v. Lewnowski*, 221 F.R.D. 587, 588 (S.D. Fla. 2004) (same); *Melea Ltd. v. CIR*, 118 T.C. 218, 222 (T.C. 2002) (same).

Appellate court authority upholding such district court orders appears to be lacking. The dearth of appellate authority generally on the issue is likely due to the fact that such orders are interlocutory in nature.

II. THE ORDER BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF COMITY AND FEDERALISM, AND INTRUDES ON THE STATE'S ABILITY TO PERFORM ITS JUDICIAL FUNCTION.

Central to our federal system—and the functioning of state courts—is the notion of "comity." *See* U.S. Const. amend. X (reserving powers to the States). This Court has emphasized the importance of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). Comity is such a "vital consideration" that federal courts may not exercise their judicial power in a manner that disregards comity to state courts. *Id.* at 10–11.

But the district court here did just that. By overriding the state trial court's order sealing a filing that the state court required in order to rule on a motion for a stay, the district court violated these basic principles, in two key respects. First, the district court's order wholly undermined the force of a state court order that was critical to the operations of the

State's judicial function. Second, the district court improperly sat as one trial court in appellate review of another trial court's order, and in doing so ruled contrary to state legal precedent. It did all of this without directing the requester to the state court that had entered the sealing order.

A. The District Court Wrongly Overrode A State Court Order That A Filing Be Under Seal In Aid Of Its Judicial Function.

This Court has held that federal courts should refrain from interfering with pending state court proceedings "involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). In *Juidice v. Vail*, 430 U.S. 327 (1977), the Court determined that a federal district court erred by entertaining a challenge to New York's statutory contempt procedures when doing so would undermine an outstanding contempt order in related state court proceedings. *Id.* at 338–39. The Court reasoned that the district court had invaded "[a] State's interest in the contempt process, through which it vindicates the regular operation of its judicial system." *Id.* at 335. Similarly, in *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1 (1987), this Court concluded that a federal district court was wrong to hear a challenge, brought by a litigant in parallel state court proceedings, to a Texas requirement that bond be posted pending appeal. *Id.* at 13-14. The Court explained that, as in *Juidice*, its holding "rest[ed] on

the importance to the States of enforcing the orders and judgments of their courts." *Id.* at 13.

These principles carry the same force here. In the state court litigation brought by the insurer against Petitioner to dispute coverage for this federal litigation, Petitioner filed an unredacted supplemental brief at the directive of the state court only after the court ordered that the filing be sealed (and instead of lodging the document as Petitioner had attempted in order to prevent public disclosure). App., *infra*, 20a–23a. The state court ordered the supplemental filing because it had determined that the information and argument the parties had provided to it were inadequate to allow it to make a meaningful ruling on the motion to stay the proceedings. App., *infra*, 17a–18a. In order for the state court to be able to assess the appropriateness of staying the insurance coverage litigation, the state court needed to understand the legal issues and factual disputes that might arise in the federal suit, and how those issues might overlap with the insurance coverage action to prejudice Petitioner. The state court therefore ordered supplemental briefing to provide it that additional information to enable it to carry out its judicial function to fairly adjudicate the stay motion.

The stay order allowed the state court to maintain jurisdiction over the insurance coverage litigation but to defer adjudication until after resolution of the related liability determination in federal court. This would not have been possible absent the sealing order because the supplemental brief filed by Petitioner could not have included a significant amount of

information and analysis about facts and legal arguments that could be developed in the federal litigation, which was critical to the state court's ability to rule on the stay. The sealing order was the state court's mechanism for developing adequate facts and law for its judicial determination on the stay motion.

Indeed, the very existence of the supplemental brief was due to the state court's order. The state court requested the supplemental brief after it found the initial submissions and hearing to be inadequate. That required Petitioner to create a document setting forth in detail facts and arguments that could be developed in the federal court litigation, assembled solely for use by the state court itself so that it could determine an issue of state law on the stay motion. *See* App. 17a–18a, *infra*. And that document would not have been filed with the state court but for the court's order that it could be sealed to ensure its confidentiality. Courts routinely reject attempts to withdraw protections from such documents that—but for the sealing order—would not have existed in the first place. *See Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985) (in analogous context, explaining that certain "papers and information . . . apparently would not even have existed but for the sealing orders and the magistrate's personal assurances of confidentiality"); *Pansy*, 23 F.3d at 790 (when determining whether to modify a confidentiality order, "one of the factors the court should consider . . . is the reliance by the original parties on the confidentiality order").

Like the state court functions at issue in *Juidice* and *Pennzoil*, the state court's sealing order operated

"in aid of the authority of the [state's] judicial system." *Juidice*, 430 U.S. at 336 n.12; *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files[.]"). By overriding the state court order sealing the supplemental brief, the federal district court not only vitiated that state court order, but also undermined the strength of similar orders going forward, thereby restricting the ability of state courts to solicit from litigants information necessary to carry out their judicial functions. The district court's order demonstrates the risk that such valid and otherwise enforceable sealing orders may not be enforced by federal trial courts, and this uncertainty undermines state courts' ability to facilitate the filing of such information.

The district court order hinders "state courts' ability to perform their judicial functions," *Sprint Commc'ns*, 571 U.S. at 78, and violates basic principles of comity and federalism.

B. The District Court Improperly Sat In Appellate Review Over A State Trial Court And Misinterpreted State Law.

1. When the district court overrode the state court sealing of the supplemental brief, it did so on the ground that the state court erred under state law when it sealed the filing in the first place. In doing so, the district court inappropriately functioned as a *de facto* appellate court of review over the state trial court. It is well established that "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atl. Coast Line R. Co. v. Bhd.*

of Locomotive Engineers, 398 U.S. 281, 296 (1970); *cf. D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923).

Moreover, there was a readily available avenue in state court for Respondent to seek unsealing by the issuing court, as Petitioner emphasized in the district court. The California Rules of Court provide that any "member of the public may move, apply, or petition . . . to unseal a record." Cal. R. Ct. 2.551(h)(2). Respondent had (and still has) the opportunity to convince the state trial court that its interpretation of California's *Montrose* Doctrine was mistaken.

And, of course, Petitioner and Respondent would have the right to seek appellate review of any ruling on that request through the state appellate court system. *See Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 76, 70 Cal. Rptr. 3d 88, 99 (2007) (order sealing or unsealing a court record is immediately appealable). That procedure ensures that a state appellate court is the body that reviews the state trial court decision and determines the scope of state law going directly to the functioning of the state judiciary. By effectively reversing the state court's interpretation of the *Montrose* doctrine, the district court prevented a state appellate court from deciding Respondent's challenge to the sealing order and stymied the development of state law on the issue.

2. The district court erred in its ruling on state law. In its initial order, the district court got it backwards. Instead of considering whether its ruling might implicate the state's interest in ensuring that

state court insurance coverage litigations do not prejudice the insured in underlying litigation, as the *Montrose* Doctrine requires, the district court incorrectly considered potential prejudice to Petitioner on the legal issues of the state court insurance coverage litigation. *See* App., *infra*, 5a. And the district court's order on reconsideration incorrectly concluded that the state court's sealing order merited "little weight" because the federal court viewed such a sealing order to be "a novel, or at best rarely used, application" of the *Montrose* Doctrine. App., *infra*, 12a.

But sealing and protective orders are regularly entered by California courts as a mechanism to effectuate the purpose of the *Montrose* doctrine. *See Haskel, Inc. v. Super. Ct.*, 33 Cal. App. 4th 963, 981, 39 Cal. Rptr. 2d 520, 530 (1995), *as modified* (Apr. 25, 1995) (directing trial court to consider as an alternative to a stay whether confidentiality order would adequately protect policyholder from prejudice in underlying action); *see also Travelers Prop. Cas. Co. of Am. v. City of L.A. Harbor Dep't*, 2016 WL 11522488, at *3 (C.D. Cal. Sept. 9, 2016) (granting *Montrose* stay but noting "as an alternative to a [*Montrose*] stay, courts have issued protective orders limiting the use and dispersal of information obtained through discovery in insurance coverage actions, to prevent prejudice to an insured's position in underlying actions"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. NVIDIA Corp.*, 2009 WL 2566719, at *6 (N.D. Cal. Aug. 18, 2009) (denying *Montrose* stay but observing that the policyholder "may seek a protective order and move for filing under seal any documents that could be prejudicial to it in [the

underlying] litigation"); *Evanston Ins. Co. v. Russell Assocs.*, 2008 WL 11342976, at *4 (C.D. Cal. June 3, 2008) (denying *Montrose* stay but noting policyholder may move for a "protective order to restrict the dissemination of any [discovery] information" that may prejudice it in the underlying action).

Maintaining the confidentiality of a brief submitted by a policyholder in support of a *Montrose* stay is necessary because policyholders are not automatically entitled to a *Montrose* stay. A policyholder must demonstrate that the facts at issue in the two cases are sufficiently overlapping such that prejudice is likely to occur. *See Riddell, Inc. v. Super. Ct.*, 14 Cal. App. 5th 755, 765-66 (Cal. App. 2017). Thus the policyholder will often be required to play "devil's advocate," predicting the arguments and legal theories that the opposing party in the underlying action (here Respondent) will make, and the prejudice the policyholder will suffer, absent a stay. Compelling Petitioner to produce to Respondent a litigation roadmap that exists only because it was previously filed under seal violates the very purpose of the *Montrose* rule. *See id.* at 768 (*Montrose* stays are mandated because they protect the policyholder from "prejudice caused by having to build the underlying plaintiffs' case for them"). And overriding that state court confidentiality would provide the insured's adversary the theories of what evidence or argument could be most damaging to the insured, work product that typically does not constitute discoverable information and was created only because required by a state court.

III. REVIEW BY THIS COURT IS WARRANTED TO RESOLVE DISAGREEMENT AMONG THE LOWER COURTS THAT PERSISTS BECAUSE SUCH INTERLOCUTORY ORDERS TYPICALLY EVADE APPELLATE REVIEW.

The principles of comity and federalism, and the interests in ensuring States' ability to exercise their judicial functions, that are presented by this petition have largely escaped appellate review in this context. That likely is due to the fact that orders by district courts overriding state sealing orders arise in the context of discovery. Trial court orders granting motions to compel are interlocutory, and thus are not final orders that can be appealed as of right. *See, e.g.*, *Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992) ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review."). Moreover, such discovery rulings are often overtaken by subsequent legal issues, including ones created by disclosure of the information, such that other legal issues arise that are more suited for direct appellate review after final judgment.

The procedural background of this petition illustrates how this important issue can readily evade appellate review. After the district court ordered production of the sealed supplemental brief, *see* App., *infra*, 2a–9a, Petitioner moved for reconsideration or, in the alternative, for certification for interlocutory appeal under 28 U.S.C. § 1292b. The district court denied certification on the ground that the issue did not meet the "controlling question of law" requirement for certification because the order, in the court's view,

was only "the discretionary resolution of [a] discovery issue." App., *infra*, 14a. Petitioner then filed a petition for writ of mandamus with the Eighth Circuit Court of Appeals, arguing that the district court should have denied Respondent's motion to compel and instead directed Respondent to petition the issuing state court for modification of its sealing order. App., *infra*, 41a–75a. But the court of appeals denied the petition without opinion. App., *infra*, 1a.

Appeal from a final judgment is not a realistic alternative for this Court to provide guidance on this important question. The production to an adversary in ongoing litigation of the opposing counsel's outline of significant facts and legal arguments that could be developed by the adversary cannot be undone. The supplemental brief that Petitioner filed in the state court insurance coverage litigation based on that court's sealing order cannot be unseen once it is produced to Respondent. Moreover, litigants challenging such an order after judgment may face an additional hurdle of potential harmless error review. *See* Fed. R. Civ. P. 61; *Tagupa v. Bd. of Directors*, 633 F.2d 1309, 1312 (9th Cir. 1980) ("The harmless error doctrine applies to discovery orders.").

Under these circumstances, the lack of appellate authority addressing the question raised by this petition is a feature supporting review by this Court, not a point in opposition. The question presented involves principles of comity and federalism that are "vital consideration[s]" at the heart of our judicial structure. *Pennzoil Co.*, 481 U.S. at 10. The disagreement among lower federal courts regarding how to apply these basic precepts under

circumstances such as those presented here should be resolved.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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