

No. 22-950

IN THE
SUPREME COURT OF THE UNITED STATES

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Dorothy A Smulley

Petitioner

v.

Safeco Insurance Company of Illinois
and

CCC Information Services Inc. aka
CCC Intelligent Solutions Holdings Inc.,
Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Internet revolution has forever altered the realities of the interstate marketplace. The Internet's prevalence and power changed the dynamics of the national and global economies and specifically, insurance industry practices. State insurance laws and regulations promulgated by respective state legislatures and enforced through enactment are neither adequate nor reasonable. Nor can any state law foresee or control the alleged fraudulent salvage trafficking activity taking place on a national scale under the protection of the McCarran-Ferguson Act (MFA) carve-out for the *business of insurance*. A resolution of this conflict is required. *Infra 13, 17-22.* Questions are,

1. Whether personal motor vehicle physical damage (MVPD) insurance valuations performed by a third party Software as a Service (SaaS) company over the Internet in digital real time transactions which stretch across state lines constitute *Commerce among the several States* and thus subject to regulation by Congress under the Commerce Clause. *Infra 3.*
2. Whether the SaaS as a registered entity is subject to Securities and Exchange Commission rules in the valuations created over the Internet. *Infra 6.*

PARTIES TO PROCEEDINGS

Petitioner is *pro se* Dorothy A Smulley, the plaintiff appellant below.

Respondents are Safeco Insurance Company of Illinois and CCC Information Services Inc., now known as CCC Intelligent Solutions Inc. also known as CCC Intelligent Solutions Holdings Inc., the defendant appellees below.

All parties appear in the caption of the case on the cover page.

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-------------------------	---------------

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----------------------	-------------

Other Authorities

<i>https://dictionary.cambridge.org/example/english/</i> diferential-treatment,	17
<i>https://ir.cccis.com/home/default.aspx,</i>	6
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https://www.sec.gov/Archives/edgar/da ...,
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https://www.sec.gov/ix?doc=/Archives/edgar/
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cccs-20221231.htm#item_1_business,15

PETITION FOR A WRIT OF CERTIORARI

Petitioner *pro se* Dorothy A Smulley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

Opinion of the Second Circuit court of appeals is unreported. (App.A 1a). Denial of rehearing by the Second Circuit is unreported (App.B 10a). Order of the Connecticut district court is unreported (App.C 11a).

JURISDICTION

Judgment of the court of appeals entered November 8, 2022. Denial of the petition for rehearing entered December 29, 2022.. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL
AND STATUTORY PROVISIONS**

- Amend. V.....(App.D33a)
- Amend. XIV, § 1.....(App.D33a)
- Art. I, § 8, cl. 3, Commerce Clause.....(App.D34a)
- 15 U.S.C. § 1011, McCarran-Ferguson
 - Act intent.....(App.D35a)
- 15 U.S.C. § 1012(b), McCarran-Ferguson
 - Act business of insurance.....(App.D35a)
- 15 U.S.C. § 78aa, Securities Exchange Act
 - exclusive jurisdiction..... (App.D35a)

- 15 U.S.C. § 78j Securities Exchange Act
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- 15 U.S.C. § 1011 Declaration of policy
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- 15 U.S.C. § 1012 Regulation
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- 28 U.S.C. § 1254 Court of Appeals;
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- 28 U.S.C. § 1337 Commerce and antitrust
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- Conn. Gen. Stat. § 42-110g
Unfair Trade Practices Act.....(App.D38a)

STATEMENT

Introduction

This is a matter of statutory fraud and negligence. Allegations involve plaintiff's motor vehicle physical damage Part D contract of insurance policy issued by Safeco Insurance Company of Illinois (Safeco). Safeco is under the umbrella of Liberty Mutual Holding Inc. (LMH). LMH is described as the sixth largest global property casualty insurer.

CCC Information Services Inc, now known as CCC Intelligent Solutions Holdings Inc (CCC) is a Software as a Service (SaaS) company. CCC is a public company and traded through the Nasdaq Stock Market. CCC is registered with the Securities & Exchange Commission (SEC) and subject to SEC oversight.

According to CCC's recent 2022 SEC 10k annual report for the period ending December 31, 2022, CCC digitizes workflows and connects with more than 30,000 companies across the property casualty insurance industry which includes insurers, collision repairer shops, parts suppliers, automotive manufacturers, financial institution lenders and others. CCC's permissive software creates valuations in the motor vehicle physical damage (MVPD) arena.

Through paid subscriptions, CCC's permits use of proprietary real time digital software via the Internet. CCC's software is permissive programming. Any authorized user can override CCC's objective data and substitute the user's own subjective opinion to reach a predetermined number. In an appraisal valuation, the predetermination number can be lower than the objective facts calculate. In a repair valuation, the predetermination number can be higher than the objective facts. Simply put, CCC's software is specifically created and programmed to permit data exploitation. See *Barclays Capital Inc. v Theflyonthewall.com*, 700 F.Supp.2d 310, 344 (S.D.N.Y. 2010) citing *CCC Info. Servs. Inc. v Maclean Hunter Mkt. Reports Inc.*, 44 F.3d 61 at 67, 72 (2d Cir. 1994).

LEGAL BACKGROUND

1. *McCarran Ferguson Act*

Generally, under the Supremacy Clause when a federal statute and a state statute conflict, the state statute yields under the doctrine of preemption. See, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

However, the McCarran Ferguson Act (MFA), U.S.C. §1011 *et seq.*, "...is an exception to this general rule, in that it permits state laws to trump federal laws in certain circumstances (or to reverse preempt those laws). The MFA was enacted in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See App. 35A for § 1012(b) of MFA.

The MFA does not shield a person accused of criminal conduct in violation of the laws of the United States. See, *United States v Redcorn*, 528 F.3d 727, 737 (10th Cir. 2008). The Supreme Court specifically acknowledged insurance companies would continue to do many things subject to federal regulation; but the Supreme Court emphasized, only when insurance companies are engaged in the *business of insurance* does federal law potentially yield to state law. See, *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969).

In *United States v Lopez*, 514 U.S. 549, (1995), the Supreme Court reiterated three categories of activity which Congress can regulate when exercising Commerce Clause power.

1. regulating the use of the channels of interstate commerce;
2. regulating and protecting instrumentalities of interstate commerce, or persons or things therein, even if the threat is from purely intrastate activities; and
3. regulating activities which have a substantial relation to interstate commerce, that is, substantially affect interstate commerce.

Lopez at 558-59.

Not only can Congress regulate the *use* of the channels of interstate commerce but those activities which *substantially affects* interstate commerce. *Id.*

“Commerce is interstate when it concerns more states than one.” *United States v. South-Eastern Underwriters Assn.*, 322 U.S. at 551.

What is regulated here are valuation services on a MVPD claim “...transmitted from one state to another whether the mechanism used to make the transaction is the United States Mail, an electronic funds transfer, or some other interstate channel.” *Id* at 546. “In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature.” *Id* at 547.

Here in this matter, the appraisal valuation was digitally transmitted via Internet from Texas to Connecticut; repair estimating from New York to Connecticut. Both via a Cloud server located elsewhere.

Group Life & Health Ins. Co. v. Royal Drug Co., 440 US 205 (1979), is a case which supports petitioner’s arguments. The Supreme Court discussed and analyzed the contractual arrangement between the parties which is dispositive here.

1. CCC’s contract with Safeco, “do[es] not involve any underwriting or spreading of risk, but [is] merely [a contractual] arrangement for the purchase of goods and services...” *Id.* at 214.
2. The practice of generating digital Internet reports is designed not for the benefit of the policyholders but to provide shortcuts in claims handling which shortcuts have, as

here, widened the opportunities for fraud against insured policyholders. *Infra* 3. CCC services are neither directed at, nor necessary for protection of policyholders. CCC's 2022 SEC 10k branding CCC an independent contract provider of valuation services bears this out.

3. CCC's marketing of SaaS are targeted and sold to a number of industries including, repair facilities, auto manufacturers, parts suppliers, financial lenders, and more. <https://ir.cccis.com/home/default.aspx> , viewed 9/28/2022.

Thus, with CCC Internet capabilities, Safeco can effectively know immediately whether the damaged vehicle is a candidate for repair or pay off. And as CCC's marketing touts, immediacy thereby reduces time and labor accordingly. As in *Group Life & Health*, the CCC contract enables insurance companies,

"...to minimize cost and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the business of insurance." *Id* at 214.

District court dismissed for lack of federal jurisdiction. In doing so, however, the dismissal was in conflict with courts within the district who found otherwise. *Infra* 17.

The Second Circuit declined to take up plaintiff's arguments and summarily affirmed dismissal. Here, too, the circuit's affirmation is in conflict with previous circuit decisions. *Infra* 17-21.

2. *Securities Exchange Act*

Section 10(b) of the Securities Exchange Act of 1934 as amended (Exchange Act) prohibits fraud in the purchase or sale of securities. See 15 U.S.C. § 78j (App.D35a). Securities and Exchange Commission (SEC) Rule 10b-5 contains the general, *catch-all* anti-fraud provision of the federal securities laws. See 17 CFR § 240-10b-5 (App.D37a).

“The primary purpose of the Securities Exchange Act was... [t]o provide fair and honest mechanisms for the pricing of securities [and] to assure that dealing in securities is fair and without undue preferences or advantages among investors... Its venue provision, §27... [15 U.S.C. §78aa; App.35a], was intended to facilitate that goal by enabling suits to enforce rights created by the Act to be brought wherever a defendant could be found.” (Cleaned up.)

Radzanower v. Touche Ross & Co., 426 US 148, 155-56 (1976).

Petitioner raised the issue of SEC jurisdiction in her complaint. However, both lower courts failed to address the SEC implication when considering federal jurisdiction.

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 2873, 177 L. Ed. 2d 535 (2010), this court found,

“The Second Circuit erred in [not] considering §10(b)..., thus allowing dismissal... What conduct §10(b) reaches is a merits question, while subject-matter jurisdiction refers to a tribunal's power to hear a case... The District Court had jurisdiction

under 15 U.S.C. §78aa to adjudicate the § 10(b) question." (Cleaned up.) *Id.*

3. CCC is subject to SEC regulation.

On February 3, 2021, CCC announced a merger with Dragoneer Growth Opportunities "...to accelerate the digital transformation of the property and casualty insurance economy." https://www.sec.gov/Archives/edgar/da.../EX-99.1_2_d101043dex991.htm EX-99.1, viewed 2/13/2021. CCC operates nationwide and in China. *Id.* CCC is subject to regulation by the U.S. Security and Exchange Commission. *Id.*

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") (codified in 15 USC §78j) is the primary anti-fraud statutory provision. The SEC primarily enforces this anti-fraud provision under Rule 10b-5, promulgated thereunder [17 CFR §240.10b-5] which prohibits the *use* of any "device, scheme, or artifice to defraud." Rule 10b-5 also imposes liability for any misstatement or omission of a material fact. https://www.law.cornell.edu/wex/securities_exchange_act_of_1934, viewed 11/10/2022.

The Second Circuit's history demonstrates great familiarity with Rule 10b-5. See generally, *Cooper v. North Jersey Trust Co.*, 226 F.Supp. 972 (SDNY 1964).

4. This matter is first impression.

The Internet has spawned a variety of fraud not thought possible just ten years ago. The defendants' motivation here is to induce fraud on insureds through the use of Internet digital technology created,

programmed and controlled by third party CCC.

Safeco benefits by showing a false expediency in turn-around time from claim initiation through to closure. Safeco further benefits by salvaging the used parts thereby gaining profit to offset all claims handling expenses including trafficking the parts. Safeco also benefits by minimizing claim reserves mandatory under law as long as a claim remains open. Thus, Safeco can claw back substantial dollar reserves statutorily required to give the false impression of efficiency in the claims sector when in fact, there is none. And when an insured protest like petitioner here, Safeco sells off the statutorily open claim to an unaffiliated entity to dispose at will thereby allowing Safeco to prematurely close the claim on Safeco's books to claw back dollar reserves.

CCC derives direct benefits also. CCC promotes the false positives experienced with Safeco to induce other insurers to subscribe to the permissive digital platform. CCC's trading stock rises, more profit is made and everyone is happy. Except the insureds.

CCC's digital technology lacks sufficient pre-programmed user safeguards to prevent Safeco and CCC users from inducing fraud. CCC knew or in the exercise of reasonable care, should have known reasonable pre-programmed safeguards prevent fraud.

For example, digital technology for tracking users and data is not new. Every social platform and media advertiser uses tracking and cookies to create personal profiles to direct user thought and buying habits, among other things. Such technology forms a continuous transparent record which should be, but is not available

to insureds via the Internet through their policyholder accounts. Technology can also block certain predetermined fields, etc. The safeguards are numerous. Any user of the Internet is familiar and if not, should be.

What conduct § 10(b) reaches is a merits question, while subject-matter jurisdiction, "refers to a tribunal's power to hear a case." *Union Pacific v Brotherhood of Locomotive Eng.*, 558 U.S. 67, 81 (2009). Plaintiff's financial loss as an insured is no less than an investor's financial loss induced by fraud. The Second Circuit was silent on the issues raised in plaintiff brief.

FACTUAL BACKGROUND

Petitioner had a contract of insurance policy with Safeco for the relevant period. The contract included motor vehicle physical damage (MVPD) under Part D of the relevant policy. Most terms and conditions under Part D are standardized throughout the insurance industry. Also standardized is the *Declaration Sheet* (dec sheet) which identifies bodily injury, third party property damage and uninsured/underinsured motorist coverage limits. The dec sheet also includes MVPD limits agreed upon by insured and insurer for the yearly premium assessed.

Outside her home state, petitioner had a minor automobile accident on an icy road. The accident damaged the left front fender and headlight. No other vehicles or individuals were involved. Soon thereafter, the vehicle was inspected by a local repair shop and found to be fully operational and functional. Petitioner resumed her journey home without incident, a journey of

approximately 380 highway miles.

The discovery evidence shows the damaged vehicle was inspected by a Safeco employee. The employee used his computer to access CCC real time permissive software *in situ* at the local repair shop. First, an appraisal was done then a repair valuation. The repairs were approximately half the appraised value. CCC's software designated repair for the vehicle.

Further discovery evidence shows Safeco's employee returned to the repair shop, vandalized plaintiff's vehicle, removed parts estimated over \$1,000 and permanently altered the *post-accident* condition. CCC's first repair valuation was then altered, parts were added, numbers increased, all to give the false appearance of an original repair valuation. The vehicle was manually redesignated *total loss*.

The discovery evidence also shows a second vandalism by a Safeco agent after Safeco towed the vehicle elsewhere under promise of repair. Again, more parts were removed and CCC's repair valuation altered. Over \$2,200 of parts and services were added onto CCC's second repair valuation. The *total loss* designation remained.

The evidence obtained supports petitioner's material facts. Why does this type of fraud occur? Simply put, salvaging and selling used car parts generates profit for Safeco. Repairing a vehicle does not. But for the data exploitation intentionally created and programmed into CCC's permissive valuation software without user safeguards to protect insureds, MVPD salvage trafficking is not possible in the expedient manner demonstrated here.

PROCEDURAL BACKGROUND

1. *Petitioner's underlying state action.*

Plaintiff first filed an action in Connecticut state court. However, state court did not reach the merits of the complaint. Instead, proceedings were stayed with an order for binding and unrestricted arbitration on both factual and legal questions.

On appeal, the state Appellate found the arbitration order insufficient as to law and constituted a stay only. On remand, state court consistently refused to conform with the Appellate's order of insufficiency.

The result of the state-appellate stand-off caused plaintiff's action to remain permanently stayed. Procedurally, the stay represented an injunction absent the safeguards statutorily required of an injunction. Under pressure from Safeco, state court ultimately dismissed the action. Plaintiff's appeal to the Appellate is pending.

Safeco refused to act pursuant to Connecticut statutory requirements. Safeco refused to act under the terms of the insurance policy contract. Safeco remains in possession and control of plaintiff's vehicle with no intent demonstrated to alleviate financial harms done.

The boundaries of CCC's permissive digital software cross every state line and like most Internet activity, is without regulation. These arguments were presented to the lower courts. District court dismissed citing lack of federal jurisdiction. As a tactical choice, the circuit summarily affirmed.

2. *Petitioner's district court action.*

During the course of the state action, plaintiff

became aware of CCC. To protect her rights, plaintiff filed a complaint in Connecticut district court. Plaintiff's complaint alleges Safeco and related Liberty Mutual companies and agents, concealed, as a standard business practice, CCC Internet digital -generated interactive reports specific to plaintiff's vehicle and falsified those reports to support pre-determined values favorable to their self-enriching goals. The pre-determined values were numeric adjustments which lowered the dollar value on the appraisal side and significantly increased the dollar value on the repair side. Plaintiff further alleges the falsified reports and the acts which created them, failed to comply with Connecticut statutes governing MVPD *total loss*.

In their motions to dismiss, both Safeco and CCC cited MFA. District court agreed and dismissed for lack of federal jurisdiction. The circuit summarily affirmed.

REASONS FOR GRANTING PETITION

1. *Petitioner has jurisdiction under both the Commerce Clause and SEC Section 10b*

"The Supreme Court instructed a court addressing a preemption claim to determine, first, whether Congress has spoken directly on the precise question at issue; if the intent of Congress is clear, it is dispositive and the inquiry ends." *Bell v. Reno*, 218 F.3d 86, at 90 (2d Cir.2000).

The pothole here is Congress has not addressed the Internet in the *business of insurance*. Thus, Safeco, CCC and many other insurers hide behind MKA's narrow carve-out to conduct fraudulent schemes which

deprive insureds their motor vehicle property interest.

2. Petitioner has jurisdiction under diversity.

Petitioner's action is among citizens of different states. Petitioner resides in Connecticut. Safeco's principal place of business is Massachusetts and CCC's principal place of business is Illinois. Thus diverse citizenship is among the parties. This fact is undisputed.

As to the statutory jurisdictional amount of \$75,000, petitioner argued reasonable probability. See *Tongkook Am. Inc v Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir.1994). An objective measure is, ".the amount in controversy as of the date of the complaint." *Scherer v Equitable Life Assurance Soc'y of U.S.*, 347 F.3d 394, 397 (2d Cir.2003). Petitioner's complaint and the undisputed material facts in her underlying state action show "substantial evidence... [of] the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact[s] exist, but merely the degree which could satisfy a reasonable fact finder." See *Columbian Enameling & Stamping Co.*, 308 US 292, 300 (1939). This is an objective test. *Id.*

In district court, Safeco simply argued a failure to meet the amount without anything more. CCC was silent on the issue. Circuit's reliance rested with district's position where lack of "plausibility of culpability prerequisites [failed] to substantiate a claim..." Thus, the circuit unfairly and subjectively eliminated punitive from the calculation of damages (App. A5a).

And in support of CCC's silence on the

jurisdictional amount, the circuit defended and determined erroneously, CCC didn't know CCC was violating the law or doing anything wrong. (App.A5a). Two factors are in play here.

First, this is a merits question which cannot be answered until all material factual evidence is submitted, reviewed and determined. For the circuit to conclude otherwise was clearly erroneous. And second, on CCC's own admission,

“In the automotive insurance sector, which represents nearly half of the U.S. P&C insurance industry, processing a single event, such as a claim, can require hundreds of micro-transactions across its supporting economy, involving consumers, lenders, collision repair facilities, automotive manufacturers, dealers, parts suppliers, medical providers, vehicle auctions, and others. These transactions depend on extensive hyper-local decisions and data, creating a level of complexity that *can increase processing costs as well as the potential for fraud and other forms of claims leakage.*” (Emphasis added.)

https://www.sec.gov/ix?doc=/Archives/edgar/data/1818201/000095017023005611/cccs-20221231.htm#item_1_business, accessed 3/21/2023

The high bar established by the circuit countered Supreme Court and circuit precedent. See, *Wolde-Meskel v Vocational Instruction Project Cnty. Servs. Inc*, 166 F.3d 59, 63 (2d Cir.1999) (*This [reasonable probability the claim is in excess] burden is hardly onerous*). This is so because “...the party opposing jurisdiction must show to a legal certainty that the

amount recoverable does not meet the jurisdictional threshold." *St. Paul Mercury Indem. Co. v Red Cab Co*, 303 US 283, 288-289 (1938). Legal certainty of a jurisdictional amount is a merits question. The lower court had jurisdiction to determine the issue on material facts but did not.

[T]he legal impossibility of recovery must be so certain as virtually [negate] the plaintiff's good faith in asserting the claim." *Chase Manhattan Bank NA v Am. Nat. Bank and Trust Co of Chicago*, 93 F.3d 1064, 1070-71 (2d Cir.1996). "[E]ven where [the] allegations leave grave doubt about the likelihood of a recovery of the requisite amount, dismissal is not warranted." *Zacharia v Harbor Island Spa Inc*, 684 F.2d 199, 202 (2d Cir.1982). "Where the damages sought are uncertain, the doubt should be resolved in favor of the plaintiff's pleadings." *Tongkook America v Shipton Sportswear Co*, 14 F.3d at 785 (1994).

As a final item and for clarification.

"[I]f punitive damages are permitted under the controlling law, the demand for such damages may be included in determining whether the jurisdictional amount is satisfied."

A.F.A. Tours Inc v Whitchurch,
937 F.2d 82, 87 (2d Cir.1991).

The Second Circuit used a *recklessness* standard to evaluate whether the opportunity for punitive damages was present. The court found in the negative (App.A5-6a). The circuit reviewed under a very narrow standard. Connecticut Unfair Trade Practices Act § 42-110g (CUTPA) criteria does not require a showing of *recklessness*. Connecticut adopted the cigarette rule as

used by the Federal Trade Commission to determine when a practice is unfair. The standard provides,

(1) Whether the practice without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise – in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness. (2) Whether it is immoral, unethical, oppressive or unscrupulous. And (3) whether it causes substantial injury to consumers. Not all three criteria are necessary to demonstrate an unfair act.

Energy Solutions Inc v Realgy LLC,
114 Conn.App. 262, 273, 969 A.2d 807 (2009).

Thus, the circuit was in error finding otherwise. Even if this court supports the *recklessness* element, CCC's own admission of their permissive software creating fraud (*Infra* 3), satisfies the *recklessness* standard.

Evidence of diversity was overlooked. This failure “...affects the fairness, integrity, [and] public reputation of judicial proceedings. *US v. Marcus*, 130 S. Ct. 2159, 2161, 560 U.S. 258, 176 L. Ed. 2D 1012 (2010).

3. *Dismissal by the lower courts conflicts with stare decisis.*

“[D]iscrimination connotes any differential treatment.” *Chambers v Dist. Of Columbia*, 35 F.4th 870, 873 (2022). Differential treatment means the way a party deals with or behaves towards another party. <https://dictionary.cambridge.org/example/english/diff>

erential-treatment, accessed 3/18/2023. Here, dismissal for lack of federal jurisdiction was a result of differential treatment adverse to petitioner. This is so because the decision of dismissal was contrary to established law.

Safeco argued petitioner's events complained of are the "*business of insurance*" without anything more. CCC did not speak. Both lower courts agreed with Safeco. The practical effect of such a finding permits Connecticut and all states to control conduct beyond the boundaries of the state. The ruling is invalid. See, *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337 (1989) (*if the practical effect is to control conduct beyond the boundaries of the state, it is invalid*).

In *Am. Booksellers Found v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003), this same circuit noted, "[b]ecause the Internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to [adjudicate] Internet activities without projecting its [law on]to other states." The decision of dismissal for lack of federal jurisdiction is unreasonably applied under established federal law. See, *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). A brief discussion of Second Circuit citations follows.

a. *Pireno v New York State Chiropractic Ass'n*,
650 F.2d 387 (2d Cir. 1981). (Cleaned up.)

The circuit considered an antitrust challenge to an insurer's practice of submitting claims for chiropractic services to a chiropractic review committee for a determination of whether the services and fees were reasonable within the meaning of the insurance policy. The circuit analyzed the Supreme Court's

opinion in *Royal Drug*, *supra*, and concluded,

"...the McCarran-Ferguson anti-trust exemption for the business of insurance is to be strictly limited to only the quintessential insurance functions."

Pireno, 650 F.2d at 392.

Underwriting and risk spreading are fundamental in the *business of insurance*.

"[A]n activity or procedure that does not either transfer risk from insured to insurer or spread the risk among insureds is not the *business of insurance*... The peer review process did neither."

(Emphasis added.)

Pireno, 650 F.2d at 393.

The court was unpersuaded by arguments where the peer review committee performed a traditional insurance adjusting function. The court suggested claims adjusting and settlement itself under *Royal Drug* might not constitute the business of insurance.

"The antitrust exemption seeks primarily to shield agreements among insurers, not those between insurers and persons outside the industry."

Pireno, 650 F.2d at 394-95 citing *Royal Drug*, 440 U.S. at 221-22m, 224-25, n.32, 99 S.Ct. at 1080, n.32.

"...[P]eer review is not the *business of insurance* within the meaning of § 2(b) of the McCarran-Ferguson Act, and... defendants' use of the procedure is therefore not immune from scrutiny under the antitrust laws." *Id.*

The Second Circuit remanded for further proceedings. Here, the Second Circuit's affirmation of dismissal on

federal jurisdictional grounds conflicts with the court's own precedent.

b. *CTS Corp. v. Dynamics Corp of Am.*,
481 US 69, 88-89, (1987)

(generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State).

c. *Lander v. Hartford Life & Annuity Ins. Co.*,
251 F.3d 101, 115 (2d Cir.2001).

(they lack the traditional earmarks of insurance. The [Supreme] Court stated... the concept of insurance involves some investment risk-taking on the part of the company). (cleaned up.)

d. *McNichols v. Geico General Insurance Co*,
3:20cv01497 (KAD) (D.Conn. July 21, 2021).

(there can be no doubt that an automobile insurance policy is a contract that affects interstate commerce).

e. *United States v Stewart*,
955 F.Supp. 385, 391 (E.D.Pa. 1997)

([MFA] does not shield a person accused of criminal conduct in violation of U.S. laws).

f. *United States v Redcorn*,
528 F.3d 727, 737 (10th Cir. 2008)

(federal prosecution for... mail fraud and wire fraud not barred by [McCarran-Ferguson] Act...).

Thus, in the context of *stare decisis*, adherence is "a foundation stone of the rule of law," *Michigan v Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). "[A]ny departure from the doctrine demands special justification..." *Halliburton Co. v Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

Neither lower courts proffered special justification for the departure from precedent. Thus, the lower courts applied differential treatment to support dismissal. This same analogy is applicable to non-antitrust cases where, as here, plaintiff alleges salvage trafficking fraud *under the guise of business of insurance*.

The district court order and circuit affirmation are unreported in the federal register. Irrespective, users of CCC and other SaaS Internet permissive software programs will continue to manipulate MVPD repair valuations upwards and appraisal valuations downward to falsely substantiate *total losses* and will continue to reap greater and greater monetary benefit from salvage sales and auctions. See, <https://www.justice.gov/archives/jm/criminal-esource-manual-1366-trafficking-certain-motor-vehicle-or-motor-vehicle-parts>, updated Jan. 17, 2020, accessed 3/18/2023.

Salvage trafficking is a well-known secret which can and should be brought to the public's attention through the grant of this petition.

4. *State insurance commissioners lack jurisdiction to regulate SaaS Internet digital transactions*

The insurance industry's complete reliance on the

Internet and CCC's permissive software should not be ignored or overlooked as the lower courts have done. As digital technology progresses, SaaS companies like CCC have and will continue to expand permissive software into other areas.

And not to be overlooked, is the inability of state insurance commissioners to address the issues complained of here in their respective states. This is because CCC internet permissive software is a product designed specifically to be national and global in scope. CCC's software and the AI algorithms which the software requires is operative in the United States and China. The global scope and exchange of American insurance industry data on insureds and their motor vehicle personal identifying information readily accessible are vulnerabilities which require recognition.

5. The questions presented are of public interest and are reoccurring.

Plaintiff's claims of salvage trafficking are not confined to Connecticut. Hundreds of legal complaints filed in both state and federal courts throughout the United States complain of this very same abuse. The only variance is how the parties described the motor vehicle physical damage contract breaches for which recompense is claimed. CCC is always a defendant, sometimes with and sometimes without an insurance company defendant. This demonstrates the tremendous inconsistency this dismissal presents with other circuits.

CCC and Safeco's activities clearly involve allegations of mail and wire fraud and implicate interstate commerce. Jurisdiction is exclusive and

preempts state intervention. The source of law militates in strong favor of federal jurisdiction.

Petitioner's vehicle was taken by Safeco November 28, 2018. Safeco continues to retain possession and control. Safeco has not provided plaintiff any recompense under the terms of her MVPD Part D insurance policy. The vehicle has not been repaired. The vehicle is unattended, unprotected against the elements and neglected by Safeco. This was a simple MVPD claim which should have never resulted in any litigation whatsoever. Yet, here we are. Why? Because CCC's permissive software plus Safeco's data exploitation equals fraud. This digital scheme carries tremendous financial benefits to the insurance company propounding the scheme. But, to the public at large, who, like plaintiff, are insured for MVPD, the financial consequences are monumental against the insured.

Granting the petition will increase public awareness. The issues complained of here are huge and increasing within the personal MVPD insurance industry. More and more consumers will lose their motor vehicle property irrespective of the contract of insurance as is the case here. A loss which plaintiff argues, constitutes an unlawful taking. Salvage trafficking of used motor vehicle parts reap greater profit which would not be generated if the vehicle was repaired.

6. Fundamental fairness is a right which requires remedy.

"The right to fundamental fairness in [judicial] proceedings encompasses a variety of procedural

protections... The scope of the right to fundamental fairness... like the scope of the constitutional right to due process that it resembles, is a question of law..."

Melendez v Fresh Start Gen. Remodeling,
183 A.3d 670, 679, 180 Conn.App.355 (2018).

"No person shall... be deprived of life, liberty, or property, without due process of law..."

United States v. Salerno, 481 U.S. 739, 746 (1987). Yet here, both lower courts refused to take up the matter.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike."

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, (1985). "If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause and cannot validly be applied to anyone. *Id* at Fn.25.

When lower courts deprive a person of property, procedural due process must be fair. See, *Mathews v Eldridge*, 424 U. S. 319, 335 (1976). In this matter both lower courts suppressed precedent and restricted arguments which fit a narrow channel towards dismissal. "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

Dismissal of plaintiff's complaint and summary affirmation by the reviewing court without more is

suppression of evidence . The procedural posture lacks transparency in the judicial process. "Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *US v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008).

Dismissal created a collateral advantage in favor of CCC and Safeco and left petitioner without any remedy. See, *MacDermid Inc v Leonetti*, 310 Conn. 616, 634 (2013) (*impermissible collateral purposes include using pleadings as leverage to gain collateral advantage extraneous to the merits of the case*).

Simply put, district court suppressed the judicial process by failing to address precedent on the relevant issues raised. Circuit court summarily dismissed which reinforced suppression. These acts which suppressed precedent avoided public awareness and judicial transparency and constitute government censorship. Substantive due process should be a bar to certain arbitrary government actions. But is not here. See, *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

Dismissal presumed plaintiff possessed no rights. The negative presumptions proffered by CCC and Safeco demonstrate the strength of privileged forces which demanded district court order dismissal to silence petitioner. Thus, the lower courts' presumption here is speech now silenced is a greater goal than permitting petitioner equal protection.

The concept government may restrict speech of

some elements of our society in order to enhance the relative voice of others should be wholly foreign in the judicial system but is not. See, *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976). See also, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 204 L. Ed. 2d 129, 587 U.S. (2019).

Simply put, dismissal failed procedural and substantive due process and was egregiously inadequate to protect petitioner's motor vehicle property interest. CCC and Safeco's rights cannot be any greater than petitioner's rights. The Supreme Court has authority to correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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