No. 20-1599

IN THE

Supreme Court of the United States

JOHN DOE 7, JANE DOE 7, JUANA DOE 11, MINOR DOE 11A, SEVEN SURVIVING CHILDREN OF JOSE LOPEZ 339, and JUANA PEREZ 43A,

Petitioners,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR GENDER & REFUGEE STUDIES, CENTER FOR JUSTICE AND ACCOUNTABILITY, GLOBAL WITNESS, HUMAN TRAFFICKING LEGAL CENTER, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, LATINOJUSTICE PRLDEF, AND LAWYERS FOR CIVIL RIGHTS IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

PETER A. NELSON
Counsel of Record
JACOB J. PERKOWSKI
LOUIS M. RUSSO
JEFFREY F. KINKLE
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
pnelson@pbwt.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

TABLE OF AUTHORITIES
(continued)

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae American Civil Liberties Union ("ACLU"), ACLU of Alabama, ACLU of Florida, ACLU of Georgia, Center for Constitutional Rights, Center for Gender & Refugee Studies, Center for Justice and Accountability, Global Witness, Human Trafficking Legal Center, International Corporate Accountability Roundtable, LatinoJustice PRLDEF, and Lawyers for Civil Rights are organizations with extensive experience litigating, documenting, campaigning, and advocating for people or groups who face the threat of violence for defending their human and civil rights.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Alabama, Georgia, and Florida are statewide affiliates of the national ACLU. The ACLU and its statewide affiliates often seek pseudonymity for plaintiffs seeking redress for violations of fundamental liberties and basic civil rights.

---

[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a), and all parties have consented in writing to its filing. *Amici* and their counsel have authored the entirety of this brief, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for survivors of human rights atrocities, for immigrants' rights, and for racial justice. CCR has represented numerous individual litigants, including asylum seekers, individuals seeking damages from human rights abusers and individuals challenging the constitutionality of sex offender registries, who proceeded under pseudonyms as the only means to ensure their safe access to justice.

The Center for Justice and Accountability ("CJA") is a U.S.-based human rights organization dedicated to deterring torture, crimes against humanity, extrajudicial killings, and other serious human rights abuses. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks truth, justice, and redress for survivors. Since its founding in 1998, CJA has represented survivor-plaintiffs in numerous lawsuits filed in federal courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, including *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (for the assassination of Saint Oscar Romero).

The Center for Gender & Refugee Studies ("CGRS") advances protections for asylum seekers

through litigation, scholarship, and development of policy recommendations, and addresses the root causes of persecution through documentation of and accountability for human rights abuses. CGRS has submitted briefs, as amicus or counsel of record regarding asylum and related humanitarian claims before the Supreme Court and in nearly every court of appeals and has a strong interest in the questions under consideration that implicate fundamental protections for survivors of human rights violations in U.S. courts.

Global Witness is an international non-profit organization working to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. As part of those efforts, Global Witness conducts investigations and reports and campaigns on behalf of frontline land and environmental defenders around the world who face reprisals and killings for defending their human rights.

The Human Trafficking Legal Center (the "Center") is a non-profit organization dedicated to helping survivors obtain justice. Since its inception in 2012, the Center has trained more than 3,400 attorneys at top law firms across the country to handle civil trafficking cases pro bono, connected more than 260 individuals with pro bono representation, and educated over 16,000 community leaders on victims' rights. The Center advocates for justice for all victims of human trafficking.

The International Corporate Accountability Roundtable ("ICAR") harnesses the collective power

of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality. ICAR's membership is composed of 40 human rights, environmental, labor, and development organizations. ICAR serves as a leader and the coordinator of the Protect the Protest Task Force.

LatinoJustice PRLDEF ("LatinoJustice"), formerly known as the Puerto Rican Legal Defense & Education Fund, is a national civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. During its 49-year history, LatinoJustice has successfully litigated numerous cases in state and federal courts across the country challenging discriminatory and retaliatory employment workplace practices targeting Latina/o immigrant workers, as well as policing and law enforcement practices racially profiling Latinos. LatinoJustice has represented numerous immigrant workers and Latino motorists seeking damages from law enforcement agencies who proceeded under pseudonyms as the only means to ensure their safe access to justice.

Lawyers for Civil Rights ("LCR") is a non-profit, non-partisan organization that fosters equal opportunity and fights discrimination on behalf of people

of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR handles major law reform cases as well as legal matters on behalf of individuals.

Amici have a substantial interest in this case, which will have a significant chilling effect on litigants who seek redress in judicial fora for human and civil rights violations. Many individuals represented by *Amici* face serious risks of reprisal for participating in litigation unless they can reliably protect their identities through pseudonymity and confidential treatment of their personal information. The Eleventh Circuit's decision here creates considerable uncertainty around these critical privacy protections. This brief provides the unique perspective of *Amici* on the importance of consistent standards concerning the availability of pseudonymity and the reliability of stipulated protective orders.

SUMMARY OF ARGUMENT

Many victims of human and civil rights violations rely on pseudonymity and stipulated protective orders to minimize the risk of retaliation for their efforts to hold their wrongdoers accountable. Without these protections, many such victims would be unwilling to pursue litigation, depriving them—and the public—of important opportunities to seek justice, reaffirm the rule of law, and bring about necessary social change.

In this case, the Eleventh Circuit affirmed the district court's decision to modify a purportedly stip-

ulated protective order and strip certain plaintiffs of their pseudonymity and confidentiality protections after years of litigation. It did so without requiring the moving party to show good cause or without even considering the plaintiffs' reliance on the protective order. The Court must consider and reject the Eleventh Circuit's erroneous decision for two reasons.

First, by making it easy for parties to a stipulated protective order to modify the order—without the burden of justifying the change and irrespective of the other party's reliance on the protections the order afforded—the Eleventh Circuit's decision is likely to have a serious chilling effect on future human and civil rights litigation. There are numerous examples in our jurisprudence of important rights being vindicated through litigation that the plaintiffs pursued pseudonymously, and there are many unfortunate examples in which plaintiffs suffered harms arising from the public disclosure of their identities. The Eleventh Circuit's decision sets a dangerous precedent that will likely result in victims of human and civil rights abuses being forced out of court by intimidation and fear of reprisal—an intolerable outcome in our justice system.

Second, by assuming district courts enter stipulated protective orders without finding good cause to do so, the Eleventh Circuit's decision eliminates the burden on parties seeking to modify stipulated protective orders. Not only does this decision exacerbate a circuit split on this issue—as Petitioners explain in their petition—but it also creates perverse incentives for parties to stipulate to protections and later seek strategic modifications to intimidate or harass their

adversaries; undermines judicial economy by encouraging parties to litigate protective orders in lieu of stipulating; and impairs plaintiffs' ability to conduct reliable risk-reward assessments when deciding whether to litigate despite the risk of retaliation. The stakes are extraordinarily high in this matter, and the need for clarity on this issue is urgent: in this and other human and civil rights litigation, lives literally hang in the balance. The uncertainty engendered by the Eleventh Circuit's decision in this case will also cast a large shadow over future human and civil rights litigation, because potential litigants will no longer be able to rely on court-ordered privacy safeguards.

This case presents this Court with a straightforward opportunity to resolve a circuit split and restore fairness to the process of modifying a protective order. The Court should grant certiorari and set a uniform standard for modifying protective orders that will ensure that litigants can rely on their protections—irrespective of whether the parties stipulate to their terms—and that the party seeking the modification bears the burden of justifying the change.

ARGUMENT

I. Pseudonymity and Confidentiality Are Critical to Human and Civil Rights Plaintiffs, and Undermining Those Privacy Protections Will Have a Chilling Effect on Human and Civil Rights Litigation.

Plaintiffs in human and civil rights litigation often depend on pseudonymity and confidentiality protections to ensure their safety from threats of reprisal. These protections increase the likelihood that issues are "addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000) (Stevens, J.). Many plaintiffs would forego litigating meritorious claims rather than risk public disclosure of their names or other sensitive personal information.

Our jurisprudence is replete with important human rights rulings that would not have been possible without such privacy protections. For example, in *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated,* 395 F.3d 978 (9th Cir. 2003), Burmese villagers who were subjected to human rights abuses by the Burmese government, in which Unocal was allegedly complicit, were allowed to litigate pseudonymously. The *Unocal* case settled, but only after the pseudonymous plaintiffs achieved a significant ruling permitting plaintiffs to sue private corporations under the Alien Tort Statute ("ATS"). *See* Armin Rosencranz et al., *Doe v. Unocal: Holding Corporations Liable For Human Rights Abuses On Their Watch*, 8 Chap. L. Rev. 130, 135 (2005).

Similarly, in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), an ATS case against the former Guatemalan Minister of Defense, a plaintiff who was permitted to proceed pseudonymously set an important human rights precedent that individuals can be liable for "command responsibility" under the ATS. *Id.* at 169–70, 172–73. Courts rarely question

"the legitimacy of plaintiffs' fears or den[y] them anonymity from the public" in cases like *Unocal* and *Xuncax*, which involve military power or terrorism. *See* Jed Greer, *Plaintiff Pseudonymity and The Alien Tort Claims Act: Questions and Challenges*, 32 Colum. Hum. Rts. L. Rev. 517, 529 (2001).

In fact, pseudonymity is the norm when litigants seek to vindicate human rights violations involving armed conflict, terrorism, and death squads. For example, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), a group of plaintiffs was permitted to proceed pseudonymously in litigating allegations of genocide by the president of a self-proclaimed Bosnian-Serb republic during the breakup of the former Yugoslavia, helping define the scope of the ATS in relation to non-state actors in the process. The same was true of the plaintiffs in *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009), who pseudonymously litigated allegations that the Haitian paramilitary organization founded by the defendant "worked in concert with the Haitian military to terrorize and repress the civilian population." *Id.* at 545–46. The anonymous plaintiffs in *Constant* were ultimately successful in litigating their claims and the judgment marks the first time that anyone had been held accountable for the devastating state-sponsored campaign of rape and terror in Haiti that destroyed countless families. Cases like these highlight the importance of permitting pseudonymous litigation when parties allege violent breaches of international law. Plaintiffs—with good reason—fear that the people or organizations they have accused of committing crimes against humanity may seek vengeance against them and their families for bringing those crimes to light.

Proceeding pseudonymously is also essential in litigation concerning politically sensitive or intensely personal subject matter. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (concerning a pregnant woman's choice whether to have an abortion); *see also Doe v. Hood*, 16-cv-00789, 2017 WL 2408196 (S.D. Miss. June 2, 2017) (permitting litigants challenging Mississippi's "Unnatural Intercourse" and sex offender registration law to proceed pseudonymously); *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (pseudonymous litigants successfully challenged Louisiana's Crime Against Nature by Solicitation Statute as unconstitutional). In cases like *Roe v. Wade*, courts generally permit plaintiffs to proceed pseudonymously because the litigations involve "highly sensitive, personal issues and the plaintiff desires to engage in prohibited conduct." Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 Hastings L.J. 779, 800 (1996) (citing Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*, 37 Hastings L. J. 1 (1985)).

A wide array of important human and civil rights litigation touching on myriad other issues has involved pseudonymous plaintiffs. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (challenge to adoption notification); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (police officer's challenge to termination of employment); *Honig v. Doe*, 484 U.S. 305 (1988) (challenge to policy of excluding disabled children from classroom for dangerous or disruptive conduct); *Plyler v. Doe*, 457 U.S. 202 (1982) (challenge to exclusion of undocumented persons from public schools); *see also, e.g.*, *Hispanic Interest Coalition of*

Alabama v. Bentley, 691 F.3d 1236, 1247 n.8 (11th Cir. 2012) (noting federal court practice allowing plaintiffs to proceed anonymously in immigration-related cases); *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019) (sex trafficking victim allowed to proceed pseudonymously). Courts generally approach anonymity in these cases with a "subtext of approval." Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 Tenn. L. Rev. 779, 810–11 (2017).

This is for good reason. The dangers of litigating human and civil rights cases without pseudonymity are well-known, and unfortunately there are numerous examples of litigants being threatened, intimidated, harassed, or injured for filing suit without the protection of pseudonymity. In *Doe v. Pittsylvania County*, 844 F. Supp. 2d 724, 732–34 (W.D. Va. 2012), for example, after the court denied pseudonymity to a plaintiff litigating prayer at government meetings, the plaintiff was threatened by the Ku Klux Klan. *See* Benjamin P. Edwards, *When Fear Rules In Law's Place: Pseudonymous Litigation As a Response to Systematic Intimidation*, 20 Va. J. Soc. Pol'y & L. 437, 453–54 (2013). In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), after the Supreme Court issued a landmark ruling that public schools could not compel bible reading, one plaintiff's child was beaten and the family's home was firebombed. *See* Edwards, *supra*, at 463–64 (discussing *Abington* and other cases in which plaintiffs faced retaliation).

As the examples discussed above show, U.S. federal and state courts have acknowledged the high

stakes for human and civil rights plaintiffs who often face violent threats for vindicating their rights. The Eleventh Circuit's decision—which makes it harder to obtain privacy protections and makes those protections less reliable—will likely chill would-be plaintiffs from pursuing these types of claims at all. For this reason, this case provides a compelling vehicle to clarify the standard for modifying a stipulated Rule 26(c) protective order and thereby restore stability to this important tool for safeguarding the privacy and physical safety of human and civil rights plaintiffs.

II. The Eleventh Circuit's Decision Creates Significant Uncertainty for Litigants with Confidentiality Concerns and Does Not Promote Judicial Economy.

Human and civil rights litigants often ask themselves a fraught question when deciding whether to file suit: "is it worth risking my life for this?" The petitioners in this very case had to assess whether to file suit given the legitimate risk of violent paramilitary retaliation—including murder.[2] And human and

[2] According to Human Rights Watch, over 400 human rights defenders have been killed in Colombia since 2016, more than any other country in Latin America. *See* Human Rights Watch, Left Undefended: Killings of Rights Defenders in Colombia's Remote Communities," (Feb. 10, 2021), https://www.hrw.org/report/2021/02/10/left-undefended/killings-rights-defenders-colombias-remote-communities; *see also* "Colombia Launches Plan to Stem Killings of Activists," Reuters (Feb. 3, 2021), https://www.reuters.com/article/us-colombia-violence/colombia-launches-plan-to-stem-killings-of-activists-idUSKBN2A339Q.

civil rights defenders like *Amici* must perform this same risk-reward assessment on behalf of their clients who may be faced with the threat of violent retaliation for filing suit.

Protective orders can reduce the threat of harm by shielding these litigants' identities and confidential information from public disclosure, but only if protective orders are *reliable*. If a party can modify a protective order at any time without a showing of good cause—which is now the law in the Eleventh Circuit—then those protections become illusory and plaintiffs cannot properly assess the risk of pursuing litigation. This case presents a straightforward opportunity and highlights the urgent need for the Court to restore the reliability of protective orders by establishing a uniform standard for modifying such orders and ensuring that the burden be placed on the party seeking the modification.

The Eleventh Circuit's decision in this case upended the petitioners' reasonable expectation that the protective order would, in fact, protect their identities from being disclosed. Indeed, before the Eleventh Circuit affirmed the trial court's decision to strip the petitioners of pseudonymity, its existing precedent explicitly recognized that litigants rely on protective orders when they disclose confidential information. In *FTC v. AbbVie Products LLC*, the Eleventh Circuit went so far as to say that judges *should* take this reliance into account when presented with a request to modify a protective order. 713 F.3d 54, 68 (11th Cir. 2013). That directive should not be controversial: parties to a stipulated protective order should be entitled to rely on the terms of a legally

enforceable, court-approved order to shield their confidential information from disclosure. But that is no longer the case in the Eleventh Circuit; the decision below effectively treats the bargained-for terms of a stipulated protective order as non-binding.

The Eleventh Circuit's decision also conflicts with the plain text of Rule 26(c). The rule expressly provides that district courts "may, *for good cause*, issue" a protective order, Fed. R. Civ. P. 26(c) (emphasis added). In other words, courts cannot issue a protective order without a showing that the circumstances merit confidentiality.

Yet the Eleventh Circuit determined that litigants routinely submit stipulated protective orders without establishing good cause—and that district courts routinely ignore this requirement by approving these stipulations. (Panel Op. at 22.) Here, the Eleventh Circuit made two troubling assumptions: (a) litigants and federal judges have a habit of flouting the Federal Rules of Civil Procedure, and (b) district court judges generally do not evaluate whether stipulated protective orders are supported by good cause before approving them. The Eleventh Circuit also drew an arbitrary distinction between "stipulated" and "disputed" protective orders to sustain these assumptions. It held that "[w]hen faced with a motion to modify [] a *stipulated* protective order, the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard." (*Id.* at 23.) This effectively rewrites Rule 26(c). It establishes that courts may issue stipulated protective orders *regardless* of whether the parties have established good cause. And it establishes that courts may en-

tirely forgo the good-cause inquiry unless and until a party seeks the benefit of a (supposedly) judicially enforceable order.

The Eleventh Circuit's interpretation of Rule 26(c) creates a perverse incentive to pull the rug out from under a party with significant privacy concerns. That is because it imposes *no burden whatsoever* on the party seeking to modify a protective order that it negotiated and agreed to, allowing that party to strip its adversary of confidentiality protections that it relied upon throughout the litigation. This new rule will likely encourage defendants to stipulate strategically to protective orders early in cases and, after learning the plaintiffs' identities and obtaining other sensitive information, move to eliminate the plaintiffs' pseudonymity or confidentiality protections from the order—often to harass or intimidate litigants into dropping their case. Such gamesmanship will inevitably follow from a rule that permits litigants to modify stipulated protective orders without showing good cause (or even any prejudice from maintaining the privacy protections).

Additionally, the Eleventh Circuit's distinction between "stipulated" and "disputed" protective orders does not promote judicial economy.[3] The court held that, unlike stipulated protective orders, the party seeking to modify a *disputed* order bears the

[3] *Amici* note that the protective order in this action was not clearly "stipulated," because the parties submitted competing protective orders and required the district court's intervention to resolve the dispute.

burden of showing good cause for the modification. (Panel Op. at 23.) This again ignores the plain text of Rule 26(c), which directs parties seeking a protective order to confer or attempt to confer in good faith with "other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1).

The Eleventh Circuit's decision incentivizes parties to litigate a protective order's terms *and* seek court intervention to resolve the dispute (rather than stipulate) to ensure that the protective order can be relied on and not be modified without a showing of good cause. Moreover, it establishes that the good-cause inquiry in the Eleventh Circuit will now hinge on whether the parties disagreed over a protective order's terms. This divorces the good-cause inquiry from the *reasons* offered by the parties to support the need for a protective order—say, for example, credible threats of retaliation—and communicates that those reasons alone cannot establish good cause. This will inevitably require litigants and courts to devote more time and resources to collateral issues unrelated to the merits of the case that could otherwise be resolved between the parties.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that the Court grant the petition.

June 2, 2021

Respectfully submitted,

PETER A. NELSON
Counsel of Record
JACOB J. PERKOWSKI
LOUIS M. RUSSO
JEFFREY F. KINKLE
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 AVE. OF THE AMERICAS
NEW YORK, NY 10036
(212) 336-2000
pnelson@pbwt.com

Counsel for Amici Curiae