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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Chiquita agreed to keep confidential certain private information it received in discovery, such as the plaintiffs' addresses and phone numbers.[1] Petitioners could have resisted disclosing much of that information, given its irrelevance to the case. But rather than force the court to resolve constant discovery disputes, petitioners stipulated to an order requiring Chiquita to keep the information confidential in perpetuity unless the court found it admissible at trial and otherwise permitted its public disclosure at that time. Pet. 9-10.

After obtaining that sensitive information, Chiquita then reneged on its agreement and asked the court for permission to release petitioners' private information to the public. This petition poses the purely legal question, *contra* BIO 2, of whether Chiquita bore the burden of justifying its change in position (as the Second, Third, and Seventh Circuits hold) or petitioners instead bore the burden of justifying continued protection because the order was stipulated rather than litigated (as the Ninth, Eleventh, and possibly Sixth Circuits hold). Pet. 15-18.

Chiquita does not contest the recurring importance of this question, which is confirmed by the outpouring of amicus support for the petition. Instead, its opposition rests almost entirely on the claim that

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[1] Chiquita claims that the protective order does not cover names. *See* BIO 1 n.1. That is incorrect. *See* Pet. App. 38a, 39a. But the Court need not resolve the question, given that the order also covers other even more sensitive information that could be used to harm or harass petitioners if their identities were revealed.

all circuits apply the same rule. In fact, the split is real, the decision below is wrong, and this case affords the Court an opportunity to set the law straight.

I. The Circuits Are Divided.

Chiquita claims that all circuits hold "that if good cause was not shown for the original protective order, the burden of showing good cause is on the party seeking continued confidentiality protection." BIO 15. The cases the petition cited from the Second, Third, and Seventh Circuits, it says, imposed the burden on the movant only because those courts determined that protective orders were not only stipulated to, but also supported by good cause. BIO 15-19. Conversely, Chiquita implies, the Eleventh Circuit would have imposed the burden on Chiquita if it had found good cause for the initial order. BIO 15-16. Not so.

1. ***Eleventh Circuit.*** The Eleventh Circuit established what it called a "bright line" rule, distinguishing between stipulated and non-stipulated orders: "When faced with a motion to modify to a stipulated protective order, the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard." Pet. App. 20a. Accordingly, the court made no inquiry into the evidence supporting the *initial* entry of the stipulated order, but asked instead whether the order was truly stipulated, Pet. App. 21a-22a, and whether petitioners had satisfied their burden of showing that *current* conditions supported *continued* protection, Pet. App. 22a-24a.

To the extent there is language in some Sixth and Ninth Circuit decisions suggesting that the burden would switch if, in issuing a stipulated order, a district court made a finding of good cause, BIO 19, at best

that suggests a further fracturing of the caselaw – the Eleventh Circuit's bright line rule is otherwise and, as discussed next, the Seventh, Second and Third Circuits apply the opposite rule, putting the burden on movant in all cases, litigated or stipulated.

2. ***Seventh Circuit.*** In *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 565-66 (7th Cir. 2018), Heraeus argued that the district court wrongly put the burden of justifying modification of a stipulated order on the movant. The Seventh Circuit disagreed, holding that the "district court correctly concluded that Heraeus, *as the party seeking modification*, has the burden of showing good cause to modify the protective order." *Id.* at 566 (emphasis added). Contrary to Chiquita's contention, the opinion did not first ask whether "good cause was shown . . . for entry of the original protective order." BIO 20. It noted only that, as in this case, the order "was agreed to by the parties and entered by the district court." *Heraeus*, 881 F.3d at 555.

Chiquita notes the underlying litigation arose under 28 U.S.C. § 1782. BIO 20. But nothing in the holding or rationale turned on that. *See Heraeus*, 881 F.3d at 565-66. Indeed, the Seventh Circuit explained the district court properly applied the "test that courts in this Circuit regularly use when resolving motions to modify protective orders," citing a series of non-Section 1782 decisions. *See id.*; *see also id.* at 566 (same).

One of those cases was *American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1978). That decision established that not only does the movant bear the burden of justifying modification in all cases, but that there is a "higher burden on the

movant" when the order was stipulated. *Id*. at 597 (requiring movant show "exceptional considerations warranting the alteration of an agreed protective order"). Chiquita attempts to distinguish *Grady* because it "involved the United States Government as a nonparty intervenor." BIO 21. But the Seventh Circuit applied the same rule in *Hereaus*, citing *Grady*, when a non-government party to the stipulation sought modification. 881 F.3d at 567.

Thus, courts within the Seventh Circuit routinely put the burden on all kinds of movants in all manner of actions. *See, e.g.*, *Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, No. 13-CV-346-BBC, 2018 WL 10036205, at *1 (W.D. Wis. Mar. 14, 2018); *Ball v. Field*, No. 90 C 4383, 1992 WL 57187, at *15 (N.D. Ill. Mar. 19, 1992); *Romary Assocs., Inc. v. Kibbi, LLC*, No. 1:10-CV-376, 2012 WL 32969, at *2 (N.D. Ind. Jan. 6, 2012).

3. ***Second Circuit.*** The Second Circuit likewise has repeatedly held that "[w]here there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need." *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (citation and internal quotation marks omitted); *see also* Pet. 16-17; *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985); *FDIC v. Ernst& Ernst*, 677 F.2d 230, 232 (2d Cir. 1982).

Chiquita claims that the Second Circuit applies the opposite rule if it concludes there was no good cause for the original order. BIO 19, 21-25. But Chiquita cannot cite even a single Second Circuit

decision doing so. In fact, none of the cases review the factual basis supporting the original order before deciding who bears the burden on modification. *See, e.g.*, *TheStreet.com*, 273 F.3d at 229; *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 738 (2d Cir. 2000); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979).

Chiquita notes that the Second Circuit's rule applies "[a]bsent a showing of improvidence in the grant" of the original motion. BIO 23 (quoting *Martindell*, 594 F.2d at 296). But improvidence is a reason for refraining from imposing a *heightened* burden on the movant, not a ground for shifting the burden to the order's beneficiary. *See Palmieri*, 779 F.2d at 864-66. Moreover, an order is not "improvidently granted" simply because a court later decides that there was an insufficient basis for its entry. *See id.* at 865-66 (rejecting that view and giving, instead, example of order that would likely "facilitate or further criminal activity").

Contrary to Chiquita's claim, the rule is not limited to cases in which the movant is "the Government." BIO 23-24; *see TheStreet.com,* 273 F.3d at 229 n.7 (rejecting distinction). And the same rule applies whether modification is sought by a party to the stipulation or by an outside party. *See, e.g.*, *Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 247 (2d Cir. 2018) (placing burden on party to stipulation);[2] *Iridium India Telecom Ltd. v. Motorola,*

[2] Chiquita attempts to distinguish *Kiobel* as a Section 1782 case. BIO 25. But the decision did not turn on that fact and the court expressly relied on non-Section 1782 precedent to resolve the question. *See* 895 F.3d at 247.

Inc., 165 Fed. App'x 878, 880-81 (2d Cir. 2005) (same); *Geller*, 212 F.3d at 738 (same). If anything, one would think the standard would be *lower* for a party that had not previously agreed to the stipulation.

Finally, *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (cited at BIO 22-23) and *Lugosch v. Pyramid Co.*, 435 F.3d 110, 121, 125-26 (2d Cir. 2006) (cited at BIO 32) – as well as the Third Circuit's *In re Avandia Marketing, Sales Practices & Products Liability Litigation*, 924 F.3d 662, 672 (3d Cir. 2019) (cited at BIO 27) – involved the common-law right of access to *judicial documents*. But "there is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court" because "[u]nfiled discovery is private, not public." *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009); *see also, e.g.*, *In re Avandia*, 924 F.3d at 670-73; *TheStreet.com*, 273 F.3d at 231-33 & n.9.[3]

4. ***Third Circuit***. In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994), the Third Circuit rejected the Second Circuit's heightened burden on movants as "too stringent," but nonetheless

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[3] Chiquita says this Court could affirm under this common law doctrine because, it claims, Chiquita sought modification so it could put petitioners' private information into the docket as summary judgment or trial evidence. BIO 27 n.5. But it never made that argument below. Nor can it cite any case applying the public access doctrine to decide what a *party* can *put into* the judicial record (as opposed to whether the *public* can access what a court *already allowed* the parties to put into the judicial record). At any rate, the district court terminated *all* protection for petitioners' information, not just information that might be put in the judicial record.

held that the "party seeking to modify the order of confidentiality must come forward with a reason to modify the order." It then elaborated:

> If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. *When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted*.

Id. (emphasis added) (internal quotation marks omitted).

Relying on the first sentence, Chiquita seemingly argues that absent good cause for the initial order, the Third Circuit would hold that no "legitimate secrecy interests . . . exist" and, therefore, would not put the burden on the movant. *See* BIO 26. But the existence of a "legitimate secrecy interest" is not the equivalent of an ultimate finding of good cause for the order. It is a lesser initial threshold to be crossed before there will be any good cause evaluation at all. That is why, in the absence of any legitimate secrecy interest, "access should be granted" without further analysis. *Pansy*, 23 F.3d at 790 (internal quotation marks omitted). Furthermore, even when the Third Circuit concluded that the order in *Pansy* had been improvidently granted, that simply meant that "the reliance interest[s] . . . must be considered weak," not that the burden shifted. *Id.* at 792.

II. The Decision Below Is Wrong.

Chiquita's defense of the Eleventh Circuit's rule only confirms the need for review.

For all its rhetoric about "judicial openness," BIO 1, Chiquita agrees that the movant bears the burden for litigated orders. BIO 15. It argues that the opposite rule applies to stipulated orders because they are routinely – and, it says, properly – issued without a finding of good cause. BIO 16. That defense provides the Court an opportunity to resolve a second conflict over whether a court may approve a stipulated order without finding good cause at the outset. *See* Pet. App. 20a & n.9 (Eleventh Circuit acknowledging split).

The Court should take that opportunity and correct the Eleventh Circuit's premise, for the plain text of the Rule requires a finding of good cause *before* a protective order may issue. Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order. . . ."); *Pansy*, 23 F.3d at 785-86; Civil Procedure Professors Br. 13-17. That requirement is not unduly burdensome. The Rule does not require extensive opinions or express findings – the entry of the order in itself can demonstrate that the court found good cause. Moreover, even while retaining the obligation to exercise independent judgment, the court can rely on parties' stipulation and justifications, as well as its prior experience with the case. *E.g.*, *Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301, 304-05 (M.D.N.C. 2002). Here, for example, the district court accepted the stipulation against the backdrop of its *forum non conveniens* ruling that made extensive inquiry into the conditions in Columbia. Pet. 9-10.

Chiquita's mistaken premise corrected, it has no meaningful response to the abundant reasons for applying the same burden for litigated and stipulated judgments. It does not dispute, for example, that distinguishing between them provides a significant disincentive to stipulation, burdening the courts. Pet. 30. Nor does it address the fact that its rule perversely makes it easier to modify orders when initial good cause is so obvious that no party was willing to contest it.

Additionally, it is "presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied." *TheStreet.com*, 273 F.3d at 230; National Crime Victims Law Institute Br. 8-11. This is true even if a later court doubts there was good cause for issuing the order. *See, e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 499-500 (1991) (giving example of "a party or witness who chooses to forego a plausible claim of privilege under the assurance that a protective order will shield the communication from subsequent disclosure").

Chiquita insists that parties have no right to rely on protective orders because they are always subject to modification and frequently apply only to the discovery stage, not trial. BIO 30-32. The first claim simply begs the question of how easily protective orders can be modified.[4] The second ignores that before Chiquita would be permitted to submit the plaintiffs' phone numbers, addresses, and other private information into the trial record, it would have to convince a court that they are

[4] The specific order in this case did not address that question. *See* Pet. App. 51a, ¶13.

relevant, admissible evidence. And if the information were admitted, petitioners could then decide for themselves whether it was too risky to continue the litigation. In contrast, with the protective order lifted, the choice whether to publicly disclose that private information is solely Chiquita's, which may do so for any reason it chooses, legitimate or otherwise.[5]

III. This Case Is An Appropriate Vehicle.

Finally, there is no merit to Chiquita's apparent suggestion that this case is a poor vehicle because the allocation of burdens would make no difference. *See* BIO 4-6, 29-32.[6]

Space does not permit a full rebuttal of Chiquita's distortion of the evidence in this case. Suffice it to say that Chiquita's suggestion that Plaintiffs used anonymity for nefarious purposes other than protection is unfounded – there is ample evidence that petitioners and their families in Colombia continue to face a significant threat of retaliation by members of

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[5] Chiquita objects that petitioners never made a reliance argument below. That is incorrect. *See, e.g.*, Pet. Ct. App. Br. 16 (relying on *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992), as collecting authorities for rule); *Jochims*, 145 F.R.D. at 501-02 (explaining reliance rationale). Regardless, because petitioners argue that reliance is a reason to place the burden on the movant, it is at most an additional argument in favor of the position they have maintained all along. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

[6] Chiquita does not claim that the grant of summary judgment in its favor moots the case. While petitioners are confident that the summary judgment order will be reversed, the underlying merits of the case have no bearing on the validity of the protective order, which will endure after the case concludes no matter who wins. *See* Pet. 14 n.6.

the paramilitary groups they have accused of committing atrocities with Chiquita's financial assistance. *See generally* Human Rights Organizations Br. The district court, relying on extensive factual and expert evidence, found those threats substantiated earlier in the case, then ordered the parties to submit proposed protective orders. Pet. 9. The district court withdrew the protective order only because it believed that petitioners bore a heavy burden to prove continuation of that threat. *See* Pet. App. 32a (concluding protection should be limited to "the exceptional case"); Pet. App. 33a ("While the Court is most sympathetic to these concerns, it finds that the presumption of openness in judicial proceedings outweighs the interests presented by Plaintiffs in support of their request to continue" protections).

Finally, because it focused exclusively on whether *petitioners* had met their purported burden, the court took no account for the Chiquita's failure to identify any substantial reason why disclosing petitioners' private information served any legitimate, much less important, purpose. Chiquita cannot argue that public disclosure of phone numbers, addresses, etc. is necessary to defend itself in court. Nor is the public interest in "judicial openness" served by publicly releasing that information, which is utterly irrelevant to the merits of the case. *Cf.* Fed. R. Civ. P. 5.2(a) (requiring redaction of similar private information in *all* cases).

CONCLUSION

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

Respectfully submitted,

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August 24, 2021