NO. 21-622

In the Supreme Court of the United States

SUSAN ELAINE DEVINE,
Petitioner,

v.

ABSOLUTE ACTIVIST VALUE MASTER FUND LIMITED, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a district court have jurisdiction to modify a previously entered protective order after the plaintiff voluntarily dismisses the suit under Federal Rule of Civil Procedure 41(a)(1)(A)(i) when the modification seeks to obtain documents that are not in the district court's possession or in the clerk's office file?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Susan Elaine Devine was defendant in the district court and appellant in the court of appeals. Respondents are Absolute Activist Value Master Fund Limited, Absolute East West Fund Limited, Absolute East West Master Fund Limited, Absolute European Catalyst Fund Limited, Absolute Germany Fund Limited, Absolute India Fund Limited, Absolute Octane Fund Limited, Absolute Octane Master Fund Limited, and Absolute Return Europe Fund Limited (Funds). Respondents were plaintiffs in the district court and appellees in the court of appeals.

None of the Respondents has a parent company, and no publicly held company owns 10% or more of any Respondents' stock.

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court for the Middle District of Florida, No. 2:15-cv-328, *Absolute Activist Value Master Fund Limited, et al.* v. *Devine*, judgment entered July 11, 2018.

U.S. District Court for the Northern District of California, No. 3:15-mc-80308, *Absolute Activist Value Master Fund Limited, et al.* v. *Devine*, judgment entered January 7, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-cv-00016, *Absolute Activist Value Master Fund Limited, et al.* v. *Devine*, judgment entered January 13, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-mc-00001, *Absolute Activist Value Master Fund Limited, et al.* v. *Devine*, judgment entered January 26, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-cv-00047, *Absolute Activist Value Master Fund Limited, et al.* v. *Devine*, judgment entered June 21, 2017.

U.S. Court of Appeals for the Eleventh Circuit, No. 16-13047, *Absolute Activist Value Master, et al.* v. *Devine*, judgment entered August 18, 2017.

U.S. Court of Appeals for the Eleventh Circuit, No. 21-13587, *Absolute Activist Value Master, et al.* v. *Devine*.

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BRIEF IN OPPOSITION

STATEMENT

A. Facts and procedural history

1. This case concerns a "massive market-manipulation" and money-laundering scheme orchestrated by Petitioner's "former" husband, Florian Wilhelm Jurgen Homm. Pet. App. 3. Homm's scheme centered on "penny stocks": shares in "thinly capitalized companies" that could be acquired for little cost and traded infrequently, making them highly susceptible to price manipulation. *Ibid.* In 2005, Homm formed Absolute Capital Management (ACM), which controlled the investment decisions

for Respondents, a group of nine Cayman Islands hedge funds that invested on behalf of hundreds of investors around the world. *Ibid.*; *Absolute Activist Value Master Fund Ltd.* v. *Devine (Absolute Activist I)*, 233 F. Supp. 3d 1297, 1303 (M.D. Fla. 2017).

2. Homm used his position at ACM's helm to make a fortune for himself and Petitioner while running Respondents into the ground. Homm arranged for Respondents to purchase shares of numerous penny stocks and then used a "variety of trading techniques" to inflate their value by trading the shares among the Funds. *Absolute Activist Value Master Fund Ltd.* v. *Devine (Absolute Activist II)*, No. 2:15-CV-328, 2015 WL 12838168, at *4-5 (M.D. Fla. July 1, 2015).

Meanwhile, Homm and his co-conspirators had arranged to acquire their own shares in the penny stocks "at little or no cost," *id.* at *5, and when they were "sufficiently inflated," Homm and his co-conspirators sold them to Respondents at the inflated cost, Pet. App. 4. This scheme made Homm more than $115 million but caused the Funds to lose more than $200 million. *Ibid.*

3. Petitioner feigns ignorance of Homm's scheme, Pet. 7, but she was an active participant. Petitioner aided Homm primarily through the pair's "strategic[]" divorce in 2006. Pet. App. 4. The divorce was a sham: After the divorce, Petitioner and Homm continued living together, sent "each other personal and intimate emails," purchased a home together, traveled together, and moved money between each other's accounts. *Ibid.*

Yet the couple's divorce settlement enabled them to repeatedly alter the beneficiary structure of a Liechtenstein-based legal entity that held "more than 50% of the

outstanding ACM shares," *Absolute Activist II*, 2015 WL 12838168, at *2, in a manner that permitted Homm to evade restrictions preventing him from trading ACM shares without approval from ACM's board of directors, Pet. App. 5. The pair's "divorce" also helped them launder money to keep their ill-gotten gains from investors, creditors, and authorities. Their divorce petition identified only a "small fraction" of their "actual assets, omitting numerous real estate holdings, and hiding tens of millions of dollars in ACM shares." *Id.* 4-5.

Petitioner also helped to launder the proceeds of Homm's scheme "through a complex network of bank accounts around the world," using those proceeds to purchase "difficult-to-trace gold, fine art, and other assets," and engaging in "simulated" transactions to launder money in between Homm's accounts and her own, all the while lying repeatedly to investigators and courts. *Absolute Activist I*, 233 F. Supp. 3d at 1304.

Petitioner's participation in Homm's scheme allowed her to amass her own huge fortune—over $63 million—which she further laundered by purchasing a waterfront property in Naples, Florida, a seaside villa in Marabella, Spain, real estate in Mallorca, Spain, and millions of dollars in gold coins. Pet. App. 6; *Absolute Activist I*, 233 F. Supp. 3d at 1304-1305. The remaining proceeds of her pre- and post-divorce schemes were spread through at least 20 different bank accounts throughout the world. Pet. App. 6.

4. When Homm's scheme was finally uncovered, he resigned from ACM and spent the next five years on the run, landing him on the FBI's Most Wanted list. Pet. App. 5-7. Authorities around the world have also been pursuing Petitioner's assets. The Department of Justice froze one of Petitioner's bank accounts and issued a grand jury

subpoena for her holdings. *Id.* 6-7. And since 2009, Devine has known that a Swiss investigation into Homm's criminal wrongdoing threatened her assets, because the Swiss seized $20 million in accounts on which she was account holder or beneficiary. *Id.* 6.

5. Respondents filed a private criminal complaint against Petitioner with the Swiss Attorney General, and have since cooperated with Swiss officials in their investigation into Petitioner's assets. *Id.* 6-7. Yet Petitioner has never been formally charged with criminal wrongdoing, by the Swiss or anyone else, Pet. 7, 8, while Homm was convicted in a Swiss court on various charges related to his penny-stock scheme. *Swiss court convicts German financier Homm in long-running fraud case*, Reuters, Apr. 23, 2021, <https://reut.rs/3sNZQPw>.

In June 2015, Respondents filed the civil action at issue here against Petitioner in the Middle District of Florida, raising both common-law unjust enrichment claims and statutory claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, and its Florida equivalent. Pet. App. 7.

One month later, the district court entered a temporary restraining order freezing tens of millions of dollars of Petitioner's assets and requiring her to produce documents identifying "all" of her assets located "anywhere in the world." Pet. App. 7. Petitioner therefore moved for the entry of a protective order that would prevent public disclosure of the personal financial information she had to share with Respondents. *Id.* 7-8.

6. The protective order that the parties jointly negotiated (Pet. App. 63-74) was fairly typical. See *Manual for Complex Litigation (Fourth)* § 11.432 (4th ed. 2004)

(outlining typical protective-order terms). It allowed the parties to label certain material as "Confidential," Pet. App. 65, 66, which the parties were generally prohibited from disclosing or using outside the litigation, *id.* 66, and which had to be "destroyed or returned * * * within sixty (60) days after the conclusion of the litigation," *id.* 74.

One exception to the proposed order's non-disclosure prohibition allowed the parties to disclose confidential discovery material pursuant to a "subpoena," "court order," "legal process," or "request for information from any international federal or state criminal authority." Pet. App. 69-70. Petitioner emphasizes (at 10) that Respondents demanded this provision, but she neglects to mention the protection that Respondents granted her in exchange: To address Petitioner's concern that law-enforcement investigators might request documents from Respondents, they agreed to "provide written notice" to her before responding. Pet. App. 70; see Dkt. No. 2:15-cv-00328 (M.D. Fla.), ECF No. 392-3, at 2-3.

The district court approved the stipulated protective order on July 30, 2015, and the parties exchanged extensive discovery under its terms for the next two years, with Petitioner receiving approximately 624,000 of Respondents' documents—5,456 of which were designated confidential. Pet. App. 8. Many of these were extremely sensitive because they concerned investor information protected under Cayman Islands law. Respondents had to obtain an order from a Cayman Islands court to produce that information, and the court's approval was conditioned on promises that the documents would only be used by parties, attorneys, and others as necessary for the American litigation. Dkt. No. 2:14-cv-00328 (M.D. Fla.), ECF No. 692, at 28-29.

Throughout this period, Petitioner was aware that she was under investigation by Swiss authorities—and had been since 2009. Pet. App. 46. Furthermore, while the Respondents received certain requests for information from the Swiss authorities, Respondents did better than provide the simple notice required under the protective order—they obtained "express permission" from the district court before responding. *Id.* 9, 18 n.7. While Petitioner now claims those exchanges with the Swiss "abused the liberal discovery permitted under U.S. law," Pet. 14, she never sought during the litigation to lift the protective order or modify the provisions allowing for such information sharing. It was only after Respondents dismissed the case, and after the deadline for Petitioner to destroy or return Respondents' confidential documents had passed, that she would make these demands.

Petitioner implies that Respondents dismissed the case to avoid sitting for depositions (at 13), but it was actually a change in the governing law that precipitated Respondents' decision. After *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. 325, 346 (2016), held that RICO permits recovery only for "domestic injur[ies]," the district court decided that Respondents could not recover under their federal or (similar) state RICO claims, because Respondents suffered injury "in the Cayman Islands" where they were located. *Absolute Activist I*, 233 F. Supp. 3d at 1326, 1328. The district court then dissolved the temporary restraining order, which was tied to the federal RICO claim, *Absolute Activist Value Master Fund Ltd.* v. *Devine* (*Absolute Activist III*), No. 2:15-cv-328, 2017 WL 3141288 (M.D. Fla. July 25, 2017), and Petitioner began moving her assets to prevent Respondents from ever recovering. Respondents therefore decided to dismiss the action under

Fed. R. Civ. P. 41(a)(1)(A)(i) on February 14, 2018. Pet. App. 8, 38, 86; Pet. 13.

Respondents' dismissal was effective immediately under circuit law, Pet. App. 13 (citing *Matthews* v. *Gaither*, 902 F.2d 877 (11th Cir. 1990)), triggering the protective order's 60-day deadline for Petitioner to destroy or return Respondents' confidential documents in her possession, *id.* 71. Yet even as the deadline came and went, Petitioner retained those documents.

7. On April 20, 2018, five days *after* expiration of the 60-day deadline, Petitioner finally moved to modify the protective order to allow her to keep Respondents' confidential documents and use them to "defend[] herself" in the Swiss investigation. Pet. App. 9. Yet Petitioner did not then—and does not now—demonstrate any essential need for her to retain those documents, beyond the vague contention that she might be "unable to obtain" them elsewhere. Pet. 14 (citing Pet. App. 124). Instead, her express purpose was retaliation: to punish Respondents for working with the Swiss authorities who were investigating her. *Ibid.* (citing Pet. App. 114-115). Petitioner also claimed Respondents "fraudulently induced" her into entering the protective order by failing to notify her of their private Swiss criminal complaint—even though she had known about the Swiss Attorney General's larger investigation since 2009. *Ibid.* (citing Pet. App. 123).

8. Every judge to consider Petitioner's demand to modify the protective order has rejected it. The first was a magistrate judge who feared that Respondents would be "unfairly prejudice[d]" and "deprive[d] * * * of the protections they reasonably expected" to receive under the protective order if Petitioner was "allow[ed]" "to withdraw from those protections at the last minute * * * simply

because it is beneficial to her." Pet. App. 57-58. The magistrate judge also warned that granting Petitioner's request could "fundamentally threaten the integrity of the discovery process" itself, undermining "the confidence that all litigants, third parties, and their counsel must have in the reliability of stipulated protective orders" if they are to be "effective in facilitating discovery." *Ibid.*

The magistrate judge found that Petitioner had presented no reason to incur these risks. The magistrate judge determined that Petitioner's allegations of "fraud in the inducement" were "without merit and lack[ed] credibility." *Id.* at 58. The magistrate judge found that Petitioner could neither "point to any false statement of material fact" by Respondents nor show that Respondents had any "duty to disclose their pursuit of other criminal proceedings in Switzerland." *Id.* 58-59. The magistrate judge also found that Petitioner failed to demonstrate the materiality of Respondents' supposed "omission," given Petitioner's concession "that she was aware of a related investigation in Switzerland" when the protective order "was negotiated," and could not explain what protections she would have requested "had she known more." *Id.* 59, 60.

The magistrate judge also found "wholly unavailing" Petitioner's argument that her inability "to obtain" Respondents' confidential documents elsewhere justified allowing her to retain or disclose them. Pet. App. 60. The magistrate judge explained that both Petitioner and Respondents had agreed to the protective order "knowing" that its "obligations would apply equally to evidence that was helpful, harmful, or neutral to their respective positions" in other cases. *Id.* 61. The magistrate judge therefore denied Petitioner's request on the merits. *Ibid.*

9. The district court also rejected the merits of Petitioner's request on *de novo* review, Pet. App. 35, and ordered her to destroy Respondents' confidential documents in her possession, *id.* 52.

B. The decision below

1. While a divided panel of the Eleventh Circuit vacated the district court's order, both majority and dissent agreed that Petitioner's request to modify the protective order must be rejected. They diverged only on *why*. The court, in an opinion by Judge Tjoflat, joined by Judge Wilson, decided that Petitioner's request presented a jurisdictional problem. Pet. App. 1, 10. The court concluded "that the Funds' voluntary dismissal of the action" under Rule 41(a)(1)(A)(i) "stripped the District Court of jurisdiction to consider Devine's motion to modify the protective order." *Id.* 10.

As the court of appeals explained, Rule 41(a)(1)(A)(i) grants the plaintiff an unqualified right to dismiss an action "without a court order" early in the case, "prior to a defendant serving 'either an answer or a motion for summary judgment.'" Pet. App. 12 (quoting Fed. R. Civ. P. 41(a)(1)(A)(i)). After those events, dismissal under clause ***(i)*** of Rule 41(a)(1)(A) is no longer possible, and dismissal without a court order can be obtained only through a "stipulation of dismissal" signed by all parties under clause ***(ii)***.

The court noted that after dismissal under Rule 41(a)(1)(A)(i), the "'action is no longer pending,'" and "the district court is immediately deprived of jurisdiction over the merits of the case." Pet. App. 13 (quoting *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 395 (1990)). The court therefore had to determine whether the district court nonetheless "retain[ed] jurisdiction" to consider

Petitioner's motion to modify the protective order by some other means. *Ibid.*

The court of appeals tried, but rejected, various options. The court recognized that other circuits had permitted district courts to modify sealing orders after cases had been dismissed by "settlement." Pet. App. 22 n.10 (citing *Poliquin* v. *Garden Way, Inc.*, 989 F.2d 527 (1st Cir. 1993); *Gambale* v. *Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004); *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *EEOC* v. *Nat'l Children's Ctr., Inc.*, 146 F.3d 1042 (D.C. Cir. 1998)). But the court determined that the resolution of these cases turned on the "retain[ed] jurisdiction" of district courts over "settlement agreements," Pet. App. 22 n.10, which was absent in this case because Respondents dismissed it *without* settlement via a "Rule 41(a)(1)(A)(i) dismissal." *Ibid.*

The court of appeals then noted that even after a Rule 41(a)(1)(A)(i) dismissal, "[t]he district court does retain jurisdiction * * * to consider a limited set of issues" under this Court's decision in *Cooter & Gell*. Pet. App. 13. But the court below determined that motions to modify protective orders do not fall within this limited set.

Cooter & Gell held that even after voluntarily dismissal under Rule 41(a)(1)(A)(i)'s predecessor, district courts possessed authority to decide certain "'collateral issues'—'independent proceeding[s] supplemental to the original proceeding'" that do not involve "'request[s] for a modification of the original decree.'" Pet. App. 14 (quoting 496 U.S. at 395). As the court below noted, these "collateral issues" include "(1) the imposition of costs, (2) the imposition of attorney's fees, (3) the imposition of contempt

sanctions, and (4) the imposition of Rule 11 sanctions." Pet. App. 14 (citing *Cooter & Gell*, 496 U.S. at 395-396).

The court of appeals concluded that Petitioner's request for modification of the protective order did not "fit neatly into the types of 'collateral issues'" *Cooter & Gell* had identified, Pet. App. 16, following the analysis set out in *Cooter & Gell* itself. In determining that Rule 11 sanctions were "collateral," this Court examined both Rule 11's absolute textual command that a court "'shall' impose sanctions," *and* Rule 11's larger "purpose" of "curbing abuses of the judicial system." 496 U.S. at 395, 397 (quoting Fed. R. Civ. P. 11). This Court had expressed concern that denying district courts jurisdiction to entertain post-dismissal Rule 11 motions would undercut that purpose. As the court below explained, "an enterprising plaintiff" might "abuse the judicial system" in a sanctionable way "but nevertheless get off scot free by voluntarily dismissing its case under Rule 41(a)(1)(A)(i)." Pet. App. 17.

The court of appeals here decided that while these concerns of warding off abuse by plaintiffs through voluntary Rule 41(a)(1)(A)(i) dismissals counseled in *favor* of permitting district courts to impose post-dismissal Rule 11 sanctions, those concerns counseled *against* granting the district court jurisdiction to consider Petitioner's motion to modify the protective order under the particular circumstances of this case. The court found nothing to suggest that "by voluntarily dismissing their case," Respondents had "abuse[d] the judicial process, manipulate[d] the protective order, or place[d] Petitioner at any strategic disadvantage." *Id.* 18. The court noted that there was "no evidence" that the Funds had "funneled documents to any government authority without the District Court's express permission." *Id.* 18 n.7. The court also pointed out

that the "terms" of the protective order had been "negotiated" by the parties at a time when Petitioner "knew * * * she was under investigation" by the Swiss authorities, and Respondents had done nothing to prevent her from "push[ing] for a stipulation" allowing her to use the [Respondents'] confidential documents" in her Swiss defense. *Id.* 18. The court of appeals therefore concluded that Petitioner's motion to modify the protective order did not "present the same concerns" of abuse that motivated the Court in *Cooter & Gell*. *Id.* 17.

The court of appeals also saw no risk that any such refusal would "harm the Funds, either"—even if Respondents had been unable to discover Petitioner's failure to comply with the protective order's return-or-destroy mandate after dismissal had occurred. Pet. App. 19. The court explained that, in such a scenario, Respondents would still have several options to preserve their rights: They could prevent the issue from ever arising by obtaining an order under Rule 41(a)(2) conditioning dismissal on the "parties' compliance with the protective order's destroy-or-return requirement." *Id.* 20. And even after dismissal, Respondents could have sought sanctions "for failure to comply" with the protective order or treated the protective order as a "contract" and enforced it in state court. *Id.* 20-21.

2. Judge Grant dissented. She disagreed that "the district court lacked jurisdiction over Petitioner's motion," concluding that "a motion to modify a protective order" is "exactly the sort of collateral issue that a district court may consider after voluntary dismissal," under *Cooter & Gell*'s framework, because the motion "ha[s] nothing to do with the merits." *Id.* 23, 25. Judge Grant also asserted that "'a protective order, like any ongoing injunction, is always

subject to the inherent power of the district court to relax or terminate the order, *even after judgment*.'" *Id.* 27 (quoting *Poliquin*, 989 F.2d at 535) (emphasis in original).

Yet Judge Grant ultimately "agree[d]" with the majority that Petitioner "cannot prevail in her attempt to modify the protective order," concluding that Petitioners' assertions of "need" for the documents, allegations of misconduct, and contentions "that she was fraudulently induced to enter the protective order" did not demonstrate "good cause" for a modification. Pet. App. 31. Accordingly, Judge Grant concluded that the district court had not "abused its considerable discretion" in rejecting Petitioner's request. *Ibid.*

REASONS FOR DENYING THE PETITION

This case has none of the characteristics this Court looks for in deciding whether to grant certiorari. The decision of the court below is narrow and fact-bound, on an issue already so narrow and fact-dependent that the court below is the only circuit court to have ever decided it. There is no split among the circuits on the issue.

The issue is also thoroughly unimportant. Post-dismissal modifications of protective orders like the one Petitioner seeks are rarely requested and granted even less often. That is because there is *virtually never* good cause to allow parties to a stipulated protective order to break the bargain that afforded them access to their opponents' darkest secrets during litigation, or allow those secrets to be publicly disclosed, *especially* after the litigation is over and any legitimate need for access has ended. The abstract question whether these post-dismissal modifications should be rejected on the merits or on jurisdictional grounds is therefore essentially meaningless. And it would

prove meaningless in this case, because three different judges at three different levels of the federal judiciary have already considered, and rejected, the merits of Petitioner's request, and will do the same on any remand. Review of this case therefore promises to be futile. In any event, the decision of the court of appeals is entirely correct, involving straightforward application of this Court's long-settled precedent. The petition should be denied.

A. There is no division among the courts of appeals.

1. The first reason review is unnecessary is that there is no circuit split on the issue the lower court addressed. No other circuit has decided whether a district court retains jurisdiction to modify a previously entered protective order after the plaintiff voluntarily dismisses the action under Rule 41(a)(1)(A)(i), meaning there is no case going the other way, and no division among the circuits for the Court to resolve.

2. Petitioner attempts to manufacture a circuit split by broadening the Question Presented to focus on *all* dismissals under "Rule 41(a)(1)." Pet. i. But even this unduly broad framing does not help Petitioner.

Four of Petitioner's own cases do not even decide that question. As Petitioner admits, they concern instead whether parties may *intervene* in litigation post-dismissal to request modifications of protective orders. Pet. 4-5, 17-20 & n.4 (citing *Pansy*, *supra*; *Nat'l Children's Ctr.*, *supra*; *Meyer Goldberg Inc. of Lorrain* v. *Fischer Foods, Inc.*, 823 F.2d 159 (6th Cir. 1987); and *Beckman Indus., Inc.* v. *Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992)). In these cases, the post-dismissal timing of requests only mattered—if at all—in determining whether the *intervention* was

"timely" under Fed. R. Civ. P. 24(b)(2), not in determining whether the court had power to address the intervenor's request. See *Pansy*, 23 F.3d at 780 ("six and one-half month delay" was not "untimely"); *Nat'l Children's Ctr.*, 146 F.3d at 1047 (delay of "two years" conceded to be "timely"); *Meyer Goldberg, Inc.*, 823 F.2d at 161, 162 (delay of "several years" could be "timely").

None of these Rule 24(b)(2) procedural cases even recognized post-dismissal interventions to present jurisdictional problems, and thus cannot stand for the proposition that district courts possess any "inherent" power overcoming that problem. Pet. 22, 23; Pet. App. 26, 27. While *Pansy* mentioned that a district court "retains the power to modify or lift confidentiality orders that it has entered," it did so only to confirm that district courts *possess* that power, nowhere suggesting that the power survives dismissal. 23 F.3d at 784. *National Children's Center* makes the same point, but the "'growing consensus'" it mentions concerns the timeliness of post-dismissal interventions under Rule 24, not jurisdiction. Pet. 20 (quoting 146 F.3d at 1047) (internal quotation omitted). And that is as close as the Third, Sixth, Ninth, and D.C. Circuits have come to addressing the Question Presented. It is therefore impossible to say how those courts would resolve that question if they actually confronted it.

3. The deeper problem is that *none* of Petitioner's cases conflict with the result in this one, because each turns on sources of jurisdiction not present in this case, and none depend on any "inherent" post-dismissal power to modify protective orders "'as a sheer matter of power.'" Pet. 21 n.6 (quoting Charles Alan Wright *et al.*, 8A *Federal Practice & Procedure* § 2044.1).

Three of Petitioner's cases, for example, involved sealed court records, and therefore implicate the "supervisory power" that "[e]very court" possesses "over its own records and files." *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). See *Gambale*, 377 F.3d at 135 (summary-judgment evidence filed under seal); *Nat'l Children's Ctr.*, 146 F.3d at 1044 (sealed "consent decree and portions of the record"); *Meyer Goldberg*, 823 F.2d at 160 (sealed "tape recordings" concerning "sensitive, privileged and confidential matters"). Even dismissal of a case cannot "divest[] a court of jurisdiction" to dispose of "material in its files as it thinks appropriate" or "to modify or vacate its own protective orders" to effectuate such disposal. *Gambale*, 377 F.3d at 139-140. But this case does not involve documents in court files, so this power is inapplicable.

And *all* of Petitioner's cases turned on another source of district court jurisdiction that is completely lacking in this case—a court's power to supervise settlements, which, as the court below noted and this Court confirmed in *Kokkonen* v. *Guardian Life Insurance of America*, 511 U.S. 375 (1994), virtually always survives dismissal. In *Kokkonen*, this Court held that parties can agree under the terms of a settlement to hold certain matters open after the case is dismissed, invoking the district court's "ancillary jurisdiction"—the power "to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its *decrees*"—*i.e.*, its judgments. *Id.* at 380 (emphasis added).

District courts normally retain ancillary jurisdiction over a matter by "'express[] reserv[ation]'" in the "judgment." *Id.* at 379. Yet *Kokkonen* held that even when "dismissal is pursuant to Rule 41(a)(1)(A)(ii)," and no

judgment of dismissal is necessary, parties can convey ancillary jurisdiction to the district court by making a certain matter a part of the settlement and "incorporat[ing] the terms of the settlement agreement" into the stipulated dismissal. *Id.* at 381-382. In this way, settling parties convey ancillary jurisdiction permitting the district court to make post-dismissal modifications to a protective order every time they incorporate the protective order into their settlement—which they will invariably do if they expect the protective order's obligations to survive the settlement and dismissal of the case.

It is the ancillary jurisdiction that courts retain after a stipulated dismissal that gives district courts jurisdiction to modify protective orders, not any "inherent" power to modify protective orders, as Petitioner insists (at 4, 17). This is because *Kokkonen* sharply limited district courts' "inherent power[s]," confining them to the strict parameters of their "ancillary jurisdiction." 511 U.S. at 380. All but one of Petitioner's cases—*Gambale*—were decided before *Kokkonen*, so none of these courts had occasion to consider whether *Kokkonen* undermines the notion of "inherent" powers they espouse. The one post-*Kokkonen* case that actually does so is one Petitioner neglects to mention—*Bond* v. *Utreras*, 585 F.3d 1061 (7th Cir. 2009). *Bond* held that *Kokkonen* "foreclose[s] the possibility" that a district court has "inherent authority to revisit and rescind [a] protective order," even after a stipulated dismissal under Rule 41(a)(1)(A)(ii). *Id.* at 1079. That authority can only exist if it is reserved in "the parties' stipulation to dismiss," or if the requested modification "involve[s]" documents "in the court file." *Ibid.*

But just as this case does not involve court records and files, it does not involve a settlement or a stipulated

dismissal under clause (ii) of Rule 41(a)(1)(A), and thus does not implicate the uniquely expansive post-dismissal jurisdiction that district courts enjoy under that rule. It instead involves a unilateral dismissal under clause (i), and the uniquely *limited* jurisdiction that *Cooter* & *Gell* affords to district courts in cases dismissed under that rule. And even if Respondents could have reserved jurisdiction to modify the protective order in that dismissal by themselves, Respondents have not done so. Accordingly, whatever "inherent powers" or "ancillary jurisdiction" the district courts enjoyed in Petitioner's cases simply do not translate to this case. And that is yet another reason there is no circuit conflict for the Court to resolve.

B. The decision below is narrow, fact-bound, nonrecurring, and unworthy of review.

1. Review is also unwarranted because the question presented by this case is narrow, fact-bound, and presents no question fit for review. There is a reason that this is the first circuit-level case to decide whether a district court lacks jurisdiction to revisit a protective order after a Rule 41(a)(1)(A)(i) dismissal: The issue only arises in a vanishingly small set of circumstances.

Requests for post-dismissal modifications of protective orders are exceedingly rare, as the staleness of Petitioner's authorities attests. Virtually all of them are *four decades* old and have not been revisited to reflect intervening decisions like *Kokkonan* and *Cooter & Gell* dating back to the *early 1990s*. These requests do not come along very often, and they almost never occur in cases involving unilateral dismissals under Rule 41(a)(1)(A)(i). Because voluntary dismissals under that provision are only available before the defendant files an answer, the confluence of

circumstances that must exist before a district court would ever face such a request produces almost a null set.

It would require a plaintiff who invests enough time and energy into a case to require production of discovery under a protective order, but nonetheless abandons the case before the defendant files an answer. It would also require a party who had such pressing need to use the other side's confidential materials as to justify breaking the bargain under which those materials were turned over, but who somehow could not manage to bring that request until after the case was dismissed, and any pressing need for the material had passed.

Such circumstances have never arisen to the circuit level before this case. They arise here only because of a worldwide temporary restraining order necessitating years of worldwide discovery before Petitioner ever answered, changes in the governing law that rendered Respondents' case virtually worthless, and a defendant whose only remaining goal after escaping criminal liability is harassing her opponents. Those circumstances are unlikely to ever arise again.

And as rare as requests for post-dismissal modifications might be, it is rarer still for district courts to grant those requests, because parties can rarely demonstrate such pressing need to disclose confidential discovery materials as to justify breaking the bargain under which those materials were turned over, especially after the case has ended and the controversy between the parties is over. Petitioner presents only one case, *Poliquin*, in which a party in her shoes secured any kind of change to a protective order. And it was a minor victory: the court of appeals did no more than withdraw confidentiality over items that were actually entered into evidence at trial and did not roll

back protections the parties had relied upon in conducting discovery. 989 F.2d at 530, 532-534. So rare are such modifications that the distinction between dismissing them on the merits and dismissing them on jurisdictional grounds is immaterial.

Indeed, the jurisdictional and merits inquiries are close cousins. Both majority and dissent below, for example, considered the same basic facts to be dispositive, including the absence of evidence of fraudulent inducement, misconduct, or other undue advantage. *Compare* Pet. App. 18 with *id.* 31 (Grant, J., dissenting). They simply viewed those dispositive facts through different lenses. It is therefore no surprise that when parties have asked this Court to address similar issues involving district courts' authority to address protective orders after judgment, the Court has passed. *Springs* v. *Ally Fin. Inc.* (No. 17-70) (concerning whether federal district courts possess jurisdiction to issue "a new protective order * * * after judgment"). The Court should similarly pass on the academic and non-recurring version of that question presented in this case.

2. In keeping with the narrow issue presented in this case, the court of appeals' resolution of that issue was appropriately narrow. The court below did not declare that district courts always lack power to issue post-dismissal modifications to protective orders. The court of appeals instead confined its analysis to a particular procedural posture, a unilateral dismissal under Rule 41(b)(1)(A)(1), and its analysis turned on a balancing of equities and risks of abuse specific to the particular parties and particular facts of this case. Indeed, the dissent criticized the majority for being *excessively* focused on "the facts of this case," Pet. App. 28. (Grant, J., dissenting), reason enough to conclude

that the case has no broader implications for anyone beyond the parties.

3. This Court's review is also unwarranted because no decision the Court might reach on the Question Presented will affect the case's eventual outcome. Before the court below decided that the district court lacked jurisdiction to modify the protective order at issue in this case, both the magistrate judge and the district court had assumed that this power existed but declined to exercise it. In the event of any remand, there is already one vote to affirm that result from the dissent, and there is every reason to believe the majority would add their votes.

Petitioner's request could only be granted for "good cause," the district court's denial of that request is subject to deferential "abuse of discretion" review, Pet. App. 30 (Grant, J., dissenting) (quoting *Carrizosa* v. *Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1249, 1250 (11th Cir. 2020)), and Petitioner makes a singularly uncompelling case for disturbing that ruling. The modification Petitioner seeks, allowing her to retain Respondents' confidential documents indefinitely for a criminal proceeding unlikely to occur, puts Respondents at grave risk, threatening disclosure of materials Respondents are obliged to keep private under Cayman Islands law, and other materials that Respondents turned over under an expectation that they would remain confidential under mutually agreed upon terms. Dkt. No. 2:14-cv-00328 (M.D. Fla.), ECF No. 692, at 28-29.

Petitioner's accusations of misconduct by Respondents (at 12, 13) still have no factual basis, and turn on credibility determinations that the lower courts have already weighed and found wanting. Pet. App. 45, 58. Petitioner's allegations of "fraud in the inducement" are similarly

baseless. While Petitioner continues accusing Respondents of hiding their private Swiss criminal complaint from her (*id.* 14), she cannot explain why the supposed deception matters, when Petitioner has known for decades that the Swiss authorities were pursuing her, and nothing prevented her before dismissal from obtaining the modification she seeks now.

Moreover, Petitioner's true purpose in seeking to retain and use Respondents' documents is as insidious as it is obvious: She hopes to harass and embarrass Respondents by disclosing confidential information about their investors in a spate of tit-for-tat retaliation simply because Respondents have cooperated with authorities' attempts to investigate her assets. Pet. 7, 9, 11, 12. That is why every judge to have considered this case agrees that the protective order should remain intact and unchanged, and why those judges would reach the same result on remand. Review would be pointless.

C. The court of appeals' decision is correct.

1. Review is also unwarranted because the Eleventh Circuit got this singular case exactly right by straightforwardly applying this Court's precedent.

"Federal courts are courts of limited jurisdiction." *Kokkonen*, 511 U.S. at 377. "They possess only that power authorized by the Constitution and statute, * * * which is not to be expanded by judicial decree." *Ibid.* *Cooter & Gell* confirms that dismissal under Rule 41(a)(1)(A)(i) deprives district courts of any authority to act absent some specific power that is retained. But Petitioner cannot identify any specific post-dismissal power that allows district courts to modify protective orders.

2. Protective orders are not found in *Cooter & Gell*'s list of "collateral" issues that district courts may consider "after an action is no longer pending." 496 U.S. at 395. And Petitioner offers no reason those categories should be stretched to include them. Rule 26(c), the source of a district court's power to make—and break—protective orders, contains nothing like Rule 11's textual imperative indicating that the power to award sanctions should live on after a case dies. *Cooter & Gell*, 496 U.S. at 385. Nor, for that matter, is a district court's authority to modify protective orders anything like the other categories of "collateral" issues *Cooter & Gell* identifies, which are considered collateral because they are completely "independent proceedings supplemental" to the original lawsuit, are "not a part of the original action," and do not involve "request[s] for a modification of the original decree." *Id. at* 396 (quoting *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939)).

Motions to modify protective orders have none of these characteristics. A district court's protective-order-related authority is tied to a "pending" action, Fed. R. Civ. P. 26(c), meaning that it necessarily expires when the action "is no longer pending," *Cooter & Gell*, 496 U.S. at 395. This is because a court's discovery-related powers "cannot be more extensive than its jurisdiction." *U.S. Cath. Conf.* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). And motions to modify protective orders cannot be considered "independent" of the dismissed case when they are necessarily tied to a previous order issued in the case—an order that formed an integral part of the discovery conducted in that case. That is not independent. That is *dependent.*

And despite what the dissent below maintains, it does not matter whether a motion to modify a protective order has anything to do "with the merits" of the dismissed case. Pet. App. 25. While an issue cannot be "collateral" if it involves "requests for modification of the original decree," *Cooter & Gell*, 496 U.S. at 395, or judges the "merits" of the previous action—this independence from the merits is but a necessary, not sufficient, characteristic defining a collateral issue. The *absence* of interference with the merits of the dismissed lawsuit cannot convey *positive* authority to act. Accordingly, the touchstone for determining whether an issue is "collateral" is not merely whether it steers clear of the dismissed case's merits, but whether it provides a new authority to replace the old one that lapsed. And that authority is something that Rule 26 simply does not provide. Modification of protective orders is therefore not a "collateral" issue that a court can consider after a Rule 41(a)(1)(A)(i) dismissal.

3. Post-dismissal modifications of protective orders also cannot be considered a proper exercise of a district court's "ancillary" or "inherent" jurisdiction. As *Kokkonen* explained, and Petitioner ignores, the option of invoking a court's "ancillary" jurisdiction is available only when "the dismissal is pursuant to Rule 41(a)(1)(A)(ii)," because the parties can "agree" in a stipulated dismissal under clause (ii) to hold a certain matter open. 511 U.S. at 381. But nothing affords the plaintiff that option in a voluntary dismissal under clause (i) of the Rule. And in any event, Respondents did not try, so any such authority was not invoked.

4. That is why the Petitioner's attempted analogy to "injunctions" falls flat. Pet. 21 n.5. Courts certainly have the power to modify permanent injunctions—even years

after the dismissal of the proceeding in which they were entered. But that is not because of anything inherently important about injunctions. Rather, courts have continuing, post-dismissal power to modify injunctions because the injunction is included in a final "decree," giving the district court ancillary jurisdiction, and a power of "'continuing supervision'" over the injunction. *Sys. Fed'n No. 91 Ry. Emp. Dep't, AFL-CIO* v. *Wright*, 364 U.S. 642, 647 (1961). For similar reasons, it might seem natural for courts to reach for an injunction analogy in cases involving attempts to modify protective orders after stipulated dismissals under clause (ii) of Rule 41(a)(1)(A)—because the mechanism of a stipulated dismissal affords parties the option of invoking that same ancillary jurisdiction. Pet. 17 (citing *Polquin*, *supra*). But that analogy is not so natural for cases under clause (i) of Rule 41(a)(1)(A). It is forced. And the Court should reject the notion underlying Petitioner's argument that district courts' post-dismissal power to modify injunctions, like the power to modify protective orders, exists simply because it *must* exist. The very idea is antithetical to the limited jurisdiction of the federal courts. If the power needs to exist, then Congress will provide for it, or this Court can amend the Federal Rules of Civil Procedure to allow for it. But the Court should not stretch the ancillary jurisdiction of the federal courts by "judicial decree" simply because Petitioner wants it to do so. *Kokkonen*, 11 U.S. at 377.

5. Indeed, it is hardly essential that district courts possess authority to modify protective orders long after the lawsuits that produced them are dismissed, the parties' controversy is over, and any basis for the district court's jurisdiction has lapsed. To the contrary, it is essential that this power *expire*.

Parties that exchange their most sensitive secrets under a protective order have every expectation that those documents will remain confidential forever. "[I]t * * * is presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied." *S.E.C.* v. *TheStreet.Com*, 273 F.3d 222, 230 (2d Cir. 2001). Moreover, "for protective orders to be effective, litigants must be able to rely upon them." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 499-501 (1991). If parties cannot have faith that protective orders will permanently secure their secrets on the back end of a case, they will be less willing to rely on them at the front end. Forcing parties to stipulated protective orders to bear a long-tail risk of modification will undermine the trust in protective orders that is so necessary to facilitate complex discovery and will force litigants to chart their course "through discovery cautiously and belligerently, to the detriment of the legal system." *Ctr. for Auto Safety* v. *Chrysler Grp., LLC*, 809 F.3d 1092, 1109 (9th Cir. 2016) (Ikuta, J., dissenting). Accordingly, ensuring that courts' ability to modify protective orders dies with the litigation with which they are associated actually protects, rather than undermines, "the judiciary's interest in maintaining a robust and fair discovery process," despite what the dissent feared. Pet. App. 24.

6. Nor will preventing post-dismissal modification of protective orders render them only "'marginally enforceable,'" as Petitioner and the dissent fear. Pet. 24 (quoting Pet. App. 29). *Cooter & Gell* made clear that, unlike the power to *modify* orders, the power to *enforce* orders, including through disciplinary measures like sanctions,

costs, and fees, is a "collateral" matter that district courts may entertain even after a Rule 41(a)(1)(A)(i) dismissal.

Furthermore, the worries about unfairness and abuse raised by Petitioner and the dissent are unfounded. Pet. 24; Pet. App. 29. Neither Petitioner nor the dissent can identify what specific "unanticipated consequences" might require a protective order's confidentiality restrictions to be relaxed after the close of a case. Pet. 24 (quoting Pet. App. 29). Nor can they identify what advantages—beyond a justified expectation of secrecy—a party might "lock in" by cutting off the district court's authority to modify a stipulated protective order through dismissal. *Ibid.* Moreover, whatever "advantages" a party obtains through such a protective order are voluntarily given. Parties to a stipulated protective order must accept the risk, as parties to every contract do, that circumstances might render their bargain a bad one. Any unfairness resulting from these voluntary bargains cannot justify breaking them.

Nor should Petitioner's concerns for those other than the parties to the protective order carry any weight. The likelihood that "media organizations" (at 6, 25) would need to modify protective orders long after a case is dismissed is low, because "[t]he newsworthiness of a particular story is often fleeting." *Grove Fresh Distribs., Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). Such ephemeral concerns cannot justify forcing parties to be subject to permanent risk that their secrets will be publicly disclosed. And Petitioner's concerns for "public or government investigatory bodies" (at 5) is not only hollow, given Petitioner's repeated attempts to stymie law enforcement, but unnecessary. As Petitioner is well aware, most protective orders have carve-outs allowing for disclosure to law enforcement, and even absent such carve-outs, "[i]n the

vast majority of cases, a protective order should yield to a grand jury subpoena." *In re Grand Jury Subpoena*, 286 F.3d 153, 162 (3d Cir. 2002). Law enforcement officials have no need to be able to permanently modify protective orders.

Ultimately Petitioner admits that the only real beneficiaries of rules subjecting protective orders to permanent post-dismissal modification are those who would do harm to those the protective order protects. Pet. 5, 20. Protective orders certainly do keep information confidential that cannot be obtained elsewhere. That is the general idea of confidential information. And parties in litigation and others might find advantage in obtaining that confidential information in search of things they can use to damage opponents, or to avoid the expense of obtaining those materials in discovery themselves. Pet. 5. But the purpose of discovery is to enable parties to obtain material "which is relevant to the subject matter in the *pending* action" not to grease the evidentiary wheels for *other* litigation. Fed. R. Civ. P. 26(b). And any efficiencies gained in avoiding "duplicative and costly litigation" and saving "time, money, and effort" are not worth upsetting parties' legitimate expectation of permanent secrecy. *Id.* 25.

7. In the end, if a provision in a protective order becomes a real problem, the parties need only avail themselves of the ultimate stopgap for amending a bad protective order: Rule 60, which allows district courts to afford "relief" from an "order" for up to a year after the order is entered, even after judgment. Fed. R. Civ. P. 60(b) & (c). The requirements for relief under Rule 60 are strict, because they should be strict. But the availability of Rule 60 removes any need to stretch the boundaries of district court jurisdiction by sheer judicial force. Accordingly,

there is great upside, and little downside, to allowing a district court's power to modify a protective order to die with the litigation that produces it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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