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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents an unambiguous split among the circuits. The dissenting member of the panel below observed as much, and nothing in Respondents' opposition brief shows otherwise. Instead, Respondents make four unavailing arguments in opposition to the petition.

First, Respondents attempt to explain away the split among the circuit courts that have considered the question presented. Respondents do so by arguing that a subset of the contrary decisions issued by other circuits addressed the issue of intervention and did not meaningfully consider whether a district court can entertain a post-dismissal motion to modify a protective order. Respondents also argue that a smaller subset of the contrary circuit court decisions are distinguishable because they involved documents in court files. Respondents further argue that all of the contrary circuit court decisions cited by Petitioner are distinguishable because they involved settlements.

These arguments are unavailing. The contrary circuit court decisions that Respondents attempt to distinguish as intervention-centric did address the jurisdictional question presented here. Respondents' claim that a smaller subset of contrary circuit court decisions can be distinguished because "this case does not involve documents in court files" likewise fails, as the holdings of all but one of those cases were not tied to the district court's physical possession of the relevant documents. Respondents' attempt to distinguish

all of the contrary circuit court decisions on the basis that they involved settlements fares no better, as none of those cases tethered its jurisdictional conclusion to the fact of a prior settlement. Thus, none of these purported distinctions diminishes the clear split that warrants this Court's review.

Second, Respondents argue that review is unwarranted because the issue presented is "non-recurring" and because Petitioner cannot show good cause for the requested modification. These arguments fail as well. In fact, the case law shows that the question presented here is neither unprecedented nor unlikely to recur. Likewise, Respondents' assertions regarding the merits of Petitioner's modification request have no support in the record, which demonstrates that Petitioner still faces a real prospect of defending herself against currently stayed Swiss proceedings in which Respondents are the only named plaintiffs.

Third, Respondents assert that this Court's precedents "straightforwardly" apply to the question presented. This claim wilts under scrutiny. Rather, *none* of the precedents cited by Respondents answers the jurisdictional question presented here, and none of the contrary circuit court decisions discussed in the petition cites those precedents.

Finally, Respondents argue policy, asserting that the ruling below must stand lest litigants lose faith in the reliability of protective orders. Respondents' concern is unfounded. Rather, sound policy rationales favor a rule that does not categorically bar trial courts

from entertaining post-dismissal motions to modify a protective order.

In sum, the petition presents a clear circuit split on an exceptionally important issue. The Court should grant the petition.

ARGUMENT

I. There Is a Clear Split Among the Circuit Courts on the Question Presented.

The circuit courts are divided on "the question in this case[, which] is whether a district court's post-voluntary-dismissal jurisdiction further extends to a motion to modify a protective order." App. 16a. The petition recounts the conflicting conclusions on each side of the split. Pet. 16-22.

In the face of this clear split, Respondents stress purported factual or procedural distinctions between the relevant cases. First, Respondents argue that a subset of the contrary decisions issued by other circuits primarily addressed the issue of intervention and therefore did not meaningfully consider whether a district court possesses jurisdiction to entertain a post-dismissal motion to modify a protective order. Opp. 14-15 (citing, *inter alia*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042 (D.C. Cir. 1998); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992)).

This argument does not withstand scrutiny. *Beckman* unambiguously addressed the jurisdictional question that Respondents claim the Ninth Circuit did not confront. 966 F.2d at 473 ("[I]ntervenors. . . . ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order. *For that reason, no independent jurisdictional basis is needed*.") (emphasis added). The same is true of *Pansy*, 23 F.3d at 779 (siding with courts that "allowed intervention by parties *for the limited purpose of modifying a confidentiality or protective order even after the underlying dispute between the parties has been settled*") (emphasis added) (citations omitted), and of *Children's Center*, 146 F.3d at 1047 (because movant sought intervention "to challenge the entry of an order of confidentiality, the general requirement of an independent jurisdictional basis would not prevent the district court from granting her motion").

Second, Respondents argue that a smaller subset of the contrary circuit court decisions is distinguishable because those cases involved "documents in court files." Opp. 16 (citing *Gambale v. Deutsche Bank AG*, 337 F.3d 133, 145 (2d Cir. 2004); *Children's Ctr.*, 146 F.3d at 1044; *Meyer Goldberg Inc. of Lorain v. Fischer Foods, Inc.*, 823 F.2d 159, 160 (6th Cir. 1987)). However, this description appears inaccurate with respect to *Meyer Goldberg*, in which the movant sought access to "tape recordings *in possession of counsel*." 823 F.3d at 161 (emphasis added).

Nor does this argument distinguish *Children's Center*, as nothing in that decision tied its legal

conclusion to the trial court's possession of the relevant documents. In fact, in that case, the movant "sought intervention so that she could obtain access to the documents under seal *and to the depositions covered by the protective order*." 146 F.3d at 1044 (emphasis added). The court's use of the conjunctive "and" in that phrase implies that the second category of documents—*i.e.*, "the depositions covered by the protective order"—were not "under seal." *Id*. The court's holding extended to both categories of documents, *id.* at 1048-49, indicating that its rationale was not tied to the trial court's physical possession of the records sought by the movant.

Finally, Respondents attempt to distinguish all of the contrary circuit court authorities cited by Petitioner and by the dissenting member of the panel below on the basis that all of those decisions "turned on . . . a court's power to supervise settlements." Opp. 16. Respondents assert that the settlement of a matter has special significance to the question presented here because "[d]istrict courts normally retain ancillary jurisdiction over a matter by express[ ] reserv[ation] in the judgment." *Id*. (citing *Kokkonen v. Guardian Life Ins. of America*, 511 U.S. 375 (1994)) (internal quotation marks omitted). It is exclusively this species of "ancillary jurisdiction," Respondents claim, that "courts retain after a stipulated dismissal that gives district courts jurisdiction to modify protective orders." *Id*.

This argument is unavailing. None of the circuit court decisions cited in the petition and by the

dissenting member of the panel below tethered its legal conclusion to settlement-derived jurisdiction. *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) ("[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.") (citation omitted); *Gambale*, 337 F.3d at 140-41; *Pansy*, 23 F.3d at 779-80; *Beckman*, 966 F.2d at 473; *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (11th Cir. 1990); *Children's Ctr.*, 146 F.3d at 1047. Thus, Respondents' theory does not distinguish any of these contrary circuit court decisions.

II. This Case Is an Appropriate Vehicle for Resolving the Question Presented.

Respondents argue that the question presented is "non-recurring" and that this case presents a poor vehicle because Petitioner's modification request lacks merit. Both arguments are baseless.

First, Respondents argue that the Court should decline to review the jurisdictional question presented because it is "non-recurring," as motions for "post-dismissal modifications of protective orders are exceedingly rare" and "parties can rarely demonstrate such pressing need to disclose confidential discovery materials as to justify" modification of a protective order. Opp. 18, 19.

Respondents cite no authority for this claim. Rather, as Respondents concede, *Poliquin* is another case in which a party sought and received a post-dismissal

modification of a protective order. *See* 989 F.2d at 533-34, 535. It is not uncommon for third parties to seek such modifications. *See*, *e.g.*, *Pansy*, 23 F.3d at 779; *Children's Center*, 146 F.3d at 1047; *Beckman*, 966 F.2d at 470.

Moreover, federal courts commonly confront related situations in which a party seeks and obtains pre-dismissal modification of a protective order to access discovery for use in foreign litigation between the same entities. *See*, *e.g.*, *In re Jenoptik AG*, 109 F.3d 721, 722-24 (Fed. Cir. 1997) (citing *Beckman*, 966 F.2d at 475); *Insituform Techs., Inc. v. Amerik Supplies, Inc.*, No. 1:08-cv-333-TCB, 2015 WL 13064917, at *3 (N.D. Ga. May 13, 2015); *Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 2-3 (D.D.C. 2005) (citations omitted). Thus, disputes like the instant litigation are neither unprecedented nor unlikely to recur.[1]

Second, Respondents argue the merits of Petitioner's modification request, asserting—without support—that the foreign criminal proceedings Respondents have spent years attempting to instigate against Petitioner are "unlikely to occur." Opp. 21.[2]

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[1] Even if such disputes were unlikely to recur often, review would be appropriate here to correct the erroneous legal rule devised by the Eleventh Circuit.

[2] Respondents' brief is replete with patently inaccurate factual claims devoid of record support. Respondents assert, for instance, that Petitioner "l[ied] repeatedly to investigators and courts," Opp. 3, but the authority they cite for that claim says no such thing. Many of the other purported facts Respondents cite are merely allegations drawn from Respondents' *own* unadjudicated complaint. *E.g.*, Opp. 2 (alleging "divorce was a sham" and

Respondents also assert—without support—that they are "at grave risk" of suffering some unidentified harm under Cayman Islands law should Petitioner obtain the modification she seeks, *id*., and that disclosure of the documents at issue may "embarrass Respondents." *Id*. at 22.

These claims have no support in the record. Rather, the record shows that Petitioner is the only putative defendant named in the private Swiss criminal complaint Respondents filed just days before they filed this action. Pet. 8. Respondents do not dispute this, nor that they did not reveal this fact to Petitioner until after they negotiated the protective order at issue here. *Id*. Nor do Respondents deny that in 2019, their private Swiss criminal complaint was transferred to a file associated with a new Swiss proceeding in which Respondents are identified as the plaintiffs, in which Petitioner is the only named target, and which remains pending. *Id*. at 8-9. These undisputed facts show that Petitioner still faces a real prospect of being forced to defend herself against these currently stayed Swiss proceedings. *Id*.

Respondents also assert that they are "at grave risk" of suffering unidentified harm under Cayman Islands law should Petitioner obtain the modification she seeks. Opp. 21. Respondents offer no support for this claim and the Court therefore need not credit it. *See*, *e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535

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citing majority opinion below, which in turn cited Respondents' "alleg[ations]" regarding divorce).

U.S. 425, 438 (2002) (declining "to accept respondents' speculation" where they failed to "provide evidence"). Nor does Respondents' fear of "embarrass[ment]," Opp. 22, show that Petitioner's modification motion lacks merit. *E.g.*, *Poliquin*, 989 F.2d at 533 ("[C]ommercial embarrassment is not a 'compelling reason' to seal a trial record."). Similarly, Respondents' desire to hobble Petitioner's defense in future Swiss proceedings is not a legitimate consideration disfavoring modification. *United Nuclear*, 905 F.2d at 1428 ("Defendants' desire to make it more burdensome for Intervenors to pursue their collateral litigation is not legitimate prejudice.") (citation omitted).

For these reasons, this case is an appropriate vehicle for resolving the question presented.

III. This Court's Prior Decisions Do Not Answer the Question Presented.

Respondents argue that this Court's prior decisions apply "straightforwardly" to the question presented. Opp. 22-24. This argument fails.

First, neither of the purportedly dispositive precedents identified by Respondents—*Kokkonen* and *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1991)—even mentions the ability of district courts to consider motions to modify protective orders. Thus, their applicability to this case is hardly "straightforward[]."

Moreover, neither of those decisions is cited in any of the contrary circuit court opinions referenced in the

petition and in the dissenting opinion below. This is so despite the fact that *Cooter & Gell* preceded *Poliquin*, *Gambale*, *Pansy*, *Beckman*, and *Children's Center*.

Respondents place even more emphasis on *Kokkonen*. Opp. 16-17, 24. For instance, Respondents cite *Kokkonen* for their claim that "[d]istrict courts normally retain ancillary jurisdiction over a matter by '"express[ ] reserv[ation]"' in the 'judgment.'" Opp. 16 (quoting *Kokkonen*, 511 U.S. at 379). *Kokkenen* says no such thing, nor does it otherwise support Respondents' far-reaching assertions regarding the centrality of settlement to the jurisdictional question presented here. Rather, *Kokkenen* observed that the contours of ancillary jurisdiction are considerably broader and less clear than Respondents suggest:

> Generally speaking, we have asserted ancillary jurisdiction . . . for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. . . .

511 U.S. at 379-80 (citations omitted).

Moreover, the question *Kokkonen* confronted is clearly distinct from that presented here. In *Kokkonen*, the "respondent moved in the District Court to enforce" a settlement agreement that had resolved prior litigation in which the petitioner had asserted state-law

claims against the respondent. *Id.* at 376-77. This Court held that the district court lacked jurisdiction over the respondent's enforcement motion, which it described as "a claim for breach of a contract, part of the consideration for which was dismissal of an earlier suit." *Id*. at 381. "[E]nforcement of the settlement agreement," the Court explained, "is for state courts, unless there is some independent basis for [federal] jurisdiction." *Id*. at 382. This rationale is not applicable to the instant case, in which Petitioner could not have turned to any state court to seek a modification of the district court's protective order. *See* App. 28a, 30a (Grant, J., dissenting) (noting that one of the "practical problems" inherent in the rule articulated by the majority is that "whatever else *state* courts can do, they cannot modify a *federal* protective order, no matter how necessary it becomes").

Furthermore, *Kokkonen* did not—contrary to Respondents' assertions—hold that a district court's explicit retention of jurisdiction over a settlement agreement is the sole source of post-dismissal ancillary jurisdiction. Rather, *Kokkonen* acknowledged that a district court may exercise ancillary jurisdiction in other situations, such as where appropriate "to permit disposition by a single court of claims that are . . . factually interdependent," or where necessary to "function successfully," which includes "manag[ing the court's] proceedings." 511 U.S. at 379-80 (citations omitted).

Thus, it is plain that *Kokkonen* does not "straightforwardly apply[]" here.[3]

That *Kokkonen* does not "straightforwardly" control this case is clear also because two of the circuit court decisions cited in the petition were issued years after *Kokkonen* but do not cite it. *See Gambale*, 377 F.3d 133; *Children's Ctr.*, 146 F.3d 1042. (Respondents incorrectly assert that "[a]ll but one of Petitioner's cases—*Gambale*—were decided before *Kokkonen*." Opp. 17.) The majority opinion below also failed to cite *Kokkonen*, which belies Respondents' claim that it clearly controls here. Finally, even if Respondents' reading of *Kokkonen* were correct, it would cut in *favor* of the Court accepting review to reconcile that decision with the string of contrary circuit court cases.

In short, this Court's prior decisions do not "straightforwardly" answer the question presented.

IV. Policy Considerations Favor Review.

Finally, Respondents argue policy, asserting that the ruling below must stand lest litigants lose faith in the reliability of protective orders. Opp. 25-28. This argument, too, in unavailing.

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[3] Respondents cite *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009), a case decided on the issue of third-party standing, to argue that *Kokkonen* controls. Opp. 16-17; 585 F.3d at 1065. Yet *Bond* clearly is distinguishable, as it explicitly tied its holding to the fact that *none* of the parties had sought post-judgment modification of the protective order. *Id*. at 1072.

First, Respondents' professed fear that reversal "will force litigants to chart their course through discovery cautiously and belligerently," *id*. at 26 (citation and internal quotation marks omitted), proves too much. As the record shows, Respondents approached many aspects of discovery belligerently and cautiously, and did so with the apparent expectation that Petitioner could *not* seek post-judgment modification of the protective order. It was Respondents—not Petitioner—who refused to be deposed during the proceedings below and who—after years of litigation during which they carefully acquired the confidential discovery they subsequently sent to their Swiss allies—voluntarily dismissed this suit just one week after they were ordered to submit to what would have been their first deposition in the case. Pet. 12-13. Thus, Respondents' incentives argument rings hollow.

Second, contrary to Respondents' assertions, one need not look far for examples of circumstances that merit modification of a protective order entered in a dispute between parties involved in litigation on multiple fronts. *See*, *e.g.*, *Jenoptik*, 109 F.3d at 722-24; *Insituform*, 2015 WL 13064917, at *3; *Infineon*, 247 F.R.D. at 2-3.

The importance of press freedoms also favors the jurisdictional rule embraced by the First, Second, Third, Ninth, Tenth, and D.C. Circuits. *See*, *e.g.*, *Pansy*, 23 F.3d at 792. Efficiency considerations likewise cut in favor of the majority rule. *E.g.*, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 861 (7th Cir. 1994) (citation omitted); *United Nuclear*, 905 F.2d at 1428.

In short, policy considerations weigh in favor of review so that the Court can consider whether the diverse interests implicated by the question presented merit reversal or uniform adoption of the jurisdictional bar devised by the Eleventh Circuit.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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