No. 20-1599

IN THE
# Supreme Court of the United States

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

*Petitioners*,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,

*Respondent*.

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

## BRIEF FOR *AMICI CURIAE* CIVIL PROCEDURE LAW PROFESSORS IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE[1]

*Amici Curiae* are professors of civil procedure at law schools throughout the United States. Amici have no personal interest in the outcome of this case but write to share their professional views regarding the need for this Court's review given the circuit conflict created by the decision below on discovery practice and procedure.

Seth Katsuya Endo is an assistant professor of law at the University of Florida Levin College of Law.[2] Professor Endo teaches, researches, and publishes on civil procedure, including a recent study on federal courts' treatment of proposed stipulated protective orders in *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249 (2020).

Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law. She is a co-author of a leading civil procedure casebook and teaches civil procedure and federal jurisdiction.

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

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David I. Levine is the Raymond Sullivan Professor of Law at the University of California Hastings College of the Law. He is the coauthor or coeditor of multiple books and articles on civil procedure and teaches civil procedure and remedies.

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Beth Stephens is a Distinguished Professor of Law at Rutgers Law School. She teaches, researches, and publishes on issues of federal civil procedure.

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## SUMMARY OF ARGUMENT

For both good and ill, stipulated protective orders are an important and widely used part of modern civil litigation. Among other things, they allow courts and litigants to streamline discovery procedures and establish confidentiality protocols while minimizing the burden on courts. Despite the practical significance of such orders and their use in a broad

range of cases, the case law on stipulated protective orders is deeply fractured and this split has significant consequences for litigants.

The Federal Rules do not distinguish between protective orders that are the result of consensus (*i.e.*, stipulated) versus contest (*i.e.*, litigated). Both require a finding of "good cause" by a court prior to entry. Nevertheless, in the opinion below, the Eleventh Circuit asserted that stipulated protective orders are entered without such a finding, and from that assertion held that when faced with a motion to modify such protective orders, the party seeking to *maintain* the status quo bears the burden of showing good cause to do so. In so holding, the Eleventh Circuit distinguished stipulated protective orders from those entered as a result of litigation; as to the latter, the party seeking to modify the protective order bears the burden of establishing good cause.

The Eleventh Circuit's decision deepens a circuit split. In contrast to the court below, the Second, Third, and Seventh Circuits all take the opposite approach. In those circuits, a movant *always* bears the burden of justifying modification, regardless of whether the protective order originally was stipulated or disputed. Disagreement on where burden properly lies is likewise evident in the Ninth Circuit and throughout district courts in other circuits.

The Eleventh Circuit also misconstrues the Federal Rules of Civil Procedure. Rule 26(c) does not except any kind of protective order from the "good cause" requirement. Nor does that Rule contemplate a divide between stipulated and disputed protective orders, or a basis for disputed protective orders to

offer more significant protection to litigants than stipulated ones.

This case has important implications for the public, litigants, and courts. First, if courts may enter stipulated protective orders without first making a finding of good cause, the common-law public right of access may be impinged. Second, the decision deepens a circuit split as to the standards for dealing with stipulated protective orders. Litigants, especially in multidistrict litigation, now face conflicting standards regarding the protections afforded their sensitive information. Litigants in ordinary cases also face uncertainty and confusing incentives. If parties are unable to rely on stipulated protective orders to the same extent as disputed ones, they may be reluctant to negotiate protective orders in the first place, for fear that their protections may prove illusory only after an important disclosure or production already has been made. Or parties may manufacture disputes at the outset simply to obtain a more ironclad protective order that bears the "right kind" of judicial imprimatur. Both outcomes would be bad for courts, which will be asked to litigate discovery disputes that might otherwise have been avoided.

The divergence in case law, widespread and recurring nature of the issue, and practical significance for litigants and courts all support the need for this Court's review.

## ARGUMENT

### I. This Case Raises An Important, Recurring Issue That Is Not Being Uniformly Addressed In Lower Courts

Stipulated protective orders are a longstanding and broadly used tool in civil litigation. See generally Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1252 & n.9 (2020) (surveying use of such orders). Our system affords litigants significant power to gather information—a power that routinely is directed toward information deemed sensitive or confidential by the party holding it. When combined with the presumption that litigation should be transparent, litigants are often confronted with the possibility that their most private information might become known not only to an opposing party but to the public, as well.

One common procedural mechanism for counterbalancing this aspect of discovery is the protective order. See, *e.g., Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-35 (1984). And because most litigants tend to have a common interest in shielding their own information from public scrutiny, many protective orders are entered into by stipulation rather than by contested motion. See, *e.g.*, Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 2 (1983). When parties agree on terms, "[i]t is common for parties to present to the court a stipulated protective order for the court to sign." Robert Timothy Reagan, *Confidential Discovery: A Pocket Guide on Protective Orders*, Fed. Jud. Cntr 6 (2012); *see also* 8A Charles Alan Wright & Arthur R. Miller, Federal Practice &

Procedure § 2035 (3d ed. 2021) ("Protective orders have often been sought by agreement"); Pet. 20 ("the majority of protective orders are stipulated to, at least in part.").

The Federal Rules proscribe a standard by which courts should evaluate the need for protective orders: "good cause." Fed. R. Civ. P. 26(c)(1). The Rules, however, do not expressly differentiate between stipulated and contested protective orders, nor do they provide a standard by which courts should evaluate requests to modify or withdraw protective orders of any kind after they have been entered.

While all of the circuits place a burden of showing good cause on the party seeking to modify or withdraw a protective order that was entered pursuant to a *contested* motion, the Petition ably demonstrates that Courts of Appeals have taken different and conflicting approaches to requests to modify or withdraw *stipulated* protective orders.

The Eleventh Circuit, in the ruling below, held that "the party seeking continued protection from the stipulated order (i.e., the party opposing the modification)" has "the burden of establishing good cause" when faced with a motion to modify. *In re: Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1250 (11th Cir. 2020) (per curiam). However, "when a court enters a *disputed* protective order," the party "moving to modify the protective order bears the burden to establish good cause." *Id.* This holding, which the Eleventh Circuit described as "a bright-line rule," treats all stipulated protective orders as "umbrella" protective orders—*i.e.*, those that permit parties to designate certain types of discovery materials as

confidential and are entered without a particularized showing of need for the protection of specific information—and, thus, differs sharply from other Circuit precedent.

By contrast, the Second, Third, and Seventh Circuits have all held that the *movant* bears the burden of showing good cause to modify a stipulated protective order, although with variations on the nature of the burden. The Second Circuit, without distinguishing between disputed and stipulated protective orders, has explained that a movant's "required showing must be more substantial than the good cause needed to obtain a sealing order in the first instance." *Geller* v. *Branic Int'l Realty Corp.*, 212 F.3d 734, 738 (2d Cir. 2000). As "a witness should be entitled to rely upon the enforceability of a protective order," the Second Circuit explained, modification is only appropriate upon "a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Id.* (internal quotation marks omitted); see also *SEC* v. *TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (same).

The Seventh Circuit, similarly, has found that "the party seeking modification [] has the burden of showing good cause to modify the protective order." *Heraeus Kulzer, GmbH* v. *Biomet, Inc.*, 881 F.3d 550, 566 (7th Cir. 2018). Although the Seventh Circuit has not embraced the Second Circuit's "extraordinary circumstance" requirement, the Seventh Circuit has held that "where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify the modification." *Am. Tel. & Tel. Co.* v. *Grady*, 594 F.2d

594, 597 (7th Cir. 1978) (per curiam); *see also Heraeus Kulzer*, 881 F.3d at 567 (describing party's burden as "even higher" because that party "agreed to the protective orders at issue").

The Third Circuit, for its part, has explained that the "party seeking to modify the order of confidentiality must come forward with a reason to modify the order." *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994). Viewing the Second Circuit's "extraordinary circumstance" standard as "too stringent," the Third Circuit holds that courts should apply "the same balancing test that is used in determining whether to grant [protective] orders in the first instance," but may consider "the reliance by the original parties on the confidentiality order" in applying this test. *Id.*

The Ninth Circuit's approach to stipulated protective orders provides yet another fracture point. While recognizing that "courts generally make a finding of good cause before issuing a protective order," the Ninth Circuit has noted that "a court need not do so where . . . the parties stipulate to such an order." *In re Roman Cath. Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011). In such an instance, "[w]hen the protective order 'was a stipulated order and no party ha[s] made a 'good cause' showing,' then 'the burden of proof * * * remain[s] with the party seeking protection.'" *Id.* (quoting *Phillips ex rel. Ests. of Byrd* v. *Gen. Motors Corp.*, 307 F.3d 1206, 1211 n.1 (9th Cir. 2002); see also *Beckman Indus., Inc.* v. *Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (describing the Second Circuit's approach as "incompatible with our circuit's law.").

In explaining its reasoning, the Ninth Circuit stated that a district court may enter a stipulated protective order without making a finding of good cause—and that, in such circumstances, the burden of modifying such a protective order would fall on the party seeking continued protection. But, unlike the Eleventh Circuit, the Ninth Circuit did not create a categorical rule that *all* stipulated protective orders would be treated as though no particularized showings of good cause had been made. Reflecting this distinction, some district courts in the Ninth Circuit have continued to make good cause findings prior to entering stipulated protective orders. See, *e.g., Oakley Inc.* v. *Nike Inc.,* No. SACV122138JVSANX, 2013 WL 12413167, at *1 (C.D. Cal. Oct. 8, 2013) (rejecting proposed protective order because "[g]ood cause must be shown even if the applicants stipulate to the issuance of the protective order."). Others, however, have seemingly relied on the language in *In re Archbishop* to enter stipulated protective orders without any such finding. See, *e.g., Ledford* v. *Idaho Dep't of Juv. Corr.*, No. 1:12-CV-00326-BLW, 2013 WL 5798682, at *1 (D. Idaho Oct. 28, 2013) (explaining that "[i]f the parties stipulate to a protective order—as they did here—the district court may enter a protective order without first finding good cause," and "[i]f a party to this stipulated protective order later wishes to release protected documents, the party opposing disclosure . . . must establish good cause to continue the protective order."). Under *In re Archbishop*, motions to modify the orders in *Oakley* and *Ledford* would be treated differently: the movant in *Oakley* would bear the burden while the party seeking to maintain the status quo in *Ledford* would bear the burden.

This jurisprudential splintering has also extended to district courts in other circuits, illustrating the breadth of the inconsistency. District courts within the Sixth and Eighth Circuits have broadly followed the approach of the Second and Seventh Circuits, referring to a "heightened" or "higher" burden, or requiring a showing of "particular" good cause or a "compelling need" for modification. See, *e.g., Premier Dealer Servs., Inc.* v. *Allegiance Administrators, LLC*, No. 2:18-CV-735, 2021 WL 266327, at *2 (S.D. Ohio Jan. 27, 2021) ("the party seeking modification may bear a heightened burden where, as here, the party seeking modification had agreed to the entry of the protective order"); *Children's Legal Servs. P.L.L.C* v. *Kresch*, No. CIV.A. 07-CV-10255, 2007 WL 4098203, at *2 (E.D. Mich. Nov. 16, 2007) ("courts often note the higher burden on a movant to justify modifying a protective order that was agreed to by the parties"); *Jochims* v. *Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992) ("where a party to stipulated protective order seeks to modify that protective order, that party must demonstrate particular good cause in order to gain relief from the *agreed to* protective order"); *Guzhagin* v. *State Farm Mut. Auto. Ins. Co.*, No. CIV. 07-4650 JRT/FLN, 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (movant "satisfied its burden by demonstrating compelling need for modification" of stipulated protective order).

Courts in the First and D.C. Circuits, meanwhile, have taken similar approaches to the Third Circuit, and simply required movants to show "good cause" for modification of stipulated protective orders. *See, e.g., Allscripts Healthcare, LLC* v. *DR/Decision Res., LLC,* 440 F. Supp. 3d 71, 78 (D. Mass. 2020) ("A party to a

stipulated protective order seeking to modify the order must demonstrate good cause for modification"); *Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft in München* v. *Northrop Grumman Risk Mgmt. Inc.*, 312 F.R.D. 686, 690 (D.D.C. 2015) ("standard for modifying" stipulated protective order is "'good cause' under Rule 26(c).")

Likewise, in the Tenth Circuit, courts have required movants to show "reasonable need" for modification, and specifically contrasted this standard to "courts requir[ing] a showing of a compelling need or extraordinary circumstance." *Brigham Young Univ.* v. *Pfizer, Inc.*, 281 F.R.D. 507, 510 (D. Utah 2012); *see also Mod. Font Applications* v. *Alaska Airlines*, No. 219CV00561DBBCMR, 2021 WL 364189, at *5 (D. Utah Feb. 3, 2021).

Taken together, these cases illustrate both the divided and uncertain nature of the jurisprudence on modification of stipulated protective orders and the ubiquity of the issue. This split is of great consequence, both to individual litigants and to the judicial system as a whole.

With respect to the former, litigants need consistent rules about protective orders in order to make informed decisions throughout the life of a litigation. Absent a protective order, a party must weigh the benefits of litigating claims with the risk of public disclosure of information that "could be damaging to reputation and privacy" or closely-guarded trade secrets. *Seattle Times*, 467 U.S. at 34-35. Litigants, accordingly, assess the possibility of obtaining a protective order and rely on entered protective orders in deciding both how to respond to

requests for discovery and whether and how to proceed with litigation at all. *See, e.g.,* Endo, 53. U.C. Davis L. Rev. at 1262-64 (noting, *inter alia*, the "low risk tolerance" for disclosure of trade secrets).

Given the practical significance of protective orders, the rules surrounding modification are equally consequential. If, as the Eleventh Circuit suggests, disputed and stipulated protective orders categorically carry different standards for modification, litigants may contest discovery terms they would otherwise not oppose in order to obtain a disputed protective order. Such an outcome would increase the burden on the judiciary, impede efficient litigation, and undermine Rule 26's directive to "in good faith confer."

Moreover, this circuit split may expose litigants to unforeseen disclosure risks while leaving them without a clear path for recourse. This is particularly evident in the context of multidistrict litigation, which has experienced a "surge" of cases. *China Agritech, Inc.* v. *Resh*, 138 S. Ct. 1800, 1811 (2018). Parties should not be required to roll the dice with respect to the standard for modification based on the district where a case is centralized and whether a request for modification is brought before or after remand to the transferee courts. *See also* Pet. at 24-25. This Court's review is needed to resolve this widespread and recurring inconsistency concerning a common tool of civil procedure.

## II. The Eleventh Circuit Erred In Treating Stipulated Protective Orders Differently Than Contested Ones

The decision below did not merely sharpen a circuit split. It is also wrong. There is no basis in law for differentiating between stipulated and contested protective orders.

Federal Rule of Civil Procedure 26(c)(1) provides that a district court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The Rules do not distinguish between disputed and stipulated protective orders, and do not create any exceptions to the requirement that a protective order be issued for "good cause."

In the decision below, the Eleventh Circuit noted that, notwithstanding the "good cause" requirement of Rule 26, "district courts often issue stipulated protective orders without finding good cause." *In re: Chiquita Brands*, 965 F.3d at 1249. The court based its modification analysis on the premise that the underlying protective order had not been subject to a good cause finding: because the "party seeking continued protection from the stipulated order (i.e., the party opposing the modification) had never established good cause for the protection in the first place," the Eleventh Circuit held, "we placed the burden of establishing good cause in the first instance on the party seeking the protection." *Id.* at 1250. Accordingly, "the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard." *Id.*

This rationale, however, runs counter to the plain text of Rule 26, as well as to a wealth of authority from other circuits and legal scholarship. There is no basis in the Federal Rules for a court to approve a stipulated protective order without conducting an independent assessment of good cause. To the contrary, "[t]hough parties often will stipulate to the entry of a discovery protective order, it is the court that ultimately must enter the order, and the court may do so only in compliance with Rule 26(c)'s good cause requirement." 1 Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary*, Rule 26 (2021 ed.). Stipulated orders "are not authorized simply on the requesting parties' say-so," as "[e]ven when the parties consent, the court may not enter an order unless Rule 26(c) is satisfied." Wright & Miller, § 2035.

Multiple courts have expressly recognized this obligation. In *Pansy*, the Third Circuit stressed that "whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order." 23 F.3d at 786. "[S]imply because courts have the power to grant orders of confidentiality does not mean that such orders may be granted arbitrarily." *Id.* at 785 (describing the "[d]isturbing" practice of courts that "routinely sign orders which contain confidentiality clauses without considering the propriety of such orders"). The Seventh Circuit has likewise explained that "[i]n deciding whether to issue a stipulated protective order, the district court must independently determine if 'good cause' exists." *Jepson, Inc.* v. *Makita Elec. Works, Ltd.,* 30 F.3d 854,

858 (7th Cir. 1994); see also *Procter & Gamble Co.* v. *Bankers Tr. Co.,* 78 F.3d 219, 227 (6th Cir. 1996) ("Rule 26(c) allows the sealing of court papers only 'for good cause shown' to the court."); *Pub. Citizen* v. *Liggett Grp., Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (a party's "privacy and litigative efficiency concerns" cannot "limit[] a district court's ability to *deny* protection under Rule 26(c), even when no good cause is shown").

Additionally, even *Chicago Tribune*—the case upon which the Eleventh Circuit purported to rely in its order below—did not hold that "[w]hen 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." *In re Chiquita Brands*, 965 F.3d at 1250 (citing *Chicago Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001) (per curiam)). The court in *Chicago Tribune* simply cited a section of the Manual for Complex Litigation that refers to umbrella protective orders in which no particularized showing of need are made. But the Manual readily acknowledges that umbrella orders can be understood as merely postponing the court's scrutiny, not eliminating it altogether. *See* Ann. Manual Complex Lit. § 11.432 (4th ed. 2004) (citing *John Does I–VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986)).

Unlike the Eleventh Circuit in the decision below, the Manual also distinguishes stipulated umbrella orders from stipulated particularized protective orders. *Id.* And, while umbrella protective orders probably are always stipulated, not all stipulated protective orders are umbrella orders. The Eleventh Circuit's misreading of *Chicago Tribune* seems to

either imagine that all stipulated protective orders are umbrella orders or that only party contestation can ensure that a district court can engage in a robust analysis as to the necessity of any protection. In so doing, the Eleventh Circuit simultaneously disregards Rule 26(c) and takes away the possibility that a district court could and would undertake the mandated good-cause analysis upon the initial application of the parties.

The good cause requirement reflects the important public role played by trial courts, as the institutions "in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times*, 467 U.S. at 36. It also safeguards "the common law's presumption of a right of access to public documents," as it allows courts to balance party showings of need with "the public's interest based on the stage of litigation." Endo, 53. U.C. Davis L. Rev. at 1283; *see also id.* at 1257. Bypassing the good cause analysis "would be tantamount to permitting the parties to control the use of protective orders," a proposal which the Judicial Conference of the United States has specifically considered and rejected. *Glenmede Tr. Co.* v. *Thompson*, 56 F.3d 476, 485, n.15 (3d Cir. 1995) (describing proposed amendment to Rule 26(c) that would permit entry of a protective order "for good cause shown or on stipulation of the parties"). Instead, "where the parties share an interest—here, in secrecy—that may diverge from that of the public, courts should not simply rubber-stamp party-proposed orders," but continue to conduct "a true independent examination." Endo, 53. U.C. Davis L. Rev. at 1254, 1286.

Enforcing the consistent application of Rule 26(c)(1) to both stipulated and disputed protective orders does not diminish other required confidentiality showings or curtail the public right of access to judicial documents. While the "good cause" standard governs protective orders concerning unfiled confidential discovery, litigants seeking to file documents under seal, for instance, must continue to meet "the vastly more demanding standards for sealing off judicial records from public view." *Shane Grp., Inc.* v. *Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016); *see also* Endo, 53. U.C. Davis L. Rev. at 1288 (describing the "common mistake of law in the entered stipulated protective orders wherein the standard for filing materials under seal is conflated with that for keeping unfiled discovery confidential."). Addressing the deepening circuit split surrounding Rule 26 and the standard for modification of stipulated protective orders will provide important clarity on a widely, but inconsistently, utilized tool of civil litigation practice.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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