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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PARTNERS IN JUSTICE INTERNATIONAL AND CENTER FOR VICTIMS OF TORTURE AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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Dated: July 8, 2021

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PARTNERS IN JUSTICE INTERNATIONAL AND CENTER FOR VICTIMS OF TORTURE

This case presents an issue of significant importance. *Amici curiae* Partners in Justice International ("**PJI**") and Center for Victims of Torture ("**CVT**") bring relevant experience concerning the implications of the decision at issue for victims of human rights violations and their families who seek judicial recourse. Petitioners' Letter of Consent to the filing of all *amicus* briefs in this matter was lodged with the Clerk of Court pursuant to Rule 37.2(a) on May 21, 2021. Counsel of Record for Petitioners and Respondent were duly notified in writing of the *amici*'s intent to submit the attached brief ten days prior to its filing. Counsel for Petitioners confirmed its consent; counsel for Respondent did not respond to *amici*'s notice. Therefore, *amici* respectfully move this Court pursuant to Supreme Court Rule 37.2(b) to file the accompanying brief in support of Petitioners.

Amici have represented and/or supported survivors of atrocity crimes and their families before U.S. courts and international tribunals. They have viewed first-hand the psychological and social damage victims and their families suffer that often deters them from seeking judicial recourse. Through their decades of experience, *amici* understand the importance of safety measures to protect the privacy of vulnerable individuals involved in legal proceedings.

The Eleventh Circuit's decision to permit revocation of confidentiality granted in a protective order to the Petitioners whose relatives were killed by paramilitary death squads and fear for their safety may put the Petitioners in danger and inhibit their access to

legal redress. *Amici*'s experience positions them to discuss the implications of this case for the benefit of the Court. *Amici* therefore seek leave to file the attached brief requesting that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Cases

International Cases

Treaties, Conventions, and Other International Legal Sources

Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1,2]

Amicus curiae Partners in Justice International ("**PJI**") is a non-profit organization working to strengthen justice processes for survivors of grave crimes such as crimes against humanity, war crimes, and genocide. PJI provides practical support to serious crime prosecutors, victim representatives, and investigators working in post-conflict and post-dictatorship jurisdictions. Its legal team has decades of experience prosecuting perpetrators and representing survivors of human rights violations and international atrocity crimes in litigation. The legal team has litigated human rights cases in U.S. courts, the Special Court for Sierra Leone ("**SCSL**"), and the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"), and has assisted local practitioners in international crimes investigation and prosecution around the world, including in Chile, Colombia, Guatemala, Kenya, Kosovo, the Philippines, South Korea, and Tunisia. PJI's legal team has first-hand experience regarding intimidation tactics of accused perpetrators of grave crimes and their associates or supporters, psychological and safety concerns of victims and their families, and litigation of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Petitioners' Letter of Consent to the filing of all *amicus* briefs in this matter was lodged with the Clerk of Court pursuant to Rule 37.2(a) on May 21, 2021. Counsel of Record for Petitioners and Respondent were duly notified in writing of *amici*'s intent to submit this brief ten days prior to its filing. Counsel for Petitioners confirmed its consent in writing; counsel for Respondent did not respond to *amici*'s notice.

numerous cases in which survivor identities were protected from public disclosure throughout the proceedings.

Amicus curiae Center for Victims of Torture ("**CVT**") is a non-profit organization dedicated to forging new ways to advance human rights and build a future free from torture. Through research, training, advocacy and healing services for survivors, each initiative CVT undertakes plays a role in building a larger vision for the torture rehabilitation movement. CVT provides a bridge between torture victims, the local community and society as a whole, working to restore the dignity of the human spirit one survivor at a time.

SUMMARY OF ARGUMENT

There are compelling reasons to grant certiorari in this case. The Eleventh Circuit's decision risks obstructing access to justice for survivors[3] of international crimes and grave human rights violations both in this case and throughout the federal judiciary.

Survivors of international crimes and grave human rights violations often participate in justice processes at great risk to themselves and to their families. Protection from public disclosure of their identities and personal information is thus often essential for their access to justice. Removing such protections, especially after they have been relied upon by litigants, risks exposing such individuals to grave

[3] "Survivors" includes family members and others with intimate relationships to the primary survivor who have suffered harm on the basis of those relationships.

harm and may deter future survivors of similar atrocities from seeking justice in a court of law.

Where the physical or psychological security of survivors of grave human rights abuses and international crimes is at risk because of litigation, survivors must be able to rely on protections they have been afforded by the courts, without fear that their personal information might later be revealed, absent a showing of good cause. Indeed, courts adjudicating international crimes and grave human rights abuses routinely order protective measures from public disclosure to safeguard the privacy and security of survivors, balancing the rights of the accused perpetrators to a public trial with the imperative to protect survivors of atrocity crimes.

Therefore, *amici* respectfully request that the Court grant the Petition for Writ of Certiorari and resolve this important question.

ARGUMENT

I. PROTECTING THE IDENTIFYING INFORMATION OF SURVIVORS OF GRAVE HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL CRIMES IS OFTEN NECESSARY FOR ACCESS TO JUSTICE

Survivors of grave human rights violations and international crimes such as torture, extrajudicial killings, forced disappearances, and war crimes, often have compelling reasons to seek protection of their identifying information in litigation against those accused of perpetrating these crimes. Protecting the identifying information of such survivors from public

disclosure is often a prerequisite for them to participate in the justice process.

It is not uncommon for survivors to be deterred from participating in the justice process because they do not want their identifying information to become public. Perpetrators of violence may employ threats and intimidation tactics to deter survivors and their families from seeking judicial recourse. Many survivors are reluctant to bring claims against perpetrators out of fear of retaliation or violence, as the Petitioners allege in the instant case. The district court in this case initially acknowledged this: "Plaintiffs' fears about retaliation from current or former members of paramilitary groups are reasonably justified." Order Den. Defs.' Joint Mot. to Dismiss 11 (Case no. 08-md-01916-Marra, ECF No. 1194).

Survivors who are severely traumatized, who have limited access to support or rehabilitation, or who live in ongoing conflict or insecurity frequently and understandably require protection against threats of physical violence, intimidation, and retaliation. *See* FIDH, ECCHR, & REDRESS, *Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes*, 15 (Sept. 2020), *available at* https://www.ecchr.eu/fileadmin/Publikationen/Breaking_Down_Barriers_EN_web_FINAL_2020-11-08.pdf. Survivors who have traveled to countries such as the United States often face different challenges—such as being far from their support structures and navigating language barriers—that leave them fearful of marginalization and stigma. *See id.*

In addition, survivors may feel anguish over having the trauma that they have experienced publicly attached to their name and perhaps other identifying information. "The stress of answering the call to testify on behalf of or against a person on trial for committing war crimes carries a burden, which manifests both physically and psychologically." Kimi King et al., *Bearing Witness: The Impact of Testifying at War Crimes Tribunals*, 4 (June 2016) *available at* http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/d584a2ff-1cb5-4380-aea9-a52a8ded1b75.pdf.

Survivors who choose to participate in any justice process without being granted privacy protection are often harmed in that process. Examples abound of witnesses being threatened by allies of the accused who believe they may appear for testimony, when witnesses travel to the courthouse, and upon their return home. *See See* Univ. of N. Tex. and Castleberry Peace Inst. et al., *Echoes of Testimonies: A Pilot Study into the long-term impact of bearing witness before the ICTY*, 61, *available at* https://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf.

Family members of survivors may also be at risk; "Threats are not only directed at witnesses personally, but may extend to family, friends, as well as property." *Id.* Even if such harms never arise, "individuals who perceive security threats are more at risk for Post-Traumatic Stress Disorder and depression." *Id.* Witnesses may also experience economic insecurity in the form of lost income, deprivation of government benefits, and ostracism from the community. *See id.* at 58-59. Thus, even the fear of harm wreaks psychological and emotional havoc on victims and their families. *See id.*

The cumulative effect on the justice system of denying survivors privacy protection in litigation or forcing them to bear a substantial burden to prove their fear and trauma can be devastating. Such a burden is even greater where, as here, Petitioners were granted protective measures in the form of a protective order shielding their identities from public disclosure, and, after having relied on them, now find that the protection of their identifying information may be removed without a showing of good cause by Respondent. The Eleventh Circuit's favoring of a presumption of openness over a presumption of safety risks the ability of the judiciary to dispense justice. Survivors may be wary of relying on a court's protective order shielding their identities from the public given that such protections may later be lifted.

Granting the present Petition for Certiorari will offer the Court the opportunity to clarify that victims of grave human rights violations and international crimes do not, and should not, bear the burden of showing good cause to retain court-ordered protective measures on which they have relied.

II. U.S. COURTS HAVE LONG RECOGNIZED THE NEED FOR CERTAIN INDIVIDUALS TO LITIGATE UNDER ORDERS PROTECTING THEIR IDENTITIES AND OTHER PERSONAL INFORMATION

In certain circumstances, like the ones present for Petitioners, federal courts recognize the necessity of pseudonyms to shield the identities of litigants and witnesses from the public. This is so despite U.S. courts generally disfavoring allowing litigants to proceed under a pseudonym to "protect[] the public's legitimate interest in knowing all of the facts involved, including the

identities of the parties." *Carrizosa v. Chiquita Brands Int'l, Inc. (In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.)*, 965 F.3d 1238, 1246 (11th Cir. 2020) (internal quotations omitted). *See also* Fed. R. Civ. P. 10(a) (complaint "must name all the parties").

As the Eleventh Circuit recognized, in circumstances like these, it is crucial that courts "weigh the transparency and openness of this nation's court proceedings against the ability of private individuals to seek redress in the courts without fear for their safety." *Carrizosa*, 965 F.3d at 1246 (internal quotations omitted). In cases in which an individual seeking legal redress faces danger of physical harm, courts may find that "the plaintiff's interest in access to the judicial system outweighs the public's interest in judicial openness." *Id*.

Specifically, federal courts have allowed individuals to proceed under pseudonyms to: (1) prevent specific physical or psychological harm to the individual; (2) avoid deterring individuals from proceeding with litigation or testifying in a case; and (3) to ensure other similarly situated potential plaintiffs are not deterred from reporting crimes and accessing the justice system.

The standard for determining whether a plaintiff may proceed anonymously does not differ depending on the stage of litigation. *S.B. v. Fla. Agric. & Mech. Univ. Bd. of Trs.*, 823 F. App'x 862, 866 (11th Cir. 2020). In both pretrial and trial settings, the relevant question is whether the individual's "substantial privacy right . . . outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Id.* (internal quotations omitted). "Whether a party's right to privacy overcomes the presumption of judicial openness

is a 'totality-of-the-circumstances question.'" *Carrizosa*, 965 F.3d at 1247 n.5.

Courts weigh a variety of factors, including whether the individuals "were threatened with violence or physical harm by proceeding in their own names." *Plaintiff B v. Francis*, 631 F.3d 1310, 1316 (11th Cir. 2011); *see, e.g.*, *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (considering "whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties"). This fact-intensive evaluation, performed similarly throughout federal jurisdictions, reflects that:

> the general presumption of openness of judicial proceedings . . . operates only as a presumption . . . . The rule rather is that under appropriate circumstances anonymity may, as a matter of discretion, be permitted. This simply recognizes that privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed this rare dispensation.
>
> *James*, 6 F.3d at 238.

Facts supporting such a dispensation exist here: Petitioners who proceed in this litigation face threats of physical harm from, among others, identified paramilitary groups, as well as the mental anguish associated with the potential harm to themselves and their families if their identities are publicly disclosed. *See* Pet'rs' Opening Br. at 3–4, 32–33.

Allowing Petitioners to proceed under pseudonyms and with their private personal information protected—as they had for years in this litigation before that crucial protection was abruptly removed—is appropriate and consistent with U.S. practice under similar

circumstances. It is highly unjust to pull the rug out from under Petitioners, who overcame significant psychological obstacles to filing their cases in the first place. Hope is essential to victims of violence and those who bear witness to it, and changing the rules midway through such traumatic litigation dashes it wholesale.

This case therefore allows the Court to clarify that a protective order in cases like this should not be lifted without good cause under Federal Rule of Civil Procedure 26(c).

A. Courts Regularly Allow Plaintiffs to Proceed Under Pseudonyms to Prevent Psychological and Physical Harm

Courts "generally find a risk of retaliatory harm" sufficient for an individual in a civil proceeding to proceed under a pseudonym "in cases where the moving party provides evidence that psychological damage or violent threats are anticipated if a party's identity is disclosed." *J.W. v. District of Columbia*, 318 F.R.D. 196, 200 (D.D.C. 2016). Evidence of threats of future physical harm or prior acts of violence against an individual—both of which are present here—have convinced courts that the need for protection from physical or psychological harm outweighs the customary openness of courts.

For example, in *Doe v. Stegall*, the Fifth Circuit allowed plaintiffs to proceed under fictitious names where "[e]vidence on the record indicate[d] that the Does may expect extensive harassment and perhaps even violent reprisals if their identities are disclosed" to a community hostile to their religious beliefs. 653 F.2d 180, 186 (5th Cir. 1981). Other courts have held similarly. *See, e.g.*, *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (no error in allowing plaintiffs to litigate pseudonymously where litigation forced plaintiffs to reveal beliefs that

"could subject them to considerable harassment"); *Doe v. First Nat'l Bank of Chicago*, 668 F. Supp. 1110, 1111 (N.D. Ill. 1987) (permitting parties to proceed pseudonymously after they became targets of threats and harassment).

Evidence of past physical harm or violence also weighs in favor of allowing a litigant to keep his identity private. *See, e.g.*, *Doe v. Triangle Doughnuts, LLC*, No. 19-cv-5275, 2020 U.S. Dist. LEXIS 109495, at *14 (E.D. Pa. June 23, 2020) (allowing plaintiff to proceed under pseudonym where she sought "to avoid additional threats or another violent interaction with her co-workers."); *see also Doe v. Shakur*, 164 F.R.D. 359, 362 (S.D.N.Y. 1996) ("Plaintiff's allegation that she has been subjected to death threats would provide a legitimate basis for allowing her to proceed anonymously.").

Courts have also permitted anonymity for litigants and witnesses who might suffer psychological harm as a result of the disclosure of their identities. In *Plaintiff B v. Francis*, the Eleventh Circuit concluded that the district court erred "by giving short shrift to the evidence regarding the amount of harm losing anonymity would cause the Plaintiffs" in a case involving sexual misconduct allegations where plaintiffs' experts testified that plaintiffs would suffer "psychological damage" as a result of being permanently and publicly associated with sexually explicit video taken without their consent. 631 F.3d at 1317.

Likewise, the U.S. District Court for the District of Columbia allowed victims in a civil proceeding against a university alleging sexual assault by a university employee to proceed under a pseudonym where the court concluded that "public disclosure of the plaintiffs' true identities is likely to result in psychological harm," including that the plaintiffs were suffering from

"depression of varying degrees, anxiety, panic attacks, and social isolation." *Doe v. George Wash. Univ.*, 369 F. Supp. 3d 49, 65 (D.D.C. 2019).

The possibility of such psychological and physical harm could result in victims deciding not to proceed with litigation. As the Eleventh Circuit has recognized, "[j]ustice should not carry such a high price." *Plaintiff B*, 631 F.3d at 1319. Granting certiorari in this case would allow the Court to clarify whether Rule 26(c) requires Petitioners to pay such a price without even a showing of good cause by Respondent.

B. Disallowing or Removing Privacy Protections for Litigants Will Deter the Filing of Meritorious Suits and Limit Access to Justice for Such Litigants and Similarly Situated Individuals

The use of pseudonyms and related privacy protections also preserves access to justice by encouraging victims of serious crimes to bring meritorious claims to court. Courts have found that shielding the identities of plaintiffs from the public outweighs the customary presumption of openness in judicial proceedings where either the plaintiff would not proceed without such protections or refusing such protections would deter other similarly situated plaintiffs from pursuing meritorious claims. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 295 n.1 (2000) (noting plaintiffs were allowed to proceed anonymously where the court wanted to ensure the "proceedings [were] addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." (internal quotations omitted)).

In the first scenario, courts have recognized that civil plaintiffs may need to proceed under a pseudonym

to ensure their own case is resolved on the merits. In *Doe v. Triangle Doughnuts, LLC*, 2020 U.S. Dist. LEXIS 109495, at *15–16, the Eastern District of Pennsylvania recognized that "because forcing Plaintiff to reveal her identity risks putting her in danger of physical harm . . . it is likely that Plaintiff would choose not to continue pursuing her claim." Unwilling to accept that risk, the court allowed plaintiff to proceed under a pseudonym. *Id.* at *17.

The Fourth Circuit ruled similarly in *James v. Jacobson*, where publicly disclosing the plaintiffs' names at trial would have revealed to plaintiffs' children that due to malfeasance by their parents' doctor, their father was not in fact their biological father, putting the children at risk of severe psychological harm. 6 F.3d at 241–42. Unwilling to risk such harm, plaintiffs took the "entirely reasonable position that they [would] not proceed except under pseudonyms." *Id.* at 241. Under those circumstances, the Fourth Circuit overturned the district court's refusal to allow them to proceed as such because the result would be "effectively to cut off a claim that, if proven, is obviously one of great civil wrong." *Id.* at 241–42. *See also Doe v. Megless*, 654 F.3d 404, 410 (3d Cir. 2011) (recognizing that whether "the litigant [may] potentially sacrifice a potentially valid claim simply to preserve their anonymity" must be considered).

Courts also have overcome the presumption of openness and ordered similar protections to prevent deterrence of similarly situated plaintiffs. In *Triangle Doughnuts*, the court's analysis regarding proceeding anonymously went beyond the plaintiff herself. 2020 U.S. Dist. LEXIS 109495, at *16. The court noted that if plaintiff was required to reveal her name publicly, it was "also likely that other similarly situated litigants would also be deterred from litigating these types of claims for

the same reasons [as Plaintiff]." *Id*. The court continued that "[t]hough some litigants would still choose to continue a lawsuit despite possible danger, the threat of physical harm would risk deterring significantly more potential litigants . . . . Accordingly, these claims would go unresolved." *Id.*

Courts have weighed similar considerations in civil cases involving sexual assault allegations. *See, e.g.*, *Doe v. Colgate Univ.*, No. 5:15-cv-1069 (LEK/DEP), 2016 U.S. Dist. LEXIS 48787, at *9 (N.D.N.Y. Apr. 12, 2016) (allowing plaintiff to proceed under pseudonym in part because "[t]he Court is also mindful of the potential chilling effect that forcing Plaintiff to reveal his identity would have on future plaintiffs facing similar situations"); *Doe v. George Wash. Univ.*, 369 F. Supp. 3d at 64, (recognizing "strong [public] interest in protecting the identities of sexual assault victims so that other victims will not be deterred from reporting such crimes").

Thus, federal courts have recognized that access to justice for individuals like Petitioners can, in certain circumstances, supersede the need for public knowledge of all aspects of the case and weigh in favor of litigants proceeding anonymously. In such cases, a protective order that allows for privacy protection should not be lifted without good cause under Rule 26(c). In no event should our court system condone a game of Russian-roulette in which a litigant must voluntarily submit herself to the needless threat of physical and psychological harm in order to pursue her claim.

Granting certiorari will allow the Court to provide necessary guidance as to how good cause should be evaluated.

III. INTERNATIONAL COURTS AND TRIBUNALS, LIKE U.S. COURTS, ROUTINELY PROVIDE PRIVACY PROTECTIONS WHERE SECURITY CONCERNS OUTWEIGH THE PRINCIPLE OF HOLDING PUBLIC PROCEEDINGS

International courts and tribunals have adopted standards similar to those of U.S. federal courts when evaluating petitions for privacy protection, and as a result routinely provide protection for survivors and witnesses of international crimes and grave human rights abuses. While not controlling, international jurisprudence and practice in relation to victims of international crimes may "provide respected and significant confirmation for [the Court's] own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Like federal courts, international courts and tribunals have issued orders to protect the identities of survivors and witnesses to:

> (1) prevent specific physical or psychological harm to the individual victim or witness (*see, e.g.* Statute of the International Tribunal for Rwanda ("**ICTR**"), S.C. Res. 955 ("ICTR Statute"), art. 21 (as amend. Aug. 14 2002), *available at* https://legal.un.org/avl/pdf/ha/ictr_EF.pdf; Statute of the SCSL, S.C. Res. 1315 (March 8, 2002) ("SCSL Statute"), art. 17, ¶2, *available at* http://www.rscsl.org/Documents/scsl-statute.pdf; ICTY R. Evid. & Procedure, IT/32/Rev.50 (July 8, 2015) ("ICTY Rules"), R. 75, *available at* https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf; ICTR R. Evid. & Procedure (June 29, 1995) ("ICTR Rules"), R. 75, *available at* https://

> unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf); and
>
> (2) avoid deterring individuals from litigating or testifying (*see Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 23, 65 (ICTY Aug. 10 1995, *available at* www.icty.org/x/cases/tadic/tdec/en/100895pm.htm).

The consistency of practice on this issue between U.S. and international courts reflects the significant involvement of the United States in the establishment and success of these tribunals. As Clint Williamson, U.S. Ambassador-at-large for War Crimes, wrote:

> The U.S. was the driving force for the creation of both [the ICTY and ICTR] and at the outset provided a large infusion of personnel, including myself, to help get the courts up and running. . . . The U.S. has also been very supportive of the world's first hybrid tribunal in Sierra Leone. . . .

Clint Williamson, *The Role of the United States in International Criminal Justice*, 25 Penn St. Int'l L. Rev., 819, 823 (2007), *available at* https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1707&context=psilr

More recently, the United States has reaffirmed its support for protecting the privacy of war crimes victims and witnesses in Syria. *See* K. Currie, U.S. Representative for Economic and Social Affairs, Remarks at an Informal Debate in the UN General Assembly on the International, Impartial, and Independent Mechanism (IIIM) on Syria (Apr. 18, 2018), *available at*

https:// usun.usmission.gov/remarks-at-an-informal-debate-in-the-un-general-assembly-on-the-international-impartial-and-independent-mechanism-iiim-on-syria/ ("The United States also applauds the information sharing cooperation agreement established between the IIIM and the Commission of Inquiry (COI), which . . . carefully respect[s] the confidentiality promised to victims and witnesses."); *see also* IIIM, Terms of Reference of the [IIIM] to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, *available at* https://iiim.un.org/terms-of-reference-of-iiim/ (providing stringent measures to protect victims' ability to provide evidence safely and securely).

U.S.-backed tribunals and investigative bodies have generally retained principles of law consonant with U.S. Constitutional protections. The Updated Statute of the ICTY balances the rights of the accused with the protection of victims and witnesses. *See* Updated Statute of the ICTY, S.C. Res. 827 ("ICTY Statute"), art. 20, ¶ 1 (as amend. Sept. 2009) *available at* https:// www.icty.org /x/file/Legal%20Library/Statute/statute_sept09_en.pdf ("The Trial Chambers shall ensure . . . that proceedings are conducted . . . with full respect for the rights of the accused and due regard for the protection of victims and witnesses"); *see also* SCSL Statute, art. 17, ¶ 2.

The Rules of Procedure and Evidence for the ICTY and ICTR provide that their respective courts may order "appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused." ICTY Rules, R. 75; *see* ICTR Rules, R. 75 (same).

Jurisprudence emerging from the ICTY, ICTR and SCSL is replete with decisions applying these rules. From its inception, the ICTY was guided by U.S. jurisprudence. In its first case, *Prosecutor v Tadic*, the ICTY cited U.S. jurisprudence as a source for balancing the interests of justice with the need to protect vulnerable victims and witnesses. *See Tadic*, Case No. IT-94-1-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 40 (citing with approval *Florida Star v. BJF*, 491 U.S. 524 (1989) and *Waller v. Georgia*, 467 U.S. 39 (1984)).

This balancing of the rights of the accused with the protection of survivors and witnesses is facilitated by the variety of protective measures available in international courts. The Rules of Evidence and Procedure for the ICTY, ICTR and SCSL Rules all provide for "measures to prevent disclosure to the public or the media of the identity" of survivors through various means, including "non-disclosure to the public of any records identifying the victim or witness," "giving of testimony through image- or voice- altering devices or closed-circuit television," "assignment of a pseudonym," and "closed sessions." ICTY Rules, R. 75(B)(i)–(ii); *see* ICTR Rules, R. 75(B)(i)–(ii) (same); SCSL R. Procedure & Evid. ("SCSL Rules"), R. 75(B) (May 14, 2005), *available at* http://www.rscsl.org/Documents/RPE.pdf. The possibility of a closed session allows the court to "order that the press and the public be excluded from all or part of the proceedings" to protect the "[privacy/]safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75." ICTY Rules, R. 79; *see* SCSL Rules, R. 79 (same); ICTR Rules, R. 79 (same). *See, e.g., Prosecutor v. Sesay,* Case No. SCSL-04-15-T, Ruling on the Prosecution's Application for the Entire Testimony of Witness TF1-129 to be Heard in Closed Session, ¶¶ 2, 4 (May 11 2005) *available at* https://

sierralii.org/sl/judgment/special-court/2005/67 (ordering testimony in closed session and redacting the transcript).

Courts have issued protective orders for victims and witnesses in consideration of the fact that they remain within the communities affected by the violations, often in close proximity to those affiliated with the alleged perpetrators. *See, e.g., Tadic*, Case No. IT-94-1-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 23 (judges in ICTY "feared that many victims and witnesses of atrocities would be deterred from testifying . . . or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives"). Indeed, more than 25 percent of the witnesses who testified before the ICTY did so with "some type of protective measure" such as "the name [of the witness] being withheld from the public or giving "testimony in closed session." ICTY, *Witness Statistics*, https://www.icty.org/en/about/registry/witnesses/statistics (last visited July 8, 2021). The Residual Mechanism of the ICTY and ICTR requires victim/ witness consent to the variation of protective measures once they are implemented and absent that, variation can only be based on a showing of exigent circumstances. *See* Int'l Residual Mechanism for Criminal Tribunals, MICT/1/Rev.7, Rule 86(I) (Dec. 4 2020), *available at* https:// www.irmct.org/sites/default/files/documents/MICT-1-Rev-7-en.pdf).

In sum, international jurisprudence has developed practices to carefully balance the principles of publicity with protection of the privacy of survivors who courageously seek accountability in circumstances that present them with consequent serious risks. The practices of international courts and tribunals counsel

that survivors of international crimes and grave human rights abuses should be granted protective measures where necessary to pursue their claims. Survivors of atrocity crimes should not face physical or psychological harm as a direct result of seeking justice.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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