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 OF NATIONAL CRIME VICTIM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote victims' rights and voices in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates; researching and analyzing developments in crime victim law; and litigating as *amicus curiae* issues of national importance regarding crime victims' rights in cases nationwide. This case involves the fundamental rights of all victims to privacy and to access the courts for redress of harm.

SUMMARY OF ARGUMENT

Protecting victims who seek redress in the courts from further harms is a primary interest of the American legal system. The Eleventh Circuit decision violates this interest. The Court should review

[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. *Amicus* and their counsel have authored the entirety of this brief, and no person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

the Eleventh Circuit's decision and reinstate the protective order, for three reasons.

First, Rule 26(c) authorizes courts to issue protective orders to protect victims from oppression and undue burdens. Issuing such orders can be essential for victim protection.

Second, under Rule 26(c), the stability of an agreement to instate a protective order is essential to the predictability of legal proceedings. Petitioners, like so many victims do, relied on the agreed-upon protective order's shield of their personal information as an essential element of their decision to bring their claims to the legal system. Without the guarantee that agreements will stand, courts risk denying potential plaintiffs access to justice.

Third, Rule 26(c) requires courts to consider fairness in determining whether lifting a protective order is appropriate. Interests in publicly shaming victims do not outweigh the serious risks of further harming the victims by releasing previously protected personal information.

In light of the important interests that are at stake in this and many other cases, this Court should grant certiorari. By clearly announcing the high burden for undoing protective orders and revealing victims' sensitive information to the public, the Court can restore predictability and fairness to the law governing this issue.

ARGUMENT

I. In interpreting Rule 26(c), the Court should recognize that protective orders are essential for victim protection.

Federal Rule of Procedure Rule 26(c) permits courts to issue protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." In this case, the parties in need of protection are Petitioners who are victims of human rights abuses. The Court should interpret Rule 26(c) against the backdrop of the need to protect victims from revictimization, further trauma, and physical and mental harm. The agreed-upon protective order in this case involves assigning pseudonyms to shield victims' personal information and a prohibition on Defendants sharing information, including victims' addresses, publicly. Pet. App. 36a-39a.

When personal information is irrelevant to legal proceedings, assigning a victim a pseudonym to shield their identity from the public is a common practice. See e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (implicitly approving of the practice of civil plaintiffs proceeding anonymously or by pseudonym); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *Poe v. Ullman*, 367 U.S. 497 (1961) (same). In fact, it is recognized that proceeding without a pseudonym can subject victims to serious psychological harm. See *Doe v. Firn*, No CV065001087S, 2006 WL 2847885, at *5 (Conn. Super. Ct. Sept. 22, 2006) (noting in a sexual assault case that "[t]o force the plaintiff[, a victim of sexual exploitation and assault,] to proceed without the protection of the pseudonym

Jane Doe could only subject the plaintiff to additional psychological harm and emotional distress").

When a person suffers the trauma of being the victim of a crime, the person's choice to seek redress in the courts should not produce further trauma. Revealing a victim's name, address, and other personal information can inflict such trauma. Further, such revelations can deter victims from seeking justice. To avoid the loss of privacy and access rights, courts across the country routinely allow victims to proceed anonymously in civil and criminal cases involving personal and sensitive matters. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 527 n.2 (1989) (referring to a rape victim by her initials, "in order to preserve [her] privacy interests") (internal citation omitted); *Plaintiff B v. Francis*, 631 F.3d 1310, 1317 (11th Cir. 2011) (vacating the district court's order denying the victims-plaintiffs' motion to remain anonymous after finding "[t]he issues involved in this case could not be of a more sensitive and highly personal nature—they involve descriptions of the [Victim-p]laintiffs in various stages of nudity and engaged in explicit sexual conduct while they were minors who were coerced by the Defendants into those activities"); *United States v. Clark*, 335 F. App'x 181 (3d Cir. 2009) (concluding that redaction of child pornography victims' names and their family members' names from victim impact statements was consistent with the Crime Victims' Rights Act (CVRA)'s guarantee of the right to be treated with respect for one's dignity and privacy); *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 199 n.1 (E.D.N.Y. 2009) (stating that

the court would not use the rape victim's name "out of respect for her dignity and privacy," as protected by the CVRA); see also *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495, *1 (W.D.N.C. May 26, 2009) (directing the government to refile Motion for Relief under the CVRA with "Jane Doe #1" substituted for the name of the victim to protect the victim's privacy). Further, courts have shown their approval for protective orders in a variety of situations. See generally *Plaintiff B*, 631 F.3d at 1316-18 (finding the trial court's order rejecting the motion for victims to remain anonymous to be in error given the sensitive and highly personal nature of the issues in the suit, involving their participation in Girls Gone Wild videos).

Examples from many areas of law reveal that victims can be deterred from seeking justice if privacy protections via protective orders are denied. See, e.g., Jayne S. Ressler, Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age, 53 U. Kan. L. Rev. 195, 219 (2004) (noting that potential plaintiffs may forfeit the opportunity to seek justice out of fear of disclosure, and clarifying that other would-be plaintiffs may not even initiate litigation). For example, victims of sexual and domestic violence can be revictimized and therefore deterred from proceeding with cases when their identities are disclosed. See, e.g., *Globe Newspaper Co. v. Clerk of Suffolk Cty. Super. Ct.*, No. 01-5588*F, 2002 WL 202462, at *6 (Mass. Super. Feb. 4, 2002) (stating that "for many victims of sexual abuse . . . public revelation of the abuse, if not sought by them, victimizes them yet again. . . . If

the identit[ies] of these victims are not protected by the courts, then their access to the courts will be severely diminished because they will not be able to turn to the courts for relief from or compensation of their emotional injuries without aggravating those same injuries"). In sexual assault cases, disclosing victims' personal information in public court records can slow the healing process from their initial trauma. See Paul Marcus & Tara L. McMahon, Limiting Disclosure of Rape Victims' Identities, 64 S. Cal. L. Rev. 1020, 1049 (1991) (discussing how, in sexual assault cases, disclosure of the victim's personal information without their consent can "slow the victim's healing process"). In short, these cases recognize that a choice between sacrificing privacy or seeking justice is not a legitimate choice for crime victims.

To be sure, a presumption exists that court records are public. But the presumption of openness is not absolute. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) ("[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial."); see also *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (stating that openness "operates only as a presumption and not as an absolute, unreviewable license to deny" protection).

This case provides a clear example of the need for protection. Petitioners and their families have endured serious human rights abuses in their native Colombia. Threats to those seeking to uphold human rights are ongoing in Colombia. Pet. Br. at 7-8. Courts below recognized that conducting litigation seeking justice for

such abuses is unacceptably dangerous in Colombia, due to the risk of retaliation by perpetrators of abuse. Order Den. Defs.' Joint Mot. to Dismiss 7, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, No. 08-01916-MD-MARRA (S.D. Fla. Nov. 29, 2016) (DE 1194).

When determining if proceeding with a pseudonym is proper, one factor courts consider is whether identification of victims would pose a risk of retaliation or physical or mental harm. See, e.g., *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 190 (2d Cir. 2008); *James*, 6 F.3d at 238; *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (acknowledging that, when there are "privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information"); *L.H. v. Schwarzenegger*, No. Civ. S–06–2042 LKK/GGH, 2007 WL 662463, at *18 (E.D. Cal. Feb. 28, 2007) (noting that "[w]hen the willingness to file suit is chilled by fear of retaliatory action, the public interest in seeing the suit move forward on its merits outweighs the public interest in knowing the plaintiffs' names").Where the criminal allegations have been proven the burden of proving such risks is lowered. Here, Defendants have pled guilty to charges of financing human rights abuses, including killing of some Petitioners' family members. Gov. Sentencing Mem., *In re: Chiquita*

Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig., No. 08-01916-MD-MARRA (S.D. Fla.) (DE 2346-2). There can be no credible opposition to the claim of risks to persons.

In its decision below, the Eleventh Circuit overlooked all of these important elements—an approach that defies Rule 26(c)'s authorization for granting protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This Court should grant the petition and make clear the importance of protecting crime victims when evaluating issues surrounding protective orders.

II. The Court should consider Petitioners' reliance interest in maintaining the agreed-upon protective order when interpreting Rule 26(c).

In this case, the Eleventh Circuit confronted not the initial question of whether to put in place a protective order but the ensuing question of whether to vacate a protective order to which all parties had previously agreed. In such a situation, protecting victims' reliance interests is paramount. As noted supra, victims can be deterred from seeking redress of courts in the first instance if such access will come at the price of sacrificing their privacy and safety. Once a protective order is in place that secures such privacy and safety, victims must be able to rely on it remaining in place in order to present their claims to courts.

This case presents this Court with a good opportunity to clarify the importance of reliance interests when requests for modifications to protective orders are advanced. Here, all parties stipulated to a protective order before discovery began, requiring the use of pseudonyms for Petitioners, as well as other protections. Global Order Setting Tr. Dates and Discovery Deadlines 1, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, No. 08-01916-MD-MARRA (S.D. Fla. Apr. 11, 2017) (DE 1361). Relying on the existence of that protective order, during discovery Petitioners disclosed sensitive personal information to Defendants, Pet. Br. at 10. Only after discovery had been completed did Defendants move to lift the protective order.

The stability of an agreement to instate a protective order is essential to the fairness and predictability of legal proceedings. Without a substantial showing of need for vacating, Defendants must not be permitted to renege on their court-sanctioned agreements. Here, Defendants moved to lift the protective order for the stated reason of airing the victims' names to the public. At best this is a desire for public shaming of Petitioners, and such reasoning should not outweigh Petitioners' well-founded fears. Privileging Defendants who choose retaliation over Petitioners who came to the courts seeking justice undermines established notions of fairness and decency.

III. Fairness dictates that a moving party prove the need to lift an agreed-upon protective order.

Releasing victims' information, which was previously protected by a court-approved protective order, is a significant change in the balance of agreed-upon parameters of litigation. After victims reveal sensitive personal information under the protection of a protective order concealing their identities from the public, a party's motion to then release that protected information is alarming. Because of the potential for abuse, a party moving to lift a protection order must carry the burden to prove that the benefits to changing the established order outweigh the risks to the protected victims.

Unfairness to the opposing party is a factor the Court must consider in deciding whether anonymous pleadings are appropriate. See, e.g., *James*, 6 F.3d at 238; *Does I thru XXIII*, 214 F.3d at 1068 (finding the use of pseudonyms to be permissible "when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity"). Fairness is also a factor when deciding to lift a protective order allowing for pseudonyms.

In this case, Defendants' stated reasons for reversing the agreed-upon protective order were to "publicly name their accusers" and "vindicate themselves against the particular Pseudonymous Plaintiffs in public." Defs.' Reply in Supp. of Expedited Mot. to Modify Protective Order 10, *In re: Chiquita Brands Int'l, Inc. Alien*

Tort Statute and Shareholder Derivative Litig., No. 08-01916-MD-MARRA (S.D. Fla. Feb. 20, 2019) (DE 2292); Defs.' Expedited Mot. to Modify Protective Order 13, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, No. 08-01916-MD-MARRA (S.D. Fla. Jan. 30, 2019) (DE 2253). There is nothing in these assertions that is grounds for fundamentally altering the landscape of these proceedings.

Defendants' only other asserted basis was to remove the "severe" "administrative burden on the Court" that protecting Petitioners' information purportedly imposed on the courts. Defs.' Expedited Mot. to Modify Protective Order 2, 11-12 (DE 2253), Defs.' Reply. Notably, Defendants had access to all necessary information from Petitioners for their corporate and legal purposes during discovery. The protective order served only to protect Petitioners' information from the public.

The Eleventh Circuit's decision places the burden on the Petitioners to prove how they would be harmed by Defendants releasing their information rather than on the Defendants to show why a dramatic change in the agreed-upon processes is necessary. This approach privileges the accused and denies victims the fairness of promised protections. The Court should grant certiorari to examine the Eleventh Circuit's abandonment of the required factor of fairness. Defendant's mere desire to publicly name their accusers simply cannot overcome Petitioners' interests in protection from revictimization and retaliation.

CONCLUSION

For all the foregoing reasons, *Amicus* respectfully requests that the Court grant the petition.

July 8, 2021 Respectfully submitted,

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