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 IN OPPOSITION

FRANK A. DANTE
MELISSA F. MURPHY
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
(215) 569-5645
dante@blankrome.com
mfmurphy@blankrome.com

MICHAEL L. CIOFFI
Counsel of Record
THOMAS H. STEWART
BLANK ROME LLP
201 East Fifth Street
1700 PNC Center
Cincinnati, OH 45202
(513) 362-8701
cioffi@blankrome.com
stewart@blankrome.com

Counsel for Respondent

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QUESTION PRESENTED

The question presented by the proceedings below is whether the Eleventh Circuit erred in holding that the district court did not abuse its discretion by placing the burden of proof on the party opposing modification of a stipulated protective order when that party did not—as a matter of fact—show good cause for the protections at the time the order was first entered.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Chiquita Brands International, Inc. ("Chiquita") hereby states that it is a wholly-owned subsidiary of Chiquita US Corporation. No publicly held company owns 10% or more of Chiquita's stock.

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INTRODUCTION

Petitioners' narrative in the Question Presented mischaracterizes the record in the lower courts and misstates what the Court would need to decide in this appeal. Amici rely on the same mischaracterization and misstatement. The district court and Eleventh Circuit decided two separate and distinct issues. The first issue was whether Petitioners could continue to proceed under pseudonym after the close of discovery. The district court held they could not and the Eleventh Circuit affirmed, finding that the district court did not abuse its discretion "when it held that the pseudonymous appellants failed to show that their privacy rights outweigh the presumption of judicial openness." Pet. App. 16a. Petitioners expressly concede that they "do not challenge that ruling here." Pet. 13 n.5. Petitioners have not sought a writ on this issue and have waived their ability to do so.[1]

The second issue was whether the district court—when weighing Respondent's motion to modify a stipulated protective order—abused its discretion by placing the burden on Petitioners to show good cause for continuing to protect certain "private facts," keeping them out of the judicial record and hidden from the public, when Petitioners had not shown good cause in the first instance for such protection. The Eleventh

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[1] Petitioners attempt to distort the issues by claiming that the protective order "also protects the use of pseudonyms" and therefore "is the primary safeguard at issue." Pet. 13 n.5. Not so. As the Eleventh Circuit succinctly ruled: "Nowhere in the protective order did the district court grant the pseudonymous appellants leave to proceed anonymously. As the district court recognized in a later order, it never considered the propriety of pseudonyms until Chiquita moved to preclude the use of pseudonyms." Pet. App. 15a.

Circuit held that there was no abuse of discretion because "the record shows that neither party ever disputed, challenged, or litigated the protective order's restrictions on the appellants in any way. Thus, in order to be entitled to the continued protection of 'private facts,' the burden plainly fell on the appellants to establish 'good cause.'" Pet. App. 22a. The Eleventh Circuit and the district court found that Petitioners failed to show good cause to conceal their private facts for the same reasons that they were not entitled to continue proceeding under pseudonyms: "in neither instance did the appellants establish a sufficient nexus between the claimed threats and the disclosure of their identities; the proffered facts were neither specific nor concrete, and the appellants gave no other justification for their private fact protections." *Id*.

In challenging the Eleventh Circuit's decision on the second issue, Petitioners cast their Question Presented as an issue of law—who bears the burden of proof on a motion to modify a protective order. It is, instead, a fact-bound question as to what was or was not disputed, challenged or litigated in the trial court at the time the protective order was entered and subsequently on Respondent's motion to modify. Peeling back the form of Petitioners' Question Presented, it becomes clear that Petitioners at best complain only of unfavorable factual findings, not a misapplication or misstatement of a rule of law.

Petitioners manufacture two reasons for a writ. The first is that the Eleventh Circuit's decision "deepened a three-way circuit split" over which party bears the burden of proof to modify a stipulated protective order entered under Rule 26(c) of the Federal Rules of Civil Procedure. The second is a hyperbolic appeal to emotion—that the Eleventh Circuit put "the lives of

the Petitioners and thousands of similarly situated Plaintiffs in these consolidated cases at risk." Pet. 4.

The Petition should be denied because both reasons are devoid of merit.

First, there is no circuit split. The decision by a unanimous panel of the Eleventh Circuit, a decision in which en banc review was denied, unanimously, is in accord with the decisions of the other circuits. Indeed, as the Eleventh Circuit articulated, the decision is premised on a fundamental tenet of our system of justice: "A lawsuit is a public event. Parties who ask a court to resolve a dispute must typically walk in the public eye." Pet. App. 4a. It is axiomatic that a party who seeks to withhold information from the public record must show good cause. Fed. R. Civ. P. 26(c). No court has held otherwise.

Here, Petitioners never made that showing—neither in the first instance when the protective order was entered before discovery commenced, nor when Respondent moved to modify it at the close of discovery, as summary judgment briefing began.

When a party opposing modification of a protective order never established good cause for withholding information from the public in the first place, that party bears the burden to establish good cause in order to defeat modification and continue the secrecy. There is no "three-way circuit conflict" over this fact-bound issue. The Eleventh Circuit's decision is a common sense, straightforward principle of law. The converse would be antithetical: even though a party did not show—as a matter of fact—good cause when the protective order was first entered, it can nevertheless keep information secret and out of the public record

without showing good cause when the protective order is later challenged.

The Eleventh Circuit's decision is not in conflict with the decisions of the Second, Seventh or Third Circuits cited by Petitioners, cases easily reconciled by their facts and circumstances. Indeed, given the record facts of the case—fact-finding affirmed by the Eleventh Circuit and not challenged by Petitioners—the decision below is logical, unremarkable and consistent with decisions from courts throughout the country when there is no showing of good cause in the first instance. Petitioners do not challenge the Eleventh Circuit's rulings, grounded in the factual record, that Petitioners had not shown good cause when the protective order was entered and did not meet that burden when Respondent challenged the need for the protective order's sweeping prohibitions.[2]

Petitioners' second argument that the Eleventh Circuit "put the lives of Petitioners and thousands of similarly situated plaintiffs in these consolidated cases at risk" is entirely unfounded. Pet. 4. This argument

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[2] Petitioners' misstatement of the Question Presented as one of law rather than fact violates the Court's rules and case law. To raise an error in the fact-finding below, a petition must raise the question in a straightforward manner in the Question Presented. Sup. Ct. R. 14.1(a). Here, that question would be whether the Eleventh Circuit erred when finding, under an abuse of discretion standard, that "[t]he district court's interpretation of its own order was entirely reasonable" in finding no good cause shown given the facts in the record. Petitioners' dilemma, of course, was that if they followed the rules and raised this question properly, their petition would be uncertworthy from the get-go under Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous fact findings or the misapplication of a properly stated rule of law." This Petition should likewise be denied.

is also incendiary and insulting to the courts below. In affirming the district court, the Eleventh Circuit held:

> The district court engaged in balancing sufficient to satisfy Rule 26(c), as it weighed the appellants' safety interests against Chiquita's interests in administrative feasibility. Further, when we review the entire record, including the protective order and the district court's order dissolving part of it, there can be no question that the court's order was drawn with precision, effectively reviewed less onerous alternatives, and precisely delimited the duration of the order.
>
> Indeed, the trial court found that the evidence presented by the appellants supported only "a vague fear [of] retaliation or bias against 'human right[s] defenders' . . . but [did] not explain how their role in this lawsuit . . . would implicate the same interests as those triggered by 'human right[s] defenders' in present-day Colombia." The appellants' "generalized subjective assertions of fear" were simply not "the kind of risk of physical or other injury" required to treat them differently than other plaintiffs.

Pet. App. 23a-24a. The district court's fact-finding regarding potential harm or danger faced by the Petitioners, as affirmed by the Eleventh Circuit, is not before the Court for review because Petitioners did not present this question. Sup. Ct. R. 14.1(a). Thus, even if the Court were inclined to engage in the intense fact-finding done by the district court and then reviewed and unanimously affirmed by the Eleventh

Circuit, it could not do so. Yet if the Court did weigh all the facts in the record it would come to the same conclusion as the district court and the unanimous panel of the Circuit Court.

The courts below carefully and extensively documented in the record that—as a matter of fact—the Petitioners did not present specific evidence that their lives were in danger as a result of their role as litigants asserting claims against Chiquita. Petitioners do not challenge these factual findings in their Question Presented. Their hyperbole is merely that, unsupported by evidence in the record.

STATEMENT OF THE CASE

1. Petitioners' lawsuit has audaciously pushed the limits of an accommodating federal judiciary. Under the cloak of anonymity, Petitioners have made incendiary allegations that Respondent and its executives abetted the murder or disappearance of their family members. After 15 years of publicly degrading Respondent, Petitioners had no evidence to support their sensational allegations and summary judgment has now been entered in favor of Respondent.

2. On September 5, 2019, the district court granted summary judgment in a detailed 73-page opinion. *See* 08-md-01916 Doc. 2551 (S.D. Fla. Sept. 5, 2019). Summary judgment for the Respondent was not surprising given the underlying facts of this case. That decision is currently on appeal to the Eleventh Circuit.

3. As the district court noted, Petitioners are "family members of Colombian nationals who were killed in separate attacks in the Uraba or Magdalena regions of Colombia between 1997 and 2004, at the pitch of a prolonged civil war which displaced hun-

dreds of thousands of Colombian civilians from their homes and claimed the lives of thousands." *See id.* at 1. The horrendous violence, death and destruction of Colombia's prolonged civil war is well documented in federal court jurisprudence and the undisputed facts of this case. *See Escobar v. Holder*, 657 F.3d 537, 540 (7th Cir. 2011) ("The battle that rages [in Colombia] has many different actors: the government's security troops, paramilitary groups, revolutionary guerrilla groups, and drug traffickers."); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) ("The events giving rise to these claims occurred against a backdrop of civil war that has plagued Colombia with violence and terror for over forty years. The civil unrest involves so-called left-wing guerrilla groups, right-wing paramilitary units, and the Colombian government, including its military and police forces.").

4. At the time Petitioners' family members were killed, it was "complete chaos" in Colombia, a country ravaged by internal political and criminal warfare. *See* 08-md-01916 Doc. 2346-3, 99:5-17 (S.D. Fla. Mar. 16, 2019). As one former AUC commander testified, guerrilla groups and paramilitary groups—all narco-terrorists—waged war against each other, the Colombian government, civilians, and businesses that operated in Colombia, causing violence and terror to reign over the country. *Id.* A former brigadier general in the Colombian Army testified that the "narco-terrorists of FARC [*Fuerzas Armadas Revolucionarias de Colombia*] and the narco-terrorists of ELN [*Ejército de Liberación Nacional*], and the narco-terrorists of the paramilitary [AUC, *Autodefensas Unidas de Colombia*]" attacked each other and the Colombian military attacked all three "because there was no ideology there. The ideology was cocaine. There was no

left or right ideologies. They're bandits, terrorists, drug dealers. We needed to attack them." *See* 08-md-01916 Doc. 2282-34, 15:6-18 (S.D. Fla. Feb. 15, 2019).

5. Petitioners' decedents were killed in this horrible drug-fueled war in Colombia. After more than 15 years of litigation, the production and review of millions of pages of documents, more than one hundred depositions, and thousands of motions and other filings, Petitioners cannot identify even a single perpetrator in the death of any decedent. The record contains no police reports or any other documents that identify even one perpetrator who killed Petitioners' decedents. The record contains no evidence as to why, with whom, or at whose behest, if anyone's, the unknown perpetrators acted.

6. In the trial court, Petitioners speculated that the unknown perpetrators were members of one of the warring factions known as the AUC. But Petitioners have never sued the AUC or any of its members, nor could they without knowing the identities of the actual perpetrators. Instead, Petitioners relied on a sweeping theory of secondary liability to ask the district court to transfer the liability of these unknown perpetrators to an American company which operated in Colombia at the time, Respondent Chiquita.

7. Like thousands of other businesses and individuals in Colombia during the prolonged war between narco-terrorists fighting each other and the government, Chiquita itself was a victim of extortion by the narco-terrorist AUC. The second in command of the AUC, Salvatore Mancuso,[3] for instance, testified that

[3] Mancuso was deposed in the United States Penitentiary, Atlanta where he served a 15-year sentence as a drug kingpin pursuant to 21 U.S.C. § 848.

if any person or business failed to pay the extortion, they would face enormous consequence, including violence to people and property. *See* 08-md-01916 Doc. 2343-36, 43:1-7 (S.D. Fla. Mar. 15, 2019).

8. Another AUC commander, Otoniél Hoyos Perez, testified that the AUC used violence and threats of violence to force businesses to pay the AUC. *See id.* at 2343-33, 50:19-23.

9. Contrary to Petitioners' assertions in their Statement of the Case, Chiquita did not plead guilty to illegally financing the AUC. Rather, Chiquita entered into a plea agreement in the United States District Court for the District of Columbia as to a single-count violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204, for engaging in transactions with the AUC, a Specially Designated Global Terrorist ("SDGT") organization, without a license. In the factual proffer supporting the plea agreement, the Government acknowledged that the payments by Chiquita were the result of extortion by the AUC. The Government agreed that the following fact would be proven "beyond a reasonable doubt": "Castaño [AUC top leader] sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex [Chiquita's Colombian subsidiary] personnel and property." 08-md-01916 Doc. 2346-1, at ¶ 21.

10. Given the facts of the case, the district court granted summary judgment in favor of Respondent because Petitioners' proffered documentary evidence "constitute[d] inadmissible hearsay, and even if accepted for its substantive content, it d[id] not support the inferences urged by Plaintiffs." 08-md-01916 Doc. 2551 at 71.

The district court found that:

> The proffered circumstantial evidence, standing alone, is too speculative to support a reasonable inference that the AUC more likely than not was responsible for the death of each bellwether victim, and would be insufficient to withstand a directed verdict at trial. The proffered expert testimony on the "likelihood" of AUC involvement in each death, based on geographical and temporal overlays, does not qualify for admission under Fed. R. Evid. 702 because it does not involve the application of reliable methodologies or principles. *Id*.

11. With respect to the use of pseudonyms and the need to shield certain private information under the protective order, Petitioners' hyperbole that the "Eleventh Circuit put lives at risk" is devoid of evidentiary support in the record and launched only to inflame and incite the Court into granting certiorari.

12. At the close of discovery and on the basis of a full record, Respondent moved to preclude the use of pseudonyms and to modify the protective order to lift protections of certain private facts, in connection with then-upcoming summary judgment and trial proceedings. Respondent did so on a discovery record that clearly proved these protections were not warranted, but rather part of Petitioners' 15-year strategy of making incendiary allegations and wounding the reputation of the Respondent and its executives with no evidence, only speculation, innuendo and rumor. Indeed, many of the pseudonymous plaintiffs testified at deposition that they had never been harmed or even threatened because of their involvement in this litigation. *See* 08-md-01916 Doc. 2253 at 7-10 (S.D.

Fla. Jan. 30, 2019). Many of them testified that they were not even aware that their claims were being prosecuted under pseudonym. *Id.*

13. In addition to eliminating the administrative burden, cost and confusion created by the need to file heavily redacted documents and parallel unredacted documents under seal, Respondent filed its motion to protect the constitutionally-based principle of openness in judicial proceedings. Also, Respondent filed its motion in order to allow the public access to the judicial record as it would soon be developed on summary judgment and at trial with nothing hidden but everything open for public scrutiny. *Id*. These principles are important, especially given the history of this case, because anonymity imbues the Petitioners' unfounded claims with a tremendous aura of seriousness, merit and credibility. Without enforcement of these principles, Petitioners could continue their campaign to ruin the reputation of the Respondent and its officers shrouded in a cloak, invisible from public access and scrutiny.

14. Petitioners' rhetoric is the opposite of what is in the record, facts they do not challenge in their Question Presented. They do not raise as an error for the Court to reverse the following findings by the Eleventh Circuit:

> To start, the district court had ample comparator evidence to support its ruling. For over a decade, hundreds of plaintiffs have litigated this case under their true names, and yet nothing in the record suggests that they have faced paramilitary retaliation.
>
> . . . Lacking specific evidence, the pseudonymous appellants cite general evidence show-

> ing that those who oppose paramilitary groups or paramilitary-affiliated entities face risks of paramilitary violence. But this evidence does not compel the conclusion that the MDL plaintiffs face those risks.
>
> . . . Indeed, the trial court found that the evidence presented by the appellants supported only "a vague fear [of] retaliation or bias against 'human right[s] defenders' . . . but [did] not explain how their role in this lawsuit . . . would implicate the same interests as those triggered by 'human right[s] defenders' in present-day Colombia." The appellants' "generalized, subjective assertions of fear" were simply not "the kind of risk of physical or other injury" required to treat them differently than other plaintiffs. Much the same analysis was applicable in determining "good cause" under Rule 26(c). *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) ("To establish 'good cause' for a protective order under Federal Rule of Civil Procedure 26(c), the courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." (quotation omitted and alterations adopted)). And without a distinct concrete harm justifying good cause, the appellants were no more entitled to protection from disclosure of their identities than they were to file pleadings under pseudonyms. Pet. App. 16a-24a.

15. Petitioners had ample opportunity in the district court to prove that they were in danger as a result of choosing to be plaintiffs in a lawsuit in the

courts of the United States. The record clearly establishes that they did not do so. Neither the district court nor the Eleventh Circuit is to blame for Petitioners' lack of evidence.

REASONS TO DENY THE WRIT

I. For Decades, Federal Courts Have Uniformly Applied the Same Burden of Proof Standard Applied by the Eleventh Circuit.

Petitioners assert that there is "chaos" in this area of the law related to modifying protective orders. In support of this proposition they cite but one 36-year-old district court case, *H.L. Hayden Co. v. Siemens Med. Sys. Inc.*, 106 F.R.D. 551, 552 (S.D.N.Y. 1985), and on this authority exaggerate further: "that inconsistency and unpredictability has endured for decades now, with no end in sight." Pet. 6.

Yet the district court in *Hayden* articulates the law "in this area" of protective order modification exactly the same way as did the Eleventh Circuit below.

Far from "chaos," this area of the law has remained the same, has been clear and has been readily discernable by both courts and litigants for nearly four decades.

Specifically, the district court in *Hayden* described the burden of proof for modification of protective orders as follows:

> Despite the language of Rule 26(c), which requires a party advocating non-disclosure to show good cause for a protective order, an order or agreement requiring confidentiality may occasionally be made without the requisite showing of good cause . . . The courts have required the party or parties opposing modi-

> fication of such orders and agreements [i.e., those entered without a showing of good cause] to bear the burden of establishing the need for continued protection. . . . However, if the issuance of a protective order was supported by a showing of good cause, the burden of persuasion is typically placed on the party seeking modification.

H.L. Hayden Co., 106 F.R.D. at 554. The Eleventh Circuit articulated the burden exactly the same way:

> We begin with a review of the law. Federal Rule of Civil Procedure 26(c) allows a court to issue a protective order upon a finding of good cause. *See* Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue [a protective order]."). The plain text of the rule suggests that a district court must find good cause to issue a protective order. *See id.* But as we've recognized, district courts often issue stipulated protective orders without finding good cause. *See Chi. Tribune Co. v. Bridgestone/Firestone, Inc.* 263 F.3d 1304, 1307 (11th Cir. 2001) (per curiam). . . . In *Chicago Tribune* . . . we recognized that 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. . . . For this reason, we placed the burden of establishing good cause in the first instance on the party seeking the protection . . . When faced with a motion to modify to [sic] a *stipulated* protective order, the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard. The bur-

> den differs, though, when a court enters a *disputed* protective order after finding good cause. . . . once a party has established good cause under Rule 26(c), the party moving to modify the protective order bears the burden to establish good cause for the modification.

Pet. App. 19a-21a (emphasis and alterations in original). Petitioners cite no case in the 36 years between *Hayden* and the Eleventh Circuit's decision that holds differently. There are, however, many cases in accord, all holding that if good cause was not shown for the original protective order, the burden of showing good cause is on the party seeking continued confidentiality protection. *See H.D. Media Co. v. United States Dept. of Justice (In re: National Prescription Opiate Litig.)*, 927 F.3d 919, 931 (6th Cir. 2019); *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1211 n.1 (9th Cir. 2002); *Bayer AG v. Barr Lab.*, 162 F.R.D. 456, 463-64 (S.D.N.Y. 1995); *Factory Mut. Ins. Co. v. Insteel Industries, Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002). *United States v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2016 WL 279543, at *4 (E.D. Tex. Jan. 22, 2016) (citing *In re Enron Corp. Sec., Derivative, & ERISA Litig.*, 2009 WL 3247432, at *3 (S.D. Tex. Sept. 29, 2009)).

II. Petitioners Attempt to Manufacture a Circuit Split by Mischaracterizing the Eleventh Circuit's Decision.

Petitioners assert that the Eleventh Circuit made an "assumption" that the stipulated order was entered without a showing of good cause, and argue that "it makes no sense to assume that because an order was stipulated, its good cause is suspect." Pet. 30. The

Eleventh Circuit assumed nothing. What it did was thoroughly examine the factual record, correctly apply the abuse of discretion standard and find that no good cause was shown by the Petitioners in the district court, in the first instance.

As the Eleventh Circuit explained in *Chicago Tribune*, it is not unusual for district courts to initially issue stipulated protective orders without finding good cause, deferring that finding to a later point in the litigation. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307-08 (11th Cir. 2001). This practice in the district courts is not a violation of Fed. R. Civ. P. 26, but rather a practical rule or method of convenience that "replaces the need to litigate the claim to protection document by document, and postpones the necessary showing of 'good cause' required for entry of a protective order until the confidential designation is challenged." *Id.* at 1307. This practical rule is hardly new or controversial and has been used by district courts for decades in order to preserve judicial and party resources by making the pretrial phase of cases, especially in complicated MDL matters, more efficient. *See H.L. Hayden Co.*, 106 F.R.D. at 554. Indeed, the protective order entered by the district court here employed this practical rule, providing that any party could challenge the designation of "any material" as confidential and apply to the Court for a determination. If such application were made, the "producing party" seeking to maintain confidentiality protections "bears the burden of establishing that the designation is proper." Pet. App. 48a-49a (Paragraph 8 of the Protective Order).

The Amici law professors do not seem to appreciate this practical rule and how it operates to streamline

pretrial litigation. Contrary to what the professors argue, the Eleventh Circuit does not "disregard" Rule 26(c)'s good cause requirement, but merely recognizes that in some cases that determination is postponed to a later point in the litigation.

Nor does the Eleventh Circuit "except any kind of protective order from the 'good cause' requirement." *See* Brief for Civil Procedure Law Professors as Amici Curiae Supporting Petitioners at 3. Just the opposite is true. The Eleventh Circuit held that the good cause requirement of Rule 26(c) must always be met, and always met in the first instance by the party seeking to keep information private and out of the public judicial record. If this burden is met at the time the protective order is first entered, which is usually the case with disputed or contested protective orders, then the Eleventh Circuit correctly states that "once a party has established good cause under Rule 26(c), the party moving to modify the protective order bears the burden to establish good cause for modification." Pet. App. 21a. On the other hand, if the facts in the record show that this burden was not met at the time the protective order was initially entered, which is often the case with stipulated protective orders, then the Eleventh Circuit also correctly states that the converse is true and "the burden of establishing good cause in the first instance is placed on the party opposing the modification," given that it had not previously shown good cause. Pet. App. 20a.

The Petitioners and professors mischaracterize the foundation of the Eleventh Circuit's decision. The Eleventh Circuit made a fact-bound determination that there was no showing of good cause at the time the protective order was initially entered. The burden, therefore, remained with the Petitioners. This deci-

sion is not only logical and correct, it is consistent with the holding of every court that has found, as a matter of fact, that there was no showing of good cause in the first instance.

The Petitioners and professors, in their zeal to criticize, fail to acknowledge that the Eleventh Circuit's position regarding timing of the good cause determination in some cases is identical to that in the Federal Judicial Center's Manual for Complex Litigation (4th ed. 2004), §11.432, which the professors cite with approval:

> When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication. Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.

One principle the professors do not and cannot dispute is that whenever the good cause determination is made, the party seeking protection must, in the first instance, establish good cause to rebut the constitutionally embedded principle of openness of judicial proceedings in order to keep information secret and out of the public scrutiny.

Only a false conflict is presented by Petitioners. There is no dispute in the federal courts that if the facts of a case establish that there was no showing of

good cause in the first instance, the burden is on the party seeking the continued protection; but if the facts of a case show that good cause was shown for the protective order in the first instance, then the burden is on the party seeking to modify it.

III. There Is No Three-Way Circuit Split.

All circuit courts that have addressed this issue agree with the Eleventh Circuit. In *H.D. Media Co. v. United States Dept. of Justice*, the Sixth Circuit held that when a district court enters a stipulated protective order without making a finding of good cause, then upon the filing of a motion to modify, the burden of demonstrating good cause remains with the party seeking protection. 927 F.3d at 931. The Sixth Circuit relied on a decision by the Ninth Circuit in *Phillips*, 307 F.3d at 1211 n.1 ("The burden of proof will remain with the party seeking protection when the protective order was a stipulated order and no party had made a 'good cause' showing.").

The cases Petitioners cite from the Seventh and Second Circuits do not conflict with the Eleventh Circuit's decision. First and foremost, none of the cases involve the central fact found by the district court and affirmed by the Eleventh Circuit upon review of the record: a protective order issued without an initial showing of good cause. This finding by the Eleventh Circuit is dispositive of the Petition. Furthermore, it was not raised by Petitioners in the questions presented as an error for the Court to review. It is, therefore, waived and not properly before the Court. *See* Sup. Ct. R. 14.1(a); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp.*, 510 U.S. 27, 34 (1993) ("Our faithful application of Rule 14.1(a) thus helps ensure that we are not tempted to engage in ill-considered decisions of

questions not presented in the petition."); *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) ("Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources."). Although the foregoing disposes of the Petition, there are several other reasons why none of the cases cited by Petitioners present a circuit conflict.

The Seventh Circuit's decision in *Heraeus Kulzer, GMBH v. Biomet, Inc.*, 881 F.3d 550 (7th Cir. 2018), actually undermines Petitioners' position. In *Heraeus Kulzer*, good cause was shown by the defendant for entry of the original protective order. *Id*. at 555. The Seventh Circuit's holding, therefore, that plaintiff—as the party moving to modify a protective order entered for good cause should bear the burden of proof (*see id.* at 567)—is entirely consistent with the Eleventh Circuit's decision below.

Moreover, *Heraeus Kulzer* was an action under 28 U.S.C. § 1782, a statute which allows a party to file suit in a district court to obtain discovery for use in a foreign investigation, lawsuit or open legal proceedings. *Heraeus Kulzer, GMBH*, 881 F.3d at 554. There, the plaintiff initiated the § 1782 action to obtain discovery from the defendant to use in the plaintiff's misappropriation of trade secrets lawsuit against the defendant in Germany. *Id.* at 555. Actions under § 1782, of course, are unique and involve considerations in shaping discovery not present in this case. Those considerations focus on "§ 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful . . . ." *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 (2004). As *Heraeus Kulzer* demonstrates, in § 1782(a) actions courts must weigh a number of

complicated factors like whether the terms of a protective order, or its modification, will delay a foreign investigation or impede the enforcement of a foreign judgment. *See Heraeus Kulzer*, *GMBH*, 881 F.3d at 566-68.

Petitioners also cite a case decided forty years earlier, *American Tel. & Tel Co. v. Grady*, 594 F.2d 594 (7th Cir. 1978). That case is easily distinguishable because it involved the United States Government as a nonparty intervenor seeking discovery documents to commence a Sherman Act lawsuit against AT&T in another jurisdiction. *See id.* at 595. Given the unique implications of providing access to the Government to commence a separate proceeding against a party, the Seventh Circuit placed the burden on the government to establish "exceptional circumstances" to intervene and modify the protective order. *See id*. at 597. Moreover, unlike here, there was no finding by either the trial court or the Seventh Circuit that the original protective order had been entered without a showing of good cause. *See id.*

The Second Circuit cases Petitioners cite also fail to show a conflict. In *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734 (2d Cir. 2000), there was no motion to modify a protective order. Rather, *Geller* involved a motion to implement the full terms of a settlement agreement that contained a provision for the sealing of the entire case file, which the Court had previously ordered. *See id.* at 735-37. Upon discovering that the district court had sealed only the settlement agreement, but not the entire case file, a party asked the district court to implement the sealing provision related to the entire case file. *Id.* at 736. As the Second Circuit explained, a district court has specific responsibilities when approving a settlement

agreement that includes a confidentiality order, in that it is required to "carefully scrutinize" the terms before endorsing it. *See id*. at 738. Because the settlement agreement imposed an "obligation" on the district court (*i.e.* sealing the entire case file) and the court agreed to do so by "so ordering" the settlement agreement, the court was thereby bound to abide by its obligation. *See id*. at 737 ("In many cases, a stipulated settlement will contemplate actions that are not within the power of the litigants to perform, but rather lie within the power of the district court ordering the settlement. When a district court 'so orders' a settlement containing such provisions, it is, with some limited exceptions, obliged to perform.").

Here, the temporary, pretrial protective order governing discovery between the parties did not impose obligations on the district court to seal judicial documents after discovery or permit the Petitioners to indefinitely shield their identities in the proceedings. *See* Pet. App. 36a-56a. Thus, there is no applicable rule to be drawn from *Geller*.

Four years later, the Second Circuit ruled that notwithstanding a stipulated pretrial protective order, a district court did not abuse its discretion when it *sua sponte* unsealed judicial documents in connection with summary judgment filings. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004). As the Second Circuit explained: "The public has a common law presumptive right of access to judicial documents . . . and likely a constitutional one as well." *Id*. at 140 (citations omitted). Accordingly, "[a] district court that concludes that there is a public right of access to judicial documents thus acts within its jurisdiction when it modifies or vacates a protective order to allow that access[.]" *Id*. at 142. The Second Circuit therefore

ruled that the burden was on the party seeking to withhold the information from the public record to establish "that there was a continuing compelling reason to require that the documents remain under seal." *See id*.

Petitioners also cite *Geller* citing *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) for the proposition that: "Absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely on the enforceability of a protective order . . ." Pet. 16. Like *Geller*, *Martindell* is a case where good cause was shown in the first instance. Courts often use the phrase "improvidence in the grant of a Rule 26(c) protective order" to indicate whether it was or was not entered for good cause. *See, e.g., Martindell*, 594 F.2d at 296. The factual record below is the opposite: no good cause was shown in the first instance. Furthermore, *Martindell* involved the placement of a higher burden on a non-party intervenor, the Government, seeking to use the information in a subsequent prosecution, and therefore is further inapposite. *See id.* at 292. There, the Government, as a nonparty, sought access to deposition transcripts of witnesses who were the subject of a separate criminal investigation. *Id.* Those transcripts and related documents had been sealed pursuant to a stipulation of confidentiality "so ordered" by the district court. *Id.* at 293. The Government sought the deposition transcripts for criminal investigation of the deponents arguing that "it would be unable to secure statements from the witnesses because they would claim their Fifth Amendment rights in any investigative interviews by the Government." *Id*. The district court denied the Government's request because "the

requested turnover would raise constitutional issues." *Id*. The Second Circuit affirmed requiring the Government as a nonparty intervenor to show "some extraordinary circumstances" to modify a protective order because "the Government as an investigator has awesome powers which render unnecessary its exploitation of the fruits of private litigation." *See id*. at 296. (quotations omitted).

SEC v. TheStreet.com, 273 F.3d 222 (2d Cir. 2001) does not present a conflict. There, the district court held a hearing to determine good cause for entry of the protective order and specifically ruled that good cause had been shown when the order was entered. *Id*. at 227. Additionally, the party seeking access to the materials was a non-party intervenor, a media company. *Id*. at 224. Intervenors generally carry the burden under Federal Rule of Civil Procedure 24 to show a sufficient interest in the litigation they seek to access. *See* Fed. R. Civ. P. 24. Furthermore, given that modification was sought by the media, the Second Circuit affirmed the district court's decision to allow access by applying a balancing test between the privacy rights of the litigants and the interest of the media and public, concluding that the media had a relevant interest in the depositions because they pertained to the interaction of the SEC and the NYSE and that interest outweighed possible reputational harm to the litigants. *TheStreet.com*, 273 F.3d at 234.[4]

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[4] The court also declined to apply the *Martindell* presumption against access to discovery materials because it found that there could be no reasonable reliance on the protective order under the circumstances of the case. *Id*. at 233. For the reasons discussed *infra* at Sections IV and V, the Petitioners here have waived any reliance argument, nor could they be deemed to have reasonably relied on a temporary pretrial order with an express modification

The other Second Circuit cases cited at pages 16 and 17 of the Petition arise under many different facts and circumstances than those before the Eleventh Circuit, yet are consistent with the decision below because the protective orders in those cases were entered for good cause. Or, conversely, there is no finding by the courts in those cases that the protective order was entered without good cause. For example, Petitioners also cite *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 240 (2d Cir. 2018), but that case is easily distinguishable because it involved a § 1782 action brought by the plaintiff seeking discovery materials from the law firm that had previously represented Shell, so that plaintiff could file a second lawsuit in the Netherlands against Shell. *Id*. at 247 ("The decision to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell, makes this case exceptional, and mandates reversal . . . If foreign clients have reason to fear disclosing all pertinent documents to U.S. counsel, the likely results are bad legal advice to the client, and harm to our system of litigation.").

Petitioners' reliance on a Magistrate Judge's decision in *Nielsen Co. (U.S.), LLC v. Success Sys.*, fares no better, as it was also an attempt by a party to modify a protective order to use protected information "for purposes beyond the present litigation," a second lawsuit. 112 F. Supp. 3d 83, 120-22 (S.D.N.Y. 2015).

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provision. *See, e.g., Gambale*, 377 F.3d at 142 n.7 ("[P]rotective orders that are on their face temporary or limited may not justify reliance by the parties. Indeed, in such circumstances reliance may be unreasonable.") (quoting *TheStreet.com*, 273 F.3d at 230-31).

The last two cases cited in Section I(A) of the Petition further contradict Petitioners' assertion of a circuit split. Those cases articulate the same burden of proof as the Eleventh Circuit. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 60 F. Supp. 3d 399, 404 n.32 (S.D.N.Y. 2014) ("[**I**]**f** the issuance of a protective order was supported by a showing of good cause, the burden of persuasion is typically placed on the party seeking modification." (quoting *H.L. Hayden Co.*, 106 F.R.D. at 554) (emphasis added) (alteration in original)); *Bayer AG*, 162 F.R.D. at 464 ("The Court agrees with *Hayden v. Siemens* that: If good cause was not shown when a protective order was initially issued, then the party seeking to maintain the order should bear the burden of establishing the need for continued protection. However, if the protective order was supported by a showing of good cause, the burden should be on the party seeking modification." (emphasis removed) (citation omitted) (internal quotation marks omitted)).

With respect to the Third Circuit, Petitioners similarly mischaracterize *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). *Pansy* is not evidence of a circuit conflict because it is entirely consistent with the Eleventh Circuit's decision. The Third Circuit in *Pansy* meticulously examined the record and found that the order of confidentiality was "improvidently granted," and remanded the case for further proceedings. *Id.* at 792. In doing so it explained that when there is no legitimate or providently granted confidentiality order, then the movant shall have access, but "when that is not the case [i.e., when a protective order has been entered for good cause], the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted." *Id.* at 790.

Additionally, the *Pansy* court noted that the document at issue did not implicate the presumption of judicial openness. *See id*. at 780-81 ("We have previously recognized a right of access to judicial proceedings and judicial records, and this right of access is 'beyond dispute.'" (citation omitted)).

The law in the Third Circuit evolved further in *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662 (3d Cir. 2019). There, the Third Circuit held that where judicial records in summary judgment briefing were at issue, the district court was required to place the burden on the party seeking continued sealing. *See id.* at 669. This is so because "the common law right of access begins with a thumb on the scale in favor of openness—the strong presumption of public access." *Id*. at 676. Thus, "[c]onsideration of the public's right of access must be the starting point, not just one of multiple factors. The scale is tipped at the outset in favor of access." *Id*. The court also held that under a Rule 26 analysis, "[o]nce sealing is challenged, the proponent of sealing must make a particularized showing of the need for continued secrecy if the documents are to remain under seal." *Id*. at 675 n.10.

Far from the Third Circuit being in conflict with the Eleventh Circuit, the common law right of public access doctrine provides a separate and distinct rationale supporting the soundness of the decisions below.[5] *See also Heraeus Kulzer, GMBH*, 881 F.3d at

[5] Although the decisions in the courts below were not expressly grounded in the common law right of public access doctrine, the dispute arose from Respondent's request to modify the protective order so that the confidential information at issue could be publicly revealed in summary judgment proceedings and at trial. The Court has discretion to "affirm on any ground that the law

567; *Gambale*, 377 F.3d at 142; *DePuy Synthes Prods., Inc. v. Veterinary Ortho. Implants, Inc.*, 990 F.3d 1364, 1370 (Fed. Cir. 2021) (citing *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011) ("[T]he district court 'cannot abdicate its responsibility . . . to determine whether filings should be made available to the public' simply because the parties agree to [a] protective order." (quoting *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 222 (6th Cir. 1996)))).

IV. There Is No Frequently Recurring and Important Issue in Civil Litigation Presented in the Petition Because the Legal Standard and Analysis for Modifying a Protective Order Is Well Developed, Understood and Applied Uniformly by the Federal Courts.

As is clear from the foregoing discussion of nearly 40 years of federal jurisprudence, when considering the standard for modifying a protective order, federal courts begin as a first step by examining the nature of the protective order—was it or was it not entered upon a finding of good cause. *See United States v. Aetna Inc.*, No. 1:16-CV-1494 (JDB), 2016 WL 8738422, at *9 (D.D.C. Sept. 22, 2016) ("The first factor is whether 'good cause' was shown for the original protective order' . . . **If so**, 'the burden is on the party seeking modification to show good cause for modification.'" (*Bayer AG*, 162 F.R.D. at 462) (emphasis added)); *H.L. Hayden Co.*, 106 F.R.D. at 554; *Chicago Tribune Co.*, 263 F.3d at 1307-08; *H.D. Media*, 927 F.3d at 931. If good cause was shown for the original protective order, the burden is on the party seeking modification, but if

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and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

good cause was not shown, then the burden is on the party seeking continued confidentiality protection.

The determination of whether good cause was shown in the first instance is intensely fact-driven. *Chicago Tribune*, 263 F.3d at 1315 ("[W]hether good cause exists for a protective order is a factual matter to be decided by the nature and character of the information in question, this determination, supported by findings of fact, must be conducted upon remand."); *H.D. Media Co.*, 927 F.3d at 939-40 ("We remand for the district court to reconsider each pleading filed under seal or with redactions and to make a specific determination as to the necessity of nondisclosure in each instance.").

Once the court determines who bears the burden of demonstrating good cause, federal courts then turn to a balancing test to weigh the need for confidentiality versus the need for disclosure. The good cause balancing test is also well understood and implicates several considerations not relevant here, like the status of the party seeking modification and its reasons for doing so weighed against the need for further secrecy, all in the context of the constitutionally-based presumption in favor of openness in judicial proceedings.

V. Petitioners Forfeited Their Reliance Argument.

In *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015), the Court held that an argument never presented to any lower court is forfeited. *See also United States v. Jones*, 565 U.S. 400, 413 (2012) ("The Government did not raise it below, and therefore the D.C. Circuit did not address it . . . we consider the argument forfeited."); *Arkansas Game & Fish Comm'n*

v. United States, 568 U.S. 23, 37-38 (2012) ("[M]indful that we are a court of review, not of first view." (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (alteration in original))). As a review of Petitioners' briefs in the district court and Eleventh Circuit clearly shows, their reliance argument was never presented to either court. There is neither a section nor even a sentence in any of Petitioners' briefs below that raise the reliance argument. Petitioners' briefs below can be found at 08-md-01916 Doc. 2277 (S.D. Fla. Feb. 13, 2019)(Response in Opposition); Corrected Appellants' Brief, 19-11494 (11th Cir. June 25, 2019); and Appellants' Reply Brief, 19-11494 (11th Cir. July 18, 2019).

VI. Even if the Court Were to Consider Petitioners' Reliance Argument, It Should Be Rejected.

The Eleventh Circuit found that the protective order was entered without a showing of good cause. Petitioners do not challenge this fact-bound decision as a question for the Court to consider. Review of whatever error they believe was committed by the appellate court in making this finding has been waived.

The fact that no good cause was shown completely undermines Petitioners' reliance argument. Protective orders that are granted with no showing of good cause do not justify reliance by a party. *Pansy*, 25 F.3d. at 792. In *Agent Orange*, the Second Circuit affirmed the lower court's modification of a protective order, holding that appellant's reliance argument was unavailing because "they never have been required to demonstrate good cause for shielding any document from public view . . . the district court properly entered the orders initially as temporary measures, and properly lifted them thereafter." *In re*

"Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 147-48 (2d Cir. 1987).

Petitioners' reliance argument should also be rejected because a party cannot justifiably rely on temporary protective orders that are applicable only to the pretrial stages of the litigation and subject to reconsideration upon commencement of trial to provide permanent protection. *See TheStreet.com*, 273 F.3d. at 231 (holding there could be no justifiable reliance on protective orders that are temporary or limited); *see also Gambale*, 377 F.3d at 142 n.7 (finding that a party could not have reasonably relied on a sealing order that was explicitly temporary).

The Protective Order entered by the district court below applied to "pretrial discovery" only and expressly did "not prevent the parties from introducing or using Confidential or Highly Confidential Information into evidence at trial, subject to any pretrial order issued by" the district court. Pet. App. 43a, ¶ 3(b). The protective order further provided that: "The procedures for the use of designated CONFIDENTIAL or HIGHLY CONFIDENTIAL documents, materials, or information in any filing, during any hearing or during the trial of this matter will be determined by the parties and the Court in advance of the filing, hearing or trial." *Id*. at 55a-56a, ¶ 18.

The protective order also provided for "modification" of its terms: "If any party finds that any term of this Order impedes its ability to prepare or present its case or is otherwise objectionable, that party may apply to the Court for modification of and relief from any of the terms of this Order." *Id*. at 51a, ¶ 13.

This plain language undermines and discredits Petitioners' reliance argument that: "If Petitioners

had known that the protective order provided very little enduring protection, they may well have made different choices." Pet. 29. It did, in fact, provide very little enduring protection.

Other provisions in the protective order undermine Petitioners' reliance argument. A party may not reasonably rely on continued confidentiality under a protective order which permits anyone at any time, including non-parties, to object. In *Lugosch v. Pyramid Co.*, 435 F.3d 110, 126 (2d Cir. 2006), the court stated:

> In fact, the confidentiality order specifically contemplates that relief from the provisions of the order may be sought at any time: "This Confidentiality Order shall not prevent anyone from applying to the Court for relief therefrom." Given this provision, it is difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret.

The protective order entered by the district court here contains almost identical language: "Nothing in this Order prevents non-parties from submitting objections to the Court." Pet. App. 51a, ¶ 14. The protective order further provided that any party could challenge the designation "of any material," and if such application were made, the "producing party" seeking to maintain confidentiality protections "bears the burden of establishing that the designation is proper." *Id*. at 48a-49a, ¶ (8(b)).

Given these provisions of the protective order, Petitioners' reliance argument has no merit and should be rejected.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL L. CIOFFI
Counsel of Record
THOMAS H. STEWART
BLANK ROME LLP
201 East Fifth Street
1700 PNC Center
Cincinnati, OH 45202
(513) 362-8701
cioffi@blankrome.com
stewart@blankrome.com

FRANK A. DANTE
MELISSA F. MURPHY
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
(215) 569-5645
dante@blankrome.com
mfmurphy@blankrome.com

Counsel for Respondent

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