No. 21-

In the Supreme Court of the United States

SUSAN ELAINE DEVINE, *Petitioner*,

v.

ABSOLUTE ACTIVIST VALUE MASTER FUND LIMITED, *et al.*, *Respondents*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the voluntary dismissal of a plaintiff's suit under Federal Rule of Civil Procedure 41(a)(1) permanently strips the district court of jurisdiction to consider a motion to modify a previously issued protective order.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Susan Elaine Devine was defendant in the district court and appellant in the court of appeals. Pursuant to Supreme Court Rule 29.6, Petitioner discloses the following: Petitioner has no parent company, and no publicly held company owns 10% or more of Petitioner's stock.

Respondents are Absolute Activist Value Master Fund Limited, Absolute East West Fund Limited, Absolute East West Master Fund Limited, Absolute European Catalyst Fund Limited, Absolute Germany Fund Limited, Absolute India Fund Limited, Absolute Octane Fund Limited, Absolute Octane Master Fund Limited, and Absolute Return Europe Fund Limited. Respondents were plaintiffs in the district court and appellees in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner provides the following statement of related cases:

U.S. District Court for the Middle District of Florida, No. 2:15-cv-328, *Absolute Activist Value Master Fund Limited, et al v. Devine*, judgment entered July 11, 2018.

U.S. District Court for the Northern District of California, No. 3:15-mc-80308, *Absolute Activist Value Master Fund Limited, et al v. Devine*, judgment entered January 7, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-cv-00016, *Absolute Activist Value Master Fund Limited, et al v. Devine*, judgment entered January 13, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-mc-00001, *Absolute Activist Value Master Fund Limited, et al v. Devine*, judgment entered January 26, 2016.

U.S. District Court for the Middle District of Florida, No. 2:16-cv-00047, *Absolute Activist Value Master Fund Limited, et al v. Devine*, judgment entered June 21, 2017.

U.S. Court of Appeals for the Eleventh Circuit, No. 16-13047, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered August 18, 2017.

U.S. Court of Appeals for the Eleventh Circuit, No. 17-13364, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered February 20, 2018.

U.S. Court of Appeals for the Eleventh Circuit, No. 19-14147, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered September 16, 2020.

U.S. Supreme Court, No. 20-1153, *Susan Elaine Devine v. Absolute Activist Value Master Fund Limited, et al*, judgment entered April 5, 2021.

U.S. Court of Appeals for the Eleventh Circuit, No. 20-10237, *Absolute Activist Value Master, et al v. Susan Devine*, judgment entered May 28, 2021 and petition for rehearing denied, July 28, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Susan Elaine Devine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The district court's order denying, in part, Petitioner's motion for modification of the previously entered stipulation and protective order is unreported but is reprinted in the appendix hereto ("App.") at App. 53a-62a. The district court's decision overruling Petitioner's objection to the district court's prior order is unreported but is reprinted at App. 33a-52a.

The decision of the Eleventh Circuit vacating the district court's order is reported at 998 F.3d 1258 and is reprinted at App. 1a-32a. The subsequent decision of the Eleventh Circuit denying Ms. Devine's petition for rehearing is unreported but is reprinted at App. 75a-76a.

STATEMENT OF JURISDICTION

On May 28, 2021, the Eleventh Circuit issued its opinion vacating the district court's decision denying, in part, Petitioner's motion for modification of the previously entered stipulation and protective order. On June 17, 2021, Petitioner filed with the Eleventh Circuit a petition for rehearing *en banc*. On July 28, 2021, the Eleventh Circuit denied Petitioner's petition

for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED IN THE CASE

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be

dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

INTRODUCTION

Petitioner, Susan Elaine Devine, respectfully petitions for a writ of certiorari to review the Judgment of the Eleventh Circuit. This case implicates an exceptionally important question on which the circuit courts are in conflict: Whether the voluntary dismissal of a plaintiff's suit under Federal Rule of Civil Procedure 41(a)(1) permanently strips the district court of jurisdiction to consider a motion to modify a stipulated protective order entered earlier in the action. By answering that question in the affirmative during the proceedings below, the Eleventh Circuit brought itself into conflict with the authoritative decisions of every other United States Court of Appeals that has addressed this issue.

Every other federal appellate court that has addressed this issue has held that district courts retain jurisdiction over motions to modify previously entered protective orders, even after the resolution of the underlying action. *See, e,g., Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) ("[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.") (citation omitted); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139-42 (2d Cir. 2004) (concluding that a district court may modify a protective order even after a Rule 41 stipulation of dismissal was filed); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994) (third parties can intervene to modify a protective order even after the underlying dispute has been settled) (citation and

footnote omitted); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 471-76 (9th Cir. 1992) (permitting intervention and modification of protective order entered in previously dismissed action);*United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.") (citation omitted); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (same) (citations omitted). The Eleventh Circuit's decision thus places it alone among the Circuit Courts and stands in stark contrast to the majority rule.

The rule articulated by the Eleventh Circuit also creates serious problems for private and public litigants. First, by holding that district courts lack post-voluntary-dismissal jurisdiction to modify protective orders, the Eleventh Circuit has barred third parties—including both private and public litigants—from seeking reasonable modifications to those orders. Such modifications permit third-parties access to potentially critical evidence produced in prior or related suits, and permit the disclosure of information that should be available to the public or to government investigatory bodies. *See Pansy*, 23 F.3d at 775; *Martindale v. Int'l Tel. and Tel. Corp.,* 594 F.2d 291, 298 (2d Cir. 1979). Second, the blanket prohibition embraced by the Eleventh Circuit inevitably will force litigants to participate in costly and time-consuming discovery duplicative of that completed in related suits previously dismissed under Rule 41(a)(1). Third, the rule articulated by the Eleventh Circuit below will undermine the ability of

media organizations and others to obtain and provide to the public information that is subject to protective orders issued in since-dismissed litigation.

A resolution of this issue is essential to clarify whether district courts possess jurisdiction to consider the multitude of post-dismissal motions to modify protective orders that litigants file every year. A resolution of this issue would also promote efficiency by clarifying that district courts may adjudicate post-dismissal motions seeking access to evidence subject to protective orders issued in prior actions. Permitting such motions will facilitate faster and less expensive discovery that otherwise would need to be duplicated in latter-filed, related suits and more broadly will promote the efficient administration of justice.

This Court should accept *certiorari*, resolve the split among the Circuits, and reverse.

STATEMENT OF THE CASE

A. Factual Background

1. Respondents are nine former hedge funds incorporated in the Cayman Islands. App. 2a. Respondents claimed to be victims of a securities fraud scheme purportedly carried out by Petitioner's former husband, Florian Homm ("Homm"), and others associated with his business. App. 175a.

Petitioner, the lone defendant in the underlying litigation, is a citizen of the United States and Brazil

and a resident of the State of Florida. Though Petitioner obtained a divorce from Homm in 2007, Respondents alleged that she helped to conceal proceeds from her former husband's purported stock manipulation scheme. App. 176a.

2. Respondents conceded below that Petitioner was not involved in the purported stock manipulation scheme. Instead, they contended that Petitioner obtained all of her assets from Homm, who, Respondents alleged, received millions of dollars for *his* role in the scheme. App. 138a, 199a. Respondents claimed, *inter alia*, that Petitioner's divorce from Homm was a strategic pretext to obtain control of certain proceeds of the alleged stock scheme.

3. In 2013, Respondents formed a virtual partnership with a Swiss prosecutor (the "Office of the Attorney General" or "OAG"). App. 113a, 134a-136a. As Petitioner explained below, after Respondents obtained access to the OAG's investigative file, they analyzed those materials and provided strategic advice to the OAG. App. 135a. Respondents repeatedly attempted—without success—to persuade the OAG to bring criminal charges against Petitioner. Respondents also attempted to persuade the OAG to restrain assets belonging to Petitioner, which the OAG eventually did. Additionally, Respondents asked the OAG to submit requests to the U.S. government to restrain certain of Petitioner's assets in the U.S. The U.S. government never acted on the OAG's requests, which continued throughout the litigation below. App. 113a, 144a.

4. On May 29, 2015, Respondents filed with the OAG a private Swiss criminal complaint against Petitioner. App. 83a. Petitioner is the only putative defendant named in the private Swiss criminal complaint. Respondents' private Swiss criminal complaint was not filed publicly. Rather, Respondents did not reveal to Petitioner that they had filed a private Swiss criminal complaint against her until February 2016—well *after* they filed this case and negotiated with Petitioner the protective order that is the subject of this petition. App. 84a-86a.

5. In 2019, the OAG sent a bill of indictment to the Swiss Court of Criminal Affairs in connection with the OAG's investigation of Homm and others. The identifying number assigned to that proceeding was SV.09.0135-FAL (the "135 Proceeding"). Petitioner was not charged in the 135 Proceeding. However, certain of her assets were restrained as a result of that indictment and, as of October 26, 2021, those assets remain unavailable to her.

6. Two days prior, on February 18, 2019, the OAG issued a note in the formal file relating to the 135 Proceeding (the "February 18 Note"). The February 18 Note states, in relevant part, that the private Swiss criminal complaint that Respondents filed against Petitioner had been transferred to the file associated with a new proceeding. The identifying number assigned to that new proceeding is SV.18.1255-FAL (the "1255 Proceeding"). Respondents are identified as the plaintiffs in the 1255 Proceeding and were the only party informed of the 1255 Proceeding. The February 18 Note also indicates that submissions sent by Respondents to the OAG on May 10, 2017, August

30, 2017, and December 5, 2018 in support of their private criminal complaint against Petitioner likewise would be transferred to the file associated with the 1255 Proceeding. The February 18 Note further states that the 1255 Proceeding—whose *only named target is Petitioner*—was suspended pending the resolution of the 135 Proceeding. Thus, the OAG commenced the 1255 Proceeding involving Petitioner based upon information that Respondents provided during the pendency of this action.

B. The Proceedings Below

7. On June 1, 2015, just six days after they filed their private criminal complaint against Petitioner in Switzerland, Respondents filed a six-count, 144-page complaint against Petitioner in the district court, alleging that Petitioner engaged in a money laundering enterprise with her ex-husband to conceal the proceeds of the alleged penny stock scheme.[1] App. 35a, 137a-138a. The monies that Respondents sought to recover through their suit were those purportedly originating from the penny stock scheme. App. 177a.

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[1] The statutory bases for federal jurisdiction in the court of first instance were 28 U.S.C. §§ 1331, 1332, and 18 U.S.C. § 1961, *et seq*. This was so because (i) Respondents' suit included a cause of action under 18 U.S.C. § 1961; (ii) there was complete diversity of citizenship between the parties to Respondents' suit and the amount in controversy exceeded $75,000, exclusive of interest and costs; and (iii) Respondents' state law claims purported to arise out of the same case or controversy as their federal claims, and purportedly arose out of a common nucleus of operative facts.

8. On July 30, 2015, twenty-one days after Petitioner learned of Respondents' U.S. complaint against her, the district court entered a Stipulation and Protective Order governing the use of discovery material produced or created in connection with this case (the "Protective Order"). App. 8a, 63a. The Protective Order provided, in relevant part, that "[e]xcept as otherwise provided [therein], information or documents designated as Confidential by a Party . . . shall not be used or disclosed by any receiving Parties or their counsel . . . for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit (including any appeals)" and that "all material designated Confidential pursuant to the terms of this Protective Order shall either be destroyed or returned to the designating Party, within sixty (60) days after the conclusion of the litigation." App. 66a, 71a.

As the parties were negotiating the terms of the Protective Order—and months *before* Petitioner became aware that Respondents had filed a secret Swiss criminal complaint against her—Respondents inserted into the agreement a clause stating that "[n]otwithstanding any provision of this Protective Order, the Parties may disclose Discovery Material marked as confidential . . . *pursuant to a request for information from any international . . . criminal authority*." (Emphasis added.) (The "IRC.") App. 69a-70a, 140a.

The IRC was drafted to provide the OAG and Respondents with the ability to avoid the formal process whereby the OAG previously had obtained information from the United States—*i.e.*, by making

formal "request[s] for mutual legal assistance" to the Office of International Affairs at the United States Department of Justice (the "DOJ"). While the formal Mutual Legal Assistance Treaty ("MLAT") process requires the involvement of the DOJ and places restrictions on the use of any documents so produced, the IRC did neither of those things.

Respondents exploited the IRC to forward material they obtained in this case to the OAG. App. 140a. Specifically, Respondents employed the IRC to forward to the OAG not only confidential documents and deposition testimony, but also documents produced by third parties in response to subpoenas that Respondents issued in the U.S. App. 140a-141a.

9. Respondents' amended complaint, filed on January 14, 2016, alleged two federal RICO claims (Counts I and II), two state-law RICO claims (Counts III and IV), a state-law unjust enrichment claim (Count V), and a state-law constructive trust claim. App. 183a. Petitioner moved to dismiss the amended complaint on February 12, 2016 (the "Motion to Dismiss"). App. 183a.

On February 8, 2017, the district court issued an Opinion and Order granting in part and denying in part the Motion to Dismiss. In that order, the district court dismissed Respondents' federal RICO claims, state-law RICO claims, and "constructive trust" claim. App. 37a. Only Respondents' unjust enrichment claim survived. App. 37a. On May 15, 2017, Respondents filed their Second Amended Complaint, which included just a single cause of action for unjust enrichment. App. 37a-38a. On July 19, 2017,

Petitioner moved to dismiss Respondents' Second Amended Complaint. App. 165a.

10. Before they voluntarily dismissed what remained of their suit against Petitioner, Respondents obtained significant discovery material though this action; they subsequently used the IRC to forward much of that discovery to the OAG. The OAG made its first request for such discovery material on January 13, 2016, without first attempting to obtain the documents at issue via the U.S. Swiss-MLAT. App. 140a. In its January 13, 2016 letter to Respondents, the OAG requested a transcript of Ms. Devine's initial deposition, material from a hearing on Ms. Devine's request for the release of legal fees, and other documents. App. 140a-141a. The OAG's letter also requested documents relevant to specific portions of Respondents' still-hidden private Swiss criminal complaint against Ms. Devine. App. 140a-141a.

Respondents thereafter employed the IRC to forward to the OAG confidential documents and deposition testimony produced or created in this case, including documents and testimony provided by third parties in response to subpoenas issued by Respondents. App. 141a. On August 30, 2017, as their U.S. suit against Petitioner continued to unravel, Respondents wrote to the OAG to urge it to "take [Petitioner] into custody." App. 144a. In their August 30 letter to the OAG, Respondents cited deposition testimony of a third-party witness—deposition testimony that Respondents obtained in this litigation and shared with the OAG—as purported proof of Petitioner's alleged misconduct. *Id*.

11. Simultaneously, Respondents refused to provide to Petitioner the discovery to which she was entitled. For instance, in January 2018, Respondents—without moving for a protective order—simply refused to attend several party depositions that Petitioner noticed. App. 151a-153a.

12. On February 7, 2018—at which point not even *one* of the Respondents had testified on the record in this action—the district court ordered Respondents to submit to a deposition. App. 153a-154a. Just seven days later, on February 14, 2018, Respondents instead voluntarily dismissed their remaining claim pursuant to Rule 41(a)(1)(A)(i) and abandoned their U.S. suit against Petitioner. App. 154a-155a.[2] On February 21, 2018, the district court dismissed this action. App. 155a.

13. On April 20, 2018, Petitioner filed her Motion for Modification of Stipulation and Protective Order (the "Modification Motion"). App. 111a. In the Modification Motion, Petitioner described materials that Respondents had designated "Confidential" and requested modification of the Protective Order so that she would be able to retain and disclose certain of those materials. *See* App. 115a. Specifically, Petitioner sought modification of the Protective Order so that she would be permitted to, *inter alia*, retain copies of all materials designated "Confidential" by the Funds "pending the resolution of the

[2] At the time of the dismissal, Petitioner's motion to dismiss the Second Amended Complaint remained pending. As a result, Petitioner never answered any of the complaints filed by Respondents. App. 112a.

investigations and other legal proceedings involving [Petitioner] and/or any of [Petitioner's] assets in Switzerland." App. 125a-126a.

In the Modification Motion, Petitioner argued that the requested modification was appropriate as a matter of basic fairness, as Respondents had "abused the liberal discovery permitted under U.S. law to obtain reams of financial information and sworn deposition testimony that they could not otherwise have acquired," "[f]unneled that material back to the OAG," and all the while "steadfastly refused to provide even one word of sworn deposition testimony themselves." App. 114a-115a. Petitioner also argued that contract law principles supported her requested modification, as Respondents had fraudulently induced Petitioner to stipulate to the IRC by "conceal[ing] . . . that they were seeking her indictment in Switzerland at the very same time that the parties were negotiating the terms of the Protective Order." App. 123a. Additionally, Petitioner argued that forcing her "to seek anew the 'Confidential' materials already produced would needlessly duplicate [in the Swiss proceedings] discovery that the parties already have conducted at great expense." App. 123a. Petitioner further argued that absent the requested modification, she likely would be unable to obtain much of the documents and testimony at issue, as Respondents are "'citizen[s] of the Cayman Islands'" who can shield themselves behind Cayman and Swiss secrecy laws. App. 124a. Briefing by the parties followed.

14. On August 27, 2018, Magistrate Judge McCoy issued an Order denying, in part, the

Modification Motion. App. 61a. On September 10, 2018, Petitioner filed her Objection to Order Denying Defendant's Motion for Modification of Stipulation and Protective Order (the "Objection"); additional briefing by the parties followed. App. 77a, 33a-34a. On January 10, 2020, the district court issued its Opinion and Order overruling the Objection. App. 51a. Petitioner timely filed a Notice of Appeal on January 17, 2020.

15. Petitioner filed her opening brief with the Court of Appeals on April 29, 2020. Respondents filed their brief on August 31, 2020, and Petitioner filed her reply brief on September 14, 2020. On December 15, 2020, the parties participated, via video-conference, in an oral argument before a three-judge panel of the Court of Appeals.

16. On May 28, 2021, a split panel of the Court of Appeals issued its opinion (the "Panel Opinion"). In the Panel Opinion, the majority held that "a motion to modify a protective order" is not one of the "types of collateral issues" to which "a district court's post-voluntary-dismissal jurisdiction" extends, and that Respondents' "Federal Rule of Civil Procedure 41(a)(1)(A)(i) voluntary dismissal deprived the District Court of jurisdiction over [Petitioner's subsequent] motion to modify the protective order." App. 16a, 23a. The third member of the panel dissented and noted in her dissenting opinion that "[t]he majority's . . . conclusion puts this Court out of step with our sister circuits." App. 26a. (Grant, J., dissenting).

17. On June 17, 2021, Petitioner filed with the Court of Appeals a petition for rehearing *en banc*. On July 28, 2021, the Court of Appeals denied Petitioner's petition for rehearing. 75a-76a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split Regarding the Jurisdiction of District Courts to Consider Post-Dismissal Motions to Modify Protective Orders.

1. The Eleventh Circuit held that Respondents' Rule "41(a)(1)(A)(i) voluntary dismissal deprived the District Court of jurisdiction over [Petitioner's subsequent] motion to modify the protective order," and that a motion to modify a protective order—unlike "costs, fees, contempt sanctions, Rule 11 sanctions, and motions to confirm arbitral awards"—is not among the "types of collateral issues" to which "a district court's post-voluntary-dismissal jurisdiction" extends. App. 16a, 23a. This conclusion conflicts with authoritative decisions of every other United States Court of Appeals that has addressed this issue. Much of this case law from the other Circuit Courts has existed for over a quarter-century without dispute or comment.

2. As the dissenting member of the panel observed below, "[t]he majority's . . . conclusion puts this Court out of step with our sister circuits." *Id*. at 27 (Grant, J., dissenting) (noting that "[e]very other circuit to consider this issue has approved of district courts

exercising jurisdiction over motions like these, even after the underlying case had been resolved"); *see also id.* at 27 (noting that a "post-dismissal motion to modify a protective order . . . is both 'constitutionally permissible' and 'practically important' for district courts to hear.").[3]

3. The dissent's analysis of the decisions of the other Circuits is correct. In *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993), the First Circuit held that "a protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment." (Citing *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 781-82 (1st Cir. 1988)).

In *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139-42 (2d Cir. 2004), the Second Circuit considered a challenge to a district court's *sua sponte* modification

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[3] The dissent discussed this Court's decisions in *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1991) and *Willy v. Coastal Corp.,* 503 U.S. 131 (1992). In *Cooter & Gell,* this Court considered, *inter alia*, whether "a district court may impose Rule 11 sanctions on a plaintiff who has voluntarily dismissed his complaint pursuant to Rule 41(a)(1)(i)." 496 U.S. at 388. In response to the argument that the dismissal deprived the district court of jurisdiction, this Court held that a district court's jurisdiction to adjudicate a Rule 11 motion survives the voluntary dismissal of the underlying complaint. *Id*. at 409. This Court's *Cooter & Gell* decision also reaffirmed the principle that a district may determine certain "collateral issue[s]" after the termination of an action. *Id.* at 396. In *Willy*, this Court followed *Cooter & Gell* and held that a district court retains the power to impose Rule 11 sanctions even in the face of "a subsequent determination that the court was without subject-matter jurisdiction." 503 U.S. at 137-39.

of a protective order; the trial court modified the order in question after entry of a stipulation of dismissal resolving a discrimination and retaliation claim. The court rejected the appellant's argument that the lower "court lacked jurisdiction" to modify the protective order "after the stipulation of dismissal was filed." *Id.* at 135. The court instead held that a district court "can modify a protective order . . . after the parties have filed a stipulation of dismissal," and can do so in response to a third-party motion or even *sua sponte*. *Id.* at 141 (citations omitted). *See also id.* at 141 & n.4 (noting that "[t]he public has a common law presumptive right of access to judicial documents" and "likely a constitutional one as well," and noting that a "court has supervisory power over its own records and files.") (citations and internal quotation marks omitted).

In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994), the Third Circuit considered "the ability of intervenors"—specifically, various media entities—"to challenge orders of confidentiality pertaining to [a] settlement agreement[]" resolving a civil rights suit brought by a former Chief of the Borough of Stroudsburg's police department. *Id.* at 775-76. The court reversed the trial court's order denying the motion to intervene and held that "'a district court may properly consider a motion to intervene permissively for the limited purpose of modifying [or vacating] a [confidentiality] order even after the underlying dispute between the parties has long been settled.'" *Id.* at 780 (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993)) (footnote omitted).

In *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 471-76 (9th Cir. 1992), the Ninth Circuit reviewed the grant of motions "to intervene under Fed. R. Civ. P. 24(b) and [to] modify a protective order to permit the intervenors access to six deposition transcripts taken in an earlier action" involving related insurance policies. *Id.* at 471. The court affirmed the lower court's decision granting the third-party motions to intervene and to modify the protective order to permit the intervenors access to the six deposition transcripts from the prior suit, which had been settled and dismissed years prior. *Id.* at 471-76 (citations omitted.) The court noted in its ruling that "[t]he discovery here is sought to meet the 'reasonable needs of other parties in other litigation.'" *Id.* at 476 (quoting *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964)).

In *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990), as in *Beckman*, the appellees were third-parties who "sought to intervene in the instant suit for the sole purpose of seeking modification of the protective order [in order to gain] access to discovery produced in this lawsuit for use in" other actions. The Tenth Circuit affirmed the ruling "modify[ing the trial court's] prior orders to allow Intervenors access to discovery for use in their collateral litigation," *id.*, and held that "[a]s long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed." *Id.* at 427 (citing *Pub. Citizen* 858 F.2d at 781-82). The rationale of the *Public Citizen* decision is straightforward: a protective order that remains in effect after the completion of litigation acts as an injunction and

therefore is always subject to modification. 858 F.2d at 782.

In *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1043 (D.C. Cir. 1998), the District of Columbia Circuit vacated and remanded a district court order denying a "motion to intervene for the limited purpose of obtaining access to documents under seal and depositions covered by a protective order." In its ruling, the Court of Appeals acknowledged that "[i]t is undisputed that a district court retains the power to modify or lift protective orders that it has entered," and that "there is a growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated." *Id.* at 1047 (citations and internal quotation marks omitted).[4]

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[4] Other Circuit Courts have issued similar rulings. *See, e.g., Springs v. Ally Fin. Inc.,* 684 F. App'x 336, 337 (4th Cir. 2017) (rejecting argument that district court lacked "subject-matter jurisdiction to enter a postjudgment protective order"); *Meyer Goldberg Inc. of Lorrain v. Fischer Foods, Inc.* 823 F.2d 159, 161-64 (6th Cir. 1987) (reversing denial of motion to intervene in earlier filed suit in order to obtain discovery relevant to subsequent suit, and ordering hearing with respect to requested post-judgment modification of protective order). Often, the government seeks to modify protective orders to gain access to information produced in prior civil litigation. In jurisdictions where a subpoena does not automatically trump a protective order, the government will apply to the district court for modification of an existing protective order. *See Martindale v. Int'l Tel. and Tel. Corp.,* 594 F.2d 291, 298 (2d Cir. 1979) (requiring extraordinary showing to invalidate protective order

4. Petitioner is unaware of any precedential decision from any other United States Court of Appeals holding that a Rule 41(a)(1) dismissal permanently strips a district court of jurisdiction to consider a motion to modify a previously entered protective order. Thus, the decision issued by the Court of Appeals below makes the Eleventh Circuit an outlier among all of the federal Courts of Appeals.[5, 6]

Because the circuit courts have adopted competing and incompatible jurisdictional rules relating to the ability of district courts to entertain post-dismissal motions to modify protective orders,

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to obtain information for use in subsequent investigation into possible violations of federal criminal laws).

[5] The Eleventh Circuit's ruling also appears to be in significant tension with decisions of this Court recognizing the continuing jurisdiction of district courts to modify injunctions. *See Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court . . . ."). *See also Pub. Citizen*, 858 F.2d at 782 ("During the pendency of the protective order, including times after judgment, the order acted as an injunction . . . .").

[6] The jurisdictional limitation embraced by the Eleventh Circuit below also contradicts a leading treatise. *See* CHARLES ALAN WRIGHT ET AL., 8A FED. PRAC. & PROC. CIV. § 2044.1 (3d ed., online edition updated Apr. 2021) ("[A]s a sheer matter of power the court has authority to alter the terms of a protective order it has entered . . . .") (footnote omitted). *See also id.* n.7 ("Generally, as long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.") (citing *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249 (10th Cir. 2006)).

and because motions seeking such modifications are filed in hundreds of cases per year throughout the federal judiciary, the instant petition for a writ of certiorari should be granted.

II. The Jurisdictional Limitation Embraced by the Eleventh Circuit Presents Serious Practical Problems for Private and Public Litigants.

1. As the dissenting member of the Eleventh Circuit panel noted, the rule created by the majority's "holding presents practical problems." App. 28a. For instance, under a rule whereby district courts lack post-voluntary-dismissal jurisdiction to modify protective orders, third parties—including the government—would be unable to seek reasonable modifications to those orders that would permit them access to potentially critical evidence produced in related prior suits. Such a blanket prohibition inevitably will force litigants to participate in costly and time-consuming discovery duplicative of that completed in any related suits previously dismissed under Rule 41(a)(1). *See, e.g.*, *Beckman Indus.*, 966 F.2d at 475 ("Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation.").

2. The rule created by the Eleventh Circuit also limits the ability of trial courts to entertain motions to modify protective orders to permit the retention and use of covered material in connection with post-dismissal motions for costs and fees. Such a rule will undercut the inherent power of district courts to issue

post-dismissal fee-shifting awards as a sanction for abusive litigation conduct.

3. While the Panel Opinion outlines "a few solutions to" the problems presented by its rule, App. 19a, none is effective. First, the majority suggested that dismissal under a different provision—namely, Rule 41(a)(2) rather than 41(a)(1)—would have allowed the district court to "condition[ ] a Rule 41(a)(2) voluntary dismissal on the parties' compliance with" one of the protective order's requirements. App. 19a-20a. But as the dissenting member of the panel noted, "this suggestion aids only the dismissing party," and "[a] party seeking to lock in an advantageous protective order through dismissal would not take that route." App. 29a.

Second, the Panel Opinion stated that if, under its rule, "a party attempts to use a voluntary dismissal as an opportunity to violate a protective order," then the district court could rely on its inherent authority or contempt power to sanction the violator. App. 20a-21a. But this proposal is no solution at all for a party seeking *modification* of a protective order rather than a remedy for a violation of one.

Third, the Panel Opinion suggested that litigants seek enforcement of "a joint, stipulated protective order" in state court. App. 21a. Yet as the dissenting member of the panel noted, many protective orders are not stipulated and therefore cannot be enforced as contracts, and in any event, state courts "cannot modify a *federal* protective order." App. 29a-30a.

4. In short, as Judge Grant noted in her dissenting opinion, the Eleventh Circuit's holding creates "a jurisdictional rule that both ossifies protective orders and renders them only marginally enforceable—even while the parties still maintain copies of each other's documents—[which] is in serious conflict with the judiciary's interest in maintaining a robust and fair discovery process in which litigants can rely on the court's supervision." App. 28a-29a. Additionally, by barring modification of protective orders following voluntary dismissal, the jurisdictional limitation embraced by the Eleventh Circuit "seems to *invite*" abusive behavior by creating an opportunity for enterprising plaintiffs "to lock in an advantageous protective order through dismissal," which would "leave[] a [defendant] who discovers unanticipated consequences of the court's order but who is also unwilling to defy that order without any recourse." App. 29a. Accordingly, certiorari is necessary to avoid the creation of a rule that would frustrate the federal judiciary's interests in promoting efficiency and in discouraging abusive litigation conduct.

III. The Issue Presented Is Important for the Administration of Justice.

1. Whether the voluntary dismissal of a plaintiff's suit under Federal Rule of Civil Procedure 41(a)(1) permanently strips the district court of jurisdiction to consider a motion to modify a previously issued stipulated protective order is an important question for this Court. In the balance lies the ability of litigants, such as Petitioner, to obtain

relief when an opposing party obtains information via civil discovery, uses that information to the movant's detriment, and then opportunistically dismisses its suit to prevent the movant from taking reciprocal discovery or moving to modify the protective order governing the use of any evidence obtained pre-dismissal.

Litigants such as Petitioner should be able to petition district courts for modifications of protective orders governing access to potentially critical evidence—evidence that such litigants may be altogether unable to access in the absence of the requested modifications. Even in cases in which the protected discovery material may be obtained in a latter-filed action, the jurisdictional limitation embraced by the Eleventh Circuit below will force litigants to engage in duplicative and costly litigation in order to obtain the protected documents. *See supra* Statement of the Case, section B(13).

If the Eleventh Circuit's ruling is permitted to stand, then district courts in that Circuit will be barred, as a matter of law, from even considering a motion to modify a protective order that could permit litigants—and the courts—to avert the unnecessary expenditure of significant amounts of time, money, and effort to obtain discovery that already exists. Additionally, that ruling would prohibit third parties, including the media, from obtaining information subject to a protective order issued in a since-dismissed prior proceeding; a number of the modification cases that embrace the majority rule on this issue involve applications from media organizations that sought access to information

produced in a concluded case. *See Pansy*, 23 F.3d at 780; *Pub. Citizen*, 858 F.2d at 778. Another pertinent modification case involved the government's attempt to access information, *see Martindale,* 594 F.2d at 294, and the jurisdictional bar embraced by the Eleventh Circuit below would impede those efforts, as well.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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