19-11494

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.
ALIEN TORT STATUTE AND SHAREHOLDER DERIVATIVE LITIGATION

0:07-cv-60821-KAM

ANTONIO GONZALEZ CARRIZOSA, JULIE ESTER DURANGO HIGITA,
LILIANA MARIA CARDONA, MARIA PATRICIA RODRIGUEZ,
ANA FRANCISCA PALAC MORENO, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC, a Delaware corporation,

Defendants-Appellees,

RODERICK HILLS, *et al.*,

Defendants.

(*Caption continued on inside covers*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE AN *AMICUS* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

PETER A. NELSON
JACOB J. PERKOWSKI
LOUIS M. RUSSO
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Amici Curiae

9:08-cv-80421-KAM

JOHN DOE I, individually and as representative of his deceased father JOHN DOE 2, JANE DOE 1, individually and as representative of her deceased mother JANE DOE 2, JOHN DOE 3, individually and as representative of his deceased brother JOHN DOE 4, JANE DOE 3, individually and as representative of her deceased husband JOHN DOE 5, MINOR DOES #1-4, by and through their guardian JOHN DOE 6, individually and as representative of their deceased mother JANE DOE 4, JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8, JANE DOE 6, JANE DOE 5, JANE DOE 7, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

9:08-cv-80465-KAM

JANE/JOHN DOES (1-144), as Legal Heirs to PETER DOES 1-144, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendant-Appellee,

DAVID DOES 1-10, *et al.*,

Defendants.

9:08-cv-80508-KAM

JOSE LEONARDO LOPEZ VALENCIA, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

9:17-cv-81285-KAM

DOES, 1-11,

Plaintiffs-Appellants,

—v.—

CARLA A. HILLS, Personal Representative of the Estate of Roderick M. Hills,

Defendant,

9:18-cv-80248-KAM

JOHN DOE #1, *et al.*, individually and as representative of his deceased father JOHN DOE 2,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

Carrizosa v. Chiquita Brands International, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 27-1(a)(9), counsel for *Amici Curiae* certifies that, in addition to those persons or entities listed in Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc, a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal (none of whom are publicly listed), including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to *Amici Curiae*, are as follows:

American Civil Liberties Union, *Amicus Curiae*

American Civil Liberties Union of Alabama, *Amicus Curiae*

American Civil Liberties Union of Florida, *Amicus Curiae*

American Civil Liberties Union of Georgia, *Amicus Curiae*

Center for Constitutional Rights, *Amicus Curiae*

Center for Gender & Refugee Studies, *Amicus Curiae*

Center for Justice and Accountability, *Amicus Curiae*

Electronic Frontier Foundation, *Amicus Curiae*

Global Witness, *Amicus Curiae*

Carrizosa v. Chiquita Brands International, Inc.

Human Trafficking Legal Center, *Amicus Curiae*

International Corporate Accountability Roundtable, *Amicus Curiae*

LatinoJustice PRLDEF, *Amicus Curiae*

Lawyers for Civil Rights, *Amicus Curiae*

Nelson, Peter A., counsel for *Amici Curiae*

Patterson Belknap Webb & Tyler LLP, law firm for *Amici Curiae*

Perkowski, Jacob J., counsel for *Amici Curiae*

Russo, Louis M., counsel for *Amici Curiae*

Dated: New York, New York
August 13, 2020

Respectfully submitted,

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Peter A. Nelson
Louis M. Russo
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Proposed *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Alabama, American Civil Liberties Union of Georgia, American Civil Liberties Union of Florida, Center for Constitutional Rights, Center for Gender & Refugee Studies, Center for Justice and Accountability, Electronic Frontier Foundation, Global Witness, Human Trafficking Legal Center, International Corporate Accountability Roundtable, LatinoJustice PRLDEF, and Lawyers for Civil Rights, by their attorneys, Patterson Belknap Webb & Tyler LLP, submit this Motion of *Amici Curiae* for Leave to File an Amicus Brief in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc, pursuant to Federal Rules of Appellate Procedure 27 and 29. In accordance with Federal Rule of Appellate Procedure 29(a)(3) and 29(b), the proposed brief of *Amici Curiae* is attached as an exhibit to this motion. In support of their motion, *Amici Curiae* state the following:

1. The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Alabama, Georgia, and Florida are statewide affiliates of the national ACLU. The ACLU and

its statewide affiliates often seek pseudonymity for plaintiffs seeking redress for violations of fundamental liberties and basic civil rights.

2. The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for survivors of human rights atrocities, for immigrants' rights, and for racial justice. CCR has represented numerous individual litigants, including asylum seekers, individuals seeking damages from human rights abusers and individuals challenging the constitutionality of sex offender registries, who proceeded under pseudonyms as the only means to ensure their safe access to justice. These cases include: *Doe v. Constant*, 354 Fed. Appx. 543 (2d Cir. 2009); *Doe v. Unocal, Corp.*, 248 F.3d 915 (2001); *Doe v. Karadzic*, 866 F.3d 784 (S.D.N.Y. 1994); *Al Otro Lado et al. v. Wolf et al.*, 17-cv-2366 (S.D. Cal., filed July 12, 2017); *Doe v. Hood*, 16-cv-00789, 2017 WL 2408196 (S.D. Miss. June 2, 2017); and *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012).

3. The Center for Gender & Refugee Studies ("CGRS") advances protections for asylum seekers through litigation, scholarship, and development of policy recommendations. It also addresses the root causes of persecution,

documenting human rights abuses in home countries. CGRS has submitted briefs, as an amicus party and/or counsel of record, regarding asylum and related humanitarian claims in nearly every court of appeals and has a strong interest in the questions under consideration in this appeal that implicate fundamental protections for survivors of human rights violations in U.S. courts.

4. The Center for Justice and Accountability ("CJA") is a non-profit human rights organization dedicated to deterring torture, war crimes, crimes against humanity, and other serious human rights abuses. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks redress for victims. CJA has represented victim plaintiffs in numerous lawsuits filed in federal courts under the Alien Tort Statute and the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. CJA's work has included seeking justice in U.S. federal court for the torture and murder of Chilean folk singer Víctor Jara in the aftermath of the 1973 coup in Chile, representing over one hundred Cambodian Americans before the international hybrid tribunal for the Khmer Rouge, and appearing as *amicus curiae* before this Court in *Balcero v. Drummond Company, Inc*., No. 13-15503-FF (11th Cir. 2014) on crimes against humanity committed by paramilitary forces in Colombia.

5. The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit organization that works to protect civil liberties and human rights in the

digital world. EFF has repeatedly represented anonymous and pseudonymous litigants and appeared as *amicus curiae* in cases where protections for pseudonymous and anonymous speech are at issue. *See, e.g.*, *Doe v. Ethiopia*, 851 F.3d 7 (D.C. Cir. 2017) (serving as counsel to Doe); *Signature Mgm't Team, LLC v. Doe*, 876 F.3d 831 (6th Cir. 2017) (serving as *amicus curiae* in support of Doe); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (serving as *amicus curiae* in support of anonymous speaker); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe). A complete list of anonymous speech cases EFF has participated in is available at https://www.eff.org/issues/anonymity.

6. Global Witness is an international non-profit organization working to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. As part of those efforts, Global Witness conducts investigations and reports and campaigns on behalf of frontline land and environmental defenders around the world who face reprisals and killings for defending their human rights.

7. The Human Trafficking Legal Center (the "Center") is a non-profit organization dedicated to helping survivors obtain justice. Since its inception in 2012, the Center has trained more than 3,400 attorneys at top law firms across the

country to handle civil trafficking cases pro bono, connected more than 260 individuals with pro bono representation, and educated over 16,000 community leaders on victims' rights. The Center advocates for justice for all victims of human trafficking.

8. The International Corporate Accountability Roundtable ("ICAR") harnesses the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality. ICAR's membership is composed of 40 human rights, environmental, labor, and development organizations.

9. LatinoJustice PRLDEF ("LatinoJustice"), formerly known as the Puerto Rican Legal Defense & Education Fund, is a national civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. During its 48-year history, LatinoJustice has successfully litigated numerous cases in state and federal courts across the country challenging discriminatory and retaliatory employment workplace practices targeting Latina/o immigrant workers, as well as

policing and law enforcement practices racially profiling Latinos. LatinoJustice has represented numerous immigrant workers and Latino motorists seeking damages from law enforcement agencies who proceeded under pseudonyms as the only means to ensure their safe access to justice. These cases include: *Plaintiffs #1-21 v. County of Suffolk*, 15-cv-2431; *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236 (11th Cir. 2012); *Lozano v. City of Hazelton*, 620 F.3d 170 (3rd Cir. 2010), *vacated*, 131 S.Ct. 2958 (2011) (vacating for further consideration on different grounds).

10. Lawyers for Civil Rights ("LCR") is a non-profit, non-partisan organization that fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR handles major law reform cases as well as legal options on behalf of individuals.

11. In light of their extensive experience with the issues before the Court, *Amici Curiae* can provide valuable insight on the significant impact the panel decision will have on litigants who seek redress in judicial fora for human and civil rights violations.

12. *Amici Curiae* argue in the proposed brief that the panel decision will have a chilling effect on human and civil rights litigation. In the experience of *Amici*,

the ability to pursue claims pseudonymously, and to rely on stipulated protective orders to guard against the disclosure of sensitive personal information, is of paramount importance to many human and civil rights litigants.

13. *Amici Curiae* argue further that the panel decision undermines the reliability of stipulated protective orders. The panel's decision renders stipulated protective orders unreliable for litigants that place a premium on pseudonymity and confidentiality.

14. Because the panel's decision concerns questions of exceptional importance, the proposed brief of *Amici Curiae* argues that the Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc should be granted.

For the foregoing reasons, *Amici Curiae* respectfully request that the Court grant this Motion of *Amici Curiae* for Leave to File an Amicus Brief in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc.

Dated: New York, New York
August 13, 2020

Respectfully submitted,

/s/ Jacob J. Perkowski

Jacob J. Perkowski
Peter A. Nelson
Louis M. Russo
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation, as provided in Federal Rule of Appellate Procedure 27 and Eleventh Circuit Rule 27-1 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 35, the motion contains 1729 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filing system.

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae

19-11494

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.
ALIEN TORT STATUTE AND SHAREHOLDER DERIVATIVE LITIGATION

0:07-cv-60821-KAM

ANTONIO GONZALEZ CARRIZOSA, JULIE ESTER DURANGO HIGITA,
LILIANA MARIA CARDONA, MARIA PATRICIA RODRIGUEZ,
ANA FRANCISCA PALAC MORENO, *et al.*,

Plaintiffs-Appellants,

—v.—

(*Caption continued on inside covers*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR GENDER & REFUGEE STUDIES, CENTER FOR JUSTICE AND ACCOUNTABILITY, ELECTRONIC FRONTIER FOUNDATION, GLOBAL WITNESS, HUMAN TRAFFICKING LEGAL CENTER, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, LATINOJUSTICE PRLDEF, AND LAWYERS FOR CIVIL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

PETER A. NELSON
JACOB J. PERKOWSKI
LOUIS M. RUSSO
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Amici Curiae

CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC, a Delaware corporation,

Defendants-Appellees,

RODERICK HILLS, *et al.*,

Defendants.

9:08-cv-80421-KAM

JOHN DOE I, individually and as representative of his deceased father JOHN DOE 2, JANE DOE 1, individually and as representative of her deceased mother JANE DOE 2, JOHN DOE 3, individually and as representative of his deceased brother JOHN DOE 4, JANE DOE 3, individually and as representative of her deceased husband JOHN DOE 5, MINOR DOES #1-4, by and through their guardian JOHN DOE 6, individually and as representative of their deceased mother JANE DOE 4, JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8, JANE DOE 6, JANE DOE 5, JANE DOE 7, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

9:08-cv-80465-KAM

JANE/JOHN DOES (1-144), as Legal Heirs to PETER DOES 1-144, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendant-Appellee,

DAVID DOES 1-10, *et al.*,

Defendants.

9:08-cv-80508-KAM

JOSE LEONARDO LOPEZ VALENCIA, *et al.*,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

9:17-cv-81285-KAM

DOES, 1-11,

Plaintiffs-Appellants,

—v.—

CARLA A. HILLS, Personal Representative of the Estate of Roderick M. Hills,

Defendant,

9:18-cv-80248-KAM

JOHN DOE #1, *et al.*, individually and as representative of his deceased father JOHN DOE 2,

Plaintiffs-Appellants,

—v.—

CHIQUITA BRANDS INTERNATIONAL, INC., a New Jersey corporation,

Defendant-Appellee,

MOE CORPORATIONS 1-10, *et al.*,

Defendants.

Carrizosa v. Chiquita Brands International, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 27-1(a)(9), counsel for *Amici Curiae* certifies that, in addition to those persons or entities listed in Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc, a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal (none of whom are publicly listed), including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to *Amici Curiae*, are as follows:

American Civil Liberties Union, *Amicus Curiae*

American Civil Liberties Union of Alabama, *Amicus Curiae*

American Civil Liberties Union of Florida, *Amicus Curiae*

American Civil Liberties Union of Georgia, *Amicus Curiae*

Center for Constitutional Rights, *Amicus Curiae*

Center for Gender & Refugee Studies, *Amicus Curiae*

Center for Justice and Accountability, *Amicus Curiae*

Electronic Frontier Foundation, *Amicus Curiae*

Global Witness, *Amicus Curiae*

Carrizosa v. Chiquita Brands International, Inc.

Human Trafficking Legal Center, *Amicus Curiae*

International Corporate Accountability Roundtable, *Amicus Curiae*

LatinoJustice PRLDEF, *Amicus Curiae*

Lawyers for Civil Rights, *Amicus Curiae*

Nelson, Peter A., counsel for *Amici Curiae*

Patterson Belknap Webb & Tyler LLP, law firm for *Amici Curiae*

Perkowski, Jacob J., counsel for *Amici Curiae*

Russo, Louis M., counsel for *Amici Curiae*

Dated: New York, New York
August 13, 2020

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorney for Amici Curiae

STATEMENT PURSUANT TO ELEVENTH CIRCUIT RULE 35-5(C)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

1. *FTC v. AbbVie Prods. LLC*, 713 F.3d 54 (11th Cir. 2013)

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Do plaintiffs who face legitimate risks of retaliation for seeking to vindicate their rights in court depend on the availability and reliability of pseudonymity and confidentiality protections?
2. In holding that a party to a stipulated protective order, entered pursuant to Fed. R. Civ. P. 26(c), bears no burden of showing good cause when seeking a modification, did the panel undermine the ability of litigants with significant privacy concerns to rely on pseudonymity and stipulated protective orders to guard their confidential information from disclosure?
3. Must a litigant seeking to proceed pseudonymously or to include confidentiality provisions in a stipulated protective order adduce

"comparator evidence" to establish good cause for those protections?

Dated: New York, New York
August 13, 2020

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorney for Amici Curiae

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT PURSUANT TO ELEVENTH CIRCUIT RULE 35-5(C) i

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND STATEMENT OF ISSUES 3

ARGUMENT 4

I. Pseudonymity and Confidentiality Are Critical To Human And Civil Rights Plaintiffs, And Undermining Those Privacy Protections Will Have A Chilling Effect On Human Rights and Civil Rights Litigation. 4

II. The Panel Decision Creates Significant Uncertainty For Litigants With Confidentiality Concerns And Does Not Promote Judicial Economy. 7

III. Requiring Comparator Evidence Imposes An Excessive Burden On Plaintiffs Seeking Pseudonymity. 10

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page

CASES

Adoptive Couple v. Baby Girl,
570 U.S. 637 (2013).....5

AT&T v. Grady,
594 F.2d 594 (7th Cir. 1978).....8

City of San Diego v. Roe,
543 U.S. 77 (2004).....5

Doe v. Frank,
951 F.2d 320 (11th Cir. 1992).....10

Doe v. Pittsylvania County,
844 F. Supp. 2d 724 (W.D. Va. 2012).....6

Doe v. Reed,
561 U.S. 186 (2010).....5

Doe v. Unocal,
395 F.3d 932 (9th Cir. 2002).....4,5

Doe No. 2 v. Kolko,
242 F.R.D. 193 (E.D.N.Y. 2006).....11

Does I Thru XXIII v. Advanced Textile Corp.,
214 F.3d 1058 (9th Cir. 2000).....10

EW v. New York Blood Center,
213 F.R.D. 108 (E.D.N.Y. 2003).....12

FTC v. AbbVie Prods. LLC,
713 F.3d 54 (11th Cir. 2013).....7

Hispanic Interest Coalition of Alabama v. Bentley,
691 F.3d 1236 (11th Cir. 2012).....6

Honig v. Doe,
484 U.S. 305 (1988).....5

Ms. Q. v. U.S. Immigration & Customs Enforcement,
No. 18-cv-2409, 2018 WL 10050939 (D.D.C. Oct. 24, 2018).....12

Plaintiff B v. Francis,
631 F.3d 1310 (11th Cir. 2011).....10

Plyler v. Doe,
457 U.S. 202 (1982).....6

Roe v. Aware Woman Ctr. for Choice, Inc.,
253 F.3d 678 (11th Cir. 2001).....10

Roe v. Howard,
917 F.3d 229 (4th Cir. 2019).....6

Roe v. Wade,
410 U.S. 113 (1973).....5

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000).....4

School District of Abington Township v. Schempp,
374 U.S. 203 (1963).....6

Sealed Plaintiff v. Sealed Defendant #1,
537 F.3d 185 (2d Cir. 2008).....10

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995).....4,5

Yaman v. U.S. Dep't of State,
786 F. Supp. 2d 148 (D.D.C. 2011).....12

STATUTES AND RULES

Fed. R. App. P. 29.....1

Fed. R. Civ. P. 26 8,9

OTHER AUTHORITIES

Armin Rosencranz et al., *Doe v. Unocal: Holding Corporations Liable For Human Rights Abuses On Their Watch*,
8 Chap. L. Rev. 130 (2005) 4

Benjamin P. Edwards, *When Fear Rules In Law's Place: Pseudonymous Litigation As a Response to Systematic Intimidation*,
20 Va. J. Soc. Pol. & Law 437 (2013).....6,7

Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*,
84 Tenn. L. Rev. 779 (2017).....6

Jed Greer, *Plaintiff Pseudonymity and The Alien Tort Claims Act: Questions and Challenges*,
32 Colum. Hum. Rts. L. Rev. 517 (2001).....5

Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*,
37 Hastings L. J. 1 (1985).....5

Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*,
47 Hastings L.J. 779 (1996).....5

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae American Civil Liberties Union ("ACLU"), ACLU of Alabama, ACLU of Florida, ACLU of Georgia, Center for Constitutional Rights, Center for Gender & Refugee Studies, Center for Justice and Accountability, Electronic Frontier Foundation, Global Witness, Human Trafficking Legal Center, International Corporate Accountability Roundtable, LatinoJustice PLRDEF, and Lawyers for Civil Rights are organizations with extensive experience litigating, documenting, campaigning, and advocating for people or groups who face the threat of violence for defending their human and civil rights. *Amici* have a substantial interest in this case, which will have a significant chilling effect on litigants who seek redress in judicial fora for civil and human rights violations. Many individuals represented by *Amici* face serious risks of reprisal for participating in litigation unless they can reliably protect their identities through pseudonymity and confidential treatment of their personal information. The panel decision here creates considerable uncertainty around these critical privacy protections. This brief provides the unique perspective of *Amici* on the importance of consistent standards

[1] No party's counsel authored this brief in whole or in part and no person or entity, other than *Amici* and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4), (b). *Amici* seek leave to file this brief under Fed. R. App. P. 29(b); counsel for Plaintiffs-Appellants has consented to the filing of this brief.

concerning the availability of pseudonymity and reliability of stipulated protective orders.

INTRODUCTION AND STATEMENT OF ISSUES

Many victims of human and civil rights violations rely on pseudonymity and stipulated protective orders to minimize the risk of retaliation for their efforts to hold their wrongdoers accountable. Without these protections, many victims would be unwilling to pursue litigation, depriving them—and the public—of important opportunities to reaffirm the rule of law, bring about necessary social change, and advance the cause of justice generally.

The panel in this case affirmed the district court's decision to modify a purportedly stipulated protective order and strip certain plaintiffs of their pseudonymity and confidentiality protections after years of litigation. The decision is highly problematic for two reasons.

First, by assuming district courts enter stipulated protective orders without finding good cause to do so, the decision eliminates the burden on parties seeking to modify stipulated protective orders. This creates perverse incentives for parties to stipulate to protections and later seek strategic modifications to intimidate or harass their adversaries, undermines judicial economy by encouraging parties to litigate protective orders in lieu of stipulating, and impairs plaintiffs' ability to conduct reliable risk-reward assessments when deciding whether to litigate despite the risk of retaliation.

Second, by effectively requiring plaintiffs to produce "comparator evidence" that similarly-situated plaintiffs suffered actual harm in order to be entitled to pseudonymity, the panel decision imposes an unreasonably high burden on human and civil rights litigants.

ARGUMENT

I. Pseudonymity and Confidentiality Are Critical To Human And Civil Rights Plaintiffs, And Undermining Those Privacy Protections Will Have A Chilling Effect On Human Rights and Civil Rights Litigation.

Plaintiffs in human and civil rights litigation often depend on pseudonymity and confidentiality protections to keep them safe from threats of reprisal. These protections increase the likelihood that issues are "addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000). Many plaintiffs would choose not to litigate without pseudonymity or if there was a risk of public disclosure of their sensitive personal information.

Our jurisprudence is replete with important human rights rulings that would not have been possible without such privacy protections. For example, in *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), Burmese villagers who were subjected to human rights abuses by the Burmese government, in which Unocal was allegedly complicit, were allowed to litigate pseudonymously. The *Unocal* case settled, but only after the pseudonymous plaintiffs achieved a significant ruling permitting

plaintiffs to sue private corporations under the Alien Tort Claims Act ("ATCA"). *See* Armin Rosencranz et al., *Doe v. Unocal: Holding Corporations Liable For Human Rights Abuses On Their Watch*, 8 Chap. L. Rev. 130, 135 (2005). Similarly, in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), an ATCA case against the former Guatemalan Minister of Defense, a plaintiff was permitted to proceed pseudonymously. *Id.* at 169-70. That case set an important human rights precedent that individuals can be liable for "command responsibility" under the ATCA. *Id.* at 172-73. Courts rarely question "the legitimacy of plaintiffs' fears or den[y] them anonymity from the public" in cases like *Unocal* and *Xuncax*, which involve military power or terrorism. *See* Jed Greer, *Plaintiff Pseudonymity and The Alien Tort Claims Act: Questions and Challenges*, 32 Colum. Hum. Rts. L. Rev. 517, 529 (2001).

Proceeding pseudonymously is also essential in litigation concerning politically sensitive or intensely personal subject matter. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). In cases like *Roe*, courts generally permit plaintiffs to proceed pseudonymously because the litigations involve "highly sensitive, personal issues and the plaintiff desires to engage in prohibited conduct." Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 Hastings L.J. 779, 800 (1996) (citing Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*, 37 Hastings L. J. 1 (1985)).

A wide array of important human and civil rights litigation has involved pseudonymous plaintiffs. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (challenge to adoption notification); *Doe v. Reed*, 561 U.S. 186 (2010); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (police officer's challenge to termination of employment); *Honig v. Doe*, 484 U.S. 305 (1988) (challenge to policy of excluding disabled children from classroom for dangerous or disruptive conduct); *Plyler v. Doe*, 457 U.S. 202 (1982) (challenge to exclusion of undocumented persons from public schools); *see also, e.g.*, *Hispanic Interest Coalition of Alabama v. Bentley*, 691 F.3d 1236, 1247 n.8 (11th Cir. 2012) (noting federal court practice allowing plaintiffs to proceed anonymously in immigration-related cases); *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019) (sex trafficking victim allowed to proceed pseudonymously). Courts generally approach anonymity in these cases with a "subtext of approval." Jayne S. Ressler, *#Worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 Tenn. L. Rev. 779, 810-11 (2017).

There are also numerous examples of litigants being threatened, intimidated, harassed, or injured for filing suit. In *Doe v. Pittsylvania County*, 844 F. Supp. 2d 724, 732-34 (W.D. Va. 2012), for example, after the court denied pseudonymity to a plaintiff litigating prayer at government meetings, the plaintiff was threatened by the Ku Klux Klan. *See* Benjamin P. Edwards, *When Fear Rules In Law's Place: Pseudonymous Litigation As a Response to Systematic Intimidation*, 20 Va. J. Soc.

Pol. & Law 437, 453-54 (2013). The dangers of litigating human and civil rights cases without pseudonymity are well-known. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), for example, after the Supreme Court issued a landmark ruling that public schools could not compel bible reading, one plaintiff's child was beaten and the family's home was firebombed. *See Edwards*, *supra*, at 463-64 (discussing *Abington* and other cases in which plaintiffs faced retaliation).

Given the high stakes for human and civil rights plaintiffs who often face violent threats for vindicating their rights, this panel decision—which makes it harder to obtain privacy protections and makes those protections less reliable—will likely chill would-be plaintiffs from pursuing their claims at all.

II. The Panel Decision Creates Significant Uncertainty For Litigants With Confidentiality Concerns And Does Not Promote Judicial Economy.

The pseudonymous appellants in this action filed suit despite a legitimate threat of paramilitary violence and retaliation. Human and civil rights defenders and litigants who face similar threats must perform a risk-reward assessment when deciding whether to litigate. The ability to proceed pseudonymously and to shield their confidential information from disclosure through stipulated protective orders can reduce the risks these individuals face. But only if stipulated protective orders can be relied upon. If the protective order can be modified at any time with no

showing of good cause, as the panel decision held, then those protections become illusory, too unreliable for plaintiffs to properly assess the risk of pursuing litigation.

In *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 68 (11th Cir. 2013), the Eleventh Circuit explicitly recognized that litigants rely on protective orders when disclosing confidential information. That conclusion should not be controversial: parties should be entitled to rely on the terms of a legally-enforceable, court-approved protective order to shield their identities and confidential information from disclosure. In *AbbVie*, the Eleventh Circuit explained that courts *should* take this reliance into account when confronted with a request to modify a protective order. 713 F.3d at 68. The panel decision in this case upends that reasonable precedent by treating the bargained-for terms of a stipulated protective order as non-binding.

The panel decision also conflicts with Fed. R. Civ. P. 26(c) and encourages litigants to give little weight to protective orders entered by district courts. The panel assumed that parties who submit stipulated protective orders for court approval do so without showing good cause under Fed. R. Civ. P. 26(c)—and that district courts routinely ignore Rule 26(c)'s good cause requirement by approving them. (Panel Op. at 22.) As a result, the panel held that "[w]hen faced with a motion to modify [] a *stipulated* protective order, the party seeking the stipulated order's protection must satisfy Rule 26(c)'s good cause standard." (*Id.*) This means the panel imposed *no burden whatsoever* on the party seeking to modify the protective order that it

previously negotiated and agreed to and to remove the confidentiality protections that its adversary relied on throughout the litigation.[2]

The decision creates a perverse incentive to pull the rug out from under the party with significant privacy concerns. The new rule will likely encourage defendants to strategically stipulate to protective orders early in cases and, after learning the plaintiffs' identities and obtaining other sensitive information, move to strip the plaintiffs' pseudonymity and confidentiality protections from the protective order—often to harass or intimidate plaintiffs. Such gamesmanship will inevitably follow from a rule that permits defendants to modify stipulated protective orders without showing good cause for the modification or any prejudice from maintaining the privacy protections.

Finally, the panel's distinction between "stipulated" and "disputed" protective orders does not promote judicial economy.[3] The panel held that, unlike stipulated protective orders, the party seeking to modify a *disputed* protective order bears the burden of showing good cause for the modification. (Panel Op. at 23.) This ignores

[2] The panel decision also creates a dramatic circuit split with the Seventh Circuit, which has held that "where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify the modification of the order." *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978).

[3] *Amici* note that the protective order in this action was not "stipulated," because the parties submitted competing protective orders and required the district court's intervention to resolve the dispute.

the plain text of Rule 26(c), which directs parties who seek a protective order to confer or attempt to confer in good faith with "other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1). Instead, the panel decision incentivizes parties to litigate a protective order's terms *and* seek court intervention to resolve the dispute—rather than stipulate—to ensure that the protective order can be relied upon and cannot be modified without a showing of good cause by the party seeking the modification. This will inevitably require litigants and courts to devote more time and resources to collateral issues unrelated to the merits of the case that could otherwise be resolved between the parties.

III. Requiring Comparator Evidence Imposes An Excessive Burden On Plaintiffs Seeking Pseudonymity.

The "ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001) (quotations omitted). Courts must examine "all of the circumstances of a given case," *Plaintiff B v. Francis*, 631 F.3d 1310, 1316 (11th Cir. 2011), which includes assessing whether the litigant faces a "real danger of physical harm," *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992), or threats of mental harm or imprisonment, *see, e.g.*, *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189-90 (2d Cir. 2008); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 (9th Cir. 2000).

The panel decision in this case imposes an exceedingly high evidentiary burden on litigants seeking to proceed pseudonymously by emphasizing so-called "comparator evidence." (Panel Op. at 18.) Specifically, the panel determined that the district court had "ample comparator evidence to support its holding" that the pseudonymous appellants could *not* justify continued protection because "hundreds of plaintiffs have litigated this case under their true names, and nothing in the record suggests that they have faced paramilitary retaliation." (*Id.*)

This ruling effectively established an unprecedented rule that litigants seeking pseudonymity must show that similarly situated parties suffered *actual* harm as a result of pursuing their claims non-pseudonymously.

Amici are not aware of any case that requires—or even mentions or considers—such comparator evidence when analyzing a plaintiff's need for anonymity. *See, e.g.*, *Advanced Textile*, 214 F.3d at 1068-69. Some courts suggest the contrary: comparator evidence should not be used. In *Doe No. 2 v. Kolko*, 242 F.R.D. 193 (E.D.N.Y. 2006), for example, the plaintiff moved to pursue sexual abuse claims pseudonymously. Even though a plaintiff in a related case had pursued the same claims against the same defendants under his true name, the court granted the *Kolko* plaintiff's motion for pseudonymity with *no assessment* of whether the other plaintiff had suffered harm for using his true name. *See id.* The panel's heavy reliance on comparator evidence fails to recognize that many human and civil rights

cases present novel circumstances that will make it impossible for plaintiffs to point to similarly situated parties.

The panel decision here is incorrect for another reason: it suggests that comparator evidence must show *actual* harm rather than a *risk* of harm. *See Advanced Textile*, 214 F.3d at 1068 (noting appropriateness of pseudonymity "when identification creates a *risk* of retaliatory physical or mental harm" (emphasis added).). Other courts do not require litigants to justify pseudonymity with this level of certainty. In *Yaman v. U.S. Department of State*, for example, the court held that pseudonymity may be appropriate based on "specific evidence *tending to show* that disclosure of [] identifying information . . . has the *potential* to place [the litigant] at grave risk of physical and emotional harm." 786 F. Supp. 2d 148, 153 (D.D.C. 2011) (emphasis added); *see also Ms. Q. v. U.S. Immigration & Customs Enforcement*, No. 18-cv-2409, 2018 WL 10050939, at *1 (D.D.C. Oct. 24, 2018) (granting pseudonymity to asylum seeker challenging family separation policy due to a "significant risk of persecution . . . if her identity is publicly revealed."). Pseudonymity may be appropriate even when a litigant makes "no particularized showing of any specific harm or stigma to her caused by prosecuting the case under her own name." *EW v. New York Blood Center*, 213 F.R.D. 108, 112 (E.D.N.Y. 2003).

CONCLUSION

The Court should grant Plaintiffs-Appellants' petition for rehearing and/or rehearing en banc.

/s/ Jacob J. Perkowski
Jacob J. Perkowski

Peter A. Nelson
Jacob J. Perkowski
Louis M. Russo
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation, as provided in Federal Rule of Appellate Procedure 27 and Eleventh Circuit Rule 27-1 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 35, the motion contains 2597 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filings system.

/s/ Jacob J. Perkowski
Jacob J. Perkowski
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae