No. 15-1211

In The
Supreme Court of the United States

FCA US LLC, F/K/A CHRYSLER GROUP LLP,

Petitioner,

v.

THE CENTER FOR AUTO SAFETY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and the civil justice system; improving the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are exceptionally important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Achieving fairness in civil litigation is fundamental to DRI's mission. Protective orders issued for good cause under Federal Rule of Civil Procedure 26(c) (and under corresponding state court rules) are an indispensable mechanism for curtailing

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), Petitioner's and Respondent's counsel of record received timely notice of DRI's intent to file this *amicus* brief. Both counsel of record have consented to the filing of this brief.

discovery's "significant potential for abuse." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). They achieve a fair, case-by-case balance between "the liberality of pretrial discovery permitted by Rule 26(b)(1)" and the "privacy interests of litigants." *Id.* at 34, 35. Indeed, protective orders "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way," Fed. R. Civ. P. 26(c)(1)(G), have become more vital than ever in view of the "exponential growth in the volume of [electronically stored] information" and the resultant explosion in e-discovery. Fed. R. Civ. P. 37(e) advisory comm. note (2015).

A fair balance would be impossible to achieve or maintain, and discovery of confidential business information "that is relevant to any party's claim or defense and proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1), would be seriously impaired or impeded, if a party which is requested (or ordered) to produce confidential business information cannot rely *throughout* the course of a proceeding on a protective order's sealing and other non-disclosure provisions. As this case illustrates, that is exactly the type of uncertainty engendered by the Ninth Circuit's vague, incongruous, and exacting "compelling reasons" standard for preventing public disclosure of sealed discovery documents that are attached to any motion "more than tangentially related to the merits of a case." Pet. App. 19a.

Here, a California federal district court entered a stipulated protective order in a putative class action involving an allegedly defective automobile

component. The protective order stated as follows: "If any papers to be filed with the Court contain 'Confidential' information, the proposed filing shall be accompanied by an application to file the papers or portion thereof containing the protected information under seal . . . ." Ninth Cir. Excerpts of Record ("ER") 74-75. Relying on the protective order, Petitioner ("Chrysler"), the defendant below, produced certain design-related documents that it designated as confidential. When the named plaintiffs moved for a preliminary injunction, both they and Chrysler requested and obtained the district court's permission to file certain of those confidential documents under seal, "for good cause," either in support of, or in opposition to, the preliminary injunction motion, which the court subsequently denied. *See* ER 140, 231; Ninth Cir. Supp. Excerpts of Record 9.

In the interim, Respondent, The Center for Auto Safety, a public interest group, moved to intervene and unseal the documents. Based on Ninth Circuit precedent, the district court ruled that there was good cause to continue keeping under seal the confidential documents attached to the preliminary injunction motion. *See* Pet. App. 46a ("The disclosure of such specific technical information . . . would enable competitors to 'leapfrog' Defendant's hard engineering work and unfairly reap the competitive rewards."). But the Ninth Circuit reversed and remanded, holding that because the sealed documents were attached to a motion that was "more than tangentially related to the merits of [the] case," *Id.* at 19a, Chrysler would have to demonstrate "compelling reasons" (more specifically, an intent on

the part of Respondent to use the documents for an improper purpose), not merely "good cause," to avert the unsealing of its confidential business information.

This inequitable and in most cases insurmountable "compelling reasons" barrier for avoiding the unsealing of confidential business information encompassed by a protective order—a standard established in this case by two Ninth Circuit judges over the strong objections of a third, *see id.* at 25a-36a—exacerbates the nationwide confusion and unpredictability already confronting litigants and district courts in a wide variety of civil litigation: The certiorari petition indicates that there now are not only two competing standards—"good cause" vs. "compelling reasons"—among the circuits, but also three different approaches (including the Ninth Circuit's two-tiered approach) for determining whether confidential business information—which a district court has allowed or required to be filed under seal in accordance with a protective order—later should be unsealed, and disclosed to the public (including to a defendant's competitors), at the behest of a plaintiff, or as here, at the urging of an advocacy group with an agenda of its own.

DRI agrees with Petitioner that the same good cause, balance-of-interests standard that long has governed issuance of Rule 26(c) protective orders—not the "intentionally stringent 'compelling reasons' standard" utilized by the Ninth Circuit and two other circuits, Pet. App. 36a (Ikuta, J., dissenting)—should be the test for continuing to keep under seal, court-filed discovery documents that contain confidential

business information. The long-standing question concerning what standard should apply to the unsealing of such documents in light of the limited common-law right of public access to court records affects a broad spectrum of civil litigation and warrants this Court's attention and resolution.

SUMMARY OF ARGUMENT

Defendants in a wide variety of civil suits cannot be expected to accede to sweeping pretrial discovery demands that encompass all sorts of confidential business information if they are unable to rely upon the sealing and other non-disclosure provisions of protective orders issued for good cause under Federal Rule of Civil Procedure 26(c)(1)(G). Such reliance is not feasible, and protective orders lose their credibility, if discovery documents containing confidential business information are filed in court under seal in support of, or in opposition to, either a dispositive or non-dispositive motion, and then immediately become vulnerable to unsealing at the urging of a plaintiff or plaintiff-intervenor.

The "compelling reasons" standard adopted by three circuits is a high hurdle for a defendant to overcome in order to thwart the unsealing of its already-sealed confidential business information. To satisfy this elevated standard, a defendant must demonstrate with factual specificity that the party seeking disclosure intends to use the information for an improper purpose unrelated to the litigation—such as intentionally using a defendant's confidential business information to place the company at a competitive disadvantage in the marketplace, or using the information deliberately but unjustifiably

to scare away the company's existing or potential customers. The Ninth Circuit's opinion below establishes an even more extreme and problematic version of the compelling reasons standard by extending it to sealed documents which have been attached not only to dispositive motions (e.g., a motion for summary judgment), but also to any type of non-dispositive motion that in some way is related to the merits of a cause of action.

Unlike the compelling reasons standard, the good cause standard adopted by three other circuits is consistent with the text and objectives of Rule 26(c). It fulfills, rather than obstructs, the fundamental purposes of protective orders, which include enabling litigants to engage in the liberal exchange of pretrial discovery documents containing confidential business information without fear of public disclosure or public access, and with little if any need for judicial involvement. When deciding whether to issue a discovery-facilitating protective order, the good cause standard requires a trial court to balance the parties' interests. In contrast, the compelling reasons standard is so far slanted toward public disclosure, it does not pretend to balance the parties' interests in anything resembling an equitable manner.

The Court should grant certiorari in this case and hold that the good cause standard governs whether discovery documents containing confidential information that have been filed in court under seal in connection with any type of motion or pleading should continue to be maintained under seal throughout the course of litigation when an opposing party seeks unsealing and public disclosure.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO PRESERVE THE VIABILITY OF RULE 26(C) PROTECTIVE ORDERS BY ESTABLISHING A NATIONALLY UNIFORM "GOOD CAUSE" STANDARD FOR AVERTING THE UNSEALING OF COURT-FILED DISCOVERY DOCUMENTS THAT CONTAIN CONFIDENTIAL BUSINESS INFORMATION

A. Protective orders that prohibit public disclosure of confidential business information—including through sealing of court-filed discovery documents for good cause—are an essential component of the civil justice system

Protective orders issued for good cause under Federal Rule of Civil Procedure 26(c) serve a vital function in the civil justice system. They enable plaintiffs and defendants to exchange trade secrets or other confidential business information needed to litigate or settle a dispute in a "just, speedy, and inexpensive" manner, Fed. R. Civ. P. 1, while prohibiting disclosure of such information to current or potential competitors and the public. *See* Fed. R. Civ. P. 26(c)(1)(G).[2] In addition, because "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action," protective orders prevent public disclosure of large amounts of confidential business information "that not only is irrelevant but if publicly released could be damaging to reputation and privacy." *Seattle Times Co. v.*

[2] Prior to 2007, Rule 26(c)(1)(G) was designated as Rule 26(c)(7).

Rhinehart, 467 U.S. at 33, 35; *see generally* 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.105[7][c] (3d ed. 2016) (most courts agree that "pretrial discovery is not generally considered to be public information").

Because "liberal discovery has a significant potential for abuse," protective orders "temper the broad scope of discovery." *Id.* §§ 26.101[1][a] & [b]; *see also Seattle Times*, 467 U.S. at 35-36 ("The prevention of the abuse that can attend the coerced production of information . . . is sufficient justification for the authorization of protective orders."). As Professor Miller explained in a frequently cited article, "[t]he protective order is an ideal mechanism for minimizing the negative side effects of modern discovery without eviscerating the value of the process." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access To the Courts*, 105 Harv. L. Rev. 427, 476 (1991); *see also* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2036 (3d. ed. 2015) ("Rule 26(c) was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)(1).")

The critical role that protective orders play in the civil justice system is underscored by the sanctions that a district court can impose for their violation. *See* Fed. R. Civ. P. 37(b)(2)(A) (sanctions for not obeying a discovery order); *see also* David F. Herr & Roger S. Haydock, *Discovery Practice* 7-40 (6th ed. 2014) ("Failure to honor the terms of a protective order can . . . result in the imposition of serious

sanctions against a party and against its counsel."); *Moore's Federal Practice* 3d, *supra*, § 26.108[2] ("Contempt sanctions are frequently imposed against a person who violates a protective order."); *cf. Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (explaining that "the most severe in the spectrum of sanctions" available for violation of a discovery order "must be available . . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent").

There are many kinds of civil suits in which protective orders play a vital role by prohibiting public disclosure of confidential business information produced in reliance upon a protective order and often in response to sweeping and invasive discovery requests. Their utility in facilitating discovery, and in turn, judicial efficiency, cannot be overstated. *See, e.g.*, William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders In Mass Tort Litigation*, 27 Rev. Litig. 565, 569 (2008) ("Protective orders—particularly in mass torts—are designed to facilitate the discovery and litigation process while protecting the parties."). Although Rule 26(c)(1)(G) protective orders are commonly used in too many categories of litigation to catalog, the following examples of the types of confidential business information that normally require absolute protection from public disclosure illustrate the point:

- *Product Liability Litigation* – R&D plans, expenditures, studies, and test data; product and component design specifications; manufacturing

equipment and process schematics; product manufacturing, distribution, sales, and profit information; component supplier information; regulatory correspondence containing confidential business information protected from disclosure under federal or state law.

- *Commercial Litigation* – Historical or projected, non-public, corporate financial information such as production, distribution, sales, revenue, cost, and profit data; principal shareholders' and executives' personal financial information; third-party financial information.
- *Antitrust Litigation* – Research data concerning relevant markets and market shares; inventory data and production schedules; cost, pricing, and profit information; sales forecasts; market expansion and other business plans.
- *Patent Infringement Litigation* – Source codes, mask files, and electronic circuitry configurations; product launch and marketing strategies; royalty rates and other terms of licensing agreements.

In these and other types of civil litigation, protective orders issued under Rule 26(c)(1)(G) customarily include provisions requiring parties to seek leave of court to seal any discovery documents, or portions of discovery documents, that contain confidential business information before they can be filed in connection with pleadings or motions. *See Moore's Federal Practice* 3d, *supra*, § 26.105[7][b] (discussing the "growing tendency" for litigants to agree to seal discovery documents when submitted to a court); Herr & Haydock, *supra*, App. B, Form A-5

(model of stipulated protective order containing seal provision).

In most cases only a small fraction of discovery documents containing confidential business information actually is filed in court and becomes part of the record of a judicial proceeding. *See, e.g.*, Pet. at 5. Sealing of court-filed confidential business information is necessary, however, in view of the public's *qualified* common-law right of access to judicial records. *See generally Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("[T]he right to inspect and copy judicial records is not absolute. . . . [C]ourts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing . . . .").

Sealing is not automatic, even when expressly contemplated by a stipulated protective order. *See* Wright & Miller, *supra*, § 2035 ("At least as to [discovery] material filed in court . . . there is a limit to the power of courts to accede to the parties' agreement that these materials be held under seal."). Instead, "whether a judicial record should be sealed depends on the judgment and discretion of the presiding judge." Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, Federal Judicial Center (2010), at 17; *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)."

Indeed, district courts' local rules reflect the gravity with which motions to seal court-filed discovery documents are considered. *See, e.g.*, Local Civ. R. 5, U.S. Dist. Ct. for the E.D. Va. (effective Jan. 11, 2016) (setting forth detailed procedural and substantive requirements governing motions to file under seal and supporting memoranda) ("Agreement of the parties that a document or other material should be filed under seal or the designation of a document or other material as confidential during discovery is not, by itself, sufficient justification for allowing a document or other material to be filed under seal."); L.R. 79-5.2.2, U.S. Dist. Ct. for the C.D. Cal. (effective Dec. 1, 2015) ("In a non-sealed civil case, no document may be filed under seal without prior approval by the Court."). After a district court determines that a court-filed discovery document containing confidential business information should be sealed, a motion by an opposing party or proposed intervenor during the course of the litigation to *unseal* the document should be viewed by the court with considerable skepticism.

B. A heightened "compelling reasons" standard for averting the unsealing of court-filed discovery documents undermines the purposes that protective orders are intended to fulfill

Rule 26(c) expressly incorporates a demanding "good cause" standard, which "requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1313

(11th Cir. 2001); *see also Seattle Times*, 467 U.S. at 36 ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery."); *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) ("If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary."). Even stipulated "umbrella" protective orders—which are commonplace in class actions and other complex litigation, and which subject a party's document-specific confidentiality designations to trial court review only when disputed—require "a threshold showing of good cause." *Moore's Federal Practice* 3d, *supra*, § 26.104[2].

"To demonstrate good cause under [Rule 26(c)(1))(G)], the party seeking the protective order must show that the information sought is a trade secret or other confidential information, and that the harm caused by its disclosure outweighs the need of the party seeking disclosure." *Id.* § 26.105[8][a]. "The primary factor courts consider in determining the appropriateness of this type of protective order concerns the degree to which the disclosure of such confidential information will put a party at a significant competitive disadvantage as to another party or with competitors." Herr & Haydock, *supra*, at 7-34; *see also Moore's Federal Practice* 3d, *supra*, § 26.104[1] ("[A] court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage.").

As the certiorari petition explains, Pet. at 12-14, three circuits have held that the same good cause, balance-of-interests standard built into Rule 26(c) applies to continuing to keep sealed discovery documents under seal after they are produced in accordance with—and in reliance upon—a protective order and subsequently filed in court. *See, e.g.*, *Chicago Tribune Co.*, 263 F.3d at 1313 (holding that an intervenor's motion to unseal discovery documents "may be resolved by the Rule 26 good cause balancing test"); *see generally* Hon. T.S. Ellis, III, *Sealing, Judicial Transparency and Judicial Independence*, 53 Vill. L. Rev. 939, 944 (2008) ("The common law presumption in favor of public access [to court records] can be overcome if it is merely outweighed by countervailing interests, *even if those interests are not necessarily compelling*, and even if the restriction on access is not narrowly tailored to serve those interests.") (emphasis added).

The "compelling reasons" standard adopted by the Ninth Circuit and two other circuits, however, skews the balance of interests drastically toward the party seeking to unseal court-filed discovery documents containing confidential business information. That standard cannot reasonably be characterized as a balancing test at all. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (explaining that the compelling reasons standard "sharply tips the balance in favor of production when a document, formerly sealed for good cause under Rule 26(c), becomes part of a judicial record"). At the very least, the compelling reasons standard "upsets the balance between the

common law right of access and Rule 26." Pet. App. 34a (Ikuta, J., dissenting).

In her dissenting opinion, Judge Ikuta emphasized that "compelling reasons" in this context is an "intentionally stringent" standard for avoiding unsealing of documents that contain confidential business information because it "requires proof that the documents are being *intentionally used for an improper purpose*." Pet. App. 36a (Ikuta, J., dissenting) (emphasis added). More specifically, the Ninth Circuit indicated in *Kamakana*, 447 F.3d at 1179, that "'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598); *see also In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983) ("Only the most compelling reasons can justify non-disclosure of judicial records."). "Emphasiz[ing] the difference between the 'compelling reasons' standard and the 'good cause' standard," the Ninth Circuit indicated in *Kamakana*, 447 F.3d at 1180, that "[a] 'good cause' showing will not, without more, satisfy a 'compelling reasons' test."

The high hurdle erected by the compelling reasons standard for keeping sealed discovery documents under seal is self-defeating: Rather than deterring use of court-filed confidential business information for a vexatious or other improper

purpose, the compelling reasons standard *facilitates* potential misuse by enabling public disclosure at the behest of an opposing party or intervenor unless the party that desires continued protection can meet the "heavy burden of exhibiting the existence of special circumstances adequate to overcome the presumption of public accessibility." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 413 (1st Cir. 1987).

As reflected by Rule 26(c)(1)(G), protection of discovery documents containing trade secrets or other confidential business information—especially company-confidential documents that a district court *already has determined* should be filed under seal—is too important to the producing party, and too critical to the fairness of the litigation process, to subject to post-sealing mischief, or worse. The careful balance between liberal discovery and privacy interests embodied by Rule 26(c) protective orders would be shattered if, for example, a plaintiff or plaintiff's counsel could position himself/herself to disclose a defendant's confidential business information to the public, or even sell it to a defendant's current or prospective competitors, simply by attaching it for a seemingly legitimate purpose to a wide variety of pretrial motions that somehow touch on the merits of a case. *See* Pet. App. 36a (Ikuta, J., dissenting); *see generally* Joshua K. Leader & Gloria Koo, *Protective Orders and Discovery Sharing: Beware of Plaintiffs Bearing Sharing Agreements*, 82 Def. Couns. J. 453, 454 (2015) (noting "the practice today of selling confidential discovery information for a profit"); Richard P. Campbell, *The Protective Order In Products Liability Litigation: Safeguard or Misnomer*, 32 B.C.L. Rev. 771, 834 (1990) (noting

that protective orders are "being eroded . . . by a plaintiff's bar that has made a business out of selling information obtained in discovery to other potential adversaries"). This Court emphasized in *Seattle Times* that the potential exploitation of liberal discovery is the very reason for trial courts' authority to issue protective orders. *See* 467 U.S. at 34.

Prior to the opinion below, the Ninth Circuit at least had restricted application of the compelling reasons standard to the unsealing of documents attached to *dispositive* motions. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) ("In *Phillips* . . . we carved out an exception to the presumption of access . . . 'when a party attaches a sealed discovery document to a *nondispositive* motion' . . . . '[G]ood cause' suffices to warrant the preserving of secrecy of sealed discovery material attached to nondispositive motions.") (quoting *Phillips v. Gen. Motors Corp.*, 307 F.3d at 1213). The opinion below, however, has blurred the Ninth Circuit's "bright line rule," Pet. App. 26a (Ikuta, J., dissenting), by holding that "public access will turn on whether the motion is more than *tangentially related to* the merits of a case," and by acknowledging that "many technically nondispositive motions will *fail this test*." *Id.* at 19a (emphasis added); *cf. Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 947 (2016) (Thomas, J., concurring) (discussing the expansive reach of the phrase "relate to"). In other words, the majority opinion below extends the reach of the compelling reasons standard to "*all* sealed documents attached to *any* filing that has *any* relation to the merits of the case." Pet. App. 35a (Ikuta, J., dissenting).

The Ninth Circuit's new and expanded version of the compelling reasons standard significantly increases the risk that confidential business information produced during discovery in reliance upon a protective order, and then filed in court under seal, later will be *unsealed* if used by a party to support or oppose a wide variety of "more-than-tangentially-related-to-the-merits" motions. This supposedly "more nuanced test," Pet. App. 20a, for avoiding unsealing not only deepens the existing circuit split regarding which standard is correct, but also further undermines the utility and reliability of protective orders, and in turn, the operation and efficiency, as well as fairness, of the discovery process. As discussed above, one of protective orders' principal purposes is to "facilitate the speedy and inexpensive disposition of litigation by avoiding discovery disputes." Wright & Miller, *supra*, § 2044.1. But under the Ninth Circuit's "intentionally stringent 'compelling reasons' standard . . . it is clear that no future litigant can rely on a protective order and will have to chart its own course through discovery cautiously and belligerently, to the detriment of the legal system." Pet. App. 36a (Ikuta, J., dissenting).

Defendants will be wary, and likely unwilling, to enter into protective orders containing sealing provisions which, as a practical matter, become meaningless whenever sealed discovery documents containing confidential business information are appended to any sort of motion bearing some relation to the merits of a case. Imagine a civil justice system without protective orders:

> Limiting the availability of protective orders makes the discovery process more contentious, protracted, and expensive. If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent their disclosure.
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> * * *
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> Absent protective orders, greater incentives would exist for commencing litigation and exploiting discovery for reasons other than the adjudication of disputes. Parties might well use the courts to pursue ulterior objectives, such as seeking a competitive advantage . . . .

Miller, *supra* at 483-84. These troubling observations also would apply to a civil justice system in which a strict compelling reasons standard for keeping already-sealed confidential business information under seal "deprives protective orders issued under Rule 26(c) of any force or effect." Pet. App. 35a (Ikuta, J., dissenting).

A defendant's inability to rely upon a protective order throughout the course of litigation not only would burden the courts with document-by-document discovery disputes, but also would have a deleterious effect on motions practice. Under the Ninth Circuit's test, defendants may be reluctant to file or support motions with sealed discovery documents if doing so would subsequently render confidential business

information vulnerable to public disclosure in the absence of compelling reasons (not merely good cause) to keep it under seal. And plaintiffs may try to game the system by seeking to attach defendants' confidential discovery documents under seal to their own motions, or to briefs in opposition to defendants' motions, and thereby position existing or future plaintiff-intervenors (or even themselves) to move thereafter for unsealing those documents. Under the Ninth Circuit's test, the documents will be unsealed, and made available to competitors and the public, unless the defendant can "meet the high threshold of showing that 'compelling reasons' support secrecy." *Kamakana*, 447 F.3d at 1180.

None of these adverse impacts on the viability of protective orders, the discovery process, motions practice, or the civil justice system will occur if this Court grants certiorari and holds that Rule 26(c)'s good cause standard applies to maintaining under seal, confidential business information contained in any court-filed discovery document that is produced in reliance upon a protective order's sealing and non-disclosure provisions.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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