

Case No. 19-13926-RR

**In the United States Court of Appeals
for the Eleventh Circuit**

DOE, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., *et al.*,
Defendants-Appellees-Cross-Appellants.

(IN RE: CHIQUITA BRANDS INTERNATIONAL, INC., ALIEN TORT
STATUTE & SHAREHOLDER DERIVATIVE LITIGATION)

On Appeal from the United States District Court
for the Southern District of Florida
No. 08-md-01916

(Nos. 07-cv-60821, 08-cv-80421, 08-cv-80465, 08-cv-80480, 08-cv-80508, 10-cv-
60573, 17-cv-81285, & 18-cv-80248)
(The Honorable Kenneth A. Marra)

**BRIEF OF *AMICI CURIAE* HUMAN RIGHTS PRACTITIONERS AND
SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND
SUPPORTING REVERSAL**

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ANTONIO GONZALEZ CARRIZOSA, *et al.*,
Plaintiffs,

JUANA DOE 11 and MINOR DOE 11A,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., KEITH E. LINDNER, CYRUS
F. FRIEDHEIM, JR., ROBERT W. OLSON, ROBERT F. KISTINGER, and
WILLIAM A. TSACALIS,
Defendants-Appellees-Cross-Appellants.

District Court No. 07-cv-60821

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son
JOHN DOE 8, and JANE DOE 7, individually and as representative of her
deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

MOE CORPORATIONS 1-10,
Defendants,

CHARLES KEISER, CYRUS FRIEDHEIM, ROBERT KISTINGER, ROBERT
OLSON, WILLIAM TSACALIS, and CARLA A. HILLS, as personal
representative of the Estate of RODERICK M. HILLS, SR,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80421

JANE/JOHN DOES (1-144),
Plaintiffs,

JUANA PEREZ 43A,
Plaintiff-Appellant-Cross-Appellee,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

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

CYRUS F. FRIEDHEIM, JR., ROBERT W. OLSON, ROBERT F. KISTINGER,
and WILLIAM A. TSACALIS,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80465

JUAN DOES, 1-377, *et al.*,
Plaintiffs,

JUVENAL ENRIQUE FONTALVO CAMARGO and NANCY MORA LEMUS,
Plaintiffs-Appellants Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

INDIVIDUALS “A THROUGH J”, et al., (whose identities are presently
unknown),
Defendants.

District Court No. 08-cv-80480

JOSE LEONARDO LOPEZ VALENCIA, *et al.*,
Plaintiffs,

JOSE LOPEZ 339,
Plaintiff-Appellant-Cross-Appellee,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., ROBERT F. KISTINGER,
WILLIAM A. TSACALIS, and KEITH E. LINDNER,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80508

ANGELA MARIA HENAO MONTES, *et al.*,
Plaintiffs,

ANA OFELIA TORRES TORRES, PASTORA DURANGO, and GLORIA
EUGENIA MUÑOZ,
Plaintiffs-Appellants Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., and KEITH E. LINDNER,
Defendants-Appellees Cross-Appellants.

District Court No. 10-cv-60573

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son
JOHN DOE 8, and JANE DOE 7, individually and as representative of her
deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CARLA A. HILLS, as personal representative of the Estate of RODERICK M.
HILLS, SR,
Defendant-Appellee-Cross-Appellant.

District Court No. 17-cv-81285

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son
JOHN DOE 8, and JANE DOE 7, individually and as representative of her
deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., CHARLES KEISER, CYRUS
FRIEDHEIM, ROBERT KISTINGER, ROBERT OLSON, and WILLIAM
TSACALIS,
Defendants-Appellees Cross-Appellants.

District Court No. 17-cv-81285

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE**

Amici curiae file this Certificate of Interested Persons and Corporate Disclosure Statement, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1-1-3, 27-1(a)(9), and 28-1(b).

Amici curiae state that they are all natural persons except for the Center for Justice and Accountability (“CJA”) and Partners in Justice International. CJA is a 501(c)(3) non-profit public benefit corporation, incorporated in Washington, D.C. and registered as a foreign non-profit corporation in California. It has no parent corporation and no publicly traded stock. No publicly held corporation owns any part of it. Partners in Justice International is a 501(c)(3) non-profit corporation, incorporated in Washington, D.C. It has no parent corporation and no publicly traded stock. No publicly held corporation owns any part of it.

The remaining *amici curiae* – Professor Gregory S. Gordon, Professor Kevin Jon Heller, Ambassador Stephen J. Rapp, and Ambassador David Scheffer, Professor Beth Stephens, Professor Ralph G. Steinhardt, Professor Beth Van Schaack – all sign on to this *amicus* brief and the accompanying motion in their individual capacities and not as representatives of any corporate entity. Descriptions of their individual academic and professional interests in this case are offered in the following section.

The *amici curiae* represented herein certify that a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations (noted with stock symbol if publicly listed), that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to *amici curiae*, are as follows:

1. The individual plaintiffs are listed in the Complaints as filed in the Southern District of Florida in Case Nos. 07-60821-CIV-MARRA (Carrizosa); 08-80421-CIV-MARRA (N.J. Action); 08-80465 CIV-MARRA (D.C. Action, Does 1-144); 08-80508-CIV-MARRA (Valencia); 08-80408-CIV-MARRA (Manjarres, NY Action); 10-60573-CIV-MARRA (Montes); and in 10-80652-CIV-MARRA (D.C. Action, Does 1-976); 11-80404-CIV-MARRA (D.C. Action, Does 1-677); 17-81285-CIV-MARRA (D.C. Action, Does v. Hills); 18-80248-CIV-MARRRA (Ohio Action, John Doe 1) .

2. The thousands of other individual Plaintiffs whose complaints have been consolidated in the instant multidistrict litigation, Case No. 0:08-md-1916-KAM.

3. Additional interested parties are:

Amici have included persons previously identified by Chiquita Brands International as having a financial interest in this litigation. *Amici* do not have direct information as to whether these persons continue to have such an interest.

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human rights situation in Colombia in the year 2002*, E/CN.4/2003/13, February
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INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief pursuant to Federal Rule of Appellate Procedure 29 in support of Plaintiffs-Appellants and reversal.¹ *Amici* are a group of international human rights scholars and practitioners with expertise in human rights litigation in U.S. federal courts and international tribunals, particularly with respect to evidentiary standards and practices used in cases involving widespread violations and atrocities. *Amici* – Ambassador Stephen J. Rapp,² Ambassador David Scheffer,³

¹ No counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel contributed money to preparing or submitting this brief.

Pursuant to the Eleventh Circuit’s General Order No. 44, “Restrictions on Visitors to the Court and Temporary Suspension of Paper Filing Requirements,” and the inability of *amici* to presently comply with paper filing requirements, this brief and the preceding motion have only been filed electronically and the required paper copies will be filed at a future date to be established by the Court.

Amici represent that this filing was not consented to by all parties in this preceding and have therefore filed the appropriate Motion for Leave to File along with this brief.

² Ambassador Stephen J. Rapp was Ambassador-at-Large in the Office of Global Criminal Justice in the U.S. State Department from 2009 to 2015. Previously he served as Prosecutor of the Special Court for Sierra Leone and Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda. He was previously U.S. Attorney for the Northern District of Iowa.

³ Ambassador David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law at Northwestern Pritzker School of Law. He previously served as the U.N. Secretary-General’s Special Expert on United Nations Assistance to the Khmer Rouge Trials.

the Center for Justice and Accountability (“CJA”),⁴ Partners in Justice International,⁵ Professor Gregory S. Gordon,⁶ Professor Kevin Jon Heller,⁷ Professor Ralph G. Steinhardt,⁸ Professor Beth Stephens,⁹ and Professor Beth Van

⁴ CJA is a human rights organization dedicated to deterring torture, war crimes, crimes against humanity, and other serious human rights abuses. Through litigation in U.S. courts since 1998, including under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, CJA holds perpetrators of abuses accountable and seeks redress for victims. CJA also appeared as *amicus curiae* before this Court in *Balcero v. Drummond Company, Inc.* on crimes against humanity committed by paramilitary forces in Colombia.

⁵ Partners in Justice International works with victims and survivors of atrocity crimes in national jurisdictions. Its legal team has decades of experience prosecuting perpetrators and representing victims and survivors of human rights violations and international atrocity crimes in litigation.

⁶ Professor Gregory S. Gordon is a Professor of Law at the Chinese University of Hong Kong. He has served as Legal Officer and Deputy Team Leader under the Office of the Prosecutor in the International Criminal Tribunal for Rwanda, and worked in Sierra Leone to conduct a post-civil war justice assessment for the U.S. Department of Justice Criminal Division’s Office of Special Investigations

⁷ Professor Kevin Jon Heller is an Associate Professor of Public International Law at the University of Amsterdam.

⁸ Professor Ralph G. Steinhardt is Lobingier Professor of Comparative Law and Jurisprudence at The George Washington University Law School. He has previously served as counsel to the U.N. High Commissioner for Refugees, Amnesty International, Human Rights Watch, and the International Human Rights Law Group, as well as to individuals alleging violations of international human rights law.

⁹ Professor Beth Stephens is Distinguished Professor of Law at Rutgers Law School and she previously was in charge of the human rights docket at the Center for Constitutional Rights in New York and continues to litigate human rights cases in U.S. federal courts.

Schaack¹⁰ have decades of expertise in U.S. and international human rights litigation as prosecutors, counsel, and scholars. *Amici* have knowledge with regards to evidentiary rules and practices used in human rights and mass atrocity cases, and are concerned that upholding the District Court's ruling will undermine the well-established evidentiary standards that are regularly utilized in such litigation, both in the United States and in international tribunals. *Amici's* interest is in ensuring bedrock principles of evidence common to complex litigation, particularly those involving mass atrocity, are maintained.

STATEMENT OF ISSUES

Whether the District Court erred in granting summary judgment on the basis that no reasonable jury could infer that members of the AUC caused the deaths of the Plaintiffs' decedents by:

- (1) Improperly conducting a piecemeal analysis of the evidence rather than utilizing a totality of the evidence approach; and

¹⁰ Professor Beth Van Schaack is the Leah Kaplan Visiting Professor of Human Rights at Stanford Law School and a Visiting Scholar at the Center for International Security & Cooperation at Stanford University. She was formerly the Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the U.S. Department of State and has also spent time with the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia.

- (2) Failing to treat circumstantial evidence as evidence that can, and does, create triable issues of fact sufficient for a case to survive summary judgment, particularly in complex proceedings.

SUMMARY OF ARGUMENT

Bedrock evidentiary principles in U.S. law direct courts to consider the totality of evidence, including circumstantial and pattern evidence, in determining whether a case can proceed to trial. These principles are particularly crucial in cases involving mass atrocities, such as this one. In abandoning these principles, the District Court's decision below threatens fundamental tenets of evidence and creates major ramifications not only for cases involving complex litigation matters generally, but particularly for those involving widespread human rights violations, where courts routinely consider evidence as a whole, including circumstantial and pattern evidence.

The District Court erred in its analysis of the evidence presented when ruling on the motion for summary judgment, performing a piecemeal analysis on admissibility rather than looking at the totality of the evidence. U.S. courts, including those in this Circuit, routinely apply a totality of the evidence approach. Indeed, this evidentiary rule is so well-established under U.S. law that *amici* are aware of no jurisdiction that takes a different approach. Deviating from the totality standard is particularly detrimental in complex cases where circumstantial evidence may be

prevalent. Any single piece of circumstantial evidence, when considered standing alone, is often insufficient to draw an inference regarding the responsibility of a given actor. However, when considered in the aggregate and cumulatively, circumstantial evidence offers adjudicators a valid basis from which to draw conclusions regarding both civil and even criminal responsibility. It is this reasoning that underpins the bedrock principle that the totality of the evidence should be considered rather than undertaking a piecemeal analysis.

Compounding this error, the District Court inexplicably viewed the use of circumstantial pattern evidence as a “novel theory” that should be “summarily rejected” and “far too speculative, standing alone” to permit the case to go to the jury. Order Granting Defendants’ Joint Motion for Summary Judgment on Colombian Law Claims of Bellwether Plaintiffs [DE 2283, 2302] and Granting Individual Defendants’ Motion for Summary Judgment on TVPA Claims of Bellwether Plaintiffs [DE 2289, 2304] at 65, *In Re Chiquita Brands International Inc. Alien Tort Statute and Shareholders Derivative Litigation* (2019) (No. 0:08-md-01916-KAM) (“DE 2551”); *Id.* at 66 (rejecting evidence of *modus operandi*). To the contrary, pattern evidence and evidence of *modus operandi* is routine in complex litigation, and particularly in cases involving mass atrocity. Given the nature of these cases, which must often rely exclusively on circumstantial evidence, U.S. courts, including those in this Circuit, have regularly accepted circumstantial evidence

regarding geographic and temporal patterns of abuse. Far from “novel”, this sort of evidence is well established as the type of evidence to be considered by a jury or other adjudicator as part of the totality. Likewise, international tribunals created to adjudicate mass atrocity crimes routinely look to circumstantial evidence, including pattern evidence and evidence of *modus operandi*, to fully inform the finder of fact. Failure to redress the lower court’s errors would undermine established evidentiary rules and have far-reaching implications for complex litigation and adjudication of claims involving widespread human rights abuses.

It is particularly striking that the District Court ruled that *none* of the proffered evidence implicating the Autodefensas Unidas de Colombia (United Self-Defence Forces of Colombia) (“AUC”) in the predicate crimes would be admissible at trial. The widespread extrajudicial killings perpetrated by the AUC in Colombia are well documented. The AUC’s pattern of abuses have been recognized by a litany of governmental, judicial, and investigative actors, including the U.S. government, the Office of the Prosecutor at the International Criminal Court (“ICC”), judicial mechanisms in Colombia, and numerous civil society organizations. Despite this consensus, the District Court ruled that there was an “absence of evidence” by which a jury could determine that the AUC was responsible for the killings in question. DE 2551 at 70.

The District Court's decision is an outlier. Indeed, the only way for the District Court to conclude, erroneously, that there was insufficient evidence to create a triable question for a jury as to the AUC's responsibility for the killings at issue was to abandon bedrock evidentiary principles that direct courts to consider the totality of evidence, including circumstantial evidence on patterns of abuses. *Amici* respectfully submit that this Court should reverse the District Court's errors.

ARGUMENT

The District Court's decision below, which abandons established rules of evidence, would have far-reaching implications beyond this case, and particularly for human rights litigation involving mass atrocities. The court erred in failing to adopt a totality of evidence approach and in excluding circumstantial evidence, thus arriving at conclusions on the facts that run counter to every other legitimate instance where the activities of the AUC have been considered.

I. In Determining Whether There is a Genuine Issue of Fact, The Court Must Consider All Evidence in Its Totality Rather Than in a Piecemeal Manner.

While courts may examine each piece of evidence individually, they must ultimately assess evidence in its totality to determine whether there is a genuine issue of material fact on a motion for summary judgment. *Lippert v. Cmty. Bank, Inc.*, 438 F.3d 1275, 1278–82 (11th Cir. 2006). The court below erred by analyzing the probative value of each piece evidence in isolation, refusing to admit evidence based

on that piecemeal analysis,¹¹ and then ultimately concluding – based on a piecemeal analysis of the evidentiary record – there were insufficient facts in the record to create a genuine issue of material fact for the jury.

The Supreme Court has held that in the context of summary judgment, “the court must review the record ‘taken as a whole’,” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), and has further emphasized that, particularly when evaluating the “character and effect of a conspiracy,” “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the

¹¹ In light of the Supreme Court’s guidance that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”) was intended to facilitate the taking of evidence abroad, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522, 538 (1987), the District Court also erred in granting summary judgment based on the absence of evidence that it had previously refused to permit discovery on in Colombia, potentially including “audio recordings of Colombian paramilitaries confessing to half of these eight murders, and perhaps more.” See Plaintiffs’ Motion for Issuance of a Letter of Request under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters at 4, *In Re Chiquita Brands International Inc. Alien Tort Statute and Shareholders Derivative Litigation* (2017) (No. 0:08-md-01916-KAM); Order Denying Plaintiffs’ Motion for Issuance of Letters of Request Under Hague Evidence Convention to Various Agencies of the Republic of Colombia [DE 1499] and Denying as Moot Plaintiffs’ Motion to File Annex to Hague Request Under Seal [DE 1542], *In Re Chiquita Brands International Inc. Alien Tort Statute and Shareholders Derivative Litigation* (2017) (No. 0:08-md-01916-KAM) (denying Plaintiffs’ Motion for Issuance of Letters of Request (“MLR”) under the Hague Convention, 28 U.S.C. § 1781 which sought discovery in Colombia).

various factual components and wiping the slate clean after scrutiny of each.” *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (vacating judgment of Court of Appeals and finding sufficient evidence for jury to infer necessary causal connection between respondents’ violations and petitioners’ injury). This Circuit likewise applies the totality of the evidence rule. *See, e.g., Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1304 (11th Cir. 2003) (determining that the Court properly examined evidence as a whole in ruling on summary judgment, rather than evaluating each piece separately).

In contrast, piecemeal analysis of evidence, such as that undertaken by the lower court, is impermissible. While the court may look at pieces of evidence individually in its analysis, it must eventually assess the totality of evidence and make a final determination of whether there is a genuine issue of material fact on that basis. *See id.* (holding that District Court rightly evaluated evidence both “individually *and in concert.*”) (emphasis added); *see also United States v. Bowers*, 811 F.3d 412, 428 (11th Cir. 2016) (upholding defendant’s conviction on basis that though “[n]o one piece of evidence discussed above is dispositive in this case ... courts instruct jurors to consider the totality of the evidence presented to determine a verdict.”). Even when individual pieces of evidence may be insufficient to create a genuine issue of material fact, the totality of evidence may meet that burden. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir.

2002) (holding that “[while] no single piece of the evidence ... is sufficient in itself to prove a price-fixing conspiracy ... [t]he question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment”).

This Circuit has consistently applied this totality standard in reviewing and reversing lower courts’ summary judgment orders in a range of civil and criminal cases. *See, e.g., Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1295 (11th Cir. 1999) (finding that “under the totality of the evidence” a fact finder could make contradictory inferences regarding whether pilots recognized that their actions could result in damage, and, considering the lack of “unequivocal direct evidence”, questions of willful misconduct “depend upon inferences to be drawn from essentially circumstantial evidence ... [and][o]ne can hardly imagine a clearer case in which such questions should have been left to the jury.”) (internal citations omitted); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1346–47, (11th Cir. 2011) (reversing summary judgment on grounds that “[b]ased on the *totality* of the foregoing circumstances ... the record contains sufficient circumstantial evidence from which a jury could infer that [defendant] displayed a racially discriminatory animus toward [plaintiff]”); *McElligott v. Foley*, 182 F.3d 1248, 1256 (11th Cir. 1999) (reversing summary judgment on grounds that “[g]iven the totality of circumstances described above, a jury could conclude that [defendants] were aware

that [plaintiff] was vitally in need of medical treatment to address his pain”); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010) (reversing summary judgment on grounds that “evidence of harassment is considered both cumulatively and in the totality of the circumstances”).

This Court has also applied the totality standard in determining the existence of issues of material fact. *See, e.g., Gibson v. Valley Ave. Drive-In Restaurants, LLC*, 597 F. App’x 568, 571 (11th Cir. 2014) (evaluating “the record evidence *as a whole*” in determining “the existence of a material factual dispute”); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994) (assessing “the cumulative effect of [relevant] facts and the conclusion that rationally could be inferred from them” and reversing District Court’s grant of summary judgment for failure to produce evidence showing existence of genuine issue of material fact).

U.S. human rights litigation, including in this Circuit, follows the same rule, and provides guidance on the reasoning underpinning use of the totality standard in complex cases such as this one. In *Mamani*, after considering a complex set of direct and circumstantial evidence involving command responsibility in the context of state violence against civilians in Bolivia, the District Court denied Defendants’ motion for summary judgment by reviewing “the totality of the evidence in this case,” and finding “a genuine dispute as to whether the deaths at issue here resulted from the

implementation of Defendants’ plan.” *Mamani v. Berzain*, 309 F.Supp.3d 1274, 1301–02 (S.D. Fla. 2018).

The practice of international criminal tribunals which regularly consider questions of proof relating to mass atrocity also provide helpful guidance.¹² In adjudicating the responsibility of defendants for specific incidents of violence, international tribunals also employ a “totality of circumstances” analysis in recognition of the fact that contextual evidence, examining patterns of widespread abuses, and placing incidents in a broader context of violations is often critical in understanding and establishing liability in cases involving mass atrocity. *See, e.g., Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Judgment ¶¶ 152–53 (Int’l Crim. Trib. For the Former Yugoslavia Sept. 27, 2007) (quoting the Trial Chamber in affirming that while individual pieces of evidence, “viewed in isolation, may not be sufficient ... it is the *cumulative effect on the evidence, i.e. the totality of the evidence ... which must be weighed.*”); *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 615 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

¹² The Eleventh Circuit has looked to practices of international criminal tribunals when dealing with cases involving widespread violence with a foreign dimension. *See, e.g., Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1290–93 (11th Cir. 2002) (referencing interpretations of command responsibility by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court).

The precedent of the U.S. Supreme Court and the Eleventh Circuit (and indeed in all jurisdictions known to *amici*) affirm the well-established and well-founded rule that evidence must be considered in its totality. Both U.S. cases and international tribunals highlight that this rule is critically important when considering evidence in mass atrocity cases. In light of this rule, the District Court erred in granting Defendants’ motion for summary judgment by failing to evaluate the totality of Plaintiffs’ evidence, which raised a triable issue as to whether the AUC was responsible for the killings.

In eliminating all of the evidence by analyzing its probative value in isolation, the District Court disregarded well-settled evidentiary standards. The District Court repeatedly remarked that individual pieces or categories of evidence “standing alone” are insufficient. *See, e.g.*, DE 2551 at 49 (finding that declarations of third-party witnesses regarding AUC activity do not, “standing alone, reasonably support an inference of AUC involvement”); *id.* at 62 (finding that Plaintiff Doe 378’s anticipated personal testimony about AUC curfew in effect at time of killing does not, “standing alone, suffice to create a triable issue on the identity of the decedent’s killers”); *id.* at 66–67 (finding that geographical and temporal circumstantial evidence is “far too speculative, standing alone” and that circumstantial evidence regarding manner of killings is “not, standing alone, sufficient evidence”). At no point did the District Court review the evidence in its totality. Thus, without

explanation, the District Court deviated from a bedrock evidentiary rule in U.S. jurisdictions, one that international tribunals also use when evaluating comparable cases.

II. Circumstantial Evidence, Including Pattern Evidence, Can Suffice to Survive Summary Judgment.

Part of evaluating the totality of the evidence includes considering circumstantial evidence. Circumstantial evidence alone is sufficient to allow a case to survive a motion for summary judgment and to ultimately prove a case, and is especially important in mass atrocity cases.

The U.S. Supreme Court has consistently held that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508, n.17 (1957). The U.S. Supreme Court has also established the sufficiency of circumstantial evidence to prove both civil and criminal cases, endorsing it as persuasive even for the higher “beyond a reasonable doubt” standard. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). The Eleventh Circuit has likewise held that “[i]nferences from circumstantial facts may frequently amount to ‘full proof’ of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary.” *Cox*, 17 F.3d at 1400.

Complex cases follow the general rule as well, relying on circumstantial evidence at the summary judgment phase. Even in cases involving no direct

evidence, circumstantial evidence evaluated through a totality-of-evidence approach has been sufficient to allow plaintiffs to survive summary judgment. *See Piamba Cortes*, 177 F.3d at 1291 (holding circumstantial evidence can be sufficient to establish that actor was aware of substantial risk of harm); *Fuente Cigar, Ltd. v. Roadway Exp., Inc.*, 961 F.2d 1558, 1561 (11th Cir. 1992) (holding circumstantial evidence sufficient to show that products were damaged when they arrived at their destination); *U.S. S.E.C. v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004) (holding SEC may prove insider trading through circumstantial evidence); *Lockheed-Martin Corp.*, 644 F.3d, at 1341–47, 1328 n.24 (holding entirely circumstantial evidence including pretext of racial animus; substantial incentive to discipline white employees more harshly; and conscientious injection of race considerations into discipline sufficient to overcome summary judgment because the “jury reasonably could infer” defendant was fired on racial grounds); *Cox*, 17 F.3d at 1397–1403 (relying on secrecy of discussions, pursuit of personal pension benefits by defendants, and other circumstantial evidence to conclude there was triable issue of fact regarding plaintiffs’ RICO claims); *O’Bryan v. Ford Motor Co.*, 18 F.Supp.3d 1361, 1368 (S.D. Fla. 2014) (permitting circumstantial evidence in products liability case).

In several such cases, the Eleventh Circuit has not only admitted circumstantial evidence, but has also laid out tests tailored to the particular

evidentiary nuances of the claims at stake. *See, e.g., Lockheed-Martin Corp*, 644 F.3d at 1327–29 (holding *McDonnell Douglas* burden-shifting framework is not *sine qua non* for employment discrimination cases, but can be used when relying on comparison evidence); *Cox*, 17 F.3d at 1397–98 (upholding that for purpose of RICO claims, “pattern” requires continuity and relationship, evaluated temporally and according to specific acts involved).

Human rights litigation follows the same general rule; circumstantial evidence is routinely put before juries and adjudicators, but with a necessarily tailored approach for the unique context of establishing proof of responsibility for widespread abuses. Other mass atrocity cases in the Eleventh Circuit have relied on circumstantial evidence in establishing triable issues of fact at the summary judgment stage. In *Mamani*, for example, the court specifically held that a “reasonable inference” could be made from changes in military doctrine; a pattern of orders given to soldiers; a pattern of soldiers’ behaviors; defendants’ behaviors; and utilization of troops consistent with defendants’ plans. *Mamani* 309 F.Supp.3d 1302; *see also id. at* 1274 (relying on timing and location of deaths in finding that there was triable issue of fact as to identity of killers so as to survive summary judgment). Circumstantial evidence can be especially important in cases involving mass killings due to obstacles plaintiffs face in gathering evidence in situations of armed conflict, such as systemic violence, suppression of rights, paramilitary

control, and lack of access to state institutions or protections. *See, e.g.*, Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 L. & Contemp. Probs. 163, 180, 186–88 (2014).

International tribunals’ decisions are instructive on the type of circumstantial evidence that is relevant in mass atrocity cases.¹³ For example, the ICC uses pattern evidence to establish links between individual crimes across a wide geographic and temporal scope and a single perpetrator. *See Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶¶ 1154, 1656 (Mar. 7, 2014). *See also Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 92–112, 124–177 (Mar. 14, 2012). Finding direct evidence in mass atrocity cases requires tailored investigative techniques. The ICC almost exclusively prosecutes leadership crimes where the alleged perpetrators under investigation are political or military leaders who often know how to smother evidentiary trails. Such investigations, which can take considerable time to perform, typically require stitching together circumstantial evidence as well as witness and documentary

¹³ The tribunals’ approach converges with the U.S. rule. Like U.S. domestic courts, international tribunals have held that circumstantial evidence alone can be used to prove a pattern sufficient to establish individual responsibility in mass atrocities comparable to those committed by the AUC. For example, the ICC has explicitly stated that circumstantial evidence is sufficient to prove a case beyond a reasonable doubt. *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 111 (Mar. 14, 2012).

evidence when possible to establish the leader's direct or complicit behavior in the atrocity crimes. This complex litigation relies on the totality of circumstantial evidence, as a coherent body of collective evidence, being examined by the Court.

Violent non-state actors “will rely little on written documentation and will take steps to avoid leaving other traces of [their] operation,” and their internal structures create harsh disincentives for those involved to come forward. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 Harv. Int'l L. J. 323, 339–40 (2009). The atrocities themselves often happen within the context of ongoing violence, with numerous perpetrators hoping to stymie investigations and numerous victims facing personal security concerns. Whiting, *Dynamic Investigative Practices* at 180.

In acknowledging these factors and the context in which the violence took place, the ICC provides useful guidance for evaluating evidence in mass atrocity cases. *See, e.g., Katanga*, ICC-01/04-01/07, ¶¶ 58–110, 1154, 1656 (Trial Chamber relied upon proof of pattern, indirect witness testimony, and public documents in reaching its verdict). In finding proof of a pattern (“non-accidental repetition of similar criminal conduct on a regular basis”), the ICC has analyzed identical or similar acts and criminal practices; *modus operandi*; and similar treatment of victims across a wide geographic area. *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, ¶¶ 688, 692–95 (Jul. 8, 2019). The ICC Trial Chamber established the

modus operandi (including an initial assault, a *ratissage* operation to eliminate survivors, and looting) through testimony of armed group insiders, witnesses who could confirm certain gatherings, similarities between witness descriptions, and other non-eyewitness testimony. *Id.* at paras. 688, 415, 484, 488, 561. *See also, e.g., id.* at n.1649, n.1650, n.1967. The ICC Trial Chamber has further relied upon documentary evidence such as civil status documents, school cards, documents from organizations, and letters. *Katanga*, ICC-01/04-01/07, ¶¶ 65, 74.

Despite the sufficiency of circumstantial pattern evidence in similar complex litigations, and the necessity of evaluating circumstantial evidence given the particular needs of mass atrocity cases, the District Court cast aside as a “novel theory” Plaintiffs’ proffered evidence and foreclosed its evaluation by a fact finder. DE 2551 at 65. *Amici* contend that the District Court’s decision was in error and, unless redressed on appeal, risks foreclosing the future adjudication of mass atrocity cases such as those previously upheld by this Court.

III. AUC Crimes are Domestically and Internationally Well-Recognized and the Court’s Outlier Finding was Only Possible Through Evidentiary Error.

The lower court’s striking finding that there was insufficient evidence regarding the AUC’s participation in the civilian killings is only possible because it abandoned bedrock principles in examining the evidence before it. Indeed, the District Court’s ruling that there was insufficient evidence of AUC crimes to permit

the case to proceed to trial stands in contrast to all the rulings of other courts and government bodies that have considered similar kinds of evidence of AUC violence.

Between 1997 and 2006, a group of paramilitaries known collectively as the AUC terrorized Colombian civilians through murder, enforced disappearance, torture, sexual assault, and other persecution. The AUC's crimes during this period have been widely recognized by multiple domestic and international judicial actors and mechanisms, including the U.S. Department of Justice and U.S. Department of State.¹⁴ *See* Designation of a Foreign Terrorist Organization, 66 Fed. Reg. 47054 (Sept. 5, 2001); *see also* Remarks by Former Secretary of State Colin L. Powell, September 10, 2001, on the Designation of the AUC as a Foreign Terrorist Organization ("FTO") ("The AUC has carried out numerous acts of terrorism, including the massacre of hundreds of civilians, the forced displacement of entire villages, and the kidnapping of political figures to force recognition of AUC demands."). In 2007, the U.S. Department of Justice reached a plea agreement with Appellee Chiquita after the company pled guilty to making payments to the AUC leadership for years, despite knowing of the AUC's violent crimes and designation as an FTO. *See* Department of Justice Press Release, "Chiquita Brands International

¹⁴ Civil society organizations have also actively reported on the AUC's violence in Colombia. *See, e.g.*, "The contribution of Chiquita corporate officials to crimes against humanity in Colombia," Article 15 Communication to the ICC by HLS Clinic, *et al.* (May 2017).

Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay \$25 Million Fine”; *see also*, Factual Proffer at ¶ 22, *USA v. Chiquita* (2007) (No. 1:07-cr-00055-RCL) (stating that by September 2000, senior executives of Chiquita knew the company was making payments to AUC, which “was a violent, paramilitary organization led by Carlos Castaño.”). Notwithstanding Chiquita’s role in the violence, the fact of the AUC’s human rights violations, including in the regions pertinent here, was not up for debate.

Aiming to provide truth, reparations, and justice to victims of the AUC, Colombia negotiated an agreement with the AUC, in which the AUC agreed to demobilize and hand over weapons in 2005. The resulting Justice and Peace process provides benefits including reduced sentences (five to eight years, less time served) in return for truth-telling, reparations to the victims, and a promise not to return to lawlessness. The confessions that thousands of AUC members presented are known as “free depositions” or “*versiones libres*.” By 2016, 4,400 former AUC members had presented confessions through this mechanism.¹⁵ Courts in Colombia, operating in part under the strictures of the Justice and Peace process, and relying in part on these

¹⁵ International Center for Transitional Justice, *Background: After Decades of Conflict, Cementing Peace and Securing Justice for Victims in Colombia* (2016), available at <https://www.ictj.org/our-work/regions-and-countries/colombia>.

confessions, have found ample evidence that the AUC committed widespread killings in the region and during the period at issue.¹⁶

Similarly, international courts and human rights bodies that have considered the AUC's activities in Colombia have uniformly found that the AUC was responsible for crimes against humanity. The Office of the Prosecutor at the ICC, for example, has found that "there is reasonable basis to believe" that the AUC paramilitaries have committed crimes against humanity. *Situation in Colombia Interim Report* ¶25, 51 (2012). Relying on circumstantial evidence, as well as judicial and administrative records created under the units established by the Colombian Justice and Peace laws, the Inter-American Commission on Human

¹⁶ The Supreme Court of Colombia has confirmed multiple times that the zones of Urabá and Magdalena were subject to extreme violence and control of the AUC. Supreme Court of Justice [Colombia], Criminal Appeals Chamber, Justice and Peace, RAD. No. 44688, Decision [*Providencia*] No. AP593-2015, at 31 & n.17 (Feb. 11, 2015) (recognizing that during the period of 1997 to 2006, Urabá was subjected to "extreme conditions of violence" under the AUC, and noting that multiple Supreme Court opinions have held, in the past that this situation in Urabá "is a notorious fact."); *see also* Supreme Court of Justice [Colombia], Criminal Appeals Chamber, Justice and Peace, RAD. No. 34547, Judgment [*Sentencia*], at 7, 9–10 (Apr. 27, 2011) (AUC's activities followed similar criminal patterns of targeted murders, selective massacres, disappearances, torture, and sexual violence across all regions where it had control, these areas included Urabá and Magdalena). Supreme Court of Justice [Colombia], Criminal Appeals Chamber, RAD. No. 33788, Order [*Acta*] at 7–9 (Mar. 24, 2010) (AUC paramilitaries' violent occupation of many regions in Colombia, including the Magdalena region, is a widely proven, known, and "notorious" fact) (quotes from the original Spanish translated by *amici*).

Rights found the Colombian state responsible for failing to protect the right to life from paramilitary violence in Urabá, Colombia (the same province at issue in the current case). *Alcides Torres Arias, Angel David Quintero et al., v. Colombia*, Case 12.414, Inter-Am. Comm'n H. R., Report No. 101/17, OEA/Ser.L/V/II.164, doc. 119, ¶¶ 68, 147–152 (2017).¹⁷ The Inter-American Court has held numerous times that the AUC was responsible for widespread crimes in various regions of Colombia.¹⁸ UN bodies examining the actions of the AUC including in the times and

¹⁷ See also Inter-American Commission on Human Rights, Inter-American Commission on Human Rights Follow-Up on the Demobilization Process of the AUC in Colombia, OEA/Ser.L/V/II, ¶ 45 (2007) (finding that AUC committed “serious violations of human rights and/or international humanitarian law against the civilian population.”).

¹⁸ See *Omeara Carrascal and Others v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ser. C (No. 368), ¶ 178 (Nov. 21, 2018) (Court has held it proven on numerous occasions that AUC committed widespread human rights violations, often with acquiescence or assistance of government forces); *Case of the Massacre of Mapiripán v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ser. C (No. 134), ¶ 96.39 (Nov. 27, 2008) (finding that AUC paramilitaries carried out massacre over several days in which about 49 individuals were killed); *Caso Valle Jaramillo v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ser. C (No. 192), ¶¶ 76 (Nov. 27, 2008) (“the Court has observed that these paramilitary groups are responsible for numerous murders and many of the human rights violations committed in Colombia generally”); *The Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. ser. C (No. 148), ¶ 125 (July 1, 2006) (finding AUC carried out massacre of civilians in Ituango and that paramilitary groups are responsible for multiple murders and other human rights violations).

locations relevant to this case have similarly found the AUC responsible for widespread human rights violations and patterns of atrocities.¹⁹

In short, the District Court’s decision to grant summary judgment was a clear outlier in matters implicating the AUC in killings of civilians in Colombia, directly contradicting the findings of numerous well-established and respected judicial and fact-finding bodies. In stark contrast to all of these other cases, investigations, and prosecutions, the lower court’s examination of the evidentiary record found nothing to establish the AUC’s linkage to the relevant killings. This ruling ran counter to two established evidentiary principles by analyzing each piece of evidence in isolation as well as excluding pattern evidence and evidence of *modus operandi* – evidence in this case that is consistent with the consensus that AUC operatives were

¹⁹ United Nations Economic and Social Council, Commission on Human Rights, *Report by the United Nations High Commissioner for Human Rights on the human rights situation in Colombia in the year 2000*, E/CN.4/2001/15, February 8, 2001, ¶¶ 30–35, (detailing massacres and “selective killings” committed by AUC, “including utter atrocities inflicted on those accused of sympathizing with the insurgents.”); United Nations Economic and Social Council, Commission on Human Rights, *Report by the United Nations High Commissioner for Human Rights on the human rights situation in Colombia in 2001*, E/CN.4/2002/17, February 28, 2002, ¶¶ 136, 138, 140 (AUC “killed residents of the zones under their military control, and people coming from zones under the control of their enemies, on mere suspicion of collaboration with the enemy[.]”); United Nations Economic and Social Council, Commission on Human Rights, *Report by the United Nations High Commissioner for Human Rights on the human rights situation in Colombia in the year 2002*, E/CN.4/2003/13, February 24, 2003, ¶¶ 23, (noting “the war crimes perpetrated by members of AUC”).

responsible for the kinds of human rights violations in the relevant time period on which this case centers.

CONCLUSION

For the above reasons, *amici* urge this Court to overturn the District Court's ruling, which granted summary judgment by impermissibly conducting piecemeal analysis of the evidence and excluding circumstantial and pattern evidence that should have been put before a jury, and which risks the future adjudication of comparable mass atrocity cases.

Respectfully,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) as the brief contains 6,187 words, excluding those parts exempted by Fed. R. App. 32(7)(f) and 11th Cir. Local R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I caused the foregoing document to be filed through the Court's CM/ECF system. I certify that to my knowledge all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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