No. 21-1057

In the Supreme Court of the United States

ORACLE CORPORATION,
Petitioner,
v.
HEWLETT-PACKARD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The California courts entered a $3 billion dollar damages award in this case—one of the largest civil awards in California history—that is based in part on conduct protected by the Petition Clause of the First Amendment. That ruling not only is wrong, but conflicts with the decisions of other courts of appeals. And it is exceptionally important. As amicus Rutherford Institute has explained (at 6-10), allowing the decision to stand will not only chill protected First Amendment activity, but penalize individuals for exercising one of the most common and critical features of our judicial system—the appeal.

Instead of confronting those arguments, HP bases its response on a fiction—arguing that the damages award had nothing to do with the constitutionally protected conduct. Virtually all of HP's arguments against certiorari hinge on this one vehicle argument. But as explained below, that argument is refuted by the court of appeal's opinion and the testimony of HP's own damages expert. And once the façade is stripped away, it is clear that HP offers no legitimate reason for this Court to allow the indefensible decision below to stand. Certiorari is warranted.

ARGUMENT

I. HP'S VEHICLE OBJECTION IS BASELESS

From start to finish, HP's opposition focuses on manufacturing a vehicle obstacle, claiming (at 1, 12-15, 17, 20-21) that the "question raised by petitioner is not at issue in this case" because "*no portion* of the damages award was based on [the] protected petitioning conduct" at issue here. Both the court of

appeal's decision and the testimony of HP's damages expert prove that this is simply false.

A. The decision below explicitly states that "Oracle's appeal was a factor in the calculation of damages." Pet. App. 93a. Indeed, "[t]here is no dispute that Orszag's testimony about how he calculated HP's damages included consideration of Oracle's stated intention to appeal." *Id.* at 90a. As the court of appeal explained:

- HP claimed that it "suffered damages because Oracle had created 'uncertainty' in the marketplace." *Id.*
- Orszag—HP's damages expert—"calculated HP's estimated damages" by considering the "'uncertainty created by Oracle's recent statements regarding its intention to appeal.'" *Id.* at 23a-24a (quoting Orszag report); *see id.* at 24a ("Oracle's statements regarding its intention to appeal . . . factored into the 'significant uncertainty . . . .'").
- Accordingly, Orszag "acknowledged that one of the factors he took into account" in measuring damages was Oracle's "press release stating [its] intent to appeal." *Id.* at 79a; *see id.* at 83a ("[I]n Orszag's view, HP had suffered damages because Oracle had created uncertainty in the marketplace, and the risk that Oracle would win on appeal was part of the conduct that created the marketplace uncertainty.").

This squares with Orszag's own testimony:

- Orszag admitted that "one of the causes of the damages" under his model was "uncertainty in the marketplace." *Id.* at 126a-27a.

- He admitted that under his damages model, "the risk that Oracle would win an appeal also created that uncertainty." *Id.* at 127a; *see id.* at 126a (agreeing that "Oracle had the right to appeal, and that was part of the uncertainty").
- And he admitted that, nevertheless, he did not even consider "how much damages were caused by the uncertainty from the appeal, as opposed to other factors." *Id.* at 127a; *see id.* at 128a (admitting he did not "look[] at" this).

Unsurprisingly, HP itself vigorously defended this damages theory in the trial court. Before trial, HP convinced the court to deny Oracle's motion in limine on this issue by arguing that Oracle's appeal announcement "is part of the evidence that has to be viewed" because "it creates uncertainty in the mind of the customers." 43 Tr. 12676-77. And after trial, HP convinced the court to deny Oracle's motion for a new trial by arguing that, because Oracle's appeal announcement "could have 'an impact on the market,'" it "'w[ould] have an impact on damages.'" 31 C.A. Appellant's App. 7972-73 (alteration in original) (citation omitted).

B. HP's attempt to gloss over these unambiguous statements boils down to double-speak.

HP suggests that Orszag did not "attribut[e] damages to the stated intent to appeal" but instead calculated damages based on "market uncertainty." BIO 12 (quoting Pet. App. 92a). But as discussed, Orszag testified that the supposed uncertainty driving the damages award was created in part by Oracle's stated intent to appeal. There would have been no reason for Orszag to even "consider[] . . . Oracle's stated intention to appeal," Pet. App. 90a, if

that statement were irrelevant to his damages calculation. Indeed, the market uncertainty and appeal announcement were so intertwined under Orszag's damages model that Orszag did not even try to "examine[] the damages caused by Oracle separate from its right to appeal." *Id.* at 83a.

Relatedly, HP repeatedly invokes the court of appeal's statement that "Oracle has not shown that HP recovered damages based on Oracle's stated intention to appeal." *Id.* at 95a. But HP rips that statement from context. As the rest of the paragraph makes clear, that statement merely reflects the court's view that the appeal announcement did not independently "cause" HP's damages apart from the market uncertainty, but instead served as "a factor" underlying the market uncertainty—the driver of damages, according to HP's own expert. *Id.* at 95a-96a. That is the only way to reconcile that statement with the rest of the court's opinion, which repeatedly acknowledges that the damages award was based on market uncertainty, and that the market uncertainty was based (at least in part) on Oracle's appeal announcement. *See supra* at 2.

HP also seizes on the court of appeal's statement that Oracle's appeal announcement did not "*solely*, or even *predominantly*," create the market uncertainty, such that Orszag did not "ascribe damages to Oracle's statement of its intent to appeal *standing alone*." BIO 13 (emphasis added) (quoting Pet. App. 93a). But the First Amendment violation exists because the appeal announcement was *a factor* in the damages calculation; Oracle has never argued it was the *only* factor (though it was undoubtedly a major one, Pet. 27 n.7). And as Oracle has explained, the existence of multiple factors driving Orszag's "uncertainty"-based

damages model required disaggregation to ensure that *none* of the damages award is attributable to protected conduct. Pet. 26-27. Yet Orszag admitted that he did not even try to undertake that disaggregation analysis. Pet. App. 83a, 127a-28a.

Equally unavailing is HP's attempt to spin the court of appeal's acknowledgment that the appeal announcement was "a factor" in the damages award. HP claims that, although "Oracle's appeal was a factor in the calculation of damages," the appeal was not an independent "source of harm in and of itself" but instead "reduced [the] mitigation [of damages] from the resumption of porting." BIO 12-13 (emphasis omitted) (quoting Pet. App. 93a). This is a distinction without a difference. Whether the appeal and accompanying announcement perpetuated an existing harm or inflicted an independent harm, they plainly factored into the damages award. There is no constitutional difference between *increasing* damages at the front end of the calculation, or preventing the *reduction* of damages at the back end (by negating a mitigating factor). Either way, the constitutionally protected activity necessarily increased the damages award.

C. Last, HP suggests that this issue will require the Court to engage in its own burdensome review of the record. BIO 13-16. Not so. The only factual predicate necessary for the Court to resolve the question presented is that the constitutionally protected conduct factored into the damages award. And the statements from the court of appeal's decision and Orszag's own testimony quoted above establish that point. Indeed, in addition to finding that the appeal announcement was "a factor in the damages calculation," the court below found that there is "no

dispute" that Orszag "included consideration of Oracle's stated intention to appeal" in his damages calculation. Pet. App. 90a, 93a. That is sufficient to decide the constitutional question presented.

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW

Once HP's vehicle argument is debunked, it is clear that certiorari is warranted.

A. The Decision Below Is Egregiously Wrong

1. The court of appeal's ruling that Oracle's appeal announcement does not warrant protection under the Petition Clause is flatly incorrect. Pet. 21-24. The Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011), and the scope of that protection necessarily encompasses conduct "incidental" to a petition, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502-03 (1988). That protection also includes the "breathing space" necessary to avoid chilling protected activity. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531-32 (2002). The court of appeal's holding that Oracle's appeal announcement did not even "implicate[] the Petition Clause" (Pet. App. 95a) flouts this Court's teachings.

HP does not seriously defend the reasoning of the decision below—indeed, as noted, it spends most of its response trying to avoid it. To the extent HP touches on the merits, it says (at 20) that *Guarnieri* "speaks to the general right to *seek redress* from courts" rather than "the application of the Petition Clause in the appellate context." The distinction makes no sense: An appeal is obviously an effort to "seek redress from

courts"—specifically, redress from an appellate court. And more generally, "the right to petition extends to *all* departments of the Government." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (emphasis added). Nothing supports HP's evident belief that the Petition Clause's protections evaporate when the petitioning conduct concerns an appellate court rather than a trial court.

HP also claims that there is no constitutional right to appeal. BIO 20 (citing *Halbert v. Michigan*, 545 U.S. 605, 610 (2005)). But that is beside the point. The question is not whether Oracle had a constitutional right to appeal (and so *Halbert* is irrelevant); it is whether Oracle may be penalized for exercising (and announcing its intention to exercise) its undisputed right to appeal under *California* law.[1]

2. The court below also erred in holding that the entire $3 billion damages award was permissible, even if it was based in part on protected conduct, simply because it derived from other factors as well. Pet. App. 93a. As Oracle explained, to avoid punishing a party for exercising its First Amendment rights, protected conduct must be disaggregated from non-protected conduct for purposes of imposing damages. Pet. 24-28. HP's expert admitted, however, that he did not perform *any* disaggregation analysis.

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[1] HP also invokes the court of appeal's accusation that Oracle did not present a "reasoned argument" on this issue. BIO 16-17 (quoting Pet. App. 89a). But that statement just reflects the court's hostility to Oracle's position. As HP acknowledges (at 8-10), Oracle's Petition Clause claim was pressed and passed upon at every stage below. *See* Pet. C.A. Br. 15-16, 90-93; Pet. C.A. Reply Br. 56-63; Pet. for Review 32-39. This Court "may therefore consider any argument [Oracle] raises in support of [that] claim." *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022).

Pet. App. 83a, 127a-28a. HP does not seriously defend this ruling. Instead, HP retreats to its (false) mantra that "*no portion* of the damages award was based on protected petitioning conduct." BIO 20-21; *see supra* at 1-6.

HP's inability to defend the merits on this point simply reinforces the need for review.

B. The Decision Below Deepens Lower-Court Conflicts

The decision below also deepens two interrelated conflicts, meaning that "litigants in different jurisdictions enjoy different First Amendment protections." Rutherford Amicus Br. 5.

1. The decision below exacerbates the longstanding lower-court division over whether and to what extent the Petition Clause protects conduct incidental to litigation. Pet. 13-19; *see* Rutherford Amicus Br. 11 (conflict "has only become more pronounced" in recent years). HP does not dispute the existence of the conflict or the need for this Court to resolve it. Instead, HP claims (at 2-3, 18-19) that the conflict is not implicated in this case because Oracle's conduct occurred "[m]id-litigation" rather than "pre-litigation." This argument fails.

The decisions on Oracle's side of the split are not limited to pre-litigation conduct. Courts have held, for example, that conduct concerning "an offer to settle" an *existing lawsuit* is "conduct incidental to the prosecution of the suit and not a separate and distinct activity." *Columbia Pictures Indus., Inc. v. Professional Real Est. Invs., Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993); *see also, e.g.*, *Primetime 24 Joint Venture v. National Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000) ("efforts incident to

litigation" include "settlement offers" (citation omitted)). Similarly, courts have recognized that litigation-related "press releases"—including "press releases publicizing [an existing] lawsuit"—are protected conduct. *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 384 F. Supp. 2d 1334, 1349 (S.D. Iowa 2005) (citing *Aircapital Cablevision, Inc. v. Starlink Commc'ns Grp., Inc.*, 634 F. Supp. 316, 325-26 (D. Kan. 1986)), *aff'd in part and remanded in part*, 464 F.3d 1339 (Fed. Cir. 2006).

Moreover, HP's argument seems to rest on the misguided premise that, whereas pre-litigation conduct is worthy of protection, mid-litigation conduct is not, because pre-litigation conduct is motivated by "the possibility of *averting* litigation." BIO 19. This is backwards: Given that the core protected conduct is litigation, it would make little sense to protect conduct incidental to possible litigation but not conduct incidental to *actual* litigation. And HP's attempt (at 19) to disparage Oracle's appeal announcement as "gratuitous" mid-litigation conduct is unfounded. Parties often announce an intent to appeal in closely watched cases and often are *required to*. Pet. 30-31; Rutherford Amicus Br. 1-2. In any event, First Amendment protection does not hinge on the alleged "motive" underlying the petitioning conduct. *BE & K Constr.*, 536 U.S. at 533-35.

2. The decision below also exacerbates lower-court confusion over disaggregation of damages attributable to First Amendment-protected conduct. Pet. 19-20. Again, HP does not dispute the existence of this conflict or the need for this Court to resolve it. Instead, HP exclusively rests on its argument (at 20-21) that "*no portion* of the damages award" in this

case "was based on protected petitioning conduct." As explained, that is flatly incorrect. *See supra* at 1-6.

C. The Question Presented Is Exceptionally Important

HP also dismisses the importance of this case—while just ignoring the Rutherford Institute's brief stressing the need for this Court's review.

1. HP does not dispute the importance of the First Amendment right to petition. Nor does HP meaningfully attempt to address the chill that this decision will create on the exercise of constitutionally protected conduct incident to litigation. Pet. 28-33. Indeed, as a result of the split in authority, "thousands of litigants operate[] under a cloud of uncertainty as to which of their litigation-related activities may later be the subject of liability." Rutherford Amicus Br. 11; *see id.* at 5-10. Such uncertainty is untenable when it concerns the exercise of "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018) (citation omitted). HP also does not dispute that this case involves one of the largest damages award in California's history. Pet. 32-33.

2. HP's attempts to downplay the significance of the decision below are unpersuasive. Its claim (at 22) that Oracle should have "defer[red]" its appeal announcement ignores that litigants, especially corporations, often make appeal announcements and may be required to do so. Pet. 30; Rutherford Amicus Br. 6-8. But in any event, HP's insistence that litigants should "defer" their exercise of constitutionally protected conduct simply proves the chill that will be created by the decision below.

HP also claims (at 16-17, 21) that the court below did not "announce a broad ruling" or make a "sweeping declaration regarding the scope of the constitutional right to petition." But the court of appeal proclaimed that "invoking the intent to appeal in a press release" in commercial litigation is not "an exercise of [the] constitutionally protected right to petition," Pet. App. 85a-86a; *see id.* at 95a, and upheld a $3 billion damages award even though *no* effort was made to disaggregate constitutionally protected conduct in calculating that award, *id.* at 83a. Those rulings will chill First Amendment freedoms. *See* Rutherford Amicus Br. 6-10. Besides, this Court has never required a broad or categorical First Amendment ruling to justify review. *Cf. Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

Finally, HP claims (at 22-23) that review is unnecessary because this case comes from an intermediate appellate court. But this Court routinely reviews decisions of the California Court of Appeal where, as here, the California Supreme Court has denied discretionary review. *See, e.g.*, *Lange v. California*, 141 S. Ct. 2011, 2016-17 (2021); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015); *Riley v. California*, 573 U.S. 373, 380 (2014); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 327 (2011). And unlike some state intermediate appellate courts, the California Court of Appeal's published decisions are binding on every trial court in the State. *Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.*, 369 P.2d 937, 940 (Cal. 1962).

* * * * *

The decision below ignores the First Amendment and its protections in the context of frequently

recurring activity—appeals. The court sustained an astronomical, $3 billion damages award attributable in part on Oracle's petitioning activity. In doing so, the court bulldozed Oracle's constitutionally protected right to petition in a published opinion that exacerbates the longstanding lower-court confusion on this important question of constitutional law. That decision—and the damages award it upheld—should not be allowed to stand and, at the very least, the California courts should be required to engage in the constitutionally required disaggregation analysis to ensure that Oracle is not being penalized for exercising its First Amendment rights.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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