No. _____

In the

Supreme Court of the United States

SANDRA SUSAN MERRITT,
PETITIONER,
v.
PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., ET AL.,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

ANITA L. STAVER
HORATIO G. MIHET
ROGER K. GANNAM
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

1. Whether this Court's decision in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), which precludes publication damages without meeting the constitutional requirements for defamation liability, prohibits a party from avoiding the First Amendment's Free Speech limitations on defamation claims by using *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), to recover publication-dependent damages under "generally applicable" laws.

2. Whether the First Amendment's Free Speech Clause prevents the Racketeer Influenced and Corrupt Organizations (RICO) Act, which was enacted to combat the infiltration of legitimate commercial enterprises by traditional "organized crime," from being applied to undercover newsgathering journalists whose purpose is to document and expose what they reasonably believe to be unlawful conduct.

3. Whether the First Amendment's Free Speech Clause protects newsgathering journalists, who operate under an alias to document and expose what they reasonably believe to be unlawful conduct, from being subjected to punitive liability for "fraud."

PARTIES TO THE PROCEEDINGS

Petitioner Sandra Susan Merritt was the appellant in the court of appeals.

Respondents were appellees in the court below. They are Planned Parenthood Federation of America, Inc.; Planned Parenthood: Shasta-Diablo, Inc. dba Planned Parenthood Northern California; Planned Parenthood Mar Monte, Inc.; Planned Parenthood of the Pacific Southwest; Planned Parenthood Los Angeles; Planned Parenthood/Orange and San Bernardino Counties; Planned Parenthood California Central Coast; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast; and Planned Parenthood Center for Choice. Unless otherwise noted or as context requires, petitioner refers to Respondents collectively as "Planned Parenthood."

RELATED PROCEEDINGS

This case relates to the following proceedings:

United States District Court (N.D. Cal.):

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 16-cv-00236 (Jan. 2016)

United States Court of Appeals (9th Cir.):

Planned Parenthood Fed'n of Am., Inc. v. Merritt, No. 20-16820 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Newman, No. 20-16068 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 20-16070 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Rhomberg, No. 20-16773 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 16-16997 (9th Cir.) (May 16, 2018)

United States Supreme Court:

Ctr. For Med. Progress v. Planned Parenthood Fed'n of Am., No. 18-696 (Apr. 1, 2019) (denying petition for certiorari)

RULE 12 STATEMENT

Pursuant to Supreme Court Rule 12(4), petitioner joins by reference the forthcoming petitions that will be filed separately by her co-defendants in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sandra Susan Merritt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App.1a–20a) is reported at 51 F.4th 1125. An accompanying memorandum disposition (App.21a–45a) is not published in the Federal Reporter but is available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (App.104a) is not reported. The judgment of the district court is reported at 613 F. Supp. 3d 1190.

JURISDICTION

The judgment of the court of appeals and accompanying memorandum disposition were entered on October 21, 2022. A petition for rehearing was denied on March 1, 2023 (App.104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I.

Other pertinent constitutional and statutory provisions are reproduced in the appendix. App.107a.

STATEMENT OF THE CASE

A. Legal Background

This case concerns whether, and to what extent, the press may raise the First Amendment as a defense against generally applicable tort laws when undercover journalists gather and publish truthful news of significant public importance.

1. The First Amendment's protection of free speech and the press "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976)). Accordingly, the First Amendment not only protects the publication of news; it also protects the newsgathering process, including undercover investigations, because "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972); accord *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the *creation* and dissemination of information are speech within the meaning of the First Amendment." (emphasis added)).

2. A long line of this Court's precedents has established that if a party seeks damages caused by the publication of speech, it must prove that the speech was false and made with actual malice. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That precept was established to provide "breathing space" to the protections afforded by the

First Amendment to the press. *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988).

This Court has rejected attempts to recover publication-dependent damages without satisfying the requirements of a defamation claim. In *Hustler*, the Court concluded that the First Amendment barred the Reverend Jerry Falwell from recovering publication damages under the generally applicable law of intentional infliction of emotional distress. 485 U.S. at 56. In reaching its holding, the Court undertook a First Amendment balancing test and determined that the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" outweighed the state's interest in protecting public figures from emotional distress. *Id.* at 50–56. *Hustler* accordingly holds that a plaintiff may not avoid the First Amendment's limitations on defamation claims by seeking publication damages under non-reputational tort claims.

This Court took a seemingly conflicting position—relied on by the Ninth Circuit below—in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991). This Court held in *Cohen* that the First Amendment did not prohibit Dan Cohen from recovering damages under Minnesota's promissory estoppel theory after two newspapers published Cohen's name, despite promising him confidentiality. *Cohen*, 501 U.S. at 665. The Court specifically noted that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Justice Blackmun, joined by Justices Marshall and Souter, dissented. In his view, *Hustler* should have controlled the case and thus prevented recovery. 501 U.S. at 674–75 (Blackmun, J., dissenting). Justice Blackmun observed that just like Virginia's tort of intentional infliction of emotional distress was "a law of general applicability" in *Hustler*, *id.* at 674, Minnesota's promissory estoppel law was unrelated to the suppression of speech. Yet, in divergence from *Hustler*, the majority permitted Minnesota's doctrine of promissory estoppel to "be enforced to punish the expression of truthful information or opinion." *Id.* at 675–76. The dissent noted that the newspapers' publication of Cohen's name was the publication of truthful information, *id.* at 676; and to punish the publication of truthful information, "it must be in furtherance of a state interest 'of the highest order.'" *Id.* (quoting *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

Justice Souter, joined by Justices Marshall, Blackmun, and O'Connor, filed a separate dissenting opinion. 501 U.S. at 676 (Souter, J., dissenting). Justice Souter observed that "'nothing [is] talismanic about neutral laws of general applicability,' for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself." *Id.* at 677 (quoting *Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in judgment)). Justice Souter did not "believe the fact of general applicability to be dispositive"; instead, he found it "necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests, and such has

been the Court's recent practice in publication cases." *Id.* at 677. Thus, Justice Souter recognized the importance of the public interest as "integral to the balance that should be struck in this case," *id.*, and in his view, "the State's interest in enforcing a newspaper's promise of confidentiality [was] insufficient to outweigh the interest in unfettered publication of the information revealed in this case," *id.* at 679.

Beyond the dissenting justices, *Cohen* has been roundly criticized by legal scholars for weakening First Amendment protections for the press. See generally Eric B. Easton, *Two Wrongs Mock A Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 Ohio St. L.J. 1135 (1997); Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 Ga. L. Rev. 1087 (2001); Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 Harv. J.L. & Pub. Pol'y 1093 (2009). And this case now before the Court exemplifies how public figures rely on *Cohen* to circumvent the First Amendment defense against defamation claims by focusing not on the broadcast but on the newsgathering process.

B. Factual Background

1. Federal law makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." 42 U.S.C. 289g-2(a). The law does not prohibit "reasonable payments associated with the transportation, implantation,

processing, preservations, quality control, or storage." 42 U.S.C. 289g-2(e)(3).

Although Section 289g-2's purpose was to enable donations of fetal tissue for research and permit those involved in facilitating the transfer to recoup reasonable costs, a profitable market has since developed for brokering fetal tissue. This growing market has influenced the timing and method for how abortions are being performed—with potential risks to the mother's health—and has resulted in the shadowy proliferation of fetal-tissue trafficking. C.A. E.R. 11- 2800:20–2801:18, 11-2808:2–6.

2. In 2000, ABC aired a "20/20" segment shedding light on illegal fetal-tissue trafficking and profiteering. C.A. E.R. 10-2723:16–21, 22-5913. Using hidden cameras, a journalist posed as a prospective investor and secretly recorded a conversation with a tissue-procurement company owner at a restaurant. C.A. E.R. 22-5913. During the conversation, the businessowner revealed that his firm had bought and sold fetal tissue for profit in violation of federal law. C.A. E.R. 22-5914. The segment also detailed incidents of fetal-tissue harvesting from a Planned Parenthood clinic in Kansas. C.A. E.R. 10- 2723:22–25. The "20/20" broadcast triggered congressional hearings and investigations but resulted in no legislative reform or increased oversight of the tissue-transfer industry. C.A. E.R. 22 -5917.

3. Ten years later, pro-life activist David Daleiden watched the "20/20" segment and became gripped with exposing fetal-tissue trafficking in the abortion industry. C.A. E.R. 11-2806:16–18. At the time,

Daleiden was research director for Live Action, a pro-life organization. C.A. E.R. 11-2806:16–18. As part of his research, he learned that fetal-tissue trafficking was a profitable business (C.A. E.R. 11-2799:5–21) and that tissue brokers and abortion providers were profiting from Section 289g-2(e)(3)'s "reasonable payments" exception by marking up the costs of processing aborted fetuses (C.A. E.R. 11-2800:20–2801:18, 11-2808:2–6).

Dismayed that no meaningful change resulted from the "20/20" investigation, Daleiden resolved to carry out a similar hidden camera investigation to expose what he suspected was Planned Parenthood's ongoing fetal-tissue trafficking with procurement companies. C.A. E.R. 22-5944. To that end, Daleiden founded the nonprofit Center for Medical Progress (CMP) and launched an undercover investigatory project—the Human Capital Project—to engage high-level officials in the abortion and tissue transfer industries. C.A. E.R. 11-2829:6–21. Like the "20/20" undercover journalists, or like testers who ferret out discriminatory housing practices, Daleiden and his team sought to document evidence "of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissues for profit," in violation of Section 289g-2. C.A. E.R. 10-2606:2–7.

In July 2013, Daleiden enlisted petitioner Sandra Susan Merritt for the Human Capital Project to play the role of "Susan Tennenbaum," the "founder and CEO" of "BioMax," a start-up tissue procurement company (C.A. E.R. 4-824:14–17). As with all hidden-camera investigations, the project's goal was simple: get people to talk. C.A. E.R. 10-2603:16–17. Posing as

representatives from "BioMax," Daleiden and Merritt had to gain insider credibility, meet decisionmakers, and document admissions of unlawful conduct. C.A. E.R. 4-844:7–11. As Daleiden explained at trial, "it was an honest reporting project, to report true facts about [Planned Parenthood] to the public." C.A. E.R. 10-2606:21–22.

For two years, Merritt posed as Tennenbaum for assignments in California, Colorado, Texas, and Maryland. App.7a–9a. With tiny video cameras hidden on their persons (App.8a–9a), Daleiden and Merritt conducted interviews at the National Abortion Federation's (NAF) annual tradeshow conference in San Francisco in April 2014; at restaurants in Los Angeles and Pasadena in July 2014 and February 2015; and at NAF's annual conference in Baltimore in April 2015. App.7a–9a. Other hidden-camera interviews took place in Texas, Colorado, and Florida. App.8a–9a. In all, the footage from the undercover interviews confirmed Daleiden's and Merritt's beliefs that Planned Parenthood and tissue procurement companies were illegally harvesting and trafficking fetal tissue. C.A. E.R. 11-3053:3–3054:20.

4. In July 2015, CMP began releasing the Human Capital Project's results to the public. App.9a. Daleiden's goal "was to report on our findings to the public and [] to hopefully generate more pressure for law enforcement and others in positions of authority and official capacity to [] take action, to correct the problems that were documented by the videos." C.A. E.R. 11-3064:3–8.

The project's broadcast—like the "20/20" investigation 15 years before—prompted a national outcry, congressional investigations, and even criminal prosecutions. The Senate Judiciary Committee released a report condemning Planned Parenthood,[1] as did a House Select Investigative Panel of the Committee on Energy and Commerce,[2] which led to criminal referrals. C.A. E.R. 21-5397, 22-5885, 23-6180.

The undercover investigation also spurred the successful prosecution of a tissue procurement company by the Orange County District Attorneys' Office, which credited Daleiden's and Merritt's undercover work for its success. C.A. E.R. 21-5312, 21-5342-80. The tissue procurement company was liable for $7.8 million, and shuttered its doors. C.A. E.R. 21-5312.

Finally, the State of Texas cancelled Medicaid provider contracts with Planned Parenthood after determining—based on Daleiden's and Merritt's work—that a local affiliate "violated federal regulations relating to fetal tissue research by altering abortion procedures for research purposes or allowing the researchers themselves to be involved in performing abortions." *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 352 (5th Cir. 2020).

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[1] MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., MAJORITY REPORT ON HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY (Comm. Print 2016).

[2] SELECT INVESTIGATIVE PANEL OF THE ENERGY & COM. COMM., 114TH CONG., FINAL REPORT xviii-xix (Comm. Print 2017).

C. Proceedings Below

1. Planned Parenthood responded to the Human Capital Project's broadcast with a torrent of litigation. But, tellingly, despite the project's unambiguous assertion that Planned Parenthood sold human body parts for profit, Planned Parenthood did not sue for defamation. Nor did it allege damages from lost business opportunities. And it did not assert revenue losses from canceled abortions or tissue procurement transactions. Instead, it adopted the novel litigation tactic deployed two decades before by the North Carolina grocery store chain Food Lion: "recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim." *Food Lion, Inc.* v. *Cap. Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). So in January 2016, Planned Parenthood filed a 14-count lawsuit in the Northern District of California, alleging, among other claims, violation of civil RICO, breach of contract, fraud, trespass, and violations of federal and state wiretapping laws. App.10a.

Like Food Lion, Planned Parenthood sought to avoid the First Amendment limitations on defamation claims "by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts." 194 F.3d at 522. Planned Parenthood accordingly labeled the expenses it voluntarily incurred to cover its response to the broadcast as "infiltration damages" and "security damages." App.10a. Backed by this Court's decision in *Cohen* and a friendly forum in San Francisco, Planned Parenthood strategized that, by characterizing its damages as "economic," and by focusing not on the

broadcast of the videos but on the newsgathering process itself, it could chart a course around *New York Times* and *Hustler* to make defendants pay.

2. Litigation ensued for three years, leading to a six-week trial in November 2019. Planned Parenthood's theory at trial was that Merritt, Daleiden, and their co-defendants created a criminal enterprise to smear and destroy the abortion provider. C.A. E.R. 3-616:25–617:2. Daleiden acknowledged that one of the project's goals was to "[d]eliver a major public relations blow to Planned Parenthood" (C.A. E.R. 11-2828:23–13), but that aim was "predicated on the foundational goal of documenting and exposing * * * actual evidence of crimes within the space of harvesting and trafficking aborted fetal organs and tissues" (C.A. E.R. 11-2828:12–20).

Despite this Court's holding that the First Amendment's Free Speech Clause can serve as a defense in state tort suits, see *Snyder* v. *Phelps*, 562 U.S. 443, 451 (2011) (citing *Hustler*, 485 U.S. at 50–51), the district court repeatedly rejected defendants' attempt to raise the First Amendment as a defense to Planned Parenthood's claims. In fact, the district court emphatically instructed the jury "[*t*]*he First Amendment is not a defense to the claims in this case for the jury to consider*." C.A. E.R. 16-ER-4274 (emphasis added).

A San Francisco jury returned its verdict for Planned Parenthood, including finding defendants liable for violating civil RICO; for violating the Federal Wiretap Act and various state recording laws; committing fraud (directly or indirectly through

conspiracy); and for punitive damages under the Federal Wiretap Act and Florida and Maryland law. App.10a.

The jury awarded Planned Parenthood substantial compensatory damages. These damages were divided into two categories: purported "infiltration damages" and purported "security damages." App.10a. The "infiltration damages," totaling $366,873, related to Planned Parenthood's purported costs to prevent a future similar intrusion: "assessing Planned Parenthood's current security measures and exploring potential upgrades, reviewing and upgrading Planned Parenthood's vetting of visitors and attendees at conferences, monitoring social media for potential threats, hiring additional security guards for Planned Parenthood's conferences, and improving the badging and identification systems at the conferences." App.10a. The "security damages," totaling $101,048, related to Planned Parenthood's costs "for protecting their doctors and staff from further targeting by [defendants]" and "from foreseeable violence and harassment by third parties." The security damages also included "costs for physical security and online threat monitoring for the individuals recorded in the videos." App.11a.

The district court later awarded nominal and statutory damages, including $2 million in trebled RICO damages and punitive damages, for a total damages award of $2,425,084. App.10a. In August 2020, the court denied defendants' post-trial motions for judgment as a matter of law, a new trial, and to amend the final judgment. App.46a. The court subsequently ordered defendants to pay Planned Parenthood

nearly $14 million in attorney's fees and costs, on top of the damages judgment. Merritt C.A. Br. 12.

3. In a published opinion, a three-judge panel of the Ninth Circuit affirmed the compensatory awards for Planned Parenthood's so-called "infiltration" and "security" damages. App.5a. The panel did not weigh the First Amendment implications of punishing the news-gathering and publication of truthful information but simply relied on *Cohen* to hold that "[i]nvoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." App.14a. Nor did the panel scrutinize whether Planned Parenthood mischaracterized its publication-dependent damages as "economic" as an end-run around the First Amendment. Instead, it summarily concluded that the "infiltration" and "security" damages were "losses caused by the defendants' violations of generally applicable laws." App.14a.

The panel further supposed that "Planned Parenthood would have been able to recover the infiltration and security damages even if Appellants had never published videos of their surreptitious recordings." App.15a. The panel speculated that, "[r]egardless of publication, it is probable that Planned Parenthood would have protected its staff who had been secretly recorded and safeguarded its conferences and clinics from future infiltrations by Appellants and third parties." App.15a. The panel did not explain that reasoning given that Planned Parenthood did not learn about the "infiltration" until CMP published the videos. App.9a. In sum, the panel

concluded that defendants' First Amendment argument "cannot be squared with *Cohen*." App.15a.[3]

In an unpublished memorandum disposition, the panel affirmed the district court's rulings on Planned Parenthood's RICO claim. App.27a. The panel found that Planned Parenthood's RICO claim satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. 1028(c)(3)(A); that Planned Parenthood established the required pattern of predicate acts necessary to violate RICO; and that a direct relationship existed between Daleiden's production and transfer of the fake driver's licenses and the alleged harm, as required to satisfy RICO's proximate cause requirement. App.27a–29a. The panel also upheld the jury's imposition of punitive damages for fraud, trespass, and violations of state wiretapping laws. App.38a–40a. The panel did not directly address petitioner's argument (Merritt C.A. Br. 65) that obtaining a punitive damages award required Planned Parenthood to prove with clear and convincing evidence that defendants acted with actual malice.

[3] The panel did reverse the jury's verdict on the Federal Wiretap Act claim and vacated the related statutory damages. App.19a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision highlights the tension between this Court's opinions in *Hustler* and *Cohen* about the extent of the First Amendment's protection of journalists who use deception to research a story. Without this Court's intervention, undercover journalism—at least in the Ninth Circuit—will be eviscerated, as subjects of unflattering *but truthful* stories can use "generally applicable" laws as an end-run around the First Amendment. As this Court made clear, such a litigation tactic is foreclosed by *Hustler*. Yet *Cohen*'s categorical rejection of this Court's previous balancing of First Amendment interests in enforcing generally applicable laws against the press has sowed chaos in lower courts. That confusion has been percolating for years, and the Ninth Circuit's embrace of *Cohen*'s erroneous legacy highlights the need for this Court's definitive resolution. Even if the First Amendment confers no broad immunity on the press to violate generally applicable laws or to commit unlawful acts during the newsgathering process, this Court should affirm that lower courts must still balance the First Amendment implications of punishing the investigation and publication of truthful news of significant public importance.

In addition, this Court should grant certiorari to eliminate the threat to First Amendment values, long recognized by members of this Court, of powerful entities exploiting RICO to punish ideological opponents. Congress enacted RICO to eradicate organized crime like the Mafia, not to target journalists. At a broader level, the Court should clarify the proper scope of RICO as Congress intended and likewise affirm that

media defendants may raise the First Amendment in defense to civil RICO claims pertaining to newsgathering activities. As to the case below, the Ninth Circuit failed to follow this Court's precedents on the proximate cause standard for civil RICO claims, which has allowed Planned Parenthood to obtain treble damages for injuries that are not directly caused by the alleged predicate acts. The Ninth Circuit's adoption of such a plaintiff-friendly causation standard is especially troubling because public figures, at least on the West Coast, can now obtain RICO treble damages against journalists who use alter egos to investigate matters of public concern.

Finally, the decision below allows the courts to chill vital First Amendment activity by imposing punitive liability on media defendants simply for using deception to gain insider access to research stories of significant public importance—stories that would not come to light without undercover investigation. Characterizing such deception as actionable "fraud," as the Ninth Circuit affirmed below, offends constitutional values, strays from the common law understanding of fraud, and is foreclosed by this Court's holding in *United States* v. *Alvarez*, 567 U.S. 709 (2012) (opinion of Kennedy, J.). It also creates a split with at least two other circuits. Just because an undercover investigator uses an alter ego to obtain and bring to light information about potential crimes that the subject would not want to be made public does not mean that the investigator intends to defraud her subject, much less cause it any legally cognizable harm.

To the contrary, absent a legally cognizable harm caused by the deception, the First Amendment

positively protects a reporter's right to use deception to gather and publish information. By ignoring those First Amendment interests and bedrock principles of tort law, the courts below erred. The consequences of the Ninth Circuit's error are dramatic—both for petitioner and for First Amendment values. Unless this Court grants review, petitioner will be subject to crushing damages, including punitive damages, and resulting legal fees, simply for engaging in the longstanding journalistic tradition of undercover newsgathering. The First Amendment does not permit imposing punitive liability for using deceptive newsgathering methods if they serve the public interest, and neither should this Court.

I. The Ninth Circuit Exacerbated the Tension Between this Court's Decisions in *Hustler* and *Cohen*.

In affirming Planned Parenthood's compensatory damages without First Amendment scrutiny, the Ninth Circuit applied *Cohen* to "simply reaffirm the established principle that the pursuit of journalism does not give a license to break laws of general applicability." App.17a. Interpreting *Cohen* to conclude that laws of general applicability categorically apply to the press without implicating the First Amendment has established a dangerous precedent for investigative journalism. Indeed, this case reflects *Cohen*'s dangerous legacy of allowing civil claimants to circumvent the First Amendment by focusing not on the broadcast but on the actual newsgathering process.

A. The Ninth Circuit's decision entrenches the confusion caused by *Cohen* and widens a divide among courts of appeals.

Based upon *Cohen*'s lack of clarity, the Ninth Circuit's decision has widened the divide among courts of appeals on how to treat publication-related cases involving generally applicable laws. While the courts of appeals were already confused on how to apply *Cohen*, the Ninth Circuit opened a third front by categorically rejecting any First Amendment defense for deception-based newsgathering. The Ninth Circuit then denied en banc review, rendering the circuit split both deep and entrenched.

The Sixth Circuit has held that the actual-malice standard applied to a breach of contract claim in part because the plaintiff did not suffer a contractual injury but complained only of a defamation-type harm. *Compuware Corp.* v. *Moody's Inv. Serv., Inc.*, 499 F.3d 520, 533–34 (2007). The Sixth Circuit acknowledged *Cohen*, noting that "[o]rdinarily, 'enforcement of … general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.'"499 F.3d at 529 (citing 501 U.S. at 670). Even so, the court cautioned that "stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'" *Id.* (quoting 501 U.S. at 670). The Sixth Circuit thus concluded that the breach of contract claim was based on the defamation claim because "it is inescapable that Compuware seeks compensation for harm caused to its reputation." *Id.* at 530. The court continued: "We see no material

difference between this claim—which, although labeled one for breach of contract, essentially asserts that Moody's acted incompetently (i.e., negligently) in compiling and evaluating its publication of protected expression—and a tort claim based on conduct that might support a pendant defamation claim." *Id.* at 532.

Two Fourth Circuit cases involving hidden-camera investigations also demonstrate the uncertainties that *Cohen* has created. In *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, the Fourth Circuit rejected the argument that Food Lion's breach of duty and trespass claims against the network for its undercover investigation of the grocery store's food handling practices should be balanced against the First Amendment. 194 F.3d 505, 521 (1999). The court of appeals noted the "arguable tension" in the way the "generally applicable law" doctrine had been enforced, *id.* at 521–22, yet found that the torts the ABC undercover reports allegedly committed "fit neatly" into the *Cohen* framework, *id.* at 521.

Emphasizing the tension caused by *Cohen*, the Fourth Circuit also rejected Food Lion's cross-appeal of a district court decision that barred it from being awarded compensatory damages for harm caused by the show's broadcast. 194 F.3d at 522. The court of appeals concluded that Food Lion could not do an "end-run" around defamation law by trying to recover reputational damages for non-reputational torts. *Id.* The court of appeal's reasoning closely mirrored this Court's observation in *Cohen* that its decision would have been different had Dan Cohen been trying to "use a promissory estoppel cause of action to avoid the

strict requirements for establishing a libel or defamation claim." 501 U.S. at 671. The Fourth Circuit thus concluded that *Hustler* foreclosed such an attempt to skirt the "actual malice" requirements of libel law. *Food Lion*, 194 F.3d at 522.

In another case, the Fourth Circuit revisited *Cohen* just this year in enjoining North Carolina's Property Protection Act, which prohibited hidden camera newsgathering activities in nonpublic areas of an employer's premises. *People for the Ethical Treatment of Animals, Inc.* v. *N. Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (2023). The court of appeals rejected North Carolina's argument that *Cohen* categorically precludes the First Amendment's application to generally applicable laws, observing that "a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it." 60 F.4th at 827. The court of appeals then found the law unconstitutional because its provisions "burden newsgathering and publishing activities." *Id.* at 828.

The Seventh Circuit has also considered a plaintiff's attempt at an end-run around the First Amendment by bringing a tort action against undercover investigators. In *Desnick* v. *American Broadcasting Companies, Inc.,* a three-judge panel upheld the lower court's dismissal of four tort claims: trespass, invasion of privacy, unlawful electronic surveillance, and fraud. 44 F.3d 1345, 1352–55 (1995). Writing for a unanimous panel, Chief Judge Richard Posner noted that, although the press is not immune from tort or contract liability, and although investigative reporting could often be "shrill, one-sided, and offensive," it still

deserved the First Amendment protections this Court had established in *New York Times* and confirmed in *Hustler*. 44 F.3d at 1355. Judge Posner emphasized that such protection was warranted "regardless of the name of the tort," *id.* (citing *Hustler*, 485 U.S. at 46), and "regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast," *id.*

In short, not only has the Ninth Circuit's decision perpetuated the confusion caused by *Cohen*; it has deepened a divide among the federal circuit courts that have considered generally applicable laws in the newsgathering context. At bottom, the extent of a reporter's First Amendment rights should not turn on her geographic location within the United States. Nor should it turn on how a plaintiff artfully characterizes its publication-dependent damages. Yet the courts of appeals are divided on *Cohen*, and the Ninth Circuit's holding will now apply to all journalists on the West Coast. This deep and intolerable confusion caused by *Cohen* warrants the Court's review.

B. Under this Court's precedents, civil claimants may not recover defamation-type damages under generally applicable tort theories.

The Ninth Circuit concluded that it was "required by" *Cohen* to conclude that the First Amendment did not bar Planned Parenthood's claim for "infiltration" and "security" damages under non-defamation state law theories. App.14a. Such a simplistic interpretation reflects the judicial confusion that *Cohen* has long caused. In any event, the Ninth Circuit misread

Cohen. Although *Cohen* cited to a long line of cases holding that generally applicable laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," 501 U.S. at 669, this Court was careful to emphasize the nature of Cohen's damages claim: "*Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim*." *Id.* at 671 (emphasis added). So, even in *Cohen*, this Court was mindful of the type of damages that the plaintiff sought to recover. Following this reasoning, *Cohen* is inapplicable when, as here, a plaintiff seeks to use a generally applicable law to recover publication-dependent damages while avoiding the requirements of a defamation claim. In such a case, *Hustler* must apply.

The Ninth Circuit ignored this reading of *Cohen* and instead attempted to distinguish *Hustler* by noting that "[t]he jury awarded damages for economic harms suffered by Planned Parenthood, not the reputational or emotional damages sought in *Hustler Magazine*." App.15a. That conclusion cannot withstand scrutiny. Although the subject torts—*e.g.*, trespass, breach of contract, and fraud—allegedly occurred during the newsgathering process, the so-called "security" and "infiltration" damages creatively advanced by Planned Parenthood all depended on the project's publication. In other words, the alleged injuries arose *from the broadcast*, not the newsgathering; and the damages, although characterized as "economic," were precisely due to *the broadcast*. Planned Parenthood did not incur security costs to protect its doctors because Merritt used an alter ego to secure interviews

with high-level doctors, or even because Merritt signed an agreement not to record at a conference. Instead, Planned Parenthood *voluntarily* incurred costs in the wake of the public outcry for what the videos truthfully alleged: that Planned Parenthood sold human body parts for profit. Under these circumstances, California's trespass and breach of contract laws were no more laws of general applicability than the libel, invasion of privacy, or intentional infliction of emotional distress claims in *Hustler*. Thus, *Hustler* should have controlled the outcome, as it should have controlled in *Cohen*. See *Cohen*, 501 U.S. at 674–75 (Blackmun, J., dissenting).

Even if Planned Parenthood's alleged "infiltration" and "security" damages could be properly characterized as resulting from violations of general applicable laws, *Hustler* and its predecessors instruct that whatever harms may occur from such a violation must be balanced against the First Amendment interests at stake. See 485 U.S. at 51. The Human Capital Project's First Amendment value was of the highest order—truthful information about fetal-tissue trafficking in the abortion industry—and that information was of significant public concern, as demonstrated by the executive, legislative, and law enforcement actions that flowed from it. See p. 9, *supra*. Any injury on the other side of the scale stemmed from Planned Parenthood's illegal tissue-transfer practices coming to light, and not from petitioner's truthful reporting.

II. The Ninth Circuit's Decision Encourages the Continued Distortion of RICO by Expanding Its Reach to Punish Newsgathering by Journalists Whose Purpose Is to Investigate and Expose What They Believe to be Unlawful Activity.

RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate * * * commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). This Court has recognized that the "declared purpose" of Congress in enacting the RICO statute, as evidenced by its title and legislative history, was "to seek the eradication of organized crime in the United States." *United States* v. *Turkette*, 452 U.S. 576, 589 (1981) (quoting the statement of findings prefacing the Organized Crime Control Act of 1970, Pub.L. 91–452, 84 Stat. 923); accord *Russello* v. *United States*, 464 U.S. 16, 26–27 (1983).

Yet RICO "has already 'evolv[ed] into something quite different from the original conception of its enactors," warranting 'concern[s] over the consequences of an unbridled reading of the statute.'" *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 412 (2003) (Ginsburg, J., joined by Breyer, J., concurring) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481, 500 (1985)). Indeed, lower courts interpret RICO so broadly that civil claimants often use it to wage "lawfare" against media outlets, advocacy organizations, and religious activists engaging in First Amendment-protected conduct. Given that "[i]t is the duty of this

Court to implement the unequivocal intention of Congress," *Sedima*, 473 U.S. at 527 (Powell, J., dissenting), this Court should affirm that RICO must be applied narrowly to confine its reach to the purpose that Congress had in mind: the eradication of organized crime in the United States. And the Court's intervention is needed now to ensure that its decisions reining in an expansive application of RICO has broad staying power.

If the Court declines to clarify RICO's narrow scope, then it should affirm that media defendants may use the First Amendment as a shield against civil RICO claims as they do with state-law claims for defamation, invasion of privacy, electronic surveillance, and the like. See, *e.g.*, *New York Times*, 376 U.S. at 254. Indeed, Justice Souter, joined by Justice Kennedy, warned about the danger presented by "harassing RICO suits" and the First Amendment's role in preventing such harassment. *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring). Justice Souter observed that it is "prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Id.* at 265. Justice Souter also explained that "legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise." *Id.* at 264. Justice Souter added that "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.*

A. The Ninth Circuit's broad application of "racketeering activity" to undercover newsgathering demonstrates the exploitation of RICO against journalists and ideological opponents.

This case raises precisely the First Amendment problems in the RICO context recognized by Justices Souter and Kennedy in *Scheidler*. See 510 U.S. at 264 (Souter, J., concurring). Even if Planned Parenthood's allegations that defendants plotted to destroy the abortion provider had merit, Planned Parenthood's alleged RICO injuries are entirely founded upon defendants' speech-related, newsgathering activities. That Planned Parenthood is a public figure, and that its fetal-tissue transfer practices is a matter of public concern, are beyond dispute. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 772–75 (1986) (discussing *New York Times* and other First Amendment cases). Thus, for defendants' newsgathering and publication activities to amount to a RICO "injury," Planned Parenthood would have to show with "convincing clarity," *New York Times*, 276 U.S. at 285–86, that defendants' purported RICO enterprise—the Human Capital Project—was done with knowledge that it was false or in reckless disregard of the truth, *id*. at 280 (internal quotation marks omitted). Planned Parenthood did not even attempt to do so, because it knew that it could exploit RICO's broad interpretation to obtain millions of dollars in treble damages in what is, at bottom, a case of bad publicity.

Members of this Court "have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for

which the States have historically taken responsibility and may deal with today if they have the will to do so." *United States* v. *Morrison*, 529 U.S. 598, 636 n.10 (2000) (Souter, J., dissenting). Accordingly, the Court should clarify that RICO may not be used to federalize traditional state-law defamation laws to evade the First Amendment. If not, then the Ninth Circuit's decision will embolden civil claimants nationwide to employ a sweeping reading of RICO to attack ideological opponents as "racketeers."

B. The Ninth Circuit misapplied this Court's precedent on the standard of causation for civil RICO violations.

At a minimum, the Ninth Circuit's decision affirming petitioner's liability under civil RICO is incorrect. RICO allows a private civil claim by "[a]ny person injured in his business or property by reason of a violation of [the criminal RICO provisions]." 18 U.S.C. 1964(c). In no fewer than three decisions, this Court interpreted "by reason of" to require that a plaintiff in a civil RICO action show that defendant's actions were "not only * * * a 'but for' cause of [plaintiff's] injury, but * * * the proximate cause as well." *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (citations omitted); see *Hemi Group, LLC* v. *City of N.Y.*, 559 U.S. 1, 9 (2010) (citing *Holmes*, 503 U.S. at 268, 271, 274); *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

The "central question" in evaluating proximate causation in the RICO context "is whether the alleged violation *led directly* to the plaintiff's injuries." *Anza*, 547 U.S. at 461 (emphasis added). According to this

Court's decision in *Hemi*: "A link [between the RICO predicate acts and plaintiff's injuries] that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient" to show proximate cause. 559 U.S. at 9 (quoting *Holmes*, 503 U.S. at 271, 274). This requirement reflects "[t]he general tendency of the law, in regard to damages at least, * * * not to go beyond the first step." *Id.* at 10 (quoting *Holmes*, 503 U.S. at 271–72).

The Ninth Circuit affirmed the district court's proximate cause determination based on the predicate acts of violating the federal Identity Theft Statute, 18 U.S.C. 1028, finding "a direct relationship between Appellants' production and transfer of the fake driver's licenses and the alleged harm [the so-called "infiltration" and "security" damages]." App.28a. Not only is this finding plainly wrong, but it contradicts this Court's precedents in *Holmes*, *Anza*, and *Hemi* precluding indirect liability for remote and tenuous predicate acts. See *Holmes*, 503 U.S. at 261–62; *Anza*, 547 U.S. at 457–58; *Hemi*, 559 U.S. at 6–8.

Planned Parenthood's injuries here "were not caused directly" by Daleiden's alleged production and transfer of three fake driver's licenses, and "thus were not caused 'by reason of' it." *Hemi*, 559 U.S. at 17–18. For example, Planned Parenthood sought "infiltration" damages for, among other things, "monitoring social media for potential threats" and "hiring additional security guards for Planned Parenthood's conferences." App.10a. Planned Parenthood also sought "security" damages related to its costs "for protecting their doctors and staff from further targeting by [defendants]" and "from foreseeable violence and harassment by third parties." The security damages included "online

threat monitoring for the individuals recorded in the videos." App.11a. Planned Parenthood failed to show that Daleiden's production and transfer of fake IDs "led *directly*" to all these injuries. *Hemi*, 559 U.S. at 14 (emphasis added). The relationship between defendants' alleged production and transfer of fake driver's licenses and Planned Parenthood's alleged injuries is simply too attenuated to support a finding of proximate cause. Like New York's causation theory in *Hemi*, "[m]ultiple steps * * * separate[d] the alleged [predicate acts] from the asserted injury. *Id.* at 15. Planned Parenthood, therefore, had no civil RICO claim.

III. Permitting Punitive Damages against Undercover Investigators for Using Alter Egos Creates a Circuit Split and Conflicts with this Court's Precedent.

In affirming that a plaintiff can obtain punitive damages against a media defendant for using alter egos and deceptive techniques during an investigation, the Ninth Circuit deepened an existing circuit conflict and disregarded this Court's clear instruction that false speech is not actionable unless it is made for material gain or causes a legally cognizable harm. Without correction, the Ninth Circuit's decision will undermine First Amendment protections for undercover newsgathering.

A. Subjecting undercover investigators to punitive liability for documenting and exposing illegal conduct is unprecedented and creates a circuit split.

The Ninth Circuit upheld the San Francisco jury's imposition of punitive damages against Merritt and the other defendants on the grounds that they "committed fraud or conspired to commit fraud through intentional misrepresentation." App.39a. The panel's decision squarely conflicts with the decisions of other courts of appeals. Indeed, subjecting journalists to punitive damages for conducting an undercover investigation is unprecedented: No federal court has ever found journalists liable for punitive damages for using alter egos and undercover identities, misrepresenting their purposes, and using hidden cameras for newsgathering.

In *Desnick*, *supra*, the Seventh Circuit rejected the proposition, affirmed by the Ninth Circuit below, that investigative deceptions are actionable fraud thereby giving rise to punitive liability. 44 F.3d at 1353 (Posner, J.). As with the undercover reporters in *Desnick*, Daleiden "did not order the camera-armed" Merritt into abortion industry conferences and meetings with doctors to defraud Planned Parenthood. *Id.* at 1353. Instead, just like ABC's purpose in *Desnick* "was to see whether the Center's physicians would recommend cataract surgery on the testers," *id.*, the Human Capital Project's purpose was to test whether Planned Parenthood officials would disclose evidence of illegal fetal-tissue trafficking with procurement companies. C.A. E.R. 10-2606:21–22. As Judge Posner observed:

> We cannot view the fraud alleged in this case in that light. Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.

Id. at 1354.

Other circuit courts have explicitly rejected punitive damages for fraud in the newsgathering context. In *Food Lion*, *supra*, the Fourth Circuit reversed liability for fraud and the related punitive damages judgment against a television network for its hidden camera exposé of a grocery chain's food handling practices. 194 F.3d at 512–513, 522. The court found that "Food Lion did not show that the administrative costs were an injury caused by reasonable reliance on the misrepresentations." *Id.* at 513.

The First Circuit similarly held that media defendants' misrepresentations to obtain the plaintiffs' voluntary participation in a "Dateline NBC" segment about the trucking industry did not give rise to punitive damages because defendants "were [not] motivated by anything more malicious than the zealous pursuit of an emotionally compelling story." *Veilleux* v. *Nat'l Broad. Co.*, 206 F.3d 92, 135 (1st Cir. 2000). The court observed: "While a jury could find that the alleged misrepresentations were made knowingly or even recklessly, it could not reasonably infer common-law malice as required under Maine law." *Ibid.*

Splitting with its sister circuits, the Ninth Circuit effectively concluded that the false statements defendants made to network with top Planned Parenthood doctors and obtain access at abortion-industry conferences were fraudulent to the extent warranting punitive damages. App.39a. The Ninth Circuit relied on no case to support the proposition that misrepresentations made during the newsgathering process constitute intentional fraud giving rise to punitive liability. The Ninth Circuit's decision thus produces a novel punitive-damages standard against media defendants that is easier to satisfy than the traditional punitive damages standard for a defamation claim (*e.g.*, actual malice). That the court of appeals denied an en banc petition documenting this circuit split renders the split deep seated and multi-faceted; it is also entrenched and unlikely to benefit from further percolation. This Court should grant review to resolve the circuit split.

B. By incorrectly affirming that using alter egos to gain insider access for a hidden camera investigation is "fraudulent" to the extent warranting punitive liability, the Ninth Circuit disregarded *Alvarez*.

The Ninth Circuit's decision upholding punitive damages conflicts not only with the decisions of its sister circuits but also with the clear teaching of this Court in *United States* v. *Alvarez*, 567 U.S. 709 (2012) (opinion of Kennedy, J.). In that case, the Court invalidated the Stolen Valor Act, a federal law prohibiting false statements about receiving military decorations or medals. The four-Justice plurality opinion observed: "Even when considering some instances of

defamation and *fraud*, * * * the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment." 567 U.S. at 719 (opinion of Kennedy, J.) (emphasis added); accord *Illinois, ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("False statement alone does not subject a fundraiser to fraud liability."). Instead, "[t]he statement must be a knowing or reckless falsehood." *Alvarez*, 567 U.S. at 719 (opinion of Kennedy, J.) (citing *New York Times*, 376 U.S. at 280). The Court emphasized that "[w]ere [it] to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." 567 U.S. at 723.

To be sure, neither the plurality nor the concurrence in *Alvarez* held that false statements are always protected under the First Amendment. Instead, as the plurality outlines, false speech may be criminalized if made "for the purpose of material gain" or "material advantage," or if such speech inflicts a "legally cognizable harm." *Alvarez*, 567 U.S. at 723, 719. Here, the Ninth Circuit sidestepped whether Merritt's false statements were made "for the purpose of material gain" or "material advantage," or if such speech inflicted on Planned Parenthood a "legally cognizable harm." *Id.* Instead, the court of appeals found that Daleiden and Merritt warranted punitive liability because they "intentionally recorded individuals without their consent at conferences and meetings" and "intentionally misrepresented their identities, the intent of their participation, and their work affiliations

to attend conferences, lunches, and meetings." App.39a–40a. But none of those actions—all of which are standard undercover reporting techniques—was made for "the purpose of material gain" or "material advantage" or inflicted on Planned Parenthood a "legally cognizable harm." 567 U.S. at 723. As Judge Posner observed in *Desnick*, *supra*: "It would be different if the false promises were stations on the way to taking [the plaintiff] to the cleaners. An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises." 44 F.3d at 1354–55. As with the undercover reporters in *Desnick*, Merritt and Daleiden's "only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, *and that is not a fraudulent scheme*." *Ibid*. (emphasis added).

To be clear, a jury may in some cases award punitive damages for fraud. But under common law principles, whether Merritt was found liable for deceptive conduct does not ultimately warrant punitive liability for fraud. Instead, the determinative factor should have been whether Merritt intentionally recorded the conversations to defraud Planned Parenthood of property or legal rights, or otherwise to intentionally cause injury. See Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1297 (4th ed.) (listing the traditional elements of a fraud action); see also Restatement (Second) of Torts § 549(1)(b) (1965) (stating that a victim of fraud may recover "pecuniary loss suffered * * * as a consequence of the recipient's reliance upon the misrepresentation"). She did not, and thus she should not be subject to punitive liability for fraud. Indeed, defendants presented undisputed evidence at trial that the "primary and overriding purpose" of CMP's hidden camera

investigation was "to gather and document evidence of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissue for profit." C.A. E.R. 10-2606:3–7. The project was not a criminal enterprise to defraud Planned Parenthood but a standard undercover investigation (*e.g.*, using false identities, pretextual scenarios, surreptitious recording) inspired by the "20/20" news segment on the fetal-tissue transfer industry. The punitive damages award should be reversed.

IV. This Case Is Exceptionally Important Because the Ninth Circuit's Decision Enables Politically Powerful Entities to Use Lawfare to Crush Investigative Reporting.

At bottom, this was a defamation case. After carrying out a "20/20"-style hidden camera investigation, defendants broadcast to the world that Planned Parenthood sold human body parts for profit. Despite facing such a horrific claim, Planned Parenthood was not prepared or able to prove that the Human Capital Project's assertion was false or made with actual malice. Instead, and thanks to *Cohen*, Planned Parenthood strategized an end-run around the First Amendment by characterizing its publication-dependent damages as "economic." That litigation tactic is foreclosed by *Hustler*—and even *Cohen*—and thus Planned Parenthood's RICO and state-law claims for trespass, fraud, and breach of contract should have been precluded by the First Amendment.

In concluding otherwise, and by affirming the enormous compensatory, trebled statutory and punitive

damages, and resulting fee award, the Ninth Circuit weakened First Amendment protections for journalists who use deception to expose unlawful activity. The court of appeals suggested that its decision should not be read as punishing the content of defendants' publication but only the way the news was gathered. App.16a. But that is a false dichotomy. A law that imposes liability on the newsgathering process should be subject to First Amendment scrutiny just as much as a law that targets speech or expressive conduct (the news itself). Left in place, the Ninth Circuit's reasoning will have a devastating chilling effect on the press's First Amendment right to gather and publish news of vital public importance.

The gravity of the Ninth Circuit's error is compounded by *Cohen*'s lack of clarity. As scholars have pointed out, *Cohen*'s "conclusion that laws of general applicability also apply to the press without raising a First Amendment issue establishes a dangerous precedent for those on the front lines of investigative journalism." Fargo & Alexander, 32 Harv. J.L. & Pub. Pol'y at 1110. Allowing *Cohen*'s confusion to percolate will empower well-funded public figures like Planned Parenthood to use generally applicable laws to punish journalists for shining a light on deeply hidden misconduct.

Rather than give industrial giants like Planned Parenthood unfettered power to wield generally applicable laws as an end-run around the First Amendment, "there should instead be a careful balancing of the interests in enforcing property and contract rights against the interest in free speech." Garfield, 35 Ga. L. Rev. at 1128. "It is the absence of such thoughtful

balancing, however, which is so glaringly evident in *Cohen* and which threatens to be *Cohen*'s legacy." *Ibid*. This case thus presents a vital question, and it is a clean vehicle for the Court to address the tension between *Hustler* and *Cohen* and accordingly clarify the scope of First Amendment protections in the news-gathering context.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

ANITA L. STAVER
HORATIO G. MIHET
ROGER K. GANNAM
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioner

May 2023