No. 22-1147

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

REPLY BRIEF FOR THE PETITIONER

ANITA L. STAVER
HORATIO G. MIHET
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

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Planned Parenthood's brief in opposition confirms that this Court should grant the petition for a writ of certiorari. Planned Parenthood does not deny that this case squarely presents the question whether a public figure may make an end-run around the First Amendment depending on how it characterizes its asserted damages. Nor does it deny that powerful entities exploit RICO to suppress First Amendment-protected advocacy. And it does not dispute that imposing punitive damages against undercover journalists is unprecedented.

Planned Parenthood instead asks this Court to deny certiorari for two reasons, neither of which is persuasive. First, Planned Parenthood argues that the Ninth

Circuit's decision is correct on the merits. But, even if that were true, it would not be a reason to deny review in a case that entrenches the confusion caused by this Court's decision in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991). Second, Planned Parenthood asserts that this case is an unsuitable vehicle for resolving the questions presented. Far from constituting a deficient vehicle, this case frames the questions presented in stark relief: Never before has a federal court affirmed such a massive damages award against the press for engaging in undercover newsgathering on an issue of great public importance. This Court should grant certiorari to bring much-needed clarity to the confusion caused by *Cohen*, clarify RICO's proper scope, and affirm that the First Amendment prohibits punitive damages against journalists who use deception to research a story of national importance.

A. Planned Parenthood Echoes the Ninth Circuit's Legal Errors.

Planned Parenthood does not dispute the importance of the questions presented. It instead asserts that review is unwarranted because the decisions below are correct. That would not justify denying certiorari even if true, given the acknowledged circuit confusion caused by *Cohen* and the undisputed importance of the questions presented.

1. As explained in the petition (at 17–23), the Ninth Circuit wrongly interpreted *Cohen* to reject the actual malice standard recognized in *Hustler Magazine., Inc.* v. *Falwell*, 485 U.S. 46 (1988), by precluding any First Amendment defense against generally applicable tort

claims. Pet.App.14a. Planned Parenthood's defense only reinforces the need for review.

a. Planned Parenthood fails to rebut the petition's showing that the Ninth Circuit's decision creates serious tension with decisions of other courts of appeals and with this Court. To begin, Planned Parenthood attempts (at 16–17) to explain away the Sixth Circuit's decision in *Compuware Corp.* v. *Moody's Investors Services, Inc.*, 499 F.3d 520 (2007), by distinguishing it on the facts. But any factual dissimilarities are beside the point. The Sixth Circuit cautioned that a plaintiff may try "to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'" *Id.* at 533–34 (quoting *Cohen*, 501 U.S. at 670). Splitting with its sister circuit, the Ninth Circuit made little effort to consider whether Planned Parenthood was attempting to "avoid the strict requirements" under *Hustler*.

Planned Parenthood likewise attempts (at 17–18) to wave away the Fourth Circuit's decision in *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999). But the court expressly noted the "arguable tension" in the way the "generally applicable law" doctrine had been enforced, 194 F.3d at 521–22, and the Ninth Circuit's decision has only stretched that tension, thereby entrenching *Cohen*'s confusion.

Planned Parenthood's dismissal (at 19–20) of the Fourth Circuit's decision in *People for the Ethical Treatment of Animals, Inc.* v. *North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815 (2023), is similarly unavailing. In that case, the court cast serious doubt on the State's argument that "[l]aws that

implicate a variety of conduct * * * need not pass First Amendment scrutiny even when applied to speech." 60 F.4th at 825–26. As the court observed, however: "Neither *Cowles* nor the cases it cites bear out that conclusion." *Ibid.* The Fourth Circuit thus rejected the State's argument—similar to the panel's erroneous conclusion—that "generally applicable laws may escape the First Amendment." *Id.* at 826. The court instead affirmed that "a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it." *Id.* at 827.

Planned Parenthood also tries to downplay (at 18–19) the significance of *Desnick* v. *American Broadcasting Companies, Inc.,* 44 F.3d 1345 (7th Cir. 1995) (Posner, J.). But as one First Amendment scholar observed: "Although grounded in the common law, Judge Posner's opinion in *Desnick* makes two vital contributions to the evolutionary process: (1) it confines *Cohen* to its peculiar facts and holding, and (2) it establishes the theoretical underpinning for according First Amendment protection to newsgathering." 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, 1203 (1997).

In any event, a circuit conflict is not the only basis for granting certiorari: The Court also grants review when a court of appeals decides a case "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As petitioner has shown, the decision below conflicts with this Court's decisions in *Hustler*—and even *Cohen*. Pet. at 21–23. No sound reason exists

for this Court to tolerate the present disuniformity, uncertainty, and harm to the First Amendment while *Cohen* awaits a square circuit split. That is particularly true because the Court has the benefit of detailed opinions from several courts of appeals and legal scholars highlighting the confusion caused by *Cohen*. See Pet. at 18–21.

b. Planned Parenthood contends that the Ninth Circuit's decision is "consistent" with *Hustler* and *Cohen*. Br. in Opp. 16. That is plainly wrong. As explained in the petition (at 22–23), First Amendment scrutiny was warranted here because, like the plaintiff's emotional-distress claim in *Hustler*, see 485 U.S. at 56, Planned Parenthood's purported "security" and "infiltration" damages are an attempt at an end-run around the First Amendment.

Faced with the possibility of this Court's scrutiny of how it characterized its damages, Planned Parenthood seeks its own end-run around *Hustler* in contending (at 20–21) that *Cohen* even applies to publication-dependent damages brought under generally applicable tort theories. That argument overlooks the critical rule affirmed in *Hustler* but muddled by *Cohen*: First Amendment scrutiny is triggered if a plaintiff seeks damages *flowing* from publication, regardless of how such damages are labeled. Here, the Ninth Circuit failed to subject Planned Parenthood's asserted "security" and "infiltration" damages to *any* First Amendment scrutiny.

Even so, the problem caused by *Cohen*, and in need of this Court's clarification, is the definition of "publication damages." Both Planned Parenthood and the

decision below advocate that publication damages are only those that relate to reputation or emotional harm. Opp. at 20; Pet. App. 15a. But the Court need not look beyond *Cohen* to find that such a limited definition is unworkable. There, the Court concluded that Cohen's claims for lost wages and lowered earning capacity were not damages for injuries to his reputation. 501 U.S. at 671. Yet Cohen's earning capacity was lowered *because* of the reaction to the exposure of his unfair campaign tactics.

Comparing the Court's reasoning in *Cohen* with the Fourth Circuit's analysis in *Food Lion* only adds to the confusion. In *Food Lion*, the court concluded that "matters such as loss of good will and lost sales" were reputational damages for a corporation. 194 F.3d at 523. But lost sales *are* the corporate equivalent of lower earnings for an individual like Cohen, which this Court treated as non-reputational. Taken together, this case squarely presents the question whether a civil claimant may attempt an end-run around the First Amendment depending on how it characterizes its damages. Planned Parenthood's denial (at 20, 22) of the confusion caused by *Cohen* defies reality.

Planned Parenthood's citation (at 20–21) to *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 562 (1977), for the proposition that publication-dependent damages do not automatically trigger the actual malice standard, is misplaced. For one thing, that case rested on a narrowly drawn opinion effectively limited to its facts. See 433 U.S. at 578–79. Thus, *Zacchini* has no application to a case where, as here, a public figure is seeking to recover voluntarily

incurred expenses flowing from the fallout of an unfavorable publication. Second, the general principle drawn from *Zacchini* is that, in applying generally applicable laws to the press, courts must consider the First Amendment implications. See *id.* at 574–75. The Ninth Circuit failed to do that here.

2. As explained in the petition (at 25–26), Congress's declared purpose in enacting the RICO statute, as recognized by this Court, was to eradicate organized crime in the United States, not to subject the press to punishing treble damages for investigating powerful private conglomerates.

a. Planned Parenthood's primary argument is that RICO is "to be read broadly." Opp. 23 (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985)). But *Sedima* concerned whether a private treble-damages action under 18 U.S.C. 1964(c) can proceed only against a defendant who has already been criminally convicted. 473 U.S. at 493. That distinction is significant because it demonstrates that *Sedima* did not interpret RICO to apply "racketeering activity" to journalists who engage in constitutionally protected newsgathering. 18 U.S.C. 1962(c). Indeed, Congress intended that "racketeering activity" be applied to organized crime, thus damages awarded against journalists are inappropriate under RICO.

Planned Parenthood additionally contends (at 23) that petitioner did not raise the First Amendment issues below. Even if so, the Court's review is still warranted because the court of appeals has "decided an important question of federal law"—namely, whether Congress intended for powerful entities to exploit

RICO to target their political and social adversaries—that should be "settled by this Court." Sup. Ct. R. 10(c).

b. Planned Parenthood erroneously contends (at 26) that the question presented does not warrant this Court's review because the Ninth Circuit's proximate-causation decision is correct. In its opposition, Planned Parenthood makes little effort to address the "central question" of "whether the alleged violation *led directly* to the plaintiff's injuries." *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Instead, it tries (at 24–26) to distinguish this Court's decisions in *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258 (1992), *Hemi Group, LLC* v. *City of N.Y.*, 559 U.S. 1 (2010), and *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), on the grounds that the harms in those cases flowed from injuries to third persons. But focusing on factual differences does not negate the overarching rule: "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. *Hemi*, 559 U.S. at 9 (quoting *Holmes*, 503 U.S. at 271, 274).

3. Planned Parenthood fails to rebut the showing in the petition (at 29–32) that the Ninth Circuit's affirmance of punitive damage against undercover journalists is unprecedented and dangerous. Planned Parenthood points to no decision of any other court of appeals upholding a punitive award against journalists who used deception to research a story. Further, Planned Parenthood's passing attempt at distinguishing the cases cited in the petition only reinforces that the Ninth Circuit's decision is a radical departure

from the precedents of this Court and other courts of appeals.

a. Planned Parenthood fails to meaningfully rebut the petition's showing that the Ninth Circuit's decision creates serious tension with decisions of other courts of appeals and this Court. It attempts (at 28–29) to explain away *Food Lion*, 194 F.3d at 512–513, 522, and *Veilleux* v. *National Broadcasting Co.*, 206 F.3d 92, 135 (1st Cir. 2000), by highlighting that both cases involved different state-law standards. But both courts weighed and considered the extent of punishing the press for pursuing a story, and both courts reversed punitive damages awards, as the Ninth Circuit should have done here. And although *Desnick* did not involve the reversal of a punitive damages award, it instructs that the type of "fraud" used by journalists to research a story would not be egregious enough for punitive liability. See 44 F.3d at 1354.

b. Planned Parenthood's attempt (at 29–30) at downplaying the below decision's conflict with *United States* v. *Alvarez*, 567 U.S. 709 (2012), is similarly unavailing. As noted in the petition (at 33–34), the panel did not address whether Human Capital Project's purpose was for "material gain"; nor did it consider whether the misrepresentations caused Planned Parenthood any "legally cognizable harm." See *Alvarez*, 567 U.S. at 723, 719. Planned Parenthood nevertheless contends that petitioner's co-defendants subsequently used the footage they obtained for a "donor proposal" to "obtain financing." Opp. 30. That is a red herring. Just because petitioner's co-defendants used the footage after the fact to seek donations does not mean that the project's *purpose* ab initio was to obtain

such donations. Equally meritless is Planned Parenthood's contention that petitioner's deceptive statements to gain access to the conferences caused it "legally cognizable harm." Br. in Opp. 30 (quoting *Alvarez*, 567 U.S. at 723). Planned Parenthood never knew about defendants' undercover investigation until Daleiden released the Human Capital Project, months after the footage was recorded.

In short, the Ninth Circuit's imposition of punitive damages will have a profound chilling effect on the press. These concerns are not "alarmist," as Planned Parenthood contends. Opp. 31. Even the Ninth Circuit recently held that "making an audio or video recording" "qualifies as speech entitled to the protection of the First Amendment" and invalidated on First Amendment grounds an Oregon recording law that is similar to the California law under which Planned Parenthood brought this suit. *Project Veritas* v. *Schmidt*, 72 F.4th 1043, 1054 (2023). Yet the threat of punitive damages would deter journalists from pursuing undercover investigations into matters of public concern, inhibit exposure of corruption, and encourage closed-doors violations of federal law.

B. The Importance of the Questions Presented Favors Review.

1. Planned Parenthood offers no sound basis for denying review of the Ninth Circuit's novel holding that *Cohen* categorically precludes a First Amendment defense against voluntarily incurred "security" and "infiltration" damages. Pet.App.15a. Indeed, Planned Parenthood identifies no other pending cases that would present an opportunity for other courts to

address the Ninth Circuit's reasoning. And the Court already has the benefit of multiple court of appeals opinions addressing *Cohen*'s confusion. Moreover, the conflict here concerns an important issue of federal law and has significant implications for animal-welfare advocates, consumer protection groups, and undercover journalism in general. "Because the question presented in this petition has divided the Circuits and concerns a matter of great importance, it warrants our review." *Robinson* v. *Dep't of Educ.*, 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting from the denial of certiorari).

2. The decision below also shows that the "the ad hoc nullification machine" continues to claim the First Amendment as a victim. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment and dissenting in part). Planned Parenthood strategically brought this case before a San Francisco judge and jury, and the Ninth Circuit effectively affirmed that "no legal rule or doctrine is safe from ad hoc nullification * * * when an occasion for its application arises in a case involving * * * abortion." *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). At a minimum, this case is an excellent vehicle to clarify that in abortion-related cases, lower courts should not weaken the standards of proof and causation under the First Amendment and federal statutes like RICO. To do so weakens the First Amendment for everyone. The implications of this case threaten to dismantle the long and rich tradition of undercover journalism that has kept powerful interests accountable.

C. This Case is a Suitable Vehicle to Resolve the Questions Presented.

Planned Parenthood raises a number of vehicle concerns; none has merit. First, Planned Parenthood contends that *Cohen*'s holding "has been the law for more than thirty years." Opp. 22. That argument ignores the confusion caused by *Cohen* and the need for this Court to clarify the actual malice standard as it applies to generally applicable laws. See Pet. 5.

Second, Planned Parenthood contends (at 21–22) that its damages were not publication dependent, and thus petitioner would lose under her own test. Besides being wrong factually and legally, such a concern goes to the merits and in no way makes this case a poor vehicle to review the important First Amendment issues at stake.

Third, Planned Parenthood argues (at 22) that petitioner is asking this Court to overrule at least two of its precedents. Not so. "*Cohen* created the jurisprudential foundation for the argument that parties can use property and contract rights to cordon off information from public purview without First Amendment scrutiny." Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 Ga. L. Rev. 1087, 1089 (2001). Petitioner is not asking this Court to overrule its precedents but to confine *Cohen* to its facts while affirming that laws that target newsgathering are not automatically immune from First Amendment scrutiny simply because they are generally applicable. In any event, the doctrine of *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because a mistaken judicial interpretation of that

supreme law is often practically impossible to correct through other means." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020).

Finally, Planned Parenthood contends that petitioner is "swimming against the jurisprudential tide," theorizing that the Court may "soon consider abandoning that requirement altogether." Opp. 22. That is pure speculation: This Court just addressed and expanded the actual malice standard in *Counterman* v. *Colorado*, 143 S. Ct. 2106, 2115 (2023). That some justices have expressed concern about the actual malice standard's practicability in some contexts is no cause to deny review in a case that has a profound impact on undercover journalism.

* * * * *

The petition should be granted.

Respectfully submitted.

ANITA L. STAVER
HORATIO G. MIHET
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

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