No. _____

In the Supreme Court of the United States

ALBIN RHOMBERG,

Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Planned Parenthood sued Petitioners over their use of undercover journalism techniques to investigate Planned Parenthood's involvement in selling fetal tissue. With the assistance of the lower courts, Planned Parenthood spun Petitioners' investigative project into a federal racketeering conspiracy and a multi-million-dollar judgment. The damages were not compensation for any injury or loss, but solely reimbursement for security enhancements.

Prior to the decision below, no reported case had allowed an award of "compensatory damages" under RICO to an indisputably uninjured plaintiff for the purpose of improving the plaintiff's position.

"But the context here is abortion." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring and dissenting). The lower courts did not hesitate to ignore "uncontroversial legal doctrines" concerning compensatory damages where the plaintiffs were abortion providers and the defendants were abortion opponents who made them look bad by releasing videos of shockingly frank conversations with abortion doctors. The questions presented are:

1. Whether RICO claims should be dismissed where the plaintiffs suffered no compensable injury.

2. Whether the lower courts erred in affirming an award of damages under RICO to reimburse Respondents for their voluntary expenses to avert a possible future recurrence of tortious conduct.

PARTIES TO THE PROCEEDING

Petitioner (Defendant-Appellant below) is Albin Rhomberg. His co-defendants below are David Daleiden, Susan Merritt, Adrian Lopez, and Troy Newman, all individuals, and the Center for Medical Progress and BioMax Procurement Services, LLC.

Respondents (Plaintiffs-Appellees below) are Planned Parenthood Federation of America, Inc.; Planned Parenthood: Shasta-Diablo, Inc., d/b/a 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, Inc.; Planned Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; and Planned Parenthood Gulf Coast.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of S. Ct. R. 14.1(b)(iii):

- *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al.*, No. 16-16997 (9th Cir.), judgment entered on May 16, 2018.

- *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al.*, No. 17-73313 (9th Cir.), denial of petition for writ of mandamus entered on April 30, 2018.

- *Center for Medical Progress, et al. v. Planned Parenthood Federation of America, Inc. et al.,* No. 18-696 (S. Ct.), certiorari denied on April 1, 2019.

- *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al.*, No. 3:16-cv-00236-WHO (N.D. Cal.), judgment entered on April 29, 2020.

- *Planned Parenthood Federation of America, Inc., et al. v. Newman*, No. 20-16068 (9th Cir.), judgment entered on October 21, 2022.

- *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al.*, No. 20-16070 (9th Cir.), judgment entered on October 21, 2022.

- *Planned Parenthood Federation of America, Inc., et al. v. Rhomberg*, No. 20-16773 (9th Cir.), judgment entered on October 21, 2022.

- *Planned Parenthood Federation of America, Inc., et al. v. Merritt*, No. 20-16820 (9th Cir.), judgment entered on October 21, 2022.

- *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al.*, No. 21-15124 (9th Cir.), appeal from entry of attorneys' fees and costs; stayed.

RULE 12 STATEMENT

Petition Rhomberg joins in the Petition for Writ of Certiorari of Troy Newman, Rhomberg's co-defendant in the proceedings below. See S. Ct. Rule 12.4. References herein to the Petition Appendix ("App.") are to the Appendix filed with Newman's Petition on May 26, 2023.

Petitioner Rhomberg also joins the petitions filed by his co-defendants below.

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DECISIONS BELOW

The district court's decisions in this case are styled *Planned Parenthood Federation of America v. Center for Medical Progress* and the circuit court's decisions are styled *Planned Parenthood Federation of America v. Newman*. The district court's decisions were published as follows: on the motion to dismiss, at 214 F. Supp. 3d 808 (N.D. Cal. Sept. 30, 2016) (App. 415[1]); on the summary judgment motions, at 402 F. Supp. 3d 615 (N.D. Cal. Aug. 23, 2019) (App. 204); and on the post-trial motions, at 480 F. Supp. 3d 1000 (N.D. Cal. Aug. 19, 2020) (App. 146). The U.S. Court of Appeals for the Ninth Circuit issued two decisions: one, which affirmed in part and reversed in part, was published at 51 F.4th 1125 (9th Cir. Oct. 21, 2022) (App. 1), and the other (unpublished), which affirmed, is available at 2022 U.S. App. LEXIS 29374 (9th Cir. Oct. 21, 2022) (App. 28). The Ninth Circuit's order denying rehearing is unpublished but is available at 2023 U.S. App. LEXIS 5035 (9th Cir. Mar. 1, 2023) (App. 503).

JURISDICTION

The Ninth Circuit panel entered judgment on October 21, 2022. App. 1, 28. Rhomberg's timely petition for rehearing *en banc* was denied on March 1, 2023. App. 503. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Citations to the Petition Appendix ("App.") are to the Appendix to the Petition for Writ of Certiorari of Troy Newman, filed on May 26, 2023.

STATUTORY PROVISIONS

Damages were awarded under RICO, the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), App. 524, which provides in pertinent part:

> Any person *injured in his business or property* by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee,…

INTRODUCTION

To find reversible error in the judgments below, one need look no further than the "Background" statement of the case in the Ninth Circuit panel's decision affirming the judgment of the trial court. App. 13-18. The panel correctly summarized the facts of the case: using fake identities and a cover story, Defendant-Petitioners infiltrated conferences that Plaintiff-Respondent Planned Parenthood Federation of America ("PPFA") hosted. Using the same strategy, Defendants arranged private lunch meetings with other Planned Parenthood staff and visited staff at two clinics. Defendants secretly recorded these meetings and then released videos containing footage of the meetings. App. 12. Albin Rhomberg was, at the time these events took place, a board member of the Center for Medical Progress ("CMP"), the entity under whose auspices the investigative infiltration, dubbed

the Human Capital Project ("HCP"), was conducted. App. 13-14.

PPFA and several other Planned Parenthood affiliates (collectively, "Planned Parenthood") brought claims seeking damages under RICO, trespass, fraud, breach of contract, and illegal recording. App. 17.

As the panel explained, a jury awarded Planned Parenthood "compensatory damages" of two kinds. One category was for expenditures PPFA incurred "to prevent a future similar intrusion" into its conferences. The other was for "costs for protecting [Planned Parenthood] doctors and staff from further targeting by Appellants and from foreseeable violence and harassment by third parties." App. 18.[2]

Neither of these categories are legally compensable expenses under the claims alleged. Compensatory damages "are intended to redress the *concrete loss* that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (emphasis added). Neither Planned Parenthood, nor the district court, nor the appellate court ever cited any case, or even tried to cite any case, that would allow for an award of compensatory damages for

[2] Because the "damages" in the instant case were awarded in the context of a civil RICO claim carrying trebled damages, punitive damages, and attorney fees liability, they underpin a judgment of *over thirty-five times* the amount of "compensation" – and counting. App. 18 (damages award); Orders, Docs. 1151, 1154 (fees and costs).

expenditures to blunt or avert future wrongful conduct by anyone.[3]

Manifestly absurd results follow if plaintiffs can recover as "damages" the costs of such upgrades. A landowner could recover from a past trespasser the cost of building a fence to prevent a "future similar intrusion." A homeowner annoyed by a neighbor's loud party could sue for nuisance and recover the costs of soundproofing for his house so he is not similarly disturbed in the future. A shop owner could sue a person caught stealing a candy bar for the cost of installing security cameras.

Defendants did not injure, break, or steal anything belonging to Planned Parenthood. Without some compensable injury to "business or property" proximately caused by Defendants' wrongful conduct in violation of RICO, the RICO claim cannot stand. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006); *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992); *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 13 (2010).

Summary reversal by this Court is reserved for "situations in which the law is settled and stable, the facts are not in dispute, and the decision below is

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[3] Whether damages could possibly be awarded under a defamation or invasion of privacy claim need not be decided here, as Planned Parenthood did not bring a defamation claim and dismissed their invasion of privacy claims prior to trial. In any event, neither Planned Parenthood nor the lower courts cited to *any* case where "damages" to pay for security or security upgrades were awarded under RICO or *any* common law tort or breach of contract claims.

clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J. dissenting). This petition presents exactly that rare combination of circumstances. The panel itself laid out the undisputed facts and the basis for the award of "compensatory damages." The law on the purpose of compensatory damages is settled and stable throughout the country. The Ninth Circuit clearly departed from the settled law in affirming the award to uninjured plaintiffs of compensatory damages for purposes other than compensation for *losses* caused by the defendants' wrongful conduct.

The petition for certiorari should be granted, the judgment below reversed, judgment entered for Defendants as to all damage claims, and the case dismissed from federal court.

STATEMENT OF THE CASE

Background Facts

The material facts of this case are undisputed. For purposes of this petition for certiorari seeking summary reversal, Petitioner Albin Rhomberg does not dispute any fact stated in the panel opinion. As the panel summarized the facts concerning the investigative project:

> Defendants-Appellants ("Appellants") used fake driver's licenses and a false tissue procurement company as cover to infiltrate conferences that Plaintiffs-Appellees ("Planned Parenthood") hosted or attended. Using the same strategy, Appellants also arranged and

> attended lunch meetings with Planned Parenthood staff and visited Planned Parenthood health clinics. During these conferences, meetings, and visits, Appellants secretly recorded Planned Parenthood staff without their consent. After secretly recording for roughly a year-and-a-half, Appellants released on the internet edited videos of the secretly recorded conversations.

App. 12.

Proceedings Below

The manifest error that justifies summary reversal of the RICO judgment below can be found in the single paragraph of the panel's decision setting out the contents and purpose of the "compensatory damage" award. App. 18. Expenses "to prevent a future similar intrusion" and to avert other potential future harms are not compensable damages.

However, a fuller chronology of the proceedings below illustrates why summary reversal of the entire judgment and remand for dismissal from federal court is the appropriate disposition.

Pre-Trial

Planned Parenthood filed the initial complaint in January 2016 and the First Amended Complaint in March 2016. The operative pleading included ten plaintiffs bringing fifteen claims, none for defamation.

Doc. 59.[4] To secure federal jurisdiction, Planned Parenthood included claims for violation of RICO (Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.) and the Federal Wiretap Act, 18 U.S.C. § 2510 et seq. The former claim was predicated on violation of the federal identify theft statute, 18 U.S.C. §1028, while the latter claim was circularly predicated on an alleged purpose to "further Appellants' civil RICO enterprise." App. 23-24.

The Complaint states that the lawsuit was brought "to recover damages for the ongoing harm to Planned Parenthood *emanating from the video smear campaign*." Amended Complaint, Doc. 59 at ¶12 (emphasis added). Specifically, Planned Parenthood alleged that, as a result of the undercover infiltration and the subsequent publication of videos, it had incurred:

> costs of hiring additional security to protect Plaintiffs' offices, clinics, and, staff; costs related to the hacking into PPFA's website . . ; costs related to responding to multiple state and federal investigations and inquiries; costs related to loss of vendors; costs related to loss of opportunity to treat clients; and the costs of the vandalism, arson, and other incidents that have physically damaged Planned Parenthood facilities and disrupted the delivery of care to patients, *all stemming from Defendants' campaign of lies*.

[4] References to filings in the District Court below are designated as "Doc." followed by the docket number in that court.

Id. at ¶161 (emphasis added).

From the outset of the litigation, Defendants argued that none of these damages were proximately caused, compensable damages under RICO or any other claim. Defendants filed Rule 12(b)(6) and state law anti-SLAPP motions arguing that Planned Parenthood had not alleged any compensable damages. Crucially, without damages – specifically, proximately-caused injury to Planned Parenthood's "business or property" – their RICO claim fails as a matter of law. *Anza*, 547 U.S. at 462 (2006).

In denying the motions, the district court agreed that some of Planned Parenthood's claimed damages attributable to the actions of third parties "would appear to be too distant, too far down the causal chain, for plaintiffs to seek them under RICO." App. 439. But other damages "including the increase in security costs at conferences, meetings, and clinics" could be recoverable. *Id*. The district court's ruling attempted to steer Planned Parenthood away from its chosen but legally flawed theory of recovering damages "emanating from the video smear campaign" and toward what the district court saw as a legally viable theory of recovery.

Defendants appealed the denial of the anti-SLAPP motion, and in May 2018 a Ninth Circuit panel held that Planned Parenthood might recover damages "such as increased costs associated with security and IT services." The panel explained, "The additional costs in security to prevent people with fake identities from infiltrating Planned Parenthood could be a direct cost from Defendants' conduct." *Planned Parenthood*

Fed'n of Am., Inc. v. Ctr. for Med. Progress, 735 Fed. Appx. 241, 247 (9th Cir. 2018).

Thus, from the pleading stage of the case, both the district court and the Ninth Circuit panel embraced the fundamental error that the costs of voluntary security upgrades incurred by an unharmed plaintiff were a form of compensatory damage. This error kept the case alive and in federal court, rather than dissolving into a handful of state law actions for trespass, unlawful recording, and breach of contract.[5]

Summary Judgment

The next opportunity for correction of this error came in December 2018. Having finally received an itemization of claimed damages from Planned Parenthood, Rhomberg filed a motion for summary judgment, again arguing that none of the listed expenses were legally compensable damages, and therefore the RICO and state law fraud claims must be dismissed. Motion, Doc. 354. In his motion, Rhomberg urged the district court, for purposes of ruling on his motion, to freely assume malice or any other despicable state of mind on his part. Reply Brief, Doc. 406 at 1. Even assuming the very worst about his motives and his full involvement in the project that more discovery might uncover, the result would be the same: *no compensable damages = no RICO liability.*

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[5] Unlike the conference contracts at issue in *National Abortion Federation v. Center for Medical Progress, et al.* (Supreme Court Docket 22-1135), the PPFA conference contracts did not contain non-disclosure provisions.

Instead, in January 2019 the district court ruled that the motion was premature and refused to address the merits, thereby keeping the case in federal court for the remainder of discovery and later summary judgment motions by all parties. Order, Doc. 432.

In May 2019, after over 40 depositions were taken, the parties filed motions for summary judgment and summary adjudication. Rhomberg (along with co-defendant Troy Newman) again argued that Planned Parenthood had demonstrated no proximately caused or even compensable damages to support its RICO and fraud claims. *All* of the claimed "damages" were voluntary expenditures for increased security for future meetings and/or voluntary security expenditures indisputably attributable to the public reaction to the video releases. Motion, Docs. 595, 704.

In its summary judgment ruling, the district court agreed with Defendants that most of Planned Parenthood's categories of claimed damages were First Amendment-barred "impermissible defamation-like publication damages that were caused by the action and reactions of third parties *to the HCP videos."* App. 225, 229-230 (original emphasis). *See also* App. 259-60 ("[T]to the extent plaintiffs seek damages that stemmed from publication of the videos, those damages are not recoverable given the First Amendment protections for publications, even under a breach of contract claim based on the PPFA [Exhibitor Agreements]").

Thus, the district court rejected the *sole* theory on which Planned Parenthood was seeking damages. However, the district court again salvaged Planned

Parenthood's case by holding that two categories of expenses were allowable as compensatory damages: the costs of upgrading access security to PPFA's conferences and the costs of personal security for certain "targeted" Planned Parenthood staff.[6] App. 229. The court ruled, "Plaintiffs may seek the narrow categories of access security improvement and personal security expenses I have identified, and defendants may argue to the jury that they were unreasonable, unnecessary or speculative." App. 233.[7]

Trial

Defendants thus went to trial with an impossible, and irrelevant, burden. PPFA's decision to make expenditures to improve its conference security after three of its conferences were infiltrated could not be characterized as "unreasonable, unnecessary, or speculative." As either a business or an ideological decision, expenditures to avoid future infiltrations, by anyone, made perfect sense.

But there was no legal basis to shift those costs to Defendants. *It is undisputed* that Defendants did not damage, steal, displace, or disrupt anything while

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[6] "Targeted" is the word of choice of Planned Parenthood, the district court, and the Ninth Circuit panel to connote unwelcome attention by Defendants that fails to meet the definition of any tortious or criminal behavior. It could as well be replaced with "object of study."

[7] This error is far from the only error committed by the district court. The district court's analysis and disposition of Planned Parenthood's RICO claim, affirmed on all points by the appellate panel, was riddled with error, from the existence of a pattern of predicate acts to the proximate causation of damages. *See* Petition for Writ of Certiorari, *Newman v. PPFA*, filed May 2023.

infiltrating the three conferences. They did not gain access to security codes or breach data systems. Rather, Defendants *paid* thousands of dollars to attend three PPFA conferences as exhibitors for BioMax. Transcript, Doc. 942 at 2529; Doc. 1020 at 2563, 2573. While there, they spoke with attendees, recorded video, and left only ephemeral footprints on hotel carpets.

Defendants' conduct did reveal to PPFA the existing gaps in its vetting of conference attendees, but Defendants' conduct *indisputably* neither created nor enlarged those gaps. PPFA's expenditures on conference security placed it in a better position to prevent infiltrations than if Defendants' conduct had not occurred. But, because of the district court's ruling, Defendants were left litigating only whether Planned Parenthood's thoroughly-invoiced expenses to upgrade its conference security were "unreasonable" or "unnecessary."

Moreover, because the district court thought the reasonableness and necessity of the conference security measures were relevant, it allowed Planned Parenthood, over Defendants' repeated objections, to put on testimony concerning "historical violence against abortion providers." Planned Parenthood put on an "expert" witness specifically to regale the jury with stories of "the history of anti-abortion violence and extremism." Transcript, Doc. 1021 at 2899-2902.[8]

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[8] Planned Parenthood had proffered this expert testimony to show that the "disruption" from third parties that followed the video releases was a "foreseeable and natural consequence of the

(continues)

Another witness testified about her job of compiling annual reports of anti-abortion "violence and disruption." *Id*. at 2826. Other witnesses were allowed to testify to their "state of mind" because "our country has a long history of anti-abortion opposition and violence," Transcript, Doc. 891 at 329, and "doctors have been targeted and murdered," *id*. at 407. The jury heard from several witnesses about how distraught Planned Parenthood personnel were after the publication of the videos in light of this "history of violence." Transcripts, Doc. 891 at 324-325; Doc. 907 at 1144-46; Doc. 908 at 1249-50, 1378; Doc. 938 at 1616-17, 1713; Doc. 940 at 1977, 2001.

In a final twist, despite the district court repeatedly allowing this prejudicial, irrelevant testimony concerning the impact of the video releases on the "state of mind" of Planned Parenthood personnel, the district court refused to instruct the jury on the First Amendment doctrine barring damages stemming from the publication of the videos. App. 40; Transcript, Doc. 1022 at 3630:12-13 (Court: "I'm not planning to say anything with respect to publication damages"). Instead, the jury was explicitly

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CMP videos" for which Defendants should be held responsible. Opposition, Doc. 674 at 8. But, as discussed above, the district court recognized the constitutional infirmity of this argument and correctly rejected Planned Parenthood's theory that Defendants could be liable for the results of third-party reaction to the videos. It declined to admit the expert testimony for the purpose of bolstering that theory. Ever helpful, however, the district court admitted this highly prejudicial, inflammatory testimony for a reason of its own devising, i.e., to show the "reasonableness" of Planned Parenthood's new security measures. Planned Parenthood had not proffered the testimony for this purpose. *Id.*

instructed, "The First Amendment is not a defense to the claims in this case for the jury to consider." Jury Instructions, Doc. 1006 at 30.

Verdict and post-trial proceedings

The jury returned a verdict for Planned Parenthood and awarded approximately $468,000 in compensatory damages for PPFA's conference security upgrades and personal security costs arising from public reaction to the release of the videos. App. 18. Because the damages were awarded under the RICO claim (as well as fraud, trespass, breach of contract and unlawful recording claims), the award of damages was trebled. With the award of compensatory damages, the jury was also allowed to find the defendants liable for varying amounts of punitive damages. With the inclusion of statutory damages, the total damage award was $2,425,084. App. 18. Finally, because compensatory damages were awarded under the RICO claim, the district court also awarded Planned Parenthood almost $14,000,000 in attorney fees and costs. Orders, Doc. 1151, 1154.[9]

Defendants filed post-trial motions under Rule 50(b), in which they once again argued that Planned Parenthood should not have been awarded any compensatory damages. The district court denied the motions *in toto*. App. 146, 202.

[9] The fee award is the subject of a separate appeal that is stayed pending the outcome of these proceedings.

Appeal

The Defendants appealed. The appeal went before the same three-judge panel which four years earlier had held that Planned Parenthood could be awarded, as compensatory damages, the costs of *improving* their conference security.

The panel issued two decisions. The published decision set forth the court's reasoning why the First Amendment was no defense and affirmed the judgment, including the judgment for damages, other than as to Planned Parenthood's claim under the Federal Wiretap Act.[10] The second opinion was a memorandum opinion that cursorily disposed of Defendants' other arguments.

Describing the damages for conference security upgrades, the panel wrote:

> The infiltration damages covered expenses such as assessing security systems, vetting practices review, hiring security guards for meetings, and installing conference badging systems. The jury could have concluded that Planned Parenthood incurred these costs to prevent further infiltrations by the Appellants and their co-conspirators as a direct result of Appellants' wrongful trespass, recording, and breach of contract actions.

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[10] The panel reversed the verdict and vacated the statutory damages awarded under the Federal Wiretap Act because Planned Parenthood alleged that the "criminal or tortious purpose" underlying the recordings was violation of civil RICO, rendering the argument "circular." Pet.App. 26a.

App. 46-47.

What the "jury could have concluded" was exactly correct; it is also exactly why the costs were not compensatory damages. The costs awarded as compensatory "infiltration damages" were reimbursement for improvements "to prevent further infiltrations" and not for the purpose of redressing any concrete loss suffered by Planned Parenthood. These expenses for, *inter alia*, security consultants, badging systems, LexisNexis subscriptions, and ID scanners were PPFA's voluntary choices from an essentially limitless corporate security smorgasbord.

Forcing Defendants to pay these costs puts PPFA in a better position than before the infiltrations. Neither Planned Parenthood nor the courts below have ever claimed otherwise. Rather, both the district court and the panel below simply concluded, as if it were a perfectly natural and reasonable result requiring no further explanation, that Defendants should be held liable for PPFA's voluntary security expenditures because Defendants' successful infiltration was the catalyst for PPFA making those expenditures.

The remainder of the "damages" award reimbursed Planned Parenthood for:

> physical security and online threat monitoring for individuals recorded in the videos Defendants released. Given the history of violence against abortion providers, it was a foreseeable and natural consequence of

> Appellants' actions that the recorded individuals would be subject to threats and reasonably fear for their safety.

App. 47.

Thus, there is no dispute that these "security damages" also did not redress any concrete loss. Instead, the Ninth Circuit upheld these damages on grounds explicitly *rejected* by the district court as violative of the First Amendment, namely, reimbursing Planned Parenthood for "impermissible defamation-like publication damages that were caused by the action and reactions of third parties *to the HCP videos*." App. 259-60 (original emphasis). The theory of recovery that the District Court clearly and correctly rejected in its ruling on summary judgment was resurrected by the Ninth Circuit for the purpose of affirming the jury's verdict.

The Ninth Circuit denied Defendants' respective petitions for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT AND SUMMARILY REVERSING

I. The Court Should Order Reversal of the Judgment Below and Remand for Dismissal of the RICO Claim.

Summary reversal is appropriate where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker,* 450 U.S. at 791 (Marshall, J., dissenting); *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting);

Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

The law on compensatory damages is settled and stable, and it applies equally to compensatory damages under common law claims or under RICO. RICO's language creating a private right of action for "any person injured in his business or property by reason of" a RICO predicate violation was "modeled on" section 4 of the Clayton Antitrust Act, which in turn was "borrowed from" section 7 of the Sherman Antitrust Act. *Holmes*, 503 U.S. at 267. Consequently, this Court has interpreted the corresponding language of all three statutes to have the same meaning, including incorporating the limitations of the common law. "Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 533 (1983).

From this Court to every circuit court to hornbooks on torts and remedies, the law on compensatory damages is clear and unambiguous.

- The purpose of compensatory damages is to "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Industries*, 499 U.S. at 54; *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) (same)

(quoting *Cooper*); *Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A.,* 801 F.3d 347, 357 (3d Cir. 2015) (same); *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 387 (4th Cir. 2015) (same); *Arnold v. Wilder*, 657 F.3d 353, 369 (6th Cir. 2011) (same); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 953 (9th Cir. 2005) (same); *Williams v. First Advantage LNS Screening Sols. Inc.*, 947 F.3d 735, 746 (11th Cir. 2020) (compensatory damages "remedy a concrete loss" and "make that plaintiff whole").

- Compensatory damages are intended to make the plaintiff whole "and nothing more." *Emprs Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 766 (10th Cir. 2004) (quoting Black's Law Dictionary 390 (6th ed. 1990); *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 300 (5th Cir. 2000) (quoting Black's Law Dictionary); *Vt. Microsystems v. Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998) (quoting Black's Law Dictionary, Rev. 4th ed. 1968); *Medina v. Dist. of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011) ("when a plaintiff seeks compensation for wrongs committed against him, he should be made whole for his injuries, not enriched") (citing *Kassman v. Am. Univ.*, 546 F.2d 1029, 1033 (D.C. Cir. 1976)).

- The purpose of an award of compensatory damages is to put the plaintiff in the position as nearly as possible equivalent to what he would have occupied had no tort been committed.

> *Schneider v. Cnty of San Diego*, 285 F.3d 784, 795 (9th Cir. 2002) ("Compensatory damages . . . serve to return the plaintiff to the position he or she would have occupied had the harm not occurred. See Dan B. Dobbs, Remedies § 1.1 (2d ed. 1993)"); *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) ("compensatory damages are designed to place the plaintiff in a position substantially equivalent to the one that he would have enjoyed had no tort been committed") (citing Restatement (Second) of Torts § 903, cmt. a (1977)); Robert E. Anderson et al., 22 Am. Jur. 2d *Damages* § 31 (2013) ("The law will not put a plaintiff in a better position than he or she would be in had the wrong not been done or the contract not been broken. . . . Anything beyond that amount is a windfall to which the plaintiff is not entitled.")

Conversely, the purpose of compensatory damages is not to protect the plaintiff against *future* harmful conduct. The legal remedy that confers protection against future harmful conduct is injunctive relief, not compensatory damages. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) ("[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial").

These are not arbitrary legal distinctions. They are deeply rooted in common law developed over centuries. Abandoning those legal principles for the

short-term gain of punishing a disfavored litigant comes at a steep price.

Before the panel decision, a landowner would not even have tried to recover from a trespasser the cost of installing a fence "to prevent a similar future intrusion." A loser of a barroom brawl would have no reason to think he could recover from an assailant the cost of a personal bodyguard or martial arts instruction to "safeguard" himself from future batteries by the defendant "and third parties." Fraud victims would know they could not recover from a con artist the costs of background investigations and credit checks on everyone they have business dealings with for years in the future.

One could continue to play with these hypothetical facts without changing the result. Even if the trespasser is a prying paparazzo or a persistent peddler, or even if the landowner has fragile landscaping or runs a day care in his home, the landowner has the choice of using his own money to make his property more secure, getting an injunction, or both. He could not recover the costs of security measures to prevent future trespasses as compensatory damages for a past trespass.

But now, at least in the Ninth Circuit, he can. In the Ninth Circuit, all these hypothetical plaintiffs could now recover more than their actual losses (if any).

More importantly, real plaintiffs can. "The strangeness of the Court of Appeals' holding may lead this Court to believe that the holding is unlikely to

figure in future cases, but the decision, if left undisturbed, will stand as a binding precedent within" the Ninth Circuit. *Kalamazoo Cnty Rd. Comm'n v. Deleon*, 574 U.S. 1104, 1104 (2015) (Alito, J., dissenting). Thanks to this outlier, a product of the "ad hoc nullification machine," *Madsen,* 512 U.S. at 785 (Scalia, J., concurring and dissenting), the law of torts and remedies has been rewritten in the Ninth Circuit.

Rhomberg has raised the trespass hypothetical in many briefs since 2016. Neither Planned Parenthood, nor the district court, nor the appellate court has ever admitted that, under this new doctrine, the trespasser would have to pay for a fence. But neither has any of them explained why, in light of this new doctrine, the trespasser would not be liable for the cost of a fence.

Planned Parenthood's efforts to provide case authority for awarding the costs of security upgrades as compensatory damages turned up two inapposite examples: 1) cases brought under the Computer Fraud and Abuse Act (18 U.S.C. § 1080 et seq.), a *statutory* remedy created by Congress to address computer hacking, and 2) an unpublished California Court of Appeals decision affirming an order of restitution to a stalking victim as a condition of probation.

But at least Planned Parenthood tried. Neither the district court nor the appellate panel cited to any authority at all to support this expansion of tort remedies, and they both ignored the implications of this holding for future litigants.

Under this new doctrine, even negligence claims could provide the basis for expanded damages. The at-fault driver facing a personal injury car accident claim could be liable for replacing the small sedan he ran into with a sturdier SUV to better protect the plaintiff from future harm from the same, or another, errant driver.

The nature and purpose of the damages awarded below are clear on the face of the opinion: "to prevent further infiltrations" and to provide security for recorded individuals in light of third-party reactions to the published videos. App. 46-47. These are not compensable damages. "The decision of the court below is unprecedented" and "so clearly wrong that summary reversal is warranted." *Kalamazoo*, 574 U.S. at 1107 (Alito, J., dissenting).

II. The Court Should Remand the Case with Orders to Dismiss the Complaint for Lack of Federal Jurisdiction.

This lawsuit never belonged in federal court. From the outset, the federal claims under civil RICO and the Federal Wiretap Act were untenable and should have been clearly seen as such. Defendants took every opportunity to point out the legal flaws in these claims before trial, particularly the lack of any proximately caused compensatory damages, which doomed the RICO claim. The federal recording claim was premised on the flawed civil RICO claim and even then relied on "circular" reasoning. App. 26 ("[I]t is clear that Appellants' violations of civil RICO could not have served as the criminal or tortious purpose required by §2511(2)(d)").

The district court, however, responded to Defendants' arguments by reframing Planned Parenthood's complaint for it, discerning unspecified evidence that it claimed supported its own revised theory of the case, and, when all else failed, upending the established law of torts and remedies to find compensable damages where there were none.

In so doing, it forced Defendants into a federal jury trial where Defendants stood little chance of prevailing on *any* claim presented by Planned Parenthood in light of the highly prejudicial and inflammatory testimony concerning "anti-abortion terrorism" admitted by the District Court. *Supra*, pp. 13-14.

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise [pendent] jurisdiction . . . ." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). Although this case went to trial, the district court erroneously allowed the case to proceed in the face of black letter law establishing the lack of federal jurisdiction.

Planned Parenthood should not be rewarded for its strategic overreach by being allowed to retain any part of its judgment against the defendants on its state law claims. The judgment below should be reversed and the case remanded with instructions to dismiss for lack of federal subject matter jurisdiction.

CONCLUSION

"*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines," not sparing the First Amendment. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275-76 (2022) (citing *Hill v. Colorado*, 530 U.S. 703, 741–42 (2000) (Scalia, J., dissenting); *id.* at 765 (Kennedy, J., dissenting)). It is discouraging but not surprising that, even after *Dobbs*, the lower courts continue to distort legal doctrines in ways that favor the discredited "right" to abortion, as well as its proponents.

Fortunately, the remedy here is clear and simple. The judgment below should be summarily reversed with instructions to enter judgment for Defendants on the RICO claim and dismiss this case from federal court. Alternatively, this Court should grant plenary review.

Respectfully Submitted,

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