Nos. 22-1160, 22-1168

In the Supreme Court of the United States

Albin Rhomberg, *Petitioner,*

v.

Planned Parenthood Federation of America, Inc., et al., *Respondents.*

(For Continuation of Caption, See Inside Cover)

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

Brief of *Amici Curiae* National Right to Life Committee, California ProLife Council, et al., in Support of Petitioners

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INTERESTS OF *AMICI CURIAE*[1]

Founded in 1968, the National Right to Life Committee, Inc. is the nation's oldest, largest, pro-life organization. *See* nrlc.org. NRLC is a federation of 50 state affiliates and over 3,000 local chapters. By education and legislation, NRLC works to restore legal protection to the most defenseless members of our society who are threatened by abortion, infanticide, assisted suicide, and euthanasia. NRLC and related entities have a long history of working to protect maternal health. *See, e.g.*, http://www.nrlc.org/uploads/international/MCCLMaternalMort2012.pdf.

California ProLife Council has been the California affiliate of NRLC since 1971. CPLC shares NRLC's goals.

Susan B. Anthony (SBA) Pro-life America is a "pro-life advocacy organization," dedicated to ending abortion through advancement of pro-life laws and health-saving regulatory measures for women, girls, and the unborn through direct lobbying and grassroots campaigns. SBA Pro-life America supports public information about and enforcement of federal policies regarding informed consent and the

[1] Rule 37 statement: All parties received notice of amicus curiae's intent to file this brief more than ten days before the due date. No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* or their counsel funded it.

protection of human subjects in the area of fetal tissue research.

Family Research Council (FRC) seeks to advance faith, family, and freedom in public policy. FRC recognizes and respects the role that a robust concept of religious freedom and free speech plays in American society and wishes to affirm this principle in law and public policy.

SUMMARY OF ARGUMENT

The Ninth Circuit opinions in *Planned Parenthood Federation of America (PPFA) v. Center for Medical Progress (CMP)* create a dangerous suppression tool against the exercise of First Amendment rights and effectively sound the death knell for undercover journalism. *Planned Parenthood Federation of America, Inc., et al. v. Newman*, 51 F.4th 1125 (9th Cir. Oct. 21, 2022); 2022 U.S. App. LEXIS 29374 (9th Cir. Oct. 21, 2022) (unpublished opinion). These opinions transform tort law from a shield into a sword to utilize against undercover journalists in order to suppress speech, not to prevent the harms envisioned by the statutes.

Given the enormous positive influence that undercover journalism has had in our democracy, the Ninth Circuit opinion, if allowed to stand, would effect a tragic loss. A brief review of the impact that this decision would have had on several famous American undercover journalists who engaged in similar types of deception as Petitioners did will illustrate the overreach and absurdity of the Ninth Circuit's

opinion. Indeed, the decision is the latest example of the "abortion distortion" by which clear legal rules are disregarded in an effort to punish an unpopular viewpoint.

ARGUMENT

I. Background

The 2015 publication of Petitioners' undercover videos, which they obtained after they infiltrated Planned Parenthood (PP) conferences and met with various employees, thrust the matter of the illegal sale of fetal tissue[2] into the forefront of the debate surrounding abortion, particularly late-term abortion. The videos showed PP personnel discussing acts that could constitute violations of 42 U.S.C. § 289g-2 and of the federal Partial Birth Abortion Ban Act (18 U.S.C. § 1531). For instance, the videos revealed PP employees negotiating for the price of providing fetal tissue to the undercover reporters (The Center for Medical Progress, *Second Planned Parenthood Senior Executive Haggles Over Baby Parts Prices, Changes Abortion Methods,* YOUTUBE (July 21, 2015), https://www.youtube.com/watch?v=MjCs_gvImyw); discussing altering the abortion method to cause a breech birth in order to increase the chances of obtaining an intact head, i.e. performing partial birth abortions (The Center for Medical Progress, *Planned Parenthood Uses Partial-Birth Abortions to Sell Baby Parts*, YOUTUBE (July 14, 2015),

[2] The sale of fetal tissue is prohibited by the NIH Revitalization Act of 1993 (42 U.S.C. § 289g-2).

https://www.youtube.com/watch?v=jjxwVuozMnU); discussing how remuneration for fetal body tissue transfers contributes to the "bottom line" of the organization PP Gulf Coast (The Center for Medical Progress, *Intact Fetuses "Just a Matter of Line Items" for Planned Parenthood TX Mega-Center*, YOUTUBE (Aug. 4, 2015), https://www.youtube.com/watch?v=egGUEvY7CEg).

The resulting public outcry spurred local and federal investigations and resulted in the closure of two bioscience companies, which were affiliated with PP, for trafficking in fetal body tissue. Daniel Langhorne, *Firms Reach $7.8-Million Settlement Over Allegations of Selling Fetal Tissue*, L.A. TIMES (Dec. 9, 2017), https://www.latimes.com/local/lanow/la-me-fetal-tissue-20171209-story.html. In addition, House and Senate Committees investigated the matter fully and made numerous criminal referrals for PPFA, PP affiliates and their business associates. U.S. House of Representatives, Select Investigative Panel of the Energy & Commerce Committee, 114th Cong., *Final Report* at 95-197 (April 2017), https://www.govinfo.gov/content/pkg/CPRT-114HPRT24553/pdf/CPRT-114HPRT24553.pdf; U.S. Senate, Majority Staff Report of Committee on the Judiciary, 114th Cong., *Human Fetal Tissue Research: Context and Controversy* at 55 (Dec. 2016), https://www.judiciary.senate.gov/imo/media/doc/2016-12-13%20MAJORITY%20REPORT%20-%20Human%20Fetal%20Tissue%20Research%20-%20Context%20and%20Controversy.pdf. The issue of the sale of fetal body parts also played a significant

role in the 2016 presidential election and was partially responsible for helping to bring the abortion issue to the forefront. Annie Karni and Anna Palmer, *Clinton's Planned Parenthood Ties Run Deep*, POLITICO (July 30, 2015, 5:15 AM), https://www.politico.com/story/2015/07/hillary-clinton-planned-parenthood-ties-120794; David Crary, *Stark Divisions on Abortion Expected to Influence 2016 Campaign*, PBS NEWS HOUR (Dec. 27, 2015, 2:49 PM), https://www.pbs.org/newshour/politics/stark-divisions-on-abortion-expected-to-influence-2016-campaign.

II. The Ninth Circuit's Errors: Granting Compensatory Damages in the Absence of Concrete Losses Caused by Petitioners and Allowing Publication Damages to Be Recovered as Economic Damages

Petitioners have detailed numerous errors in the Ninth Circuit's reasoning. These errors include the lack of legally compensable losses proximately caused by Petitioners' actions. Petition for Writ of Certiorari of Albin Rhomberg at 17-23, *Albin Rhomberg v. Planned Parenthood Federation of America, et al.*, No. 22-1160 (docketed June 1, 2023). Indeed, Petitioners could not possibly have caused any damage to PPFA's screening process for the simple reason that the screening procedures were in place prior to any action on the part of the Petitioners. Effects follow causes, and not the other way around. The damages are for improvements, not repairs, to existing processes. In the absence of any actual losses caused by Petitioners,

the court should have imposed nominal, not compensatory damages. Cornell Law School, "Compensatory Damages," *Legal Information Institute*, https://www.law.cornell.edu/wex/compensatory_damages; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 524 (1999) (awarding $2.00 in damages for trespass and breach of duty of loyalty). The Ninth Circuit decision therefore allows any plaintiff to present a wish list to a court and recover costs for non-existent or speculative "losses" which are unbounded in scope, and which lack any principled limitations in amount. The damage award is necessarily subjective and arbitrary, based on whatever the plaintiff asserts as necessary.

Since the court's damage award does not compensate PPFA for actual losses resulting from Petitioners' direct actions, their purpose and effect are and will be to punish speech and chill future journalism activities of Petitioners and other undercover reporters. Courts should not allow tort law to be misused as a tool of revenge by plaintiffs who are angered by true reporting on their activities.

The Ninth Circuit also erred by allowing PPFA to recover publication-dependent damages disguised in the garb of economic damages, in contravention of this Court's decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); Petition for Writ of Certiorari of Sandra Susan Merritt at 17-24, *Sandra Susan Merritt v. Planned Parenthood Federation of America, Inc.*, et al., No. 22-1147 (docketed May 25, 2023); Petition for Writ of Certiorari of Center for Medical Progress (CMP), et al. at 15-32, *Center for Medical Progress, et al. v. Planned*

Parenthood Federation of America, et al., No. 22-1168 (docketed June 2, 2023). Despite the fact that PPFA discovered the infiltration as a result of publication, the court based the damages award on the speculative assertion that PPFA could have recovered compensatory damages even if publication had not occurred. The court did not explain how, apart from publication, PPFA could have discovered the infiltration. Merritt, *supra*, at 13; CMP, *supra* at 8.

Furthermore, the decision ignored the rule that newsgathering activities, as part of the process of creating news, enjoy the same First Amendment protections as publication. Branzburg v. Hayes, 408 US 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated"); *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."); *People for the Ethical Treatment of Animals, Inc. (PETA) v. North Carolina Farm Bureau Federation*, No. 20-1776 (4th Cir. Feb. 23, 2023) (invalidating North Carolina's Property Protection Act as applied to PETA's newsgathering activities because the latter is speech protected by the First Amendment). Following the Ninth Circuit's reasoning, Jerry Falwell could have recovered "economic" damages from *Hustler Magazine* if he had claimed medical expenses arising from his distress because the mere creation of the parody, whether it was published or not, would have been enough to trigger his need for medical care. The court's circuitous reasoning is indeed an attempt at making an "end-run around First Amendment

strictures . . . foreclosed by Hustler." *Food Lion*, 194 F.3d at 521.

It is also useful to consider that, had Petitioners' videos been anodyne, and no third-party threats had occurred, PPFA's claim for security damages would have been rendered unsustainable. Since Petitioners did not threaten PPFA or its employees, there would have been no proven need for protection against any foreseeable violence by third parties. It is precisely because the videos exposed possible illegal fetal trafficking by PPFA that threats occurred and the need for security arose. It follows that the security damages are publication-dependent and reputational in nature and are therefore precluded by the First Amendment. *Hustler*; *Food Lion,* 194 F.3d at 523 (disallowing compensation for loss of good will and lost sales as reputational damages precluded by the First Amendment); *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 532 (2007) ("Despite Compuware's attempt to avoid the actual-malice standard by clothing its requested relief in the garb of rescission, we must look beyond the damages sought by the plaintiff to the injuries actually sustained."). *Cohen v. Cowles Media Co.*, 501 U.S., 663, 671 (1991) (Allowing plaintiff to recover economic damages for his job loss because "Cohen is not seeking damages for injury to his reputation or his state of mind.").

The court's grant of exorbitant compensatory and punitive damages as well as attorney's fees to prevent speculative future infiltrations, threats, or violence by Petitioners or by third parties also serves as a type of "heckler's veto," a prior restraint on speech.

Undercover journalists will think twice before engaging in any investigations that might produce third-party threats against the subjects of their newsgathering activities because of the fear of similar draconian court-ordered publication-dependent damages cleverly disguised as economic in nature. Such speculative concerns cannot justify prior censorship of free speech. *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949) ("It [free speech] may indeed best serve its high purpose when it . . . *even stirs people to anger*. . . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a *clear and present danger* of a serious substantive evil.") (emphases added). Concerns about phantom future infiltrations or threats do not pose a "clear and *present* danger" to the subjects of news reporting. However, this court's excessive damages award does pose a clear and present danger to First Amendment activities of news reporters.

III. Applying the Ninth Circuit's Reasoning to the Activities of Iconic Undercover Reporters Outside of the Abortion Context Illustrates the Overreach of the Court's Reasoning and the Chilling Effect It Will Have on Newsgathering and Reporting.

Misrepresentation of one's identity and purpose has been an integral part of the newsgathering process of undercover reporting for more than one hundred years. Undercover journalists engage in such misrepresentations in order to uncover corruption in service of the public good, in the exercise of their First

Amendment rights. Their purpose is not the perpetration of the types of harms that civil RICO and laws against trespass, fraud, etc. are intended to address.

Viewing the actions of undercover reporters from the past through the distorted lens created by the Ninth Circuit opinion clearly illustrates the impact this opinion would have had on undercover journalism. It would have produced counter-intuitive results and imposed similar draconian damages on these iconic reporters. It quite possibly would have prevented this important form of journalism from ever taking off. It is perhaps easier to recognize the extreme impact of the opinion when it is applied outside of the current context, to avoid the effects of the "abortion distortion." *See Thornburgh v. American College of Obstetricians,* 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) ("no legal rule or doctrine is safe from *ad hoc* nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.").

A. Nellie Bly

In 1887, Nellie Bly, a reporter for Joseph Pulitzer's *New York World,* assumed the pseudonym Nellie Brown and feigned insanity before police, in court, and in public medical examinations to gain admission to the mental asylum Blackwell's Island, where she remained for ten days. The subsequent publication in the newspaper of her exposé of the horrible abuse and neglect of insane patients drew outrage and sparked reforms at the asylum. Nellie Bly, *Ten Days in a Mad-House* (Ian L. Munro,

Publisher 1887) https://web.archive.org/web/20040216024852/http://digital.library.upenn.edu/women/bly/madhouse/madhouse.html. Her report also ignited her career and spawned the age of undercover journalism. Arlisha R. Norwood and Mariana Brandman, *Nellie Bly*, National Women's History Museum, https://www.womenshistory.org/education-resources/biographies/nellie-bly-0.

Had the asylum brought a lawsuit against Bly alleging fraud and trespass, it might have been reasonable for a court to have awarded damages to the plaintiff for the ten days of room, board, and medical care that she cost them. But the Ninth Circuit opinion would not have stopped there. Although Bly did not create the asylum's screening procedures, nor did she affect them in any way, she would have been responsible for infiltration damages in order to prevent future infiltrations, threats or harassment by her or others. She had fooled several public medical examiners into believing she was insane, so she would have to pay the costs of assessing the various ways to address the problem she had supposedly created. She would likely have had to pay for upgrading the examination process, such as by retraining the doctors or by hiring more qualified ones. Perhaps, if the asylum saw it necessary, they would have begun additional screenings of inmates after they were admitted in order to ensure that they really were still insane. She would have had to pay to put that new process in place. Additional infiltration damages could be claimed at the discretion of Blackwell's Island or its consultants.

Following the court's reasoning on security damages, Bly would have had to pay for security for the more nefarious of the asylum employees, even though she did not hurt or threaten anyone at the asylum. Going into detail and naming names, she had chronicled some horrific instances of physical abuse by some of the staff, including choking, beating, and neglect of inmates. This would give rise to accusations of her having "targeted" them. For the sake of analysis, it can be assumed that friends and relatives of the abused inmates were so enraged that they threatened the named employees. Bizarrely, she would have had to pay for bodyguards and additional security for the abusers. The court would assume that, even had the publication that produced the threats never occurred, the asylum's assertion of the need for security based solely on concerns about possible future actions by Bly or others would suffice to justify imposing security damages. The individuals whom Bly had named would of course deny wrongdoing, and the insane patients would be incapable of backing up Bly's story. Even if they did, they would not be believed.

The court would ignore the obvious intervening causes of publication and any third-party threats that occurred. It would not require any evidence that the asylum employees were aware of her infiltration before publication. The jury, which would be composed of married men harboring suspicions about women in the workplace, would hear inflammatory prejudicial testimony on the dangers "stunt girl reporters" posed to a stable society. Katy Waldman, *The Lost Legacy of the Girl Stunt Reporter*, THE NEW

YORKER (April 29, 2021) https://www.newyorker.com/books/under-review/the-lost-legacy-of-the-girl-stunt-reporter. ("[S]tunt reporting placed women on the crumbling edge of respectability."). This would obviously affect the jury's view on the potential danger of the occurrence of future similar activities.[3] It is quite possible that, with the bad press that would result, Joseph Pulitzer would never have established the Pulitzer Prize.

In short, the Ninth Circuit's approach would have successfully turned the tables on the upstart Nellie Bly and affirmed the power and institutional viability of the abusive Blackwell's Island.

B. Upton Sinclair

In 1904, at the behest of the socialist weekly *Appeal to Reason,* Upton Sinclair went undercover for seven weeks to investigate Chicago's meatpacking industry. Workers in the slaughterhouses smuggled him in so that he could see firsthand the conditions in which they worked. Sinclair's fictional novel *The Jungle* was published in 1906 and described the unsanitary and harmful conditions he had personally observed in the meat-packing plants. As a result, Congress passed the Pure Food and Drug Act and Meat Inspection Act of 1906. James Diedrick, *The Jungle*, THE ENCYCLOPEDIA OF CHICAGO, (Chicago

[3] The District Court allowed prejudicial testimony regarding "historical violence against abortion providers" and "the history of anti-abortion violence and extremism" to be presented to the San Francisco jury. Rhomberg at 12-13.

Historical Society, 2005) http://www.encyclopedia.chicagohistory.org/pages/679.html. This influential work is considered ground-breaking for having opened the eyes of the public and government to the need for oversight of the food industry. Sinclair earned his place in history as one of the first muckrakers -- journalists who exposed corruption in government and business. *Muckraker Journalism,* ENCYCLOPAEDIA BRITTANICA (orig. pub. July 20, 1998), https://www.britannica.com/topic/muckraker.

The Ninth Circuit would have had a different response to Sinclair's work. There is no record of his having directly damaged anything, but, like Petitioners, he would have had to pay infiltration costs to keep others like him from gaining entrance to the plants in the future. This might have included the cost of adequate screening of all entrants to the plants, alterations to the building structure to be sure no one could slip in through a window, and security guards to keep the plant and its employees safe from Sinclair and anyone else who might attempt a future infiltration. If the owners discovered which employees had been involved with smuggling him in, Sinclair would have had to pay the cost of hiring new employees and training the others to ensure no one would take part in any such activity again. All this would occur even though Sinclair's actions had no effect at all on the existing conditions at the plant. He left them in the same condition that he first found them.

Assume for the sake of analysis that threats had been made against the business owners. Prejudicial and irrelevant evidence that painted all socialists as a growing danger to a free-market society and to capitalist businesses would be presented to the jury as potentially relevant to the damages award. C. Bradlaugh, *Socialism: Its Fallacies and Dangers*, 12-21, at 16, THE NORTH AMERICAN REVIEW, Vol. 144, No. 362 (Jan., 1887), https://www.jstor.org/stable/25101155. ("Modern Socialism is more ambitious of exercising State authority, and is therefore more dangerous than was the socialism of fifty years ago.") The case would be brought in a community composed largely of financiers and other capitalists, so the jury would be biased against socialists. The jury would therefore naturally view the possibility of future infiltrations and violence against the meat-packing businesses as a foreseeable danger to these venerable institutions on which the stability of capitalist society rested. Bradlaugh, *supra,* at 20. ("While I do not believe that Socialism can make the revolution its advocates menace, I do believe it may make disorder, turmoil, riot, and disturbance."). Therefore, Sinclair would have had to pay for security for the business owners and the employees to protect them against violent revolutionary extremists like himself. These nefarious motives and intentions would be imputed to Sinclair, although there is no record of his having ever incited riots or threatened anyone.

All damages would be labeled as economic in nature, even though the "losses" were incurred after the novel's publication. The businesses would claim that, once they found out about Sinclair's actions and

political affiliation, they would have incurred all the costs anyway to prevent future incidents, regardless of publication. The court would ignore the obvious fact that, but for the publication, the infiltrations would never have been made known. Sinclair would have gone down in history as a troublemaker and an outcast.

C. Gloria Steinem

In 1963, feminist Gloria Steinem lied about her age and, using her grandmother's name and Social Security Number, obtained employment as a Playboy Bunny at New York City's Playboy Club. She worked as a "bunny" for less than one month. The result of her undercover work, "A Bunny's Tale," was published in *Show* magazine. It outlined the financial and sexual exploitation of the women employed as "bunnies," as well as the physically painful reality of donning the ultra-tight bunny costume and required three-inch heels. The public response to the story motivated Hugh Hefner, the owner of the Playboy Clubs, to stop requiring the women to endure unnecessary "internal physical" examinations, and to make other improvements to working conditions. Rachel Chang, *Inside Gloria Steinem's Month as an Undercover Playboy Bunny*, BIOGRAPHY (March 23, 2020), https://www.biography.com/authors-writers/gloria-steinem-undercover-playboy-bunny.

As with the other undercover reporters, the Ninth Circuit would have required Steinem to pay for the upgrading of background checks for prospective

employees. Though she threatened no one, her feminist background would fuel suspicions that her animosity towards men and misogynist businesses might result in future infiltrations by her or by other radical feminists. Again, assume for the sake of analysis that threats were made against the Playboy Clubs or Hugh Hefner. Testimony regarding the dangers of "militant feminism" would be used to bolster the Playboy Club's asserted need for security damages to protect them. Mona Cristina Rocha, *Militant Feminism and the Women of the Weather Underground Organization*, at 1, LSU DOCTORAL DISSERTATIONS (2014). https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1939&context=gradschool_dissertations. ("Arguing that violence can be justified in the pursuit of feminist aims, and that justified violence can be used by women just as easily as by men, the women of the WUO articulated and embodied militant, revolutionary feminist principles."). The jury would be composed largely of conservatives and business owners.

The intervening causes of the publication of "A Bunny's Tale" and the public's reaction to it would be ignored, as the court would reason that the Playboy Club's "losses" would have been incurred anyway to prevent future trespassers. She would be characterized as a "militant feminist," who, like the Weather Underground, posed a danger to civil society.

In order to discredit her, the Club would have claimed that she embellished her account for effect. The "bunnies" would have been afraid to speak out

and verify her "tale" lest they lose their jobs. Gloria Steinem would have been disgraced, possibly permanently.

D. *The Chicago Tribune*

Some undercover reporters have been awarded Pulitzer Prizes for their work. *The Chicago Tribune* earned the coveted prize in 1976 for the work of William Gaines in exposing unsanitary and fraudulent practices at Chicago's von Solbrig Hospital. Brooke Kroeger, *Undercover Reporting: The Truth About Deception*, 193-94 (Northwestern University Press Evanston, Illinois, 2012) https://library.oapen.org/bitstream/handle/20.500.12657/31391/1/628774.pdf. In 1975, Gaines obtained employment as a janitor at the hospital by falsifying his background. His report revealed shocking unsanitary practices, such as the use of janitors, himself included, to move patients out of the operating rooms without requiring the janitors to first wash up. The resulting public outrage led to the facility's closure, even before the Chicago Board of Health could hold hearings on the hospital's license revocation. Kroeger, *supra,* at 187. "Rarely . . . have the impact and results of such a journalistic investigation been so concrete, so sweeping, and so swiftly obtained." *Kroeger, supra,* at 265.

The Ninth Circuit opinion would have treated him no differently from the previous reporters. Had the hospital not shut down, like Steinem, he would have had to pay to upgrade background checks for

candidates for employment. Assuming, again, that enraged families and friends of hospital patients made threats against the hospital or its personnel, he and *The Tribune* would have had to pay security damages for the building as well as for any hospital personnel he "targeted" in his report. If the hospital had gone into bankruptcy, he might have been held responsible for paying for any contractual defaults as these would of course be viewed as foreseeable economic damages of his incursion. The hospital would claim that the cause of their losses was not the unsanitary and unethical way that they conducted the hospital's affairs, but rather the need to protect the hospital from bad actors, like Gaines. The hospital would deny that any problems Gaines revealed were pervasive, and that his story exaggerated any issues that existed. Other hospital employees would be afraid to speak out lest they be blackballed by the industry. Needless to say, *The Tribune* would not have received a Pulitzer Prize.

Though some of the foregoing may seem far-fetched, the reasoning and outcomes in each situation are plausibly consistent with the Ninth Circuit's unhinged analysis. In the foregoing examples, outside of the divisive context of abortion, the "good guys" and the "bad guys" are clearly defined and generally agreed upon. It is easy to see the outrageousness of requiring Nellie Bly or William Gaines to pay for security to protect abusive or negligent medical personnel from angry friends and families of their victims. Similarly, the absurdity of blindly associating Steinem with militant feminism and Sinclair with revolutionary socialism and then basing damages on

these unsubstantiated associations is obvious. However, when the subject is abortion, many, including apparently the Ninth Circuit, are easily swayed by prejudice against the opposing viewpoint and are therefore tempted to ignore reality and abandon sound legal analysis. *June Medical Services L.L.C., et al., v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting) ("[T]he abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way.").

The Petitioners posed no more of a threat to PP than Nellie Bly, Upton Sinclair, Gloria Steinem and William Gaines did to the entities they investigated. There is nothing in the record to suggest the contrary. The court attempts to overcome any weaknesses or gaps in evidence or in the chain of causation by resorting to prejudicial and baseless inferences about the motives and future activities of Petitioners based on the activities of third parties on the fringe of the pro-life movement. To the extent these foregoing examples seem like parody, it is because the Ninth Circuit opinion is more of a parody of First Amendment jurisprudence than a well-reasoned application of it. This is not proper judicial decision-making. It is a smear campaign.

The preceding analysis should not be construed as an argument for the law to turn a blind eye towards all civil or criminal infractions by journalists in pursuit of a scoop. Rather its purpose is to point out the need for courts to abide strictly by basic legal principles, such as requiring actual losses and respecting the First Amendment, before granting

damages to a plaintiff. Furthermore, courts should not be blinded by prejudice against any movement or party in their zeal to achieve their view of a just result. The Ninth Circuit has failed to pursue blind justice, and the resulting opinion poses a threat to newsgathering activities of undercover journalists and therefore to the First Amendment. As this Court has noted, "without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg, 408 US at 681.

This unprincipled opinion empowers plaintiffs to turn the tables on undercover reporters in an attempt to recover their reputations and thereby suppress future negative stories. The Ninth Circuit opinion indeed "eviscerates" freedom of the press.

IV. Undercover Journalism Fills a Necessary Niche in the Field of News Reporting, and the Ninth Circuit Opinion Threatens Its Continued Existence.

There is an obvious ethical tension involved in the practice of undercover journalism.

> Like almost no other journalistic approach, undercover reporting has a built-in ability to expose wrongs and wrongdoers or perform other meaningful public service. It can illuminate the unknown, it can capture and sustain attention, it can shock or amaze. The

> criticism that has bedeviled the practice in more recent years comes from the ethical compromises it inevitably requires, its reliance on some of journalism's most questionable means, and the unacceptable excesses of the few. Deception not only happens in the course of reporting undercover, it is intrinsic to the form.

Kroeger*, supra* at xv.

Nevertheless, undercover reporting provides eye-witness corroboration from an objective reporter of corruption and abuse in situations where victims or witnesses either would not be believed or are incapable or unwilling to speak out. The insane inmates at Blackwell's Island were incapable of advocating for themselves. The low-wage workers in the Chicago meat-packing plants, the "bunnies" at the Playboy Club, and the hospital employees at von Solbrig would have been afraid to speak up for fear of retaliation. The act of whistleblowing represents a potential threat to reputation, career, and financial future, and such individuals do not always receive the protections they need after they come forward. Jerry Dunleavy, *Hunter Biden Investigation: Second IRS Whistleblower Claims Retaliation*, WASHINGTON EXAMINER (May 22, 2023, 7:48 pm), https://www.washingtonexaminer.com/news/justice/second-irs-whistleblower-hunter-biden-concerns-retaliated.

William Gaines' investigation of the von Solbrig Hospital was spurred on by the report of a former janitor. In support of the decision to go undercover, Gaines said, "No newspaper reader would be expected to believe such a shocking account by an uneducated and disgruntled janitor." Kroeger, *supra,* at 187-188. In order to access these places of hidden corruption, reporters, as a last resort, turn to deception.

The Fourth Circuit's observation that "We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts" (*Food Lion,* 194 F.3d at 521) is belied by the record of immediate, dramatic public policy changes that have come on the heels of undercover reporting, when nothing was done before. Blackwell's Island was "notorious" before Bly's investigation, but no reforms occurred until she went undercover. *Nellie Bly: Undercover in New York's Notorious Asylum for the Insane*, THE BOWERY BOYS: NEW YORK CITY HISTORY (November 13, 2015), https://www.boweryboyshistory.com/2015/11/nellie-bly-undercover-in-new-yorks-notorious-asylum-for-the-insane.html. Upton Sinclair's *The Jungle* resulted immediately in the passage of federal legislation to address the problems he uncovered – no small feat. Gloria Steinem's report caused Hugh Hefner to stop requiring newly hired "bunnies" to undergo unnecessary gynecological exams. Even if any women had dared to complain previously, nothing happened until Steinem publicly exposed the practice. William Gaines' reporting shut down the offending hospital even before the state regulators could do the job. *Supra*, at III.

Interestingly, Gaines also won a Pulitzer Prize in 1988 for a traditional investigation into corruption in Chicago's City Council. When asked about the impact of the story, he responded that it educated people, but that it did not reform anything. "The difference between Gaines's two Pulitzers was the difference between bagging an elk with a gun and bagging the whole herd with a camera." Michael Miner, *When Undercover Was King*, CHICAGO READER (August 9, 2001) https://chicagoreader.com/news-politics/when-undercover-was-king-more-bleeding-at-the-sun-times/.

The difference that undercover reporting makes has been expressed as such:

> Experiential narratives provided by companion stories such as Gaines's sweeten and embellish the more essential, data-laden efforts of an investigative series with facts that have been equally, although differently, hard won. . . . The narrative dimension of most undercover efforts has a way of magnetically attracting attention to the main subject, which is, and should always be, one of the high-value propositions of such an undertaking. It is also the element that generates the buzz. In the von Solbrig case, this meant an overspill of visceral outrage.

Kroeger, *supra*, at 174.

It is indeed "visceral outrage" that this Court has recognized as a legitimate response to First Amendment activity, and a reason for its protection. *Terminiello,* 337 U.S. at 4 ("It [free speech] may indeed best serve its high purpose when it . . . *even stirs people to anger*. . . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a *clear and present danger* of a serious substantive evil.") (emphases added). Where no "clear and present danger" exists, speech should not be hindered.

Given the unique ability of undercover reporting to bring about a societal response, including anger, by revealing abuse and corruption in hidden places, it is imperative that courts hold reporters responsible only for actual damages they proximately cause and strike a proper balance between First Amendment rights and the rights of tort victims. For the reasons previously given, the Ninth Circuit opinion utterly fails to do this.

CONCLUSION

Freedom of the press is a bedrock of democracy -- to speak truth to power, bring corruption to light, and inform voters. Some stories simply cannot be obtained without reporters going undercover and misrepresenting who they actually are. Planned Parenthood would never have opened its doors to Petitioners had they made known their identities and purpose. Whistleblowers are very rare, as the cost to

career and reputation are too high for most people to endure the consequences of speaking out publicly. Considering these realities, courts should not allow subjects of undercover journalism to voluntarily rack up costs for non-existent injuries and tack on outrageously high attorneys' fees for the purpose of punishing said journalists and silencing future ones. This lawsuit was brought for the obvious purposes of moving the public discourse away from the damaging information revealed by the videos and of impugning the conduct of the messengers. In its disregard of legal rules and in its willingness to acquiesce to PPFA's vengeful desire to impose previously unheard of and extraordinarily harsh penalties on the Petitioners, this decision is the latest example of the "abortion distortion" in the law. If this opinion with its draconian penalties is allowed to stand, it will come close to ensuring that no "upstart" journalist would ever attempt to speak truth to power in such a situation again. It will in fact "eviscerate" freedom of the undercover press. *Branzburg*, 408 US at 681. Our republic will suffer as powerful organizations and people in places beyond the reach of traditional journalism will not be held accountable for their malfeasances. Public discourse will be impoverished, and it is more likely that bad actors will continue to commit bad acts under the radar.

Accordingly, this Court should grant the Petitions for Writ and strike a constitutional balance between applying tort law to journalists while still upholding the First Amendment.

Respectfully Submitted,

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