No. 22-1160

In the Supreme Court of the United States

ALBIN RHOMBERG, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After a six-week trial, a jury found that petitioner's co-conspirators lied their way into private medical conferences and healthcare clinics and surreptitiously recorded respondents' doctors and staff without consent. As a result of those intrusions, respondents suffered economic injuries in the form of out-of-pocket costs they were forced to incur to restore the physical security of their conferences and staff. The jury found petitioners liable for fraud, trespass, breach of contract, unlawful recording, and violations of civil RICO, awarding compensatory and punitive damages. A unanimous panel of the court of appeals affirmed the jury's verdict on the RICO claims in an unpublished, nonprecedential memorandum disposition. The court of appeals denied panel rehearing and rehearing en banc without any noted dissent.

The question presented is whether, on the facts of this case, a reasonable jury could find that respondents were "injured" by petitioner's violations of RICO under 18 U.S.C. § 1964(c).

RULE 29.6 STATEMENT

Respondents Planned Parenthood Federation of America, Inc., Planned Parenthood Shasta-Diablo, Inc. (DBA Planned Parenthood Northern California), Planned Parenthood Mar Monte, Inc., Planned Parenthood of the Pacific Southwest, Planned Parenthood Los Angeles, Planned Parenthood/Orange and San Bernardino Counties, 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 have no parent corporations, and no publicly held corporation owns ten percent or more of their stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a) is reported at 51 F.4th 1125. The memorandum disposition of the court of appeals (Pet. App. 28a-54a) is unpublished but available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (Pet. App. 503a–506a) is unreported. The opinion of the district court on petitioners' posttrial motions (Pet. App. 146a-203a) is reported at 480 F. Supp. 3d 1000. The opinion of the district court on injunctive relief is reported at 613 F. Supp. 3d 1190. The opinion of the district court on summary judgment (Pet. App. 204a-414a) is reported at 402 F. Supp. 3d 615. The opinion of the district court on petitioner's motion to dismiss (Pet. App. 415a-502a) is reported at 214 F. Supp. 3d 808.

INTRODUCTION

In an unpublished, nonprecedential decision, the court of appeals affirmed the district court's ruling that the jury's award of compensatory damages in this case was supported by substantial evidence. After a six-week trial, the jury had found that petitioner's co-conspirators

lied their way into private medical conferences and healthcare clinics and surreptitiously recorded respondents' doctors and staff without consent. The jury further had found that, in response to those intrusions, respondents reasonably and necessarily incurred out-of-pocket costs to restore the physical security of their conferences and staff, and awarded reimbursement for those costs as compensatory damages. The district court had held that those damages were properly recoverable, and a unanimous panel of the court of appeals affirmed in a nonbinding memorandum disposition. The court of appeals denied panel rehearing and rehearing en banc without any noted dissent.

Petitioner now challenges the jury's compensatory damages award. Petitioner principally seeks summary reversal, arguing that the out-of-pocket expenses respondents reasonably and necessarily incurred in response to the intrusions by petitioner's co-conspirators are categorically unrecoverable. But the decision below on compensatory damages is correct and consistent with a wealth of caselaw upholding similar compensatory awards in a variety of contexts. The decision below also is nonprecedential, does not implicate any split of authority, and applies settled legal principles to largely undisputed facts. These circumstances do not warrant plenary review or summary reversal.

The petition should be denied.

STATEMENT[1]

A. Factual Background

1. Respondents are Planned Parenthood Federation of America, Inc. ("PPFA") and a number of its affiliates.

[1] A substantially similar Statement is contained in the Briefs in Opposition filed contemporaneously in Nos. 22-1147, 22-1159, and 22-1168.

PPFA's affiliates provide reproductive healthcare services—including safe, legal abortions—to millions of patients annually at clinics around the country.

To strengthen professional relationships and facilitate candid discussions among its doctors and staff, PPFA holds several national conferences each year. These conferences take place in secure, private event spaces, are not open to the public, and are limited to pre-registered invitees who have been vetted by PPFA or other conference co-sponsors. See Pet. App. 33a-35a, 44a-46a.[2] Respondents' doctors and staff also attend conferences held by other organizations, including the National Abortion Federation ("NAF"). PPFA "is a member of NAF, as are many of PPFA's affiliates, providers, and staff." *Id.* at 15a. NAF's conferences likewise are held in secure, private spaces, are not open to the public, and are limited to pre-registered invitees. See *id.* at 33a-35a, 44a-46a.

2. David Daleiden is a longtime anti-abortion activist, and "his name was on 'no access' lists of individuals barred from entering Planned Parenthood conferences and affiliated health centers." Pet. App. 13a. In early 2013, Daleiden circulated a proposal to Troy Newman and petitioner Albin Rhomberg—also longtime anti-abortion activists—"outlining an undercover operation to infiltrate organizations, especially Planned Parenthood and its affiliates, involved in producing or procuring fetal tissue and to expose alleged wrongdoing through the release of 'gotcha' undercover videos." *Id.* at 14a. In March 2013, Daleiden, Newman, and petitioner formed the Center for Medical Progress ("CMP") "to oversee their operation." *Ibid.* Daleiden served as CMP's CEO, Newman as its Secretary, and petitioner as its CFO. *Ibid.*

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[2] Like the Petition, see Pet. 1 n.1, this Brief in Opposition cites to the Petition Appendix filed in No. 22-1159.

"To carry out their operation," Daleiden formed BioMax Procurement Services, LLC—"a fake tissue procurement company." *Ibid.* "BioMax had a website, business cards, and promotional materials, but was not in fact involved in any business activity." *Ibid.* "Daleiden filed BioMax's articles of incorporation with the State of California in October 2013, signing the fictitious name 'Susan Tennenbaum.'" *Ibid.* "Daleiden used the false name 'Robert Sarkis' while posing as BioMax's Procurement Manager and Vice President of Operations." *Ibid.*

"Daleiden then recruited additional associates to participate in the scheme." *Id.* at 15a. Susan Merritt, another anti-abortion activist "who had previously participated in an undercover operation targeting abortion providers, posed as BioMax's CEO 'Susan Tennenbaum.'" *Ibid.* "Brianna Baxter, using the alias 'Brianna Allen,' posed as BioMax's part-time procurement technician." *Ibid.*

"To further the subterfuge, Daleiden created or procured fake driver's licenses for himself, Merritt, and Baxter." *Ibid.* "Daleiden modified his expired California driver's license, typing 'Robert Daoud Sarkis' over his true name." *Ibid.* "Using the internet, he paid for a service to produce fake driver's licenses for 'Susan Tennenbaum' (Merritt) and 'Brianna Allen' (Baxter)." *Ibid.* "Daleiden also had bank cards issued for the aliases Sarkis and Tennenbaum." *Ibid.*

3. In 2013 through 2015, Daleiden, Merritt, Baxter, and another co-conspirator attended numerous abortion-related conferences while posing as representatives of BioMax. First, "[t]o establish their credentials, BioMax 'employees' attended several entry-level conferences." *Ibid.* In particular, "[i]n June 2013, 'Robert Sarkis' attended the International Society of Stem Cell Research Annual Meeting in Boston." *Ibid.* Then, "[i]n September of that same year, 'Susan Tennenbaum' and 'Brianna Allen'

attended the Association of Reproductive Health Professionals conference in Colorado." *Ibid.*

"Contacts from this meeting vouched for BioMax's *bona fides*, permitting BioMax to register as an exhibitor" for NAF's 2014 Annual Meeting in San Francisco. *Ibid.* "Daleiden, using Merritt's alias 'Susan Tennenbaum,' signed Exhibitor Agreements for the 2014 NAF conference on behalf of BioMax." *Id.* at 16a. "Daleiden, Merritt, and Baxter all attended NAF's 2014 Annual Meeting … on behalf of BioMax, presenting their fake California driver's licenses at check-in and posing as Sarkis, Tennenbaum, and Allen." *Ibid.* "All signed confidentiality agreements, that among other things, prohibited them from recording." *Ibid.* Nevertheless, "they covertly recorded during the entire conference." *Ibid.*

Petitioner's co-conspirators then attended four additional conferences held by PPFA or NAF—PPFA's North American Forum on Family Planning, held in Miami; PPFA's Medical Directors' Conference, held in Orlando; PPFA's 2015 National Conference, held in Washington, D.C.; and NAF's 2015 Annual Meeting, held in Baltimore. See *ibid.* "At these conferences, [petitioner's co-conspirators] often signed additional exhibitor or confidentiality agreements and secretly recorded persons with whom they spoke." *Ibid.*

4. In addition to infiltrating conferences, petitioner's co-conspirators also arranged lunch meetings and site visits, where they made further surreptitious recordings.

"Daleiden … repeatedly sought a meeting with Dr. Deborah Nucatola," who "was then the Senior Director of Medical Services at PPFA and an abortion provider in California." *Ibid.* "She eventually agreed to meet, and Daleiden and Merritt secretly recorded Dr. Nucatola throughout a two-hour lunch." *Ibid.* "Daleiden and Merritt repeated this same strategy with Dr. Mary Gatter, the

Medical Director of Planned Parenthood Pasadena and San Gabriel Valley, Inc. ...." *Ibid.*

"Daleiden and Merritt also used their conference contacts to secure visits to Planned Parenthood clinics in Texas and Colorado. At both, they posed as Sarkis and Tennenbaum and wore hidden cameras that recorded the entire time." *Id.* at 17a.

5. "On July 14, 2015, CMP started releasing videos that included footage from the conferences, lunches, and clinic visits [petitioner's co-conspirators] had secretly recorded." *Ibid.* Thereafter, respondents "provided temporary bodyguards to several of the recorded individuals and even relocated one of the recorded individuals and her family." *Ibid.* Respondents "also hired security consultants to investigate [the] infiltration and enhance the security of [respondents'] conferences." *Ibid.*

B. Proceedings Below

1. In January 2016, respondents brought this lawsuit against petitioner and his co-conspirators, asserting common-law claims for fraud, trespass, and breach of contract, as well as statutory claims for violating civil RICO, the federal eavesdropping statute, and the state eavesdropping statutes of California, Florida, and Maryland. See Pet. App. 17a.

Petitioner moved to dismiss under Rule 12(b)(6) and to strike under California's anti-SLAPP statute. Among other things, petitioner argued that respondents sought "damages resulting from the publication of the recordings" and therefore "must satisfy the First Amendment requirements for defamation claims." *Id.* at 467a. The district court disagreed, explaining that "the First Amendment does not impose heightened standards on [respondents]' tort claims as long as [respondents] do not seek reputational damages (lost profits, lost vendors)

stemming from the publication conduct of [petitioner]." *Id.* at 470a (emphasis omitted).

Petitioner also argued under RICO that "the causal nexus between [petitioner's] conduct and the harm alleged … is too distant." *Id.* at 437a. But the district court rejected that argument as well. The court acknowledged that respondents "may not be able to recover for damages that were not *directly* caused by the actions of [petitioner]"—"[f]or example, the damages [respondents] incurred because their website was hacked by a third party would appear to be too distant, too far down the causal chain." *Id.* at 439a (footnote omitted). "But other damages alleged—including the increase in security costs at conferences, meetings, and clinics that [respondents] incurred when *they learned* about [the] infiltration of their conferences, meetings, and clinics—are much more directly tied to [petitioner's] conduct and do not raise the problem of intervening actions of third-parties." *Ibid.*

Petitioner's co-conspirators took an interlocutory appeal, and the court of appeals affirmed. *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018); *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 735 F. App'x 241 (9th Cir. 2018). Petitioner's co-conspirators filed a petition for certiorari, which this Court denied. *Ctr. for Med. Progress* v. *Planned Parenthood Fed'n of Am.*, 139 S. Ct. 1446 (2019).

2. After discovery, the parties filed "seven motions for summary judgment, one special motion to strike the complaint, a *Daubert* motion, and a motion to strike an expert." Pet. App. 205a. As relevant here, petitioner again argued that respondents' damages were barred by the First Amendment, but the district court again disagreed. The court acknowledged that respondents "cannot recover for reputational damages or 'publication' damages under the First Amendment," and it drew "the line for

compensable damages between those caused by … direct conduct and those caused by third parties." *Id.* at 206a.

The court accordingly allowed respondents to seek just two narrow categories of damages. In particular, the court allowed respondents to seek damages *only* "[1] for personal security costs for individuals targeted by [petitioner's co-conspirators] and [2] for measures to investigate the intrusions and upgrade the security measures meant to vet and restrict future access to the conferences and facilities." *Id.* at 206a-207a. The court did *not* allow respondents to seek damages for "more general expenses to upgrade physical security at Planned Parenthood facilities," for example, nor for "the time and expense [respondents] incurred in responding to the threats and acts of third parties following release of the videos." *Id.* at 207a.

The court thus held that "some of the damages [respondents] s[ought] here are more akin to publication or reputational damages that would be barred by the First Amendment," but "[o]thers … are economic damages that are not categorically barred." *Id.* at 228a. "Those that fall in the latter category," the court explained, "result *not* from the acts of third parties who were motivated by the contents of the videos, but from the *direct* acts of [petitioner's co-conspirators]—their intrusions, their misrepresentations, and their targeting and surreptitious recording of [respondents]' staff." *Id.* at 228a-229a. "[Petitioner and his co-conspirators] are not immune from the damages that their intrusions into the conferences and facilities directly caused, nor from the damages caused by their direct targeting of [respondents]' staff …." *Id.* at 229a.

The district court rejected petitioner's argument seeking "to preclude [respondents] categorically from seeking damages covering 'increased security.'" *Id.* at 232a. "That the systems implemented by [respondents]

following the intrusions were new or improved," the court explained, "does not make them unrecoverable as a matter of law." *Id.* at 233a. But the court allowed petitioner to "argue to the jury that they were unreasonable, unnecessary, or speculative." *Ibid.*

The district court also rejected petitioner's arguments under RICO. Petitioner first argued that his co-conspirators did not commit any predicate act of producing or transferring fake IDs in violation of 18 U.S.C. § 1028 because there was no evidence that "the production[or] transfer … [wa]s in or affect[ed] interstate … commerce." 18 U.S.C. § 1028(c)(3)(A). But the court held that respondents had established that interstate-commerce element as a matter of law. As the court explained, "only a 'minimum nexus' with interstate commerce is required under this statute," and "Daleiden admitted that he used the internet to secure two of the IDs, [petitioner and his co-conspirators] intended to affect interstate commerce in creating the false IDs, and [petitioner's co-conspirators] used those IDs across state lines." Pet. App. 240a.

Petitioner next argued that respondents had not adequately established the requisite "pattern of racketeering activity," 18 U.S.C. § 1962(a), because petitioner's and his co-conspirators' scheme "'came to fruition'" with the publication of the videos, such that their "work … [wa]s 'complete' and 'finished.'" Pet. App. 244a. Petitioner did not dispute, however, that his and his co-conspirators' "zealous activism against [respondents]" is *not* "over." *Ibid.* And the court concluded that there was "evidence from which a reasonable juror could conclude that [petitioner] will attempt similar tactics … again in the future." *Ibid.*

Petitioner finally argued that there was insufficient evidence of proximate causation. But, as explained, the court had already found that "certain categories of damages sought by [respondents] are not recoverable." *Id.* at

247a. "For the damages that are allowable," the court found "sufficient evidence … for a reasonable juror to conclude that those damages were directly caused by [petitioner's] actions." *Ibid.*

3. After a six-week trial, "the jury found for [respondents] on all counts." *Id.* at 18a. "The jury awarded … compensatory and punitive damages, and the district court later awarded nominal and statutory damages, resulting in a total damages award of $2,425,084." *Ibid.*

"The compensatory damages were divided into two categories: infiltration damages and security damages." *Ibid.* "The infiltration damages, totaling $366,873, related to [PPFA]'s costs to prevent a future similar intrusion." *Ibid.* "The security damages, totaling $101,048, related to [certain respondents'] costs for protecting their doctors and staff from further targeting …." *Ibid.* While these costs directly compensated respondents for concrete out-of-pocket expenses, respondents argued—and the jury found—that the expenses were reasonable and necessary to restore "confidence" and a "sense of trust and faith" in the physical security of respondents' conferences, clinics, and staff, which petitioner's actions had "broken." C.A. E.R. 3601-02.

The district court entered limited injunctive relief, *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 613 F. Supp. 3d 1190 (N.D. Cal. 2020), and denied petitioner's posttrial motions, Pet. App. 146a-147a.

3. On appeal, a unanimous panel of the court of appeals affirmed in part and reversed in part.

a. In a published opinion, the panel affirmed the district court's conclusion that the compensatory damages award is consistent with the First Amendment, but reversed the verdict under the federal eavesdropping statute.

As to the First Amendment, the panel "express[ed] no view on whether [petitioner's and his co-conspirators'] actions here were legitimate journalism … because even accepting [their] framing, the First Amendment does not prevent the award of the challenged damages." *Id.* at 19a n. 4. The panel noted that "[g]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 19a (quoting *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991)). "Invoking journalism and the First Amendment," the panel explained, "does not shield individuals from liability for violations of laws applicable to all members of society." *Id.* at 21a. And here, "[n]one of the laws [petitioner] violated was aimed specifically at journalists or those holding a particular viewpoint." *Ibid.* Rather, "[t]he two categories of compensatory damages permitted by the district court[] … were awarded by the jury to reimburse [respondents] for losses caused by [petitioner's] violations of generally applicable laws." *Id.* at 21a-22a. Petitioner "ha[s] no special license to break laws of general applicability in pursuit of a headline." *Id.* at 22a. The jury's compensatory damages award thus merely reflects that petitioner "ha[s] been held to the letter of the law, just like all other members of our society." *Ibid.*

The panel rejected petitioner's argument "that the infiltration and security damages … are impermissible publication damages" under *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988). Pet. App. 22a. The panel explained that this case is "distinguishable from *Hustler*" because "[t]he jury awarded damages for economic harms …, not the reputational or emotional damages sought in *Hustler*." *Ibid.* Furthermore, "[petitioner's] argument that, absent a showing of actual malice, all damages related to truthful publications are necessarily barred by the First Amendment cannot be squared with *Cohen*." *Id.*

at 23a. In *Cohen*, after all, this Court "upheld an economic damage award reliant on publication—damages related to loss of earning capacity—even though the publication was truthful and made without malice." *Ibid.*

In the alternative, the panel held that even if all damages resulting from a publication were automatically unrecoverable absent a showing of actual malice, the damages here *still* pass muster. That is because respondents "would have been able to recover the infiltration and security damages even if [petitioner] had never published videos of the[] surreptitious recordings." *Id.* at 22a. As the panel explained, "[r]egardless of publication, … [respondents] would have protected [their] staff who had been secretly recorded and safeguarded [their] conferences and clinics from future infiltrations." *Id.* at 22a-23a.

The panel emphasized that its decision "does not impose a new burden on journalists or undercover investigations using lawful means." *Id.* at 23a. "Journalism and investigative reporting have long served a critical role in our society," but they "do not require illegal conduct." *Ibid.* "In affirming [respondents'] compensatory damages from [petitioner's] First Amendment challenge," the panel "simply reaffirm[ed] the established principle that the pursuit of journalism does not give a license to break laws of general applicability." *Ibid.*

As to the federal eavesdropping statute, the panel held that there was insufficient evidence that petitioner's co-conspirators recorded communications "for the purpose of committing any criminal or tortious act," as the statute requires where one party to a recorded communication consents. 18 U.S.C. § 2511(2)(d). The panel accordingly vacated the statutory damages awarded under the federal eavesdropping statute. Pet. App. 24a-27a & nn. 7, 9.

b. In a separate, unpublished, nonprecedential memorandum disposition, the panel rejected all of petitioner's remaining arguments.

As to RICO, the panel held that respondents' claim "satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. § 1028(c)(3)(A)." *Id.* at 35a. As the panel explained, petitioner's co-conspirators "used the fake licenses to gain admission to out-of-state conferences and facilities, and then presented those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." *Id.* at 35a-36a. "[F]urther, Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was intimately related to interstate commerce." *Id.* at 36a (quotation marks omitted).

The panel also held that respondents presented sufficient evidence "regarding the required *pattern* of predicate acts necessary to violate RICO." *Ibid.* "A pattern may be established," the court explained, "by proof that defendants' conduct possessed 'open-ended continuity,' *i.e.*, that their conduct 'by its nature projected into the future with a *threat* of repetition.'" *Ibid.* (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)) (emphasis by panel). Here, "[t]he evidence showed that various [co-conspirators] had previously advocated for or used undercover sting operations targeting Planned Parenthood, and CMP and BioMax were still extant and intended to carry out future projects." *Ibid.*

The panel also found sufficient evidence regarding "RICO proximate cause." *Ibid.* As the panel explained, "[t]here was a direct relationship between [petitioner's co-conspirators'] production and transfer of the fake driver's licenses and the alleged harm." *Id.* at 36a-37a. And this case implicates none of the concerns animating this Court's proximate cause precedents. "The district court permitted only infiltration damages and security

damages, limiting any difficulty in determining what damages were attributable to [petitioner's] RICO violation; there [wa]s no risk of [respondents] recovering duplicative damages; holding [petitioner] liable discourages illegal behavior; and there are no more directly injured victims." *Id.* at 37a.

Finally, as to punitive damages, the panel found "no error in the award of punitive damages." *Id.* at 47a. As the panel explained, "[t]here was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, Merritt, [petitioner], Newman, CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation." *Ibid.* Moreover, petitioner and his co-conspirators "waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs." *Id.* at 47 n.9. And "[e]ven if the argument were not waived," it was "meritless." *Ibid.*

4. Petitioner and his co-conspirators filed four separate petitions for panel rehearing or rehearing en banc. After calling for a response, the panel denied panel rehearing, and the full court denied rehearing en banc without any noted dissent. *Id.* at 503a–506a.

REASONS TO DENY THE PETITION

The decision of the court of appeals upholding the jury's award of compensatory damages does not warrant summary reversal or plenary review. The decision below is correct, does not conflict with any decision of this Court or another court of appeals, is of no significance beyond this case, and is limited to the facts presented. Further review is not merited in any form.

A. The Court Of Appeals' Holding Affirming The Compensatory Damages Award Does Not Warrant Summary Reversal

Petitioner principally argues that this Court should summarily reverse. But petitioner acknowledges that that rarely granted remedy is not appropriate unless "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Pet. 17. Here, the decision below is correct and does not remotely meet this Court's stringent requirements for summary reversal.

1.a. The court of appeals correctly affirmed the district court's holding that the jury's award of compensatory damages was supported by substantial evidence.

As the court of appeals explained, "[a] jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." Pet. App. 32a. Here, the jury awarded two narrow categories of compensatory damages. First, the jury awarded "infiltration damages," which "covered expenses such as assessing security systems, vetting practices review, hiring security guards for meetings, and installing conference badging systems." *Id.* at 46a. The court of appeals explained that "[t]he jury could have concluded that [respondents] incurred these costs to prevent further infiltrations by [petitioner] and [his] co-conspirators as a direct result of [petitioner's] wrongful trespass, recording, and breach of contract actions." *Id.* at 46a-47a. Second, the jury awarded "security damages," which "provided physical security and online threat monitoring for individuals" whom petitioner's co-conspirators targeted for recording. *Id.* at 47a. The court of appeals explained that, "[g]iven the history of violence against abortion providers, it was a foreseeable and natural consequence of [petitioner's and his co-conspirators'] actions that the recorded

individuals would … reasonably fear for their safety." *Ibid.*

Petitioner focuses on the first category of compensatory damages—the infiltration damages—arguing that they were not compensatory in nature. See Pet. 21-23. But these damages served the precise function compensatory damages are meant to serve: ensuring that respondents occupied the same position they had occupied before petitioner and his co-conspirators violated the law. Before petitioner's co-conspirators' infiltrations, respondents' conferences served as secure, private forums where professional colleagues could engage in frank discussions about sensitive topics—confident that everyone in attendance had been properly vetted. See C.A. ER 1273, 3525. After the infiltrations, however, frank discussions of sensitive topics were impossible. Petitioner and his co-conspirators had demonstrated the desire and ability to penetrate respondents' security measures. And respondents did not know who all of petitioner's co-conspirators were, how far the intrusions extended, and what events and facilities petitioner and his co-conspirators would continue to infiltrate. See C.A. ER 2318, 3559, 3564.

Respondents' witnesses testified extensively about the acute "sense of crisis" the infiltrations created. C.A. E.R. 2171. Respondents "were unaware of the scope. [They] were unaware of what other conferences [petitioner and his co-conspirators] may be targeting, what other people that they may be working with." C.A. E.R. 3564; see also, *e.g.*, C.A. E.R. 2171 (describing uncertainty about "how far this was going to go" and "[h]ow resourced this group was"); C.A. E.R. 2318 (describing not knowing the "extent of the network, formal or informal, that [petitioner and his co-conspirators] ha[d]"); C.A. E.R. 3559 ("We, you know, at the time didn't know the scope, how wide this network was that [petitioner and his co-conspirators] had to infiltrate future events."). Respondents

thus faced an "immediate need to create processes and practices to safeguard against any future infiltration by [petitioner and his co-conspirators]." C.A. E.R. 3559; see C.A. E.R. 3572. The infiltration damages accordingly compensated respondents for the reasonable and necessary costs of the steps they were forced to take to "restore security," Pet. App. 44a—to repair "that sense of trust and faith with [respondents'] family and our supporters," which the infiltrations had "broken." C.A. E.R. 3601.

b. Lower courts have allowed victims of unlawful intrusions to recover compensation similar to respondents' infiltration damages in at least three circumstances.

The first set of cases concerns the Computer Fraud and Abuse Act ("CFAA"), which provides a private right of action for "loss by reason of a violation" of the statute's criminal prohibition against accessing a computer system without authorization. 18 U.S.C. § 1030(g). Under the CFAA, courts often allow damages for "costs necessary to upgrade security systems or analyze the circumstances of [an] intrusion." *Delacruz* v. *State Bar of Cal.*, No. 5:14-cv-05336-EJD, 2015 WL 5697365, at *6 (N.D. Cal. Sep. 29, 2015); see, *e.g.*, *Ticketmaster L.L.C.* v. *Prestige Ent. W., Inc.*, 315 F. Supp. 3d 1147, 1173 (C.D. Cal. 2018); *AtPac, Inc.* v. *Aptitude Sols., Inc.*, 730 F. Supp. 2d 1174, 1184 (E.D. Cal. 2010); *Kalow & Springnut, LLP* v. *Commence Corp.*, No. 07–3442 (FLW), 2009 WL 44748, at *2 (D.N.J. Jan. 6, 2009). In a prior case, for example, the Ninth Circuit affirmed a CFAA damages award that compensated the victim of a computer intrusion for costs incurred to investigate the intrusion and to "block" it from continuing. *Facebook, Inc.* v. *Power Ventures, Inc.*, 252 F. Supp. 3d 765, 778 (N.D. Cal. 2017), *aff'd*, 749 F. App'x 557 (9th Cir. 2019). Here, the infiltration damages similarly served to "block" further intrusions by petitioner and his co-conspirators into respondents' conferences.

Petitioner acknowledges that courts have awarded damages for upgraded security measures in CFAA cases. See Pet. 22. Petitioner tries to distinguish these cases on the ground that the CFAA is "a *statutory* remedy created by Congress to address computer hacking." *Ibid.* But petitioner never explains why, if costs to prevent future intrusions are recoverable as compensation under the CFAA, they are not equally recoverable as compensation under RICO (as well as the common-law torts the jury found that petitioner and his co-conspirators committed).

The second set of cases concerns stalking. In stalking cases, courts commonly award restitution to victims to compensate them for the costs of security measures taken to protect against further stalking. See, *e.g.*, *State* v. *Pumphrey*, 338 P.3d 819, 822-23 (Or. 2014) ("cost of changing locks on the victim's home" constituted "economic damages"); *State* v. *Fallis*, 150 Wash. App. 1008 (2009) (cost of security system); *People* v. *Muccillo*, No. G029985, 2003 WL 178837, at *2 (Cal. Ct. App. Jan. 28, 2003) (cost of bodyguard); *People* v. *Henderson*, 20 Cal. App. 5th 467, 469, 473 (2018) (cost of security system). Here, petitioner and his co-conspirators doggedly followed respondents back and forth across the country over the course of multiple years. They infiltrated conferences and clinics in more than half a dozen jurisdictions, arranged lunch meetings with respondents' doctors and staff under false pretenses, and made hundreds of hours of unlawful recordings without consent, all with the avowed goal of destroying respondents and their "evil … empire." C.A. Supp. ER 386-89; C.A. ER 1160-61. That course of conduct *is* stalking, or at least closely analogous to it.

Again, petitioner acknowledges that courts have awarded compensation similar to the infiltration damages in stalking cases. See Pet. 22. Yet petitioner has no substantive answer to those cases, which plainly treat costs

to forestall continuing unlawful conduct as recoverable compensation that is necessary to make victims whole.

The third set of cases concerns continuing or recurring trespasses. The Restatement (Second) of Torts provides that, "[i]f [a defendant] causes continuing or recurrent tortious invasions on the land of another … and it appears that the invasions will continue indefinitely," the plaintiff may recover "compensation" that includes "either the decrease in the value of the land … or *the reasonable cost to the plaintiff of avoiding future invasions*." Restatement (Second) of Torts § 930 (Am. Law Inst. May 2023 update) (emphasis added). When a defendant has "created a damaging situation of substantial and lasting character," it is fair to assume the defendant will "maintain it for an indefinite time in the future." *Id.* § 930 cmt. b. And "'[i]ndefinitely' … does not mean that the situation may be expected to last forever, but merely that there is no reason to expect its termination at any definite time in the future." *Ibid.* Here, as explained, there was ample evidence from which the jury could find that the intrusions into respondents' conferences by petitioner and his co-conspirators—which had been ongoing for multiple years—would recur and continue in the future. See § A.1.a, *supra*.

Petitioner appears to be unaware that damages for reasonable costs of preventing continuing or recurring trespasses is a traditional common-law remedy. To the contrary, petitioner asserts that allowing "a landowner [to] recover the cost of building a fence to prevent a future similar intrusion" would be a "[m]anifestly absurd result[]." Pet. 4. In fact, that result is not absurd; the Restatement recognizes that kind of remedy as appropriate in circumstances similar to those presented here.

c. Petitioner's remaining arguments are similarly unavailing. Petitioner asserts, for example, that respondents' infiltration damages improperly provided monetary

relief "against *future* harmful conduct." Pet. 20. That is wrong twice over. To begin with, the infiltration damages compensated respondents for tangible, out-of-pocket expenses that respondents were forced to incur to remedy the harm caused by the infiltrations. The jury found that those *past* costs were among the "foreseeable and natural consequence[s]" of the *past* unlawful acts petitioner and his co-conspirators committed. Pet. App. 47a. Furthermore, as explained, in cases involving the CFAA, stalking, and continuing or recurring trespasses, courts often award compensation to forestall future violations of the law. Those cases refute petitioner's suggestion that the *only* "legal remedy that confers protection against future harmful conduct is injunctive relief, not compensatory damages." Pet. 20.

Petitioner also asserts that the infiltration damages left respondents "in a better position than [they] would [have been] in had the wrong not been done." Pet. 20. Not so. The evidence showed that petitioner's misconduct threw respondents into "crisis," C.A. E.R. 2171, and destroyed the central purpose of their conferences: providing a secure environment for sensitive conversations among trusted colleagues. By restoring some measure of confidence in the physical security of their conferences, the infiltration damages only partially repaired that harm. As the district court explained in granting limited injunctive relief, "extensive testimony at trial demonstrated … that … a significant portion of [respondents]' injuries could not adequately be addressed by damages or were difficult to measure if not impossible to accurately value as part of a request for damages." *Planned Parenthood*, 613 F. Supp. 3d at 1209. Respondents would have much preferred for petitioner and his co-conspirators never to have infiltrated respondents' conferences in the first place.

Finally, in addition to the "fence" hypothetical that squarely contradicts the Restatement, petitioner conjures several other scenarios where the decision below supposedly would require compensation. See Pet. 21-23. But petitioner's hypotheticals lack a crucial ingredient found by the jury: that the expenses reflected in the infiltration damages "were reasonably incurred in light of the Defendants' actions." D.C. Dkt. 1006, at 90-91. Here, as explained, the intrusions by petitioner's co-conspirators raised a reasonable fear that petitioner or his known or unknown co-conspirators would continue infiltrating respondents' conferences and facilities, warranting reasonable expenditures to prevent that from happening. At a minimum, based on the six-week trial record, a reasonable jury could so find.

2. In any event, the decision below does not remotely warrant summary reversal. Again, petitioner acknowledges that summary reversal is not appropriate unless "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Pet. 17. Here, if anything, the law is settled *against* petitioner's position; it certainly is not settled *in favor of* it. And while the facts are largely undisputed, the decision below is not in error, let alone clearly so. Notably, petitioner does not cite any case where any court has held that damages similar to the infiltration damages were unrecoverable under RICO—or any other statute, for that matter.

Instead, petitioner cites a litany of cases standing for broad principles governing compensatory damages. See *id.* at 18-20. But those cases do not help petitioner. The decision below did not reject the principle that "[t]he purpose of compensatory damages is to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," that "compensatory damages are intended to make the plaintiff whole and nothing more," or that "[t]he purpose of an award of compensatory

damages is to put the plaintiff in the position as nearly as possibly equivalent to what he would have occupied had no tort been committed." *Id.* at 18-19 (quotation marks omitted). The court of appeals simply held that respondents' infiltration damages were fully consistent with those principles. Petitioner's disagreement with how the court of appeals applied basic legal rules to the facts of this case—affirming the ruling of the district court and upholding the findings of the jury—does not justify summary reversal.

Furthermore, as explained, courts often award compensation analogous to the infiltration damages in CFAA, stalking, and trespass cases. Accordingly, in order to summarily reverse, this Court would either have to abrogate those three whole categories of cases or carefully distinguish them. That is not the kind of task this Court undertakes in a summary reversal.

Finally, petitioner ignores the principle that appellate courts "afford substantial deference to a jury's finding of the appropriate amount of damages," "uphold[ing] the jury's award unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork." *United States* v. *CB & I Constructors, Inc.*, 685 F.3d 827, 839 (9th Cir. 2012) (quotation marks and brackets omitted); accord, *e.g.*, *Vogler* v. *Blackmore*, 352 F.3d 150, 154 (5th Cir. 2003) (similar); *Dancy* v. *McGinley*, 843 F.3d 93, 99-100 (2d Cir. 2016) (similar). That deferential standard of review presents yet another obstacle to summary reversal. This Court summarily reverses most commonly in cases where the legal standard cuts strongly against the decision below—for example, where a court of appeals denies qualified immunity, see, *e.g.*, *Rivas-Villegas* v. *Cortesluna*, 142 S. Ct. 4 (2021), or grants relief under the Antiterrorism and Effective Death Penalty Act, see, *e.g.*, *Mays* v. *Hines*, 141 S. Ct. 1145 (2021). Petitioner does not cite any case

where this Court has summarily reversed on any damages issue. A challenge to a jury's award of compensatory damages rarely presents a viable appellate issue at all. It certainly does not warrant summary reversal.[3]

B. The Court Of Appeals' Holding Affirming The Compensatory Damages Award Does Not Merit Plenary Review

As a fallback, petitioner seeks plenary review, but that request fares no better. The decision below is nonprecedential, and it does not implicate any split of authority or otherwise meet this Court's criteria for review.

1. Contrary to petitioner's assertion, the decision below on compensatory damages is *not* "binding precedent within the Ninth Circuit." Pet. 22 (quotation marks omitted). Exactly the opposite is true: The court of appeals' memorandum disposition is unpublished and nonprecedential. As the decision itself states, it "is not appropriate for publication and is not precedent." Pet. App. 31 n.*. Furthermore, the court of appeals' analysis of the compensatory damages award is abbreviated, spanning just a few sentences. See *id.* at 46a-47a. And those sentences

[3] Petitioner argues that this Court should not only summarily reverse the compensatory damages award, but also remand with instructions to dismiss any remaining state-law claims for lack of federal jurisdiction. Pet. 23-24. This Court need not address that issue if it denies summary reversal. But petitioner's request fails on two additional levels. First, the court of appeals never addressed this supplemental jurisdiction question. As this Court often observes, it is "a court of review, not of first view." *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1183 (2023) (citation omitted). Second, petitioner relies on a case where "all federal-law claims [were] eliminated before trial." *Carnegie-Mellon Univ.* v. *Cahill*, 484 U.S. 343, 350 n.7 (1988). That is not what happened here. Trial has already happened, and two federal claims were tried, under RICO and the federal eavesdropping statute. See Pet. App. 17a, 23a.

focus on "proximate[] caus[ation]," *id.* at 46a, rather than the compensability question presented in the Petition.

2. The decision below also does not conflict with any decision of this Court or another court of appeals. Again, while petitioner cites various cases standing for certain broad principles, see Pet. 18-20, the court of appeals did not disagree with those principles. It simply found that the infiltration damages fully complied with them. Petitioner's case-specific challenge to the court of appeals' application of settled legal principles does not warrant full briefing and argument.

Nor is it true that "the law of torts and remedies has been rewritten in the Ninth Circuit." *Id.* at 22. As explained, the nonprecedential decision below comports with settled law. See § A.1.b, *supra.* Indeed, petitioner's proposed rule—the exact contours of which are unclear—would conflict with the CFAA, stalking, and trespass cases discussed above, as well as the general principle that appellate courts defer to a jury's findings on damages.

Ultimately, petitioner challenges the jury's determination that, under the circumstances of this case, the particular costs respondents incurred were reasonably necessary to restore the status quo ante and place respondents in the position they occupied before petitioner's and his co-conspirators' unlawful acts. That factbound determination does not warrant any form of further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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