No. 22-1160

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

REPLY BRIEF OF PETITIONER ALBIN RHOMBERG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Planned Parenthood ("PP") asserts that the decision below affirming a jury award of "compensatory damages" consisting of reimbursements for upgrades and personal security expenses is "consistent with a wealth of case law upholding similar compensatory awards in a variety of contexts." Brief in Opposition ("BIO") 2.

However, that purported "wealth of case law" makes no appearance in PP's brief. PP failed to cite a single case awarding or upholding an award of compensatory damages for security or security upgrades under RICO or any common law theory of tort or breach of contract. *Not a single case.*

PP's "wealth of case law" refers to cases arising in two entirely dissimilar situations: the federal Computer Fraud and Abuse Act and criminal stalking prosecutions. PP rounds out the collection with an out-of-context quotation from the Restatement (Second) of Torts, understandably never before seen in this litigation. On the basis of these legal odds and ends, never mentioned in the decisions below, PP claims that the ruling below applied a "traditional common law remedy" (BIO 19) and "comports with settled law." BIO 24.

PP scoured every nook and cranny of American law to find even one case to justify the multi-million dollar judgment awarding RICO and common law damages for security upgrades. Its inability to find any such case confirms that the decision below is, quite literally, without precedent.

ARGUMENT

I. Planned Parenthood suffered no injury to its business or property.

RICO affords a civil remedy to persons injured in their "business or property" by reason of a RICO violation, allowing them to recover treble damages. 18 U.S.C. §1964(c). PP effectively concedes that it suffered no such business injury. It admits that the only thing "broken" by Defendants' infiltration was the "confidence" and "sense of trust and faith" of PP's conference attendees. BIO 10, 16.

Costs to remediate emotional distress are not recoverable RICO damages. *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992). "Plaintiffs . . . cannot transform their apprehension of third-party prowlers into a compensable RICO injury simply by reaching for their wallets." *Ainsworth v. Owenby*, 326 F. Supp. 3d 1111, 1124 (D. Ore. 2018).

PP offered no evidence of any financial harm *it* suffered due to the purported "broken" trust. "To demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest." *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1086-87 (9th Cir. 2002). PP has never even argued, much less presented evidence, that the alleged loss of confidence had or would have had any financial ramifications, such as lost fees paid by attendees or exhibitors. The only alleged consequence was fewer

"frank discussions about sensitive topics." BIO 16. Reticence is not an injury to business or property.[1]

PP also argues that the security expenditures did not place them in a better position than before the infiltrations, because, pre-infiltration, attendees were "confident that everyone in attendance had been properly vetted" (BIO 16), while the post-infiltration security upgrades "only partially repaired that harm" by "restoring some measure of confidence." BIO 20. But the subjective and clearly flawed perceptions of attendees are not the benchmark for whether PP's situation has improved. The attendees' past "confidence" in the vetting was obviously misplaced. Defendants were admitted to the PPFA conferences based on their prior attendance at other industry conferences, whereby they established their "*bona fides*." App. 15-16. PP itself conducted almost no vetting; it had no software for detecting fake IDs; it had none of the laundry list of upgrades that constitute the damages award here. After the discovery of the infiltration, PP made expenditures to increase vetting and security, the benefits of which it is now enjoying. Forcing Defendants to pay for those upgrades places PP in an objectively better position than before Defendants conducted their investigation.

II. PP Failed to Adduce Any Legal Basis for Award of Personal Security Costs.

PP claims, "Petitioner focuses on the first category of compensatory damages – the infiltration damages"

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[1] Not only did PP not adduce any evidence of the actual or potential financial impact of the "broken" trust on attendance, it never even put on any evidence that it informed attendees of the new security features that allegedly would "restore" that trust.

(BIO 16), and it then proceeds to entirely ignore the other category of alleged damages, the so-called "security damages," i.e., expenses for personal security incurred in response to public reaction to the videos. App. 18, 47.

Contrary to PP's assertion, Rhomberg's Petition repeatedly discussed the personal "security damages," and particularly how the panel affirmed the award of these costs on grounds specifically and correctly rejected by the district court as violative of the First Amendment. Pet. 16-17.

As the published panel decision made clear, neither category of alleged "damages" was awarded for the purpose of repairing any loss or making the plaintiff whole following an injury. Both categories were intended to prevent future harms – an impermissible basis for an award of compensatory damages. Pet. 20, 23 ("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. . . . These are not compensable damages.")

PP claims that the award for personal security costs "still pass[es] muster" under a non-publication theory, i.e., the appellate court's speculation that "[r]egardless of publication, *it is probable* that Planned Parenthood would have protected its staff who had been secretly recorded . . ." App. 22 (emphasis added). This speculation on the part of the panel is another example of it bending over backwards to assist PP in achieving a victory over abortion opponents. The court's supposition about what PP would have done "regardless of publication" flies in the face of overwhelming evidence, including its own

statements, that the security costs were incurred specifically in response to the public reaction to the publication of the videos, and nothing else.[2] Neither here nor below could PP provide any evidentiary support for this court-initiated theory.

Moreover, making expenditures "for physical security and online threat monitoring *for the individuals recorded in the videos that [Defendants] released*" (App. 18, emphasis added) would be a nonsensical statement in the absence of publication. And even if PP somehow had learned, without publication, that Defendants had recorded certain employees, it would still make no sense for PP to have, e.g., hired armed security guards for an employee because she had been taken out to lunch and recorded a year earlier, or arrange for "online threat monitoring" for someone recorded months earlier at a conference. Such measures would not be needed to prevent Defendants from arranging a second lunch date or striking up a conversation. The *only* purported "threat" was from third parties who had seen the videos.

The award of compensatory damages for these personal security expenses is unjustified and unprecedented.

III. The Award of "Compensatory Damages" for Conference Security Upgrades Is Erroneous and Unprecedented.

PP asserts that there are "at least three circumstances" in which courts have allowed

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[2] Opening Brief, Ninth Cir. Doc. 20, at 21-25 (collecting record citations).

"compensation similar to respondents' infiltration damages." BIO 17. However, these examples are inapposite, and the lower courts did not rely on or refer to these circumstances – or any other – in affirming the damages verdict here.

A. Computer Fraud and Abuse Act.

PP asserts that, in cases brought under the federal Computer Fraud and Abuse Act ("CFAA") (18 U.S.C. §1030) "courts often allow damages for costs necessary to upgrade security systems or analyze the circumstances of an intrusion." BIO 17 (quotation marks omitted). But the four cases it next cites all were decisions at the pleading stage, where no costs were awarded at all. *Id.*

Leaving that aside, CFAA is not part of the common law from which RICO damages are derived. Pet. 18. CFAA is "primarily a criminal anti-hacking statute." *Fidlar Techs. v. LPS Real Estate Data Solutions, Inc.*, 810 F.3d 1075, 1079 (7th Cir. 2016). It has its own precise definitions, thresholds, and remedies. Of particular relevance, CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. §1030(e)(11).

Courts rarely resort to the common law to interpret CFAA, instead carefully parsing the statute's terms in the context of its purpose as an anti-hacking statute. *See, e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1660 (2021) ("The statutory

definitions of 'damage' and 'loss' thus focus on technological harms—such as the corruption of files—of the type unauthorized users cause to computer systems and data."); *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1263 (9th Cir. 2019) ("The statute's 'loss' definition—with its references to damage assessments, data restoration, and interruption of service—clearly limits its focus to harms caused by computer intrusions, not general injuries unrelated to the hacking itself.").

These interpretations of "loss" and "damages" in CFAA have no relevance here, where the issue is the definition of damages governing the RICO, tort, and breach of contract claims underpinning the judgment below. Pet. 18. Congress's choice of appropriate remedies for the discrete case of deterring computer hacking is neither applicable nor controlling here. "Under the presumption that Congress acts interstitially, we construe a statute as displacing a substantial portion of the common law only where Congress has clearly indicated its intent to do so." *United States v. Nosal*, 676 F.3d 854, 857 (9th Cir. 2012) (en banc). In enacting a criminal anti-hacking statute, Congress in no way indicated that it intended to supplant or expand remedies available under the common law.[3]

[3] Even if a court were to decide that CFAA is relevant to the issues in this case, what Defendants did, even *mutatis mutandis*, was not the equivalent of gaining "unauthorized access" on a computer. Defendants did not access any areas that were "off limits" to them as authorized, vetted, paid-in-full exhibitors at PPFA's conferences. *Cf. Van Buren*, 141 S. Ct. at 1662.

B. Restitution Orders in Criminal Stalking cases.

PP for the first time provides cases it claims show that the "infiltration damages" awarded here find support in criminal restitution orders in stalking cases.

In fact, restitution in stalking cases is entirely unlike the award here. First, courts order restitution from individuals who have been found guilty of *criminal* conduct. Second, restitution is ordered pursuant to statutes specifically authorizing restitution, which statutes have been written and interpreted in ways inconsistent with RICO case law and the common law. *E.g.*, *State v. Pumphrey*, 266 Ore. App. 729, 734 (Or. 2014) ("Although defendant's criminal activities must be a 'but for' cause of the victim's economic damages, the damages need not be the *direct* result of defendant's criminal activity") (original emphasis)[4]; *People v. Muccillo*, 2003 Cal. App. Unpub. LEXIS 889, *6 (Cal. Ct. App. Jan. 28, 2003) ("We construe a victim's right to restitution broadly and liberally") (quotation omitted). In *People v. Henderson*, 20 Cal. App. 5th 467, 471-72 (2018), cited by PP, the appellate court was construing a statutory restitution provision that allowed and even specifically mandated inclusion of the costs of installing a home security system in restitution orders.

Moreover, Defendants' conduct was not stalking. "Stalking" is variously defined in criminal statutes,

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[4] *Cf. Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well.") (simplified).

but the common elements include unwanted following, behavior designed to terrorize or alarm, and threats that place the other in reasonable fear for his or her physical safety. *E.g.,* California Pen. C. §646.9. Defendants' conduct was neither stalking nor "closely analogous" to stalking. BIO 18. PP claims that the Defendants "doggedly followed respondents back and forth across the country over the course of multiple years." *Id*. Respondents are corporations; Defendants did not follow, alarm, or threaten the corporations, nor their employees. Defendants were sometimes guests, sometimes hosts of PP's staff, and the investigation itself never placed anyone in fear of physical harm. Indeed, the success of Defendants' investigation depended on making PP's personnel feel very comfortable around them.

PPFA was the only respondent awarded "infiltration damages," i.e., the costs of increased vetting for conferences. Defendants met with PPFA's Senior Director of Medical Services, who was so enthusiastic about Defendants' purported business that she encouraged them to attend PPFA conferences. C.A. ER-1901, 1942:3-5. Daleiden did so, and PPFA willingly accepted almost ten thousand dollars from BioMax to allow Defendants to attend their conferences. C.A. ER- 2952, 2987, 2997.

Defendants did not "stalk" anyone. They invited people to lunch and wangled invitations to three PPFA conferences and two clinics. A wangled invitation is still an invitation, not stalking.

C. Restatement (Second) of Torts, §930.

PP's final example of "similar" circumstances is "cases concern[ing] continuing or recurring

trespasses." BIO 19. But PP cites no cases. It provides only a partial quotation from a section of the Restatement (Second) of Torts. *Id*. The full quotation, with PP's omission in italics, states:

> If one causes continuing or recurrent tortious invasions on the land of another *by the maintenance of a structure or acts or operations not on the land of the other* and it appears that the invasions will continue indefinitely, . . .

Restatement (Second) of Torts, §930(a).

The language omitted by PP makes the inapplicability of the section evident. Section 930 concerns continuing or recurring invasions on *the land*, not the rented hotel conference areas, of another. It concerns invasions caused by structures, acts, or operations *not* on that land. Indeed, according to the original Restatement, those structures, acts, or operations must be on the defendant's "own land."[5] This section concerns "comparatively enduring" situations "of a substantial and last character" causing "depreciation in the value" of the land invaded. *Id*. at §930(2) and cmt. b. Accordingly, under certain conditions there could be an award of the "reasonable cost to the plaintiff of avoiding future invasions" because such expenditures are a form of mitigation of damages to the land. *See, e.g*., *Jackson v. Keane*, 502 So. 2d 1185, 1188 (Miss. 1987) ("We agree with the general rule that a landowner can recover *reasonable* and *necessary* expenses incurred in an attempt to prevent future damages, so long as

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[5] "Where, by the maintenance of a structure *on his own land or by acts and operations thereon*, a person causes continuing or recurrent tortious invasions of the land of another . . ." Restatement of Torts, §930(a) (emphasis added).

those expenses do not exceed the diminution in value the property would suffer if the preventive measures are not undertaken.").

It is not surprising that PP did not cite a single case illustrating this supposed "traditional common law remedy." BIO 19. The facts of any actual cases employing §930 would show how utterly dissimilar they are to the facts in this case. Section 930 has no application to two people congregating with hundreds of others at occasional conferences held in rented hotel spaces.

PP has now made its position on Rhomberg's trespass hypothetical clear. Pet. 4, 21-22. PP believes that if Abel crosses Baker's lawn a few times, Baker can sue for trespass and, arguing that the trespasses by Abel or his friends would recur "indefinitely," recover from Abel the cost of building a fence.

This is not the law. Were plaintiffs allowed to recover the costs of security measures to prevent future recurrences of past tortious conduct, there would be a plethora of cases where defendants challenged the reasonableness of such awards– just as there are a plethora of cases challenging the reasonableness of awards for compensation for genuine injuries. But Planned Parenthood could not find *a single case* even discussing an award for prophylactic security measures under any common law theory.

IV. Summary Reversal Is Appropriate.

As is clear from the foregoing, granting summary reversal in this case would not require this Court to "abrogate these three whole categories of cases or carefully distinguish them." BIO 22. Should this

Court reverse the judgment in this case because of the lack of any compensable RICO damages, there would be no effect on damages under CFAA, on state criminal restitution statutes, or on the Restatement's commentary concerning damages for enduring trespasses and nuisances originating on the land of another.

Not surprisingly, Respondents assert that summary reversal is not appropriate here because the lower court was correct. BIO 21-24. Beyond that, however, they claim that the lower court did not disagree with any settled legal principle; "it simply found that the infiltration damages were fully consistent with those principles." BIO 22, 24.

In fact, the panel did not iterate *any* settled principle justifying the award of compensatory "damages" here. Instead, in its *precedential* opinion, it affirmed a judgment of damages to unharmed plaintiffs, awarded entirely for the purpose of "preventing a future similar intrusion" and "protecting" from future harms. *Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1132 (9th Cir. 2022) (App. 18). In so doing, it violated settled tenets of the law of remedies (Pet. 18-20) and created a vast new area of potential liability under RICO, tort, and contract law.

PP's claims should never have been allowed to proceed in federal court. These invalid "damages" claims provided an excuse to admit indisputably inflammatory testimony about what security upgrades were "reasonable" in light of the "history of anti-abortion violence and extremism," tainting the entire trial. Pet. 12-13.

CONCLUSION

This Court should grant Rhomberg's petition, summarily reverse the judgment below, and remand with directions to enter judgment for Defendants on the RICO claim and dismiss the case from federal court.

Respectfully submitted,

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