No. _____

In the Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; and DAVID DALEIDEN,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Thomas Brejcha
Peter Breen
THOMAS MORE SOCIETY
309 W. Washington,
Suite 1250
Chicago, IL 60606
(312) 782-1680

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Rd.
South Suite 250
Austin, TX 78746
(512) 399-3022

Harmeet K. Dhillon
Mark P. Meuser
DHILLON LAW GROUP
177 Post Street, Ste. 700
San Francisco, CA 94108
(415) 577-2850

Jeffrey M. Harris
Counsel of Record
James F. Hasson
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9938

Attorneys for Petitioners

May 30, 2023

QUESTION PRESENTED

The circuit courts are divided over when the First Amendment protects defendants against tort claims arising out of speech or expression. In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) this Court applied First Amendment scrutiny to intentional infliction of emotional distress claims premised on the defendant's speech. *Id.* at 52-53. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), however, the Court stated that "generally 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 669.

The lower courts have struggled to reconcile *Hustler* and *Cowles*, leading to acknowledged division about when parties may be held liable in tort for speech or expression that has not been shown to be false. The question presented is: Does First Amendment scrutiny apply when a plaintiff's claim for damages is based on a defendant's public speech, even if a plaintiff sues under a law of general application or attempts through creative pleading to recharacterize publication damages as something else?

PARTIES TO THE PROCEEDING

Petitioners are Center for Medical Progress, BioMax Procurement Services, LLC, and David Daleiden. Petitioners were the defendants below.

Respondents are Planned Parenthood Federation of America, Inc.; Planned Parenthood: Shasta-Diablo, Inc., d/b/a Planned Parenthood Northern California; Planned Parenthood Mar Monte, Inc.; Planned Parenthood of the Pacific Southwest; Planned Parenthood of Los Angeles; Planned Parenthood of Orange and San Bernardino Counties, Inc; Planned Parenthood of 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. These respondents were plaintiffs below.

Respondents also include National Abortion Federation, an intervenor below.

Respondents also include Troy Newman, Albin Rhomberg, Sandra Susan Merritt, and Gerardo Adrian Lopez, who were Petitioners' co-defendants below.

RULE 29.6 STATEMENT

Petitioners Center for Medical Progress and BioMax Procurement Services, LLC have no parent company or publicly held company with a 10% or greater ownership interest in them.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al., No. 3:16-cv-236-WHO (Aug. 23, 2019) (order granting in part and denying in part cross-motion for summary judgment)

Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al., No. 3:16-cv-236-WHO (April 29, 2020) (final judgment)

United States Court of Appeals (9th Cir.):

In re: Center for Medical Progress, et al., No. 17-73313 (April 30, 2018) (order)

Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al., No. 16-16997 (May 16, 2018) (opinion), *amended*, (August 1, 2018)

Planned Parenthood Federation of America, Inc., et al. v. Newman, et al., No. 20-16068 (consolidated with Nos. 20-16070, 20-16773, 20-16820) (Oct. 21, 2022) (opinion)

Planned Parenthood Federation of America, Inc., et al. v. Newman, et al., No. 20-16068 (*consolidated with* Nos. 20-16070, 20-16773, 20-16820) (Oct. 21, 2022) (memorandum)

Planned Parenthood Federation of America, Inc., et al. v. Newman, et al., No. 20-16068

(*consolidated with* Nos. 20-16070, 20-16773, 20-16820) (Mar. 1, 2023) (denying petitions for rehearing)

Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al., No. 21-15124 (pending appeal of attorney's fee award)

United States Supreme Court:

Center for Medical Progress, et al. v. Planned Parenthood Federation of America, Inc., et al., No. 18-696 (May 16, 2018) (denying certiorari)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTRODUCTION

"As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Thus, tort claims alleging injuries from the publication of protected speech can prevail only if they satisfy the material falsehood and "actual malice" standard established by *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988). Because the First Amendment's protection of the "free flow of information to the people" is "paramount," these requirements are rigid and inflexible. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). And they continue to apply even when a law can cover speech and conduct alike. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

This case arises from Petitioners' investigation of illegal and unethical conduct in the abortion industry. Petitioners' publication of recorded conversations with industry executives sparked national debate, widespread policy changes, and criminal prosecutions. Confronted with a public-relations nightmare, plaintiffs-Respondents Planned Parenthood Federation of America and its affiliates (collectively, "PPFA") responded by taking Petitioners to court, alleging fourteen common-law and statutory claims (but not defamation), all of which sprang directly from Petitioners' reporting.

After ruling categorically that "[t]he First Amendment is not a defense" to *any* of PPFA's claims, 16-ER-

4274,[1] the district court entered judgment for more than $2 million against Petitioners and assessed nearly $14 million in attorney's fees, all for publishing speech of intense public interest that Respondents have never claimed is false. In short, the subjects of an undercover investigation into unlawful and unethical conduct converted the public-relations fallout from that reporting into so-called "economic damages" and then obtained a crippling $16 million judgment against the investigators, without ever alleging a defamation claim or contesting the truth of Petitioners' reporting.

This litigation has dragged out for nearly seven years and involves multiple co-defendants, but at bottom it involves core questions about how the First Amendment applies when plaintiffs seek tort damages based on a defendant's protected speech or expression. The Ninth Circuit decided that no First Amendment scrutiny whatsoever applies when a tort claimant purportedly seeks only non-reputational "economic damages," or when the claim is based on a "generally applicable" law, but other circuits have reached the opposite conclusion. This Court should grant certiorari to resolve this division, answer these important questions, and reaffirm that any damage award premised on protected speech must satisfy First Amendment scrutiny.

---

[1] The citations that begin with a number and "ER" refer to the Excerpts of Record produced for the consolidated appeals in this case to the Ninth Circuit, *Planned Parenthood Federation of America, Inc., et al., v. Center for Medical Progress, et al.* (No. 20-16068).

OPINIONS BELOW

The district court's judgment is available at App.28. The Ninth Circuit panel opinion affirming the judgment in part and reversing in part is published at 51 F.4th 1125 and reproduced at App.1. The Ninth Circuit order denying rehearing en banc is reproduced at App.255.

JURISDICTION

The district court's final judgment was entered on April 29, 2020. App.43. A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part on October 21, 2022, App.1, and a petition for rehearing en banc was denied on March 1, 2023. App.255. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. CMP investigates PPFA's fetal tissue sales and releases video recordings.

In 2010, David Daleiden learned troubling information that led him to suspect that the Planned Parenthood Federation of America and its affiliates were harvesting and selling fetal tissue from abortions, in violation of state and federal law. One of his sources was a hidden-camera investigation conducted by Chris Wallace and published by ABC *20/20*. *See* 10-ER-2723-24. Using a fictitious name and fake credentials, ABC journalists met with fetal tissue vendors in the abortion industry. Their three-month investigation revealed a host of illegal and unethical practices in the industry related to the sale of tissue from aborted babies.

At the time—when it was not the focus of the investigation—Planned Parenthood praised ABC's report and condemned the abortion provider who was its target. Gloria Feldt, then the president of Planned Parenthood, publicly stated, "Where there is wrongdoing, it should be prosecuted and the people who are doing that kind of thing should be brought to justice." ABC News 20/20, Press Release (Mar. 6, 2000), https://perma.cc/XX3Y-8BWB. Yet despite congressional hearings and investigations prompted by the report, there was no "justice" and no accountability for the misconduct ABC *20/20* had exposed.

Believing that additional investigation was necessary to reveal these abuses to the public, Daleiden created an investigative journalism project modeled on

the ABC report. In 2013, he formed the Center for Medical Progress ("CMP") to monitor and report on medical ethics, with a particular focus on the harvesting and sale of fetal tissue and fetal experimentation. CMP organized a limited liability company, naming it BioMax Procurement Services, to investigate the fetal tissue industry.

Over the following two years, Daleiden and other CMP members attended events held by Planned Parenthood and other major players in the abortion industry. Some of those events were trade shows hosted by the National Abortion Federation ("NAF"), a membership organization of abortion providers that counts PPFA as its most prominent member. While registering for these trade shows, Daleiden signed a one-page form contract that stated, among more than a dozen other clauses relating to the exhibition during the trade show, that participants would not reveal unspecified "confidential information" that NAF "may furnish" during the trade shows. 26-ER-6844. Upon arrival at the events, Petitioners were required to sign additional, non-specific NDAs. 26-ER-6843.

Outside of these trade shows, Daleiden and other CMP members also met with PPFA executives and other members of the abortion industry. They toured PPFA-affiliated facilities in Texas and Colorado. Consistent with local laws—including exceptions to generally applicable secret-recording prohibitions for conversations that are easily overheard in public settings, or that contain evidence of illegal activity—Daleiden and others documented these meetings using

concealed cameras. 10-ER-02659, 11-ER-2929, 11-ER-3019, 11-ER-3034-38.

CMP's techniques—the use of assumed names, a shell company, and hidden cameras—were nearly identical to those used by the ABC *20/20* team. Indeed, their undercover investigation was no different from countless others by journalists in many fields. *See, e.g.*, Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 10 (2012) ("Since at least the early 1960s, as technology began to allow, scores of television series and segments have relied on the hidden camera…. Newspaper reporters also have used miniature cameras even well before the advent of television.").

B. CMP's published recordings spark nationwide debate and government action.

Beginning in July 2015, CMP began releasing videos of its encounters with PPFA and other members of the abortion industry. Each week, CMP published footage of the full conversations, as well as shorter "highlight" videos of the most salient excerpts. In addition, Daleiden and his team provided their findings to law enforcement before publication.

The videos garnered immediate nationwide attention. They were widely recognized as exposing illegal or unethical activity among the nation's largest and most prominent abortion providers. Congress took notice. The Senate Judiciary Committee published a report crediting "[t]he CMP videos" as "the impetus for the Committee's investigation." Staff of S. Comm. on the Judiciary, 114th Cong., *Human Fetal Tissue*

Research: Context and Controversy 28 (Comm. Print 2016), *available at* https://perma.cc/3V6D-9R8N. The House of Representatives, too, formed a Special Investigative Panel to probe the conduct exposed in CMP's reporting. U.S. House of Representatives, Select Investigative Panel of the Energy & Commerce Committee, *Final Report* (Dec. 30, 2016), *available at* https://perma.cc/HR9E-DRBP. That panel made fifteen criminal and regulatory referrals, resulting in successful prosecutions in Arizona and Orange County, California. *Id.* at 33-135; Brief of State Attorneys General, at 7-9, *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress*, 51 F.4th 1125 (9th Cir. 2022) (No. 20-16068) ("Attys.Gen.Br.").

CMP's reports also prompted action at the state level. Several states terminated Planned Parenthood affiliates' enrollment as Medicaid providers. *See, e.g.*, *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc) (upholding Texas decision to block Planned Parenthood's participation in state Medicaid program, based in part on CMP videos). Although Planned Parenthood claimed the videos were heavily edited and misleading, the Fifth Circuit pointedly noted that Planned Parenthood "did not identify any particular omission or addition in the video footage" in its filings. *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc v. Smith*, 913 F.3d 551, 559 & n.6 (5th Cir. 2019), *rev'd on other grounds*, 981 F.3d 347; *see id.* (noting that "[Texas] OIG had submitted a report from a forensic firm concluding that the video was authentic and not deceptively edited").

PPFA learned about CMP's undercover investigation at the same time as the rest of the country. After CMP began publishing its videos—the veracity of which has not been challenged here—PPFA engaged in a spending spree to try to stem the public relations fallout. Its first order of business was to "prevent further" undercover investigations of its fetal tissue operations and thwart anyone else from successfully mimicking CMP's tactics. Appellees' Brief at 57, *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress*, 51 F.4th 1125 (9th Cir. 2022) (No. 20-16068). To accomplish this goal, PPFA contracted with outside vendors to expand vetting procedures for visitors and conference attendees, upgraded the badging system for access to its facilities, hired more security guards, and increased its "monitoring" operations. *Id.* Eliminating follow-on investigations was only one reason for the expenditures, however. "[M]ore broadly," PPFA's purpose for assuming these costs was "to restore … participants' 'confidence' and 'sense of trust and faith' in PPFA's conferences" and operations. *Id.*

It is undisputed that PPFA took these actions only after the videos were released and that it has never claimed that it would have undertaken those expenditures otherwise. As the district court later conceded, "none of the damages sought were incurred prior to publication of the videos." App.62 & n.11.

C. PPFA sues for alleged damages from CMP's reporting.

1. On January 14, 2016, PPFA filed a fourteen-count complaint against CMP, seeking damages based on CMP's investigation and subsequent publication of

its findings. The causes of action PPFA alleged arose under common law as well as both state and federal statutes, but all fourteen claims were based on the same set of underlying facts: CMP's undercover investigation of PPFA and its affiliates' fetal-tissue sales and publication of videos documenting its interactions with PPFA employees. PPFA alleged that these purported violations were part of a "smear campaign" designed to "demonize Planned Parenthood" in the eyes of the public. 11-ER-6660.

To avoid the obvious implication that it was suing over CMP's speech, PPFA euphemistically labeled its losses as "infiltration damages" and "security damages." App.18. It categorized "infiltration damages" as costs incurred by PPFA and its affiliates to prevent follow-on investigations (by CMP or others) using the same techniques. App.18, 84. PPFA's purported "infiltration damages" included the expense of assessment of PPFA's existing security measures, improvements to PPFA's vetting of visitors and conference attendees, additional conference security guards, and upgraded badging and identification systems at conferences. App.18. And it categorized "security damages" as costs incurred to protect its employees from future recording by Petitioners or other investigators, as well as all expenses allegedly incurred to protect itself from security threats from individuals angered by the contents of the videos. *Id.* These labels, PPFA argued, distinguished their claimed relief from the sort of "publication damages" barred by the First Amendment. App.22.

PPFA never alleged that CMP caused any damage to its property. In PPFA's own words, it sought to recover for "financial losses … stemming from Defendants' campaign of lies," harm to its "brand," and a loss of public "trust" and "confidence" due to the videos. 25-ER-6629, 6672; 13-ER-3601-02; 18-ER-4810, 4816. The complaint contains a list of grievances that are inextricably intertwined with CMP's decision to publish videos detailing the results of its investigation. *See, e.g.*, 25-ER-6679 (PPFA was "forced to divert resources to combat Defendants' misrepresentations in intentionally distorted videos"); *see also* 25-ER-6662 ("The reaction to this inflammatory and misleading video was immediate."); 25-ER-6666 ("After the release of Defendants' videos[,] there was a dramatic increase in the threats, harassment, and criminal activities targeting abortion providers …."). Thus, even though PPFA "fail[ed] to file a defamation claim," App.65, it sought substantial "damages" to reimburse it for expenses it voluntarily incurred to prevent similar investigative reports by others in the future, and to address the *public's* perceived response to the video.

On summary judgment, the district court held that PPFA could seek, as "compensable damages," App.46, costs PPFA incurred arising out of defendants' investigation. The district court did acknowledge that the First Amendment barred "reputational or publication damages." App.68. It therefore excluded third-party harms—such as an unrelated hacking of PPFA's website—from recovery, along with the costs of security for facilities and employees with no connection to CMP's investigation. App.70. Yet the court held that some costs, even though they were the result of

CMP's publishing, were permissible "economic damages." These included "costs to investigate the intrusions and to implement access-security measures … to prevent future surreptitious intrusions," as well as "personal security costs for staff" whom defendants "intentionally recorded." App.69. As long as these costs resulted "from the *direct* acts of defendants," and not "the acts of third parties who were motivated by the contents of the videos," the court would permit PPFA to claim them as damages. App.68-69.

Based on this flawed distinction, which treated PPFA's expenditures as unrelated to CMP's public reporting, the district court allowed the case to proceed to a six-week jury trial. During the trial, the court repeatedly downplayed the First Amendment implications of PPFA's claims. After closing arguments, the court instructed the jurors that free speech considerations were legally irrelevant to the issues before them. See 16-ER-4274 ("The First Amendment is not a defense to the claims in this case for the jury to consider."). The jury found for PPFA on all its claims. 18-ER-4876.

Having brushed aside CMP's First Amendment defenses, the district court awarded PPFA $366,873 in "infiltration damages," $101,048 in "security damages," and nearly $2 million in punitive damages. App.18. On top of these "compensatory damages" based on CMP's reports on PPFA's own undisputed words and actions, the district court awarded PPFA more than $13.7 million in attorneys' fees and costs. *See Parenthood Fed'n of Am., Inc. v. Ctr. for Med.*

Progress, 2020 WL 7626410 (N.D. Cal. Dec. 22, 2020).[2] In all, the district court entered a $16 million judgment against CMP—all for using the same undercover techniques journalists have used for 150 years and publishing speech that PPFA never alleged was false. *See* Brief of Amici Curiae Free Speech Scholars and Animal-Advocacy Organizations at 5-8, *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress*, 51 F.4th 1125 (9th Cir. 2022) (No. 20-16068) ("Animal.Advocacy.Orgs.Br.").

2. CMP timely appealed. A coalition of First Amendment scholars and animal-advocacy groups, including People for the Ethical Treatment of Animals, wrote as *amici* to warn that the district court's rulings, by ignoring "First Amendment limits on recoverable damages" in civil claims, threatened to "chill[ ] undercover newsgathering and the investigative reporting reliant upon it." *Id.* at 2-3. This chilling effect, in turn, would quash the type of stories that historically have been "integral to public discourse and the resulting social legislative change." *Id.* at 2. Twenty state attorneys general also weighed in on CMP's behalf. The states argued that the district court judgment would chill "law enforcement access to evidence of wrongdoing," if allowed to stand. Attys.Gen.Br., at 2.

Nevertheless, the Ninth Circuit declined to meaningfully address the profound First Amendment implications of this case. It adopted the district court's

[2] The district court also awarded statutory damages under the Federal Wiretap Act, 18 U.S.C. §2511(2)(d), which the Ninth Circuit reversed and vacated on appeal. App.27.

analysis wholesale, disposing of the First Amendment issues in just a few pages. *See* App.19-23. As a threshold matter, the court upheld the district court's refusal to apply any First Amendment scrutiny because "the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." App.21. It further specified that First Amendment protections do not apply when a predicate tort law is not "aimed specifically at journalists or those holding a particular viewpoint." *Id.*

The court then held that PPFA's so-called "infiltration and security damages" were not "impermissible publication damages," because the harms PPFA allegedly suffered from the publication of CMP's videos were "economic" in nature, rather than "the reputational or emotional damages sought in *Hustler*." App.22. In other words, the panel refused to look past PPFA's self-serving description of the relief it sought. *But see Compuware Corp. v. Moody's Invs. Servs., Inc.*, 499 F.3d 520, 532 (6th Cir. 2007) ("Despite Compuware's attempt to avoid the actual-malice standard by clothing its requested relief in the contractual garb of rescission, we must look beyond the damages sought by the plaintiff to the injuries actually sustained."); *Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union*, 585 F. Supp. 2d 815, 820 (E.D. Va. 2008) ("[T]he label of the claim is not dispositive of the standard of proof for damages.").

In short, the Ninth Circuit affirmed the district court's multimillion-dollar judgment against CMP for "damages" that directly and exclusively flowed from CMP's investigative report about a high-profile issue

of national debate—without *ever* finding the report to be false. CMP petitioned for en banc review, but the petition was denied on March 1, 2023. App.255-58.

Just days before the en banc court denied CMP's petition, the Fourth Circuit considered the same legal questions presented here and disagreed with the Ninth Circuit panel's approach. *See People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023) ("*PETA*"), *petitions for cert. filed*, Nos. 22-1148 & 22-1150 (May 24, 2023). The majority in *PETA* held that First Amendment scrutiny is appropriate whenever state action seeks to punish expressive activity, even if a predicate law applies to journalists and non-journalists alike. The *PETA* majority relied on many of the same precedents cited by CMP in its appellate briefs. *Compare* Petition for Panel Rehearing and Rehearing En Banc of the Center for Medical Progress, *et al.*, at 9, *Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress*, 51 F.4th 1125 (9th Cir. 2022) (No. 20-16068), *with PETA*, 60 F.4th at 825-28. The dissent, on the other hand, favorably cited the Ninth Circuit's decision in this case, while acknowledging that appellate courts have adopted different approaches to this issue. *See* 90 F.4th at 844-45 (Rushing, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court may grant certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). The Court's intervention is particularly critical when the lower courts are "confounded" by conflicting

precedent and the ensuing confusion "render[s] the constitutionality" of First Amendment activities "anyone's guess." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari).

Here, the courts of appeals are openly divided about how to reconcile the precedents set forth by this Court in *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Under the current state of the law, the residents of thirteen states can be subject to ruinous damages for publishing truthful content; the residents of eleven states can publish exactly the same content with full confidence in their First Amendment protections; and the residents of the remaining twenty-six states are forced to guess which approach federal courts may take if they are haled into court.

This Court should grant certiorari and confirm that the First Amendment applies whenever a defendant's speech is the but-for cause of the plaintiff's purported damages, and that the First Amendment does not become irrelevant simply because a plaintiff sues under a law that could also be applied to unprotected conduct in other circumstances.

I. This Court's intervention is necessary to resolve acknowledged division among the circuit courts over when the First Amendment protects against publication damages.

The fundamental issue in this case is straightforward. *Hustler* held that plaintiffs cannot conduct an

end-run around the First Amendment by creatively relabeling tort claims predicated upon on a defendant's protected speech. 485 U.S. at 50. Three years later, in *Cowles*, the Court made what should have been an uncontroversial observation that members of the media do not have "special immunity from the application of general laws." 501 U.S. at 670. Nowhere in *Cowles* did the Court say that First Amendment safeguards do not apply when a law applies generally to all members of society—as most laws do—or that speech suddenly loses its constitutional protection simply because a law might also be applied to prohibitable conduct. Nevertheless, the lower courts have divided over the proper interpretation of these cases and are split on two closely related issues of First Amendment doctrine as a result.

A. The Ninth Circuit split with three other circuits by assessing the constitutionality of publication damages based on the plaintiff's self-serving description of its injuries instead of their but-for cause.

The definition of "publication damages" is intuitive and straightforward—they are damages that would not occur but for the publication of protected speech, including the public's reaction (foreseeable or otherwise) to that speech. *See, e.g.*, *Snyder v. Phelps,* 562 U.S. 443, 457 (2011) (affirming reversal of jury award because "[i]t was *what [Defendant] said* that exposed it to tort damages." (emphasis added)); *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 194 F.3d 505, 522 (4th Cir. 1999); *La Luna Enters., Inc. v. CBS Corp.,* 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999). In *Hustler*, this Court clarified that any claim for

publication damages—*regardless of the cause of action*—must satisfy the same First Amendment standard that applies to libel or defamation claims. 485 U.S. at 50. Indeed, "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical" of public figures. *Id.* at 51.

Citing *Hustler*, courts have repeatedly rejected plaintiffs' self-serving attempts to recast publication damages as damages for garden-variety torts. At least three circuits have expressly held that whether a plaintiff seeks publication damages is dictated by the nature of his alleged injuries, not by how he labels those injuries or by the causes of action he chooses to plead. In *Compuware*, for example, the Sixth Circuit explained that "[t]he Supreme Court and our sister circuits have not hesitated" to apply First Amendment scrutiny when a claim is "based on the same conduct or statements that underlie a pendant defamation claim." 499 F.3d at 532. Courts "must look beyond the damages sought by the plaintiff to the injuries actually sustained." *Id.* Accordingly, the Sixth Circuit rejected the plaintiff's "backdoor attempt to assert a defamation claim without the additional burden of satisfying the demanding actual-malice standard." *Id.* at 533; *see also id.* at 533 ("[R]egardless of how Compuware phrases the relief sought, its only injuries …

result[ ] from Moody's publication of protected speech.").[3]

The Fourth Circuit has also rebuffed plaintiffs' attempts "to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts." *Food Lion*, 194 F.3d at 522. The panel in *Food Lion* properly distinguished *Cowles* on the ground that the Court's opinion there did not authorize damages stemming from "some form of expression." *Id.* The Eighth Circuit has likewise held that "[a] plaintiff may not avoid the protection afforded by the Constitution … merely by the use of creative pleading." *Beverly Hills Foodland, Inc. v. United Food and Com. Workers Union, Local 655,* 39 F.3d 191, 196 (8th Cir. 1994).

Here, though, the district court adopted—and the Ninth Circuit affirmed—the opposite approach. PPFA sought damages for "financial losses" allegedly caused by Petitioners' "campaign of lies." 25-ER-6672. PPFA

---

[3] This petition raises the "undeniably important" issue of when monetary awards must pass First Amendment scrutiny. *McKesson v. Doe*, 141 S. Ct. 48, 50 (2020). The lower courts held that the First Amendment did not apply *at all* because Respondents characterized their damages as "economic" and sued under "generally applicable" tort laws. This Court should review and reverse that holding but it need not delve into the specific standard of First Amendment scrutiny that would apply to speech-related damages, whether falsity, actual malice, or something else. Because Respondents' claims arose out of Petitioners' core protected speech and there was never an allegation (much less proof) of falsity, the imposition of damages should have been barred by the First Amendment under any conceivable standard of review.

did not bring a defamation claim, surely because it would have been unable to show that Petitioners' recordings were false. PPFA filed fourteen tort claims based on CMP's undercover investigation and release of its videos, but—despite its rhetoric about CMP's "malicious lies," 25-ER-6680—defamation was not one of them. At trial, PPFA conceded that its purported "damages" included voluntary expenditures designed to "restore" the public's "sense of trust" and "confidence" in its activities. 13-ER-3601-02; *but see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

The district court acknowledged in passing this Court's precedents regarding publication damages but then promptly ignored this Court's definition of that term. According to the district court, PPFA's purported damages—which, as the court itself conceded, occurred only after the "publication of the videos," App.62 & n.11—did not "stem[ ] from publication of the videos" because damages "that result[ ] from *defendants'* own actions are not barred by the First Amendment." App.100.

At bottom, the district court characterized damages allegedly caused by the acts of third parties who reacted to the videos as "publication damages," but all other damages—regardless of their nature—as permissible "economic damages." The court reached that holding even though those "economic damages" (including voluntary, forward-looking expenditures such as "costs … to implement access-security measures")

never would have occurred if Petitioners had not released their footage. *See* App.69. Indeed, many of the claimed expenditures were meant precisely to "prevent future surreptitious intrusions" for the same kind of newsgathering. *Id.*[4]

A slight tweak in the facts reveals the absurdity of the district court's approach. If Daleiden had executed the same investigative playbook—attending National Abortion Federation trade shows, meeting with PPFA executives, and touring PPFA facilities—but simply transcribed his conversations with pencil and paper and returned home without telling a soul, PPFA's request for damages to prevent future parties from doing likewise would be laughable. And any request for "personal security expenses" to protect against alleged third-party threats would likewise be a non-starter. Put differently, PPFA's claims for damages were allowed to proceed to trial only because Daleiden chose to *publish his findings* for *public consumption*, rather than keep them to himself. That is the *sine qua non* of publication damages.

---

[4] The district court's failure to categorize PPFA's purported "damages" based on their originating cause was constitutional error on its own, even if the district court had adhered to its own flawed standards. *See Compuware*, 499 F.3d at 532; *Food Lion*, 194 F.3d at 522-23; *Beverly Hills Foodland*, 39 F.3d at 196. But the district court did not even honor its novel "third-party reaction" standard. For example, it authorized damages for "personal security costs" PPFA ostensibly incurred to protect certain employees depicted in the recordings from non-specific "threats" posed by unidentified third parties who watched CMP's videos. App.69.

The Ninth Circuit affirmed the district court's approach with little additional analysis. The panel held that "the facts before [it]" were "distinguishable from *Hustler Magazine*," because "[t]he jury awarded damages for economic harms suffered by Planned Parenthood, not the reputational or emotional damages sought in *Hustler*." App.22. That conclusory statement was the sum total of the court's analysis. The court's opinion does not explain *why* PPFA's damages were "economic," other than the fact that PPFA told the court that they were.

Moreover, the Ninth Circuit's approach contains no limiting principle. It is not enough to merely declare that damages are recoverable because they are "economic." Every claim for damages is "economic" in that it seeks monetary compensation to recover the value of what the plaintiff allegedly lost. *Cf.* Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 Ga. L. Rev. 1087, 1123-24 (2001) ("One of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses. Such damages are not distinguishable from the damages caused by the harm to reputation but rather flow directly from the loss in reputation."); Douglas Laycock, *The Death of the Irreparable Injury Rule* 43 (1991). Centuries of common-law jurisprudence have relied on that basic feature to distinguish legal relief from equitable relief. Laycock, *supra*, at 43. In *Cowles*, for example, the Court declined to apply First Amendment scrutiny to damages that bore no relation to speech. *Cf.* 501 U.S. at 671 (distinguishing plaintiff's claim from other claims where parties attempt to use state-law torts "to avoid the strict

requirements for establishing a libel or defamation claim"). The Ninth Circuit may not coopt the phrase "economic damages" to describe its own, amorphous standard for imposing liability premised on publication notwithstanding the First Amendment.

The Ninth Circuit compounded its legal errors by attempting to distinguish between the *creation* of speech and the *publication* of speech—*i.e.*, between Petitioners' act of *filming* their videos and their act of *releasing* them. App.22-23. This Court and every other appellate court to address this issue have expressly rejected any such distinction. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected.").

To that end, the panel was correct that its opinion differed from this Court's opinion in *Hustler*—but perhaps not in the way it intended. In *Hustler*, this Court held that plaintiffs cannot use creative causes of action to evade the First Amendment's protections of speech and expression. Here, the Ninth Circuit held the opposite and split with three other circuit courts in the process.

B. The circuits are also divided on the closely related question of whether First Amendment scrutiny applies to "generally applicable" tort claims that may apply to speech and conduct alike.

The circuits are also divided over the closely related question of whether First Amendment protections apply to expressive activity that is punishable under "generally applicable" laws that apply to both speech and conduct alike. Two circuits have held that it does; two others have held that it does not. These decisions apply different legal standards to materially similar facts, based on divergent interpretations of this Court's decisions in *Hustler* and *Cowles*. And this division of authority implicates the same fundamental questions discussed above, namely when and how the First Amendment protects speakers against tort claims arising out of their publication of speech.

This Court has repeatedly recognized that any attempt to punish protected speech is subject to the constraints of the First Amendment. *See, e.g.*, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (clarifying that speakers—press or not—can raise as defense the fact that antitrust laws are being applied to them *because of their speech).* In *Cohen*, for example, this Court vacated the conviction of an anti-war protestor who was charged with violating a generally applicable law against disturbing the peace, because "the generally applicable law was directed at Cohen because of what his speech communicated." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (discussing *Cohen*); *see also Cantwell v. Connecticut*, 310

U.S. 296, 308-09 (1940) (reversing conviction under breach-of-peace statute that generally applied to "a great variety of conduct" because alleged offense was due to "the effect of [the speaker's] communication upon his hearers"). Even where a law "may be described as directed at conduct," the First Amendment applies whenever "the conduct triggering coverage of the statute consists of communicating a message." *Holder*, 561 U.S. at 28.

Holder, *Cantwell*, and *Cohen* involved generally applicable criminal laws, but this Court has taken the same approach to tort claims predicated upon publication. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that invasion of privacy claims must satisfy First Amendment defamation standards when they are based on a defendant's otherwise protected speech. *Id.* at 387-88. In *NAACP v. Claiborne Hardware Co.*, the plaintiffs accused the defendants of tortious interference with business relations, based on the Defendants' public advocacy for a boycott of several businesses. 458 U.S. at 891, 909-10. The trial court awarded (and the Mississippi Supreme Court affirmed) compensatory damages for "lost business earnings" caused by the boycott and for harms inflicted by members of the public who, incensed by the revelations in defendants' speeches, allegedly intimidated other customers into avoiding the plaintiffs' stores. *Id.* at 893-94. This Court reversed because the plaintiffs' economic damages flowed solely from the defendant's speech. *Id.* at 926-29. The Court reiterated that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of

nonviolent, protected activity." *Id.* at 918. That the law in question was generally applicable made no difference.

Moreover, this Court recently reiterated that when constitutionally protected speech and alleged tort occur in close succession, the First Amendment "mandates 'precision of regulation' with respect to 'the grounds that may give rise to damages liability.'" *McKesson v. Doe*, 141 S. Ct. 48, 50 (2020) (per curiam) (quoting *Claiborne*, 458 U.S. at 916-17). In *McKesson*, the Fifth Circuit held that "the First Amendment impose[d] no barrier to tort liability" against an activist, based solely on the actions of a third party "whose only association with him was attendance at [his] protest." *Id.* Although this Court ultimately vacated that decision on unrelated state-law grounds and remanded with instructions to certify a question to the Louisiana Supreme Court, it pointedly noted that the question presented, regarding the permissible scope of tort liability for speech-related harms, was "undeniably important" and "fraught with implications for First Amendment rights." *Id.* at 50-51; *cf.* 16-ER-4274 ("The First Amendment is not a defense to the claims in this case for the jury to consider.").

So, too, in *Hustler*. There, the jury rejected the plaintiff's libel claim under the standard articulated by this Court in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), but awarded the plaintiff a six-figure judgment for intentional infliction of emotional distress—a generally applicable tort—under the same facts. *Hustler*, 485 U.S. at 49. As in this case, the

district court denied the defendant's motion for judgment as a matter of law, and the court of appeals affirmed. *Id.* This Court reversed, holding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications … without showing in addition that the publication contains a false statement of fact." *Id.* at 56. The decision reflected the Court's "considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*; *see also Phelps,* 562 U.S. at 459-60 (applying heightened First Amendment standard to claims for intentional infliction of emotional distress and intrusion on seclusion—both of which are generally applicable torts).

In *Cowles*, the plaintiff leaked information about a political campaign to two newspapers in exchange for promises of anonymity, but the newspapers identified the plaintiff as the source of the information anyway. 501 U.S. at 665-66. The plaintiff was promptly fired, and subsequently sued the newspapers under state law for damages stemming from their breach of promises. *Id.* at 666. In a brief opinion, this Court held that the plaintiff could recover damages because "generally applicable laws do not violate the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Importantly, the Court then listed the substantive law at issue—promissory estoppel—alongside a series of other laws that are enforceable against the press but do not burden expression. *See id.* (listing the

National Labor Relations Act, compliance with subpoenas, the Fair Labor Standards Act, various tax laws, and similar statutes). Prohibitions on defamation and other publication-based injuries are conspicuously absent from this list. *Cowles* thus stands for the straightforward and unremarkable proposition that, although the First Amendment provides ample protections for the *publication* of truthful content, it does not give journalists license to disregard laws unrelated to publication or expression. *See id.* at 670.

The Court reinforced this principle in its subsequent decision in *Turner Broadcasting System, Inc. v. FCC*, when it held that "the enforcement of a generally applicable law *may or may not* be subject to heightened scrutiny under the First Amendment," depending on the law's particular application. *See* 512 U.S. 622, 640 (1994) (contrasting *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566-67 (1991), and *Cowles*, 501 U.S. at 670)). It then did so a second time in *Holder*, as explained above. *See supra*, at 23.

The Fourth Circuit's decisions in *Food Lion* and *PETA* accurately reflect this Court's jurisprudence. In both cases, the court rejected the notion that "[l]aws that implicate a variety of conduct … need not pass First Amendment scrutiny even when applied to speech." *PETA*, 60 F.4th at 825-26; *see also Food Lion*, 194 F.3d at 522-23 (similar). To the contrary, "a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it." *PETA*, 60 F.4th at 827. Because "[l]aws cast in broad terms can restrict speech as much as laws that single it out," *id.*, it makes no sense

to limit First Amendment safeguards to laws that are "aimed specifically at journalists or those holding a particular viewpoint," like the Ninth Circuit did here, *see* App.21. "*Applying* the First Amendment, of course, does not necessarily translate into invalidating a [judgment]; it only triggers the balancing inquiry" detailed in this Court's precedents. *PETA*, 60 F.4th at 827; *cf.* App.22 (characterizing First Amendment protections as a "special license to break laws").

The Tenth Circuit also got it right. In *Western Watersheds Project v. Michael*, the court held that a statute prohibiting individuals from crossing private land to collect resource data from adjacent public land was subject to First Amendment strictures. 869 F.3d 1189, 1195-96 (10th Cir. 2017). The court explained, as a threshold matter, that "[t]o determine if such provisions are subject to scrutiny under the First Amendment, the question is not whether trespassing is protected conduct, but whether the act of collecting resource data on public lands qualifies as protected speech." *Id.* at 1194; *see also Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1227-28 (10th Cir. 2021) (similar).

In the opinion below, however, the Ninth Circuit took a markedly different approach. The panel latched on to *Cowles*'s reference to "[g]enerally applicable laws" in isolation, without meaningful analysis of the opinion as whole. *See* App.19. Based on this misreading of *Cowles*, the panel rejected "[the] argument that, absent a showing of actual malice, all damages related to truthful publications are necessarily barred by the First Amendment." App.23. The court thus declined to

apply *any* First Amendment scrutiny because, in its view, "the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." App.21. It concluded that First Amendment protections were irrelevant to the multi-million-dollar damages judgment based on Petitioners' public statements, because Petitioners "ha[d] been held to the letter of the law, just like all other members of our society." App.22.

But if that reasoning were correct, it would have been equally true of the defendants in *Hustler*, *Claiborne Hardware*, and *Phelps*. None of those cases involved laws specifically targeting the press or any "particular viewpoint," and the claims in all three invoked "laws of general applicability" against the defendants. Yet in each case, the First Amendment required a higher standard before damages could be awarded. Contrary to the Ninth Circuit's reasoning, subjecting generally applicable laws to First Amendment scrutiny *when they are applied to expressive activities* does not provide journalists—or any other citizen[5]—a "special immunity from the application of general laws." App.20. Rather, it merely protects "the area of public debate," as the Framers intended. *Hustler*, 485 U.S. at 53.

The Ninth Circuit's opinion here simply cannot be squared with the Fourth Circuit's opinions in *Food Lion* and *PETA* or the Tenth Circuit's opinion in

[5] As the Court has recognized on several occasions, the First Amendment guarantee of freedom of the press extends to all citizens, regardless of formal media affiliations or job titles. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

Western Watersheds Project. *See PETA*, 60 F.4th at 844-45 (Rushing, J., dissenting) (recognizing conflict between majority opinion and the Ninth Circuit's decision here). Indeed, the court eschewed any pretense of reconciling its opinion with *Food Lion* or *Western Watersheds*. Instead, it relied on the First Circuit's reasoning in *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 127-29 (1st Cir. 2000) (rejecting First Amendment scrutiny of "generally applicable" laws, "even when the information being disseminated is truthful," as a form of "general immunity from tort liability"). In the process, it merely deepened the extant circuit split.

In short, the courts of appeals have struggled to apply this Court's First Amendment jurisprudence to "generally applicable" tort claims involving the publication of protected speech. At a minimum, the Court should grant certiorari to clarify when courts should apply *Hustler* and when they should apply *Cowles*. Uncertainty about the precise standard to apply to non-defamation tort claims premised on a defendant's speech permeates nearly three decades of lower court decisions following *Cowles*.

In *Food Lion*, for instance, the Fourth Circuit lamented the "tension between the approaches" prescribed by *Hustler* and *Cowles*. 194 F.3d at 521-22. More recently, the Fourth Circuit questioned whether *Cowles* remains good law *at all* in light of this Court's subsequent decision in *Holder*. *See PETA*, 60 F.4th at 826-27 (rejecting interpretation of "*Cowles* to mean that generally applicable laws may escape the First Amendment" as "not quite right, even assuming we

could set *Humanitarian Law Project* aside"). Likewise, the Sixth Circuit, grappling with *Hustler* and *Cowles*'s applications to a breach of contract claim based on a defendant's public statements, lamented that "the only published precedent on this issue comes from a California bankruptcy court." *Compuware*, 499 F.3d at 530.

District courts, too, have acknowledged "analytical uncertainty" about how to reconcile the two cases. *Smithfield Foods*, 585 F. Supp. 2d at 822. Indeed, the district court in this case—its other legal errors notwithstanding—conceded that "Planned Parenthood cannot recover for reputational damages or 'publication' damages under the First Amendment," but still justified its ruling on the ground that "there is no bright line in the precedent establishing when a category of damages should be analyzed by proximate cause or the First Amendment." App.46; *see also* App.68 (citing "inconsistent analyses of the line between impermissible reputational or publication damages and allowable economic or pecuniary damages").

* * *

The issues presented here are straightforward, despite PPFA's attempts to muddy the waters. Euphemisms like "infiltration damages" and "security damages" notwithstanding, the bottom line is that the courts badly misinterpreted the First Amendment by holding that speech is categorically unprotected whenever a plaintiff sues under a law of general application or labels his publication damages as "economic." The circuit courts are divided over how to

analyze the critical First Amendment issues at stake, and this Court's intervention is imperative.

II. If allowed to stand, the Ninth Circuit's opinion will significantly chill core speech, expression, and investigative journalism.

The Ninth Circuit's decision will allow plaintiffs to evade First Amendment scrutiny whenever they sue under laws of "general application" or creatively recast their damages as "economic." In other words, it will bless "expansive restrictions on newsgathering speech" and chill undercover journalism on critical issues of public debate. *PETA*, 60 F.4th at 833. For the powerful and wealthy in particular, this ruling is a blueprint for warding off unwanted attention with the threat of ruinous judgments against journalists or whistleblowers.

That is precisely what happened here: an investigative journalist exposed unethical and unlawful activity related to an issue of profound national importance. The subjects of that investigation then sued. They converted the public-relations blow from bad press into so-called "economic damages," and sought compensatory relief under "generally applicable" legal theories—all the while never suing for defamation or contesting the truth of the reports that were the gravamen of their suit. And with the blessing of the lower courts, they secured judgments totaling $16 million.

As this Court has recognized, such an outcome "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it" before choosing to publish any

remotely controversial article on a matter of heated public debate. *Hill*, 385 U.S. at 389. In practical terms, it would "present a grave hazard of discouraging the press from exercising the constitutional guarantees." *Id.* "Those guarantees are not for the benefit of the press so much as for the benefit of" American society at large. *Id.* "A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Id.*

The disagreement among the circuits on these issues also means that journalists will be forced to operate under radically different constraints in different parts of the country. In some regions, their work will be protected by the First Amendment, and they will not be liable for injuries that purportedly flow from their speech. In others, an unwelcome investigative report may portend massive legal liability. Moreover, federal courts' acknowledged confusion about the proper constitutional standard to apply to undercover journalism leaves media outlets with no coherent way to assess their exposure for a potential exposé. And, as hidden recording technologies become ever more sophisticated, the First Amendment issues presented here are certain to recur.

The freedom of speech and the press, including undercover journalism, is too important to be threatened by such legal uncertainty. Undercover journalism is "directly connected to the advancement of self-governance." Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1474 (2015). It "enhance[s] citizen scrutiny" of "matters of public concern," thereby

"advanc[ing] public discourse and democracy in meaningful ways." *Id.* Undercover reporting can also "inform significant moral and philosophical questions relevant to the broader search for truth protected by the First Amendment." *Id.* at 1475-76. By "expos[ing] … hidden conduct" of powerful institutions, it "may affect the public's thinking" and "prompt[ ] the kind of moral reflection that shapes public opinion." *Id.* at 1476. With the power "to create awareness, correct widespread misconceptions, provoke outrage," such reporting can "give a human face … to any number of institutions and social worlds that otherwise would be ignored, misunderstood, or misrepresented for lack of open access." Kroeger, *Undercover Reporting*, *supra*, at 8-9. Penalizing such investigative work therefore "run[s] afoul of the principle that 'debate on public issues should be uninhibited [and] robust.'" Cheng, *supra*, at 1474 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001)).

Activists and First Amendment scholars from across the political spectrum have sounded this alarm already in this very case. Citing investigations from the antebellum period to a 2007 Pulitzer-winning *Washington Post* exposé on conditions at Walter Reed National Military Medical Center, these *amici* showed "that undercover newsgathering has been and remains central to this country's law and policy debates on matters of public concern since at least the mid-1800s." Animal.Advocacy.Orgs.Br. 5-6, 9-10. Drawing on their own experience bringing animal abuse to light, they further explained that "deception is integral and necessary to the promotion of public

discussion of the ills and unsavory portions of society—matters of profound public concern." *Id.* at 13.

Yet the Ninth Circuit's opinion threatens this important work. *Amici* warned that precedents safeguarding freedom of the press "will become hollow, Pyrrhic victories if any investigator who uses deception to uncover facts of public significance can be subjected to potentially bankrupting tort claims for engaging in deception-based investigations." *Id.* at 22. "[I]f left standing," the lower courts' rulings here supply a "roadmap for investigative subjects to sue journalists, activists, and whistleblowers to chill their undercover investigative work." *Id.* at 27. "Going forward," subjects can "duplicate the successful prosecution strategy in this case," *id.* at 29: implement new security measures, hire consultants and private investigators, and the like, then pass the bill to the reporters who unearthed their misconduct through a tort suit. Then faced with "potentially debilitating liability," "[e]ven relatively well-heeled media outlets skilled in investigative reporting are likely to consider whether undercover work … is worth the risk." *Id.*

In a similar case in the Eighth Circuit, Judge Grasz recognized precisely the same risks:

> At a time in history when a cloud of censorship appears to be descending, along with palpable public fear of being "cancelled" for holding "incorrect" views, it concerns me to see a new category of speech which the government can punish …. Ultimately, the Supreme Court will have to determine whether such laws can be

> sustained, or whether they infringe on the "breathing room" necessary to effectuate the promise of the First Amendment.

Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 788 (8th Cir. 2021) (Grasz, J., concurring).

At bottom, the Ninth Circuit's ruling exposes traditional investigative journalism practices to ruinous liability. It strikes at the core the First Amendment's protection of freedom of the press. And the ramifications—from hindrance to public discourse and moral reflection to concealment of outright criminal conduct—are both predictable and intolerable. The profound public importance of the questions presented here only underscore the necessity that this Court grant certiorari.

CONCLUSION

This Court should grant certiorari.

Thomas Brejcha
Peter Breen
THOMAS MORE SOCIETY
309 W. Washington
Ste. 1250
Chicago, IL 60606
(312) 782-1680

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Rd.
South Suite 250
Austin, TX 78746
(512) 399-3022

Harmeet K. Dhillon
Mark P. Meuser
DHILLON LAW GROUP
177 Post Street
Ste. 700
San Francisco, CA 94108
(415) 577-2850

Jeffrey M. Harris
Counsel of Record
James F. Hasson
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd.
Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9938

May 30, 2023

Attorneys for Petitioners