No. 22-1168
(Vide 22-1147; 22-1159; 22-1160)

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

Amicus, as an issue-oriented educational 501(c)(3) non-profit organization, has a deep and vested interest in the ability to engage in free and fair speech. *Amicus* advances its mission through both legal institutions and the media, and relies on freedom of speech and freedom of the press to do so. As such, *Amicus* is alarmed by the Ninth Circuit's disregard for First Amendment protections and the weaponization of the courts to punish unpopular viewpoints and journalists.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision to uphold the district court and permit publication damages without a defamation showing is a blow to First Amendment rights and this Court's precedent. The Ninth Circuit's decision splits with other federal

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[1] Pursuant to U.S. Supreme Court Rule 37.2, *Amicus* informed the parties of its intention to file this brief on June 20, 2023. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

circuits regarding the application of the Court's *Cohen v. Cowles Media, Co.,* 501 U.S. 663 (1991) holding and threatens to reduce First Amendment protections for citizens within its jurisdiction. In addition to causing substantial adverse consequences for the Petitioners in this case, the Ninth Circuit's decision will also cause substantial adverse consequences to the public in general and most especially to journalists attempting to expose wrongdoing.

This Court's intervention is greatly needed.

ARGUMENT

A. The Ninth Circuit's Decision Creates a Concerning Circuit Split.

The Ninth Circuit's decision runs counter to the Fourth, Sixth, and Eighth Circuits' application of *Cowles* and threatens to expose the citizens of the Ninth Circuit to diminished First Amendment protections. In *Cowles*, this Court established two important and related principles. First, it retained the heightened actual malice standard laid out in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and the admonition against permitting damages based solely on protected publications without a properly plead and proven defamation claim. *Cowles,* 501 U.S. at 671. Second, the Court held that laws of general applicability can be the basis of a damage award when that damage is *tied directly* to an underlying tort. *Id.* at 669. These two principles maintain the vital importance of the First Amendment while not

permitting the media to carve out a blanket immunity.

The Fourth Circuit upholds the Court's *Cowles* distinction between First Amendment damages requiring a *New York Times* actual-malice defamation showing, on the one hand, and damages flowing from torts of general applicability on the other hand. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, two television reporters went undercover to investigate a report received by ABC producers, alleging unsanitary meat-handling practices at Food Lion stores. *Food Lion*, 194 F.3d 505, 510 (1999). The two reporters, keeping their ABC employment and undercover surveillance equipment secret, submitted job applications with Food Lion and secured positions in two different Food Lion stores. *Id.* The reporters subsequently recorded both audio and video footage at the two stores where they secured employment. *Id.* This secret footage included "the meat cutting room, the deli counter, the employee break room, and a manager's office." *Id.* at 511.

Some of the video footage was aired on ABC's *Prime Time Live*. *Id.* Food Lion sued ABC, not for defamation, but for the manner in which ABC obtained the footage. *Id.* In its complaint, Food Lion averred claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, but did not bring a defamation cause of action. *Id.*

The Fourth Circuit affirmed the lower court's finding that Food Lion could not recover damages resulting from the *Prime Time Live* broadcast because

the "publication damages were not proximately caused by the non-reputational torts." *Id*. at 522. The Court specifically objected to Food Lion's attempt to by-pass heightened First Amendment standards:

> Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational claims, while holding to the normal state law proof standards for these torts. This is precluded by *Hustler*.

Id. (citation omitted). The Fourth Circuit summed up the *Hustler Magazine v. Falwell*, 485 U.S. 46 (1998) First Amendment limitation:

> *Hustler* confirms that when a public figure uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*.

Id. at 523.

This prohibition affects not only those damages specifically labeled as reputational or state of mind damages, but also those which, though labeled as non-reputational torts, stem directly from the protected publication. *See id*. at 522; *see also*, *Smithfield Foods, Inc. v. United Food & Commer. Workers Int'l Union*, 585 F. Supp. 2d 815, 821 (E.D. Va. 2008); *Brock v. Viacom Int'l, Inc*., 2005 U.S. Dist. LEXIS 12217 *3

(N.D. Ga. February 28, 2005).

Similarly, the Sixth Circuit recognizes *Cowles'* dual protection for the First Amendment and torts of general applicability. In *Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 532 (6th Cir. 2007), the court refused to permit the plaintiff-appellant to collect damages on its breach of contract claim because the injury was reputational in nature despite its "contract" label. The court held that the "sort of injury at issue in this case – the 'defendant made statements that harmed the plaintiff' injury – is a classic example of reputational or defamation-type harm." *Id.* In so finding, the court held that *Cowles* compelled it to apply the actual malice standard to the contract claim in this case:

> While *Cohen* held that a publisher 'has no special immunity from the application of general laws," the Court distinguished between cases – like *Cohen* – where a plaintiff is seeking to enforce generally applicable law and the actual-malice standard does not apply, and cases – like *Falwell* – where a plaintiff is attempting to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim' and the actual-malice standard does apply.

Id. at 533 (internal citations omitted).

The Eighth Circuit also recognizes this Court's *Cowles* principle of distinguishing between damages flowing from state laws of general applicability and damages dressed up to look like they flow from laws of general applicability but are in actuality damages flowing from protected First Amendment activity that require an actual malice showing. In *Beverly Hills Foodland v. United Food and Com. Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994), the court disallowed the plaintiff-appellant's tortious interference claim that failed to include an actual malice showing. In so holding the court found:

> [T]he actual malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as a plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading.

Id.

The Ninth Circuit, ignoring these sister courts, instead blurred this Court's *Cowles* two distinct principles and applied only the "general laws of applicability" portion. The consequences of this misapplication of *Cowles* are not only a shockingly unjust monetary award against Respondents, but a chilling of First Amendment rights against any journalists within the Ninth Circuit who may espouse views unpopular with the sitting state jurists. This harm is significant, and the Court's intervention is

needed to restore First Amendment harmony among the federal circuits.

B. The Ninth Circuit's Decision Misapplies This Court's Precedent.

In addition to addressing the circuit split caused by the Ninth Circuit, the Court should grant Petitioners' petition for a writ of certiorari because its own precedent has been misapplied. Following this Court's renowned decision in *New York Times Co. v. Sullivan*, a plaintiff public figure claiming defamation was required to demonstrate that the defamatory statement was published "with actual malice – 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (*quoting New York Times*, 376 U.S. 254, 285-86). This First Amendment limitation on defamation claims was confirmed later in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In order to provide First Amendment free speech the "breathing room" it needed, the Court reaffirmed that the public figure must "prove both that the statement was false and that the statement was made with the requisite level of culpability." *Id.* at 52.[2]

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[2] The types of damages referred to in *Hustler* and its progeny have been called reputational or state of mind damages and encompass a wide variety of damages. *See e.g., Cowles*, 501 U.S. at 671 (lost employment and lowered earning capacity were not reputation or state of mind damages); *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612, 627 (S.D. Ohio 1998) (travel costs incurred after the publication were tied to reputational injuries); *Food Lion*, 194 F.3d at 523 (loss of good will and lost sales were reputational damages); *Brock*, 2005 U.S.

Cowles did not undo *New York Times* or *Hustler* or remove the requirement that plaintiffs basing damages on protected publications must meet the heightened *New York Times* actual malice standard. Rather, *Cowles* simply recognized that "laws of general applicability" can be enforced against members of the media while maintaining the rule that damages resulting from the torts must meet the actual malice standard if damages are reputational or "state of mind" related. *Cowles*, 501 U.S. at 669, 671.

The Ninth Circuit misapplied the Court's *Cowles* holding by obfuscating "laws of general applicability" with reputational damages. *See Planned Parenthood Federation of Am., Inc. v. Newman*, 51 F.4th 1125, 1133-1135 (9th Cir. 2022). Unlike the *Cowles* plaintiff who demonstrated damages directly tied to the promissory estoppel violation, the Respondents here cannot demonstrate ***any*** damages related directly to any laws of general applicability. For example, Respondents asserted that Petitioners breached contracts related to registering for Planned Parenthood conferences. Respondents claim they were damaged by the breaches of these contracts because Petitioners were not who they said they were and were not intending to procure fetal tissue from Respondents. The damages claimed by Respondents are not directly tied to the breach but are instead

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at *8 (embarrassment, public ridicule, humiliation, and emotional distress are reputational and state of mind harms); *Smithfield*, 585 F. Supp. 2d at 823-24 (direct expenses paid to rebut claims, national and customer-specific lost profits, and abnormal returns on stock were all tied to reputational injuries).

directly tied to the publication -- the release of the videos. The jury awarded $366,873.00 to Planned Parenthood to compensate them for costs associated with Petitioners' "infiltration," and $101,048.00 in security and "monitoring" costs. *See* Petition for a Writ of Certiorari, Appendix ("Cert. App.") at 18. Respondents did not expend any funds on investigation, security, or monitoring after Petitioners' attendance at the conferences because the ***attendance*** did not harm Respondents. Respondents did not expend any of these costs in reliance on Petitioners' representations as a fetal tissue procurement company.[3] It is undisputed that these funds were expended *post factum*, only after, and in reaction to, the publication of the videos.

Another example of unrelated damages is Respondents' assertion that Petitioners committed trespasses by attending the Planned Parenthood conferences and entering their offices under the pretense of being a fetal tissue procurement company. Respondents assert that these trespasses caused them damage. Most of the damages asserted by Respondents in their Complaint were quintessential reputational/state of mind damages: diverting resources to combat Petitioners" misrepresentations in intentionally distorted videos, governmental investigations, harassment and intimidation, and

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[3] Had Respondents relied on Petitioners representations as a fetal tissue procurement company and expended funds in reliance of that representation, the Respondents would have damages directly tied to an underlying tort. The Respondents did not. In fact, Petitioners paid Respondents for admission to the conferences and Respondents accepted and retained these funds.

online hacking. *See* Cert. App. at 70. For good measure, Respondents included "property damage" and "security threats." *Id*. Despite Respondents slapping an economic-looking label on these, no actual property damage was caused by Petitioners.

This Court's *Cohen* holding does not permit courts to make an end-run around *New York Times* and *Hustler* by re-labeling reputational damages as economic damages. The Ninth Circuit's misapplication cannot be left to erode First Amendment rights and expose journalists to crushing damage awards for doing nothing more than engaging in protected free press activities.

The Court's intervention is needed to restore First Amendment protection in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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