No. 22-1168

In The
Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, et al.,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* OF COALITION OF FREE SPEECH, WHISTLE-BLOWER PROTECTIONS, AND ANIMAL-ADVOCACY ORGANIZATIONS IN SUPPORT OF PETITIONERS

GREGG P. LESLIE
Counsel of Record
ZACHARY R. CORMIER
Arizona State University
Sandra Day O'Connor
College of Law, First
Amendment Clinic, Public
Interest Law Firm
111 E. Taylor St., MC 8820
Phoenix, AZ 85004
Gregg.Leslie@asu.edu
(480) 727-7398

Additional counsel listed inside front cover

List of Additional Counsel for Amici:

JUSTIN MARCEAU
University of Denver, Sturm College of Law
2255 E. Evans Ave.
Denver, CO 80208

GABE WALTERS
JT MORRIS
Foundation for Individual Rights and Expression
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003

PIPER HOFFMAN
Animal Outlook
P.O. Box 9773
Washington, D.C. 20016

AMANDA HITT
Director
Government Accountability Project
1612 K St., NW
Suite 1100
Washington, DC 20006

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are free speech advocacy organizations, whistle-blower protection organizations, and animal-advocacy organizations. *Amici* have an interest in preserving robust constitutional protections for speech (and the precursors of speech) and for those who gather news and report on matters of public concern. *Amici* take no position on the specific actions of Petitioners in this case or the accuracy of their publication of edited videos. However, *amici* have a strong interest in ensuring that journalists, whistleblowers, activists, and others remain able to use undercover methods to investigate and report on matters that might otherwise remain unavailable or inaccessible to the public, continuing our valuable American tradition of important journalism conducted using undercover techniques. Because the decision below threatens this important tradition, *amici* urge the Court to grant certiorari.

Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amici* affirm that counsel of record received timely notice to the intent to file this brief.

participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment.

Animal Outlook is a tax-exempt animal-advocacy organization based in Washington, DC. Animal Outlook's mission is to change the world for animals by deploying an arsenal of strategies to challenge the status quo of animal agribusiness. Animal Outlook works to expose the truth, deliver justice, revolutionize food systems, and empower others to stand up for animals by leaving them off our plates.

The Freedom of the Press Foundation (FPF) is a nonprofit organization that protects, defends, and empowers public-interest journalism. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including the development of encryption tools, documentation of attacks on the press, training newsrooms on digital security practices, and advocating for the public's right to know. Protecting journalists' right to gather and report on newsworthy information is central to FPF's mission.

The Government Accountability Project (GAP) is a nonpartisan, public interest group with the mission to promote corporate and government accountability by protecting whistleblowers, advancing occupational free speech, and empowering citizen activists. Founded in 1977, GAP is the nation's leading whistleblower protection and advocacy organization. In addition to focusing on whistleblower support, GAP leads campaigns to enact whistleblower protection laws both domestically and internationally.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case implicates the continuing vitality of reporting through covert investigative reporting and deception, which is responsible for some the most noteworthy and impactful stories and exposés in American history. This Court should grant a writ of certiorari because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," U.S. Sup. Ct. R. 10(c), by allowing a judgment based on newsgathering and reporting on important public issues and giving insufficient weight to the First Amendment implications of that decision.

The Ninth Circuit's decision to ignore the applicability of First Amendment rights in this context may be best summarized by its statement that "infiltration damages and security damages[] were awarded by the jury to reimburse Planned Parenthood for losses caused by Appellants' violations of generally applicable laws." *Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1134 (9th Cir. 2022). But by allowing such liability for constitutionally protected conduct, the courts below circumvented well-established standards for determining whether Petitioners caused a legally cognizable reputational injury, threatening the ability of journalists, whistleblowers, activists and others to investigate and publish important stories. Indeed, from Mortimer Thompson's firsthand accounts of the slave trade leading up to the Civil War, to Nellie Bly's graphic translation of her time in Blackwell's Island Insane Asylum, to Upton Sinclair's exposé of the meat-packing industry, investigative reporting is

responsible for bringing to public view some of the most pressing matters of the last 150 years.

The Ninth Circuit's decision threatens two significant aspects of First Amendment protections that are vital to newsgathering and reporting: *First*, undercover investigative reporting on matters of public concern pursued through investigative deception is protected speech under the First Amendment; and *second*, courts must uphold First Amendment limits on recoverable damages for non-defamation civil claims arising out of investigative reporting to avoid chilling undercover newsgathering and the investigative reporting reliant upon it.

This Court has rejected the view that there is an exception to the First Amendment for "false statements." But the Ninth Circuit in this case ignored free speech principles and approved a near categorical common law right to punish persons who engage in deception-based investigations. If such a view stands, civil claimants leveraging misapplied generally applicable laws through litigation will be able to quash investigative reporting on matters of the highest public concern. This Court should grant certiorari to guard against *any* erosion of the protections afforded to investigative journalism by the Constitution.

The First Amendment bars publication and reputation damages for non-defamation claims. But this is the very type of harm for which the Ninth Circuit allowed plaintiffs to recover by upholding their claim to pursue their costs for increased security measures. Such costs serve as a stand-in for direct publication damages and could severely limit undercover reporting as a result. Added security costs

stem from public anger over the revealed conduct, and they are inseparable from the public's response to the published information — underscoring that this is a matter of public concern.

ARGUMENT

I. Historically, Undercover Newsgathering and Reporting Have Been Central to Democratic Accountability in the United States.

Since the antebellum period, journalists in the United States have engaged in undercover or clandestine newsgathering through omission or misrepresentation of their true purposes and identities. This undercover newsgathering of firsthand facts and observations has resulted in important and sometimes history-making reporting. For example, abolitionist activists and northern journalists reported on slavery in the South through careful concealment and misrepresentation of their motives.[2]

One such undercover journalist documented — in horrific detail — the sale of black men, women, children, and infants at a slave auction near Savannah, Georgia, in 1859, for a series in the *New York Tribune*.[3] That undercover reporter's true name was Mortimer Thompson. He wrote under the pen name "Q.K. Philader Doesticks" and described for his

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[2] *See* Brooke Kroeger, *Undercover Reporting, The Truth About Deception* at 17 (2012).

[3] *Id.* at 19–21.

readers why he needed to conceal his identity and the means by which he did so:

> Your correspondent was present at an early date, but as he easily anticipated the touching welcome that would, at such time, be officiously extended to a representative of *The Tribune* . . . and not desiring to be the recipient of a public demonstration from the enthusiastic Southern populations . . . he did not placard his mission and claim his honors. Although he kept his business in the background, he made himself a prominent figure in the picture, and, wherever there was anything going on, there was he in the midst.[4]

Months later, another journalist went undercover to report on the execution of John Brown, the prominent abolitionist who advocated for armed insurrection to free slaves and who was the first person in the history of the United States to be executed for treason.[5] Henry Olcott, a *New York Tribune* journalist who volunteered, posed as a member of the Petersburg Grays, a regiment sent to Charles Town, Virginia, to guard Brown's body.[6]

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[4] *Id.* at 24.

[5] *See The Execution of John Brown* at 7, N.Y. Tribune (Dec. 3, 1859), https://undercover.hosting.nyu.edu/files/original/f1d36593c3eb2643fcc2d3fc5fdd8477dac430cc.pdf [https://perma.cc/4MLU-2B9L].

[6] *See* Sarah Belle Dougherty, *Remembering Henry S. Olcott*, The Theosophical Society, https://www.theosophical.org/compo

After the Civil War era, journalists used similar methods to report on a number of industries. In the late 1800s, a journalist named Elizabeth Jane Cochran, working under the pen name Nellie Bly, routinely used false identities to gain access to institutions and businesses engaged in unlawful activity.[7] Her most famous exposé resulted from her posing as a mentally ill person to gain access to Blackwell's Island Insane Asylum for women in New York City, where she uncovered and later wrote about abusive and violent staff, fire hazards, extremely cold temperatures, unsanitary practices, terrible food, and the treatment of foreign-born women who were not mentally ill but had been committed because others, including the asylum's staff, could not understand them and assumed them to require treatment.[8]

At the turn of the 20th century, written eyewitness accounts of the meat-packing industry, including Upton Sinclair's novel *The Jungle* (1906), triggered a nationwide debate that spurred measures to protect public health and ensure worker safety.[9] Sinclair spent weeks undercover in Chicago's meatpacking plants to research the novel, which, by

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nent/content/article/65-about-us-sp-709/olcott/1857-remembering-hs-olcott [https://perma.cc/D62L-RUYL].

[7] *See generally* Brooke Kroeger, *Nellie Bly: Daredevil, Reporter, Feminist* (1994).

[8] *See generally* Nellie Bly, *Ten Days in a Mad-House* (1887).

[9] *See, e.g.*, David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic (Jan. 24, 2016), https://www.theatlantic.com/politics/archive/2016/01/how-teddy-roosevelt-invented-spin/426699/ [https://perma.cc/QS48-957E]; Karen Olsson, *Welcome to The Jungle*, Slate (July 10, 2006) https://slate.com/culture/2006/07/upton-sinclair-s-the-jungle.html [https://perma.cc/B5LK-UJBF].

exposing the industry's harsh, inhumane, and unsanitary working conditions, produced an unprecedented response.[10] Indeed, Congress enacted the Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399f), following Sinclair's work.

In later decades, journalists engaged in undercover reporting to tell all manner of stories. For example, in 1978, the *Chicago Sun-Times* published a series of stories that exposed corruption by city inspectors based on reporting by undercover journalists who surreptitiously bought and operated a bar, The Mirage Tavern.[11] In 2016, *Mother Jones* published an account of paramilitary militias on the U.S. border by a reporter who joined a militia undercover.[12]

In recent years, journalists and researchers have continued to use undercover methods to report on conditions at animal production facilities, taking advantage of new recording technologies to revive old debates. In California, for example, an undercover investigator working with *amicus* Animal Outlook,[13] recorded video footage in a facility that supplied the

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[10] *See* Kroeger, *supra* note 2 at 83–91.

[11] Kroeger, *supra* note 2 at 257–80.

[12] Shane Bauer, *I Went Undercover With a Border Militia. Here's What I Saw.*, Mother Jones (Nov./Dec. 2016), https://www.motherjones.com/politics/2016/10/undercover-border-militia-immigration-bauer/ [https://perma.cc/M96X-AQKB].

[13] Animal Outlook was known as Compassion Over Killing at the time of this investigation.

National School Lunch Program and a popular restaurant chain showing inhumane handling of cows, including some who could no longer walk being shot in the head over and over, then having their mouths and nostrils stood upon until they suffocated to death. The video led the federal government to shut down the facility temporarily and the chain to sever ties with it.[14]

At bottom, whatever the subject of reporters' interests, there is no question that undercover newsgathering has been and remains central to this country's debates on matters of public concern—speech at the First Amendment's core—since at least the mid-1800s.

II. Deceptive Techniques Are Necessarily Employed by Journalists and Others Engaged in Undercover Newsgathering Today.

Journalists engaged in undercover newsgathering today routinely and necessarily engage in deception to access facts hidden from public view and to enable them to tell an accurate story. Building on the legacy of reporters like Mortimer Thompson and Nellie Bly, journalists engaging in investigative deception have exposed poor medical care of wounded veterans, inhumane living conditions in welfare hotels, racial animosity and discrimination at industrial facilities, and the mistreatment of

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[14] Tiffany Hsu, *In-N-Out Dumps California Slaughterhouse Accused of Abusing Cows*, L.A. Times (Aug. 21, 2012), https://www.latimes.com/business/la-fi-mo-in-n-out-cattle-slaughterhouse-20120821-story.html [https://perma.cc/UWG7-EY9K].

animals intended to be kept as pets or raised in the animal agriculture industry.

In 2007, *The Washington Post* published an exposé of conditions at Walter Reed National Military Medical Center.[15] To accomplish their reporting over four months, reporters Dana Reed and Anne Hull and their photographer Michel du Cille posed as regular visitors and sometimes trespassed into patient-only areas with recording equipment.[16] This investigative series revealed "signs of neglect everywhere" at Walter Reed Medical Center: "mouse droppings, belly-up cockroaches, stained carpets, cheap mattresses," and a general indifference to the soldiers under care at the facility.[17] The series resulted in the firing of the Secretary of the Army and officials responsible for Walter Reed.[18] As a result of the series, the *Post* won the Pulitzer Prize for Public Service in 2008.[19]

These reporters were hardly unique in their use of deception to enable undercover newsgathering: In just the two decades preceding the Walter Reed

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[15] Dana Reed & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, The Wash. Post (Feb. 18, 2007), https://www.washingtonpost.com/archive/politics/2007/02/18/soldiers-face-neglect-frustration-at-armys-top-medical-facility/c0c4b3e4-fb22-4df6-9ac9-c602d41c5bda/ [https://perma.cc/9344-AUU2].

[16] Walter Kurtz, *The Post Wins 6 Pulitzer Prizes*, The Wash. Post (Apr. 8, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040701359.html [https://perma.cc/648X-MVDY].

[17] Reed & Hull, *supra* note 15.

[18] Kurtz, *supra* note 16.

[19] *Id.*

exposé, reporters engaged in deception to reveal living conditions in welfare hotels,[20] working conditions in New York sweatshops,[21] working conditions of low-wage retail jobs in the United States,[22] and the availability of drugs in prisons.[23]

Reporters and investigators partnering with activist organizations have done similarly. For example, an investigator for *amicus* Animal Outlook obtained employment at a Tyson Foods contractor in Virginia and documented and exposed workers "crushing and stomping on chicks," "beating chickens to death," and impaling injured birds on nails stuck into pipes.[24] The investigation resulted in the firing of

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[20] Philip Shenon, *Welfare Hotel Families: Life on the Edge*, N.Y. Times (Aug. 31, 1983), https://www.nytimes.com/1983/08/31/nyregion/welfare-hotel-families-life-on-the-edge.html [https://perma.cc/MM8K-EYMV].

[21] Jane H. Li, *65 Cents an Hour—A Special Report: Week in Sweatshop Reveals Grim Conspiracy of the Poor*, N.Y. Times (Mar. 12, 1995), https://www.nytimes.com/1995/03/12/nyregion/65-cents-hour-special-report-week-sweatshop-reveals-grim-conspiracy-poor.html [https://perma.cc/QV65-9G2R].

[22] *See generally* Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (2001).

[23] Athelia Knight, *Drug Smuggling and Hot Goods: A Ride on Prison Visitors' Buses*, The Wash. Post (Mar. 4, 1984), https://www.washingtonpost.com/archive/politics/1984/03/04/drug-smuggling-and-hot-goods-a-ride-on-prison-visitors-buses/f7e604db-70ca-40cb-8f06-9d837a043d94/ [https://perma.cc/96G2-SZ74].

[24] Justin Wm. Moyer, *'You Need to Kill Him?': Tyson Food Contractors Caught on Video Mistreating Chickens*, The Wash. Post (Dec. 6, 2017), https://www.washingtonpost.com/local/you-need-to-kill-him-tyson-food-contractors-caught-on-video-

10 employees and the termination of the facility's contract.[25]

Similarly, an investigator with Mercy for Animals worked for a dairy in Idaho and recorded workers deliberately beating, kicking, and punching dairy cows.[26] This investigation led the Idaho Dairyman's Association to draft and urge the adoption of a statute criminalizing this very type of investigation.[27] *See* Id. Rev. Stat. § 18-7042. This statute was partially invalidated by the U.S. Court of Appeals for the Ninth Circuit, because it would work as an unconstitutional infringement on the ability of reporters to engage in deceptive practices necessary to undercover newsgathering and reporting. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1199 (9th Cir. 2018).

These examples illustrate that undercover newsgathering and reporting by investigative deception promotes public discussion of matters of profound public concern and uncovers important facts that otherwise would remain hidden to the public.

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mistreating-chickens/2017/12/06/35ec4f58-d9fa-11e7-94b5-82a81b0f862e_story.html [https://perma.cc/868V-GAMF].

[25] *Id.*

[26] *Video Shows Alleged Criminal Abuse of Bettencourt Dairy Cows in Idaho*, CBS News (Oct. 11, 2012), https://www.cbsnews.com/news/video-shows-alleged-criminal-abuse-of-bettencourt-dairy-cows-in-idaho/ [.

[27] *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom. Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

III. The Ninth Circuit's Decision Gives Insufficient Weight to the Important First Amendment Issues at Stake in this Case.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. The protection of this fundamental liberty comes from a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In that way, the First Amendment seeks "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 604 (1982).

This case implicates two significant aspects of First Amendment protections vital to newsgathering and reporting: *First,* the First Amendment protects "false statements" such that undercover investigative reporting pursued through investigative deception (either by omissions or other misrepresentations) to gain access *is* protected speech; and *second*, First Amendment limits on recoverable damages for non-defamation civil claims arising out of investigative reporting must be respected or else excessive civil damages awards and injunctions for reputation- or publication-type harm will chill undercover newsgathering and the investigative reporting reliant upon it.

A. The use of deception for undercover investigative reporting is constitutionally protected speech.

Famous undercover newsgathering and reporting[28] has often been possible only through the use of deception to gain access to knowledge otherwise effectively hidden from public view. Deception, on some level, is oftentimes necessary to facilitate or produce the truth.[29] But that compels a question:

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[28] This brief sometimes refers to newsgathering and sometimes refers to investigative reporting. While there is a distinction between these activities, it is not a constitutionally significant one. Newsgathering is protected by the First Amendment because, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). *Cf. Citizens United v. FEC*, 558 U.S. 310, 352 (2010) ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.").

[29] Although valuable news stories are obtained through undercover reporting techniques, media ethicists urge journalists to consider other newsgathering options and to use deception only when "traditional, open methods will not yield information vital to the public." Society of Professional Journalists, Code of Ethics (2014) (SPF Code), https://www.spj.org/ethicscode.asp [https://perma.cc/3RBJ-RDB9]; *see also* Bill Kovach & Tom Rosenstiel, *The Elements of Journalism* at 120–21 (3d ed. 2014); Greg Marx, *The Ethics of Undercover Journalism*, Colum. Journalism Rev. (Feb. 4, 2010), https://archives.cjr.org/campaign_desk/the_ethics_of_undercover_journalism.php [https://perma.cc/L6SS-284E]. The SPJ Code is an aspirational guide and "is not, nor can it be under the First Amendment, legally enforceable." SPF Code (footer). Ethical decisions necessarily rest with media organizations themselves, not with litigants or judges.

When is investigative deception protected speech?[30] The Ninth Circuit ignored free speech principles by deciding that the First Amendment did not apply to Petitioners' actions simply because they violated laws of general applicability. In doing so, it presumed that engaging in constitutionally protected speech, with the goal of shedding light on a question of public interest, can give rise to legally cognizable harms under unrelated laws, such as property harms under a trespass statute. *Planned Parenthood Fed'n of Am.*, 51 F.4th at 1134. The Ninth Circuit's presumption conflicts with (1) this Court's clear holding that falsehoods constitute protected speech, (2) a primary goal of the First Amendment, which is to facilitate truth-seeking, and (3) the long-standing and deeply beneficial practice of undercover investigations.

This Court has rejected the view that there is a "general exception to the First Amendment for false statements." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality op.); *id.* at 729 (Breyer, J., concurring). *Alvarez* involved the constitutionality of the Stolen Valor Act and, specifically, whether to invalidate the conviction of a person who lied about having been awarded the Congressional Medal of Honor. *Id.* at 713. To be sure, the false statement in *Alvarez* was "a pathetic attempt to gain respect that eluded [Alvarez]," *id.* at 714—and the government alleged a variety of harms to the military community

[30] *See generally* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435 (2015).

when its honors are "dilut[ed]" by those who falsely claim to hold them, *id.* at 724–25.

Despite this, six justices recognized that even a truth-impeding lie is protected by the First Amendment unless it causes *legally cognizable harm* to the deceived party. *Id.* at 722; *id.* at 729 (Breyer, J., concurring). Both the plurality and concurring decisions shared the view that punishing "falsity alone" is impermissible; rather, the government may regulate false speech only when there is some "intent to injure," or more precisely, some intent to cause a "legally cognizable harm" protected by the law. *Id.* at 718. And, as the plurality made plain, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725. Because there was an insufficient link between the false statements about military honors and the dilution of the public's perception of such honors, the Court rejected the government's claim of harm. *Id.*

Moreover, *Alvarez* leaves no doubt that lies do not become nonspeech or unprotected simply because they result in changed behavior or different outcomes based on reasonable reliance on the deception. Lies frequently cause listeners to act differently, or change their minds, but this is not a reason to deprive the speech of protection. Indeed, even when the stakes are highest, and the integrity of a statewide election is at issue, "fake news" or deceptive political speech will often be protected. *See id.* at 738 (Breyer, J., concurring) (noting in the political context a "false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous"). So it is clear after *Alvarez*

that false statements enjoy First Amendment protection unless they cause direct, legally cognizable harm.

Thus, harm resulting from the exposure of an investigative subject's own conduct is not a legally cognizable harm under *Alvarez*. And as might be expected given this country's tradition of undercover newsgathering, deception used by journalists, activists, and whistleblowers to gain access to private property—e.g., omitting or affirmatively misrepresenting political, organizational, or journalistic affiliations, or affirmatively understating certain educational backgrounds—rarely causes cognizable legal injury where it is done in the service of investigative reporting. Investigative reporting exposes perceived societal ills, which certainly may result in negative economic consequences after bad publicity for those engaged in objectionable conduct. But this harm is traceable first and foremost to the objectionable conduct itself, and only then to its publication and the advocacy that is often enabled (or emboldened) by such publication, not to the use of deception to gain access.

Imagine the perverse—and speech chilling—outcomes if cognizable harm from the publication of the content of an investigation could be punished at a level corresponding to its public significance. If the undercover investigation exposes nothing of public interest (or indeed conduct perceived as salubrious to or consistent with the good of the public at large), damages would be minimal. Yet an investigation that exposes fraud, abuse, malfeasance, or criminality, could expose the reporter to ruinous damages. That is

no way to uphold the vital role undercover reporting plays in informing the public debate.

Mere investigative deception, without more, does not constitute the type of legally cognizable harm contemplated by *Alvarez*. "[T]he liar who causes no trespass-type harm—the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has occurred)." *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017). Likewise, investigative deception does not vitiate consent in the trespass context such that deception-based access to private property necessarily infringes on property interests in a way that could produce a legally cognizable harm. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1351–52 (7th Cir. 1995) (Posner, J.); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993).[31]

This lack of legally cognizable harm is most acute in the context of "ag-gag" statutes. For over a decade, commercial food producers have lobbied states to criminalize and create private rights of action for deceptive access to slaughterhouses, factory farms,

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[31] That is not to say newsgatherers who use investigative deceptions to access private property and intentionally cause specific *physical harm* or *tangible damage* to the property, or persons, do not cause legally cognizable harm. *See Wasden*, 878 F.3d at 1199.

and other industrial farming operations in response to animal-advocacy organizations videoing and publishing the conduct of persons working in these facilities. These laws are an overt attempt to criminalize investigative deception to the benefit of one industry and the detriment of the public. Fortunately, courts have been steadfast in invalidating many of the laws on First Amendment grounds. *See, e.g.*, *Wasden*, 878 F.3d at 1184 (Idaho); *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (4th Cir. 2023) (North Carolina); *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021) (Kansas), *cert. denied*, 142 S. Ct. 2647 (2022); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021) (upholding access restriction, but finding employment provision violated free speech clause); *Herbert*, 263 F. Supp. 3d at 1193 (Utah).

But ag-gag laws are only one example of the use of the law to inhibit newsgathering. And the decisions of this Court safeguarding free speech against targeted attacks by legislatures will become hollow, Pyrrhic victories if any investigator who uses omission or affirmative deception to uncover facts of public significance can be subjected to potentially bankrupting tort claims for engaging in undercover investigations. If civil claimants can leverage misapplied generally applicable laws and accomplish the same objective—to chill investigative reporting—journalists, activists, and whistleblowers speaking on matters of the highest public concern are no better off. *Cf. Snyder v. Phelps*, 562 U.S. 443, 457 (2011) (reversing $10-plus million jury verdict and stating

"[i]t was what Westboro said that exposed it to tort damages" under generally applicable laws).

This Court should grant certiorari and guard against *any* erosion of the protections afforded to investigative deceptions by the Constitution whether they come by industry-sponsored statutes or retaliatory litigation.

B. First Amendment limits on tort damages are vital to protecting undercover reporting on public issues.

Even if the Ninth Circuit's sweeping conclusion is correct—that seemingly all deception-based undercover investigations can be actionable because they violate laws of general applicability—the damages theories allowed by the court run afoul of the First Amendment.

Broadly speaking, private investigative subjects displeased with the public airing of their secrets and back-room conduct have two forms of recourse in court. They can sue under defamation theories, which, to some degree, require proof of falsity and a level of fault on the part of the speaker.[32] Or, they can sue under non-defamation theories and avoid questions of truthfulness and traditional defamation defenses. *See, e.g.*, *Food Lion*, 194 F.3d at 522 ("Food Lion . . . understood that if it sued ABC for defamation it would have to prove that the *PrimeTime*

[32] For example, defamation liability may be possible for video footage if the footage is edited so as to be intentionally misleading. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1138 (10th Cir. 2014).

Live broadcast contained a false statement of fact that was made with 'actual malice' . . . It is clear that Food Lion was not prepared to offer proof meeting the *New York Times* standard."); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 643 (N.D. Cal. 2019) (noting plaintiffs' decision to bypass defamation claim). This choice, however, comes at a cost: Civil claimants may *not* recover for defamation-type damages (i.e., publication and reputation damages) through non-defamation theories. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (rejecting attempt to seek damages under tort theory to avoid First Amendment limitations on defamation claims).

This latter point is well accepted; so much so that plaintiffs in this case disclaimed any reputational damages. *See Planned Parenthood Fed'n of Am.*, 402 F. Supp. 3d at 642 n.13 (quoting plaintiffs disclaiming "reputational damages such as loss of goodwill or loss of revenue" and "expenses to protect [Planned Parenthood's] brand and reputation"). And the district court confirmed the First Amendment bars plaintiffs from recovering "publication or reputational damages" here. *Id.* at 644. In doing so, the district court acknowledged the "inconsistent analyses of the line between impermissible reputational or publication damages and allowable economic or pecuniary damages," *id.*, but nonetheless allowed two specific categories of damages totaling more than $468,000—"personal security damages" for heightened personal security for certain staff who were the subjects of the released videos, and "access-security improvement damages" for improvements to

conference and event security. *Id.* at 645.[33] In the court's view, these damages were not properly considered reputational or publication damages; rather, the damages resulted "from the *direct* acts of defendants"—namely, "their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff." *Id.* at 644.

For support, the district court looked to the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). There, the Court cleared the way for a political campaign aide to recover under a promissory estoppel claim against a newspaper after the paper (truthfully) published his name as an informant, despite agreeing to confidentiality. *Id.* at 665–66, 670. Cohen did not seek "damages for injury to his reputation or his state of mind"—he knew he could not satisfy "the strict requirements for establishing a libel or defamation claim," because the disclosed information was true—but instead "sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity." *Id.* at 671. In allowing the claim, the Court distinguished *Hustler Magazine*, where it rejected a public figure's attempt to recover emotional harm (reputational damages) under the tort of intentional infliction of emotional distress. *Id.*

The district court's articulation of recoverable damages in this case, which was fully endorsed by the Ninth Circuit (with the exception of a damages claim under the Federal Wiretap Act), puts a fine point on the need for definite standards to identify the types of damages available to civil claimants who elect to avoid

[33] The court also allowed nominal and statutory damages. *Id.*

the constitutional—and common law—prerequisites for defamation claims. That is, a need to specifically distinguish between damages caused by constitutionally protected speech (i.e., exposing facts from an undercover investigation through publication) and damages caused by something other than protected speech.

On this point, injuries borne of publication on issues of public concern, and the concomitant public discourse that results, are not legally cognizable because they cannot fairly be traced exclusively to the investigative deceptions that created the opportunity for the exposure, but rather to the conduct exposed by those deceptions. Thus, the investigative deception is not the legal or proximate cause of the injuries. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.") (citing W. Keeton, et al., *Prosser and Keeton on the Law of Torts § 42* (5th ed. 1984)); *see also* Nathan Siegel, *Publication Damages in Newsgathering Cases*, 19 Comm. Law at 11, 15 (2001) (noting "proximate cause is a particularly suitable means for resolving claims for publication damages"). The First Amendment cannot countenance a system of law in which exposure of putative misdeeds—even by deception—is judged to be the actionable cause of injuries to the bad actor, rather than the potential misdeeds themselves, and the investigator who exposes the putative misdeeds must pay the bad actor, rather than the bad actor paying the piper.

Any other rule would leave investigative reporters prostrate before the financially and

politically powerful. Indeed, if left standing, the Ninth Circuit's decisions on recoverable damages will be a roadmap for investigative subjects to sue journalists, activists, and whistleblowers to chill their undercover investigative work. It requires little imagination to duplicate the successful prosecution strategy in this case. Going forward, in response to damning undercover reporting and to pad large awards investigative subjects may:

- hire security and employment consultants to overhaul access-security;
- hire private investigators to vet employees (both current and prospective) and third-party vendors;
- implement other access-control measures, such as ID systems, surveillance, etc.; and
- hire private security for key company executives and the named wrongdoers.

These heightened security measures are a direct response to the very issue being investigated. Absent the subject's fear that more people will engage in deception in order to report, the security would not be an issue.

Most concerning, the additional costs to inoculate these persons against public scrutiny, inextricably tied to reputational or publication harms, will actually be recoverable in lawsuits against the newsgatherers who exposed the bad behavior. *See Planned Parenthood Fed'n of Am.*, 51 F.4th at 1134 ("The two categories of compensatory damages permitted by the district court, infiltration damages and security damages, were awarded by the jury to reimburse Planned Parenthood for losses caused by

Appellants' violations of generally applicable laws."). This "exception" to this Court's First Amendment doctrine threatens to swallow rules necessary for undercover reporting.

Again, this case serves as the blueprint. Plaintiffs prosecuted 15 claims against defendants—from RICO and federal wiretapping claims, to trespass and fraud claims—in a case that has spanned more than seven years (and counting), generated over 1150 docket entries, and resulted in a five-week jury trial. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 613 F. Supp. 3d 1190, 1195 (N.D. Cal. 2020). Bringing a case of this magnitude and scope demands legions of attorneys. And that's certainly true here. "More than 130 attorneys worked on the case for plaintiffs and 22 of them billed more than 250 hours each." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-00236-WHO, 2020 WL 7626410, at *1 (N.D. Cal. Dec. 22, 2020). All told, plaintiffs sought recovery for ***21,200.25 hours of time*** and were awarded nearly ***$13.5 million in attorneys' fees and costs*** in addition to damages.

It will take little legal imagination to imitate plaintiffs' strategy if the Ninth Circuit's judgment is affirmed. But few independent investigative reporters and advocacy organizations (those most often engaged in undercover work) could withstand such an assault. Even relatively well-heeled media outlets skilled in investigative reporting are likely to consider whether undercover work in the Ninth Circuit is worth the risk. To be clear, organizations considering an undercover investigation now face the specter of potentially debilitating liability because they

investigated suspected misconduct on a matter of public concern.

In the end, if investigative reporting is to have any role in exposing fraud, abuse, malfeasance, and criminality, or facilitating dialogue and debate on matters of great public concern as it has for over a century, First Amendment limits on recoverable damages for non-defamation civil claims must be vigorously enforced.

CONCLUSION

For the reasons above, this Court should grant review to examine the important First Amendment issues at stake that were largely ignored or misapplied by the courts below.

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Respectfully Submitted,

GREGG P. LESLIE
Counsel of Record
ZACHARY R. CORMIER
Arizona State University
Sandra Day O'Connor
College of Law, First
Amendment Clinic,
Public Interest Law Firm
111 E. Taylor St., MC 8820
Phoenix, AZ 85004
Gregg.Leslie@asu.edu
(480) 727-7398

JUSTIN MARCEAU
University of Denver, Sturm
College of Law
2255 E. Evans Avenue
Denver, CO 80208

GABE WALTERS
JT MORRIS
Foundation for Individual
Rights and Expression
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003

PIPER HOFFMAN
Animal Outlook
P.O. Box 9773
Washington, D.C. 20016

AMANDA HITT
Director
Government Accountability
Project
1612 K Street, NW
Suite 1100
Washington, DC 20006