No. 22-1168

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.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After a six-week trial, a jury found that petitioners lied their way into private conferences and healthcare clinics and surreptitiously recorded respondents' doctors and staff without consent. The jury found petitioners liable for fraud, trespass, breach of contract, unlawful recording, and violations of civil RICO, and awarded respondents compensatory and punitive damages. While petitioners published videos containing footage from their surreptitious recordings, the compensatory damages award remedied nonreputational economic harms caused by petitioners' unlawful conduct, not by their publication of the videos. A unanimous panel of the court of appeals held that, although the First Amendment requires a plaintiff to show actual malice before recovering damages for defamation or similar torts, respondents were not required to show actual malice here for two independent reasons: the damages remedied nonreputational economic injuries, and respondents could have recovered the same damages even if petitioners had never published the videos.

The question presented is whether, absent a showing of actual malice, the First Amendment bars compensatory damages for nonreputational economic injuries that the plaintiff would have suffered regardless of the defendants' speech merely because the defendants engaged in unlawful conduct for the purpose of publishing speech.

RULE 29.6 STATEMENT

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a) is reported at 51 F.4th 1125. The memorandum disposition of the court of appeals is unpublished but available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (Pet. App. 255a–258a) is unreported. The opinion of the district court on petitioners' posttrial motions is reported at 480 F. Supp. 3d 1000. The opinion of the district court on injunctive relief is reported at 613 F. Supp. 3d 1190. The opinion of the district court on summary judgment (Pet. App. 44a-254a) is reported at 402 F. Supp. 3d 615. The opinion of the district court on petitioners' motion to dismiss is reported at 214 F. Supp. 3d 808.

INTRODUCTION

This case involves a straightforward application of longstanding First Amendment principles. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment bars public figures from recovering damages for defamation without showing that

the defamatory "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), this Court held that this actual-malice requirement also applies to a claim for "the severe emotional distress suffered by [a] person who is the subject of an offensive publication." *Id.* at 52.

In *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), however, the Court made clear 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. *Cohen* concerned a newspaper that, in breach of a promise of confidentiality, published the name of a confidential source. *Id.* at 671. When the source sued for promissory estoppel, the Court held that the actual-malice requirement did not apply. The Court distinguished *Hustler* on the ground that the source was "not seeking damages for injury to his reputation or his state of mind," but rather "for breach of a promise that caused him to lose his job and lowered his earning capacity." *Ibid.*

Here, after a six-week trial, a jury found that petitioners violated numerous laws of general applicability by lying their way into respondents' private conferences and clinics and by surreptitiously recording respondents' doctors and staff without consent. While petitioners later published videos containing footage from their surreptitious recordings, the court of appeals held that respondents were not required to show actual malice, for two independent reasons. First, "[t]he jury awarded damages for economic harms …, not … reputational or emotional damages." Pet. App. 22a. Second, respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their

surreptitious recordings." *Ibid.* The court of appeals denied rehearing en banc without any noted dissent.

Those holdings do not warrant further review. Petitioners claim that the lower courts are divided over how to reconcile *Hustler* and *Cohen*, but every court of appeals to address the issue has applied *Cohen*'s distinction between economic damages and reputational or emotional damages. Equally illusory is petitioners' supposed split over the scrutiny applicable to claims that the First Amendment immunizes violations of generally applicable laws. The decision below also is correct. Indeed, to reverse, this Court would have to overrule two longstanding precedents *and* overturn the court of appeals' factbound determination that respondents would have suffered the same damages "[r]egardless of publication." *Ibid.*

In any event, this case is a poor vehicle to clarify the applicability of the actual-malice requirement. On the facts, petitioners would not win even under their own legal standard. Moreover, in their briefing below, petitioners did not cite, nor did the court of appeals discuss, many of the key cases petitioners now rely upon. And while petitioners seek to expand the actual-malice requirement, multiple Justices of this Court have expressed interest in reconsidering whether that requirement should ever apply in the first place.

The petition should be denied.

STATEMENT[1]

A. Factual Background

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

[1] A substantially similar Statement is contained in the Briefs in Opposition filed contemporaneously in Nos. 22-1147, 22-1159, and 22-1160.

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

To strengthen professional relationships and facilitate candid discussions among its doctors and staff, PPFA holds several national conferences each year. These conferences take place in secure, private event spaces, are not open to the public, and are limited to pre-registered invitees who have been vetted by PPFA or other conference co-sponsors. See *Planned Parenthood Fed'n of Am., Inc.* v. *Newman*, No. 20-16068, 2022 WL 13613963, at *2, 5, 7 (9th Cir. Oct. 21, 2022). Respondents' doctors and staff also attend conferences held by other organizations, including the National Abortion Federation ("NAF"). PPFA "is a member of NAF, as are many of PPFA's affiliates, providers, and staff." Pet. App. 15a. NAF's conferences likewise are held in secure, private spaces, are not open to the public, and are limited to pre-registered invitees. See *Planned Parenthood*, 2022 WL 13613963, at *2, 5, 7.

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

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

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

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

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

of that same year, 'Susan Tennenbaum' and 'Brianna Allen' attended the Association of Reproductive Health Professionals conference in Colorado." *Ibid.*

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

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

4. In addition to infiltrating conferences, petitioners also arranged lunch meetings and site visits, where they made further surreptitious recordings.

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

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

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

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

B. Proceedings Below

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

Petitioners moved to dismiss under Rule 12(b)(6) and to strike under California's anti-SLAPP statute. Among other things, petitioners argued that respondents sought "damages resulting from the publication of the recordings" and therefore "must satisfy the First Amendment requirements for defamation claims." *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 839 (N.D. Cal. 2016). The district court disagreed, explaining that "the First Amendment does not impose heightened standards on [respondents'] tort claims as long as [respondents] *do*

not seek reputational damages (lost profits, lost vendors) stemming from the publication conduct of [petitioners]." *Id.* at 841.

Petitioners also argued under RICO that "the causal nexus between [petitioners'] conduct and the harm alleged … is too distant." *Id.* at 826. But the district court rejected that argument as well. The court acknowledged that respondents "may not be able to recover for damages that were not *directly* caused by the actions of [petitioners]"—"[f]or example, the damages [respondents] incurred because their website was hacked by a third party would appear to be too distant, too far down the causal chain." *Id.* at 827 (footnote omitted). "But other damages alleged—including the increase in security costs at conferences, meetings, and clinics that [respondents] incurred when *they learned* about [petitioners]' infiltration of their conferences, meetings, and clinics—are much more directly tied to [petitioners]' conduct and do not raise the problem of intervening actions of third-parties." *Ibid.*

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

2. After discovery, the parties filed "seven motions for summary judgment, one special motion to strike the complaint, a *Daubert* motion, and a motion to strike an expert." Pet. App. 45a. As relevant here, petitioners argued that respondents' remaining damages were barred by the First Amendment, but the district court again disagreed. The court acknowledged that respondents

"cannot recover for reputational damages or 'publication' damages under the First Amendment," and it drew "the line for compensable damages between those caused by [petitioners]' direct conduct and those caused by third parties." *Id.* at 46a.

The court accordingly allowed respondents to seek just two narrow categories of damages. In particular, the court allowed respondents to seek damages *only* "[1] for personal security costs for individuals targeted by [petitioners] and [2] for measures to investigate the intrusions and upgrade the security measures meant to vet and restrict future access to the conferences and facilities." *Id.* at 46a-47a. The court did *not* allow respondents to seek damages for "more general expenses to upgrade physical security at Planned Parenthood facilities," for example, nor for "the time and expense [respondents] incurred in responding to the threats and acts of third parties following release of the videos." *Id.* at 47a.

The court thus held that "some of the damages [respondents] s[ought] here are more akin to publication or reputational damages that would be barred by the First Amendment," but "[o]thers … are economic damages that are not categorically barred." *Id.* at 68a. "Those that fall in the latter category," the court explained, "result *not* from the acts of third parties who were motivated by the contents of the videos, but from the *direct* acts of [petitioners]—their intrusions, their misrepresentations, and their targeting and surreptitious recording of [respondents]' staff." *Id.* at 68a-69a. "[Petitioners] are not immune from the damages that their intrusions into the conferences and facilities directly caused, nor from the damages caused by their direct targeting of [respondents]' staff …." *Id.* at 69a.

The district court rejected petitioners' argument seeking "to preclude [respondents] categorically from seeking damages covering 'increased security.'" *Id.* at

72a. "That the systems implemented by [respondents] following the intrusions were new or improved," the court explained, "does not make them unrecoverable as a matter of law." *Id.* at 73a. But the court allowed petitioners to "argue to the jury that they were unreasonable, unnecessary, or speculative." *Ibid.*

The district court also rejected petitioners' arguments under RICO. Petitioners first argued that they did not commit any predicate act of producing or transferring fake IDs in violation of 18 U.S.C. § 1028 because there was no evidence that "the production[or] transfer … [wa]s in or affect[ed] interstate … commerce." 18 U.S.C. § 1028(c)(3)(A). But the court held that respondents had established that interstate-commerce element as a matter of law. As the court explained, "only a 'minimum nexus' with interstate commerce is required under this statute," and "Daleiden admitted that he used the internet to secure two of the IDs, [petitioners] intended to affect interstate commerce in creating the false IDs, and [petitioners] used those IDs across state lines." Pet. App. 80a.

Petitioners next argued that respondents had not adequately established the requisite "pattern of racketeering activity," 18 U.S.C. § 1962(a), because their scheme "'came to fruition'" with the publication of the videos, such that their "work … [wa]s 'complete' and 'finished.'" Pet. App. 84a. Petitioners did not dispute, however, that their "zealous activism against [respondents]" is *not* "over." *Ibid.* And the court concluded that there was "evidence from which a reasonable juror could conclude that [petitioners] will attempt similar tactics … again in the future." *Ibid.*

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

87a. "For the damages that are allowable," the court found "sufficient evidence … for a reasonable juror to conclude that those damages were directly caused by [petitioners]' actions." *Ibid.*

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

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

The district court entered limited injunctive relief, *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 613 F. Supp. 3d 1190 (N.D. Cal. 2020), and denied petitioner's posttrial motions, *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 480 F. Supp. 3d 1000 (N.D. Cal. 2020).

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

a. In a published opinion, the panel affirmed the district court's conclusion that the compensatory damages award is consistent with the First Amendment, but re-

versed the verdict under the federal eavesdropping statute.

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

The panel rejected petitioners' argument "that the infiltration and security damages … are impermissible publication damages" under *Hustler*. *Ibid.* The panel explained that this case is "distinguishable from *Hustler*" because "[t]he jury awarded damages for economic harms …, not the reputational or emotional damages sought in *Hustler*." *Ibid.* Furthermore, "[petitioners]' argument that, absent a showing of actual malice, all damages related to truthful publications are necessarily barred by the First Amendment cannot be squared with

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

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

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

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

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

As to RICO, the panel held that respondents' claim "satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. § 1028(c)(3)(A)." *Planned Parenthood*, 2022 WL 13613963, at *2. As the panel explained, petitioners "used the fake licenses to gain admission to out-of-state conferences and facilities, and then presented those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." *Ibid.* "[F]urther, Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was intimately related to interstate commerce." *Ibid.* (quotation marks omitted).

The panel also held that respondents presented sufficient evidence "regarding the required *pattern* of predicate acts necessary to violate RICO." *Id.* at *3. "A pattern may be established," the court explained, "by proof that defendants' conduct possessed 'open-ended continuity,' *i.e.*, that their conduct 'by its nature project[ed] into the future with a *threat* of repetition.'" *Ibid.* (quoting *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)) (emphasis by panel). Here, "[t]he evidence showed that various [petitioners and co-conspirators] had previously advocated for or used undercover sting operations targeting Planned Parenthood, and CMP and BioMax were still extant and intended to carry out future projects." *Ibid.*

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

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

Finally, as to punitive damages, the panel found "no error in the award of punitive damages." *Id.* at *7. As the panel explained, "[t]here was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, Merritt, Rhomberg, Newman, CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation." *Ibid.* Moreover, petitioners and their co-conspirators "waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs." *Id.* at *7 n.9. And "[e]ven if the argument were not waived," it was "meritless." *Ibid.*

4. Petitioners and their co-conspirators filed four separate petitions for panel rehearing or rehearing en banc. After calling for a response, the panel denied panel rehearing, and the full court denied rehearing en banc without any noted dissent. Pet. App. 258a.

REASONS TO DENY THE PETITION

The decision below applied settled legal principles to largely undisputed facts. The court of appeals' First Amendment holding does not conflict with any decision of this Court or another court of appeals, is correct on the merits, and is of limited significance. In any event, this case is an exceedingly poor vehicle to address the question presented. Further review is not warranted.

A. The Decision Below Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals

Petitioners argue that the decision below implicates two splits of authority. But both splits are illusory.

1. Petitioners first argue that the decision below widens a circuit split regarding how to reconcile *Hustler* and *Cohen*. No such split exists. *Hustler* held that the actual-malice requirement announced in *Sullivan* applies not only to defamation claims, but also to claims for "the severe emotional distress suffered by [a] person who is the subject of an offensive publication." 485 U.S. at 52. *Cohen* then distinguished *Hustler*, holding that the actual-malice requirement did not apply to a promissory estoppel claim by a plaintiff who was "not seeking damages for injury to his reputation or his state of mind," but "for breach of a promise that caused him to lose his job and lowered his earning capacity." 501 U.S. at 671. Here, the court of appeals applied *Cohen*'s distinction between economic injury and reputational or emotional injury, as have all other courts of appeals to address the issue.

a. Petitioners first argue that the decision below conflicts with *Compuware Corp.* v. *Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007), but that case is a straightforward application of *Hustler*. In *Compuware*, Compuware hired Moody's to rate and publish its creditworthiness; disliking the rating it received, it sued for (among other things) defamation and breach of contract. *Id.* at 522-24. The district court granted summary judgment to Moody's, finding that Compuware could not show actual malice, and the Sixth Circuit affirmed. *Id.* at 526-29.

In concluding that the actual-malice standard applied, the Sixth Circuit held that Compuware's breach-of-contract claim was a repackaged defamation claim seeking redress for a reputational injury. As the court

explained, quoting the district court with approval, "the breach of contract claim is dependent on the truth of the rating and the care taken by the publisher during the publication process." *Id.* at 530. The court then quoted *Cohen*'s distinction of *Hustler* and explained that, in the case before it, "it is inescapable that Compuware seeks compensation for harm caused to its reputation." *Ibid.*

The court further explained that three factors made it particularly clear that the actual-malice requirement applied. First, the contract at issue involved a promise by Moody's "to provide its opinion of Compuware's creditworthiness and to publish a report of that opinion." *Id.* at 531. "A breach of contract claim based on an agreement to publish an opinion," the court explained, "invokes core First Amendment principles." *Ibid.* Second, Compuware did "not present a typical contract claim" and instead "assert[ed] an argument sounding in negligence," making the "contract claim more akin to a tort claim." *Id.* at 531-32. And "the Supreme Court and our sister circuits have not hesitated to apply the actual-malice standard to tort claims that are based on the same conduct or statements that underlie a pendant defamation claim." *Id.* at 532 (citing, among other things, two decisions by the Ninth Circuit). Third, "Compuware complain[ed] only of an injury to its reputation." *Ibid.* "Our sister circuits," the court observed, "have found that the kind of damages sought by the plaintiff influences whether the actual-malice standard applies to a state-law claim." *Ibid.*

This case bears no resemblance to *Compuware*. Respondents did not allege a breach of a "promise to publish an opinion." Respondents have not asserted "tort claims that are based on the same conduct or statements that underlie a pendant defamation claim." And most importantly, respondents are not seeking redress for "an injury to [their] reputation." Indeed, the court of appeals

concluded that respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings." Pet. App. 22a.

b. Petitioners next raise *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), but that case applies the same rule as *Compuware*. In *Food Lion*, "[t]wo ABC television reporters, after using false resumes to get jobs at Food Lion, Inc. supermarkets, secretly videotaped what appeared to be unwholesome food handling practices," and "[s]ome of the video footage was used by ABC in a … broadcast that was sharply critical of Food Lion." *Id.* at 510. While "Food Lion did not sue for defamation," it "asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices," seeking damages "for items relating to its reputation, such as loss of good will and lost sales." *Id.* at 510-11, 522. The district court upheld a jury verdict in Food Lion's favor, but the Fourth Circuit reversed in relevant part, holding that Food Lion had not shown actual malice. See *id.* at 511, 522-24.

The court explained the problem succinctly: "What Food Lion sought to do … was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. … [S]uch an end-run around First Amendment strictures is foreclosed by *Hustler*." *Id.* at 522. "[A]ccording to [*Cohen*]," the court explained, the actual-malice requirement "appl[ies] to damage claims for reputational injury from a publication." *Id.* at 523. And "in seeking compensation for matters such as loss of good will and lost sales," Food Lion was "claiming reputational damages from publication." *Ibid.*

Food Lion thus draws exactly the same line as *Cohen*, *Compuware*, and the decision below—claims for reputational or emotional injuries are subject to the ac-

tual-malice requirement, and claims for other injuries are not. See *Veilleux* v. *NBC*, 206 F.3d 92, 128-29 (1st Cir. 2000) (finding actual-malice requirement inapplicable and distinguishing *Food Lion* on this ground). *Food Lion* certainly never suggests that the actual-malice requirement applies even where plaintiffs would have suffered the same injury "[r]egardless of publication." Pet. App. 22a.

c. Petitioners' reliance on *Beverly Hills Foodland, Inc.* v. *United Food & Commercial Workers Union, Local 655*, 39 F.3d 191 (8th Cir. 1994), fares no better. There, an employer sued a union for defamation and tortious interference based on handbills the union distributed and statements it made criticizing the employer's hiring practices. See *id.* at 193-94. The district court granted summary judgment to the union because the employer failed to show actual malice, and the Eighth Circuit affirmed. See *id.* at 197.

As to the tortious inference claims, the Eighth Circuit observed that those claims were based on the same conduct as the defamation claims and sought damages for the same reputational injury—"los[t] business due to [a] decrease in consumer shopping." *Id.* at 196. The court then explained that "the malice standard required for actionable defamation claims … must equally be met for a tortious interference claim based on the same conduct or statements." *Ibid.* "This is only logical," the court explained, "as a plaintiff may not avoid the protection afforded by the Constitution … merely by the use of creative pleading." *Ibid.*

Beverly Hills Foodland thus aligns with *Compuware*: When a plaintiff asserts defamation and non-defamation claims side-by-side, based on the same conduct and statements and alleging the same injury, the actual-malice standard plainly applies. Here, however, respondents did *not* assert defamation and non-

defamation claims in parallel. Nor are respondents' claims based on facts that would have supported an unpled defamation claim. Respondents "stipulated" that the individuals in the videos "spoke the words recorded in the videos," *Planned Parenthood*, 2022 WL 13613963, at *4, and petitioners violated the law *not* by publishing videos, but by producing and transferring fake IDs, lying to gain access to respondents' conferences, clinics, and staff, and recording surreptitious videos without consent.

d. Petitioners also assert that the court of appeals improperly "attempt[ed] 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." Pet. 22. That assertion is unavailing on three levels.

First, the portion of the decision below petitioners cite, Pet. App. 22-23, does not distinguish between creation and publication. Petitioners attack a straw man.

Second, to the extent the decision below can be read to draw this distinction, that is only because petitioners *invited* it. Again, the actual-malice requirement applies to defamation claims and their constitutional equivalents—*i.e.*, certain claims redressing injuries resulting from wrongful *publications* of speech. For that reason, petitioners argued (wrongly) that respondents' damages stemmed from petitioners' *publication* of the videos. Petitioners' opening brief below used the word "publication" almost 100 times. See generally C.A. Br. of CMP, Biomax, Daleiden, and Lopez. While the court of appeals may have *focused* on publication rather than creation, so did petitioners.

Third, any creation/publication distinction does not implicate a split of authority. While petitioners cite three cases rejecting such a distinction, those cases all involved challenges to statutes that were not generally applicable, but instead regulated speech in particular. See *Brown* v.

Entm't Merchants Ass'n, 564 U.S. 786 (2011) (striking down law imposing restrictions on sales or rentals of "violent video games"); *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011) (striking down law restricting disclosure of pharmacy records); *ACLU of Ill.* v. *Alvarez*, 679 F.3d 583 (7th Cir. 2012) (reversing denial of preliminary injunction against state eavesdropping law as applied to certain recordings).

2. Petitioners also argue that the decision below creates a split regarding "whether First Amendment protections apply to expressive activity that is punishable under … laws that apply to both speech and conduct alike." Pet. 23. Again, not so.

a. Petitioners cite three criminal cases holding that "any attempt to punish protected speech is subject to the constraints of the First Amendment," which applies "whenever the conduct triggering coverage of the statute consists of communicating a message." Pet. 23-24 (citation omitted). But this is not a criminal case. While Daleiden and Merritt have been charged in *separate* criminal cases for their unlawful recordings of respondents' staff, see *People* v. *Daleiden*, No. 2502505 (Cal. Super. Ct. May 3, 2017); *People* v. *Merritt*, No. 17006621 (Cal. Super. Ct. May 3, 2017), *this* is a civil case.

Furthermore, the "conduct triggering coverage" under the laws at issue here did *not* "consist of communicating a message." The relevant laws here made petitioners liable for trespass, breach of contract, recording without consent, and conducting an enterprise through a pattern of racketeering activity. None of that is "communicating a message."[2]

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[2] While respondents' fraud claims held petitioners liable for speech, the fraudulent speech consisted of misrepresenting petitioners' identities, *not* publishing the videos. See C.A. Supp. E.R. 837-839, C.A. E.R.100-01 (jury instructions detailing all of the false

b. The civil decisions of this Court petitioners cite are equally irrelevant. Petitioner cites *Hustler* and *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), but those cases merely hold that the actual-malice requirement applies to claims seeking redress for emotional injuries resulting from wrongful publications. See *Hustler*, 485 U.S. at 52; *Time*, 385 U.S. at 389-91. That principle is entirely consistent with *Cohen* and the decision below.

Petitioner also cites *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), which concerned claims of malicious interference asserted by merchants against participants in a boycott. See *id.* at 888-89. The Mississippi Supreme Court had held that 92 participants could be held liable for the boycott's economic consequences, reasoning that the boycott involved "illegal force, violence, and threats," and therefore was tortious in its entirety. *Id.* at 895 (quoting *NAACP* v. *Claiborne Hardware Co.*, 393 So.2d 1290, 1301 (Miss. 1980)). But this Court reversed. As relevant here, the Court held that, to the extent the merchants sought to hold NAACP leader "[Charles] Evers liable for the unlawful conduct of others" based on his "public speeches," those speeches did not constitute fighting words or incitement. *Id.* at 927-28. Accordingly, "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech." *Id.* at 928. *Claiborne Hardware* did not address the actual-malice requirement.

This case is a far cry from *Claiborne Hardware*. Petitioners did not raise, and the court of appeals did not address, whether petitioners' speech constituted fighting words or incitement. And the jury did not hold petitioners liable "for the unlawful conduct of others" based on petitioners' "public speech[]." To the contrary, respond-

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statements underlying respondents' fraud claims). Furthermore, petitioners waived any challenge to their fraud liability. See *Planned Parenthood*, 2022 WL 13613963, at *7 n.9.

ents would have suffered the same injuries "[r]egardless of publication." Pet. App. 22a. Petitioners were held responsible for injuries "result[ing] *not* from the acts of third parties who were motivated by the contents of the videos, but from the *direct* acts of [petitioners]—their intrusions, their misrepresentations, and their targeting and surreptitious recording of [respondents]' staff." *Id.* at 68a-69a.

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994), is even farther afield. There, this Court held that a federal statute requiring cable television systems to carry local broadcast stations was subject to intermediate First Amendment scrutiny. See *id.* at 626, 661-62. Rejecting the government's argument that "a less rigorous standard" should apply, *id.* at 637, the Court noted that, "while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, laws that single out the press, or certain elements thereof … are always subject to at least some degree of heightened First Amendment scrutiny." *Id.* at 640-41 (citations omitted). The Court never mentioned the actual-malice requirement.

Unlike *Turner*, this case does not involve laws that "single out the press." Petitioners acknowledge that this case involves "'generally applicable' laws that apply to both speech and conduct alike." Pet. 23.[3]

c. Nor does the decision below conflict with the circuit precedents petitioners cite. Those cases concern specialized state trespass statutes that single out speech, and do not address the actual-malice requirement.

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[3] Petitioners also cite *McKesson* v. *Doe*, 141 S. Ct. 48 (2020), but they concede that this Court resolved that case not under the First Amendment, but by "vacat[ing] … on unrelated state-law grounds and remand[ing] with instructions to certify a question to the Louisiana Supreme Court." Pet. 25.

To begin with, there is no conflict with *People for the Ethical Treatment of Animals, Inc.* v. *North Carolina Farm Bureau Federation, Inc ("PETA"),* 60 F.4th 815 (4th Cir. 2023), *petitions for cert. pending*, Nos. 22-1148 & 22-1150 (filed May 24, 2023). There, the Fourth Circuit struck down a state statute criminalizing certain kinds of trespass as applied to undercover animal-cruelty investigations. Importantly, three of the four provisions at issue "on their face single[d] out speech." *Id.* at 829. Moreover, the provisions did "not merely target speech, but speech critical of the [property owner]," thereby triggering "strict scrutiny." *Id.* at 830. The fourth provision also triggered strict scrutiny because it imposed "restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.* at 831 (citation omitted). The court ultimately concluded that "the challenged provisions fail[ed] even intermediate scrutiny," *id.* at 831, because the state produced no evidence that narrower restrictions would be insufficient and because the restrictions on newsgathering did not "fit" the state's proffered interests, *id.* at 832.

Unlike the provisions struck down in *PETA*, the generally applicable laws here do not single out speech or draw distinctions between different viewpoints or speakers. And petitioners did not request, nor did the court of appeals conduct, any inquiry into the governmental interests served by the laws here or the fit between those interests and the laws' scope.

While the dissent in *PETA* cited the decision below in this case, it did so only for the undisputed proposition that "generally applicable" laws "do[] not merit heightened First Amendment scrutiny." *Id.* at 844-45 (Rushing, J., dissenting). The dissent's core disagreement with the majority concerned whether or not North Carolina's trespass statute triggered heightened scrutiny by

"singl[ing] out" speech, *id.* at 844, which the laws here do not do.

Nor is there any conflict with *Western Watersheds Project* v. *Michael*, 869 F.3d 1189 (10th Cir. 2017), or *Animal Legal Defense Fund* v. *Kelly*, 9 F.4th 1219 (10th Cir. 2021). In *Western Watersheds*, the Tenth Circuit held that some level of First Amendment scrutiny applied to a statute providing enhanced penalties for trespass on private land "if an individual subsequently collects resource data from public lands." 869 F.3d at 1194. The court reasoned that the statute imposed "differential treatment," *id.* at 1194, based on "the protected creation of speech," *id.* at 1196. Similarly, in *Animal Legal Defense Fund*, the Tenth Circuit struck down statutory provisions that targeted speech because "they regulate[d] what may be permissibly said to gain access to or control over an animal facility" and did so in a way that was "viewpoint discriminatory." 9 F.4th at 1232. In other words, both cases concerned state statutes that, unlike the laws here, singled out speech.

Indeed, the Ninth Circuit too has struck down a special state trespass provision because it imposed an impermissible content-based restriction on speech. See *Animal Legal Def. Fund* v. *Wasden*, 878 F.3d 1184, 1203-05 (9th Cir. 2018). But the decision below had no difficulty distinguishing that precedent, which "repeated that facially constitutional statutes apply to everyone, including journalists." Pet. App. 21a. If this Court is to review how the First Amendment applies to special state trespass statutes, it should grant the petitions in *PETA* or another case directly involving such a statute. It should not grant review here.

B. The Decision Below Is Correct And Of Limited Significance

1. The court of appeals correctly held that the actual-malice requirement does not apply here, for two independent reasons.

a. First, the court of appeals correctly held that "[t]he jury awarded damages for economic harms …, not … reputational or emotional damages." Pet. App. 22a. That reasoning aligns perfectly with the grounds on which *Cohen* distinguished *Hustler*. See *Cohen*, 501 U.S. at 671. It also comports with the purpose underlying the actual-malice requirement, which originated as a constitutional requirement for defamation claims. See *Sullivan*, 376 U.S. at 279-80. At their core, defamation claims vindicate an "interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966). The actual-malice requirement thus sensibly is limited to defamation and similar claims "for injury to [the plaintiff's] reputation or … state of mind." *Cohen*, 501 U.S. at 671.

Petitioners take the position that the actual-malice requirement "applies whenever a defendant's speech is the but-for cause of the plaintiff's purported damages." Pet. 15. But that argument conflicts with two decisions of this Court.

The first is *Cohen*. There, again, this Court held that the actual-malice requirement did not apply to a contractual claim seeking damages resulting from the defendant's publication of an article identifying the plaintiff as a confidential source. See 501 U.S. at 671. There was no question that publication was a but-for cause of the plaintiff's damages—after all, the alleged promissory breach *was* the publication of speech. Yet this Court held that the actual-malice requirement did not apply. *Ibid.* As the court of appeals explained, "[petitioners]' argument that, absent a showing of actual malice, all damages

related to truthful publications are necessarily barred by the First Amendment cannot be squared with *Cohen*." Pet. App. 23a.

Petitioners' argument also conflicts with *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). There, this Court held that the actual-malice requirement did not apply to a claim by an acrobatic performer against a reporter who broadcasted the performer's act, violating a state-law right of publicity. *Id.* at 563-65. Even though the broadcast was obviously a but-for cause of the performer's damages, the Court distinguished its actual-malice precedents, explaining that "[t]he interest protected" by the claims in those cases was "clearly that of reputation, with the same overtones of mental distress as in defamation." *Id.* at 573 (citation omitted). The performer's claim, by contrast, vindicated a "proprietary interest … in his act." *Ibid.* Accordingly, just because the publication of speech was a but-for cause of the plaintiff's damages does *not* mean that the actual-malice requirement automatically applies.

Petitioners also challenge the decision below on the facts, arguing that the court of appeals had no basis to hold that respondent's damages were economic "other than the fact that [respondents] told the court that they were." Pet. 21. But the court's holding was based on the facts presented at trial, not respondents' "self-serving description." *Id.* at 13. The jury awarded damages for tangible, out-of-pocket expenses reasonably incurred to safeguard the physical safety and security of respondents' conferences, clinics, and staff. Contrary to petitioners' suggestion, those expenses did not "flow directly from [any] loss in reputation." *Id.* at 21 (citation omitted). They flowed from petitioners' infiltration of respondents' facilities and targeting of their staff. While respondents suffered an array of reputational harms stemming from the publication of the videos, respond-

ents did not seek damages for huge swaths of those harms in their complaint, and of the damages respondents initially sought, the district court barred the vast majority—all but two limited categories. See Pet. App. 46a-47a, 68a-69a. In any event, respondents' factbound challenge to the particular damages awarded here does not warrant further review.

Furthermore, the damages award here serves, and does not undermine, First Amendment values. Respondents' conferences facilitate sensitive conversations among professional colleagues, and their clinics and staff offer confidential healthcare services to patients. Those associative activities are impossible if respondents cannot control who enters their facilities. "[The] right to exclude is central to [the] freedom of association." *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 445 (2008). The damages award here upholds the right to exclude and, through it, the right to associate.

b. The court of appeals also held that the actual-malice requirement does not apply for a second, independent reason: Respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings." Pet. App. 22a.

Never acknowledging this holding directly, petitioners assert that the laws at issue were "*applied to expressive activities*." Pet. 29. Petitioners also assert that respondents' claims "were allowed to proceed to trial only because Daleiden chose to *publish his findings* for *public consumption*, rather than keep them to himself." Pet. 20. Those assertions run headlong into the express holding below that the outcome would have been the same "even if [petitioners] had never published videos."

To be sure, respondents "*learned*" of petitioners' unlawful conduct through their videos. *Planned Parenthood*, 214 F. Supp. 3d at 827. But the court of ap-

peals determined that, if respondents had found out through some other means, such as an internal investigation or a leak from a co-conspirator, respondents still "would have protected [their] staff who had been secretly recorded and safeguarded [their] conferences and clinics from future infiltrations." Pet. App. 22a-23a. That conclusion is amply supported by the record. Multiple witnesses testified at length that it was petitioners' *infiltrations*, not the videos, that necessitated strengthening respondents' security measures. See C.A. E.R. 2170, 2226, 3558-71. And respondents obtained enhanced security for one of their doctors even though no video of her was published. See C.A. Supp. E.R. 586; C.A. E.R. 2038-40; see also C.A. E.R. 1785-89; C.A. Supp. E.R. 589-94. At a minimum, a reasonable jury could find that publication was not a but-for cause of respondents' damages. And respondents' case-specific arguments about the particular causal chain here do not warrant review.

2. The significance of the decision below is limited. In holding that the actual-malice standard does not apply in this case, the court of appeals applied the same logic uniformly applied by appellate courts nationwide since *Cohen*. See § A, *supra*. And petitioners' dire predictions about the consequences of the decision below ring hollow. Petitioners assert, for example, that residents of the Ninth Circuit now "can be subject to ruinous damages for publishing truthful content," Pet. 15, but the decision below holds no such thing. Petitioners violated laws of general applicability, and respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos." Pet. App. 22a.

Nor is there any merit to petitioners' alarmist assertion that the decision below "exposes traditional investigative journalism practices to ruinous liability." Pet. 36. *Cohen*'s holding that journalists must obey laws of general applicability has been the law for more than thirty

years, and the cases it cited have been the law for almost a century. Yet investigative journalism continues to thrive. The decision below "does not impose a new burden on journalists or undercover investigations using lawful means." Pet. App. 23a. "Journalism and investigative reporting have long served a critical role in our society," but they "do not require illegal conduct." *Ibid.*

Journalists themselves recognize as much. Reputable news organizations prohibit lawbreaking in the service of newsgathering. For example, the *Dow Jones Code of Conduct* governing journalists at *The Wall Street Journal* provides: "All employees … must obey all applicable laws." *Dow Jones Code of Conduct*, Dow Jones, https://bit.ly/3Yvckvf. Likewise, the *New York Times*'s *Ethical Journalism Handbook* states: "Staff members must obey the law in pursuit of the news," "may not commit illegal acts of any sort," and "may not record conversations without the prior consent of all parties to the conversations." *Ethical Journalism: A Handbook of Values and Practices for the News and Opinion Departments*, N.Y. Times, https://bit.ly/43OmyYv. The Fourth Circuit put it well in *Food Lion*: "[T]he media can do its important job effectively without resort to the commission of run-of-the-mill torts." 194 F.3d at 521. At a minimum, newsgathering does not require a "pattern" of lawbreaking that "project[s] into the future with a threat of repetition" and necessitates costly measures to prevent its recurrence, as the jury found here. *Planned Parenthood*, 2022 WL 13613963, at *3 (emphasis and citation omitted); see *id.* at *7.[4]

[4] Petitioners' suggestion that their lawbreaking "exposed unethical and unlawful activity" by respondents, Pet. 32, is wrong. The magistrate judge, district judge, and court of appeals all concluded that "[t]he videos did not contain evidence of wrongdoing." *Planned Parenthood*, 2022 WL 13613963, at *1; see C.A. E.R. 197.

Indeed, the decision below on the actual-malice requirement is of limited significance even in this case. That is because the jury awarded damages under multiple causes of action. For example, the jury awarded compensatory damages for breach of contract, and in a related case, the court of appeals held that petitioners "waived any First Amendment rights to disclose [recorded] information publicly by knowingly signing … agreements" similar to the agreements here. *Nat'l Abortion Fed'n* v. *Ctr. for Med. Progress*, 685 F. App'x 623, 626 (9th Cir. 2017). Under that holding, petitioners' arguments to this Court would not alter respondents' breach-of-contract damages. The jury also awarded statutory penalties for petitioners' violations of state eavesdropping statutes. Petitioners' arguments would not disturb those penalties either, as they rest on petitioners' surreptitious recordings alone and do not require proof of actual damages. In other words, petitioners' arguments would at most reduce, but not eliminate, the damages award.[5]

C. This Case Is A Poor Vehicle To Clarify The Actual-Malice Requirement

In any event, this case is an exceedingly poor vehicle for clarifying when the First Amendment requires plaintiffs to prove actual malice.

1. To begin with, petitioners ask this Court to hold that the actual-malice requirement "applies *whenever* a defendant's speech is the *but-for cause* of the plaintiff's purported damages." Pet. 15 (emphases added). If this Court were to do so, however, it would not change the outcome of this case. Again, the court of appeals held

[5] Nor would petitioners' arguments undermine the district court's award of attorneys' fees. That award is authorized not only by RICO but also by the Florida and Maryland eavesdropping statutes, as well as one contract at issue. See D.C. Dkt. 1150, at 5.

that respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos." Pet. App. 22a. In other words, petitioners' publication of speech was *not* "the but-for cause of [respondents'] damages." Under the facts as evaluated by the court of appeals, therefore, petitioners would lose even under their own legal test.

For that reason, this Court's disposition of the question presented will make no difference unless the Court *also* reviews the court of appeals' case-specific holding that petitioners' publication of the videos was not a but-for cause of respondents' damages. This Court generally does not review that kind of factbound question, which in this case would require analyzing a six-week trial record.

2. Petitioners also failed to raise or develop multiple arguments critical to their petition.

To begin with, petitioners' arguments would require this Court to overrule at least two longstanding First Amendment precedents. See § B.1.a, *supra* (discussing *Cohen* and *Zacchini*). But petitioners do not engage in any *stare decisis* analysis. See *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020). Indeed, petitioners do not even ask for the extraordinary remedy of overruling, which this Court generally does not grant without a forthright request from a party. See, *e.g.*, *Haaland* v. *Brackeen*, 143 S. Ct. 1609, 1631 (2023).

In addition, petitioners rely on numerous cases they did not cite below and the court of appeals therefore had no occasion to discuss. For example, petitioners did not cite, and the court of appeals did not discuss, this Court's decisions in *Claiborne Hardware*, *Turner Broadcasting*, *Brown*, or *Sorrell*. If this Court is to clarify the relevance of those decisions to the actual-malice requirement, it should do so in a case where the arguments about those precedents were fully aired below.

3. Finally, petitioners are swimming against the jurisprudential tide. Multiple respected jurists, including two sitting Justices of this Court, have called for reconsidering the "soundness" of the actual-malice requirement in an appropriate case. *Counterman* v. *Colorado*, 143 S. Ct. 2106, 2132-33 (2023) (Thomas, J. dissenting); see *id.* at 2133 (collecting statements by Justices Thomas and Gorsuch, as well as Judge Silberman and Justices Burger, Rehnquist, White, Harlan, Marshall, Stewart, and Scalia). But petitioners seek to reaffirm, clarify, and *expand* the applicability of that requirement. It makes little sense to grant review in this case to clarify when the actual-malice requirement applies if the Court may consider abandoning that requirement altogether in another case in the near future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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