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.

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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

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

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

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

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

Attorneys for Petitioners

September 6, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

REPLY BRIEF

PPFA faces the tall task of defending the constitutionally indefensible, and its only recourse is to mischaracterize the district court's decision and the Ninth Circuit opinion affirming it. By its own admission, PPFA sought damages for voluntary expenditures it undertook to "restore 'confidence'" and "a 'sense of trust and faith'" among its supporters after Petitioners published videos exposing PPFA's sale of organs from aborted babies. BIO.11. Those are quintessential publication damages that must satisfy First Amendment scrutiny.

Yet the district court held—and the Ninth Circuit affirmed—that "[t]he First Amendment is not a defense to [PPFA's] claims" because PPFA sued under generally applicable causes of action and labeled its damages "economic" in nature. *See* Pet.11-13. Contra PPFA, Petitioners do not argue that the Ninth Circuit erred by failing "to expand the actual-malice standard." BIO.3. Rather, it erred by failing *to apply the First Amendment at all*. *See* Pet.18 n.3. In the process, the court created one circuit split and deepened another about the proper application of this Court's dueling precedents in *Hustler* and *Cowles*.

The Fourth, Sixth, and Eighth Circuits have held that plaintiffs cannot evade the First Amendment by taking injuries allegedly caused by a defendant's protected speech and creatively relabeling them as something else. But all that matters in the Ninth Circuit is whether a plaintiff calls its injuries "economic" harms. Likewise, the Fourth and Tenth Circuits have held that First Amendment scrutiny is required whenever a law is enforced against expressive activity, but the

First Circuit and now the Ninth Circuit have held that the First Amendment is inapplicable if the law is "generally applicable."

As a last resort, PPFA describes this case as a "poor vehicle" for this Court to clarify its First Amendment jurisprudence. *See* BIO.31-33. It argues that this Court's intervention "would not change the outcome of this case" and, alternatively, that Petitioners "failed to raise or develop multiple arguments critical to their petition." Neither contention holds water. Petitioners have raised the same First Amendment arguments throughout this litigation. Moreover, because PPFA's claim for damages is subject to First Amendment scrutiny, and the Ninth Circuit refused to apply *any* level of scrutiny, a ruling in favor of Petitioners would necessarily set aside the entire award.

I. The Ninth Circuit's decision cannot be squared with this Court's First Amendment jurisprudence.

PPFA describes the Ninth Circuit's decision as a straightforward application of this Court's precedents. BIO.26-31. That is incorrect.

A. The Ninth Circuit erred by failing to examine the underlying cause of PPFA's purported damages and categorizing them as "economic" in nature solely because they involved monetary expenditures. PPFA concedes that most of those expenditures—which it euphemistically labels "infiltration damages"—were designed to restore the "confidence" and "faith" of unrelated third parties in the aftermath of CMP's videos. BIO.11; *see* Pet.8. This Court's precedents are rife with the once-unremarkable observation that damage

to the "public confidence" or "public faith" in an organization is synonymous with damage to its reputation. *See, e.g.*, *Lopez v. United States*, 373 U.S. 427, 442 (1963) ("the reputation of the individual agent for honesty" aligns closely with "the public's confidence in his work"); *Republican Party of Minnesota v. White*, 536 U.S. 765, 817-18 (2002) (a lack of "public faith" in an organization is a product of its "reputation"). This case is no different. PPFA's expenditures to rehabilitate the perceptions of third parties cannot be categorized as anything other than "reputational" in nature. The Ninth Circuit, however, classified PPFA's purported damages as "economic" in nature, simply because they involved tangible expenditures. *See* Pet.21 (citing App.22).

Put differently, the Ninth Circuit used PPFA's "costs for increased security measures" as "a stand-in for direct publication damages." Br. for Coal. of Free Speech, Whistle-Blower Protections, and Animal Advocacy Orgs. at 4. That holding cannot be reconciled with *Hustler*, or the "long" line of prior cases that "recognized that First Amendment defenses are available against general tort claims." Br. for Ethics and Pub. Pol'y Ctr. at 9 n.3; *see Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988).

The remainder of PPFA's damages—the so-called "security damages" reimbursing PPFA for the voluntary private security expenses it incurred—like the "infiltration damages," cannot possibly be tied to anything other than the public's and third parties' reaction to Petitioners' protected speech. No one has alleged that CMP or its four associates involved in the

investigation—one of whom is an elderly woman—posed an ongoing threat to any person identified by CMP's investigation. Thus, to the extent PPFA had *any* basis for its exorbitant "security" expenses, that must have flowed directly from third parties who listened to Petitioners' speech. *See* Br. for Nat'l Right to Life at 8.

PPFA contends that the Ninth Circuit's opinion is consistent with this Court's decisions in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). *See* BIO.26-27. Not so. According to PPFA and the Ninth Circuit, *Cowles* stands for the proposition that the First Amendment is irrelevant whenever a plaintiff sues under a "generally applicable" cause of action that regulates conduct as well as speech. *See* BIO.27; App.21. PPFA's only defense of that sweeping rule is that the defendant's "publication [in *Cowles*] was a but-for cause of the plaintiff's damages," and this Court ultimately upheld a damages award under a promissory estoppel theory, even though the veracity of the defendant's speech was not at issue. BIO.26-27. But that fundamentally misunderstands this Court's holding. As the Fourth Circuit explained in *Food Lion*, *Cowles* can be reconciled with *Hustler* only "if we view the challenged conduct in *Cowles* to be the breach of promise and not some form of expression." *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 521-22 (4th Cir. 1999).[1] In other words, *Cowles* held

[1] To the extent *Hustler*'s application is unclear in light of *Cowles*, *see infra,* at 9-10, that is just another reason why the

that plaintiffs can recover damages for harmful conduct incidental to speech—it did not hold that speech itself becomes unprotected whenever a plaintiff chooses to sue under a "generally applicable" cause of action.

Zacchini is equally inapposite. There, this Court merely held that the press does not have a special privilege to misappropriate "the proprietary interest of [an entertainer] in his act." 433 U.S. at 573. That uncontroversial holding is no different from the tax, labor, and antitrust laws listed in *Cowles* that are "enforceable against the press but do not burden expression." Pet.26-27.

B. The Ninth Circuit alternatively suggested that PPFA "'would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings.'" BIO.28. PPFA leans heavily on this dictum but cannot identify any evidence to support it. PPFA argues that it *could* have "found out" about CMP's investigations "through some other means" if Petitioners had never released their videos. BIO.28-29. But speculation about what might have occurred under a different fact pattern cannot establish a cognizable injury, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), much less compensatory damages. PPFA concedes that it "learned of" Petitioners' investigation "through their videos." BIO.28. Thus, PPFA's purported "damages" were caused solely by "what [Petitioners] said." *Snyder v.*

Court should grant certiorari to clarify the First Amendment's application to tort claims based on speech.

Phelps, 562 U.S. 443, 457 (2011). Indeed, PPFA spent "infiltration" and "security" costs solely to remedy its lost reputational confidence due to public and third party reaction to what Petitioners said.

In sum, PPFA cannot divorce its claims for damages from the reputational injuries alleged in its complaint. *See* Pet.10 (listing allegations of reputational injury). The Ninth Circuit's distorted definitions of "economic" damages and "publication damages" do not "comport[] with the purpose underlying the actual-malice requirement" or any other First Amendment principle. BIO.26; *cf. Hustler*, 485 U.S. at 50 ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").

II. PPFA cannot plausibly dispute the circuit splits implicated here.

PFFA denies any division among lower courts on both questions presented in this case: when a damages award is barred as impermissible publication damages, and whether a plaintiff's invocation of a "generally applicable law" against speech eliminates any First Amendment scrutiny. On both points, PPFA is wrong.

A. By allowing PPFA to recover for harms allegedly suffered from Petitioners' speech—including "damages" from the public's lost "confidence" and "sense of trust" in its activities, *see* Pet.10, 19—the Ninth Circuit broke with three other circuits on the definition of publication damages implicating the First Amendment. There is no dispute that PPFA

suffered its purported harms only after publication, *see* App.62 & n.11, yet the Ninth Circuit allowed PPFA to skirt all First Amendment scrutiny by artfully pleading non-reputational causes of action. It held that PPFA's damages were not "impermissible publication damages" because they were "economic"—*i.e.*, involved tangible expenditures—rather than "reputational or emotional." App.22. The other circuits to decide this question have not drawn such a line, but included economic harms among publication damages where they were caused by a defendant's publication. Pet.16-22.

PPFA attempts to align this case with *Food Lion* because that case applied First Amendment scrutiny "to damage claims for reputational injury from a publication." 194 F.3d at 523; *see* BIO.18. But, crucially, *Food Lion* never distinguished—as the Ninth Circuit did here—"economic harms" from publication harms. Quite the opposite: the plaintiff company's reputational injury chiefly consisted of "lost sales." 194 F.3d at 523. The Fourth Circuit thus refused to constrict the reach of the First Amendment, as the Ninth Circuit has, by categorically immunizing claims for "economic harms." *See* App.22.

PPFA also fails to distinguish *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007); *see* BIO.17-18. It cannot deny that *Compuware* rejected a "backdoor attempt to recover damages for the harm allegedly caused by Moody's protected expression of its opinion of Compuware's financial condition." 499 F.3d at 531. And PPFA ignores that the Sixth Circuit's First Amendment analysis began

from the fact that plaintiff sued because it was "[u]nhappy with the contents of the [defendant's] publication and the corresponding" economic injury, in the form of a "ratings downgrade." *Id.*

That court's analysis unequivocally supports Petitioners here. The *Compuware* defendant's (like Petitioners') "opinion and its publication are matters protected by the First Amendment." *Id.* Consequently "the very subject matter and corresponding duties" disputed in the case were "intimately tied to speech, expression, and publication." *Id.* The Sixth Circuit also saw "no material difference" between the claim before it and tort claims which concededly require First Amendment scrutiny. *Id.* at 532. This conclusion rested on the fact that the plaintiff "essentially assert[ed]" claims against the defendant's "compiling and evaluating its publication of protected expression"—*i.e.*, that the claimed injury arose from the content the defendant chose to publish. *Id. Compuware* further noted that the "injury" complained of was "not contractual in nature," even *after* the plaintiff amended its complaint to seek only "rescission of its agreement" with the defendant. *Id.* Likewise here, PPFA "has not been injured by [Petitioners'] failure to perform [their] contractual obligations," but by Petitioners' "negative statements about [PPFA]." *Id.* at 533.

The Ninth Circuit's holding cannot be squared with this analysis of publication damages, and PPFA's rejoinder that *Compuware* concerned "a repackaged

defamation claim" simply begs the question. BIO.16.[2] It is common ground that defamation-type damages implicate the First Amendment even when a plaintiff seeks them through some other cause of action against publication. But when are damages (as the Ninth Circuit put it here) "impermissible publication damages"? App.22. *Compuware* and other circuits' decisions answer that the First Amendment applies when the injury is based on protected speech. *Cf. Phelps*, 562 U.S. at 457 ("It was what [the defendant] *said* that exposed it to … damages." (emphasis added)).

B. The Ninth Circuit below also took the aggressive position that "the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." App.21. It reduced the First Amendment analysis to a narrow inquiry into whether the law at issue is "aimed specifically at journalists or those holding a particular viewpoint." App.21. In so holding, the Ninth Circuit joined the First Circuit against the Fourth and Tenth Circuits. Pet.27-31.

PPFA attempts to minimize this conflict, but as with the scope of publication damages, its efforts fail.

---

[2] PPFA is correct that the Eighth Circuit's approach in *Beverly Hills Foodland* "aligns with *Compuware*," BIO.19, but only because that case, too, is at odds with the Ninth Circuit's holding. Like the Sixth Circuit, the Eighth Circuit counted an economic injury—harm to "business relations with customers"—as a publication injury implicating the First Amendment. *Beverly Hills Foodland, Inc. v. United Food & Com. Workers Union, Loc. 655*, 39 F.3d 191, 196 (8th Cir. 1994).

At the outset, the Fourth Circuit has attempted to reconcile *Cowles* with this Court's other cases by holding that "the challenged conduct in *Cowles*" was "not some form of expression" but simply a "breach of promise." *Food Lion*, 194 F.3d at 522. The Fourth Circuit recently doubled down on this narrower reading of *Cowles* in *People for the Ethical Treatment of Animals v. North Carolina Farm Bureau Federation*, 60 F.4th 815 (4th Cir. 2023) ("*PETA*"), *petitions for cert. filed*, Nos. 22-1148 & 22-1150 (May 24, 2023). *PETA* holds that *Food Lion* did not "read *Cowles* to mean that generally applicable laws may escape the First Amendment." *Id.* at 826. The court returned to *Cowles*' statement that "generally applicable law[s] … 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." 60 F.4th at 825 (emphasis added). That rule, the court said, "is true, so far as that goes," but does not mean "[l]aws that implicate a variety of conduct … need not pass First Amendment scrutiny even when applied to speech." *Id.* at 825-26. Instead, the court listed "abound[ing]" examples—drawn from the both the civil and criminal context, *but see* BIO.21—in which a "generally applicable law" implicated the First Amendment when "triggered … by 'communicating a message.'" 60 F.4th at 826.

PPFA downplays the conflict between this case and *PETA*, but fails to engage with any of this analysis or the case's foundation in *Food Lion*. BIO.24. It instead tries to sweep this all away by focusing on differences between the laws at issue in each case. BIO.24. But the divergence is unmistakable. Whereas

the Ninth Circuit here insisted that any First Amendment scrutiny would specially immunize "journalists" from "laws applicable to all members of society," App.21, the Fourth Circuit has rejected this expansive reading of *Cowles* to reconcile it with this Court's other decisions.

PPFA also fails to distinguish the Tenth Circuit's decision in *Western Watersheds Project v. Michael*, striking down a law against trespassing on private property to survey public property. 869 F.3d 1189, 1194 (10th Cir. 2017). The challenged law applied to "journalists" and "all other members of our society" alike, which would have averted any First Amendment scrutiny under the Ninth Circuit's approach here. App.21-22. Yet the Tenth Circuit ruled (in a pre-enforcement challenge) that the law's potential application to protected speech transgressed the First Amendment. PPFA cannot reconcile these two conflicting approaches.

At bottom, the lower courts have failed to resolve the longstanding "analytical uncertainty" around the First Amendment's application to claims like those here. *Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union*, 585 F. Supp. 2d 815, 822 (E.D. Va. 2008).

III. The purported obstacles to review are illusory.

PPFA repeatedly refers to the actual-malice standard for defamation claims set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *E.g.*, BIO.2, 16, 19, 22, 26. And PPFA argues that this case

is unfit for review because some members of this Court have recently criticized *Sullivan*'s test. *Id.* at 33. But this case presents distinct First Amendment questions that neither depend on *Sullivan* nor call for a reassessment of its holding.

Petitioners have already explained that this case does not present what "specific standard of First Amendment scrutiny … would apply to speech-related damages, whether falsity, actual malice, or something else." Pet.18 n.3. But PPFA ignores this altogether. Instead, PPFA asserts that Petitioners "seek to reaffirm, clarify, and *expand* the applicability of" the actual-malice standard. BIO.33.

Not so. *Sullivan* concerned what level of protection the First Amendment provides against certain defamation claims. 376 U.S. at 279-80; *cf. McKee v. Cosby*, 139 S. Ct. 675, 677, (2019) (Thomas, J., concurring in denial of certiorari). This case, though, is about whether the First Amendment applies *at all* to the damages PPFA has claimed. The district court instructed the jury it did not. Pet.11 (citing 16-ER-4274). The Ninth Circuit agreed. Pet.12-13; App.19-23. This Court could grant review and reverse on that core question without either extending or repudiating *Sullivan*.

Finally, PPFA argues that reversal by this Court "would not change the outcome of this case." BIO.31. But that argument depends on continued acceptance of PPFA's self-serving description of its relief as non-publication damages—the very premise in dispute here. *See* Pet.13. And it is premised on dicta by the

court of appeals, *see supra*, at 5, not any factual finding that could impede review. Properly applying the First Amendment to a claim for injuries a plaintiff suffered after publication, App.62 & n.11, in the form of harm to public "confidence" and "a 'sense of trust and faith'" in the plaintiff, BIO.11, would manifestly require reversal of the judgment below. This Court should do so by clarifying its own caselaw and vindicating the First Amendment.

CONCLUSION

This Court should grant certiorari.

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

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

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

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

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

September 6, 2023

Attorneys for Petitioners