No. 21-1057

IN THE

Supreme Court of the United States

ORACLE CORPORATION,

Petitioner,

v.

HEWLETT-PACKARD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated, and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States. The decision below is inconsistent with the text, history, and tradition of the Petition Clause. The Rutherford Institute accordingly supports the Petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Oracle decided to appeal an adverse ruling in a closely-watched lawsuit against Hewlett-Packard Co. (HP), it did what most organizations would do in a case of this magnitude: It issued a press release. The press release informed shareholders and other interested members of the public of its intent to appeal, and briefly detailed the rationale underlying its

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

decision. Pet. App. 22a. Little did Oracle know that this innocuous act would end up costing it more than three billion dollars.

At the damages phase of the trial, HP's expert opined that Oracle's press release had contributed to "uncertainty in the marketplace" that caused HP to incur $3.014 billion in damages. Pet. App. 81a, 83a, 92a-93a. The jury awarded HP exactly what it asked for. Pet. App. 29a.

On appeal, Oracle reiterated the objection it had made below: namely, that the damages award was invalid because it penalized Oracle for exercising its First Amendment right to petition the courts. Pet. App. 84a-98a; *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). And its press release was precisely the type of activity "incidental" to litigation to which this Court has historically granted immunity.

The Court of Appeal rejected these arguments. It acknowledged that Oracle's prosecution of the appeal itself was protected under the Petition Clause but held that its press release—which summarized the very same facts and arguments being litigated on appeal—was not. Pet. App. 95a.

This holding deepened an extant conflict on the question of whether the Petition Clause protects litigation-related activity. The decision below reflects the same conclusion the Tenth Circuit reached when it held that "when the basis for immunity is the right to

petition, purely private threats of litigation are not protected because there is no petition addressed to the government." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 893 (10th Cir. 2000) (en banc). This conflicts with the judgment of the seven other circuit courts to address the issue. Pet. 13-19.

Resolution of this split is essential to provide litigants clarity regarding their First Amendment rights. Litigants in different jurisdictions are afforded different First Amendment rights depending on where suit is filed. This type of "uncertainty may [itself] perniciously chill speech," as litigants cannot be sure which speech is protected in which jurisdiction. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 751 (1996) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965)). Litigants have many reasons to speak publicly about litigation efforts, including required securities disclosures, settlement efforts, and pre-litigation cease-and-desist letters. The California Court of Appeal's decision here will chill each of these categories of speech, because litigants cannot be sure whether and which statements are protected under the Petition Clause. The decision will also promote forum shopping, as plaintiffs will prefer jurisdictions imposing damages for speech that is constitutionally protected elsewhere.

The decision below is also wrong. This Court has traditionally extended immunity not only to petitioning activity directed to the government, but also to private conduct that is related to petitioning. In so doing, it has observed the need to afford the right to petition adequate "breathing space," the importance of

protecting conduct that is "incidental" to the right to petition, and the imperative to defend against laws which only "indirectly" encroach on the right. These varying formulations all communicate the same core idea: The vitality of the right to petition depends on courts extending immunity prophylactically to encompass activity that is intertwined with petitioning conduct. The Court of Appeal's opinion cannot be squared with this imperative.

It is also inconsistent with what this Court has described as a core policy that the right to petition the courts seeks to vindicate: the "public airing of disputed facts." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983). The "disputed facts" publicized in the course of litigating the appeal are substantively identical to the facts detailed in Oracle's press release. Both are likely to result in the same "marketplace uncertainty." Yet under the decision below, the former is immune from liability, while the latter is not. Such artificial line-drawing finds no support in this Court's Petition Clause jurisprudence.

This Court should grant the petition and reverse the judgment below.

ARGUMENT

I. The Question Presented Is Important And Recurring.

A. The question presented is important.

1. Litigants in different jurisdictions enjoy different First Amendment protections.

For over two centuries, this Court has emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). That is especially true for the right to petition the government: "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018) (citation omitted). But the California Court of Appeal's decision here directly conflicts with the law of the Ninth Circuit, which holds that petitioning immunity protects "not only petitions sent directly to the court in the course of litigation, but also conduct incidental to the prosecution of the suit." *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 934 (9th Cir. 2006) (citation omitted); *see also United States v. Koziol,* 993 F.3d 1160, 1171 (9th Cir. 2021). California litigants thus enjoy greater petitioning rights in federal court than in state court.

This constitutional dissonance extends beyond California. Litigants in the Tenth Circuit are subject to liability for litigation-related activities that would be protected in other courts, including every single other federal court of appeals that has considered the

issue. Pet. 13-19 (detailing 7-1 split among the federal circuit courts). This disuniformity will chill protected petitioning activity, interfere with laws requiring public disclosure of legal proceedings, disincentivize attempts to resolve disputes outside of court, and contribute to rampant forum shopping. *Infra* 6-10.

2. The courts' division on the scope of Petition Clause immunity will chill protected speech and lead to forum shopping.

Parties to a controversy engage in litigation-related activities outside of court all the time, for any number of reasons. Sometimes those activities are mandated by law. Sometimes they are ethically appropriate, and sometimes they promote efficiency. But the rule announced by the California Court of Appeal and the Tenth Circuit will chill every one of these legitimate and protected forms of speech because of the risk of liability.

Certain litigants are required by law to announce an intent to sue or appeal. For instance, publicly traded companies are subject to the SEC's periodic filing requirements which must describe any "material" legal proceedings, including the principal parties, facts giving rise to the proceeding, and the relief sought. *See* 17 C.F.R. § 229.103. But under California state and Tenth Circuit law, this required disclosure to shareholders could in fact subject a company to liability. Like the press release at issue here, these disclosures are publicly available and are just as likely to cause "uncertainty in the marketplace." Pet. App. 83a. Under the rule announced by the decision below,

a public filing mandated by federal law may itself be a source of liability.

This result is even more troubling when one considers all the important reasons that corporations may wish to disclose litigation risks. Given this Court's capacious interpretation of "materiality," companies would be well advised to err on the side of disclosure and transparency.[2] Yet under the California Court of Appeal's rule here, litigants are put to a Hobson's Choice of whether to violate SEC regulations or expose themselves to liability for obeying them. And this untenable dynamic is multiplied many times over by the analogous disclosure laws on the books in California and the States comprising the Tenth Circuit. *See, e.g.*, Cal. Corp. Code § 1502.1(8); Colo. Rev. Stat. Ann. § 11-51-304(2)(k); Okla. Stat. Ann. tit. 27A § 2-10-302(A)(2); *id.* 63 § 1-852(E)(1);

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[2] The SEC's disclosure laws apply to "material" legal proceedings, which excludes 1) "ordinary routine litigation incidental to the business" and 2) proceedings below a certain damages threshold. 17 C.F.R. § 229.103(a)-(b). And this Court has held, in the context of these SEC filings, that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976); *see also Wilson v. Great Am. Indus., Inc.,* 661 F. Supp. 1555, 1564 (N.D.N.Y. 1987), *rev'd on other grounds*, 855 F.2d 987 (2d Cir. 1988) (damages award was material information of which shareholders should have been informed, even though it did not satisfy the statutory damages threshold because "there was a substantial likelihood that the decision would have been viewed by the reasonable investor as having altered the 'total mix' of information made available").

Utah Code Ann. § 61-1-10(2)(k)(ii); Kan. Stat. Ann. § 17-12a304(b)(12).

The rule announced by the decision below will also frustrate efforts to resolve disputes outside of court. Owners of intellectual property rights, for example, traditionally have protected their valuable rights by sending cease-and-desist letters to alleged infringers as a preliminary step, before having to resort to litigation. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 654 n.5 (1999) (Stevens, J., dissenting) (noting that "'[t]he first step in enforcing a patent is usually to send a cease-and-desist or charge-of-infringement letter'"). In many instances, such letters result in an amicable resolution of the matter.[3] And even if those letters do not result in settlement, they often lead to information that helps to narrow the claims or properly identify the appropriate infringer. This process economizes both judicial and litigant resources by ensuring that litigation is a last, rather than a first resort.

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[3] *See, e.g.*, Leah Chan Grinvald, *Policing The Cease-And-Desist Letter*, 49 U.S.F. L. Rev. 411, 417 (2015) (observing that "of fifty-eight experienced intellectual property lawyers … almost all conducted their dispute resolution by using cease-and-desist letters, which typically resulted in a privately negotiated settlement," and a large portion "had never brought a trademark or copyright case to trial over the course of their careers."); Brief Amici Curiae of ETW Corp. and IMG in support of Petition for Writ of Certiorari, *Major League Baseball Players Ass'n v. Cardtoons, L.C.*, 531 U.S. 873 (2000) (No. 00-39), 2000 WL 33999839, at *7 (amici sent over 100 cease-and-desist letters per year in the three years before the Tenth Circuit's decision, with "a settlement success rate of over 99%").

But by withdrawing First Amendment protections for activities that are incidental to litigation, the decisions of the California Court of Appeal and the Tenth Circuit have created great uncertainty about whether these standard pre-litigation practices are still viable. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 894 (10th Cir. 2000) (en banc) (Lucero, J., dissenting). This type of "uncertainty may [itself] perniciously chill speech." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 751 (1996) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965)). Litigants necessarily will hesitate to send cease-and-desist letters, even though they are unquestionably reasonable, because they could lead to a tort claim. Under these circumstances, the result may well be a policy that amounts to "sue first, talk later."

Another result of the conflict of authority on the question presented is the promotion of forum shopping. Given the choice between suing in federal court in California, which immunizes activity incidental to litigation, and California state court, which allows damages based on that very same activity, the choice is clear. *See, e.g.*, Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 Cardozo L. Rev. 1367, 1372 (2004) ("plaintiffs will generally seek to file claims in jurisdictions where the expected net gain is the largest").

Moreover, the Internet and other methods of scalability have expanded the scope of personal jurisdiction over many corporate defendants. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119

(W.D. Pa. 1997). Under the California Court of Appeal's and Tenth Circuit's holdings, every communication or action routinely taken in connection with litigation—settlement discussions, claim investigations, and witness interviews, not to mention any activity that can be interpreted as publicizing one's litigation efforts—can subject a litigant to a retaliatory suit in a jurisdiction that does not consider those activities to be protected under the First Amendment.

B. The question presented is recurring.

The impact of the split over the scope of the Petition Clause is significant. The California state courts serve nearly 12% of the country's population.[4] The California Courts of Appeal receive roughly 6,000 notices of appeal in civil cases each year.[5] More than 10,000 civil suits were initiated in federal district court in the Tenth Circuit during the 12-month period ending September 30, 2021.[6] And over 600 civil

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[4] United States Census Bureau, *QuickFacts California* (2021), https://www.census.gov/quickfacts/CA.

[5] Judicial Council of California, *2020 Court Statistics Report: Statewide Caseload Trends 2009–10 Through 2018–19* at 39 (2020), https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf. By comparison, during the 12-month period ending March 31, 2020, a total of 12,519 in the "Other Private Civil" category were commenced in the U.S. Courts of Appeals. U.S. Courts, *U.S. Courts of Appeals–Cases Commenced, Terminated, and Pending by Circuit and Nature of Proceeding* (2020), https://www.uscourts.gov/file/28127/download (Federal Judicial Caseload Statistics).

[6] U.S. Courts, *U.S. District Courts—Civil Cases Filed, Terminated, and Pending, by Jurisdiction* (2021),

appeals were lodged with the Tenth Circuit Court of Appeals during that same period.[7] Every one of these thousands of litigants operates under a cloud of uncertainty as to which of their litigation-related activities may later be the subject of liability.

This is also not the first time this Court has been asked to review this issue. The Major League Baseball Players Association petitioned for review of the Tenth Circuit's *Cardtoons* decision. The Court denied review. 531 U.S. 873 (2000). Since then, the circuit split has only become more pronounced, with three additional circuits opposing the Tenth Circuit's holding in *Cardtoons*. With eight circuit courts and one state appellate court having weighed in, no additional percolation is necessary. The question presented is ripe for review.

II. Oracle's Announcement Is Protected Under The Petition Clause Because It Was "Incidental" To Its Notice of Appeal.

The Petition Clause of the First Amendment guarantees the right of every person to petition the government for redress of grievances. U.S. Const. amend. I. This right has a nearly millennia-long pedigree, traceable to the "Magna Carta, which confirmed the right of barons to petition the King." *Borough of*

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https://www.uscourts.gov/statistics/table/c-1/judicial-business/2021/09/30.

[7] U.S. Courts, *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending by Circuit and Nature of Proceeding* (2020), https://www.uscourts.gov/file/28127/download (Federal Judicial Caseload Statistics).

Duryea v. Guarnieri, 564 U.S. 379, 395 (2011). The right became more important with time. In the pre-revolutionary era, for example, "the primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 145 (1986). Today, "the right to petition extends to all departments of the Government," and therefore encompasses a "right of access to the courts." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Guarnieri*, 564 U.S. at 387 (Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.").

To give this right meaning and effect, those who petition the government are generally immune from statutory liability stemming from their petitioning activity. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002). But this immunity is not narrowly circumscribed to the petitioning conduct itself. Like all other First Amendment rights, its vitality depends upon courts extending protection to activity that is peripheral to the constitutional right. *See Buckley v. Valeo*, 424 U.S. 1, 17-18 (1976) (conduct may not be regulated where it is "intertwined with" or "integral to" speech). Such prophylactic immunity is necessary "because First Amendment freedoms need breathing space to survive," lest they be "chilled" by overzealous regulation. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). In practice, this means that conduct "incidental" to petitioning the courts is also immune from liability. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988). So, for

example, the "decision to accept or reject an offer of settlement," which takes place outside of court, "is conduct incidental to the prosecution of the [law]suit and not a separate and distinct activity which might form the basis for … liability." *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993).

In this case, Oracle's press release announcing its decision to file an appeal is likewise incidental to its prosecution of the appeal itself. Litigants routinely issue announcements that apprise interested members of the public of developments taking place in active litigation. While such announcements, like settlement negotiations, do not appear as judicial docket entries, they are commonplace in litigation, and therefore fall within the penumbral immunity afforded to conduct that is "incidental" to the litigation of the underlying suit.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the first case to define the contours of Petition Clause immunity, the Court extended immunity to activity that was incidental to the core right of petition. 365 U.S. 127 (1961). It held that a railroad association was immune from liability not only for efforts to directly lobby elected officials, but that its related publicity campaign—a robust and professionally-managed operation that included "[c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda, and … other documents" (*id.* at 142)—was also entitled to the same immunity despite being directed at the general public rather than the government. *Id.* at 138-45. There is no reason to reach a different result as to Oracle's

more modest efforts to inform the public of its intent to appeal.

Oracle's press release is far more integral to the right to petition than other litigation-related activity that this Court has immunized. Take *United Mine Workers of Am., District 12 v. Illinois State Bar Ass'n*, in which the Illinois Supreme Court held unlawful an arrangement by which a union hired an attorney to represent its members in workers' compensation claims. 389 U.S. 217, 218-19 (1967). This Court reversed, reasoning that such an outcome would unduly impinge on the members' right to petition the courts. In so holding, it rejected the contention that the members' right to petition was not violated because they were still free to access the courts by hiring their own attorneys. The Petition Clause, this Court explained, "would … be a hollow promise" if its "guarantees" could be "erode[d]" by such "indirect restraints." *Id.* at 222.[8]

The Court has also relied on the First Amendment principle of "breathing space" in broadly construing the scope of petitioning immunity. *BE&K*, 536 U.S. at 531. "[O]bjectively baseless" lawsuits, for example, may be afforded immunity even though they "advance no First Amendment interests of their own." *Id.*; *see also Noerr*, 365 U.S. at 140, 142, 145 (Petition Clause protects publicity campaign employing "vicious" and

[8] *United Mine Workers* is just one among a line of cases affording immunity from laws that indirectly affect the right to petition by regulating various aspects of the attorney-client relationship. *See Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

"reprehensible" tactics that "fall[] far short of the ethical standards generally approved in this country"). Such prophylactic immunity, or "breathing space," is necessary to ensure the vitality of the right to access the courts. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). If certain forms of unworthy petitioning must be granted immunity in order to afford the right the "'breathing space' essential to [its] fruitful exercise," then surely Oracle's entirely truthful announcement of its intent to appeal must be deserving of protection. *BE&K*, 536 U.S. at 531.

Conferring immunity on Oracle's announcement also advances the policy at the core of the right to petition the courts. In this case, HP was awarded damages stemming from the public's appraisal of Oracle's announced intent to appeal. Yet this claimed "injury" is the very policy outcome that the Petition Clause seeks to advance: The "public airing of disputed facts" has long been recognized as a principal "[F]irst [A]mendment interest" that is derived from unfettered access to the courts. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983). Oracle's announcement, which stated the factual and legal basis for its disagreement with the trial court's order (Pet. App. 22a), advanced this important constitutional interest. Yet according to the decision below, the "public airing of disputed facts" found in Oracle's appellate briefing is constitutionally protected, while the pre-appeal announcement describing those same facts may be the source of liability. Such a cramped and formalistic interpretation of the Petition Clause is inconsistent with the policies that the right seeks to

vindicate and cannot be squared with this Court's broad and prophylactic application of immunity.[9]

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the judgment of the California Court of Appeal.

Respectfully submitted,

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[9] Equally unmoored from this Court's precedents is the Court of Appeal's alternative holding that the entire damages award should be affirmed even if a portion of it is attributable to First Amendment protected activity. Pet. 24-26.