No. 22-1147

In the Supreme Court of the United States

SANDRA SUSAN MERRITT, PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., 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 petitioner and her co-conspirators 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, awarding 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 speech. Respondents were the direct, intended victims of petitioner's scheme, and there were no more directly harmed victims. And the punitive damages award was supported by overwhelming evidence of petitioner's repeated fraudulent conduct. A unanimous panel of the court of appeals affirmed in relevant part.

The questions presented are:

1. Whether, absent a showing of actual malice, the First Amendment bars a compensatory damages award for nonreputational economic injuries merely because the defendants claim to be undercover reporters and engaged in tortious conduct for the purpose of publishing speech.

2. Whether defendants claiming to be undercover reporters are exempt from civil RICO claims by the direct, intended victims of an unlawful scheme merely because the defendants engaged in that scheme for the supposed purpose of publishing speech.

3. Whether, under the First Amendment, defendants claiming to be undercover reporters are exempt from liability for punitive damages for fraud merely because they engaged in fraudulent conduct for the supposed 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–20a) is reported at 51 F.4th 1125. The memorandum disposition of the court of appeals (Pet. App. 21a-45a) is unpublished but available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (Pet. App. 104a) is unreported. The opinion of the district court on petitioners' posttrial motions (Pet. App. 46a-103a) 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 is reported at 402 F. Supp. 3d 615. The opinion of the district court on petitioner's motion to dismiss is reported at 214 F. Supp. 3d 808.

INTRODUCTION

A jury found that petitioner and her co-conspirators lied their way into private conferences and clinics and surreptitiously recorded respondents' doctors and staff without consent. The district court upheld those findings, and the court of appeals unanimously affirmed, refusing to exempt petitioner from liability merely because she claims

to have broken the law in the course of newsgathering. Petitioner now seeks review of three questions related to the First Amendment, RICO, and punitive damages. None merits further review.

First, petitioner challenges the court of appeals' holding that respondents were not required to prove actual malice. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment bars a public figure 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 280. 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. But in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), this Court held that the actual-malice requirement did *not* apply to a contractual claim where the plaintiff 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." *Id.* at 671 (citation omitted). Here, following *Cohen*, the court of appeals held that respondents sought "damages for economic harms …, not … reputational or emotional damages." Pet. App. 15a. Indeed, respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings." *Ibid.* That holding does not implicate any split of authority and is correct. Regardless, this case is a poor vehicle for review, as petitioner would lose even under her own legal standard.

Second, petitioner challenges her liability under RICO. While petitioner suggests that RICO should be limited to organized crime, that argument is foreclosed by precedent. Petitioner also argues that "media

defendants" should receive a special RICO defense, but that argument was not pressed or passed upon below and is plainly meritless. Finally, petitioner argues that her RICO violations did not proximately cause respondents' injuries, but the cases she cites all involved indirect victims. Here, respondents were the direct, intended victims of petitioner's scheme. As the court of appeals found, "there are no more directly injured victims" than respondents. Pet. App. 29a.

Third, petitioner challenges the punitive damages award. But on that issue, too, the decision below is splitless and correct. Indeed, the court of appeals found "overwhelming evidence to support the punitive damages award." *Id.* at 39a. Moreover, while petitioner purports to challenge only punitive damages, her arguments suggest that she should have had no fraud liability at all—even though she "waived any challenge to [her] liability for fraud by failing to properly raise the issue in [her] opening brief[]" below. *Id.* at 39a n.9.

Ultimately, the court of appeals correctly applied the principle, articulated by this Court in a "well-established line of cases," 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." *Cohen*, 501 U.S. at 669.

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. PPFA's affiliates provide reproductive healthcare

[1] A substantially similar Statement is contained in the Briefs in Opposition filed contemporaneously in Nos. 22-1159, 22-1160, and 22-1168.

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 Pet. App. 25a-27a, 33a-38a. 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." *Id.* at 8a. NAF's conferences likewise are held in secure, private spaces, are not open to the public, and are limited to pre-registered invitees. See *id.* at 25a-27a, 33a-36a.

2. 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." *Id.* at 6a. 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 6a. 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." *Id.* at 6a-7a. "BioMax had a website, business cards, and promotional materials, but was not in fact involved in any business activity." *Id.* at 7a.

"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 7a. Petitioner 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, [petitioner], 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' ([petitioner]) and 'Brianna Allen' (Baxter)." *Ibid.* "Daleiden also had bank cards issued for the aliases Sarkis and Tennenbaum." *Id.* at 7a-8a.

3. In 2013 through 2015, petitioner, Daleiden, 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." *Id.* at 8a. 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 [petitioner]'s alias 'Susan Tennenbaum,' signed Exhibitor Agreements for the 2014 NAF conference on behalf of BioMax." *Ibid.* "Daleiden, [petitioner], 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.*

Petitioner and her co-conspirators 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, [petitioner and her co-conspirators] often signed additional exhibitor or confidentiality agreements and secretly recorded persons with whom they spoke." *Id.* at 8a-9a.

4. In addition to infiltrating conferences, petitioner and her co-conspirators 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." *Id.* at 9a. "She eventually agreed to meet, and Daleiden and [petitioner] secretly recorded Dr. Nucatola throughout a two-hour lunch." *Ibid.* "Daleiden and [petitioner] repeated this same strategy with Dr. Mary Gatter, the Medical Director of Planned Parenthood Pasadena and San Gabriel Valley, Inc. …." *Ibid.*

"Daleiden and [petitioner] 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." *Ibid.*

5. "On July 14, 2015, CMP started releasing videos that included footage from the conferences, lunches, and clinic visits [petitioner and her co-conspirators] 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." *Id.* at 9a-10a. Respondents "also hired security consultants to investigate [petitioner's and her co-conspirators'] infiltration and enhance the security of [PPFA's] conferences." *Id.* at 10a.

B. Proceedings Below

1. In January 2016, respondents brought this lawsuit against petitioner and her 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 *ibid.*

Petitioner moved to dismiss under Rule 12(b)(6) and to strike under California's anti-SLAPP statute. Among other things, petitioner 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 [petitioner]." *Id.* at 841 (emphasis omitted).

Petitioner also argued under RICO that "the causal nexus between [petitioner's] 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 [petitioner]"—"[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. "But other damages alleged—including the increase in security costs at conferences, meetings, and clinics that [respondents] incurred when *they learned* about [petitioner's and her co-conspirators'] infiltration of their conferences, meetings, and clinics—are much more directly tied to [petitioner's] conduct and do not raise the problem of intervening actions of third-parties." *Ibid.*

Petitioners' co-conspirators 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). Petitioner's co-conspirators 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." *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 633 (N.D. Cal. 2019). As relevant here, petitioner again 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 … direct conduct and those caused by third parties." *Ibid.*

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 633-34. 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 634.

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 644. "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 [petitioner and her co-conspirators]—their intrusions, their misrepresentations, and their targeting and surreptitious recording of [respondents]' staff." *Ibid.* "[Petitioner and her co-conspirators] 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 644-45.

The district court rejected petitioner's argument seeking "to preclude [respondents] categorically from seeking damages covering 'increased security.'" *Id.* at 646. "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." *Ibid.* But the court allowed petitioner to "argue to the jury that they were unreasonable, unnecessary, or speculative." *Id.* at 646-47.

The district court also rejected petitioner's arguments under RICO. Petitioner first argued that she and her co-conspirators 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, [petitioner and her co-conspirators] intended to affect interstate commerce in creating the false IDs, and [they] used those IDs across state lines." *Id.* at 650.

Petitioner next argued that respondents had not adequately established the requisite "pattern of racketeering activity," 18 U.S.C. § 1962(a), because the scheme "'came to fruition'" with the publication of the videos, such that their "work … [wa]s 'complete' and 'finished.'" *Id.* at 651. Petitioner did not dispute, however, that her and her co-conspirators' "zealous activism against [respondents]" is *not* "over." *Ibid.* And the court concluded that there was "evidence from which a reasonable juror could conclude that [petitioner and her co-conspirators] will attempt similar tactics … again in the future." *Ibid.*

Petitioner 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 653. "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 10a. "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." *Id.* at 10a. "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 …." *Id.* at 10a-11a. 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 petitioner's 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, Pet. App. 46a-47a.

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 reversed the verdict under the federal eavesdropping statute.

As to the First Amendment, the panel "express[ed] no view on whether [petitioner's and her co-conspirators'] actions here were legitimate journalism … because even

accepting [their] framing, the First Amendment does not prevent the award of the challenged damages." *Id.* at 12a 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 11a (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 14a. And here, "[n]one of the laws [petitioner] 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 [petitioner's] violations of generally applicable laws." *Ibid.* Petitioner "ha[s] no special license to break laws of general applicability in pursuit of a headline." *Ibid.* The jury's compensatory damages award merely reflects that petitioner "ha[s] been held to the letter of the law, just like all other members of our society." *Ibid.*

The panel rejected petitioner's 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*." *Id.* at 15a. 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*." *Ibid.* 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 [petitioner] had never published videos of the[] surreptitious recordings." *Ibid.* 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." *Ibid.*

The panel emphasized that its decision "does not impose a new burden on journalists or undercover investigations using lawful means." *Id.* at 16a. "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. 16a-19a & nn.7, 9.

b. In a separate, unpublished, nonprecedential memorandum disposition, the panel rejected all of petitioner's 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)." *Id.* at 14a. As the panel explained, petitioner and her co-conspirators

"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 28a. "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 projected 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 [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 infiltration 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." *Id.* at 28a-29a.

Finally, as to punitive damages, the panel found "no error in the award of punitive damages." *Id.* at 39a. As the

panel explained, "[t]here was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, [petitioner], Rhomberg, Newman, CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation." *Ibid.* Moreover, petitioner and her co-conspirators "waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs." *Id.* at 39a n.9. And "[e]ven if the argument were not waived," it was "meritless." *Ibid.*

4. Petitioner and her 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. *Id.* at 104a-106a.

REASONS TO DENY THE PETITION

Petitioner seeks review of three questions related to the First Amendment, RICO, and punitive damages. As to each question, further review is not warranted.

A. The Court of Appeals' Holding That The Compensatory Damages Comport With The First Amendment Does Not Warrant Further Review[2]

Petitioner first seeks review of the court of appeals' holding that the compensatory damages are consistent with the First Amendment. That holding does not implicate any split of authority. It is also correct, of limited significance, and a poor vehicle for review.

1. Petitioner argues that "the courts of appeals are divided on *Cohen*" and its relationship to *Hustler*. Pet. 21. Not so. *Hustler* held that the actual-malice requirement applies not only to defamation claims, but also to claims

[2] The first question presented is similar to that in No. 22-1168. The Court should deny review here for the additional reasons stated in respondents' Brief in Opposition there.

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 rather "for breach of a promise that caused him to lose his job and lowered his earning capacity." 501 U.S. at 671 (citation omitted). The decision below and each court of appeals decision petitioner cites are consistent with those holdings.

a. Petitioner first argues 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*. Compuware hired Moody's to rate and publish its creditworthiness and, disliking the rating it received, sued for (among other things) defamation and breach of contract. *Id.* at 524. The district court granted summary judgment to Moody's, finding that Compuware could not show actual malice, and the Sixth Circuit affirmed. *Id.* at 529-34.

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 to remedy 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 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 "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. 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 respondents are not seeking redress for "an injury to [their] reputation." Indeed, respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings." Pet. App. 15a.

b. Petitioner next raises *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," 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 other claims "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 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." *Id.* at 523.

Food Lion thus draws the same line as *Cohen*, *Compuware*, and the decision below—the actual-malice requirement applies only to claims for reputational or emotional injuries. See *Veilleux* v. *NBC*, 206 F.3d 92, 128-29 (1st Cir. 2000) (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 injuries "[r]egardless of publication." Pet. App. 15a.

c. *Desnick* v. *American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), is similarly inapposite. There, a doctor sued a television network for defamation, trespass, fraud, and other torts after the network sent individuals posing as patients into the doctor's clinic, where they made surreptitious recordings later aired in an unflattering broadcast. *Id.* at 1347-48. As relevant here, the court of appeals affirmed the district court's dismissal of the doctor's trespass claims, finding that he consented to the test patients entering his offices, which "were open to anyone expressing a desire for [medical] services." *Id.* at 1352. Contrary to petitioner's suggestion, that holding did not rest on the First Amendment. The court simply

concluded that the alleged intrusion was not a trespass under Illinois law. See *ibid.*

To the extent *Desnick* discussed the First Amendment, it said nothing inconsistent with the decision below. The court noted that "there is no journalists' privilege to trespass." *Id.* at 1351. The court also stated that the subject of an unflattering broadcast generally "has no legal remedy"—"[i]f … no established rights are invaded in the process of making it (for the media have no general immunity from tort or contract liability)." *Id.* at 1355. This case falls squarely into that "if" clause; petitioner violated numerous "established rights" in making the videos.

d. Nor is there any 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 statute criminalizing certain kinds of trespass as applied to animal-cruelty investigations. Importantly, three of the four provisions at issue "on their face single[d] out speech." *Id.* at 829. Moreover, these provisions did "not merely target speech, but speech critical of the [property owner]," 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 831-33.

The laws at issue here are quite different. They are generally applicable and do not single out speech or distinguish between viewpoints or speakers. Moreover, 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 North Carolina's trespass statute "single[d] out" speech, *ibid.*, which the laws here do not.

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

a. First, the court of appeals held that "[t]he jury awarded damages for economic harms …, not … reputational or emotional damages." Pet. App. 15a. That reasoning aligns perfectly with *Cohen*. See 501 U.S. at 671. While petitioner argues that "*Cohen* is inapplicable when, as here, a plaintiff seeks to use a generally applicable law to recover publication-dependent damages," Pet. 22, that position conflicts with two decisions of this Court.

The first is *Cohen* itself. There, this Court held that the actual-malice requirement did not apply to a contractual claim seeking damages resulting from a newspaper's publication of an article identifying the plaintiff as a confidential source. See 501 U.S. at 671. There was no question that the plaintiff's damages were publication-dependent—the alleged breach *was* a publication. Yet this Court held that the actual-malice requirement did not apply. *Ibid.* In moments of candor, petitioner appears to concede that her arguments are inconsistent with *Cohen*. See Pet. 4-5 (summarizing *Cohen* dissents); *id.* at 17 ("*Cohen*'s dangerous legacy"); *id.* at 23 ("*Hustler* … should have controlled in *Cohen*.").

Petitioners' position 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 performer's damages were obviously publication-dependent, 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 a plaintiff's damages depend on a publication of speech does *not* mean that the actual-malice requirement automatically applies.

b. The court of appeals also held that the actual-malice requirement does not apply here for a second reason: Respondents "would have been able to recover the [same] damages even if [petitioners] had never published videos of their surreptitious recordings." Pet. App. 15a. Petitioner has no response. Accordingly, even if this Court were to hold that claims for "publication-dependent damages" always trigger the actual-malice requirement, it would make no difference. Respondents' damages were *not* "publication-dependent."

To be sure, respondents "*learned*" of petitioners' unlawful conduct through their videos. *Planned Parenthood*, 214 F. Supp. 3d at 827. But if respondents had found out through other means, they still "would have protected [their] staff who had been secretly recorded and safeguarded [their] conferences and clinics from future infiltrations." Pet. App. 15a.

3. The decision below is of limited significance and a poor vehicle for review. *Cohen*'s holding that journalists must obey laws of general applicability has been the law for more than thirty years. The decision below "does not impose a new burden on journalists or undercover investigations using lawful means." Pet. App. 16a.

Furthermore, petitioner's first question presented asks whether, absent proof of actual malice, the First

Amendment precludes recovery of "publication-dependent damages." Pet. i. As explained, however, the court of appeals concluded—in a holding petitioner does not challenge—that respondents' damages were *not* "publication-dependent." Under her own legal test, petitioner would still lose.

Petitioner's arguments also would require this Court to overrule two of its precedents. See § A.2.a, *supra*. But petitioner does not engage in any *stare decisis* analysis. Petitioner does not even ask for overruling, which this Court generally does not grant without a request from a party. See, *e.g.*, *Haaland* v. *Brackeen*, 143 S. Ct. 1609, 1631 (2023).

Finally, petitioner is swimming against the jurisprudential tide. Multiple jurists, including two sitting Justices of this Court, have called for reconsidering the actual-malice requirement. See *Counterman* v. *Colorado*, 143 S. Ct. 2106, 2132-33 (2023) (Thomas, J. dissenting) (collecting statements by Justice Thomas, Justice Gorsuch, and others). It makes little sense to clarify the actual-malice requirement if the Court may soon consider abandoning that requirement altogether.

B. The Court of Appeals' Holding That Petitioners Are Not Exempt From Civil RICO Liability Does Not Warrant Further Review[3]

Petitioner next argues that the Court should grant review to narrow RICO as applied to "media defendants" and to "clarify" the RICO's proximate causation requirement. Pet. 24-25. Neither issue warrants review.

1. Petitioner asks this Court to "affirm that RICO must be applied narrowly to confine its reach to the

[3] The second question presented is similar to the third question presented in No. 22-1159. The Court should deny review here for the additional reasons stated in respondents' Brief in Opposition there.

purpose that Congress had in mind: the eradication of organized crime in the United States." Pet. 25. But petitioner never made, and the court of appeals never addressed, any argument for an atextual limitation on RICO confining it to organized crime. And for good reason—any such argument is foreclosed by precedent. In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), the court of appeals had affirmed the dismissal of a RICO claim on the ground that the plaintiff did not suffer an injury "caused by an activity which RICO was designed to deter." 473 U.S. at 485. This Court reversed. "RICO is to be read broadly," the Court explained. *Id.* at 497. "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* at 499 (cleaned up). While RICO has been employed against defendants beyond "the archetypical, intimidating mobster," "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." *Ibid.*

Petitioner offers no sound reason to revisit *Sedima* now. "What is more, *stare decisis* carries enhanced force when a decision, like [*Sedima*], interprets a statute." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015).

Equally unavailing is petitioner's suggestion to narrow RICO by granting "media defendants" a special "actual malice" defense. Pet. 25. Below, petitioner never argued that the actual-malice requirement should apply differently to RICO claims against "media defendants" than it does to other claims against other defendants. The court of appeals certainly never discussed any such argument. And petitioner does not identify any lower-court decision that has addressed, let alone adopted, her position. Instead, petitioner relies entirely on three decades-old non-majority opinions. See Pet. 25-27 (citing opinions).

Furthermore, petitioner's plea for a special exemption from RICO liability rests on a distortion of the facts.

The actions for which the jury found petitioner liable were not "First Amendment-protected conduct." Pet. 24. Petitioner was held liable for conducting an enterprise through a pattern of predicate criminal acts—specifically, producing and transferring fake driver's licenses. "Quite obviously, a journalist cannot invoke the First Amendment to shield herself from charges of illegal wiretaps, breaking and entering, or document theft." *PETA*, 60 F.4th at 824. The same goes for violating RICO.

2. Petitioner also seeks review on RICO's proximate causation requirement. Again, however, the decision below is splitless, correct, and a bad vehicle.

a. Petitioner cites three of this Court's RICO proximate-causation precedents, but the decision below is consistent with all of them.

Petitioner's first case is *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992). There, the Securities Investor Protection Corporation ("SIPC") asserted RICO claims against market manipulators based on a lengthy causal theory. According to SIPC, the defendants (1) made "unduly optimistic statements" about certain stocks, (2) causing broker-dealers to buy "substantial amounts of the stock," after which (3) "the stocks plummet[ed]," causing (4) the broker-dealers to suffer "liquidation," which (5) caused SIPC to advance funds to cover customer claims against the broker-dealers. *Id.* at 262-63. While the court of appeals allowed such a claim to proceed, this Court reversed. See *id.* at 263-65.

The Court held that RICO requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. In other words, "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person … [i]s generally said to stand at too remote a distance to recover." *Id.* at 268-69. The Court found this "directness of relationship" to be a "central element[]" of RICO for three reasons. First, "the less

direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269. Second, "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury …, to obviate the risk of multiple recoveries." *Ibid.* And third, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law." *Id.* at 269-70.

Applying those principles, the Court emphasized that SIPC was asserting the rights of indirectly injured customers, not directly injured broker-dealers. See *id.* at 272-74. The Court then rejected SIPC's invitation to "[a]llow[] suits by those injured only indirectly." *Id.* at 274. Asserting the rights of "secondary victims," the Court held, "run[s] afoul of proximate-causation standards." *Ibid.*

Anza v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), is similar. There, a steel company brought a RICO suit alleging that a competitor "harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers." *Id.* at 457-58. While the court of appeals allowed that claim to survive a motion to dismiss, this Court reversed. The Court's "analysis beg[an]—and … largely end[ed]—with *Holmes*." *Id.* at 456. The Court explained that "[t]he direct victim of [the competitor's] conduct was the State of New York, not [the plaintiff]." *Id.* at 458. The Court further explained that "[t]he attenuated connection between [the plaintiff]'s injury and [the defendant's] injurious conduct" implicated all three of "underlying premises" for the direct relation requirement articulated in *Holmes*. *Id.* at 458-59; see *id.* at 458-60. The Court

concluded: "There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 460.

Hemi Group, LCC v. *City of New York*, 559 U.S. 1 (2010), follows the same basic script. There, New York City asserted a RICO claim against a New Mexico retailer that sold cigarettes to city residents but failed to submit required customer information to New York State. *Id.* at 5-6. That failure prevented the state from passing the customer information along to the city, which made it more difficult for the city to collect sales tax from the purchasers. *Ibid.* The court of appeals allowed the city's claim to survive a motion to dismiss, but this Court again reversed. The Court held that "[t]he City's causal theory [wa]s far more attenuated than the one [the Court] rejected in *Holmes*." *Id.* at 9. And "*Anza* … confirm[ed] that the City's theory of causation [wa]s far too indirect." *Id.* at 10. "The City's theory," the Court explained, would require "extend[ing] RICO liability to situations where the defendant's fraud on [a] third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 11.

The decision below is consistent with these cases. In each case, plaintiffs were injured only indirectly, suffering harms "flowing … from the misfortunes visited upon a third person," *Holmes*, 503 U.S. at 269. Here, respondents were petitioner's *direct*, intended victims. "[T]here are no more directly injured victims." Pet. App. 29a.

b. The decision below is correct. As the court of appeals explained, "[t]here was a direct relationship between [petitioners]' production and transfer of the fake driver's licenses and the alleged harm." Pet. App. 28a. Petitioners produced and transferred fake IDs for the specific purpose of infiltrating *respondents'* facilities, with the goal of destroying *respondents*' operations. The

scheme's goal was to destroy respondents and their "evil … empire." C.A. Supp. E.R. 386-89; C.A. E.R. 1160-61.

Moreover, this case does not implicate the concerns underlying the "direct relation" requirement. First, respondents recovered narrow categories of readily ascertainable damages, eliminating "any difficulty in determining what damages were attributable to [petitioner's] RICO violation," as opposed to other causes. Pet. App. 37a. Second, there was no need to apportion damages between victims injured at different levels, and "no risk of [respondents] recovering duplicative damages." *Ibid.* Finally, "holding [petitioners] liable" upholds the general interest in "discourag[ing] illegal behavior," since "there are no more directly injured victims" who would be more appropriate plaintiffs. *Id.* at 29a.

c. Regardless, this case is a poor vehicle to clarify RICO's proximate-causation requirement. Below, the parties disputed how many predicate acts were committed, see C.A. Br. of Appellees at 37, 53-55, and the court of appeals never definitively resolved that dispute. Accordingly, this Court would have to delve into the six-week trial record to identify—in the first instance—how many times a reasonable jury could find that petitioner and her co-conspirators violated 18 U.S.C. § 1028, and only *then* turn to the questions presented. This Court, however, is "a court of review, not of first view." *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1183 (2023) (citation omitted).

C. The Court Of Appeals' Holding That Petitioners Are Not Exempt From Punitive Damages For Fraud Does Not Warrant Further Review

Finally, petitioner challenges the decision below upholding the jury's award of punitive damages for fraud. That holding, too, does not warrant review.

1. The decision below on punitive damages does not involve any split.

Petitioner again cites *Desnick*, where the Seventh Circuit affirmed the dismissal of a doctor's fraud claim against a television network that had sent test patients into the doctor's clinic. See 44 F.3d at 1354-55. But the misrepresentations underlying the fraud claim were *not* made by test patients. Instead, the fraud claim rested on *separate* representations by a producer that the network "would present a 'fair and balanced' picture of the [clinic]'s operations and would not use 'ambush' interviews or undercover surveillance." *Id.* at 1351. Furthermore, *Desnick* rejected the doctor's fraud claim not under the First Amendment, but under Illinois law, which recognizes promissory fraud only if the conduct was "particularly egregious or … embedded in a larger pattern of deception of enticements which reasonably induces reliance." *Id.* at 1354. That state-law standard was not met in *Desnick* because when "investigative journalists well known for ruthlessness promise to wear kid gloves," any "person of normal sophistication" would expect them to "break their promise." *Ibid.* Furthermore, "the so-called fraud was harmless" because the only information the network obtained by it portrayed the doctor in a positive light. *Id.* at 1354-55.

This case is quite different. Petitioners did not misrepresent what they would publish as journalists; they falsely claimed to be representatives of a legitimate tissue procurement business. And this case does not involve Illinois law, with its peculiar limits on promissory fraud, which are "shared by few other states." *Id.* at 1354.

Petitioner's reliance on *Food Lion* fails for similar reasons. There, the Fourth Circuit reversed a fraud claim by a supermarket chain against a television network that placed employees in the chain's stores. See 194 F.3d at

512. The Fourth Circuit rejected the chain's fraud claims because the chain could not show "injurious reliance" on the misrepresentations on the relevant employment applications. *Ibid.*; see *id.* at 512-14. That state-law holding under North and South Carolina law has nothing to do with the First Amendment or punitive damages. It certainly does not conflict with the decision below here, where petitioner and her co-conspirators never would have gained entry to respondents' conferences and clinics had they told the truth.

Nor is there a conflict with *Veilleux*. That case concerned a trucker's claims against a television network regarding an unflattering broadcast. See 206 F.3d at 102. But *Veilleux upheld* the trucker's fraud claim to the extent it was based on the network's false representation that the broadcast would not include a particular advocacy group. Indeed, the court of appeals rejected the network's First Amendment argument that this portion of the fraud claim was barred by *Hustler*. *Id.* at 126-29. While the court also held that this part of the fraud claim could not support punitive damages, that was only because the trucker could not prove that the network's conduct was "outrageous" or motivated by "ill will," as Maine law required. *Id.* at 135. The court rejected a *separate* part of the trucker's fraud claim, but again did so solely under state law—it concluded that the network's promise "to portray the trucking industry in a positive light was too vague to be actionable." *Id.* at 119. Upholding one part of a fraud claim against state-law and First Amendment challenges, while rejecting other parts solely on state-law grounds, does not conflict with the decision below here.

Finally, there is no conflict with *United States* v. *Alvarez*, 567 U.S. 709 (2012). There, striking down the Stolen Valor Act, this Court made clear that the First Amendment does not protect false speech that "was made

for the purpose of material gain," "was used to gain a material advantage," or otherwise inflicts "a legally cognizable harm." *Id.* at 719, 723. Under that rule, the knowing misrepresentations petitioner and her co-conspirators made to facilitate their surreptitious recordings are unprotected.

First, the misrepresentations were "made for the purpose of material gain" and "used to gain a material advantage." For example, petitioner's co-conspirators used the information they gained to create a donor proposal, which they used to obtain financing for their "project." See, *e.g.*, C.A. ER 2524, 3154-55; Supp. ER 380-81. Petitioner also lied to obtain exhibit space at respondents' conferences—a valuable property right. See C.A. Supp. ER 775-77, 786; C.A. E.R. 2987, 2997, 2999.

Second, the fraudulent statements also caused "legally cognizable harm." Petitioner's trespasses by fraud impaired respondents' right to exclude others—"a fundamental element of the property right." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2072-73 (2021) (citation omitted). Petitioner also harmed respondents by necessitating the costs they incurred to restore confidence in the physical security of their conferences and clinics. Indeed, in finding petitioners liable for common-law fraud, the jury necessarily found that respondents were harmed. See C.A. ER 100.

2. The decision below upholding the punitive damages award is correct. Petitioner concedes that "a jury may in some cases award punitive damages for fraud." Pet. 34. And here, "[t]here was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that [petitioner] committed fraud or conspired to commit fraud through intentional misrepresentation." Pet. App. 39a. "That evidence included: (1) that [petitioner] intentionally recorded individuals

without their consent at conferences and meetings; [and] (2) that [petitioner] intentionally misrepresented [her] identit[y], the intent of [her] participation, and [her] work affiliation[] to attend conferences, lunches, and meetings." *Id.* at 39a-40a. While petitioner suggests that her conduct did not meet "the traditional elements of a fraud action," Pet. 34, the jury, the district court, and the court of appeals all disagreed. Petitioner's factbound arguments are contradicted by the record and unworthy of further review.

3. Finally, this case is of limited significance and a bad vehicle.

Again, the decision below on punitive damages is nonprecedential, with only a few sentences of analysis. Furthermore, petitioner does not articulate any clear legal rule that would invalidate the jury's award. At most, petitioner advocates "a careful balancing of the interests in enforcing property and contract rights against the interest in free speech," Pet. 36 (citation omitted), but she offers no hint of what that "balancing" might look like.

In addition, while petitioner purports to challenge only punitive damages, her arguments logically imply that she should have had no fraud liability at all. Of the four cases she cites, for example, three did not even involve punitive damages. See § C.1, *supra*. The court of appeals, however, held that petitioner "waived any challenge to [her] liability for fraud." Pet. App. 39a n.9. Petitioner offers no basis to disturb that waiver holding, which prevents this Court from even reaching petitioner's third question presented.

Finally, there is no merit to petitioner's alarmist assertion that "the Ninth Circuit's reasoning will have a devastating chilling effect on the press's First Amendment right to gather and publish news of vital public importance." Pet. 36. As the court of appeals explained,

"[j]ournalism and investigative reporting have long served a critical role in our society," but they "do not require illegal conduct." Pet. App. 16a.

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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2023