No. _____

In the

Supreme Court of the United States

SANDRA SUSAN MERRITT,
PETITIONER,
v.
PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., ET AL.,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

ANITA L. STAVER
HORATIO G. MIHET
ROGER K. GANNAM
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

1. Whether this Court's decision in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), which precludes publication damages without meeting the constitutional requirements for defamation liability, prohibits a party from avoiding the First Amendment's Free Speech limitations on defamation claims by using *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), to recover publication-dependent damages under "generally applicable" laws.

2. Whether the First Amendment's Free Speech Clause prevents the Racketeer Influenced and Corrupt Organizations (RICO) Act, which was enacted to combat the infiltration of legitimate commercial enterprises by traditional "organized crime," from being applied to undercover newsgathering journalists whose purpose is to document and expose what they reasonably believe to be unlawful conduct.

3. Whether the First Amendment's Free Speech Clause protects newsgathering journalists, who operate under an alias to document and expose what they reasonably believe to be unlawful conduct, from being subjected to punitive liability for "fraud."

PARTIES TO THE PROCEEDINGS

Petitioner Sandra Susan Merritt was the appellant in the court of appeals.

Respondents were appellees in the court below. They are 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; Planned Parenthood California Central Coast; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast; and Planned Parenthood Center for Choice. Unless otherwise noted or as context requires, petitioner refers to Respondents collectively as "Planned Parenthood."

RELATED PROCEEDINGS

This case relates to the following proceedings:

United States District Court (N.D. Cal.):

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 16-cv-00236 (Jan. 2016)

United States Court of Appeals (9th Cir.):

Planned Parenthood Fed'n of Am., Inc. v. Merritt, No. 20-16820 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Newman, No. 20-16068 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 20-16070 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Rhomberg, No. 20-16773 (9th Cir.) (Oct. 21, 2022)

Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, No. 16-16997 (9th Cir.) (May 16, 2018)

United States Supreme Court:

Ctr. For Med. Progress v. Planned Parenthood Fed'n of Am., No. 18-696 (Apr. 1, 2019) (denying petition for certiorari)

RULE 12 STATEMENT

Pursuant to Supreme Court Rule 12(4), petitioner joins by reference the forthcoming petitions that will be filed separately by her co-defendants in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sandra Susan Merritt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App.1a–20a) is reported at 51 F.4th 1125. An accompanying memorandum disposition (App.21a–45a) is not published in the Federal Reporter but is available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (App.104a) is not reported. The judgment of the district court is reported at 613 F. Supp. 3d 1190.

JURISDICTION

The judgment of the court of appeals and accompanying memorandum disposition were entered on October 21, 2022. A petition for rehearing was denied on March 1, 2023 (App.104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I.

Other pertinent constitutional and statutory provisions are reproduced in the appendix. App.107a.

STATEMENT OF THE CASE

A. Legal Background

This case concerns whether, and to what extent, the press may raise the First Amendment as a defense against generally applicable tort laws when undercover journalists gather and publish truthful news of significant public importance.

1. The First Amendment's protection of free speech and the press "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976)). Accordingly, the First Amendment not only protects the publication of news; it also protects the newsgathering process, including undercover investigations, because "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972); accord *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the *creation* and dissemination of information are speech within the meaning of the First Amendment." (emphasis added)).

2. A long line of this Court's precedents has established that if a party seeks damages caused by the publication of speech, it must prove that the speech was false and made with actual malice. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That precept was established to provide "breathing space" to the protections afforded by the

First Amendment to the press. *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988).

This Court has rejected attempts to recover publication-dependent damages without satisfying the requirements of a defamation claim. In *Hustler*, the Court concluded that the First Amendment barred the Reverend Jerry Falwell from recovering publication damages under the generally applicable law of intentional infliction of emotional distress. 485 U.S. at 56. In reaching its holding, the Court undertook a First Amendment balancing test and determined that the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" outweighed the state's interest in protecting public figures from emotional distress. *Id.* at 50–56. *Hustler* accordingly holds that a plaintiff may not avoid the First Amendment's limitations on defamation claims by seeking publication damages under non-reputational tort claims.

This Court took a seemingly conflicting position—relied on by the Ninth Circuit below—in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991). This Court held in *Cohen* that the First Amendment did not prohibit Dan Cohen from recovering damages under Minnesota's promissory estoppel theory after two newspapers published Cohen's name, despite promising him confidentiality. *Cohen*, 501 U.S. at 665. The Court specifically noted that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Justice Blackmun, joined by Justices Marshall and Souter, dissented. In his view, *Hustler* should have controlled the case and thus prevented recovery. 501 U.S. at 674–75 (Blackmun, J., dissenting). Justice Blackmun observed that just like Virginia's tort of intentional infliction of emotional distress was "a law of general applicability" in *Hustler*, *id.* at 674, Minnesota's promissory estoppel law was unrelated to the suppression of speech. Yet, in divergence from *Hustler*, the majority permitted Minnesota's doctrine of promissory estoppel to "be enforced to punish the expression of truthful information or opinion." *Id.* at 675–76. The dissent noted that the newspapers' publication of Cohen's name was the publication of truthful information, *id.* at 676; and to punish the publication of truthful information, "it must be in furtherance of a state interest 'of the highest order.'" *Id.* (quoting *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

Justice Souter, joined by Justices Marshall, Blackmun, and O'Connor, filed a separate dissenting opinion. 501 U.S. at 676 (Souter, J., dissenting). Justice Souter observed that "'nothing [is] talismanic about neutral laws of general applicability,' for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself." *Id.* at 677 (quoting *Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in judgment)). Justice Souter did not "believe the fact of general applicability to be dispositive"; instead, he found it "necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests, and such has

been the Court's recent practice in publication cases." *Id.* at 677. Thus, Justice Souter recognized the importance of the public interest as "integral to the balance that should be struck in this case," *id.*, and in his view, "the State's interest in enforcing a newspaper's promise of confidentiality [was] insufficient to outweigh the interest in unfettered publication of the information revealed in this case," *id.* at 679.

Beyond the dissenting justices, *Cohen* has been roundly criticized by legal scholars for weakening First Amendment protections for the press. See generally Eric B. Easton, *Two Wrongs Mock A Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 Ohio St. L.J. 1135 (1997); Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 Ga. L. Rev. 1087 (2001); Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 Harv. J.L. & Pub. Pol'y 1093 (2009). And this case now before the Court exemplifies how public figures rely on *Cohen* to circumvent the First Amendment defense against defamation claims by focusing not on the broadcast but on the newsgathering process.

B. Factual Background

1. Federal law makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." 42 U.S.C. 289g-2(a). The law does not prohibit "reasonable payments associated with the transportation, implantation,

processing, preservations, quality control, or storage." 42 U.S.C. 289g-2(e)(3).

Although Section 289g-2's purpose was to enable donations of fetal tissue for research and permit those involved in facilitating the transfer to recoup reasonable costs, a profitable market has since developed for brokering fetal tissue. This growing market has influenced the timing and method for how abortions are being performed—with potential risks to the mother's health—and has resulted in the shadowy proliferation of fetal-tissue trafficking. C.A. E.R. 11- 2800:20–2801:18, 11-2808:2–6.

2. In 2000, ABC aired a "20/20" segment shedding light on illegal fetal-tissue trafficking and profiteering. C.A. E.R. 10-2723:16–21, 22-5913. Using hidden cameras, a journalist posed as a prospective investor and secretly recorded a conversation with a tissue-procurement company owner at a restaurant. C.A. E.R. 22-5913. During the conversation, the businessowner revealed that his firm had bought and sold fetal tissue for profit in violation of federal law. C.A. E.R. 22-5914. The segment also detailed incidents of fetal-tissue harvesting from a Planned Parenthood clinic in Kansas. C.A. E.R. 10- 2723:22–25. The "20/20" broadcast triggered congressional hearings and investigations but resulted in no legislative reform or increased oversight of the tissue-transfer industry. C.A. E.R. 22 -5917.

3. Ten years later, pro-life activist David Daleiden watched the "20/20" segment and became gripped with exposing fetal-tissue trafficking in the abortion industry. C.A. E.R. 11-2806:16–18. At the time,

Daleiden was research director for Live Action, a pro-life organization. C.A. E.R. 11-2806:16–18. As part of his research, he learned that fetal-tissue trafficking was a profitable business (C.A. E.R. 11-2799:5–21) and that tissue brokers and abortion providers were profiting from Section 289g-2(e)(3)'s "reasonable payments" exception by marking up the costs of processing aborted fetuses (C.A. E.R. 11-2800:20–2801:18, 11-2808:2–6).

Dismayed that no meaningful change resulted from the "20/20" investigation, Daleiden resolved to carry out a similar hidden camera investigation to expose what he suspected was Planned Parenthood's ongoing fetal-tissue trafficking with procurement companies. C.A. E.R. 22-5944. To that end, Daleiden founded the nonprofit Center for Medical Progress (CMP) and launched an undercover investigatory project—the Human Capital Project—to engage high-level officials in the abortion and tissue transfer industries. C.A. E.R. 11-2829:6–21. Like the "20/20" undercover journalists, or like testers who ferret out discriminatory housing practices, Daleiden and his team sought to document evidence "of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissues for profit," in violation of Section 289g-2. C.A. E.R. 10-2606:2–7.

In July 2013, Daleiden enlisted petitioner Sandra Susan Merritt for the Human Capital Project to play the role of "Susan Tennenbaum," the "founder and CEO" of "BioMax," a start-up tissue procurement company (C.A. E.R. 4-824:14–17). As with all hidden-camera investigations, the project's goal was simple: get people to talk. C.A. E.R. 10-2603:16–17. Posing as

representatives from "BioMax," Daleiden and Merritt had to gain insider credibility, meet decisionmakers, and document admissions of unlawful conduct. C.A. E.R. 4-844:7–11. As Daleiden explained at trial, "it was an honest reporting project, to report true facts about [Planned Parenthood] to the public." C.A. E.R. 10-2606:21–22.

For two years, Merritt posed as Tennenbaum for assignments in California, Colorado, Texas, and Maryland. App.7a–9a. With tiny video cameras hidden on their persons (App.8a–9a), Daleiden and Merritt conducted interviews at the National Abortion Federation's (NAF) annual tradeshow conference in San Francisco in April 2014; at restaurants in Los Angeles and Pasadena in July 2014 and February 2015; and at NAF's annual conference in Baltimore in April 2015. App.7a–9a. Other hidden-camera interviews took place in Texas, Colorado, and Florida. App.8a–9a. In all, the footage from the undercover interviews confirmed Daleiden's and Merritt's beliefs that Planned Parenthood and tissue procurement companies were illegally harvesting and trafficking fetal tissue. C.A. E.R. 11-3053:3–3054:20.

4. In July 2015, CMP began releasing the Human Capital Project's results to the public. App.9a. Daleiden's goal "was to report on our findings to the public and [] to hopefully generate more pressure for law enforcement and others in positions of authority and official capacity to [] take action, to correct the problems that were documented by the videos." C.A. E.R. 11-3064:3–8.

The project's broadcast—like the "20/20" investigation 15 years before—prompted a national outcry, congressional investigations, and even criminal prosecutions. The Senate Judiciary Committee released a report condemning Planned Parenthood,[1] as did a House Select Investigative Panel of the Committee on Energy and Commerce,[2] which led to criminal referrals. C.A. E.R. 21-5397, 22-5885, 23-6180.

The undercover investigation also spurred the successful prosecution of a tissue procurement company by the Orange County District Attorneys' Office, which credited Daleiden's and Merritt's undercover work for its success. C.A. E.R. 21-5312, 21-5342-80. The tissue procurement company was liable for $7.8 million, and shuttered its doors. C.A. E.R. 21-5312.

Finally, the State of Texas cancelled Medicaid provider contracts with Planned Parenthood after determining—based on Daleiden's and Merritt's work—that a local affiliate "violated federal regulations relating to fetal tissue research by altering abortion procedures for research purposes or allowing the researchers themselves to be involved in performing abortions." *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 352 (5th Cir. 2020).

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[1] MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., MAJORITY REPORT ON HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY (Comm. Print 2016).

[2] SELECT INVESTIGATIVE PANEL OF THE ENERGY & COM. COMM., 114TH CONG., FINAL REPORT xviii-xix (Comm. Print 2017).

C. Proceedings Below

1. Planned Parenthood responded to the Human Capital Project's broadcast with a torrent of litigation. But, tellingly, despite the project's unambiguous assertion that Planned Parenthood sold human body parts for profit, Planned Parenthood did not sue for defamation. Nor did it allege damages from lost business opportunities. And it did not assert revenue losses from canceled abortions or tissue procurement transactions. Instead, it adopted the novel litigation tactic deployed two decades before by the North Carolina grocery store chain Food Lion: "recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim." *Food Lion, Inc.* v. *Cap. Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). So in January 2016, Planned Parenthood filed a 14-count lawsuit in the Northern District of California, alleging, among other claims, violation of civil RICO, breach of contract, fraud, trespass, and violations of federal and state wiretapping laws. App.10a.

Like Food Lion, Planned Parenthood sought to avoid the First Amendment limitations on defamation claims "by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts." 194 F.3d at 522. Planned Parenthood accordingly labeled the expenses it voluntarily incurred to cover its response to the broadcast as "infiltration damages" and "security damages." App.10a. Backed by this Court's decision in *Cohen* and a friendly forum in San Francisco, Planned Parenthood strategized that, by characterizing its damages as "economic," and by focusing not on the

broadcast of the videos but on the newsgathering process itself, it could chart a course around *New York Times* and *Hustler* to make defendants pay.

2. Litigation ensued for three years, leading to a six-week trial in November 2019. Planned Parenthood's theory at trial was that Merritt, Daleiden, and their co-defendants created a criminal enterprise to smear and destroy the abortion provider. C.A. E.R. 3-616:25–617:2. Daleiden acknowledged that one of the project's goals was to "[d]eliver a major public relations blow to Planned Parenthood" (C.A. E.R. 11-2828:23–13), but that aim was "predicated on the foundational goal of documenting and exposing * * * actual evidence of crimes within the space of harvesting and trafficking aborted fetal organs and tissues" (C.A. E.R. 11-2828:12–20).

Despite this Court's holding that the First Amendment's Free Speech Clause can serve as a defense in state tort suits, see *Snyder* v. *Phelps*, 562 U.S. 443, 451 (2011) (citing *Hustler*, 485 U.S. at 50–51), the district court repeatedly rejected defendants' attempt to raise the First Amendment as a defense to Planned Parenthood's claims. In fact, the district court emphatically instructed the jury "[*t*]*he First Amendment is not a defense to the claims in this case for the jury to consider*." C.A. E.R. 16-ER-4274 (emphasis added).

A San Francisco jury returned its verdict for Planned Parenthood, including finding defendants liable for violating civil RICO; for violating the Federal Wiretap Act and various state recording laws; committing fraud (directly or indirectly through

conspiracy); and for punitive damages under the Federal Wiretap Act and Florida and Maryland law. App.10a.

The jury awarded Planned Parenthood substantial compensatory damages. These damages were divided into two categories: purported "infiltration damages" and purported "security damages." App.10a. The "infiltration damages," totaling $366,873, related to Planned Parenthood's purported costs to prevent a future similar intrusion: "assessing Planned Parenthood's current security measures and exploring potential upgrades, reviewing and upgrading Planned Parenthood's vetting of visitors and attendees at conferences, monitoring social media for potential threats, hiring additional security guards for Planned Parenthood's conferences, and improving the badging and identification systems at the conferences." App.10a. The "security damages," totaling $101,048, related to Planned Parenthood's costs "for protecting their doctors and staff from further targeting by [defendants]" and "from foreseeable violence and harassment by third parties." The security damages also included "costs for physical security and online threat monitoring for the individuals recorded in the videos." App.11a.

The district court later awarded nominal and statutory damages, including $2 million in trebled RICO damages and punitive damages, for a total damages award of $2,425,084. App.10a. In August 2020, the court denied defendants' post-trial motions for judgment as a matter of law, a new trial, and to amend the final judgment. App.46a. The court subsequently ordered defendants to pay Planned Parenthood

nearly $14 million in attorney's fees and costs, on top of the damages judgment. Merritt C.A. Br. 12.

3. In a published opinion, a three-judge panel of the Ninth Circuit affirmed the compensatory awards for Planned Parenthood's so-called "infiltration" and "security" damages. App.5a. The panel did not weigh the First Amendment implications of punishing the news-gathering and publication of truthful information but simply relied on *Cohen* to hold that "[i]nvoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." App.14a. Nor did the panel scrutinize whether Planned Parenthood mischaracterized its publication-dependent damages as "economic" as an end-run around the First Amendment. Instead, it summarily concluded that the "infiltration" and "security" damages were "losses caused by the defendants' violations of generally applicable laws." App.14a.

The panel further supposed that "Planned Parenthood would have been able to recover the infiltration and security damages even if Appellants had never published videos of their surreptitious recordings." App.15a. The panel speculated that, "[r]egardless of publication, it is probable that Planned Parenthood would have protected its staff who had been secretly recorded and safeguarded its conferences and clinics from future infiltrations by Appellants and third parties." App.15a. The panel did not explain that reasoning given that Planned Parenthood did not learn about the "infiltration" until CMP published the videos. App.9a. In sum, the panel

concluded that defendants' First Amendment argument "cannot be squared with *Cohen*." App.15a.[3]

In an unpublished memorandum disposition, the panel affirmed the district court's rulings on Planned Parenthood's RICO claim. App.27a. The panel found that Planned Parenthood's RICO claim satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. 1028(c)(3)(A); that Planned Parenthood established the required pattern of predicate acts necessary to violate RICO; and that a direct relationship existed between Daleiden's production and transfer of the fake driver's licenses and the alleged harm, as required to satisfy RICO's proximate cause requirement. App.27a–29a. The panel also upheld the jury's imposition of punitive damages for fraud, trespass, and violations of state wiretapping laws. App.38a–40a. The panel did not directly address petitioner's argument (Merritt C.A. Br. 65) that obtaining a punitive damages award required Planned Parenthood to prove with clear and convincing evidence that defendants acted with actual malice.

[3] The panel did reverse the jury's verdict on the Federal Wiretap Act claim and vacated the related statutory damages. App.19a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision highlights the tension between this Court's opinions in *Hustler* and *Cohen* about the extent of the First Amendment's protection of journalists who use deception to research a story. Without this Court's intervention, undercover journalism—at least in the Ninth Circuit—will be eviscerated, as subjects of unflattering *but truthful* stories can use "generally applicable" laws as an end-run around the First Amendment. As this Court made clear, such a litigation tactic is foreclosed by *Hustler*. Yet *Cohen*'s categorical rejection of this Court's previous balancing of First Amendment interests in enforcing generally applicable laws against the press has sowed chaos in lower courts. That confusion has been percolating for years, and the Ninth Circuit's embrace of *Cohen*'s erroneous legacy highlights the need for this Court's definitive resolution. Even if the First Amendment confers no broad immunity on the press to violate generally applicable laws or to commit unlawful acts during the newsgathering process, this Court should affirm that lower courts must still balance the First Amendment implications of punishing the investigation and publication of truthful news of significant public importance.

In addition, this Court should grant certiorari to eliminate the threat to First Amendment values, long recognized by members of this Court, of powerful entities exploiting RICO to punish ideological opponents. Congress enacted RICO to eradicate organized crime like the Mafia, not to target journalists. At a broader level, the Court should clarify the proper scope of RICO as Congress intended and likewise affirm that

media defendants may raise the First Amendment in defense to civil RICO claims pertaining to newsgathering activities. As to the case below, the Ninth Circuit failed to follow this Court's precedents on the proximate cause standard for civil RICO claims, which has allowed Planned Parenthood to obtain treble damages for injuries that are not directly caused by the alleged predicate acts. The Ninth Circuit's adoption of such a plaintiff-friendly causation standard is especially troubling because public figures, at least on the West Coast, can now obtain RICO treble damages against journalists who use alter egos to investigate matters of public concern.

Finally, the decision below allows the courts to chill vital First Amendment activity by imposing punitive liability on media defendants simply for using deception to gain insider access to research stories of significant public importance—stories that would not come to light without undercover investigation. Characterizing such deception as actionable "fraud," as the Ninth Circuit affirmed below, offends constitutional values, strays from the common law understanding of fraud, and is foreclosed by this Court's holding in *United States* v. *Alvarez*, 567 U.S. 709 (2012) (opinion of Kennedy, J.). It also creates a split with at least two other circuits. Just because an undercover investigator uses an alter ego to obtain and bring to light information about potential crimes that the subject would not want to be made public does not mean that the investigator intends to defraud her subject, much less cause it any legally cognizable harm.

To the contrary, absent a legally cognizable harm caused by the deception, the First Amendment

positively protects a reporter's right to use deception to gather and publish information. By ignoring those First Amendment interests and bedrock principles of tort law, the courts below erred. The consequences of the Ninth Circuit's error are dramatic—both for petitioner and for First Amendment values. Unless this Court grants review, petitioner will be subject to crushing damages, including punitive damages, and resulting legal fees, simply for engaging in the longstanding journalistic tradition of undercover newsgathering. The First Amendment does not permit imposing punitive liability for using deceptive newsgathering methods if they serve the public interest, and neither should this Court.

I. The Ninth Circuit Exacerbated the Tension Between this Court's Decisions in *Hustler* and *Cohen*.

In affirming Planned Parenthood's compensatory damages without First Amendment scrutiny, the Ninth Circuit applied *Cohen* to "simply reaffirm the established principle that the pursuit of journalism does not give a license to break laws of general applicability." App.17a. Interpreting *Cohen* to conclude that laws of general applicability categorically apply to the press without implicating the First Amendment has established a dangerous precedent for investigative journalism. Indeed, this case reflects *Cohen*'s dangerous legacy of allowing civil claimants to circumvent the First Amendment by focusing not on the broadcast but on the actual newsgathering process.

A. The Ninth Circuit's decision entrenches the confusion caused by *Cohen* and widens a divide among courts of appeals.

Based upon *Cohen*'s lack of clarity, the Ninth Circuit's decision has widened the divide among courts of appeals on how to treat publication-related cases involving generally applicable laws. While the courts of appeals were already confused on how to apply *Cohen*, the Ninth Circuit opened a third front by categorically rejecting any First Amendment defense for deception-based newsgathering. The Ninth Circuit then denied en banc review, rendering the circuit split both deep and entrenched.

The Sixth Circuit has held that the actual-malice standard applied to a breach of contract claim in part because the plaintiff did not suffer a contractual injury but complained only of a defamation-type harm. *Compuware Corp.* v. *Moody's Inv. Serv., Inc.*, 499 F.3d 520, 533–34 (2007). The Sixth Circuit acknowledged *Cohen*, noting that "[o]rdinarily, 'enforcement of … general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.'"499 F.3d at 529 (citing 501 U.S. at 670). Even so, the court cautioned that "stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'" *Id.* (quoting 501 U.S. at 670). The Sixth Circuit thus concluded that the breach of contract claim was based on the defamation claim because "it is inescapable that Compuware seeks compensation for harm caused to its reputation." *Id.* at 530. The court continued: "We see no material

difference between this claim—which, although labeled one for breach of contract, essentially asserts that Moody's acted incompetently (i.e., negligently) in compiling and evaluating its publication of protected expression—and a tort claim based on conduct that might support a pendant defamation claim." *Id.* at 532.

Two Fourth Circuit cases involving hidden-camera investigations also demonstrate the uncertainties that *Cohen* has created. In *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, the Fourth Circuit rejected the argument that Food Lion's breach of duty and trespass claims against the network for its undercover investigation of the grocery store's food handling practices should be balanced against the First Amendment. 194 F.3d 505, 521 (1999). The court of appeals noted the "arguable tension" in the way the "generally applicable law" doctrine had been enforced, *id.* at 521–22, yet found that the torts the ABC undercover reports allegedly committed "fit neatly" into the *Cohen* framework, *id.* at 521.

Emphasizing the tension caused by *Cohen*, the Fourth Circuit also rejected Food Lion's cross-appeal of a district court decision that barred it from being awarded compensatory damages for harm caused by the show's broadcast. 194 F.3d at 522. The court of appeals concluded that Food Lion could not do an "end-run" around defamation law by trying to recover reputational damages for non-reputational torts. *Id.* The court of appeal's reasoning closely mirrored this Court's observation in *Cohen* that its decision would have been different had Dan Cohen been trying to "use a promissory estoppel cause of action to avoid the

strict requirements for establishing a libel or defamation claim." 501 U.S. at 671. The Fourth Circuit thus concluded that *Hustler* foreclosed such an attempt to skirt the "actual malice" requirements of libel law. *Food Lion*, 194 F.3d at 522.

In another case, the Fourth Circuit revisited *Cohen* just this year in enjoining North Carolina's Property Protection Act, which prohibited hidden camera newsgathering activities in nonpublic areas of an employer's premises. *People for the Ethical Treatment of Animals, Inc.* v. *N. Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815 (2023). The court of appeals rejected North Carolina's argument that *Cohen* categorically precludes the First Amendment's application to generally applicable laws, observing that "a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it." 60 F.4th at 827. The court of appeals then found the law unconstitutional because its provisions "burden newsgathering and publishing activities." *Id.* at 828.

The Seventh Circuit has also considered a plaintiff's attempt at an end-run around the First Amendment by bringing a tort action against undercover investigators. In *Desnick* v. *American Broadcasting Companies, Inc.,* a three-judge panel upheld the lower court's dismissal of four tort claims: trespass, invasion of privacy, unlawful electronic surveillance, and fraud. 44 F.3d 1345, 1352–55 (1995). Writing for a unanimous panel, Chief Judge Richard Posner noted that, although the press is not immune from tort or contract liability, and although investigative reporting could often be "shrill, one-sided, and offensive," it still

deserved the First Amendment protections this Court had established in *New York Times* and confirmed in *Hustler*. 44 F.3d at 1355. Judge Posner emphasized that such protection was warranted "regardless of the name of the tort," *id.* (citing *Hustler*, 485 U.S. at 46), and "regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast," *id.*

In short, not only has the Ninth Circuit's decision perpetuated the confusion caused by *Cohen*; it has deepened a divide among the federal circuit courts that have considered generally applicable laws in the newsgathering context. At bottom, the extent of a reporter's First Amendment rights should not turn on her geographic location within the United States. Nor should it turn on how a plaintiff artfully characterizes its publication-dependent damages. Yet the courts of appeals are divided on *Cohen*, and the Ninth Circuit's holding will now apply to all journalists on the West Coast. This deep and intolerable confusion caused by *Cohen* warrants the Court's review.

B. Under this Court's precedents, civil claimants may not recover defamation-type damages under generally applicable tort theories.

The Ninth Circuit concluded that it was "required by" *Cohen* to conclude that the First Amendment did not bar Planned Parenthood's claim for "infiltration" and "security" damages under non-defamation state law theories. App.14a. Such a simplistic interpretation reflects the judicial confusion that *Cohen* has long caused. In any event, the Ninth Circuit misread

Cohen. Although *Cohen* cited to a long line of cases holding 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," 501 U.S. at 669, this Court was careful to emphasize the nature of Cohen's damages claim: "*Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim*." *Id.* at 671 (emphasis added). So, even in *Cohen*, this Court was mindful of the type of damages that the plaintiff sought to recover. Following this reasoning, *Cohen* is inapplicable when, as here, a plaintiff seeks to use a generally applicable law to recover publication-dependent damages while avoiding the requirements of a defamation claim. In such a case, *Hustler* must apply.

The Ninth Circuit ignored this reading of *Cohen* and instead attempted to distinguish *Hustler* by noting that "[t]he jury awarded damages for economic harms suffered by Planned Parenthood, not the reputational or emotional damages sought in *Hustler Magazine*." App.15a. That conclusion cannot withstand scrutiny. Although the subject torts—*e.g.*, trespass, breach of contract, and fraud—allegedly occurred during the newsgathering process, the so-called "security" and "infiltration" damages creatively advanced by Planned Parenthood all depended on the project's publication. In other words, the alleged injuries arose *from the broadcast*, not the newsgathering; and the damages, although characterized as "economic," were precisely due to *the broadcast*. Planned Parenthood did not incur security costs to protect its doctors because Merritt used an alter ego to secure interviews

with high-level doctors, or even because Merritt signed an agreement not to record at a conference. Instead, Planned Parenthood *voluntarily* incurred costs in the wake of the public outcry for what the videos truthfully alleged: that Planned Parenthood sold human body parts for profit. Under these circumstances, California's trespass and breach of contract laws were no more laws of general applicability than the libel, invasion of privacy, or intentional infliction of emotional distress claims in *Hustler*. Thus, *Hustler* should have controlled the outcome, as it should have controlled in *Cohen*. See *Cohen*, 501 U.S. at 674–75 (Blackmun, J., dissenting).

Even if Planned Parenthood's alleged "infiltration" and "security" damages could be properly characterized as resulting from violations of general applicable laws, *Hustler* and its predecessors instruct that whatever harms may occur from such a violation must be balanced against the First Amendment interests at stake. See 485 U.S. at 51. The Human Capital Project's First Amendment value was of the highest order—truthful information about fetal-tissue trafficking in the abortion industry—and that information was of significant public concern, as demonstrated by the executive, legislative, and law enforcement actions that flowed from it. See p. 9, *supra*. Any injury on the other side of the scale stemmed from Planned Parenthood's illegal tissue-transfer practices coming to light, and not from petitioner's truthful reporting.

II. The Ninth Circuit's Decision Encourages the Continued Distortion of RICO by Expanding Its Reach to Punish Newsgathering by Journalists Whose Purpose Is to Investigate and Expose What They Believe to be Unlawful Activity.

RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate * * * commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). This Court has recognized that the "declared purpose" of Congress in enacting the RICO statute, as evidenced by its title and legislative history, was "to seek the eradication of organized crime in the United States." *United States* v. *Turkette*, 452 U.S. 576, 589 (1981) (quoting the statement of findings prefacing the Organized Crime Control Act of 1970, Pub.L. 91–452, 84 Stat. 923); accord *Russello* v. *United States*, 464 U.S. 16, 26–27 (1983).

Yet RICO "has already 'evolv[ed] into something quite different from the original conception of its enactors," warranting 'concern[s] over the consequences of an unbridled reading of the statute.'" *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 412 (2003) (Ginsburg, J., joined by Breyer, J., concurring) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481, 500 (1985)). Indeed, lower courts interpret RICO so broadly that civil claimants often use it to wage "lawfare" against media outlets, advocacy organizations, and religious activists engaging in First Amendment-protected conduct. Given that "[i]t is the duty of this

Court to implement the unequivocal intention of Congress," *Sedima*, 473 U.S. at 527 (Powell, J., dissenting), this Court should affirm that RICO must be applied narrowly to confine its reach to the purpose that Congress had in mind: the eradication of organized crime in the United States. And the Court's intervention is needed now to ensure that its decisions reining in an expansive application of RICO has broad staying power.

If the Court declines to clarify RICO's narrow scope, then it should affirm that media defendants may use the First Amendment as a shield against civil RICO claims as they do with state-law claims for defamation, invasion of privacy, electronic surveillance, and the like. See, *e.g.*, *New York Times*, 376 U.S. at 254. Indeed, Justice Souter, joined by Justice Kennedy, warned about the danger presented by "harassing RICO suits" and the First Amendment's role in preventing such harassment. *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring). Justice Souter observed that it is "prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Id.* at 265. Justice Souter also explained that "legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise." *Id.* at 264. Justice Souter added that "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.*

A. The Ninth Circuit's broad application of "racketeering activity" to undercover newsgathering demonstrates the exploitation of RICO against journalists and ideological opponents.

This case raises precisely the First Amendment problems in the RICO context recognized by Justices Souter and Kennedy in *Scheidler*. See 510 U.S. at 264 (Souter, J., concurring). Even if Planned Parenthood's allegations that defendants plotted to destroy the abortion provider had merit, Planned Parenthood's alleged RICO injuries are entirely founded upon defendants' speech-related, newsgathering activities. That Planned Parenthood is a public figure, and that its fetal-tissue transfer practices is a matter of public concern, are beyond dispute. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 772–75 (1986) (discussing *New York Times* and other First Amendment cases). Thus, for defendants' newsgathering and publication activities to amount to a RICO "injury," Planned Parenthood would have to show with "convincing clarity," *New York Times*, 276 U.S. at 285–86, that defendants' purported RICO enterprise—the Human Capital Project—was done with knowledge that it was false or in reckless disregard of the truth, *id*. at 280 (internal quotation marks omitted). Planned Parenthood did not even attempt to do so, because it knew that it could exploit RICO's broad interpretation to obtain millions of dollars in treble damages in what is, at bottom, a case of bad publicity.

Members of this Court "have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for

which the States have historically taken responsibility and may deal with today if they have the will to do so." *United States* v. *Morrison*, 529 U.S. 598, 636 n.10 (2000) (Souter, J., dissenting). Accordingly, the Court should clarify that RICO may not be used to federalize traditional state-law defamation laws to evade the First Amendment. If not, then the Ninth Circuit's decision will embolden civil claimants nationwide to employ a sweeping reading of RICO to attack ideological opponents as "racketeers."

B. The Ninth Circuit misapplied this Court's precedent on the standard of causation for civil RICO violations.

At a minimum, the Ninth Circuit's decision affirming petitioner's liability under civil RICO is incorrect. RICO allows a private civil claim by "[a]ny person injured in his business or property by reason of a violation of [the criminal RICO provisions]." 18 U.S.C. 1964(c). In no fewer than three decisions, this Court interpreted "by reason of" to require that a plaintiff in a civil RICO action show that defendant's actions were "not only * * * a 'but for' cause of [plaintiff's] injury, but * * * the proximate cause as well." *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (citations omitted); see *Hemi Group, LLC* v. *City of N.Y.*, 559 U.S. 1, 9 (2010) (citing *Holmes*, 503 U.S. at 268, 271, 274); *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

The "central question" in evaluating proximate causation in the RICO context "is whether the alleged violation *led directly* to the plaintiff's injuries." *Anza*, 547 U.S. at 461 (emphasis added). According to this

Court's decision in *Hemi*: "A link [between the RICO predicate acts and plaintiff's injuries] that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient" to show proximate cause. 559 U.S. at 9 (quoting *Holmes*, 503 U.S. at 271, 274). This requirement reflects "[t]he general tendency of the law, in regard to damages at least, * * * not to go beyond the first step." *Id.* at 10 (quoting *Holmes*, 503 U.S. at 271–72).

The Ninth Circuit affirmed the district court's proximate cause determination based on the predicate acts of violating the federal Identity Theft Statute, 18 U.S.C. 1028, finding "a direct relationship between Appellants' production and transfer of the fake driver's licenses and the alleged harm [the so-called "infiltration" and "security" damages]." App.28a. Not only is this finding plainly wrong, but it contradicts this Court's precedents in *Holmes*, *Anza*, and *Hemi* precluding indirect liability for remote and tenuous predicate acts. See *Holmes*, 503 U.S. at 261–62; *Anza*, 547 U.S. at 457–58; *Hemi*, 559 U.S. at 6–8.

Planned Parenthood's injuries here "were not caused directly" by Daleiden's alleged production and transfer of three fake driver's licenses, and "thus were not caused 'by reason of' it." *Hemi*, 559 U.S. at 17–18. For example, Planned Parenthood sought "infiltration" damages for, among other things, "monitoring social media for potential threats" and "hiring additional security guards for Planned Parenthood's conferences." App.10a. Planned Parenthood also sought "security" damages related to its costs "for protecting their doctors and staff from further targeting by [defendants]" and "from foreseeable violence and harassment by third parties." The security damages included "online

threat monitoring for the individuals recorded in the videos." App.11a. Planned Parenthood failed to show that Daleiden's production and transfer of fake IDs "led *directly*" to all these injuries. *Hemi*, 559 U.S. at 14 (emphasis added). The relationship between defendants' alleged production and transfer of fake driver's licenses and Planned Parenthood's alleged injuries is simply too attenuated to support a finding of proximate cause. Like New York's causation theory in *Hemi*, "[m]ultiple steps * * * separate[d] the alleged [predicate acts] from the asserted injury. *Id.* at 15. Planned Parenthood, therefore, had no civil RICO claim.

III. Permitting Punitive Damages against Undercover Investigators for Using Alter Egos Creates a Circuit Split and Conflicts with this Court's Precedent.

In affirming that a plaintiff can obtain punitive damages against a media defendant for using alter egos and deceptive techniques during an investigation, the Ninth Circuit deepened an existing circuit conflict and disregarded this Court's clear instruction that false speech is not actionable unless it is made for material gain or causes a legally cognizable harm. Without correction, the Ninth Circuit's decision will undermine First Amendment protections for undercover newsgathering.

A. Subjecting undercover investigators to punitive liability for documenting and exposing illegal conduct is unprecedented and creates a circuit split.

The Ninth Circuit upheld the San Francisco jury's imposition of punitive damages against Merritt and the other defendants on the grounds that they "committed fraud or conspired to commit fraud through intentional misrepresentation." App.39a. The panel's decision squarely conflicts with the decisions of other courts of appeals. Indeed, subjecting journalists to punitive damages for conducting an undercover investigation is unprecedented: No federal court has ever found journalists liable for punitive damages for using alter egos and undercover identities, misrepresenting their purposes, and using hidden cameras for newsgathering.

In *Desnick*, *supra*, the Seventh Circuit rejected the proposition, affirmed by the Ninth Circuit below, that investigative deceptions are actionable fraud thereby giving rise to punitive liability. 44 F.3d at 1353 (Posner, J.). As with the undercover reporters in *Desnick*, Daleiden "did not order the camera-armed" Merritt into abortion industry conferences and meetings with doctors to defraud Planned Parenthood. *Id.* at 1353. Instead, just like ABC's purpose in *Desnick* "was to see whether the Center's physicians would recommend cataract surgery on the testers," *id.*, the Human Capital Project's purpose was to test whether Planned Parenthood officials would disclose evidence of illegal fetal-tissue trafficking with procurement companies. C.A. E.R. 10-2606:21–22. As Judge Posner observed:

> We cannot view the fraud alleged in this case in that light. Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.

Id. at 1354.

Other circuit courts have explicitly rejected punitive damages for fraud in the newsgathering context. In *Food Lion*, *supra*, the Fourth Circuit reversed liability for fraud and the related punitive damages judgment against a television network for its hidden camera exposé of a grocery chain's food handling practices. 194 F.3d at 512–513, 522. The court found that "Food Lion did not show that the administrative costs were an injury caused by reasonable reliance on the misrepresentations." *Id.* at 513.

The First Circuit similarly held that media defendants' misrepresentations to obtain the plaintiffs' voluntary participation in a "Dateline NBC" segment about the trucking industry did not give rise to punitive damages because defendants "were [not] motivated by anything more malicious than the zealous pursuit of an emotionally compelling story." *Veilleux* v. *Nat'l Broad. Co.*, 206 F.3d 92, 135 (1st Cir. 2000). The court observed: "While a jury could find that the alleged misrepresentations were made knowingly or even recklessly, it could not reasonably infer common-law malice as required under Maine law." *Ibid.*

Splitting with its sister circuits, the Ninth Circuit effectively concluded that the false statements defendants made to network with top Planned Parenthood doctors and obtain access at abortion-industry conferences were fraudulent to the extent warranting punitive damages. App.39a. The Ninth Circuit relied on no case to support the proposition that misrepresentations made during the newsgathering process constitute intentional fraud giving rise to punitive liability. The Ninth Circuit's decision thus produces a novel punitive-damages standard against media defendants that is easier to satisfy than the traditional punitive damages standard for a defamation claim (*e.g.*, actual malice). That the court of appeals denied an en banc petition documenting this circuit split renders the split deep seated and multi-faceted; it is also entrenched and unlikely to benefit from further percolation. This Court should grant review to resolve the circuit split.

B. By incorrectly affirming that using alter egos to gain insider access for a hidden camera investigation is "fraudulent" to the extent warranting punitive liability, the Ninth Circuit disregarded *Alvarez*.

The Ninth Circuit's decision upholding punitive damages conflicts not only with the decisions of its sister circuits but also with the clear teaching of this Court in *United States* v. *Alvarez*, 567 U.S. 709 (2012) (opinion of Kennedy, J.). In that case, the Court invalidated the Stolen Valor Act, a federal law prohibiting false statements about receiving military decorations or medals. The four-Justice plurality opinion observed: "Even when considering some instances of

defamation and *fraud*, * * * the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment." 567 U.S. at 719 (opinion of Kennedy, J.) (emphasis added); accord *Illinois, ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("False statement alone does not subject a fundraiser to fraud liability."). Instead, "[t]he statement must be a knowing or reckless falsehood." *Alvarez*, 567 U.S. at 719 (opinion of Kennedy, J.) (citing *New York Times*, 376 U.S. at 280). The Court emphasized that "[w]ere [it] to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." 567 U.S. at 723.

To be sure, neither the plurality nor the concurrence in *Alvarez* held that false statements are always protected under the First Amendment. Instead, as the plurality outlines, false speech may be criminalized if made "for the purpose of material gain" or "material advantage," or if such speech inflicts a "legally cognizable harm." *Alvarez*, 567 U.S. at 723, 719. Here, the Ninth Circuit sidestepped whether Merritt's false statements were made "for the purpose of material gain" or "material advantage," or if such speech inflicted on Planned Parenthood a "legally cognizable harm." *Id.* Instead, the court of appeals found that Daleiden and Merritt warranted punitive liability because they "intentionally recorded individuals without their consent at conferences and meetings" and "intentionally misrepresented their identities, the intent of their participation, and their work affiliations

to attend conferences, lunches, and meetings." App.39a–40a. But none of those actions—all of which are standard undercover reporting techniques—was made for "the purpose of material gain" or "material advantage" or inflicted on Planned Parenthood a "legally cognizable harm." 567 U.S. at 723. As Judge Posner observed in *Desnick*, *supra*: "It would be different if the false promises were stations on the way to taking [the plaintiff] to the cleaners. An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises." 44 F.3d at 1354–55. As with the undercover reporters in *Desnick*, Merritt and Daleiden's "only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, *and that is not a fraudulent scheme*." *Ibid*. (emphasis added).

To be clear, a jury may in some cases award punitive damages for fraud. But under common law principles, whether Merritt was found liable for deceptive conduct does not ultimately warrant punitive liability for fraud. Instead, the determinative factor should have been whether Merritt intentionally recorded the conversations to defraud Planned Parenthood of property or legal rights, or otherwise to intentionally cause injury. See Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1297 (4th ed.) (listing the traditional elements of a fraud action); see also Restatement (Second) of Torts § 549(1)(b) (1965) (stating that a victim of fraud may recover "pecuniary loss suffered * * * as a consequence of the recipient's reliance upon the misrepresentation"). She did not, and thus she should not be subject to punitive liability for fraud. Indeed, defendants presented undisputed evidence at trial that the "primary and overriding purpose" of CMP's hidden camera

investigation was "to gather and document evidence of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissue for profit." C.A. E.R. 10-2606:3–7. The project was not a criminal enterprise to defraud Planned Parenthood but a standard undercover investigation (*e.g.*, using false identities, pretextual scenarios, surreptitious recording) inspired by the "20/20" news segment on the fetal-tissue transfer industry. The punitive damages award should be reversed.

IV. This Case Is Exceptionally Important Because the Ninth Circuit's Decision Enables Politically Powerful Entities to Use Lawfare to Crush Investigative Reporting.

At bottom, this was a defamation case. After carrying out a "20/20"-style hidden camera investigation, defendants broadcast to the world that Planned Parenthood sold human body parts for profit. Despite facing such a horrific claim, Planned Parenthood was not prepared or able to prove that the Human Capital Project's assertion was false or made with actual malice. Instead, and thanks to *Cohen*, Planned Parenthood strategized an end-run around the First Amendment by characterizing its publication-dependent damages as "economic." That litigation tactic is foreclosed by *Hustler*—and even *Cohen*—and thus Planned Parenthood's RICO and state-law claims for trespass, fraud, and breach of contract should have been precluded by the First Amendment.

In concluding otherwise, and by affirming the enormous compensatory, trebled statutory and punitive

damages, and resulting fee award, the Ninth Circuit weakened First Amendment protections for journalists who use deception to expose unlawful activity. The court of appeals suggested that its decision should not be read as punishing the content of defendants' publication but only the way the news was gathered. App.16a. But that is a false dichotomy. A law that imposes liability on the newsgathering process should be subject to First Amendment scrutiny just as much as a law that targets speech or expressive conduct (the news itself). Left in place, 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.

The gravity of the Ninth Circuit's error is compounded by *Cohen*'s lack of clarity. As scholars have pointed out, *Cohen*'s "conclusion that laws of general applicability also apply to the press without raising a First Amendment issue establishes a dangerous precedent for those on the front lines of investigative journalism." Fargo & Alexander, 32 Harv. J.L. & Pub. Pol'y at 1110. Allowing *Cohen*'s confusion to percolate will empower well-funded public figures like Planned Parenthood to use generally applicable laws to punish journalists for shining a light on deeply hidden misconduct.

Rather than give industrial giants like Planned Parenthood unfettered power to wield generally applicable laws as an end-run around the First Amendment, "there should instead be a careful balancing of the interests in enforcing property and contract rights against the interest in free speech." Garfield, 35 Ga. L. Rev. at 1128. "It is the absence of such thoughtful

balancing, however, which is so glaringly evident in *Cohen* and which threatens to be *Cohen*'s legacy." *Ibid*. This case thus presents a vital question, and it is a clean vehicle for the Court to address the tension between *Hustler* and *Cohen* and accordingly clarify the scope of First Amendment protections in the news-gathering context.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

ANITA L. STAVER
HORATIO G. MIHET
ROGER K. GANNAM
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20001
(202) 289-1776
court@lc.org

Counsel for Petitioner

May 2023

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

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.; Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast, Plaintiffs-Appellees,

v.

Troy NEWMAN, Defendant-Appellant,

and

Center for Medical Progress; BioMax Procurement Services, LLC; David Daleiden, aka Robert Daoud Sarkis; Albin Rhomberg; Sandra Susan Merritt, aka Susan Tennenbaum; Gerardo Adrian Lopez, Defendants,

National Abortion Federation, Intervenor.

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.; Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast, Plaintiffs-Appellees,

v.

Center for Medical Progress; BioMax Procurement Services, LLC; David Daleiden, aka Robert Daoud Sarkis; Gerardo Adrian Lopez, Defendants-Appellants,

and

Troy Newman; Albin Rhomberg; Sandra Susan Merritt, aka Susan Tennenbaum, Defendants,

National Abortion Federation, Intervenor.

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.; Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast, Plaintiffs-Appellees,

v.

Albin Rhomberg, Defendant-Appellant,

and

Center for Medical Progress; BioMax Procurement Services, LLC; David Daleiden, aka Robert Daoud Sarkis; Troy Newman; Sandra Susan Merritt, aka Susan Tennenbaum; Gerardo Adrian Lopez, Defendants,

National Abortion Federation, Intervenor.

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.; Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; Planned Parenthood Gulf Coast, Plaintiffs-Appellees,

v.

Sandra Susan Merritt, aka Susan Tennenbaum, Defendant-Appellant,

and

Center for Medical Progress; BioMax Procurement Services, LLC; David Daleiden, aka Robert Daoud

Sarkis; Troy Newman; Albin Rhomberg; Gerardo Adrian Lopez, Defendants,

National Abortion Federation, Intervenor.

No. 20-16068, No. 20-16070, No. 20-16773, No. 20-16820

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Argued and Submitted April 21, 2022

San Francisco, California

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Filed October 21, 2022

OPINION

Before: Mary H. Murguia, Chief Judge, Ronald M. Gould, Circuit Judge, and Nancy D. Freudenthal*, District Judge.

Opinion by Judge Gould

GOULD, Circuit Judge:

***1130** Defendants-Appellants ("Appellants") used fake driver's licenses and a false tissue procurement company as cover to infiltrate conferences that Plaintiffs-Appellees ("Planned Parenthood") hosted or attended. Using the same strategy, Appellants also arranged and attended lunch meetings with Planned

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* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

Parenthood staff and visited Planned Parenthood health clinics. During these conferences, meetings, and visits, Appellants secretly recorded Planned Parenthood staff without their consent. After secretly recording for roughly a year-and-a-half, Appellants released on the internet edited videos of the secretly recorded conversations. Planned Parenthood sued Appellants for monetary damages and injunctive relief. After pre-trial motions and a six-week trial, Appellants were found guilty of trespass, fraud, conspiracy, breach of contracts, unlawful and fraudulent business practices, violating civil RICO, and violating various federal and state wiretapping laws. Planned Parenthood was awarded statutory, compensatory, and punitive damages as well as limited injunctive relief.

Appellants argue that the compensatory damages awarded against them are precluded by the First Amendment and that Planned Parenthood did not show that Appellants violated the Federal Wiretap Act.[1] We have jurisdiction under 28 U.S.C. § 1291. We affirm the awards of compensatory and punitive damages, but we reverse the jury's verdict on the Federal Wiretap Act claim and vacate the related statutory damages for violating the Federal Wiretap Act.

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[1] In a separate memorandum disposition, filed simultaneously with this opinion, we address Appellants' other grounds of appeal.

I. BACKGROUND

In 2013, David Daleiden, a long-time pro-life activist, started the Human Capital Project ("HCP"). Daleiden is well-known in pro-choice circles, and his name was on "no access" lists of individuals barred from entering Planned Parenthood conferences and affiliated health centers.[2] Daleiden partnered with two other long-time pro-life activists, Troy Newman and Albin Rhomberg, to start HCP. Newman operated Operation Rescue, which maintains a website that publicizes the names, photographs, and personal information of abortion providers. Rhomberg has worked on pro-life projects for more than four decades, including projects that publicize the names of abortion providers in several countries.

***1131** In February and March of 2013, Daleiden circulated a proposal to Newman and Rhomberg 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. In March 2013, Daleiden, Newman, and Rhomberg formed the Center for Medical Progress ("CMP") to oversee their operation; Daleiden was the CEO, Newman the Secretary, and Rhomberg the CFO. To carry out their operation, Daleiden created a fake tissue

[2] In this Opinion, we use the term "pro-life" to describe Appellants because Appellants refer to themselves using this term. Likewise, we use the term "pro-choice" to describe Appellees because Appellees use that term.

procurement company, BioMax. [3] Daleiden filed BioMax's articles of incorporation with the State of California in October 2013, signing the fictitious name "Susan Tennenbaum." BioMax had a website, business cards, and promotional materials, but was not in fact involved in any business activity. Daleiden used the false name "Robert Sarkis" while posing as BioMax's Procurement Manager and Vice President of Operations.

Daleiden then recruited additional associates to participate in the scheme. Susan Merritt, another long-time pro-life activist who had previously participated in an undercover operation targeting abortion providers, posed as BioMax's CEO "Susan Tennenbaum." Brianna Baxter, using the alias "Brianna Allen," posed as BioMax's part-time procurement technician. Adrian Lopez used his own name and posed as a BioMax procurement technician.

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

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[3] Tissue procurement companies obtain human tissue samples, including fetal tissue from abortion providers, and provide them to medical researchers. Fetal tissue donation to medical researchers is legal under federal law. Federal law permits "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. § 289g-2(e)(3).

Sarkis and Tennenbaum.

To establish their credentials, BioMax "employees" attended several entry-level conferences. In June 2013, "Robert Sarkis" attended the International Society of Stem Cell Research Annual Meeting in Boston. In September of that same year, "Susan Tennenbaum" and "Brianna Allen" attended the Association of Reproductive Health Professionals conference in Colorado as representatives of BioMax. Contacts from this meeting vouched for BioMax's *bona fides*, permitting BioMax to register as an exhibitor at the National Abortion Federation ("NAF") 2014 Annual Meeting. Planned Parenthood Federation of America ("PPFA") is a member of NAF, as are many of PPFA's affiliates, providers, and staff.

Daleiden, using Merritt's alias "Susan Tennenbaum," signed Exhibitor Agreements for the 2014 NAF conference on behalf of BioMax. Daleiden, Merritt, and Baxter all attended NAF's 2014 Annual Meeting in San Francisco on behalf of BioMax, presenting their fake California driver's licenses at check-in and posing as Sarkis, Tennenbaum, and Allen. All signed confidentiality agreements, that among other things, prohibited them from recording. However, they covertly recorded during the entire conference.

For over a year, Appellants Daleiden, Merritt, and Baxter (using their false names) and Lopez (using his real name), on behalf of BioMax, attended the 2015 NAF Annual Meeting and three Planned ***1132** Parenthood conferences held in Florida and Washington, D.C. At these conferences, Appellants often signed additional exhibitor or confidentiality

agreements and secretly recorded persons with whom they spoke.

Daleiden also repeatedly sought a meeting with Dr. Deborah Nucatola, to whom he had introduced himself at the 2014 NAF Annual Meeting; Dr. Nucatola was then the Senior Director of Medical Services at PPFA and an abortion provider in California. She eventually agreed to meet, and Daleiden and Merritt secretly recorded Dr. Nucatola throughout a two-hour lunch. Daleiden and Merritt repeated this same strategy with Dr. Mary Gatter, the Medical Director of Planned Parenthood Pasadena and San Gabriel Valley, Inc.: during a lunch meeting solicited by Daleiden, Daleiden and Merritt recorded Dr. Gatter without her knowledge.

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

On July 14, 2015, CMP started releasing videos that included footage from the conferences, lunches, and clinic visits Appellants had secretly recorded. Appellants portray themselves as journalists reporting important and newsworthy information, whereas Planned Parenthood argues that Appellants purposefully conducted a smear campaign using illegal methods.

In response to the release of the videos, the recorded individuals testified that they received a variety of threats. Planned Parenthood provided temporary bodyguards to several of the recorded individuals and

even relocated one of the recorded individuals and her family. Planned Parenthood also hired security consultants to investigate Appellants' infiltration and enhance the security of its conferences.

Planned Parenthood timely brought a civil action against Appellants in January 2016 seeking compensatory, statutory, and punitive damages for claims including violation of civil RICO, federal wiretapping law, state wiretapping laws, civil conspiracy, breach of contracts, trespass, and fraud. Planned Parenthood also sought injunctive relief prohibiting Appellants from carrying out similar future infiltrations.

After a six-week trial, the jury found for Planned Parenthood on all counts. The jury awarded Planned Parenthood compensatory and punitive damages, and the district court later awarded nominal and statutory damages, resulting in a total damages award of $2,425,084.

The compensatory damages were divided into two categories: infiltration damages and security damages. The infiltration damages, totaling $366,873, related to Planned Parenthood's costs to prevent a future similar intrusion. They included costs for assessing Planned Parenthood's current security measures and exploring potential upgrades, reviewing and upgrading Planned Parenthood's vetting of visitors and attendees at conferences, monitoring social media for potential threats, hiring additional security guards for Planned Parenthood's conferences, and improving the badging and identification systems at the conferences. The

security damages, totaling $101,048, related to Planned Parenthood's costs for protecting their doctors and staff from further targeting by Appellants and from foreseeable violence and harassment by third parties. The security damages included costs for physical security and online threat monitoring for the individuals recorded in the videos that Appellants released.

The district court also awarded Planned Parenthood limited injunctive relief against all Appellants except Lopez. On August 19, 2020, the district court denied ***1133** Appellants' motion for judgment as a matter of law, a new trial, and to amend the judgment. Appellants timely appealed.

II. STANDARD OF REVIEW

We review constitutional challenges *de novo*. *Crime Just. & Am., Inc. v. Honea*, 876 F.3d 966, 971 (9th Cir. 2017). "We review de novo a judgment as a matter of law." *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017). Judgment as a matter of law is appropriate when the evidence permits only one reasonable conclusion. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205–06 (9th Cir. 2008).

III. THE FIRST AMENDMENT

"[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." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115

L.Ed.2d 586 (1991).[4] In *Cohen*, a campaign worker, Mr. Dan Cohen, provided two newspapers with information damaging to his candidate's opponent. *Id.* at 665, 111 S.Ct. 2513. Cohen revealed the information on the condition that his identity as the source be kept secret. *Id.* However, the newspapers subsequently published articles revealing Cohen as the source of the damaging information, and Cohen was fired from the campaign. *Id.* at 666, 111 S.Ct. 2513. Cohen sued the newspapers seeking compensatory damages under a state promissory estoppel cause of action. *Id.* at 671, 111 S.Ct. 2513. He argued that the newspapers' publication of his name was a breach of promise, which caused him to lose his job and lowered his earning capacity. *Id.* In reasoning that the First Amendment did not bar the damages, the Supreme Court explained that "[i]t is ... beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws' " and "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670, 111 S.Ct. 2513 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132, 57 S.Ct. 650, 81 L.Ed. 953 (1937)).

We recently reiterated this holding, stating that "the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability." *Animal Legal Def. Fund v.*

[4] We express no view on whether Appellants' actions here were legitimate journalism or a smear campaign because even accepting Appellants' framing, the First Amendment does not prevent the award of the challenged damages.

Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018). In *Wasden*, we examined an Idaho statute criminalizing entry into or obtaining records of an agricultural production facility by force, threat, misrepresentation, or trespass; obtaining employment with an agricultural facility by force, threat, or misrepresentation with intent to cause harm; or entering and recording inside a non-public agricultural production facility without consent. *Id.* at 1190–91. In response to facial First Amendment challenges, we held that the provisions criminalizing entry and recording violated the First Amendment because the entry provision was overbroad and the recording provision was a content-based restriction that was unable to survive strict scrutiny. *Id.* at 1194–98, 1203–05. Conversely, the provision criminalizing obtaining records did not facially violate the First Amendment because it protected the facility owners' property rights from legally cognizable harm. *See id.* at 1199–1201. The employment provision, meanwhile, complied with the First Amendment because the Supreme Court had previously held that such ***1134** speech was unprotected by the First Amendment, and the provision was not aimed at suppressing a specific viewpoint. *Id.* at 1201–02 (citing *United States v. Alvarez*, 567 U.S. 709, 723, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012)). *Wasden*, therefore, repeated that facially constitutional statutes apply to everyone, including journalists.[5]

[5] Appellants raise no facial First Amendment challenges.

Wasden was not novel within the Ninth Circuit. More than fifty years ago, we held that journalists could not use subterfuge to gain entry into a private home and secretly record an individual suspected of committing a crime. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 247, 249 (9th Cir. 1971). We noted that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Id.* at 249.

Adhering to *Cohen, Wasden*, and *Dietemann*, we repeat today that journalists must obey laws of general applicability. Invoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society. None of the laws Appellants violated was aimed specifically at journalists or those holding a particular viewpoint. The two categories of compensatory damages permitted by the district court, infiltration damages and security damages, were awarded by the jury to reimburse Planned Parenthood for losses caused by Appellants' violations of generally applicable laws. As required by the Supreme Court in *Cohen*, and our court in *Wasden* and *Dietemann*, Appellants have been held to the letter of the law, just like all other members of our society. Appellants have no special license to break laws of general applicability in pursuit of a headline.

Appellants are incorrect in arguing that the infiltration and security damages awarded by the jury are impermissible publication damages. In *Hustler*

Magazine, Inc. v. Falwell, the Supreme Court held that a public figure could not recover damages for emotional distress or reputational loss caused by the publication of an ad parody about him absent a showing of falsity and actual malice. 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). However, the facts before us are distinguishable from *Hustler Magazine*. The jury awarded damages for economic harms suffered by Planned Parenthood, not the reputational or emotional damages sought in *Hustler Magazine*. *See id.* at 50, 108 S.Ct. 876; *see also Cohen*, 501 U.S. 663, 111 S.Ct. 2513 (1991) (distinguishing between economic damages and "damages for injury to [one's] reputation or his state of mind"); *Veilleux v. NBC*, 206 F.3d 92, 127–29 (1st Cir. 2000) (same).

Further, Planned Parenthood would have been able to recover the infiltration and security damages even if Appellants had never published videos of their surreptitious recordings. Regardless of publication, it is probable that Planned Parenthood would have protected its staff who had been secretly recorded and safeguarded its conferences and clinics from future infiltrations by Appellants and third parties. Appellants' 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*. In *Cohen*, the Supreme Court upheld an economic damage award reliant on publication—damages related to loss of earning capacity—even though the publication was truthful and ***1135** made without malice. *See Cohen*, 501 U.S. at 671, 111 S.Ct. 2513.

Our decision does not impose a new burden on journalists or undercover investigations using lawful means. From the beginning of their scheme, Appellants engaged in illegal conduct—including forging signatures, creating and procuring fake driver's licenses, and breaching contracts—that the jury found so objectionable as to award Planned Parenthood punitive damages. Journalism and investigative reporting have long served a critical role in our society. *See Wasden*, 878 F.3d at 1189. But journalism and investigative reporting do not require illegal conduct. In affirming Planned Parenthood's compensatory damages from Appellants' First Amendment challenge, we simply reaffirm the established principle that the pursuit of journalism does not give a license to break laws of general applicability.

IV. THE FEDERAL WIRETAP ACT

At trial, Planned Parenthood alleged that Appellants recorded Planned Parenthood's staff forty-two separate times at conferences, lunches, and health clinics without their consent in violation of the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d). Planned Parenthood argued that the criminal or tortious purpose behind these recordings was to further Appellants' civil RICO enterprise with the ultimate goal of harming or destroying Planned Parenthood. Planned Parenthood also contended that Appellants' civil RICO scheme served the same purpose: harming and destroying Planned Parenthood.[6]

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[6] "To state a civil RICO claim under 18 U.S.C. § 1964(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through

The jury agreed with Planned Parenthood and determined that Appellants had illegally recorded Planned Parenthood staff in all forty-two of the pled instances. The jury awarded Planned Parenthood damages based on these recordings, and, pursuant to the jury's findings, the district court awarded statutory damages to various Planned Parenthood entities for these same violations.[7]

On appeal, Appellants contend that they could not have violated the Federal Wiretap Act because their violation of civil RICO is not a sufficient criminal or tortious purpose to impose liability under § 2511(2)(d). We agree.

The Federal Wiretap Act generally prohibits any person from intentionally recording an oral communication. 18 U.S.C. § 2511(1)(a). One exception to this broad prohibition is that a person may record a conversation in which he or she is a party unless the

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a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to the plaintiff's business or property." *Abcarian v. Levine*, 972 F.3d 1019, 1028 (9th Cir. 2020) (internal quotations and citation omitted). Planned Parenthood alleged that Daleiden's production and transfer of the three fake driver's licenses, in violation of 18 U.S.C. § 1028(a)(1) and (a)(2), served as the civil RICO predicate acts.

[7] The jury awarded Planned Parenthood approximately $100,000 in compensatory damages related to the Federal Wiretap Act claim, and the district court awarded statutory damages of $90,000. Additionally, the jury awarded Planned Parenthood $870,000 in punitive damages for claims of fraud, trespass, breach of Maryland wiretapping law, and breach of federal wiretapping law. The jury did not specify which claims the punitive damages related to.

"communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." § 2511(2)(d).

A recording has a criminal or tortious purpose under § 2511(1) when "done for the purpose of facilitating some further impropriety, such as blackmail." ***1136** *Sussman v. Am. Broad. Companies, Inc.*, 186 F.3d 1200, 1202 (9th Cir. 1999). This criminal or tortious purpose must be separate and independent from the act of the recording. *Id.* ("[T]he focus is not upon whether the interception itself violated another law; it is upon whether the *purpose* for the interception—its intended use—was criminal or tortious.") (citation omitted). Put another way, the independent purpose must be "essential to the actual execution of an illegal wiretap ... [and] directly facilitate the criminal conduct." *United States v. McTiernan*, 695 F.3d 882, 890 (9th Cir. 2012); *see also Caro v. Weintraub*, 618 F.3d 94, 99–100 (2d Cir. 2010). The recording party must also have the independent criminal or tortious purpose at the time the recording was made. *See Sussman*, 186 F.3d at 1203; *see also Caro*, 618 F.3d at 99 ("There is a temporal thread that runs through the fabric of the statute and the case law. At the time of the recording the offender must intend to use the recording to commit a criminal or tortious act.").

With this understanding, it is clear that Appellants' violations of civil RICO could not have served as the criminal or tortious purpose required by § 2511(2)(d). Planned Parenthood alleged that the criminal or tortious purpose of Appellants' civil RICO violation was to destroy Planned Parenthood. Planned

Parenthood similarly argued that the purpose of the secret recordings was to further Appellant's civil RICO scheme, which sought to destroy Planned Parenthood. However, § 2511(2)(d) requires that the criminal or tortious purpose be independent of and separate from the purpose of the recording. Planned Parenthood runs afoul of this requirement by reusing the same criminal purpose—furthering the civil RICO scheme to destroy Planned Parenthood—as both the purpose of the civil RICO claim and the independent criminal or tortious purpose of § 2511(2)(d).[8] And, Planned Parenthood's argument is circular: according to Planned Parenthood, the civil RICO conspiracy is furthered by the recordings, and the recordings themselves further the ongoing civil RICO conspiracy. Such reasoning is not permitted by § 2511(2)(d). *See Sussman*, 186 F.3d at 1202.

V. CONCLUSION

For the above reasons, we affirm the award of infiltration and security damages and the award of punitive damages. We reverse the jury's verdict on the Federal Wiretap Act claim and vacate the related statutory damages awards.[9]

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[8] Planned Parenthood briefly suggests that Appellants use of the secret recordings for fundraising can serve as an alternative independent purpose under § 2511(2)(d). However, fundraising is not a criminal or tortious purpose.

[9] Other than the statutory damages, all of Planned Parenthood's damages related to the Federal Wiretap Act are duplicative of damages affirmed in the simultaneously-filed memorandum disposition. This opinion vacates the statutory damage awards related to the Federal Wiretap Act.

AFFIRMED IN PART, REVERSED AND VACATED IN PART.

All Citations

51 F.4th 1125, 2022 Daily Journal D.A.R. 10,957

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al., Plaintiffs-Appellees,

v.

Troy NEWMAN, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Center for Medical Progress; et al., Defendants-Appellants,

and

Troy Newman; et al., Defendant,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Albin Rhomberg, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Sandra Susan Merritt, aka Susan Tennenbaum, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

No. 20-16068, No. 20-16070, No. 20-16773, No. 20-16820

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Argued and Submitted April 21, 2022 San Francisco, California

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FILED October 21, 2022

Appeal from the United States District Court for the Northern District of California, William Horsley Orrick, District Judge, Presiding, D.C. No. 3:16-cv-00236-WHO

Before: MURGUIA, Chief Judge, GOULD, Circuit Judge, and FREUDENTHAL,* District Judge.

MEMORANDUM**

***1** Defendant-Appellants ("Appellants") appeal (1) rulings and findings on the breach of contract claims; (2) the grant of summary judgment on several trespass claims; (3) several rulings regarding the RICO claim; (4) the approval of adverse inferences; (5) rulings on numerous jury instructions; (6) rulings on several discovery and evidentiary issues; (7) rulings regarding the recorded individuals' reasonable expectations of privacy; (8) the award of compensatory damages; (9) the grant of injunctive relief; (10) the sufficiency of the evidence supporting the judgment against Adrian Lopez, Troy Newman, and Albin Rhomberg; and (11) the failure of the district court to recuse himself or be disqualified.[1] As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[2]

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* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] In a separate opinion, filed simultaneously with this memorandum disposition, we discuss the facts of this case and Appellants' First Amendment and Federal Wiretap Act grounds of appeal.

[2] Any purported basis of appeal not explicitly addressed in this memorandum disposition or the simultaneously filed opinion is waived either because it was not properly raised or because

We review the grant and denial of summary judgment *de novo*. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). We view the evidence in the light most favorable to the non-moving party and may affirm on any ground supported by the record. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

"A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (citation omitted).

"We review de novo a judgment as a matter of law." *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017). Judgment as a matter of law is appropriate when the evidence permits only one reasonable conclusion. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205–06 (9th Cir. 2008) (citation omitted).

1. The district court did not err in determining that the public policy exception did not excuse Appellants' contractual breach. The videos did not contain evidence of wrongdoing. Further, Appellants do not show that "the interest in ... enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178(1) (1981). There is a strong public interest in the enforcement of contracts

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reaching the issue is unnecessary to the panel's decision. *See, e.g.*, *Badgley v. United States*, 957 F.3d 969, 978–79 (9th Cir. 2020); *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012).

entered willingly. Given Appellants' elaborate and long-term deception, Plaintiffs-Appellees ("Planned Parenthood") were reasonably justified in expecting that the contracts and their terms would be honored. Appellants' reliance on the public policy exception is also undercut by their misconduct, *see infra*, and their publication of significant amounts of video that is not related to any alleged crime or wrongdoing, *see Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011).

***2** The district court did not err in determining that Planned Parenthood Federation of America ("PPFA") is a third-party beneficiary of the National Abortion Federation ("NAF") Agreements. PPFA benefitted from the NAF Agreements because the agreements protected confidential information disclosed at NAF conferences attended by PPFA members. *See Goonewardene v. ADP, LLC*, 434 P.3d 124, 126–27 (Cal. 2019). PPFA is also a NAF member, and the NAF Agreements state that NAF conference information is provided to help NAF members; PPFA thus benefited from receiving confidential information at the NAF conferences, and giving benefits to PPFA and others was a motivating purpose of the NAF Agreements. *See id.*

Substantial evidence supported the jury's verdict that Appellants violated the Planned Parenthood Gulf Coast ("PPGC") non-disclosure agreement ("NDA"). There is sufficient evidence to show that Appellants should have reasonably understood that the conversations at the PPGC clinic were confidential, including: the recorded conversations that took place in areas with access limited to staff using secure

keycards; Daleiden and Merritt entered these secured locations only after signing an NDA, presenting (fake) identification, going through a metal detector, and seeing PPGC staff use a keycard to enter; and Planned Parenthood's staff testified that they generally understood such conversations to be confidential.

The NAF NDAs were supported by consideration. The NAF exhibitor agreements and NDAs are best read as a single contract because they were "executed as parts of substantially one transaction" covering the entrance to and conduct during the NAF conferences. *See Meier v. Paul X. Smith Corp.*, 205 Cal. App. 2d 207, 217 (Cal. Ct. App. 1962). NAF gave consideration for the NDAs. The exhibitor agreements allowed NAF to reject an exhibitor for any reason in its sole discretion, and NAF's decision to admit Appellants, constituted consideration.[3]

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[3] The jury found that Daleiden, BioMax, and CMP breached the obligations clause of the exhibitor agreements. We will not now review the district court's denial of Appellants' motion for summary judgment on this issue. *Williams v. Gaye*, 895 F.3d 1106, 1122 (9th Cir. 2018). Likewise, we need not reach the issue whether the district court erred in granting Planned Parenthood summary judgment regarding the breach of the educational and products clauses of the exhibitor agreements.

Appellants waived their argument that the Exhibitor Agreements became moot by failing to adequately brief the issue. *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010). Even if we were to reach the merits of Appellants' argument, we would affirm the district court because the exhibitor agreements did not state that eviction was the sole remedy for a breach and Planned Parenthood could seek other lawful remedies.

2. The district court did not err in granting Planned Parenthood's motion for summary judgment as to claims that various Appellants trespassed in several clinics and conferences. Appellants exceeded the scope of their consent to enter the Planned Parenthood conferences and facilities and NAF conferences by surreptitiously recording Planned Parenthood staff in violation of contractual promises Appellants made to Planned Parenthood—including promises to maintain confidentiality and to comply with fraud and privacy laws. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *see also supra* Part 1.

3. There was no error in the district court's rulings on the RICO claim. Planned Parenthood's RICO claim satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. § 1028(c)(3)(A). *See, e.g., United States v. Gutierrez*, 963 F.3d 320, 339 n.7 (4th Cir. 2020); *United States v. Klopf*, 423 F.3d 1228, 1239 (11th Cir. 2005). The production and transfer of the fake driver's licenses affected interstate commerce because Appellants 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. *See United States v. Turchin*, 21 F.4th 1192, 1202–03 (9th Cir. 2022). And further, 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." *See United States v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007).

***3** The district court did not err in denying Appellants' renewed motion for judgment as a matter of law regarding the required *pattern* of predicate acts necessary to violate RICO. A pattern may be established by proof that defendants' conduct possessed "open-ended continuity," *i.e.*, that their conduct "by its nature project[ed] into the future with a *threat* of repetition." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (emphasis added). "As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied." *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.5 (9th Cir. 1987). The evidence showed that various Appellants 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. The district court did not err in determining that "there was sufficient evidence on which a reasonable jury could rely to establish open-ended continuity."

The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law on RICO proximate cause. There was a direct relationship between Appellants' production and transfer of the fake driver's licenses and the alleged harm. *See Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 12 (2010); *see also Harmoni Intl. Spice, Inc. v. Hume*, 914 F.3d 648, 651–52 (9th Cir. 2019). The district court permitted only infiltration damages and security damages, limiting any difficulty in determining what damages were attributable to Appellants' RICO violation; there is no risk of Planned Parenthood recovering duplicative damages;

holding Appellants liable discourages illegal behavior; and there are no more directly injured victims. *See Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*, 943 F.3d 1243, 1249–52 (9th Cir. 2019); *Harmoni*, 914 F.3d at 652.

4. We "review for abuse of discretion a district court's decision to draw an adverse inference from a party's invocation in a civil case of the Fifth Amendment privilege against self-incrimination." *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 909 (9th Cir. 2008). Courts may draw adverse inferences in civil cases from a party's invocation of the Fifth Amendment right not to testify. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000).

Here, the district court did not abuse its discretion in approving the adverse inferences according to the standard set forth in *Glanzer*. *Id.* at 1265. There was no less burdensome way for Planned Parenthood to present evidence about the topics covered by the adverse inferences: no alternative testimony or documents were available to show the state of mind or beliefs of those who had refused to testify, Appellants themselves objected to the admission of evidence that supported some adverse inferences, and the stipulations to which Appellants agreed were misleading and incomplete. *See Glanzer*, 232 F.3d at 1265. There was also a substantial need for the adverse inferences: in particular, many of the adverse inferences regarding Newman related to his knowledge, intent, and motive, crucial components of Planned Parenthood's causes of action. *See id.* Further, evidence in the record supports all of the

adverse inferences that Appellants allege lacked a factual foundation.

The adverse inferences were also reasonable, and neither their number nor use was unduly prejudicial. The adverse inferences accompanied a complex, six-week trial with dozens of witnesses and numerous exhibits. The district court gave the jury proper limiting instructions, telling the jury that they were permitted, but not required, to draw the adverse inferences, and instructed the jury that they "may not consider" the adverse inferences as to Planned Parenthood's California claims. The district court also did not abuse its discretion in admitting Newman Adverse Inference 1. The district court balanced the interests of the parties in admitting this adverse inference because Newman himself objected to the admission of the book upon which this adverse inference was based.

***4** The district court did not err in permitting adverse inferences based on two non-parties invocations of the privilege against self-incrimination.[4] The non-party adverse inferences were relevant to Planned Parenthood's claims, the adverse inferences could not

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[4] Appellants argue that adverse inferences against non-parties should not be permitted, but do not explain why. Other circuits have upheld such inferences. *See, e.g.*, *LiButti v. United States*, 107 F.3d 110, 122–124 (2d Cir. 1997); *F.D.I.C. v. Fid. & Deposit Co.*, 45 F.3d 969, 977–78 (5th Cir. 1995); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275–81 (3d Cir. 1986); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 521 (8th Cir. 1984). Appellants have not pointed to any circuits which do not permit adverse inferences about nonparties, much less provided any reason this court should not permit them.

have been obtained from other sources, the district court evaluated proper criteria when permitting the admission of these adverse inferences, and the district court gave a limiting instruction to the jury. There was no abuse of discretion.

Finally, even assuming *arguendo* that the district court erred in drawing some or all of the adverse inferences, any error was harmless. *See Richards*, 541 F.3d at 915. The jury saw significant evidence and could evaluate the demeanor of those witnesses who did testify, and none of the adverse inferences were so prejudicial as to taint the verdict.

5. We review the district court's formulation of civil jury instructions, including its denial of a proposed jury instruction, for abuse of discretion. *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014) (en banc); *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002). We review whether an instruction stated the law correctly *de novo*. *Peralta*, 744 F.3d at 1082. "We do not reverse the judgment if the alleged error in the jury instructions is harmless." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1087 (9th Cir. 2005) (citation omitted). When a party fails to preserve an objection to a jury instruction, we review for plain error. *Skidmore as Tr. for Randy Craig Wolfe Tr. V. Led Zeppelin*, 952 F.3d 1051, 1072 (9th Cir. 2020) (en banc). "Jury instructions must be supported by the evidence, fairly and adequately cover the issues presented, correctly state the law, and not be misleading." *Peralta*, 744 F.3d at 1082.

The district court did not abuse its discretion in instructing the jury and, assuming *arguendo* that the

district court erred, any error was harmless. First, the district court did not err in failing to give the First Amendment instructions that Appellants requested. The proposed instruction that the jury should assume the truth of the videos' content was unnecessary because Planned Parenthood stipulated that the participants spoke the words recorded in the videos. The instruction regarding publication damages was unnecessary because the jury was only permitted to award narrow categories of damages. Furthermore, when evaluated as a whole, any potential omission was harmless because the jury was instructed to consider only two narrow categories of damages "directly caused" by Appellants.

Second, the district court did not err in instructing the jury regarding Appellants' breach of the NAF Agreements. Appellants did not object to this instruction, and we review for plain error. *Skidmore*, 952 F.3d at 1072. The district court determined only after providing its instruction that Appellants breached the NAF Agreements by disclosing confidential information. However, Appellants have not shown that this error "affected substantial rights," *id.* at 1073, because Appellants admitted in their answer that Daleiden disclosed information learned at NAF meetings to third parties without NAF's consent.

***5** Third, the district court did not abuse its discretion when instructing the jury regarding California Penal Code § 632. The instruction required that the jury find that an Appellant "intentionally recorded" and that the recorded individual "had a reasonable expectation" of privacy. The instruction closely followed the 2022

California Civil Pattern Jury Instructions, and any potential difference between the instructions and the language in *People v. Superior Ct. of Los Angeles Cnty.*, 449 P.2d 230, 237 (Cal. 1969) is irrelevant and harmless.

Fourth, the district court did not err in instructing the jury on punitive damages. Because Appellants did not object to the district court's omission of the punitive damages instruction Appellants originally requested, we review for plain error. *Skidmore*, 952 F.3d at 1072. The district court did not plainly err in omitting Appellants' requested instruction prohibiting third-party damages because the instructions on punitive damages as a whole did not permit such an award.

Fifth, there was no error in the recording instructions. Neither 18 U.S.C. § 2510(2) nor Florida Statute § 934.02(2) require a separate expectation of privacy above the objective reasonableness of the recorded individual's subjective belief. *See Price v. Turner*, 260 F.3d 1144, 1148–49 (9th Cir. 2001); *Huff v. Spaw*, 794 F.3d 543, 549 & n.4 (6th Cir. 2015); *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985). All the recorded individuals exhibited reasonable expectations of privacy; they conversed in private areas that were protected by keycard access or limited to badge-carrying conference attendees, and the conversations took place behind closed doors or in areas where no one could reasonably be expected to surreptitiously eavesdrop. *See infra* Part 7. The instruction regarding corporate standing under the recording statutes also accurately conveyed the law. *See Smoot v. United Transp. Union*, 246 F.3d 633, 639–40 (6th Cir. 2001). And many of the recordings

contained information concerning Planned Parenthood's business matters, so any potential error in the corporate standing instruction was harmless. *Altera Corp.*, 424 F.3d at 1087.[5]

6. We review a district court's rulings on discovery for abuse of discretion. *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016). "A district court is vested with broad discretion to permit or deny discovery, and a decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (citation omitted). "We review evidentiary rulings for abuse of discretion and reverse if the exercise of discretion is both erroneous and prejudicial." *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013). Prejudice occurs when the district court's error "more probably than not" tainted the verdict. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008).

First, the district court did not err in prohibiting discovery into, and evidence at trial showing, Appellants' purported credibility and good intent and positive results from Appellants' actions. These issues were irrelevant to the claims at issue; journalists have no special license to break laws of general applicability, *see, e.g., Animal Legal Def. Fund v.*

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[5] Appellants' cursory argument that Planned Parenthood Northern California ("PPNorCal") lacked standing to bring its recording claim fails because there was sufficient evidence in the record to show that Dr. Drummond-Hay was recorded discussing PPNorCal's internal matters.

Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018); and there was no evidence in the record that Planned Parenthood broke any laws or that any charges have been filed against Planned Parenthood by the Department of Justice.

***6** Second, the district court did not abuse its discretion in refusing to admit Appellants' California Penal Code § 633.5 affirmative defense evidence.[6] Any evidence that Appellants gained after they had already started their surreptitious recordings had no bearing on why they initially decided to record. Appellants only engaged Dr. Smith after they began releasing the videos, so this evidence could not have influenced their intent to make any of the recordings. The district court admitted evidence related to the Dr. Nucatola meeting. Moreover, even if the excluded evidence had been admitted, it was unlikely to have changed the jury's verdict. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001).

Third, even assuming *arguendo* that *de novo* review applies, the district court did not err in admitting evidence showing historical violence against abortion providers. This evidence was probative of important issues, including why the conferences had high security, why Planned Parenthood incurred certain expenses to restore security, and why individuals at the conferences had reasonable expectations of

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[6] *De novo* review is only available when a defendant was completely prevented from presenting a defense, which was not the case here. *See Branch Banking*, 871 F.3d at 759–60; *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010). Even if we reviewed *de novo*, we would reach the same conclusion.

privacy. The danger of unfair prejudice did not substantially outweigh the probative value of this evidence.[7] *See* Fed. R. Evid. 403.

7. The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law regarding the recorded individuals' reasonable expectations of privacy at various conferences and meetings. "[W]hether a communication is confidential is a question of fact normally left to the fact finder." *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1126 (9th Cir. 2017).[8]

Substantial evidence supports the jury's determination that the recorded individuals had objectively and subjectively reasonable expectations of privacy. Dr. Nucatola met Appellants at a private conference, and she understood attendees to have been carefully vetted; Appellants carried out an elaborate ruse to portray themselves as representatives of a fake tissue procurement company; Dr. Nuctatola's conversation with Appellants occurred in a booth in the back of a restaurant when

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[7] Appellants waived their objection to the admission of the NAF report on historical anti-abortion violence by failing to sufficiently raise this issue in their opening briefing. *See Badgley*, 957 F.3d at 978–79. Even if not waived, Appellants failed to show that the district court abused its discretion in admitting the report as a business record because they did not point to any inaccuracies in the report or otherwise demonstrate that the report was unreliable. *See N.L.R.B. v. First Termite Control Co.*, 646 F.2d 424, 427 (9th Cir. 1981).

[8] Our review is not *de novo* because the issues here are primarily factual. *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020).

the restaurant was busy; Dr. Nucatola testified that she could not hear conversations at other tables and believed that their conversation was private; and the jury saw multiple videos of the restaurant meeting and could judge for themselves whether Dr. Nucatola had a reasonable expectation of privacy. Similarly, Dr. Gatter was introduced to Appellants by a trusted colleague; Appellants carried out an elaborate ruse to portray themselves as representatives of a fake tissue procurement company; Appellants met Dr. Gatter and Laura Felczer in an empty restaurant; and the jury saw video of the meeting and could judge for themselves whether Dr. Gatter and Felczer had a reasonable expectation of privacy.

***7** Substantial evidence also supports the jury's finding that the individuals recorded at the conferences had objectively and subjectively reasonable expectations of privacy. The conference organizers took extensive measures to protect the security of the conferences including reserving private hotel spaces; restricting access to the conferences; hiring security to monitor entrances; requiring attendees to pre-register; requiring attendees to show photo ID at check-in; requiring attendees to sign confidentiality agreements; and requiring attendees to wear badges at the conferences. The conversations generally occurred in crowded areas with lots of background noise. Many who attended the conferences testified that they believed the conferences and their conversations were private.

8. The district court did not err in denying Appellants' post-trial motion for judgment as a matter of law on the infiltration and security damages on grounds that

the damages were proximately caused by Appellants' underlying torts. A defendant proximately causes damages when there is a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury" such that the alleged injury "was a foreseeable and natural consequence" of the defendant's scheme. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657–58 (2008).

The infiltration damages covered expenses such as assessing security systems, vetting practices review, hiring security guards for meetings, and installing conference badging systems. The jury could have concluded that Planned Parenthood incurred these costs to prevent further infiltrations by the Appellants and their co-conspirators as a direct result of Appellants' wrongful trespass, recording, and breach of contract actions. The security damages provided physical security and online threat monitoring for individuals recorded in the videos Defendants released. Given the history of violence against abortion providers, it was a foreseeable and natural consequence of Appellants' actions that the recorded individuals would be subject to threats and reasonably fear for their safety. *See Bridge*, 553 U.S. at 657–58.

9. We review an award of punitive damages for abuse of discretion, and "a challenge to the sufficiency of the evidence to support a punitive damage award must be rejected if the award is supported by substantial evidence." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906–07 (9th Cir. 2002). In general, a general jury verdict will be upheld only if there is substantial

evidence to support each theory of liability submitted to the jury. *Webb v. Sloan*, 330 F.3d 1158, 1166 (9th Cir. 2003). However, a reviewing court has the discretion to construe a general verdict as attributable to any theory if it is supported by substantial evidence and was submitted to the jury free of error. *Traver v. Meshriy*, 627 F.2d 934, 938–39 (9th Cir. 1980); *see Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996).

There was no error in the award of punitive damages. Though we reverse the jury's verdict on the Federal Wiretap Act claim, there was substantial evidence to support the other theories of liability. There was substantial evidence that Appellants committed fraud, trespassed, and violated state wiretapping laws, and that they engaged in that conduct through "fraud" or "intentional misconduct." There was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, Merritt, Rhomberg, Newman, CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation.[9] That evidence included: (1) that Daleiden and Merritt intentionally recorded individuals without their consent at conferences and meetings; (2) that Daleiden and Merritt intentionally misrepresented their identities, the intent of their participation, and

[9] Appellants waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs. *See Isabel v. Reagan*, 987 F.3d 1220, 1226 n.7 (9th Cir. 2021); *Badgley*, 957 F.3d at 978–79. Even if the argument were not waived, Appellants' challenge would be meritless and would not shield them from liability.

their work affiliations to attend conferences, lunches, and meetings; (3) that Newman was aware of and agreed to the fraudulent tactics; (4) that Rhomberg knew the project would involve secret recordings and advised on what should be recorded; and (5) that Daleiden, Rhomberg, and Newman formed CMP and BioMax to infiltrate conferences attended by Planned Parenthood staff and obtain "gotcha" videos made with hidden recording equipment. *See* 18 U.S.C. § 2520(b)(2); Fla. Stat. § 768.72; *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 650 (Md. 1992). Given the overwhelming and largely undisputed evidence of intentional fraud by the Defendant-Appellant agents of CMP and BioMax, there was no error on the punitive damages award.

***8 10.** "We review the district court's decision to grant a permanent injunction for abuse of discretion." *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017). "Although questions of standing are reviewed de novo, we will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010).

The district court did not clearly err in determining that Planned Parenthood had standing to seek injunctive relief. Following a six-week jury trial, the district court determined, among other things, that: Appellants used fake driver's licenses and secretly recorded individuals associated with Planned Parenthood; Daleiden, Merritt, Baxter, and Lopez secretly recorded everyone with whom they spoke to

at various conferences, lunches, and clinics; Daleiden, Newman, and Rhomberg sought to end legal abortion in America; Merritt and Daleiden had previously engaged in undercover work targeting Planned Parenthood; all individual Appellants were involved with CMP, which is still operational and has the aim of ending legal abortion; and each individual Appellant has the ability to continue to conduct similar work. None of these factual findings were clearly erroneous, *see Preminger v. Peake*, 552 F.3d 757, 762 n.3 (9th Cir. 2008), and the district court did not err in determining that Planned Parenthood had standing to seek injunctive relief because it was likely to be injured again in a similar way, *see Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

The district court did not abuse its discretion in determining that the injunction was in the public interest. The district court found that Appellants' actions substantially disrupted Planned Parenthood's legal provision of healthcare to patients. *See Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) ("The public interest mostly concerns the injunction's impact on nonparties rather than parties.") (internal quotations omitted). There was no evidence in the record that Planned Parenthood broke the law or that any charges had been filed against Planned Parenthood by the Department of Justice.

Nor did the district court abuse its discretion in determining that many of Planned Parenthood's injuries could not be addressed by damages. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Damages alone could not prevent Appellants

from committing further illegal actions targeting Planned Parenthood such as trespass, unconsented recordings, and breach of contracts.

Finally, the district court did not abuse its discretion in issuing a permanent injunction against all Appellants except Lopez. The district court observed Merritt during the six-week trial and heard significant evidence about her long-time pro-life activism, including her role in Appellants' scheme and a previous undercover activity targeting Planned Parenthood.[10]

11. Substantial evidence supports the judgment against Lopez. Lopez knew Daleiden's true identity but referred to Daleiden by his fake name, Sarkis, when attending Planned Parenthood's conferences; Lopez posed as a BioMax technician, which he was not; and Lopez secretly recorded at the conferences he attended without the consent of those he recorded.[11]

***9** Substantial evidence also supports the judgment against Rhomberg. Rhomberg was the CFO of CMP and participated in numerous CMP board meetings

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[10] The only Appellant who sufficiently raised a challenge to the injunction regarding him or herself is Merritt; all other Appellants waived such a challenge. *See Badgley*, 957 F.3d at 978–79.

[11] Appellants cursorily argue that Lopez is subject to the agent immunity rule. This argument is unpersuasive because Lopez himself had a duty to not defraud Planned Parenthood. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 512 (Cal. 1994); *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1381 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Apr. 7, 2000).

for several years; Rhomberg assisted in CMP's fundraising; Rhomberg received a "project proposal" from Daleiden outlining a plan to buy "Undercover Equipment" to expose fetal trafficking using " 'gotcha' undercover videos" from annual abortion-provider conferences that Appellants later attended and where they secretly recorded attendees; the jury heard Rhomberg admit at his deposition, in contradiction to his trial testimony, that Daleiden told him he intended to go undercover to infiltrate abortion-provider conferences; and the jury saw a video in which Daleiden called Rhomberg from one of Planned Parenthood's clinics using the fake name "Sarkis."

Substantial evidence supports the judgment against Newman. Newman was the Secretary of CMP; after publication of the videos, Newman wrote that "I just wanted to underscore that it was my project for the past three years" and "originated from our office alone,"; in a book he wrote, Newman described an elaborate hoax scenario to send a team with a hidden video camera into clinics providing abortions; Daleiden testified that Newman appreciated the undercover methodology of the project; Rhomberg testified that Newman participated in CMP board meetings every few months for several years; the adverse inferences approved by the district court stated that Newman had an "integral role in CMP and the Human Capital Project since its origin in 2013," "understood that one of CMP's goals was to end abortion, and to defund and shut down Planned Parenthood," knew that other Appellants used fake names to infiltrate Planned Parenthood's conferences, and knew BioMax was a front organization that surreptitiously recorded Planned Parenthood's staff

without their consent; and the day after the first video was released, Newman wrote that "this has exceeded our expectations. We are off to a great start."

We are not convinced by Newman's argument that it was "fundamentally unfair" for the district court to include him on the trespass and recording claims even though the complaint did not allege that he committed these offenses. This argument was waived due to insufficient briefing, *see Badgley*, 957 F.3d at 978–79, and Newman did not allege any prejudice from this omission. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000).

Planned Parenthood did not need to prove that Newman could only be liable in his personal capacity if an ordinarily prudent person knowing what he knew at the time would not have acted similarly. The district court correctly noted that tacit consent and knowledge of unlawful purpose are enough to prove a director's personal liability, and corporate officers can be personally liable "for violating their own duties towards persons injured by the corporation's tort." *See PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1380 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Apr. 7, 2000). Even if the district court had applied Newman's preferred test, Newman cannot show prejudice: there is substantial evidence that Newman authorized or knew about the tortious conduct and an "ordinarily prudent person, knowing what [Newman] knew at that time, would not have acted similarly under the circumstances." *See Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 508–09 (Cal. 1986).

Newman's argument that a person who is not a party to a contract cannot be guilty of conspiracy to break that contract is unavailing. Newman relies on *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973), which is limited to "the tort of breach of duty of good faith and fair dealing" and is inapplicable here. *See Younan v. Equifax Inc.*, 169 Cal. Rptr. 478, 485 (Cal. Ct. App. 1980).

***10 12.** "Rulings on motions for recusal are reviewed under the abuse-of-discretion standard." *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012). The standard is "[w]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* (quoting *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (per curiam)).

Judge Orrick did not abuse his discretion in refusing to disqualify himself, and Judge Donato did not abuse his discretion in determining that Judge Orrick need not recuse himself. A reasonable person would not ascribe the views of a judge's spouse to the judge him or herself simply because the spouse's profile picture included the judge. *See Perry v. Schwarzenegger*, 630 F.3d 909, 911–12 (9th Cir. 2011). Nor would a reasonable person have questioned the impartiality of Judge Orrick given his former role at the Good Samaritan Family Resource Center.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 13613963

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al., Defendants.

Case No. 16-cv-00236-WHO

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Signed 08/19/2020

*1007 ORDER ON POST-TRIAL MOTIONS

Re: Dkt. No. 1080

William H. Orrick, United States District Judge

Following a five-week trial concerning defendants' targeting of plaintiff Planned Parenthood Federation of America (PPFA) and its affiliates through surreptitious recording of plaintiffs' staff members, the jury returned a verdict in favor of plaintiffs on November 15, 2019. Based on that verdict and on my findings of fact and conclusions of law supporting plaintiffs' Unfair Competition claim and injunctive relief, I entered judgment on April 29, 2020. Dkt. No. 1074. Defendants then moved pursuant to Rules 50(b), 59(a), and 59(e) for judgment as a matter of law, for a new trial, and to amend the Judgment. Defendants'

Joint Post Judgement Motions (Mot.), Dkt. No. 1080 at 1.

Before the trial started, either at the motion to dismiss stage, on summary judgment, ***1008** or *in limine,* I had ruled on each of the legal issues raised by defendants' current motions. They identify no reason to revisit those well-trod issues. And their challenges to the jury's verdict based on a purported lack of evidence are not well taken. The jury was entitled to reject defendants' testimony and rely on the documentary and other evidence to find in favor of plaintiffs. Sufficient evidence exists for each of the jury's determinations in the verdict. Defendants' motions are DENIED.

BACKGROUND

The factual background regarding the inception and execution of defendants' Human Capital Project (HCP) – the plan to target plaintiff Planned Parenthood Federation of America (PPFA) and its affiliates through surreptitious recording of plaintiffs' staff members in order to expose plaintiffs' conduct in the collection and transfer of fetal tissue that defendants contend was illegal or unethical – and the resulting infiltration of the PPFA and National Abortion Federation (NAF) conferences, plaintiffs' clinics, and the release of videos featuring surreptitious recordings of plaintiffs' staff has been thoroughly explicated in prior orders; I will not repeat it. *See* Dkt. Nos. 753, 1073.[1]

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[1] Plaintiffs, as identified in the Final Preliminary Jury Instructions (Dkt. No. 850), are Planned Parenthood Federation

The legal theories underlying plaintiffs' claims against defendants have been repeatedly tested and, where appropriate, trimmed. Plaintiffs' theories were first tested on motions to dismiss and a related motion to strike under California's Anti-SLAPP law.[2] Those motions were decided in September 2016, in a 56-page opinion denying for the most part the motions to dismiss and the motion to strike. I did determine that plaintiffs could not assert mail or wire fraud predicate acts or acts based on 18 U.S.C. § 1028(a)(3) and § 1028(a)(7) in support of their Racketeer Influenced and Corrupt Organizations (RICO) claims. *Id.* at 10–13. I also thoroughly reviewed defendants' arguments that their conduct was wholly protected under the First Amendment. *Id.* at 34–36. I rejected defendants' broad immunity argument but recognized that absent a defamation-type cause of action, plaintiffs could not

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of America (PPFA); Planned Parenthood: Shasta-Diablo, Inc. dba Planned Parenthood Northern California (PPNorCal); Planned Parenthood Mar Monte, Inc. (PPMM); Planned Parenthood of the Pacific Southwest (PPPSW); Planned Parenthood Los Angeles (PPLA); Planned Parenthood/Orange and San Bernardino Counties (PPOSBC); Planned Parenthood California Central Coast (PPCCC); Planned Parenthood Pasadena and San Gabriel Valley, Inc. (PPPSGV); Planned Parenthood of the Rocky Mountains (PPRM); and Planned Parenthood Gulf Coast (PPGC) and Planned Parenthood Center for Choice (PPCFC). Defendants, as identified in the Final Preliminary Jury Instructions, are the Center for Medical Progress (CMP), BioMax Procurement Services (BioMax), David Daleiden, Sandra Susan Merritt, Adrian Lopez, Albin Rhomberg, and Troy Newman.

[2] *See* California Code of Civil Procedure § 425.16, defining "strategic lawsuits against public participation" or SLAPP lawsuits

seek reputational damages for "(lost profits, [or] lost vendors) stemming from the publication conduct of defendants." *Id.* at 36. I concluded that "discovery will shed light on the nature of the damages for which plaintiffs seek recovery" and that "[r]esolution of this issue is more appropriately addressed at summary judgment or trial." *Id.*[3]

***1009** Defendants appealed my denial of the anti-SLAPP motion (based on the same arguments that defendants made in their motions to dismiss the California and other state law claims). In an order dated May 16, 2018, the Ninth Circuit affirmed the denial of the anti-SLAPP motion challenging the sufficiency of plaintiffs' state law claims. Dkt. Nos. 262, 309.

After extensive discovery – and the resolution of numerous discovery disputes by Magistrate Judge Donna M. Ryu – the case proceeded to summary judgment. In a 137-page opinion, I granted in part and denied in part defendants' motions for summary judgment and granted in part and denied in part plaintiffs' motion for summary judgment. Dkt. No. 753 (Summary Judgment Order). Of particular significance to the arguments raised by defendants in their post-trial motions, I again considered defendants' argument both that their conduct was fully protected by the First Amendment and that all of the damages plaintiffs sought were barred by the

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[3] I also noted that some of the damages pleaded by plaintiffs in their First Amended Complaint might fail on summary judgment or trial due to the hurdle of "proximate cause." *Id.* at 33–34.

First Amendment. *Id.* at 15–22. I concluded, distilling various lines of Supreme Court precedent but also persuasive cases from the federal circuits and district courts, that plaintiffs' damages were limited but not barred. I found that plaintiffs would be entitled – assuming the jury agreed on the evidence submitted to them – to "intrusion" damages incurred to investigate and address the intrusion by defendants into the PPFA conferences and "security" damages incurred by plaintiffs with respect to their investigation of and subsequent measures taken to address the "targeting" of their staff members by defendants. *Id.* at 19-20.[4] I excluded numerous other categories of damages that plaintiffs sought as impermissible reputational damages or because they

[4] I agreed "with defendants that some of the damages plaintiffs seek here are more akin to publication or reputational damages that would be barred by the First Amendment. Others, however, are economic damages that are not categorically barred. Those that fall in the latter category result not from the acts of third parties who were motivated by the contents of the videos, but from the direct acts of defendants – their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff. Defendants 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 plaintiffs' staff, that caused plaintiffs to bear costs in the form of private security for those staff members after plaintiffs became aware of defendants' ruse and recordings." *Id.* at 19.

were caused only by the publication of the CMP videos.[5]

In the Summary Judgment Order, I also concluded that there was sufficient evidence to let the RICO claims proceed to trial despite defendants' challenges to the essentially undisputed facts regarding the production and transfer of the fake IDs, the disputed facts regarding the alleged continuity of the alleged predicate acts and the RICO enterprise, and the disputed roles of the alleged RICO conspirators. *Id.* at 28–34. On the recording claims, I determined ***1010** the standards for establishing a reasonable expectation of privacy under each relevant statute and rejected defendants' argument concerning the lack of corporate standing of plaintiff-organizations to assert the recording claims when the defendants had targeted their staff with the aim of recording them discussing internal corporate matters. *Id.* at 77–101.

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[5] Significant categories of damages sought by plaintiffs were excluded from the case: "(1) costs of physical security assessments for plaintiffs' buildings and additional building and IT-security measures to physically protect plaintiffs' patients, information, offices, and clinics; (2) grants for security enhancements to affiliates experiencing increased security threats as a result of CMP's videos (PPFA only), other than personal security expenses for staff who were targeted by defendants; (3) costs of repairing and protecting PPFA website after hacking; (4) costs of repairing and protecting online appointment systems; (5) loss of revenue due to hack of the PPFA patient portal; (6) staff time spent monitoring threats and responding to protests and increased security incidents; (7) costs relating to vandalism to plaintiffs' offices and clinics; and (8) costs of the grief/stress hotline for staff related to the increase in threats." *Id.* at 20.

I granted partial summary judgment to plaintiffs with respect to breach of PPFA's agreements by Daleiden and BioMax, denied it as to CMP because plaintiffs did not adequately brief the alter ego basis, and granted defendant Merritt and Lopez's motion because neither of those defendants signed the PPFA agreements. On the NAF agreements, I explained that evidence could show that plaintiffs were third-party beneficiaries. *Id.* at 45. Finally, as to the PPCG non-disclosure agreement, I held that the NDA prohibited disclosure of "information reasonably understood – under an objective standard – as 'confidential under the circumstances of the disclosure,' " which would be determined by the jury. *Id.* at 53-55.[6]

Then came a slew of pretrial motions. In my September 12, 2019 Order ruling on pretrial motions, I explained the following:

> Journalism vs. a Smear Campaign. These are the dueling narratives of this case. Defendants argue that they were involved in traditional under-cover journalism in order to expose violations of the law by Planned Parenthood with respect to PPFA and its affiliates' fetal tissue transfer programs. Plaintiffs argue that the goal of defendants' Human Capital Project (HCP) was to smear plaintiffs with allegations they profited from the fetal tissue

[6] I granted Merritt and Lopez's motions as to the breach of contract claims based on contracts they did not sign and granted Rhomberg and Newman's motions as to breach of contract claims asserted through the civil conspiracy claim. *Id.* at 41–43, 50–51, 54–55, 135.

transfer programs in order to drive PPFA and its affiliates out of business. These narratives are not directly and significantly relevant to the remaining claims and defenses in this case that are to be decided by the jury. However, they are central to the context of and the background to this case. Therefore, defendants are entitled to characterize their conduct as a journalistic enterprise and plaintiffs are entitled to attack that in part by exploring defendants' past conduct and writings regarding abortion.

Illegal Conduct. The causes of action in this case concern whether the strategies chosen by the defendants with respect to the Human Capital Project broke the law and caused damage outside the First Amendment context. There are raging debates whether the videos show illegal conduct, whether 4 of 59 Planned Parenthood affiliates profited from selling fetal tissue, whether there have been any live births during abortion procedures at Planned Parenthood affiliates, and how government entities have responded to the HCP disclosures. Those debates are barely, if at all, relevant to the causes of action that will be tried to the jury. Evidence on those issues will be excluded under Federal Rule of Evidence 403 because it will confuse the jury about the issues it needs to decide, waste a significant amount of trial time, and be prejudicial.

The defense argues that illegality by plaintiffs in their fetal tissue programs is critically related to their intent (under the federal wiretapping claim), to the reasonable expectations of privacy in

recorded conversations, to the newsworthiness of defendants' publications, and to the social utility of defendants' conduct. Plaintiffs have dropped their invasion of ***1011** privacy claims and publication of private facts hook for the federal wiretapping claim, so newsworthiness and social utility are no longer relevant to the claims and defenses to be decided by the jury. Similarly, while defendants' intent to violate RICO remains an element of the federal wiretapping claim, that intent must be established based on evidence defendants knew at the time of the inception of the HCP and prior to the first surreptitious recording. Defendants can present evidence of what they knew, what they believed, and how they carried out their journalistic endeavors through the HCP (the defense narrative discussed above) consistent with their intent. What defendants uncovered through the surreptitious recordings or through discovery in this case, and any expert opinion on that evidence, is not relevant.

Because the California Penal Code section 633.5 "reasonable belief" defense is an issue that will be decided by the jury – as relevant only to plaintiffs' Penal Code section 632 and 634 illegal recording and trespass claims – defendants Daleiden and Merritt may present evidence of what they knew or believed regarding plaintiffs' commission of violent felonies. That knowledge or belief must be based on what Daleiden or Merritt knew prior to their first surreptitious recording. Evidence regarding what Daleiden or Merritt learned following their first surreptitious recording cannot be relied on for this defense.

Evidence of possibly illegal conduct does not get into this case through the issue of reasonable expectation of privacy under the recording claims. Defendants argue that precluding this evidence will:

> hamstring Defendants' ability to argue that the individuals they recorded lacked any expectation of privacy as understood by the federal, Florida, and Maryland recording statutes. Defendants' experts will need to explain how certain medical procedures work in order to explain how the individuals recorded knew they were discussing wrongful conduct. See *Brugmann v. State*, 117 So. 3d 39, 49 (Fla. Dist. Ct. App. 2013) (identifying eight-factor test for determining reasonableness of expectation of privacy, including illegal conduct, intent, and content of communication, upon collecting cases).

Dkt. No. 772 at 11. But they fail, as they did on summary judgment, to specifically identify *any* much less *each* of the particular and actionable recordings that show plaintiffs' staff members discussing *illegal* conduct. To the extent that one or two of the actionable recordings might show plaintiffs' staff members expressing interest or theoretical ability to engage in conduct that defendants contend is illegal (but plaintiffs contend is not), the evidence and opinions defendants seek to bring in (mostly through their proposed experts as discussed in more depth below) is vastly outweighed by the Rule 403 considerations identified above.

Finally, the accounting issues regarding the fetal tissue programs of the four affiliate-plaintiffs is not directly and significantly relevant to the remaining claims and defenses in this case. Delving into these contested but minimally relevant issues, such as the proper interpretation of 42 U.S.C. § 289g-2 and whether indirect costs can be considered in evaluating compliance with the statute, is significantly outweighed by a number of Rule 403 factors, including juror confusion and waste of time.

In short, compliance with or alleged violation of federal laws (including but not limited to 42 U.S.C. § 289g-2 and the Partial Birth Abortion Ban) and whether babies were born alive at Planned Parenthood clinics to facilitate the affiliates' ***1012** participation in fetal tissue donation programs will be excluded under Rule 403. I will draft a limiting instruction, to be provided for counsel's review prior to the final Pretrial Conference on September 23, 2019, explaining that the truth of the allegations made in the HCP videos regarding whether plaintiffs profited from the sale of fetal tissue or otherwise violated the law in securing tissue for those programs are not matters for the jury to decide.

Newsworthiness. The newsworthiness of defendants' HCP, including the campaign and the videos, is no longer an issue for determination by the jury given that plaintiffs have dropped their invasion of privacy claims (Counts 13 and 14) and dropped the "publication of private facts" tort as a basis for liability under the federal wiretapping claim (Count 2). That does not preclude defendants

from offering evidence that they believed at the commencement of the HCP that it would result in newsworthy information, or that in fact it generated attention in the media. However, the stories themselves will not be admissible under Rule 403.

Government Investigations, Referrals, and Prosecutions. No evidence regarding government investigations, referrals, or prosecutions stemming from the HCP or otherwise will be admitted. Under Rule 403, the minimal relevance of this evidence to each side's narrative about this case is significantly outweighed by the dangers of unfair prejudice, confusing the issues, misleading the jury, and waste of time.

Dkt. No. 804 at 1-4.

On September 29, 2019, in the Final Pretrial Minutes/Order I reminded the parties of the following:

Truth

If plaintiffs mention the term smear campaign in opening statements or closing arguments, that will not automatically open the door to the "truth" of the videos. The limiting instruction prepared by the Court is sufficient to remind the jury that the truth of the videos is not an issue for their decision. However, if plaintiffs intentionally use "smear" as a recurring theme in their case, or otherwise place the truth of the videos repeatedly and directly at issue, they run the risk of opening the door to the matters that I have excluded from this trial.

Intent

Evidence regarding defendants' intent is admissible with respect to their intent to commit the RICO enterprise and to the competing narratives of the parties (whether defendants set out to harm these plaintiffs and/or to uncover illegal conduct through tools of journalism) and punitive damage defense generally. The relevant information regarding this intent includes: (i) the information defendants had about alleged illegal conduct by plaintiffs that defendants possessed at the inception of the CMP when the goals of the Project were laid out and the strategies for the Project identified; (ii) comments defendants made – at inception of project, during the project, and after the project – regarding the Project itself; (iii) the strategies defendants employed as part of the Project; and (iv) the steps that defendants took to inform government officials or members of law enforcement about their findings, which as noted below should be agreed-to as stipulated fact or facts (because the evidence regarding the response of government officials or law enforcement is and continues to be excluded under the prior motion in limine rulings under Rule 403). The Court has already prepared a limiting instruction regarding media accounts that were published following the release of the HCP videos.

***1013** Section 633.5 defense. The only testimony that will be allowed regarding this defense must be based on information Daleiden or Merritt learned prior to the first recording any defendant made in California

Dkt. No. 835 at 2.

At the start of the trial, the jury was read the following Preliminary Instruction:

> PRELIMINARY INSTRUCTION NO. 18 – MATTERS NOT TO BE DECIDED BY THE JURY
>
> The claims and defenses in this case concern the strategies chosen and employed by the defendants. I need to emphasize what this case is not about. It is not about the truth of whether plaintiffs profited from the sale of fetal tissue or otherwise violated the law in securing tissue for those programs. It is not about whether any plaintiff actually engaged in illegal conduct. Those issues are a matter of dispute between the parties in the world outside this courtroom. In this courtroom your job is to consider the evidence related to the claims and defenses in this case in accordance with the instructions that I give you.

Final Preliminary Jury Instruction, Dkt. No. 850 at 19. I repeated this instruction frequently during the trial as a limiting instruction.

To provide evidence in support of defendants' intent and case narrative, the parties reached a Stipulation on Law Enforcement Contacts that was read to the jury on October 31, 2020. It identified each of defendant Daleiden's specific "contacts with members of law enforcement" and explained that he provided those "members of law enforcement with documents and recordings made by the Center for Medical Progress." Dkt. No. 928.

In light of defendant Newman's and the two CMP contractors' invocation of the Fifth Amendment privilege against self-incrimination and refusal to answer questions in discovery, plaintiffs requested a series of adverse inferences to be read to the jury. After reviewing the supporting evidence for each inference, and rejecting plaintiffs' requests for unsupported or ambiguous inferences, I issued a Final Order on Adverse Inferences on November 5, 2019. Dkt. No. 968. I read those adverse inferences to the jury and instructed at that time and in the Final Jury Instructions that "they may, but are not required" to, take the "specified inferences of fact" against Newman and the two contractors.

In an Order issued on November 11, 2019, I granted portions of plaintiffs' Rule 50 motion, finding that: (1) plaintiffs' employees and contractors are third-party beneficiaries of the NAF Exhibitor and Confidentiality Agreements; (2) defendants Merritt, Daleiden, BioMax, and CMP breached the NAF 2014 Confidentiality Agreement and defendants Daleiden, Lopez, BioMax, and CMP breached the NAF 2015 Confidentiality Agreement prohibiting "Videotaping or Other Recording"; and (3) defendants Daleiden, BioMax, and CMP breached the NAF Exhibitor Agreements in 2014 and 2015 concerning the requirement to provide "truthful, accurate, complete, and not misleading" information. Dkt. No. 994 at 1.

The jury returned its verdict on November 15, 2020. It found defendants directly liable (or indirectly liable through conspiracy) for plaintiffs' claims of: (i) trespass (under the laws of Florida, Washington, D.C., Texas); (ii) Breach of PPFA's Exhibitor Agreements

(EAs); (iii) Breach of NAF Agreements; (iv) Breach of PPGC Agreement; (v) Fraudulent Misrepresentations; (vi) False Promise Fraud; (vii) violation of the RICO Act, 18 U.S.C. §§ 1962(c) and 1962(d); (viii) violations of recording laws (Federal, California, Florida, Maryland); ***1014** (ix) and punitive damages under Florida and Maryland law. Verdict, Dkt. No. 1016.[7]

On April 29, 2020, after a further round of briefing supported by citations to evidence admitted at trial, I issued a 48-page order containing findings of fact and conclusions of law on the UCL claim, concluding that "Defendants are each liable for unlawful and fraudulent business practices that occurred in California and out-of-state unlawful and fraudulent business practices that caused harm in California." Dkt. No. 1073 at 42. I rejected plaintiffs' request for overbroad and unsupported injunctive relief, granting instead narrow injunctive relief resting on the specific conduct each defendant engaged in (as found by the jury and supported by my findings under the UCL claim) in favor of only those plaintiffs who prevailed on their claims against those specific defendants. *Id.* at 47–48. I entered judgment encompassing the damages awarded by the jury and the injunctive relief. *See* Dkt. Nos. 1073, 1074.

LEGAL STANDARD

Judgment as a matter of law under Rule 50(b) is granted "only if, under the governing law, there can

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[7] A detailed description of which plaintiffs prevailed against which defendants on which claims was laid out in the April 2020 Order on Equitable Relief. Dkt. No. 1073 at 2–3.

be but one reasonable conclusion as to the verdict." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001); Fed. R. Civ. P. 50(b). When evaluating such a motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The Ninth Circuit has made clear that a court "cannot disturb the jury's verdict if it is supported by substantial evidence." *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999). Substantial evidence means "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion" from the same evidence. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (internal quotation marks omitted). "Thus, although the court should review the record as a whole, it must disregard evidence favorable to the moving party that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury." *Reeves*, 530 U.S. at 151, 120 S.Ct. 2097. In other words, entry of judgment as a matter of law is warranted only "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro*, 833 F.3d at 1066 (internal quotation marks omitted).

Under Federal Rule of Civil Procedure 59(a)(1), a court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a). A trial court may grant a new trial, "even though the verdict is supported by substantial evidence, if the verdict is

contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). The decision to grant a new trial falls within the sound discretion of the trial court. *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010). However, a court should not grant a new trial unless it is "left with the definite and firm conviction that a mistake has been committed." *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987) (internal quotations omitted). On the other hand, a trial court may deny a motion for a new trial unless "there is an absolute absence ***1015** of evidence to support the jury's verdict." *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (internal quotation marks omitted). In considering a Rule 59(a) motion, the court "is not required to view the trial evidence in the light most favorable to the verdict. Instead, the district court can weigh the evidence and assess the credibility of the witnesses." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014).

Under Federal Rule of Civil Procedure 59(e), a motion to alter or amend a judgment may be granted only: "(1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). In determining a Rule 59(e) motion, the "district court enjoys considerable

discretion in granting or denying the motion" but "amending a judgment after its entry remains "an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per curiam).

DISCUSSION

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Compensatory Damages

As noted above, through pretrial orders I narrowly limited the damages plaintiffs were allowed to pursue to "security" damages for the personal security measures plaintiffs implemented for staff "targeted" by defendants and "infiltration" damages incurred to investigate and remediate defendants' intrusions into plaintiffs' conferences and clinics. The jury subsequently awarded compensatory damages to each of the plaintiffs that sought them based on the evidence admitted at trial. Defendants contend, however, that there was insufficient evidence to allow the jury to do so.

1. Security damages

Defendants argue that plaintiffs at trial failed to "show that their security 'damages' were caused by anything other than publication of the videos, and publication damages are not recoverable." Mot. at 3. They cite testimony from witnesses who admitted that part of the reason some of the security measures were implemented was due to concerns about the particular staff members having been "spotlighted" by

defendants' videos and how people other than defendants might react to the videos. Mot. at 3–5. However, in each instance there was evidence on which a reasonable juror could rely that staff who received the "security" services at issue or their affiliates were targeted by defendants' infiltrations and recordings. That is sufficient to remove this narrow category of damages from the otherwise excluded "publication" damages. That some of the security services were not put in place until after specific HCP videos were released subsequent to the initial videos (which in some instances was when a plaintiff learned that its staff had been recorded) does not undermine the evidence that the expenses were incurred in response to defendants' acts of targeting and recording these plaintiffs. [8] Similarly, that plaintiffs did not ***1016** go out and provide security damages for each staff member or affiliate that was conceivably targeted and/or recorded is irrelevant.[9]

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[8] Whether or not these targeted individuals or their organizations received threats from individuals who might have been motivated by the content of the HCP videos is likewise irrelevant. *But see* Reply at 1–2. There was, however, evidence at trial on which reasonable jurors were entitled to rely that given the history of violence against abortion providers the implementation of security measures for recorded staff was reasonable.

[9] Defendants contend that PPFA cannot be reimbursed for the $6,000 PPFA provided to PP Michigan to pay for Reputation.com, because that was a "voluntary" payment to its affiliate. Mot. at 12. Plaintiffs respond that these damages were not, in fact, awarded by the jury, and plaintiffs confirm they are not seeking

There is sufficient evidence on which a reasonable jury could rely to find that plaintiffs' security damages were incurred as a direct result of defendants' conduct targeting and recording plaintiffs' staff. There is no ground to support defendants' motion for judgment as a matter of law given the evidence at trial.

2. Infiltration damages

Defendants also challenge the "infiltration" damages plaintiffs sought and were awarded by the jury, arguing as a matter of law that defendants cannot be liable for improvements to PPFA's conference and event security measures to "foil all possible" ways defendants might use to infiltrate plaintiffs' conferences and events in the future. I addressed and rejected this argument, and the cases defendants cite in support, in prior orders pre-trial. I will not address it again.

Plaintiffs submitted ample evidence regarding what they did to investigate defendants' intrusions, why they hired Kroll Services and Thatcher Services, what investigations those entities did and what recommendations they made, and which of those recommendations PPFA implemented in light of defendants' actions and why. Similarly, there was evidence about PPFA's purchase of conference badge and ID scanners and the use of Lexis-Nexis to vet attendees. Defendants cross-examined plaintiffs' witnesses on each of these topics and argued that the

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them. Defendants do not address or dispute plaintiffs' assertions on reply.

expenditures were not necessary or were too remote in time or purpose from defendants' actions to be recoverable. They also attempted to establish, and argued to the jury, that plaintiffs knew or should have known that their existing security measures were insufficient and, therefore, that the amount of damages sought from defendants was unreasonable. The jury clearly disagreed. Based on the evidence at trial, there is no reason to revisit the issue as a matter of law. There was ample evidence on which reasonable jurors could rely to award the infiltration damages.

Finally, defendants argue that plaintiffs did not present any historical expenditures to provide a "baseline" of the conference and clinic security measures to allow the jury to assess what reasonable infiltration damages should be awarded. There was, however, evidence that plaintiffs hired new consultants to address a new and different threat, so evidence regarding past expenditures would have been of limited, if any, utility. In any event, the defendants were free to (and did) attempt to make that point and argue to the jury that these expenses were unreasonable. The jury rejected that argument.

Defendants are not entitled to judgment as a matter of law or a reduction in the amount of compensatory damages sought by and awarded to plaintiffs by the jury. The damages are amply supported by the

evidence at trial and are sufficiently directly tied to the actions of defendants.[10]

***1017 B. Punitive Damages**

Defendants contend that plaintiffs failed to introduce sufficient evidence to meet the standards for imposing punitive damages under the laws of Florida and the other relevant jurisdictions.

Under Florida law, the jurors had to find by "clear and convincing evidence that the Defendant was guilty of intentional misconduct or gross negligence, which was a substantial cause of injury to the Plaintiffs." Final Jury Instructions at 97. Defendants do not take issue with the instruction. Instead, they argue (consistent with their theory of the case) that no evidence supports the imposition of punitive damages under Florida law because their purpose in attending PPFA's Florida conferences was "journalistic" and their intent was to investigate and expose potential illicit or illegal conduct in the sale and transfer of fetal tissue. The jurors rejected that narrative in favor of the evidence supporting plaintiffs' theory that defendants were not journalists but activists who intentionally engaged in fraud and

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[10] Defendants only general Rule 50(b) argument regarding trespass that is not tied to Rhomberg or Newman is that "plaintiffs failed to adduce sufficient evidence" for a reasonable jury to find that any defendants' trespass caused any actual damage. Mot. at 20. That argument fails for the reasons just discussed.

misrepresentations in order to harm and destroy plaintiffs.[11]

Defendants separately argue that punitive damages cannot be awarded against Merritt, who did nothing in Florida. But she did engage in substantial conduct in Maryland, which creates a sufficient basis to include her in the punitive damages award. Defendants point to no error in the instructions (the instructions, for example, did not indicate that Merritt had directly engaged in any conduct in Florida).

Defendants then argue that punitive damages were likewise without evidentiary support for the claims related to the federal recording statute and under Maryland's law, as the jurors were instructed that they had to find "clear and convincing evidence that the Defendant engaged in that conduct with malice, oppression, or fraud." Final Jury Instructions (Dkt. No. 1006) at 95-96.[12] Again, this argument relies on

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[11] These dueling narratives do not, contrary to defendants oft-repeated argument, turn on the truth of allegations levelled against plaintiffs in the HCP videos. They do, however, implicate defendants' intent at the inception and during the HCP, a topic that was extensively addressed by witnesses and exhibits from both sides during the trial.

[12] Defendants mention site visits in Colorado and Texas, but the jury was never instructed about punitive damages based on conduct in those jurisdictions. Therefore, conduct in those states is not at issue. In reply, defendants appear to take aim at the Verdict Form, criticizing it because it did not ask the jury to identify under which state laws punitive damages were awarded. Reply at 8. But the jury instructions, which the jury is presumed

defendants' rejected characterization of their conduct as journalists protected by the First Amendment. Their legal arguments have been repeatedly rejected; there was sufficient evidence on which jurors could reasonably rely to find malice, oppression, or fraud.

Next, defendants note that the jury was instructed that in weighing whether to impose punitive damages under federal and Maryland law, it should consider "[i]n view of that Defendant's financial condition, what amount is necessary to punish him and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a Defendant has substantial financial resources." *Id.* at 96. Similarly, under Florida law, the jurors were instructed that in determining whether to impose punitive damages, one of the factors to be considered is "the financial resources of Defendants," however, "you may not award an amount that would financially ***1018** destroy Defendants." *Id.* at 97. Defendants argue that since no evidence regarding the financial condition of any defendant was introduced at trial, punitive damages could not have been awarded under federal or Maryland law.

The law contradicts that argument. Cases from Florida and Maryland explain that information regarding a defendant's financial conduction is not a precondition to an award or instead is a burden of evidence placed on defendants who want to ensure punitive damages are not "excessive". *See, e.g., Brooks*

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to follow, did. Final Jury Instructions at 95-97; *see also Cheney v. Washington*, 614 F.3d 987, 997 (9th Cir. 2010).

v. Rios, 707 So. 2d 374, 376 (Fla. 3d Dist. App. 1998) ("evidence of a defendant's net worth ... is not a prerequisite for such an award."); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 275, 841 A.2d 828 (2004) ("plaintiff has no obligation to establish a defendant's ability to pay punitive damage"); *see also Brooks*, 707 So. 2d at 376 ("A defendant against whom punitive damages are sought, however, must present evidence as to his or her net worth at trial to preclude a jury from assessing an unduly harsh penalty, as well as to preserve his or her right to argue the excessiveness of the punitive award on appeal.").

Finally, defendants note that punitive damages are unconstitutional when the harms at issue were inflicted on non-parties. They argue the jury may have impermissibly considered the harm to non-parties when imposing punitive damages because they heard testimony from plaintiffs' witnesses about their personal mental and emotional state after viewing or being made aware of the HCP videos. However, the Supreme Court case on which defendants rely points out that jurors may take into account whether "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few" but that courts must provide defendants the ability to object and seek relief from the risk that a jury might punish it for its harm to others, through instructions or other rulings. *Philip Morris USA v. Williams*, 549 U.S. 346, 357, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). Defendants here did not seek such relief. *See, e.g., Sony BMG Music Entm't. v. Tenenbaum*, 660 F.3d 487, 506 n. 20 (1st Cir. 2011)

(*Philip Morris* argument waived where defendant did not request a specific instruction).

The jury *was instructed* to focus on the harm caused to "plaintiff" when assessing punitive damages. Final Jury Instructions at 95-96. There was also a legitimate, different purpose for the testimony to which defendants object; to support the reasonableness of the damages plaintiffs incurred for the security and infiltration measures plaintiffs took in response to defendants' conduct. There is no indication that the jury was impermissibly punishing defendants for their harm to non-parties.

Defendants are not entitled to judgment as a matter of law or other relief based on the award of punitive damages.

C. RICO

Under RICO, defendants argue initially that plaintiffs' evidence fails to show that the predicate acts of production and transfer of fake IDs "directly caused" plaintiffs' economic losses. They assert that the damages sought under RICO – the security and infiltration damages identified above – were instead caused by a "long series of acts" separated from the transfer and production of the IDs by too many steps. Mot. at 16–19; Reply at 4–7.

The line of cases that defendants identify in their reply in support of their "one-step" causation argument have been discussed numerous times; I will not repeat those discussions here. Reply at 4–7. Suffice it to say, the evidence at trial was consistent with plaintiffs' characterization of the evidence at

summary judgment: the ***1019** production and transfer of the fake IDs was the crucial act *by defendants* that allowed *defendants* entry into the conferences (presenting their IDs) and their introduction to plaintiffs' staff, who were then targeted *by defendants*. While there were stages of defendants' plan between the production and transfer of the IDs, from the presentment of those IDs at the conferences and clinics up to the defendants' achievement of their goal (the surreptitious video recordings), there was sufficient evidence that the fake IDs were the crucial component to achieve their goals, and that directly and proximately caused plaintiffs' damage to their business or property rights sufficient for RICO liability.[13]

Defendants also dispute the sufficiency of evidence on the pattern/open-ended continuity RICO element, arguing that all of their testimony related to the production and transfer of the fake IDs showed a "one-time" occurrence that is not likely to repeat.[14] [14]

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[13] Plaintiffs' RICO damages are not undermined merely because the jury awarded similar or the same amount of damages under RICO and the trespass, breach of contract, and fraud claims. Defendants' actualized goal of infiltrating and surreptitiously recording plaintiffs – of which the production and transfer of fake IDs was a necessary and critical part – violated different statutes and caused similar and in some instances the same damages. That proximate cause is satisfied under RICO simply means the causal link for the damages under the other claims is easily satisfied.

[14] I will not address defendants' argument that they could not have violated 18 U.S.C. § 1028 because they did not steal anyone's actual identity. This argument should have been raised

However, there was sufficient evidence on which a reasonable jury could rely to establish open-ended continuity, including the longstanding opposition between plaintiffs and defendants, the history and context of each defendant's past conduct, the defendants' conduct since the conclusion of the HCP, and CMP's status as an ongoing entity. That each defendant's name is now well-known to plaintiffs only increases the likelihood that these individuals will produce or transfer or present fake IDs for themselves or others they are working in concert with. *See* Findings of Fact and Conclusions of Law (Dkt. No. 1073) at 27.[15]

Defendants are not entitled to judgment as a matter of law on the RICO claim.[16]

D. Fraudulent Misrepresentation

Defendants make several arguments that judgment as a matter of law should be entered in their favor on

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pre-trial – as their other RICO predicate act challenges repeatedly were at the motion to dismiss, summary judgment, or *in limine* stages – but defendants failed to do so.

[15] Relatedly, that the defendants have not – during the pendency of this litigation – attempted to produce, transfer, or present fake IDs does not "prove" there is no open-ended continuity, but only that defendants decided to avoid doing so while litigating this and the criminal matters pending in state court.

[16] Specific challenges made by Lopez, Merritt, and Rhomberg to the evidence regarding their connection to the RICO claims will be addressed below.

the fraud claims. First, defendants argue their conduct cannot be considered fraudulent under *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). I have rejected this argument several times and will not revisit it, except to say that the jury clearly concluded based on sufficient evidence that defendants' fraudulent conduct caused ample "legally cognizable harm."

The second argument is that plaintiffs adduced insufficient evidence of reliance (actual reliance under the laws of Florida and reasonable reliance under the laws of ***1020** California, Colorado, Texas, and D.C.). There was ample testimony at trial that defendants would not have been allowed access to the conference, clinics, or lunch meetings absent their misrepresentations (the false names, their fake positions at the non-operational front company BioMax, and their false intent for securing that access). Defendants argue that plaintiffs' failure to exercise reasonable diligence (for example, their failure to run background checks on the names of the individuals and company) precludes a finding of reasonable reliance. They introduced evidence of what they characterized as plaintiffs' deficient security measures and failures and repeatedly argued this point. The jury rejected that argument based on sufficient evidence.

E. Recording Claims

1. Entity Standing

Defendants assert at various points that none of the plaintiff entities had "corporate" standing to sue over defendants' recordings of their staff members. In

particular, they challenge the corporate standing of the plaintiff entities for the six recordings taken at the PPFA Conference in Washington, D.C. They argue that the respective entity-plaintiffs lacked standing because they failed to introduce evidence (namely the audio of the clips) to show that those being recorded were disclosing corporate information or were targeted by defendants based on their relationships with the entity-plaintiffs. They also challenge the evidence regarding the targeting of Nucatola and Drummond-Hay at the 2014 NAF Conference, and whether those recorded conversations disclosed internal business matters. Similarly, defendants contend that there was insufficient evidence of targeting or disclosure of internal information by the four individuals captured in the eight recordings in Florida.

Defendants' argument fails. There was ample evidence that they were specifically targeting staff of PPFA and Planned Parenthood affiliates *because* those staff members could divulge information about the internal matters of PPFA and the affiliates. That directed targeting and the fact that they recorded staff members from each of the relevant plaintiffs is sufficient. [17] However, there was also significant

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[17] That defendants recorded everyone they encountered during the conferences and visits due a technical need to keep the devices always on does not undermine the substantial evidence that the plaintiffs were specifically targeted by defendants given the stated purpose and goals of the Project. Similarly, that in some of the videos the individuals recorded approached the BioMax exhibit does not negate the fact that sufficient evidence

evidence – from clips played with audio at trial, testimony from those recorded, and testimony from defendants themselves about the questions they asked and the information they sought to uncover – establishing that defendants asked about and staff disclosed internal matters of the plaintiff entities. Indeed, that was the goal of the recordings in support of the Project. The totality of the evidence was sufficient to establish corporate standing.

2. Federal

Defendants challenge whether there was sufficient evidence that the intent or the purpose of the recordings was to violate civil RICO – as required under the federal statute – when, according to defendants, their purpose was a journalistic effort to expose illegal conduct in the sale and transfer of fetal tissue. As discussed, there was sufficient evidence regarding defendants' intent to focus on PPFA and its affiliates for their surreptitious recordings in order to put them out of business through the RICO enterprise alleged.

***1021** Defendants also challenge the sufficiency of evidence showing that those recorded had a subjective expectation of privacy that was objectively reasonable. They identify six recordings taken at the 2015 PPFA National Conference where there was no evidence regarding the content of the recorded discussions or testimony from the recorded individuals. They contend that there could not be any expectation of

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showed defendants were at those conferences to target and record plaintiffs' staff.

privacy where two other conference attendees (Nguyen and Castle) were recorded in "crowded areas" of the conference where other people could have theoretically overheard part of the conversations. They claim that there was no evidence of subjective expectations of privacy for the two individuals recorded in the "reception area" of the PPRM clinic (Johnstone and Ginde) and assert that there was no evidence of expectations of privacy for the two PPGC receptionists or for Farrell at the PPGC clinic.

With respect to the 2015 PPFA National Conference, there was significant evidence introduced regarding the security measures that PPFA undertook relevant to creating a subjective and objectively reasonable expectation of privacy including, most significantly, restricting access to conference spaces to attendees bearing conference badges and employing door monitors where the challenged recordings were made. Witnesses testified that these measures gave them an expectation of security and privacy in their interactions with other conference attendees, given evidence that the purpose of these conferences was to provide a secure and safe space to discuss their occupations. They plausibly testified that they would not expect to be surreptitiously recorded or overheard by those adverse to them when having conversations within those areas.

The same evidence, both general (security measures) and specific (attendees at those conferences testifying as to their expectations of privacy given the very purpose of those conferences), was adduced for each conference. The jury could reasonably rely on the totality of that evidence to establish both the

subjective expectation of privacy and its objective reasonableness. There was also testimony from conference attendees about subjective expectations of privacy at those conferences that jurors could rely on to determine subjective expectations, even though each recorded individual did not testify.

Significant evidence regarding the security and access measures at the clinics was also introduced, including the requirement for prior appointments to access the facilities, the use of guards and screening devices further restricting access, the use of key cards and locked doors to access meeting rooms and clinic spaces, and – at PPGC – the prior signing of the NDA required by Farrell. All of this evidence, in addition to the testimony of individuals recorded during the clinic visits, was sufficient, even if every person recorded did not testify regarding her specific expectation of privacy.

3. California

Defendants argue that plaintiffs submitted insufficient evidence of Nucatola's expectation of privacy at the 2014 NAF meeting under California law because she admitted that there were unknown people standing behind her during her conversation at the BioMax booth in the exhibitor area and that there was insufficient evidence that Drummond-Hay had a reasonable expectation of privacy when she spoke to defendants in a crowded room. However, these conversations took place in the restricted areas of the conference. As noted above, there was significant evidence supporting a reasonable expectation of privacy in these circumstances despite

the chance that some other conference attendee or hotel staff (both of ***1022** whom had signed different confidentiality agreements) could possibly have overheard some part of a conversation.[18]

Defendants also challenge the jury's finding of a reasonable expectation of privacy during the lunch meeting at a restaurant where Gatter and Felczer were recorded and the lunch meeting at a restaurant where Nucatola was recorded, given the fact that both recordings were made in public restaurants and the speakers did not testify that they lowered their voices or changed topics when waitstaff or others might overhear. Defendants note that the Hon. Christopher C. Hite in the criminal proceedings in California state court dismissed the Section 632 claim regarding one of the lunches based on his findings that the individual recorded made no effort to confine her conversation to the defendants and testified that she did not believe the conversation was controversial or contained any questionable conduct necessitating a confidential communication. Dkt. No. 1080-2.

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[18] Defendants point to Judge Hite's ruling in the state court criminal proceedings dismissing two criminal counts under California Penal Code section 632 because the conversations at issue – one taken in an elevator and another recorded in the main hotel lobby at the NAF conference in "areas open to the public and not part of the conference" – lacked "probable cause" of confidentiality, namely a reasonable expectation that the conversation was not being overheard or recorded. Dkt. No. 1080-2. Defendants do not argue on this motion that any of the NAF recordings that the jury found violated California law were recorded in similar circumstances.

The jury here reached a different conclusion than Judge Hite on that one lunch. It heard some similar but also some different testimony than was presented in the criminal proceedings, including that the individual recorded was seated with her back to the wall, allowing her to see nearby tables, and that she never noticed anyone interested or listening-in to their conversation.[19] This claim was submitted to the jury on instructions not challenged post-trial. Based on a different record than Judge Hite had, the jury found liability.

4. Florida

Similarly, defendants challenge the expectation of privacy showing for two recordings of Nucatola made during receptions at the conferences that were restricted to conference attendees and for her discussion with defendants at the BioMax booth in the restricted-access exhibitor hall. But Nucatola's specific testimony about her expectation of privacy at these conferences as well as the general testimony regarding the access-restrictions and security measures was sufficient. The same is true for defendants' challenges to the recordings of Gatter,

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[19] On the record before him, Judge Hite concluded that there was no evidence that the recorded individual had a "relationship with the defendants prior to lunch" or had "vetted" defendants prior to the lunch. Dkt. No. 1080-2. In this trial, on the other hand, there was evidence that Daleiden, Merritt, and BioMax were vetted through their infiltration and appearance at the April 2014 NAF Conference, which was where the recorded individual first met Daleiden and Merritt and learned about BioMax. This was before the lunch meeting with defendants that occurred shortly thereafter.

Gupta, VanDerhei, Smith, Moran, Nguyen, Russo, Ginde, and Sigfried. Many of these witnesses testified about their expectations of privacy at the Florida conferences, although some did not. The jury was entitled to rely on the access-restriction and other security measures implemented by PPFA, as well as the specific testimony regarding subjective expectations of privacy, to conclude that each recording at issue violated the expectations of the privacy of those recorded.[20]

***1023 5. Maryland**

Finally, defendants' sufficiency challenges to the recordings that the jury concluded violated Maryland law also fail. The recordings at issue, again, were taken in restricted-access conference areas. That the rooms in which the conversations occurred were crowded or noisy does not defeat the significant evidence establishing a reasonable expectation of privacy based on the security-access measures and testimony from some of those who were recorded at the conference.

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[20] One specific and potentially distinguishing factor identified by defendants regarding the recording of Gupta during a dinner at the October 2015 Conference was the presence of guests, but that does not alter the reasonableness analysis. Testimony established that the dinner guests had to be registered along with the attendees and wore badges. Similarly, that there could have been guests "within sight" of an outdoor reception in a restricted-access area does not undermine Siegfried's expectation of privacy in a conversation with attendees in the restricted-access area.

F. Breach of Contract

1. CMP Alter Ego

Defendants contend that plaintiffs failed to adduce sufficient evidence to hold CMP liable for violation of any of the contracts at issue under the doctrine of alter ego liability. They argue that California law does not recognize "reverse veil piercing" and that there was an insufficient showing of the requirements of traditional veil piercing, namely a sufficient unity of interest and ownership such that separate personalities of the individual and corporation no longer exist and treating the acts of the corporation alone will sanction fraud, promote injustice, or cause an inequitable result.

Defendants assert that the first prong cannot be met because the CMP Board of Directors did not even know about BioMax. Mot. at 35. However, there was evidence that CMP's Board members knew a front business (BioMax) had been created as a necessary step in the HCP and the jury was entitled to rely on that evidence. On the second prong, defendants argue that there was no evidence that Daleiden or BioMax would be unable to pay any award in this case and/or that injustice would result. But BioMax was, as the jury implicitly found, a fake "front" business, not a real business with any operations. Undisputed evidence at trial demonstrated that all of the contractors were paid by CMP. Allowing CMP to escape liability when it is the entity that funded the HCP, as shown by admissible evidence at trial, would result in injustice.

Plaintiffs also note that CMP could be held liable on an agency theory. I agree. There was sufficient evidence at trial for the jury to conclude that CMP was the undisclosed principal funding the HCP: it paid the expenses of the front entity (BioMax) including the salaries of the contractors who misrepresented themselves as BioMax employees when they were in reality contractors paid by CMP.

2. PPFA Exhibitor Agreements

Defendants argue, resting on their challenge to the compensatory damages addressed above, that the breach claim fails because no damages were suffered as a result. More specifically, they contend that Nucatola's security damages cannot be supported by this breach claim when the only videos of Nucatola released by HCP stemmed from her lunch with defendants and that PPFA was not entitled to "essential monitoring" damages. I have addressed and rejected those arguments earlier in this Order.

3. NAF Exhibitor and Confidentiality Agreements

In addition to their general argument that no compensatory damages stemmed from these breaches, addressed and rejected above, defendants contend that PPFA does not have standing to assert breach of the NAF agreements as ***1024** "fourth-party" corporate beneficiaries, irrespective of whether its staff (who were taped) were appropriate third-party beneficiaries. Mot at 36–37. Their argument rests mostly on rationales already rejected (Daleiden's subjective belief about who was protected by the EAs, the "failure" of NAF to provide a list of attendees prior

to defendants' agreeing to the EAs, etc.). There was significant evidence that PPFA's staff were targeted by defendants seeking to uncover information about PPFA's operations in violation of and using means expressly prohibited by the EAs. The evidence also established that PPFA is itself a member of NAF, whose interests are expressly addressed and protected by the NAF agreements. That is sufficient.

4. PPCG NDA

Defendants attack the breach of the PPCG NDA claim by arguing that plaintiffs failed to show that defendants secured "confidential information" during their recording at PPGC's clinic. In support, defendants point exclusively to Daleiden's subjective testimony that he did not believe any of the subjects discussed disclosed confidential information. But the standard is not subjective, it is objective. There was sufficient evidence from Farrell and Nguyen on which reasonable jurors could rely to conclude that the recipients should have reasonably understood the information disclosed to be confidential.

As to actual damages, defendants argue that none was shown to have resulted from the PPGC breach because one witness testified in her lay opinion that the videos – not the intrusion – caused the harm to PPGC and publication damages have been barred. But substantial evidence supports the damages awarded to PPGC as incurred to protect specific staff members who were specifically targeted by defendants.

G. Fifth Amendment Privileges

Defendants argue that the potential adverse inferences read to the jury – resulting from Newman and the two CMP contractors' refusal to answer questions based on the Fifth Amendment – "violated Newman's rights and prejudiced all Defendants." Mot. at 39. They reassert their prior arguments that plaintiffs failed to identify the inference, show the inference was tied to an actual question asked of each, provide independent admissible evidence in support, show a "substantial need" for the inference, and that there was no other source for the information covered by the inference. *Id.* In addition to the alleged prejudice to Newman from the improper inferences, the other defendants assert that they too were prejudiced by the three sets of inferences because the jury likely drew adverse inferences against them from Newman's and the two contractors' refusal to answer questions. *Id.* at 40.

I found that a number of narrowly drafted, specific inferences were appropriate after reviewing multiple rounds of briefing addressing caselaw and the identification of underlying and supporting facts. I rejected plaintiffs' request for overbroad or unsupported inferences and considered all and accepted some of defendants' objections to each proposed inference. Dkt. Nos. 806, 823, 838, 951, 953, 956, 964, 968. At the end of the process, I found:

> The inferences, identified below, are supported by the questions asked by plaintiffs in the depositions that Newman, Baxter, and Davin refused to answer under the Fifth Amendment. The inferences go to core, disputed issues regarding the

> defendants' intent, knowledge, and conduct in this case relevant to the claims arising under federal and the laws of Texas, Colorado, Florida, Maryland, and the District of Columbia, but not relevant to the claims arising ***1025** solely under California law. Other evidence in this case, including admitted documentary evidence, support the existence of the facts that plaintiffs seek to establish through the inferences. Because of the nature of inferences, generally going to the defendants' intent and knowledge, the inferences cannot be otherwise adequately established through less burdensome means. There is no unfair prejudice to Newman, Baxter, Davin, or any of the testifying defendants from allowing the inferences identified below.

Dkt. No. 968 at 1. I read those inferences to the jury on November 6, 2019, Dkt. No. 1008, and instructed the jury that they were "permitted but not required to draw the inference that the withheld information would have been unfavorable to" Newman, Baxter and Davin and that if "a witness who asserts the Fifth Amendment is associated closely enough with a defendant, you may but are not required to draw an adverse inference against the defendant." Trial Tr. 3458:22-24; 3463:6-19. I instructed that for "claims based on California law, you may not consider that, or speculate about why" Newman or the contractors "invoked the Fifth Amendment and refused to answer." *Id.*, 3458:10-13; 3464:4-6.

In the Final Jury Instructions, I instructed the jurors that they were permitted to but not required to draw the adverse inferences. *See* No. 8 at 30 ("in civil cases, you are permitted, but not required, to draw the inference that the withheld information would have been unfavorable to the Defendant"); No. 9. at 31 ("If a witness who asserts the Fifth Amendment is associated closely enough with a Defendant, you may, but are not required to, draw an adverse inference against the Defendant."). I also instructed that no inferences should be drawn with respect to claims arising under California law. *See* No. 8 at 30 ("For claims based on California law, you may not consider that, or speculate about why, Newman invoked the Fifth Amendment and refused to answer."); No. 9 at 31 ("For claims based on California law, you may not consider that, or speculate about why, Baxter or Davin invoked the Fifth Amendment and refused to answer.").

These instructions limited the scope of the allowable inferences and were provided after fully considering and rejecting defendants' "other evidence is sufficient" arguments. In Reply, defendants claim that Newman's stipulation to some facts eliminated the need for any additional inferences from him. Reply at 19. But I rejected that argument when it was first made. A defendant cannot avoid inferences by attempting to admit favorable, more limited facts, and to ignore unfavorable ones in an attempt to use the Fifth Amendment as both a shield and a sword.

Defendants' request for post-trial relief based on the adverse inferences is DENIED.

H. Civil Conspiracy

Defendants argue that there was insufficient evidence either of "an agreement which is a substantive violation of RICO (such as conducting the affairs of an enterprise through a pattern of racketeering)" or of "defendant's participation or agreement to participate in two predicate offenses." *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993) (internal quotations to *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984) omitted). As discussed below, there was sufficient evidence that each defendant knew that to effectuate the goal of the HCP, defendants needed to gain access to plaintiffs' conferences, facilities, and staff, and that false identities and fake IDs were, therefore, required. Given the defendants' backgrounds, including their roles in prior undercover operations against abortion providers and the evidence ***1026** regarding each defendants' knowledge of the use of those false identities during the HCP, the evidence was sufficient.

Second, defendants argue generally that they cannot be guilty of conspiring to conduct what they characterize was a lawful undercover investigation. That characterization was rejected by the jury.

I will now turn to the defendant-specific challenges brought by Lopez, Merritt, Rhomberg, and Newman.

I. Lopez and Merritt

1. RICO

Defendants Lopez and Merritt argue, first, that they cannot be liable under RICO because there was

insufficient evidence that they were involved in the "operation or management" of the RICO enterprise. However, there was sufficient evidence that both knew from the HCP's inception that their goal was to use misrepresentations to gain access to conference and clinics and plaintiffs' staff more generally in order to surreptitiously record plaintiffs' staff. There was sufficient evidence of these defendants' knowledge for the jury to find that they joined the Project with the goal to harm and end the viability of plaintiffs' operations. These two defendants were, as evidenced throughout the trial, key operatives whose participation was crucial to the Project and defendants' more general goal. It does not matter that neither Lopez nor Merritt was the "ringleader" and that they followed Daleiden's directions where to go and whom they should target. They did not need to be in charge; they only needed to have significant roles in operating the RICO enterprise, which they did. That is sufficient.

Concerning their knowledge and intent that at least one member of the enterprise would commit two or more predicate acts, the evidence supports that Lopez knew of and that Merritt both knew of and used the fake IDs. Merritt received and used one of the fake IDs and was with Daleiden when he repeatedly used his fake ID. Lopez was with Daleiden at four conferences when Daleiden repeatedly used his fake ID and Lopez had to publicly refer to Daleiden by the name on that fake ID during those conferences. From this evidence, the jury could reasonably conclude that both Lopez and Merritt knew and intended that the fake ID predicate acts would be committed.

2. Conspiracy

The final argument concerning Lopez and Merritt is that their conduct is protected by the "agent immunity rule." I addressed and rejected this legal argument on undisputed facts on summary judgment. I will not discuss it further.

J. Rhomberg

1. Conspiracy/RICO

Rhomberg argues that the evidence against him is insufficient for the RICO conspiracy claim. Defendants admit that he knew about plans to infiltrate conferences and meet with abortion providers and do not dispute the evidence that Daleiden called Rhomberg during the PPGC visit, where Daleiden identified himself as Sarkis to Rhomberg. Instead, defendants contend that the evidence is insufficient to show Rhomberg's knowledge of the intent of his co-conspirators to commit the predicate fake ID acts. They point to Daleiden's testimony that he created his fake ID and procured and transferred the other two fake IDs without the knowledge or participation of any of the other defendants.

To repeat, the jury was entitled to disbelieve Daleiden's testimony. It could instead focus on Rhomberg's background and prior involvement with the anti-abortion movement, his position as a board member of CMP, his receipt of the HCP ***1027** plans discussing infiltration and surreptitious recordings by actors using false names, the call from Daleiden at PPGC, and his responses to updates on the progress

of the Project. It was entitled to consider these factors as evidence to conclude that Rhomberg knew that his co-conspirators would commit the fake ID predicate acts.

2. Conspiracy/Fraudulent Misrepresentations

Regarding the conspiracy under the fraudulent misrepresentation claim, Rhomberg argues that plaintiffs failed to show that he knew about and agreed with the plan that other defendants would "intentionally misrepresent [themselves] to plaintiffs in a manner that would be tortious." Defendants note that I instructed the jury that "Plaintiffs contend that Defendants made three general categories of false statements of fact: (1) Defendants' use of fake names; (2) Defendants' provision of fake identifications; and (3) statements suggesting BioMax was a legitimate tissue procurement organization." Final Jury Instructions at 47.

Given the evidence of Rhomberg's knowledge and agreement to the scope and intent of the Project, as well as the establishment of the "front" company and use of "moles," there was sufficient evidence for the jury to rely on to find Rhomberg's knowledge and agreement to those frauds against PPFA, its affiliates, and its staff generally. While Rhomberg may not have known to which specific staff members the misrepresentations would be made (or the specific logistical details), he knew the target generally, the goal, and that the misrepresentations would be made. That is sufficient. There was likewise sufficient evidence of promissory fraud. Rhomberg may not have directed the Project, but he was aware of its

goals and methods, including the use of false statements to "infiltrate," as outlined in Project proposals and in updates provided to him as a member of the CMP Board.

3. Conspiracy/Recordings

Rhomberg asserts that plaintiffs failed to provide sufficient evidence that he knew and agreed that his co-conspirators intended to infiltrate plaintiffs' conferences and clinics and make surreptitious recordings in violation of federal, California, Florida, and Maryland law. Rhomberg relies on Daleiden's testimony attempting to "walk back" other evidence regarding his co-conspirators' knowledge of, agreement with, and contributions to the methods and goals of the Project, including as addressed above the objectives of the RICO enterprise. But the jury was entitled to disregard Daleiden's testimony. The other evidence that reasonable jurors could rely on established Rhomberg's knowledge that "infiltration" was going to occur and that "undercover" recordings were going to be and were made of plaintiffs' staff members at conferences and at clinics around the country in order to produce "gotcha videos." The jury was entitled to reject Rhomberg's testimony that he was "impressed" by Daleiden's "checking" with lawyers and theologians prior to undertaking the recordings.

More fundamentally, Rhomberg knew and encouraged the specific conduct – surreptitious recordings at conferences, clinics, and lunches – for which the jury found him liable as a conspirator. He may not have known, in advance, the specific

circumstances for each recording made (which under the relevant jurisdictions impact the reasonableness of an expectation of privacy), but there was sufficient evidence to find him liable as a conspirator for the recordings which the jury determined violated the underlying recording laws.

4. Conspiracy/Trespass

For similar reasons, the evidence regarding Rhomberg's knowledge of the ***1028** goals and methods of the Project, the updates provided to him as a board member of CMP including updates on "site visits," and his receipt of the call from Daleiden and subsequent conversation during the PPGC visit, is sufficient to hold Rhomberg liable for conspiracy to trespass.

K. Newman

1. Evidence

Newman argues first that there was no evidence (other than the inferences) showing that he had any real knowledge about the goals, methods, or conduct of the Project. He relies almost exclusively on the trial testimony of Daleiden, which attempted to walk back *other* evidence regarding Newman (and Rhomberg), including their touted purpose on CMP's Board in light of their backgrounds (which for Newman included undercover and surreptitious recording operations against abortion providers), their receipt of and input on the Project proposals and road maps regarding the design and methods used in the Project, the updates on the Project provided to them during board meetings, and Newman's claims of credit for the

Project when the CMP videos were released. The jury was entitled to reject Daleiden's testimony (as well as the testimony from the HCP public relations consultant, Byran) and rely on the other, sufficient evidence, and draw reasonable inferences therefrom.

2. Conspiracy/RICO

There was sufficient evidence on which the jury could rely to find that Newman had the knowledge and intent that at least one member of the enterprise would commit two predicate acts of producing and transferring fake IDs. As with Rhomberg, the jury was entitled to disregard Daleiden's testimony and instead focus on the evidence of Newman's background and prior involvement with the anti-abortion movement – including his extensive experience running undercover operations and conducting surreptitious recordings of abortion providers – as well as Newman's touted position and reason for his selection as a board member of CMP, his receipt of the Project roadmap, HCP plans, and updates that repeatedly discussed infiltration and surreptitious recording by "moles" and actors, and his claim of credit for and direction of the Project itself.

3. Conspiracy/Fraudulent Misrepresentations

Newman again relies on Daleiden's testimony concerning the conspiracy/fraudulent misrepresentation and false promises claims. The jury was entitled to reject Daleiden's testimony in favor of other evidence supporting the conclusion that Newman knew – in light of his past experiences, the reason for being sought out by Daleiden to serve on CMP's Board, and his claim of credit for the Project –

that misrepresentations to plaintiffs and their staff members were an expected and necessary component of the Project and that they in fact occurred throughout the Project as the "actors" achieved their repeated intrusions based on their misrepresentations and false promises, and that the front company BioMax became a "trusted" entity. That is sufficient.[21]

4. Conspiracy/Trespass

Newman argues, first, that he cannot be held liable on a conspiracy theory ***1029** for the trespass or recording violations because he was excluded from those claims in the Amended Complaint. This argument was raised and rejected on summary judgment, where Newman identified no actual prejudice from any alleged confusion over which claims were asserted against him as a conspirator, and I will not revisit it here. On the question of evidence in support, there was sufficient evidence on which reasonable jurors could rely that he knew and intended that his co-conspirators would trespass at the conferences and clinics in light of the methods and goals of the Project identified in communications at the Project's inception and as the Project was carried out.

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[21] Newman also argues in passing that because he could not be liable for conspiracy to breach the contracts at issue, he could not be liable for false promises fraud even if he knew and intended his co-conspirators to lie in their agreements with plaintiffs. However, his liability for false promise fraud is separate from the breach of contract claims; it implicated different duties and conduct. The conspiracy claim based on this fraud stands.

5. Conspiracy/Recording

In addition to the rejected failure to plead argument, Newman raises the same arguments as Rhomberg that he cannot be held liable as a conspirator to violate the various recordings laws at issue unless there is direct evidence that he knew his co-conspirators intended to record in violation of specific state's laws. I reject them for the same reasons. There was sufficient evidence regarding Newman's knowledge of and encouragement of his co-conspirator's aim to infiltrate and surreptitiously record at conferences, clinics, and lunches to sustain the jury's determination regarding his liability for conspiracy to violate the recording statutes.

6. Punitive Damages

Finally, Newman contends that the punitive damages awarded against him cannot stand because of Daleiden's testimony attempting to undercut the other evidence of Newman's significant role and involvement in the Project. He also argues that because the evidence established only that he was motivated to join CMP and advise on the Project in order to uncover illegal or unethical conduct by plaintiffs, any allegation that his conduct was malicious or grossly negligent is defeated. However, there was sufficient evidence for the jury to rely on to find that Newman's conduct with respect to CMP and the Project merited his inclusion in the punitive damages award.

Defendants' motion for judgment as a matter of law under Rule 50(b) is DENIED.

II. MOTION FOR A NEW TRIAL

Defendants move for a new trial arguing, first, that the jury's verdict and the Judgment are contrary to the clear weight of evidence for the reasons raised in their Rule 50(b) motion. I reject those arguments for the reasons described above. The verdict is not contrary to the clear weight of the evidence, is not based upon false evidence, and a new trial is not necessary to prevent a miscarriage of justice.

Defendants also move for a new trial based on mostly unidentified but allegedly erroneous "evidentiary rulings," including my rulings excluding from trial unidentified footage that defendants contend would have shown "illegal conduct" by plaintiffs that defendants contend should have been admitted to corroborate defendants' statements regarding the purpose of the HCP. Prior to each day of trial, and often at breaks during trial days, I reviewed tens to hundreds of pages of defendants' proposed evidentiary submissions (deposition designations and counter-designations) as well as the videos defendants wished to play in court. I issued specific rulings each day on those matters. Defendants have chosen not to identify any of those specific evidentiary rulings in their post-trial challenge.[22] Defendants are

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[22] Defendants point only to Docket No. 878 (where Rhomberg objected to the application of the "Party-Witness Testimonial Non-Consultation Rule") and Docket No. 879, where Lopez responded to plaintiffs' objections to evidence Lopez intended to use during his testimony. Lopez argues that the proposed video evidence was relevant to both Lopez's motive to participate in the Project and to show recordings in crowded conference areas that undermined the recorded-individual's expectation of

***1030** not entitled to a new trial based on their generalized objections to my evidentiary rulings.

Finally, defendants move for a new trial based on allegedly excessive damages. But the punitive damages awarded based on the jury instructions (identifying the factors the jury had to consider in order to impose punitive damages under federal, Florida, and Maryland laws only) were supported, were not excessive, and were not imposed to punish defendants for harm to non-parties.

Defendants' motion for a new trial under Rule 59(a) is DENIED.

III. MOTION TO ALTER OR AMEND JUDGMENT

Finally, plaintiffs raise five arguments in favor of altering or amending the Judgment.[23]

A. PPRM nominal damages for trespass

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privacy. Some of the evidence was allowed – as was significant other evidence supporting defendants' beliefs and intent – and some was not based on Rule 403 grounds. Defendants do not identify which rulings were erroneous.

[23] Instead of arguing and fully supporting each specific objection to the Judgment within the 70 pages allowed for their post-trial brief, defendants instead attempt to incorporate prior arguments and refer to Dkt. No. 1033. I have reviewed, again, Dkt. No. 1033. However, I only address arguments defendants have supported (with statutory or case citations) and do not address unsupported arguments or arguments made only in passing (*i.e.*, defendants' assertion that the Judgment contains some unidentified "duplication" of damages and the passing objection to plaintiffs' "conditional" election of remedies).

Defendants argue first that PPRM is not entitled to nominal damages of $1 because the verdict form did not ask the jurors to award a specific amount of nominal damages. However, I determined that nominal damages were mandatory for the trespass at issue as a matter of law. Therefore, the issue was not submitted to the jury. The Judgment appropriately includes $1 in nominal damages to PPRM.

B. Election of remedies

Defendants argue that plaintiffs cannot recover both punitive damages and statutory damages for the same recording claims. However, as each relevant statute allows both punitive and statutory damages, that duplication is permissible. *See* Fla. Stat. Ann. §§ 934.10(1)(a)-(d) (may recover equitable relief; actual damages or $1,000 in statutory damages (whichever is higher); punitive damages; and reasonable attorney's fees and costs); Md. Code Ann., Cts. & Jud. Proc. §§ 10-410 (a)(1)-(3) (may recover actual damages or $1,000 in statutory damages (whichever is higher); punitive damages; and reasonable attorney's fees and costs); 18 U.S.C. §§ 2520(b)(1)-(3) (may recover equitable relief; "damages under subsection (c) and punitive damages in appropriate cases"; and reasonable attorney's fees and costs).

Defendants contend that plaintiffs cannot be awarded damages for the same recordings under both the federal and state recording laws, but that is permissible.[24] They argue that plaintiffs cannot be

[24] *Peake v. Chevron Shipping Co., Inc.*, C 00-4228 MHP, 2004 WL 1781008, at *3 (N.D. Cal. Aug. 10, 2004), the only case relied on by defendants, addresses duplicate recovery under tort and

***1031** awarded statutory damages "on top of the actual damages determined by the jury" that plaintiffs have elected to receive under RICO because the damages stem from the same conduct. However, the compensatory damages elected are RICO damages (and not under the contract or tort claims, unless the RICO damages are reversed on appeal). The statutory damages flow from the recording claims.

Finally, defendants argue that the California statutory damages for the recording claim are limited to $5,000 per lawsuit and not per recording. *See Franklin v. Ocwen Loan Servicing, LLC*, No. 18-CV-03333-SI, 2018 WL 5923450, at *7 (N.D. Cal. Nov. 13, 2018), *order clarified*, No. 18-CV-03333-SI, 2019 WL 452027 (N.D. Cal. Feb. 5, 2019) (limiting Cal. Penal Code § 632 damages to $5,000 per class member irrespective of the number of violations); *but see Ronquillo-Griffin v. TELUS Communications, Inc.*, No. 17-cv-129-JM (BLM), 2017 WL 2779329 (S.D. Cal. June 27, 2017) (allowing $5,000 statutory damages per violation). Here, I conclude – especially given that multiple recordings were taken by multiple defendants at different locations and at different times – that damages per violation are appropriate under Section 632.

C. Election between Statutory, Trebled, and Punitive Damages

Defendants argue that plaintiffs cannot seek punitive damages that are duplicative of the RICO trebled

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contract claims and not recovery under the laws of two separate jurisdictions (federal and state).

damages because the RICO trebled damages are themselves sufficiently punitive. But Ninth Circuit law is to the contrary. *See, e.g., Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997) ("a plaintiff may receive both treble damages under RICO and state law punitive damages for the same course of conduct."). Defendants' supposition that the jury "could have" assessed punitive damages on conduct that occurred in California – despite clear jury instructions directing the jury to consider punitive damages only for the federal, Florida and Maryland claims – is unfounded.

D. RICO

Defendants re-raise their argument, rejected above, that the damages were not sufficiently directly related to the RICO predicate acts. There is no need to consider this argument again.

E. Injunction

Finally, defendants challenge the narrow injunction I entered following further briefing based on the verdict and the UCL Findings of Fact and Conclusions of Law. As noted above, plaintiffs sought an overbroad and vague injunction that was not adequately cabined or tied to the specific illegal conduct the jury found that the defendants committed against specific plaintiffs. Nonetheless, defendants argue that the much narrower and specific injunction I entered is contrary to the evidence, based on the arguments I reject above. There are no grounds raised in this motion to justify altering the narrow and specific injunctive relief I ordered in the Judgment.

Defendants' motion to alter or amend the Judgment under Rule 59(e) is DENIED.

CONCLUSION

Defendants' motion for judgment as a matter of law, for a new trial, and for amendment or alteration of the Judgment is DENIED. Motions for attorney fees and costs are due fourteen days from the date of this Order. Defendants' obligation to post a bond to secure the Judgment on ***1032** appeal is due fourteen days from the date of this Order.

IT IS SO ORDERED.

All Citations

480 F.Supp.3d 1000

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; et al., Plaintiffs-Appellees,

v.

Troy NEWMAN, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Center for Medical Progress; et al., Defendants-Appellants,

and

Troy Newman; et al., Defendant,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Albin Rhomberg, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

Planned Parenthood Federation of America, Inc.; et al., Plaintiffs-Appellees,

v.

Sandra Susan Merritt, aka Susan Tennenbaum, Defendant-Appellant,

and

Center for Medical Progress; et al., Defendants,

National Abortion Federation, Intervenor.

No. 20-16068, No. 20-16070, No. 20-16773, No. 20-16820

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FILED March 1, 2023

Appeal from the United States District Court for the Northern District of California, William Horsley Orrick, District Judge, Presiding, D.C. No. 3:16-cv-00236-WHO

Before: MURGUIA, Chief Judge, GOULD, Circuit Judge, and FREUDENTHAL, District Judge.

The panel has unanimously voted to deny Appellants' petitions for panel rehearing (ECF Nos. 153, 154, 157). Chief Judge Murguia and Judge Gould voted to deny Appellants' petitions for rehearing en banc (ECF Nos. 153, 154, 156, 157), and Judge Freudenthal has so recommended. The petitions for en banc rehearing

have been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petitions for panel rehearing and petitions for rehearing en banc are DENIED.

APPENDIX E

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 1962 provides:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities

of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

3. 18 U.S.C. 1964 provides:

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of

endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.