**Case Nos. 20-16068, 20-16070,
20-16773, & 20-16820**

In the United States Court of Appeals
for the Ninth Circuit

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

v.

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

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:16-cv-236-WHO
The Honorable William H. Orrick

BRIEF OF AMICI CURIAE FREE SPEECH SCHOLARS AND ANIMAL-ADVOCACY ORGANIZATIONS IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are scholars of First Amendment and information law and animal-advocacy organizations. (*See* App'x A.) Amici have an interest in preserving robust constitutional protections for speech (and the precursors of speech) and for those who gather news and report on matters of public concern. Amici have a strong interest in ensuring that individuals remain able to use undercover methods to investigate and report on matters that might otherwise remain unavailable or inaccessible to the public, continuing an American tradition of important journalism conducted using undercover techniques.

SUMMARY OF THE ARGUMENT

This case implicates the continuing vitality of reporting through investigative deception, which is responsible for some the most noteworthy and impactful stories and exposés in American history.

I. Undercover newsgathering and reporting is central to law and policy debates on matters of public concern. From Mortimer Thompson's firsthand accounts of the slave trade leading up to the Civil War, to Nellie Bly's graphic translation of her time in Blackwell's Island Insane Asylum, to Upton Sinclair's exposé of the meat-packing industry,

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[1] All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

investigative reporting is responsible for bringing to public view some of the most pressing matters in the last 150 years.

II. The deception-based techniques used by journalists, activists, and whistleblowers are absolutely necessary to access facts hidden from public view and thereby enable accurate stories. Examples include the use of investigative deception to reveal animal abuse and food-safety issues in factory farms, living conditions in welfare hotels, working conditions in New York sweatshops, working conditions of low-wage retail jobs in the United States, the availability of drugs in prisons, and deplorable conditions at a military hospital. The reporting of these stories, made possible by undercover investigations, was integral to public discourse and the resulting social and legislative change.

III. The district court's decision here raises several pressing First Amendment issues. The First Amendment protects rights essential to permit the individual citizen to effectively participate in and contribute to our republican system of self-government, and to render public debate well informed—capable of advancing knowledge, discovering truth, and informing rational decisions. The district court's decisions on appeal threaten two significant aspects of First Amendment protections that are vital to newsgathering and reporting: *first*, undercover investigative reporting on matters of public concern pursued through investigative deception is protected speech under the First Amendment;

and *second*, First Amendment limits on recoverable damages for non-defamation civil claims arising out of investigative reporting must be respected to avoid chilling undercover newsgathering and the investigative reporting reliant upon it.

A. The use of deception for undercover investigative reporting on matters of public concern is constitutionally protected speech. The U.S. Supreme Court has rejected the view that there is an exception to the First Amendment for "false statements." But the district court in this case ignored free speech principles and approved a near categorical common law right to punish persons who engage in deception-based investigations. If such a view stands, civil claimants leveraging misapplied generally applicable laws through litigation will accomplish exactly what this Court has said cannot be done through industry-specific legislation like agricultural-gag (ag-gag) statutes: namely, to quash investigative reporting speaking on matters of the highest public concern. This court should guard against *any* erosion of the protections afforded to investigative deceptions by the Constitution. Indeed, the decisions of this Court safeguarding free speech against targeted attacks, *see Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 (9th Cir. 2018), will be gutted if investigators using deception to uncover facts of public significance can be subjected to potentially bankrupting civil claims simply for engaging in such deception.

B. The First Amendment bars publication and reputation damages for non-defamation claims. But this is the very type of harm for which the district court allowed plaintiffs to recover by permitting plaintiffs to pursue their costs for increased security measures. *First,* such costs serve as a stand-in for direct publication damages and could severely limit undercover reporting as a result. *Second*, to the extent, as the district court acknowledged, added security costs stem from public anger over the revealed conduct, these alleged harms are inseparable from the public's response to the published information (underscoring that this is a matter of public concern). *Third*, allowing such claims for added security measures will provide future targets a roadmap for investigative subjects to deter undercover reporting. Thus, the but-for motivation for the security *is* the constitutionally protected conduct. At bottom, if investigative reporting is to have a similar role in exposing fraud, abuse, malfeasance, and criminality, or facilitating dialogue and debate on matters of great public concern as it has for over a century, First Amendment limits on recoverable damages for non-defamation civil claims must be respected.

ARGUMENT

I. Undercover Newsgathering and Reporting Is Central to Democratic Accountability in the United States.

Since the Antebellum period, journalists in the United States have engaged in undercover or clandestine newsgathering through omission or misrepresentation of their true purposes and identities. This undercover newsgathering of firsthand facts and observations has resulted in important and sometimes history-making reporting. For example, abolitionist activists and Northern journalists reported on conditions of Southern slaves by concealing their purpose in observing the slaves' circumstances.[2]

One such undercover journalist documented—in horrific detail—the sale of 436 black men, women, children, and infants at a slave auction near Savannah, Georgia, in 1859, for a series in the *New York Tribune*.[3] That undercover reporter's true name was Mortimer Thompson. He wrote under the pen name "Q.K. Philader Doesticks" and described for his readers why he needed to conceal his identity and the means by which he did so:

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[2] *See generally Reporting Slavery – The New York Tribune*, Undercover Reporting, https://bit.ly/3q5PR55.

[3] *American Civilization Illustrated: A Great Slave Auction*, New York Tribune (Mar. 5, 1859), at 5, https://bit.ly/2NHC0nT.

> Your correspondent was present at an early date, but as he easily anticipated the touching welcome that would, at such time, be officiously extended to a representative of *The Tribune* . . . and not desiring to be the recipient of a public demonstration from the enthusiastic Southern populations . . . he did not placard his mission and claim his honors. Although he kept his business in the background, he made himself a prominent figure in the picture, and, wherever there was anything going on, there was he in the midst. At the sale might have been seen a busy individual, armed with pencil and catalogue, doing his utmost to keep up all the appearance of a knowing buyer . . . . This gentleman was much condoled with by some sympathizing persons, when the particularly fine lot on which he had fixed his critical eye was sold and lost to him forever, because he happened to be down stairs at lunch just at the interesting moment.[4]

Months later, another journalist went undercover to report on the execution of John Brown, the prominent abolitionist who advocated for armed insurrection to free slaves and who was the first person in the history of the United States to be executed for treason.[5] Henry Olcott, the *New York Tribune* journalist who volunteered, posed as a member of the Petersburg Grays, a regiment sent to Charles Town, West Virginia, to guard Brown's body.[6]

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[4] *See American Civilization Illustrated*, *supra* note 3.

[5] *See The Execution of John Brown*, New York Tribune (Dec. 3, 1859), at 7, https://bit.ly/3pI9bVN.

[6] *John Brown's Hanging – Henry S. Olcott – New York Tribune*, Undercover Reporting, https://bit.ly/2ZKJ06m.

Since Reconstruction, journalists have used similar methods to report on a number of industries. In the late 1800s, a journalist named Elizabeth Jane Cochran, working under the pen name Nellie Bly, routinely used false identities to gain access to institutions and businesses engaged in unlawful activity.[7] Her most famous exposé resulted from her posing as a mentally ill person to gain access to Blackwell's Island Insane Asylum for women, where she uncovered and later wrote about abusive and violent staff, fire hazards, extremely cold temperatures, unsanitary practices, terrible food, and the treatment of foreign-born women who were not mentally ill but had been committed because others, including the asylum's staff, could not understand them and assumed them to require treatment.[8]

At the turn of the 20th century, written eyewitness accounts of the meat-packing industry, including Upton Sinclair's novel *The Jungle* (1906), triggered a nationwide debate that led to a regulatory regime to protect public health and ensure worker safety.[9] Sinclair spent weeks undercover in Chicago's meatpacking plants to research the novel,

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[7] *See generally* Brooke Kroeger, Nellie Bly: Daredevil, Reporter, Feminist (1994).

[8] *See generally* Nellie Bly, Ten Days in a Mad-House (1887).

[9] *See, e.g.*, David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic (Jan. 24, 2016), https://bit.ly/3pHlzW7/; Karen Olsson, *Welcome to The Jungle*, Slate (July 10, 2006), https://bit.ly/3um0Mur.

which, by exposing the industry's harsh, inhumane, and unsanitary working conditions, produced an unprecedented response.[10] Indeed, Congress enacted the Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399f), following Sinclair's work. Both laws recognized the strong public interest in the safety of the Nation's food supply.

In later decades, journalists engaged in undercover reporting to tell all manner of stories. For example, in 1978, the *Chicago Sun-Times* published a series of blockbuster stories that exposed corruption by city officials based on reporting by undercover journalists who surreptitiously operated a popular tavern—that is to say, they misrepresented their identities as bartenders.[11] In 2016, *Mother Jones* published an account of paramilitary militias on the U.S. border by a reporter who joined a militia undercover.[12]

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[10] *See* Brooke Kroeger, Undercover Reporting: The Truth About Deception 83–91 (2012).

[11] Pamela Zekman & Zay N. Smith, *Our 'Bar' Uncovers Payoffs, Tax Gyps,* Chicago Sun-Times (Jan. 8, 1978), https://bit.ly/2ZFlPKB.

[12] Shane Bauer, *I Went Undercover With a Border Militia. Here's What I Saw.*, Mother Jones (Nov/Dec 2016), https://bit.ly/3bmkwpi.

In recent years, journalists and researchers have continued to use undercover methods to report on conditions at animal production facilities, taking advantage of new recording technologies to revive old debates. In California, for example, an investigator working with the Humane Society of the United States obtained video of inhumane handling of cattle that could no longer walk.[13] The video has been viewed millions of times and has sparked thousands of online comments,[14] and also led to the largest recall of ground beef in the history of the United States.[15]

At bottom, whatever the subject of reporters' interests, there can be no question that undercover newsgathering has been and remains central to this country's law and policy debates on matters of public concern since at least the mid-1800s.

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[13] The Humane Society of the United States, *Rampant Animal Cruelty at California Slaughter Plant* (Jan. 30, 2008), https://bit.ly/3aG7fZG.

[14] The Humane Society of the United States, *Slaughterhouse Investigation: Cruel and Unhealthy Practices*, YouTube (Jan. 30, 2008), https://www.youtube.com/watch?v=zhlhSQ5z4V4.

[15] Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, The New York Times (Feb. 18, 2008), https://nyti.ms/2ZIEUvo.

II. Deceptive Techniques Are Necessarily Employed by Journalists and Others Engaged in Undercover Newsgathering.

Journalists engaged in this undercover newsgathering routinely and necessarily engage in deception to access facts hidden from public view and to enable them to tell an accurate story. Building on the legacy of reporters like Mortimer Thompson and Nellie Bly, journalists engaging in investigative deception have exposed poor medical care of wounded veterans, inhumane living conditions in welfare hotels, racial animosity and discrimination at industrial facilities, and mistreatment of animals intended to be kept as pets or raised for food.

In 2007, *The Washington Post* published an exposé of conditions at Walter Reed National Military Medical Center.[16] To accomplish their reporting over four months, the reporters Dana Reed and Anne Hull, and their photographer Michel du Cille, posed as regular visitors and sometimes trespassed into patient-only areas with recording equipment.[17] This investigative series revealed "signs of neglect everywhere" at Walter Reed Medical Center: "mouse droppings, belly-up cockroaches, stained carpets, cheap mattresses," and a general

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[16] Dana Reed & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, The Washington Post (February 18, 2007), https://wapo.st/2NNRAhE.

[17] Walter Kurtz, *The Post Wins 6 Pulitzer Prizes*, The Washington Post (April 8, 2008), https://wapo.st/3sifCRc.

indifference to the soldiers under care at the facility.[18] The series resulted in the firing of the Secretary of the Army and officials responsible for Walter Reed.[19] As a result of the series, the *Post* won the Pulitzer Prize for Public Service in 2008.[20] The series would not have been possible if the reporters did not pretend to be persons they were not and did not use investigative deception to gain access to areas of Walter Reed where they were not permitted to be.

These reporters were hardly unique in their use of deception to enable undercover newsgathering: in just the two decades preceding the Walter Reed exposé, reporters engaged in deception to reveal living conditions in welfare hotels,[21] working conditions in New York sweatshops,[22] working conditions of low-wage retail jobs in the United States,[23] and the availability of drugs in prisons.[24]

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[18] Reed & Hull, *supra* note 16.

[19] Kurtz, *supra* note 17.

[20] *Id.*

[21] Philip Shenon, *Welfare Hotel Families: Life on the Edge*, New York Times (Aug. 31, 1983), https://nyti.ms/3ul4mFu.

[22] Jane H. Li, *65 Cents an Hour—A Special Report: Week in Sweatshop Reveals Grim Conspiracy of the Poor*, New York Times (Mar. 12, 1995), https://nyti.ms/3sfw9Ff.

[23] *See generally* Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America (2001).

Reporters and investigators partnering with activist organizations have done similarly. For example, an investigator for amicus PETA obtained employment at a Hormel Foods supplier in Iowa where he documented and exposed misconduct and abuse.[25] The supplier's employees were recorded beating pigs with metal rods, sticking clothespins into pigs' eyes, and kicking a young pig in the face, abdomen, and genitals to make her move while telling the investigator, "You gotta beat on the b[**]ch. Make her cry."[26] The investigation resulted in 22 charges of livestock neglect and abuse against six of the facility's former employees, all of whom admitted guilt.[27]

Similarly, an investigator with amicus MFA worked for a dairy in Idaho and recorded workers deliberately beating, kicking, and punching dairy cows.[28] This investigation led the Idaho Dairyman's Association to

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[24] Athelia Knight, *Drug Smuggling and Hot Goods: A Ride on Prison Visitors' Buses*, The Washington Post (Mar. 4, 1984), https://wapo.st/3kau2Qd.

[25] *Undercover Video Shows Workers Abusing Pigs*, NBC News (Sept. 17, 2008), https://nbcnews.to/380H2TU.

[26] *Mother Pigs and Piglets Abused by Hormel Supplier*, People for the Ethical Treatment of Animals, https://bit.ly/3uJPEry.

[27] *22 Charges Filed Based on PETA Investigation at Hormel Supplier*, People for the Ethical Treatment of Animals (Oct. 14, 2013), https://bit.ly/2PmkczA.

[28] *Video Shows Alleged Criminal Abuse of Bettencourt Dairy Cows in Idaho*, CBS News (Oct. 11, 2012), https://cbsn.ws/2NRbQ1V.

draft and urge the adoption of a statute criminalizing this very type of investigation.[29] *See* Id. Rev. Stat. § 18-7042. This statute was partially invalidated by this Court, because it would work an unconstitutional infringement on the ability of reporters to engage in deceptive practices necessary to undercover newsgathering and reporting. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1199 (9th Cir. 2018).

This Court has also rejected a tort lawsuit in response to an undercover investigation on issues important to women's health. The undercover reporting in *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, concerned laboratories that analyze pap smears and highlighted the pressures laboratories place on technicians to process slides quickly, which frequently resulted in testing errors. 306 F.3d 806, 810 (9th Cir. 2002). The Court affirmed the dismissal of claims for intrusion upon seclusion, trespass, tortious interference with contract, and punitive damages. *Id.* at 809.

These examples of undercover newsgathering facilitated by investigative deception illustrate that such deception is integral and necessary to the promotion of public discussion of the ills and unsavory portions of society—matters of profound public concern.

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[29] *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom. Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

III. The Decisions on Appeal Are Entangled in Pressing and Timely First Amendment Issues.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. The protection of this fundamental liberty "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)). In that way, the First Amendment seeks "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), and to render public debate well informed—capable of advancing knowledge, discovering truth, and informing rational decisions, *see, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Bridges v. California*, 314 U.S. 252, 277–78 (1941).

This case implicates two significant aspects of First Amendment protections vital to newsgathering: *first,* the First Amendment protects "false statements" such that undercover investigative reporting pursued through investigative deception (either by omissions or other misrepresentations) to gain access *is* protected speech; and *second*, the First Amendment limits on recoverable damages for non-defamation

civil claims arising out of investigative reporting must be respected or else excessive civil damages awards and injunctions for reputation- or publication-type harm will chill undercover newsgathering and the investigative reporting reliant upon it.

A. The use of deception for undercover investigative reporting is constitutionally protected speech.

It is beyond dispute that famous undercover newsgathering and reporting[30] has often been possible only through the use of deception to

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[30] This brief sometimes refers to newsgathering and sometimes refers to investigative reporting. While there is a distinction between these activities, it is not a constitutionally significant one. Newsgathering is protected by the First Amendment 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). The First Amendment thus protects "the right of the public to receive suitable *access* to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added). Access ensures people have the information needed "to decide for [themselves] the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Critically, First Amendment protections "do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story." *Obsidian Fin. Grp. v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014); *cf. Citizens United v. FEC*, 558 U.S. 310, 352 (2010) ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.").

gain access to knowledge otherwise effectively hidden from public view. That is, deception, on some level, is oftentimes necessary to facilitate or produce the truth.[31] But that compels a question: When is investigative deception protected speech?[32] The district court in this case ignored free speech principles and recognized a near categorical common law right to punish persons who engage in deception-based investigations. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 677 (N.D. Cal. 2019) (misreading Ninth Circuit precedent recognizing the importance of deception in undercover investigations by characterizing it as limited to "overbroad criminal statute[s]," and applying a common law definition of trespass without regard to critical First Amendment protections).

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[31] Although valuable news stories are obtained through undercover reporting techniques, media ethicists urge journalists to consider other newsgathering options and to use deception only when "traditional, open methods will not yield information vital to the public." Society of Professional Journalists, Code of Ethics (2014) (SPF Code), https://bit.ly/3e3xQ4L; *see also* Bill Kovach & Tom Rosenstiel, The Elements of Journalism 120–21 (3d ed. 2014); Greg Marx, *The Ethics of Undercover Journalism*, Colum. Journalism Rev. (Feb. 4, 2010), https://bit.ly/306kzAi. The SPJ Code is an aspirational guide and "is not, nor can it be under the First Amendment, legally enforceable." SPF Code (footer). Ethical decisions necessarily rest with media organizations themselves, not with litigants or judges.

[32] *See generally* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435 (2015).

In 2012, the U.S. Supreme Court in *United States v. Alvarez*, rejected the view that there is a "general exception to the First Amendment for false statements." 567 U.S. 709, 717 (2012) (plurality op.); *id.* at 729 (Breyer, J., concurring). *Alvarez* involved the constitutionality of the Stolen Valor Act and, specifically, whether to invalidate the conviction of a person who lied about having been awarded the Congressional Medal of Honor. *Id.* at 713. To be sure, the false statement in *Alvarez* was valueless to society—"a pathetic attempt to gain respect that eluded [Alvarez]," *id.* at 714—and the government alleged a variety of harms to the military community when its honors are "dilut[ed]" by those who falsely claim to hold them, *id.* at 724–25.

Despite this, six justices recognized that even a worthless, truth-impeding lie is protected by the First Amendment unless it causes *legally cognizable harm* to the deceived party. *Id.* at 722; *id.* at 729 (Breyer, J., concurring). Both the plurality and concurring decisions shared the view that punishing "falsity alone" is impermissible; rather, the government may regulate false speech only when there is some "intent to injure," or more precisely, some intent to cause a "legally cognizable harm" protected by the law. *Id.* at 719. And, as the plurality made plain, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725. Because there was an insufficient link between the false statements about military honors

and the dilution of the public's perception of such honors, the Court rejected the government's claim of harm. *Id.*

Moreover, *Alvarez* leaves no doubt that lies do not become non-speech or unprotected simply because they result in changed behavior or different outcomes based on reasonable reliance on the deception. Lies frequently cause listeners to act differently, or change their minds, but this is not a reason to deprive the speech of protection. Indeed, even when the stakes are highest, and the integrity of a statewide election is at stake, "fake news" or deceptive political speech will often be protected. *See id* at 738 (Breyer, J., concurring) (noting in the political context a "false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous"). So it is after *Alvarez* false statements enjoy First Amendment protection unless they cause direct, legally cognizable harm.

As might be expected given this country's tradition of undercover newsgathering, deception used by journalists, activists, and whistleblowers to gain access to private property—e.g., affirmatively misrepresenting or omitting political, organizational, or journalistic affiliations, or affirmatively understating or omitting certain educational backgrounds—rarely causes cognizable legal injury where it is done in the service of investigative reporting. Investigative reporting

exposes perceived societal ills, which certainly may result in negative economic consequences after bad publicity for those engaged in objectionable conduct. But this harm is traceable to the truthful information that is published and the advocacy that is often enabled (or emboldened) by such publication, not the use of deception to gain access. That is, harm resulting from the exposure of the investigative subject's own conduct is not a legally cognizable harm under *Alvarez*. Indeed, attributing harm from the publication of the content of an investigation could perversely allow a newsgatherer's investigation to be punished at a level corresponding to its public significance. If the undercover investigation exposes nothing of public interest (or indeed conduct perceived as salubrious to or consistent with the good of the public at large), damages would be minimal; but, an investigation that exposes fraud, abuse, malfeasance, or criminality, could expose the reporter to ruinous damages. This cannot be the rule.

Thus, the district court erred when it found that, as a matter of law, affirmative deceptions deployed by investigators seeking to gain access to matters of public concern are categorically fraudulent and amenable to tort claims such as trespass. *Planned Parenthood Fed'n of Am.*, 402 F. Supp. 3d at 677 (describing deception used to secure entry broadly as a form of "fraud . . . used to gain access"). The district court would read the First Amendment so narrowly as to provide no

protection to an undercover newsgatherer who hoped to stir "public outrage" or "to assist defendants' fundraising and ultimate goal to put plaintiffs out of business." *Id.* at 684.

But the First Amendment requires more. Mere investigative deception, without more, does not constitute the type of legally cognizable harm contemplated by *Alvarez*. "The liar who causes no trespass-type harm—the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has occurred)." *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1203 (D. Utah 2017). Likewise, investigative deception does not vitiate consent in the trespass context such that deception-based access to private property necessarily infringes on property interests in a way that could produce a legally cognizable harm. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1351–52 (7th Cir. 1995) (Posner, J.); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) ("In a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass.").[33]

[33] That is not to say newsgatherers who use investigative deceptions to access private property and intentionally cause specific

Consistent with this country's longstanding tradition and the value of investigative deception, courts should acknowledge this use of deception and affirm its protection under the First Amendment. The Court reasoned in *Alvarez* that harm-causing lies are not protected by the First Amendment because lies generally distort rather than facilitate the search for truth. But lies used to obtain and disclose information of public concern that would otherwise be hidden, as occurs with investigative deception—high-value lies—do not fit this rubric and warrant rigorous First Amendment protection. Investigative deception facilitates rather than impedes discourse and transparency on matters of public concern. It would be perverse to protect one's valueless lie about winning the Medal of Honor, while leaving unprotected the deceptions that have defined and made possible this country's tradition of investigative journalism, which has spurred social change and accountability for over 150 years. Let there be no doubt, if investigative deceptions are held unlawful, it could cripple undercover reporting.

This warning is most acute in the context of ag-gag statutes. For over a decade, commercial food producers have lobbied states to criminalize and create private rights of action for deceptive access to slaughterhouses, factory farms, and other industrial farming operations

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physical harm or *tangible damage* to the property, or persons, do not cause legally cognizable harm. *See Wasden*, 878 F.3d at 1199.

in response to animal-advocacy organizations videoing and publishing the conduct of persons working in these facilities. These laws are an overt attempt to criminalize investigative deception to the benefit of an industry. Fortunately, courts have been steadfast in invalidating many of the laws on First Amendment grounds. *See, e.g.*, *Wasden*, 878 F.3d at 1184 (Idaho); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547 (M.D.N.C. 2020) (North Carolina), *appeal filed*, No. 20-1807; *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974 (D. Kan. 2020) (Kansas), *appeal filed*, No. 20-3082 (10th Cir.); *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) (Iowa), *appeal filed*, No. 19-1364 (8th Cir.); *Herbert*, 263 F. Supp. 3d at 1193 (Utah).

But ag-gag laws are only one example of the use of the law to inhibit newsgathering. And the decisions of this Court safeguarding free speech against targeted attacks by legislatures will become hollow, Pyrrhic victories if any investigator who uses deception to uncover facts of public significance can be subjected to potentially bankrupting tort claims for engaging in deception-based investigations. If civil claimants can leverage misapplied generally applicable laws can accomplish the same objective—to chill investigative reporting—journalists, activists, and whistleblowers speaking on matters of the highest public concern are no better off. *Cf. Snyder v. Phelps*, 562 U.S. 443, 457 (2011) (reversing $10-plus million jury verdict and stating "[i]t was what

Westboro said that exposed it to tort damages" under generally applicable laws). These are key voices in the public-policy debate, which often close the enforcement gap between regulators and Congress.

Courts should guard against *any* erosion of the protections afforded to investigative deceptions by the Constitution whether they come by custom statutes or bespoke litigation.

B. The First Amendment limits the types of damages that are recoverable for non-defamation claims.

Even if the district court's sweeping conclusion that seemingly all deception-based undercover investigations can be actionable as trespass is correct (and it is not), the damages theories endorsed by the district court run afoul of the First Amendment.

Broadly speaking, private investigative subjects displeased with the public airing of their secrets and conduct have two forms of recourse in court. They can sue under defamation theories, which, to some degree, require proof of falsity and a level of fault on the part of the speaker.[34] Or, they can sue under non-defamation theories and avoid questions of truthfulness and traditional defamation defenses. *See, e.g.*, *Food Lion*, 194 F.3d at 522 ("Food Lion . . . understood that if it sued

[34] For example, defamation liability may be possible for video footage if the footage is edited so as to be intentionally misleading. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1143 (10th Cir. 2014).

ABC for defamation it would have to prove that the *PrimeTime Live* broadcast contained a false statement of fact that was made with 'actual malice' . . . . It is clear that Food Lion was not prepared to offer proof meeting the *New York Times* standard."); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 643 (N.D. Cal. 2019) (noting plaintiffs' decision to bypass defamation claim). This choice, however, comes at a cost: civil claimants may *not* recover for defamation-type damages (i.e., publication and reputation damages) through non-defamation theories. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (rejecting attempt to seek damages under tort theory to avoid First Amendment limitations on defamation claims).

This latter point is well-accepted; so much so that plaintiffs in this case disclaimed any reputational damages. *See Planned Parenthood Fed'n of Am.*, 402 F. Supp. 3d at 642 n.13 (quoting plaintiffs disclaiming "reputational damages such as loss of goodwill or loss of revenue" and "expenses to protect [Planned Parenthood's] brand and reputation"). And the district court confirmed the First Amendment bars plaintiffs from recovering "publication or reputational damages" here. *Id.* at 644. In doing so, the district court acknowledged the "inconsistent analyses of the line between impermissible reputational or publication damages and allowable economic or pecuniary damages," *id.*, but nonetheless allowed two specific categories of damages totaling more than $468,000:

- *Personal security damages*: heightened personal security for certain staff who were the subjects of the released videos.
- *Access-security improvement damages*: improvements to conference and event security, including hiring consulting companies to advise on security, conference ID badges and ID scanners, and vetting attendees through LexisNexis.

Id. at 645.[35] In the court's view, these damages were not properly considered reputational or publication damages; rather, the damages resulted "from the *direct* acts of defendants"—namely, "their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff." *Id.* at 644.

For support, the district court looked to the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). There, the Court cleared the way for a political campaign aide to recover under a promissory estoppel claim against a newspaper after the paper (truthfully) published his name as an informant, despite agreeing to confidentiality. *Id.* at 665–66, 670. Cohen did not seek "damages for injury to his reputation or his state of mind"—he knew he could not satisfy "the strict requirements for establishing a libel or defamation claim," because the disclosed information was true—but instead "sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity." *Id.* at 671. In allowing the claim, the

[35] The court also allowed nominal and statutory damages. *Id.*

Court distinguished *Hustler Magazine*, where it rejected a public figure's attempt to recover emotional harm (reputational damages) under the tort of intentional infliction of emotional distress. *Id.*

The district court's articulation of recoverable damages in this case puts a fine point on the need for definable standards to identify the types of damages available to civil claimants who elect to avoid the constitutional—and common law—prerequisites for defamation claims. That is, a need to specifically distinguish between damages caused by constitutionally protected speech (i.e., exposing facts from an undercover investigation through publication) and damages caused by something other than protected speech.

On this point, injuries borne of publication on issues of public concern, and the concomitant public discourse that results, are not legally cognizable because they cannot fairly be traced exclusively to the investigative deceptions that created the opportunity for the exposure, but rather to the conduct exposed by those deceptions. Thus, the investigative deception is not the legal or proximate cause of the injuries. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.") (citing W. Keeton, et al., Prosser and Keeton on the Law of Torts § 42 (5th ed. 1984)); *see also* Nathan Siegel, *Publication Damages in Newsgathering*

Cases, 19 Comm. Law., Summer 2001, at 11, 15 (2001) (noting "proximate cause is a particularly suitable means for resolving claims for publication damages"). The First Amendment cannot countenance a system of law in which exposure of putative misdeeds—even by deception—is judged to be the actionable cause of injuries to the bad actor, rather than the potential misdeeds themselves.

Any other rule would leave investigative reporters prostrate before the financially and politically powerful. Indeed, if left standing, the district court's various decisions on recoverable damages will be a roadmap for investigative subjects to sue journalists, activists, and whistleblowers to chill their undercover investigative work. It requires little imagination to duplicate the successful prosecution strategy in this case. Going forward, in response to damning undercover reporting and to pad large awards investigative subjects may

- hire security and employment consultants to overhaul access-security;
- hire private investigators to vet employees (both current and prospective) and third-party vendors;
- implement other access-control measures, such as ID systems, surveillance, etc.; and
- hire private security for key company executives and the named wrongdoers.

These heightened security measures are a direct response to the reporting—that is, the but-for motivation for security *is* the reporting.

Absent the subject's fear that more people will engage in deception in order to report, the security would not be an issue.

Most concerning, the additional costs to inoculate these persons against public scrutiny, inextricably tied to reputational or publication harms, will actually be recoverable in lawsuits against the newsgatherers who exposed the bad behavior. *See Planned Parenthood Fed'n of Am.*, 402 F. Supp. 3d at 644; *see also id.* at 685 (holding that, although "threats from third parties in response to the videos . . . were part of the motivation for paying for additional personal security measures," these expenses nevertheless also "are tied directly to defendants' conduct and plaintiffs' reactions to discovering it"). This "exception" to the Supreme Court's First Amendment doctrine threatens to swallow rules necessary for undercover reporting.

Again, this case serves as the blueprint. Plaintiffs prosecuted 15 claims against defendants—from RICO and federal wiretapping claims, to trespass and fraud claims—in a case that has spanned over five years (and counting), generated over 1150 docket entries, and resulted in a five-week jury trial. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-00236-WHO, 2020 WL 2065700, at **23–28 (N.D. Cal. Apr. 29, 2020). Bringing a case of this magnitude and scope demands legions of attorneys. And that's certainly true here. "More than 130 attorneys worked on the case for plaintiffs and 22 of

them billed more than 250 hours each." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-00236-WHO, 2020 WL 7626410, at *1 (N.D. Cal. Dec. 22, 2020). All told, plaintiffs sought recovery for ***21,200.25 hours of time*** and were awarded nearly ***$13.5 million in attorneys' fees and costs*** in addition to damages.

Amici cast no fault on plaintiffs for their zeal in prosecuting the case. While it will take little legal imagination to imitate their strategy if the district court's judgment is affirmed, it took real ingenuity to devise it. But the point remains: few independent investigative reporters and advocacy organizations (those most often engaged in undercover work) could withstand such an assault. Even relatively well-heeled media outlets skilled in investigative reporting are likely to consider whether undercover work in the Ninth Circuit is worth the risk. To be clear, organizations considering an undercover investigation now face the specter of potentially debilitating liability because they engaged in an investigation on a matter of public concern.

In the end, if investigative reporting is to have any role in exposing fraud, abuse, malfeasance, and criminality, or facilitating dialogue and debate on matters of great public concern as it has for over a century, First Amendment limits on recoverable damages for non-defamation civil claims must be vigorously enforced.

CONCLUSION

The Court should affirm that undercover investigative reporting on matters of public concern pursued through investigative deception is constitutionally protected speech, and it should strictly enforce the First Amendment limits on recoverable damages for non-defamation civil claims arising out of investigative reporting.

Dated: March 5, 2020

Respectfully submitted,

s/Christopher O. Murray

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Dated: March 5, 2021.

s/Christopher O. Murray
Christopher O. Murray

CERTIFICATE OF SERVICE

I certify that on March 5, 2021, I electronically filed Brief of Amici Curiae Free Speech Scholars and Animal-Advocacy Organizations in Support of Neither Party with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: March 5, 2021.

s/Christopher O. Murray
Christopher O. Murray

Appendix A – List of Amici

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Animal-Advocacy Organizations

Animal Outlook is a tax-exempt animal-advocacy organization based in Washington, DC. Animal Outlook's mission is to change the world for animals by deploying an arsenal of strategies to challenge the status quo of animal agribusiness. Animal Outlook works to expose the truth, deliver justice, revolutionize food systems, and empower others to stand up for animals by leaving them off our plates.

People for the Ethical Treatment of Animals (PETA) is a tax-exempt animal-protection charity. Since its founding in 1980, PETA has worked to establish and protect the rights of all animals. With more than 6.5 million members and supporters, PETA is the largest animal-rights organization in the world. PETA is guided by the principles that animals are not ours to eat, wear, experiment on, or use for entertainment.

Mercy For Animals, Inc. (MFA) is a tax-exempt animal-protection charity, founded in 1999, whose mission is to construct a compassionate food system by reducing suffering and ending the exploitation of animals for food. Through public engagement and education, undercover investigations, corporate campaigns and policy work, MFA works to create a world where animals are respected, protected, and free to pursue their own interests.

The Government Accountability Project (GAP) is nonpartisan, public interest group with the mission to promote corporate and government accountability by protecting whistleblowers, advancing occupational free speech, and empowering citizen activists. Founded in 1977, GAP is the nation's leading whistleblower protection and advocacy organization. In addition to focusing on whistleblower support, GAP leads campaigns to enact whistleblower protection laws both domestically and internationally.