Consolidated Appeals Nos. 20-16068,
20-16070, 20-16773, and 20-16820

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

SANDRA SUSAN MERRITT,
Defendant-Appellant.
(No. 20-16820)

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

REPLY BRIEF OF APPELLANT SANDRA SUSAN MERRITT

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INTRODUCTION[1]

Planned Parenthood's attempt to defend both the verdict and the district court's prejudicial errors fails against the decisive facts and law presented in Merritt's opening brief. The jury returned an unprecedented verdict against citizen journalists, including an enormous award of punitive damages, punishing Defendants for using tried-and-true undercover investigative techniques to expose misconduct by a politically powerful organization. Nothing in Planned Parenthood's brief justifies this result. The district court's rulings and the verdict on Planned Parenthood's recording claims are unsupported by case law in this Circuit or in any other federal appellate court. Controlling precedent and fundamental principles of fairness demand reversal.

[1] Merritt joins the other Defendant-Appellants' reply briefs and writes separately here to address the parts of Planned Parenthood's brief directed to her Opening Brief.

Merritt's Opening Brief is abbreviated as "MB"; Planned Parenthood's Brief as "PPB."

ARGUMENT

I. Defendants are Entitled to Judgment on the Recording Claims.

A. Defendants are not liable under the Federal Wiretap Act because Defendants' undercover investigative project was not conducted for a "criminal or tortious" purpose.

The Wiretap Act allows one party to a conversation to record, unless her purpose in doing so is to commit a crime or a tort. *See* 18 U.S.C. § 2511(2)(d). As in *Sussman v. American Broadcasting Companies, Inc.*, Planned Parenthood's Wiretap Act claim turns on whether Defendants' recording was "done for the purpose of facilitating some further impropriety, such as blackmail." 86 F.3d 1200, 1202 (9th Cir. 1999). The evidence adduced at trial demonstrated that Defendants' purpose was *not* to commit a crime or tort but to gather evidence of misconduct in the fetal tissue transfer industry, a wholly lawful purpose. (MB:17–18 & n.8; TRX:24, 67.)

Planned Parenthood dismisses this undisputed evidence of the recordings' purpose with the red herring that the statute "contains no blanket exemption for journalists" and that a recording can have both a lawful and a tortious or criminal purpose. Planned Parenthood advances the convoluted theory that the purpose of Defendants' hidden camera

recording investigation was "*harming* Plaintiffs by conducting an enterprise through a pattern of racketeering activity." (PPB:145 (emphasis added).) The linchpin of Plaintiffs' argument—Defendants' alleged intent to "harm" Planned Parenthood—easily fails.

Indeed, the only case supporting Plaintiffs' theory of "harming" as an unlawful purpose (*Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir. 1971)) predates the 1986 amendment to the Wiretap Act. Congress removed language that allowed for liability where the recording was made for the purpose of committing a crime, tort or "other injurious act," precisely because it was a threat to journalists. *Boddie v. Am. Broad. Co.*, 881 F.2d 267, 269 (6th Cir. 1989) (noting that the amendment's purpose was "to eliminate an offended interviewee's 'right to bring a suit' where no tort or crime is committed by the journalist").

Without "intent to harm" as a prop, Plaintiffs' argument falls apart. Plaintiffs cannot explain how the production of three IDs in 2013 and early 2014 could be the "criminal or tortious purpose" behind recordings *subsequently* made in 2014 and 2015, other than to try to roll them up in

an alleged RICO conspiracy to "harm" Plaintiffs.[2] (*See* PPB:144–147 (eight references to "harm")).

Plaintiffs use the term "harm" equivocally. They employ this syllogism: "[T]he whole goal of Defendants' RICO enterprise was to harm Plaintiffs; harm is an essential element of Plaintiffs' RICO claims; and creating the recordings played an integral role in causing that harm." Ergo, Plaintiffs contend, "violating civil RICO was Defendants' intended use for the videos." (PPB:147).

But the alleged "harm" that Defendants intended to cause Plaintiffs (injury to reputation, criminal prosecutions, loss of public funding) is entirely distinct from the "harm" that undergirds Planned Parenthood's RICO claim (costs for personal security and preventing future infiltrations into conferences). Were Plaintiffs relying on the reputational harms Defendants intended to inflict on Planned Parenthood to sustain their RICO claims, they would have lost their RICO claims at the pleading stage.

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[2] Plaintiffs erroneously assert (PPB:145) that the presentation of IDs at conferences were also RICO predicate acts. This is incorrect (*see* Newman Reply at 1-3), but even if it were, it would not explain how using IDs to *enter* conferences could be the purpose of the *subsequent* recording at the conferences.

Planned Parenthood's attempt (PPB:146) to distinguish *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), also relies on the amorphous concept of "harm": "Defendants intended to harm Plaintiffs all along." *Id.* But so did the network and reporters in *Desnick*; they intended to "harm" the plaintiff ophthalmologic clinic by exposing whatever wrongful or questionable practices they uncovered.

As the Third Circuit observed, "[a]ll authority of which we are aware indicates that the criminal or tortious acts contemplated by § 2511(2)(d) are acts secondary to the acquisition of the communication involving tortious or criminal use of the interception's fruits." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 144–45 (3d Cir. 2015). Here, Planned Parenthood has offered no evidence whatsoever that Defendants used the "interception's fruits" for a tortious or criminal purpose. Baldly alleging that the recordings' purpose was to "violate civil RICO" cannot withstand appellate scrutiny.

As Plaintiffs admit, civil RICO is a "statutory tort *remedy*." (PPB:147 (quoting *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (emphasis added)). Civil RICO provides "particularly drastic remedies" (*id.*) for the repetition of certain federal

crimes. One can no more record "for the purpose" of "violating civil RICO" than one could record for the purpose of violating 18 U.S.C. §3559(c), a federal sentence enhancement provision.

Plaintiffs failed to show that the recordings were intended for, much less "essential" to, a criminal or tortious purpose. *Cf. United States v. Christensen*, 624 F. App'x 466, 475 (9th Cir. 2015). Tellingly, Plaintiffs' Answering Brief entirely ignores *Christensen*.[3] This Court should enter judgment as a matter of law on Plaintiffs' Wiretap Act claims.

B. Planned Parenthood failed to prove that the recorded individuals had reasonable expectations of privacy.

1. Whether a party had a reasonable expectation of privacy is a mixed question of law and fact that is reviewed de novo.

In urging unyielding deference to the jury (PPB:113–114), Planned Parenthood advocates a role for the jury that is contrary to this Court's precedents. This Court holds that the existence of a reasonable expectation of privacy "is a mixed question of law and fact." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020).

[3] Plaintiffs also ignore amicus's arguments regarding the unconstitutionality of § 2511(2)(d) (Project Veritas's brief at 4–15), which Defendants adopt. *See Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1110-12 (9th Cir. 2020) (Court can consider "purely legal questions" raised for the first time on appeal).

And "unless the mixed question is primarily factual," mixed questions are reviewed de novo. *N.B. v. Hellgate Elem. Sch. Dist., ex rel. Bd. of Dir., Missoula Cty.*, 541 F.3d 1202, 1207 (9th Cir. 2008).

A mixed question of law and fact appears "when the historical facts are established; the rule of law is undisputed …; and the issue is whether the facts satisfy the legal rule." *In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) (en banc) (quoting *Pullman–Standard v. Swint,* 456 U.S. 273, 289 n.19 (1982). The Court reviews mixed questions de novo "because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles." *Id.* (citing *Boone v. United States,* 944 F.2d 1489, 1492 (9th Cir. 1991). And where, as here, the parties "dispute only the ultimate conclusions to be drawn from the admitted facts," and because "these judgments are legal in nature," this Court "can make them without usurping the function of the jury." *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

Planned Parenthood rejects this Court's holdings, instead asserting that all the jury's conclusions on the recording claims should merely be reviewed for substantial evidence. (PPB:112.) That is wrong. Here, the jury's role on a claimant's expectation of privacy is to resolve the disputed

"historical facts" necessary to evaluate the statutory elements (*e.g.*, Cal. Penal Code § 632 and 18 U.S.C. § 2511(2))—that is, who was recorded, why, and where. *In re Bammer*, 131 F.3d at 792. That means this Court's deference to the jury does not entail deference to the ultimate conclusion; instead, this Court accepts as true any genuinely disputed historical fact favoring Planned Parenthood (because the jury is presumed to have resolved disputed facts in favor of the verdict) and considers those facts established along with all other "uncontradicted and unimpeached" evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

Ignoring the above legal principles, Planned Parenthood fashions a standard of review so narrow that it would prohibit de novo review of any recording verdict. First, Planned Parenthood portrays PPFA's and NAF's "privacy and security measures" as a question of fact that the jury has broad latitude to resolve. (PPB:115.) Second, Planned Parenthood goes a step further, contending that the proper standard on privacy expectations "is the one embodied in the jury instructions on this issue." (PPB:128 (citing 1-ER-106).) If either premise were correct, appellate courts could only rarely decide a recording claim.

Indeed, whether the conference security measures dispensed a blanket reasonable expectation of privacy for all attendees is "a textbook example of a legal conclusion informed by historical facts." *In re Bammer*, 131 F.3d at 792. Given that Planned Parenthood's conference recording claims rest entirely on its novel "badges-and-security" theory (PPB:115; *see infra*, sections 2 and 3), this Court must "expound on the law, particularly by amplifying or elaborating on a broad legal standard." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). Because answering the question of whether the recorded individuals possessed blanket reasonable expectations of privacy "entails primarily legal … work," *see id.*, this Court should review the decision below de novo.

Finally, Planned Parenthood frequently references the jury instructions (PPB:128, 134–127, 148) as if they govern this Court's legal analysis. They do not. When reviewing a motion for judgment as a matter of law, courts must "apply the law as it should be, rather than the law as it was read to the jury." *Pincay v. Andrews*, 238 F.3d 1106, 1109 n.4 (9th Cir. 2001).

2. Based on the relevant factors, the conference attendees lacked a reasonable expectation of privacy in their conversations with Defendants.

Planned Parenthood's statutory claims arising under 18 U.S.C. § 2511, Cal. Penal Code § 632, and Maryland and Florida law rest on the assumption that the recorded individuals had a reasonable expectation of privacy in their conversations with Defendants. Planned Parenthood does not dispute that section 632 and 18 U.S.C. § 2511 require the same analysis. *See In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 827 (N.D. Cal. 2020). So too with the Florida and Maryland claims. Indeed, Planned Parenthood implicitly concedes (PPB at 120) that the test is based on Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967).

In light of the relevant factors set forth in Merritt's opening brief (at 29), which Planned Parenthood failed to contradict, the recorded conference attendees had no subjective expectation of privacy. For example, Planned Parenthood adduced no evidence about the context of the conversations that the witnesses characterized as private. Planned Parenthood did not argue that the conversations at NAF conferences were hushed or that the recorded attendees lowered their voices to

protect their conversations from the "uninvited ear." *Katz*, 389 U.S. at 352. Nor did Planned Parenthood provide any information about "the tone, volume, or audibility" of the allegedly private conversations at the Washington, D.C. and Maryland conference spaces. *See Kee v. City of Rowlett*, 247 F.3d 206, 211, 216 (5th Cir. 2001). And Planned Parenthood did not specify which conversations at the Florida events were conducted in a manner inaudible to others. *See Siripongs v. Calderon*, 35 F.3d 1308, 1320 (9th Cir. 1994). That is because in all these instances, none of those requisite facts existed.

At all events, all the conversations took place in open, noisy areas where other people could easily overhear each conversation. (MB:36–42.) Planned Parenthood's failure to prove otherwise at trial undermined any justification for the jury to find an expectation of privacy. *See, e.g.*, *HLV, LLC v. Page & Stewart*, 303 F. Supp. 3d 580, 584 (W.D. Mich. 2018) ("The presence of other individuals, even if they do not participate in the conversation, leaves a speaker with no expectation of privacy in his statements."); *Caro v. Weintraub*, 2009 WL 2358919 (D. Conn. 2009), *aff'd*, 618 F.3d 94 (2d Cir. 2010) (concluding that the speaker had no

subjective expectation of privacy where he spoke in presence of others and knew they could hear his statements).

3. None of the recorded individuals exhibited an expectation of privacy.

Most damaging to Planned Parenthood's argument is that it failed to present evidence demonstrating any affirmative steps the recorded individuals took to preserve their privacy. *Cf. Med. Lab'y Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 813 (9th Cir. 2002) ("The subjective expectation of privacy may be tested by any outward manifestations that Devaraj expected his dealings with the ABC representatives to be private."); *Kemp v. Block*, 607 F. Supp. 1262, 1264 (D. Nev. 1985) ("A comparison of what precautions he took to safeguard his privacy interest with the precautions he might reasonably have taken, is appropriate.")

Moreover, Planned Parenthood brushes off the principle that, under both the federal and Florida recording laws, the recorded party must "exhibit" an expectation of privacy (MB:43–44). *Cf. Huff v. Spaw*, 794 F.3d 543, 550 (6th Cir. 2015) ("one must *exhibit* an intention to keep statements private"). Instead, Planned Parenthood contends that "Merritt's sole authority" for the requirement is *McDonough v.*

Fernandez-Rundle, 862 F.3d 1314 (11th Cir. 2017), and that that case is limited by its facts and only to Florida law. (PPB:134 n.31.) This is incorrect in two ways.

First, the best authority for the "exhibit" requirement are the statutes, both of which define a protected "oral communication" as one "uttered by a person *exhibiting* an expectation" of privacy. 18 U.S.C. § 2510(2); Fla. Stat. § 934.02(2) (emphasis added). This statutory language is unambiguous, and courts are not free to ignore it. Second, Planned Parenthood ignores the several cases cited by Merritt that applied the "exhibition" requirement in the federal recording statute, including *Kee*, 247 F.3d at 211–12 (asking "whether the individual, by his conduct, has exhibited an actual expectation of privacy"); *Huff*, 794 F.3d at 548–49 (asking "whether a person exhibited an expectation of privacy"); and *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993) (asking "whether [defendant's] conduct exhibited a subjective expectation of privacy").[4]

[4] Planned Parenthood mischaracterizes (PPB:133) the holding in *Abdo v. State*, 144 So.3d 594 (Fla. Dist. Ct. App. 2014) as rejecting the exhibition element. In reversing the trial court's finding that a recording did not meet the state statute's definition of an "oral communication," the

Deflecting the "exhibition" element, Planned Parenthood does not dispute that it failed to prove that any of the conference attendees exhibited a reasonable expectation of privacy. Instead, the only argument it presents (PPB:115) is that the conference security measures created a blanket, subjective expectation of privacy for each word uttered in the event spaces. As discussed below, however, that argument is wrong as a matter of law.

4. The conference recording claims fail as a matter of law because no rule supports Planned Parenthood's badges-and-security theory.

Planned Parenthood's position on PPFA's and NAF's conference security measures is a prime example of its confusion about the roles of the court and jury. No dispute exists about the historical facts: PPFA and NAF, like many organizations, generally restrict admission to their conferences to paid and/or invited attendees. But Planned Parenthood contends that the "privacy and security measures" that the organizations

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Florida court of appeals did not single out the word "exhibiting" but quoted most of the definition. It then found that the trial court erroneously relied only on viewing a video showing that the recording "was made in an enclosed vehicle, which was owned by him, while the vehicle was in motion." *Id.* at 596. "Exhibiting" played no part in the court's decision.

implemented at their events "engendered subjective expectations of privacy" where attendees could speak "without fear of infiltration or surreptitious recording." (PPB:115.)

Conspicuously absent from Planned Parenthood's discussion is a single case to support that novel theory. The lack of case law is obvious: The Wiretap Act and the state recording statutes "protect[] people, not places." *Katz*, 389 U.S. at 351; *cf. Kee*, 247 F.3d at 213 (noting that a subjective expectation of privacy during a conversation "does not necessarily[] turn on the physical characteristics of the place or property in which the speech takes place"). Just as in the Fourth Amendment context, Planned Parenthood was required to show that each recorded attendee "*personally* ha[d] an expectation of privacy." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (emphasis added). Planned Parenthood failed to do so.

To circumvent its lack of testimonial evidence, Planned Parenthood contends that an individual's subjective expectation of privacy need only "be proven by circumstantial evidence." (PPB:116–117.) In support, Planned Parenthood cites (PPB:117) three out-of-circuit cases, but all are easily distinguishable. *Campbell v. United States* dealt with a motion to

suppress evidence in violation of the Fourth Amendment. *See* 2015 WL 3770271, at *12 (M.D. Fla. June 17, 2015), *aff'd*, 891 F.3d 940 (11th Cir. 2018), *opinion vacated and superseded*, 743 F. App'x 412 (11th Cir. 2018), *and aff'd*, 743 F. App'x 412 (11th Cir. 2018). *Cross v. State of Alabama, State Department of Mental Health & Mental Retardation* was a sexual harassment suit involving public employees. *See* 49 F.3d 1490 (11th Cir. 1995). And in *United States v. Childs*, the court had to determine the defendant's subjective expectation of privacy because he refused to testify at the suppression hearing. *See* 2008 WL 941779, at *7 (D. Mass. Apr. 4, 2008). But here, each party to the conversations was available to testify about their subjective expectations of privacy at the conferences and hotels.

Not only does Planned Parenthood fail to cite a single case to support its badges-and-security theory, but what it asserts on one page, it denies on the next. Planned Parenthood characterizes the district court's description of the expectation of privacy being that one would not be surreptitiously recorded or overheard "by those adverse to them" as merely dicta. (PPB:116.) Indeed, Planned Parenthood denies that the district court held that "such adversity was a prerequisite for

establishing a statutory violation." (PPB:116.) That is wrong. The "adversity" was exactly why Planned Parenthood stressed the pre-conference vetting of attendees and on-site security to assure that individuals admitted to the conference areas were "trusted" members of the abortion community. (PPB:13, 17–18, 113–115.) It was also why Planned Parenthood called Melissa Fowler to testify about why NAF implemented security measures. (PPB:157; 5-ER-1210:15–19 ("And that is a critical part of our case in the sense that the willingness of our clients to speak with the defendants was in significant part because they had been admitted to NAF, which is understood to be, really, the gold standard of conference security")).

Plaintiffs simply cannot, on one hand, describe how the conferences "were safe spaces where attendees could freely discuss issues surrounding abortion" (PPB:115), yet on the other hand deny that the district court erroneously accorded decisive weight to conference attendees' feelings that they were not being overheard "by those adverse to them." (1-ER-21:10–11.) [5]

[5] Alternatively, Plaintiffs must rely on the theory that all attendees at any limited admission event, of any nature or size, enjoy a reasonable

Because Planned Parenthood failed to establish a subjective expectation of privacy for each recorded event attendee at trial, the district court should have granted judgment for Defendants as a matter of law.

5. Dr. Nucatola and Dr. Gatter did not have objectively reasonable expectations of privacy during their lunch meetings with Defendants.

The jury's finding that Drs. Nucatola and Gatter had reasonable expectations of privacy during their lunch meetings with Defendants is both objectively unreasonable and against the clear weight of the evidence. The evidence does not meet the high standard required to prove "confidentiality." As this Court found, California Penal Code § 632 "outlaws only the surreptitious recording of 'confidential communications,' but a communication is not confidential if 'made in a public gathering' or the parties reasonably may expect that it 'may be overheard.'" *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1121 (9th Cir. 2017) (quoting Cal. Penal Code §§ 632(a), (c)). In light of that standard,

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expectation of privacy in all their conversations. There is, of course, no legal support for this theory either.

neither of the lunchtime conversations was confidential because both parties reasonably expected that they "may be overheard."

For instance, Planned Parenthood emphasizes that Defendants' lunchtime conversation with Dr. Nucatola was confidential because they were "in a booth at the back of the restaurant." (PPB:129.) Even so, Planned Parenthood does not deny that the conversation still could "be overheard." Cal. Penal Code § 632(c). In fact, Planned Parenthood concedes that "waiters could theoretically hear isolated snippets of conversation." (PPB:129–130.) That admission alone is enough to render the conversation non-confidential. It does not matter that Dr. Nucatola thought "no waiter appeared to be listening." (PPB:130.) The fact is that the lunch took place in a crowded restaurant where they could reasonably expect others "may" overhear them.

Similarly, Planned Parenthood contends that Daleiden and Merritt's lunch with Dr. Gatter and Felczer was confidential because the restaurant was empty and no waitstaff "appeared interested in the conversation." (PPB:131.) Again, Planned Parenthood cannot deny that the entire lunchtime conversation reasonably could have been overheard by others, including the waitstaff constantly attending their table. A

conversation that could be overheard by others is not "confidential" within the meaning of the statute. Thus, Defendants are not liable under Section 632.

II. At a Minimum, Defendants Are Entitled to a New Trial.

A. The district court prejudicially erred in banning evidence of Defendant's Section 633.5 defense.

Merritt's opening brief demonstrated (at 52–55) that research and findings made after the first surreptitious recording confirmed that Defendants' hidden camera interviews in California were obtaining evidence "reasonably believed to relate to the commission by another party to such communication of … any felony involving violence against the person…." Cal. Penal Code § 633.5. The district court erred when it excluded Defendants' corroborating evidence. And because the exclusion prevented Defendants from offering their full defense, de novo review is warranted. *See United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010).

1. The evidence of Defendants' beliefs was highly relevant.

Planned Parenthood does not dispute that the excluded evidence was relevant to Defendants' Section 633.5 defense. (PPB:128–129.) Instead, Planned Parenthood contends (PPB:143) that Merritt failed to

cite to the record. That is a red herring. Merritt explicitly detailed in her opening brief (at 52–53), with citations to the record, that Defendants sought the testimony of Dr. Forrest Smith, who Defendants retained to review their undercover footage for evidence of unlawful tissue harvesting.

Planned Parenthood's only response is that Dr. Smith's testimony was properly excluded because Defendants had no contact with him before the Human Capitol Project was publicly released. (PPB:140.) That is beside the point. Dr. Smith's testimony was relevant in confirming to the jury that Drs. Nucatola and Gatter had discussed harvesting organs from born-alive infants during their lunch meetings, thus showing Defendants' beliefs were not unfounded. (1-ER-134.) Yet the district court excluded that evidence.

Similarly, the district court arbitrarily excluded portions of the lunch with Dr. Nucatola where she admitted that abortion providers alter abortion procedures to obtain more intact—and thus more valuable—organs and tissues. In response, Planned Parenthood argues (PPB:139) that the district court in fact admitted the video footage. That is misleading. Although it admitted the footage to be played at one point in

trial (8-ER-1947:11–1950:3), the district court prohibited Defendants from using that footage to illustrate to the jury their reasonable beliefs that Planned Parenthood affiliates were engaging in misconduct. (2-ER-126.) That was error.

Planned Parenthood likewise contends (PPB:141) that CMP's investigative findings about fetal tissue trafficking were properly excluded because the tissue procurement organizations were not parties to the litigation. That argument is meritless. The jury should not have adjudicated Defendants' conduct without fully understanding the misconduct that occurred as a result of the perverse financial relationships between various Plaintiffs and the tissue procurement organizations (relationships that were severed due to the Human Capital Project). The project findings were highly relevant to confirm Defendants' reasonable beliefs that Planned Parenthood and its affiliates effectuated a "system wide conspiracy to profit from the sale of fetal tissue." *See* Judicial Council of California Civil Jury Instruction 3710; *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972) ("A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct

of the purported principal from which an intention to consent to or adopt the act may be fairly inferred.").

Finally, Planned Parenthood contends (PPB:142–143) that the jury need not know about its abortion procedures and accounting practices. But the gravamen of the Section 633.5 defense is that Defendants had reason to believe that Planned Parenthood affiliates were altering abortion procedures to accommodate fetal tissue harvesting—which is itself a battery against the woman undergoing the abortion—to the point of engaging in illegal partial-birth abortion and even harvesting fetal tissue from premature infants while they were still alive—both also "violent felonies." Prohibiting evidence of how Planned Parenthood affiliates altered their abortion methods, procedures or techniques for financial gain left Defendants virtually defenseless under Section 633.5.

Excluding relevant evidence is "an extraordinary remedy to be used sparingly." *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995). Contrary to Planned Parenthood's protestations, nothing outweighed the prejudice to Defendants by excluding this critical evidence.

2. Planned Parenthood fails to refute Merritt's showing that the evidentiary exclusions were severely prejudicial.

Because the evidence was relevant to Defendants' Section 633.5 defense, the district court was required to identify some prejudice that "*substantially* outweighed" the evidence's admission. *Obrey v. Johnson*, 400 F.3d 691, 698 (9th Cir. 2005) (emphasis added). Planned Parenthood asserts that Defendants suffered no prejudice. But the jury received a misleading half story that supported Planned Parenthood's themes and excluded Defendants'. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001) (the prejudice analysis determines whether error "tainted the verdict"). The exclusion severely limited Defendants' opportunity to show that their investigation was neither unfounded nor based simply on malice toward Planned Parenthood, as Plaintiffs falsely contended.

B. Prejudicial error in the instructions and verdict form require a new trial.

In a case that involves "highly complex statute[s], multiple charges and defendants, allegations of a conspiracy, a number of subsidiary legal issues, and highly disputed facts …, the danger of jury confusion is especially great and the district court's responsibility to provide

clarification particularly acute." *United States v. Frega*, 179 F.3d 793, 810–11 (9th Cir. 1999). The district court erroneously abdicated its responsibility to provide clear jury instructions in this indisputably complex case. This Court must review these errors de novo. *See United States v. Christensen*, 828 F.3d 763, 785 (9th Cir. 2015) ("Whether jury instructions omit or misstate elements of a statutory crime or adequately cover a defendant's proffered defense are questions of law reviewed de novo.")

1. The District Court erroneously instructed the jury that Plaintiffs had standing on the recording claims based solely on Defendants' intent.

Plaintiffs raise three arguments against a finding that the district court committed reversible error in instructing the jury about corporate standing. All fail.

First, the argument was not waived. Defendants repeatedly objected to instructions that allowed a finding of corporate standing based on Defendants' intent. (18-ER-5062; 18-ER-5065; 15-ER-4200:18–4201:7; 15-ER-4251:2–7.)

Second, Plaintiffs misstate the holdings of *Smoot v. United Transp. Union*, 246 F.3d 633, 640 (6th Cir. 2001), *Hatchigian v. Int'l Bhd. of Elec.*

Workers, Loc. Union No. 98, 1988 WL 100780 (E.D. Pa. Sept. 27, 1988), and *Superior Performers, Inc. v. Meaike*, 2014 WL 5819826 (M.D.N.C. Nov. 10, 2014). None of these cases even suggests that a corporation has a possessory interest in a conversation merely if that conversation "was initiated for a business-related purpose." (PPB:150.) All three cases looked to the circumstances surrounding the recording (*e.g.*, closed meeting of corporation's board) and the conversation's contents, not the defendant's intent. Indeed, the court in *Meaike* specifically stated that the holdings in *Smoot* and *Hatchigian* "depended on the nature of the intercepted conversations." 2014 WL 5819826, at *12.

Planned Parenthood misleadingly quotes (PPB:151) from *Smoot* and *Hatchigian* to argue that a possessory interest can be found even if the content is not business related. Although plaintiffs in those cases did not provide the courts with transcripts of the conversations, enough was proved (*see Smoot*, 246 F.3d at 640) or alleged (*see Hatchigian*, 1988 WL 100780, at *1) of the circumstances and contents to allow each court to find a sufficient possessory interest for that stage of the litigation.

Third, the error was not harmless. Planned Parenthood asserts (PPB:151–152) that because the jury heard a few recorded conversations

with high-ranking Planned Parenthood doctors about internal matters, the jury could simply assume that the same was the case for all 42 of the conversations at issue. But the jury also heard recordings or descriptions of conversations that were *not* about internal corporate matters. For example, the jury was informed that one recording of a conversation with a contract doctor for Planned Parenthood Gulf Coast (PPGC), played without sound, concerned "sensitive abortion procedures." (8-ER-2078:12–16.) A contract abortion provider describing (with arm gestures) her abortion technique is not a discussion of internal corporate matters in which PPGC has a possessory interest. Yet, the jury held Defendants liable to PPGC for this recording.

Similarly, discussions with contract doctors about who was the affiliate's medical director (TRX:6116; TRX:5395-2) or with PPFA employees about the general messaging surrounding fetal tissue procurement (TRX:5975A) do not rise to the level of a discussion of internal corporate matters in which the affiliate has a possessory interest. But because the jury was erroneously instructed and then urged by Plaintiffs to find corporate standing *solely* based on Defendants' general intent to "target" employees who could disclose the Plaintiffs'

internal matters (16-ER-4382:23–4383:14), it found liability on all recordings.

Planned Parenthood also contends that PPNorCal had standing to pursue a recording claim based on the recording of contract doctor Drummond-Hay, supposedly about PPNorCal's "internal matters." (PPB:153.) In fact, neither her testimony nor the recordings in evidence indicate whether Drummond-Hay was discussing her work with PPNorCal or with PPMM, for whom she also worked as a contractor.

The verdicts on these claims must be reversed.

2. The instructions and verdict form articulated an erroneous standard as to the California recording claims.

The district court erred in rejecting Defendants' proposed jury instruction on Section 632's specific intent requirement and in failing to instruct the jury that Defendants are not liable under Section 632 if they did not specifically intend to record a confidential communication.

Planned Parenthood contends (PPB:135) that the California Supreme Court's decision in *People v. Superior Court of Los Angeles Cty.*, 70 Cal. 2d 123, 133 (1969) ("*Smith*") holds only that Section 632 does not prohibit an accidental recording. That is false. For one, Planned

Parenthood disregards that *Smith* expressly held that the "intent to record *a confidential communication*" is "a *necessary* element of the offense." *Smith*, 70 Cal. 2d at 123 (emphasis added). Separating intent from the communication's confidentiality "would produce results at once unreasonable and inconsistent with legislative purpose." *Id.* at 132.

Planned Parenthood asserts that its narrower interpretation of *Smith* is confirmed by a California Court of Appeal decision in *Rojas v. HSBC Card Services, Inc.*, 20 Cal. App. 5th 427 (2018). But *Rojas* merely relied on the second ground iterated by the *Smith* court, namely, where the recording party has "knowledge to a substantial certainty" that a confidential communication will be recorded. *Id.* at 436. In other words, *Smith* requires a degree of intentionality for recording a *confidential* communication, not just an intention to record a conversation that a jury may later determine to be confidential.

A defendant is entitled to an instruction about her theory of the case "if it is supported by law and has foundation in the evidence." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Here, the evidentiary record provided a foundation for Defendants' theory that they lacked the specific intent to record confidential communications, and the district

court abused its discretion by not giving Defendants' proposed instruction.

Planned Parenthood asserts that the instruction was correct because it "tracks the California pattern jury instructions." (PPB:135) But the "[u]se of a model jury instruction does not preclude a finding of error." *United States v. Warren*, 984 F.2d 325, 328 n.3 (9th Cir. 1993).

3. The error severely prejudiced Defendants.

The district court's error was not harmless and requires reversal. *See Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). This Court "presume[s] prejudice where civil trial error is concerned and the burden shifts to the [plaintiff] to demonstrate 'that it is more probable than not that the jury would have reached the same verdict' had it been properly instructed." *Galdamez v. Potter*, 415 F.3d 1015, 1025 (9th Cir. 2005) (citations omitted). Because Planned Parenthood contends that the instruction was correct, it does not dispute that the district court's instruction prejudiced Defendants. Nor does Planned Parenthood argue that it is more probable than not that the jury would have reached the same conclusion even if the Section 632 jury instruction had included

specific intent. Planned Parenthood thus has failed to rebut the presumption of prejudice.

In any event, considering the district court's Section 632 instruction omitting specific intent even though it is "a necessary element," *Smith*, 70 Cal. 2d at 123, it is more probable than not that the error was *not* harmless. "[N]othing about this verdict indicates that the result would have been the same without the error." *See Caballero*, 956 F.2d at 207. The jury concluded that Defendants intentionally recorded the individuals without considering whether Defendants had the specific intent to do so. In light of Defendants' ample evidence showing their intent not to violate Section 632, a properly instructed jury may well have concluded that Daleiden and Merritt lacked the requisite specific intent to record confidential communications. Thus, the district court's error was not harmless, and this Court should reverse for a new trial on Planned Parenthood's Section 632 claim.

III. The Punitive Damages Award Should Be Stricken.

A. Planned Parenthood failed to present clear and convincing evidence that Merritt and her co-defendants acted with actual malice or intentional misconduct.

Planned Parenthood was required to prove—*by clear and convincing evidence*—that Defendants either acted with malice, *see Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992), or engaged in intentional misconduct or gross negligence, *see* Fla. Stat. § 768.72(2). Planned Parenthood resorts (PPB:183) to repeating the same false themes presented at trial, cherry-picking private statements made by various defendants (but notably not Merritt) indicating their opposition to Planned Parenthood's mission. A more careful review of the record, however, shows that the evidence does not support punitive liability.

Planned Parenthood further contends that Defendants should be punitively liable for "fraudulent conduct." (PPB:184.) The problem with that argument is that the standard undercover journalistic practices of falsifying identities and hidden camera interviews are not fraudulent schemes that remotely give rise to punitive liability. As one district court explained, "[i]nvestigators and testers … do not engage in misrepresentations of the grave character implied by the other words in

the phrase but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence." *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998) (quoting David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 Geo. J. Legal Ethics 791, 817 (1995)). So, even if Defendants "intentionally misrepresented or concealed a material fact" as part of their undercover investigation (27-ER-7121), the evidence nevertheless does not permit the conclusion that Defendants were intending to inflict any legally cognizable harm.

No doubt reasonable people could conclude that Defendants were trying to publicly expose unlawful tissue transfer practices, but they simply could not conclude that Defendants' conduct rose to the extreme level required under federal, Florida, and Maryland law. And, as in *Desnick*, Defendants' only scheme was "to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme." 44 F.3d at 13. Therefore, contrary to Planned Parenthood's contention (PPB:185), the evidence was not so one-sided as to meet the clear and convincing standard for putative liability.

B. The punitive damages award violates due process by punishing Defendants for alleged harm to nonparties.

A defendant has a constitutional right not to be punished for harms allegedly inflicted on parties other than plaintiff. *See Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007). The punitive damages verdict reveals that the jury acted with passion and prejudice, punishing Defendants based on Planned Parenthood's improper appeal to sympathy for nonparties. Planned Parenthood does not dispute that Defendants were improperly punished for allegedly harming nonparties like Dr. Nucatola. Instead, it parrots the district court's conclusion that Defendants did not properly object while offering its own flawed analysis of controlling law. Both efforts fail.

First, Planned Parenthood's contention (PPB:179) that Defendants did not sufficiently preserve their objections on appeal is incorrect. Defendants expressly sought a harm-to-others jury instruction (18-ER-5082), which the district court rejected (27-ER-7120–7121). Defendants further objected to Planned Parenthood's proposed instruction "for omitting language regarding damage to third parties." (18-ER-5089.) (MB:70–71.)

Second, Planned Parenthood contends that *Williams* "itself permits punitive damages to be based upon harm 'to those whom [plaintiffs] directly represent.'" (PPB:182 (citing 549 U.S. at 353).) *Williams* says nothing of the sort. To be sure, the Supreme Court observed that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible…." 549 U.S. at 355. But the Court cautioned that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id*. That is what happened here. Planned Parenthood offered no evidence of the alleged harm to Dr. Nucatola to show that Defendants' conduct "also posed a substantial risk of harm to the general public." Instead, Planned Parenthood offered such evidence so the jury may "punish [Defendants] directly on account of harms" alleged to have been caused to Dr. Nucatola. The Supreme Court expressly prohibited that approach. *Id*. at 349.

This Court has previously reversed punitive awards because of the failure to instruct the jury that it could not punish the defendant for harms suffered by non-parties. *See, e.g.*, *White v. Ford Motor Co.*, 500

F.3d 963, 972 (9th Cir. 2007) ("there is a significant risk that the jury, in arriving at its punitive damage award, punished Ford for harm to nonparties"); *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) (reversing punitive award where limiting instruction did not adequately advise jury that it could not punish the defendant for harms to non-parties). This Court should do so again here. The district court erred in failing to instruct the jury that it could not punish Defendants for conduct that harmed nonparties. This Court should vacate the punitive damages verdict and remand the case for a new trial. *See Larez v. Holcomb*, 16 F.3d 1513, 1520 (9th Cir. 1994).

IV. The Permanent Injunction Against Merritt Should Be Vacated.

Planned Parenthood does not dispute that it has failed to show "a sufficient likelihood that [it] will again be wronged in a similar way" by Merritt. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Instead, Planned Parenthood resorts to mockery, snidely commenting that Merritt's age and health did not "preclude[] her from actively participating in a six-week trial" and falsely accusing her of lying under

oath. (PPB:206.)[6] By Planned Parenthood's logic, Merritt's trial attendance means she, a disabled retiree, could again conduct an intensive multiyear, cross-country undercover investigation. With that and nothing more, Planned Parenthood failed to show that it "faces an actual and imminent threat of future injury" warranting injunctive relief. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 968 (9th Cir. 2018). Accordingly, the Court should vacate the permanent injunction against Merritt.

CONCLUSION

The Court should reverse with directions to enter judgment for Merritt (and the other defendants). Alternatively, the Court should reverse and remand for a new trial. Further, the Court should strike the punitive damages award. The Court should also vacate the permanent injunction against Merritt.

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[6] Plaintiffs' attack on Merritt for "giving false testimony" is itself false. (PPB:206.) A review of the trial transcript shows that Merritt mistakenly testified, based solely on watching a *five-year-old* video, that she thought she put *her* conference badge into her purse when in fact it was another person's badge. On redirect, Merritt admitted her understandable mistake. (*See* 7-ER-1756:15-1768:25.) Indeed, even the district court acknowledged that Merritt provided "*mistaken* testimony" on this point. (6-ER-1428:22–25 (emphasis added).)

Date: November 8, 2021

Respectfully submitted,

/s Horatio G. Mihet

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CERTIFICATE OF COMPLIANCE

I am the attorney for appellant in this case. This brief contains 6,981 words**,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Date: November 8, 2021

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