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. 3:16-cv-236-WHO
Hon. William H. Orrick

PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

Defendant-Appellant Sandra Susan Merritt moves under Federal Rule of Appellate Procedure 35 and Ninth Circuit Rule 35 for a rehearing en banc. The panel has significantly altered the contours of undercover journalism—a longstanding and constitutionally protected practice by which investigators engage in hidden camera interviews to uncover criminal conduct. The full court's review is necessary to bring the panel's decision in line with this Court's precedent protecting undercover investigations.

In conjunction with other Defendants, who are filing separate en banc petitions in their related appeals,[1] Merritt participated in an undercover investigative project for the Center for Medical Progress (CMP) to expose fetal tissue trafficking in the abortion industry generally, and by Planned Parenthood specifically. To gain access to abortion industry insiders, they posed as representatives of a tissue procurement company, and using a cover story they secured lunch meetings with Planned Parenthood doctors and attended abortion

[1] Pursuant to Fed. R. App. P. 28(i), Merritt adopts by reference the en banc petitions filed by co-defendants Center for Medical Progress, David Daleiden, Albin Rhomberg and Troy Newman, in their related appeals.

tradeshow conferences, where they secretly recorded their business conversations. CMP then published the investigative results, garnering national attention and triggering congressional inquiries into various abortion business practices of Planned Parenthood and others.

In 2016, Planned Parenthood and its affiliates sued Merritt, David Daleiden, CMP, and the other Defendants under federal and state wiretapping laws and various other claims. The case was tried in 2019, and a jury—guided by a series of prejudicial rulings and instructions from the district court—returned verdicts for Planned Parenthood. In separate opinions, the panel largely affirmed the proceedings below but reversed the jury's verdict on Planned Parenthood's claim under the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d). *See Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1135 (9th Cir. 2022).

Rehearing en banc is now appropriate because the panel's rejection of the proper standard for evaluating the objective reasonableness of one's expectation of privacy is flatly inconsistent with the decisions of the Supreme Court, *see Katz v. United States*, 389 U.S. 347 (1967), this Court, *see Deteresa v. Am. Broad. Companies, Inc.*, 121 F.3d 460 (9th Cir. 1997), and other federal appellate courts.

Rehearing en banc is also warranted because the panel disregarded its duty to follow California Supreme Court precedent by upholding a jury instruction that misstates the elements of California's eavesdropping law. In *People v. Superior Court of Los Angeles County* ("*Smith*"), 70 Cal. 2d 123, 133 (1969), the California Supreme Court expressly held that Cal. Penal Code § 632(a) is a specific-intent offense, which requires a defendant to deliberately record for the purpose of capturing a confidential conversation. Merritt and the other Defendants cannot be liable for violating § 632(a) because they lacked the requisite *mens rea* of purposefully desiring to record confidential communications.

Lastly, rehearing en banc is necessary because the panel's upholding of punitive damages against Defendants by characterizing their use of alter egos and hidden cameras as "fraud" is egregiously wrong. No other court of appeals has ever found journalists punitively liable for using undercover identities to gain insider access for a story of significant public interest. And this Court expressly holds that "a false statement" made to access a facility for news gathering "cannot on its face be characterized as 'made to effect a fraud….'" *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194–95 (9th Cir. 2018) (quoting *United*

States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion)). The consequence of the panel's decision is that journalists are now exposed to punitive liability for exercising their "First Amendment right to engage in undercover investigations…." *Wasden*, 878 F.3d at 1190.

This case involves questions of exceptional importance. The effect of the panel's ruling is to make hidden camera journalism a strict liability offense, prohibit undercover investigations of politically powerful organizations, and subject journalists to punitive liability for using secret identities to probe or expose potentially criminal conduct. The en banc Court should review the panel's decision before it becomes the law of this Circuit and sets a dangerous precedent against journalists.

REASONS FOR GRANTING REHEARING EN BANC

I. The panel's conclusion that the recorded individuals had objectively reasonable expectations of privacy creates an intra- and inter-circuit conflict.

A. Contrary to the panel's conclusion, whether the recorded individuals had a reasonable expectation of privacy is a mixed question of law and fact that is reviewed de novo.

Parsing language from *Safari Club International v. Rudolph*, the panel upheld the jury's verdict on the state-law recording claims on the basis that whether "a communication is confidential is a question of fact normally left to the fact finder." (Memorandum Opinion ["Op."] 17–18 [quoting 862 F.3d 1113, 1126 (9th Cir. 2017)].) That conclusion warrants en banc review, because it conflicts with this Court's previous holdings and is inconsistent with a majority of federal appellate courts.

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). 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).

Contrary to the panel's conclusion, the question of whether the recorded individuals possessed an objectively reasonable expectation of privacy at the restaurants and conferences is not "primarily factual" (Op. 18, note 8) but a legal question. Indeed, this Court has expressly recognized that under California's eavesdropping statute, Cal. Penal Code § 632(a), whether a communication is confidential turns on the parties' reasonable expectations "judged by an *objective standard* and *not* by the subjective assumptions of the parties." *Deteresa v. Am. Broad. Companies, Inc.*, 121 F.3d 460, 463 (9th Cir. 1997) (quoting *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 248 (Cal. Ct. App. 1990)) (emphasis added).

Further, this Court has long held that whether an individual's expectation of privacy is objectively reasonable is a question of law that is reviewed *de novo*. *See United States v. Shryock*, 342 F.3d 948, 977 (9th Cir. 2003) ("We review de novo whether a citizen's expectation of privacy was objectively reasonable.") (citing *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000)); *see also United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) ("We review de novo … a court's determination of whether an individual's expectation of privacy was objectively reasonable."); *United States v. Yang*, 958 F.3d 851, 858 (9th Cir. 2020)

("Whether or not an individual's expectation of privacy was objectively reasonable is … reviewed *de novo*.") (quoting *United States v. Gust*, 405 F.3d 797, 799 (9th Cir. 2005)).

Including the Ninth Circuit, a majority of federal appellate courts hold that whether an individual has an objectively reasonable expectation of privacy is a question of law reviewed *de novo*. *See, e.g.*, *United States v. Ferebee*, 957 F.3d 406, 416 (4th Cir. 2020) ("[T]he ultimate question of whether a given set of facts gives rise to a reasonable expectation of privacy is a legal question."); *United States v. Gomez*, 276 F.3d 694, 697 (5th Cir. 2001) (noting that "whether an expectation of privacy is reasonable under the circumstances" is a question of law "reviewed de novo") (quoting *United States v. Cardoza–Hinojosa*, 140 F.3d 610, 613 (5th Cir. 1998)); *United States v. Williams*, 521 F.3d 902, 906 (8th Cir. 2008) ("Whether an individual has a reasonable expectation of privacy is a question of law reviewed de novo.") (citing *United States v. Kiser*, 948 F.2d 418, 423 (8th Cir. 1991)); *United States v. Higgins*, 282 F.3d 1261, 1270 (10th Cir. 2002) (concluding that the court of appeals would review de novo the ultimate issue of whether an expectation of privacy was reasonable); *United States v. Siau*, 281 F. App'x 949, 951 n.2

(11th Cir. 2008) (unpublished) (noting that whether an individual "had an objectively reasonable expectation of privacy is a question of law, and therefore is subject to de novo review").

The panel's deference to the jury cannot be reconciled with the above decisions. 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)—that is, who was recorded, why, and where. *In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) (en banc). That means the panel's deference to the jury should not have entailed deference to its ultimate conclusion; instead, the panel should only have accepted 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), along with any other "uncontradicted and unimpeached" evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

But where, as here, the parties "dispute only the ultimate conclusions to be drawn from the admitted facts"—namely, whether the individuals had an objectively reasonable expectation of privacy in their conversations with Defendants—"these judgments are legal in nature,"

and this Court "can make them without usurping the function of the jury." *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986). The panel failed to do so, and en banc review is therefore warranted.

The consequence of the panel's decision is a standard of review so narrow that it would prohibit *de novo* review of any invasion-of-privacy verdict. For example, the panel portrays the National Abortion Federation's "extensive measures to protect the security of the conferences" as a question of fact that the jury has broad latitude to resolve. (Op. 19.) But whether the conference security measures dispensed a blanket reasonable expectation of privacy for all attendees, in all conversations, at all locations, 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, the panel should have "expound[ed] 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.*, the panel should have reviewed the decision below *de novo*. Therefore, en banc review is warranted because the panel's decision will create confusion about the proper standard to evaluate the objective reasonableness of an individual's expectation of privacy.

B. The panel's conclusion that privacy rights protect places and not people is at odds with Supreme Court precedent.

Planned Parenthood's statutory claims arising under 18 U.S.C. § 2511, Cal. Penal Code § 632, and Maryland and Florida law all rested on the assumption that the recorded individuals had a reasonable expectation of privacy in their conversations with Defendants. The test to determine whether an individual had a reasonable expectation of privacy is based on Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967). The panel made no mention of *Katz*, and the result is a decision that is inconsistent with Supreme Court precedent.

Just like the Fourth Amendment, the state-law recordings statutes "protect[] people, not places." *Katz*, 389 U.S. at 351. To determine what protection is afforded to those people, Justice Harlan outlined "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that

society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). As Justice Harlan noted, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances *would be unreasonable*." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added).

Yet the panel erroneously reached the opposition conclusion. It determined that Defendants' conversations—all of which took place in restaurants and in "crowded areas" at the conference halls (Op. 19)—were private. But Planned Parenthood did not argue (and the evidence did not show) that the conversations in open and crowded areas at the conferences, or at restaurant tables constantly attended by waiters, 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. *Kee v. City of Rowlett*, 247 F.3d 206, 211, 216 (5th Cir. 2001). In all events, all the recorded conversations took place in open, noisy areas where other people could easily overhear each conversation. (Op. 18–19.)

Even if the various recorded individuals had a subjective expectation of privacy based on where they sat in the restaurant booths and the security measures at the conferences, in light of *Katz*, such an expectation was not objectively reasonable. *See United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991) (noting that a subjective expectation of privacy must be objectively reasonable); *see also Deteresa*, *supra*, 121 F.3d at 463 (same). Conversations "in the open" subject to "being overheard" by others are not protected, and thus, as a matter of law, "the expectation of privacy under the circumstances *would be unreasonable*." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added). Under Supreme Court precedent, the panel decision cannot stand.

II. The panel's rejection of Penal Code § 632 as a specific-intent offense is untenable in light of California Supreme Court precedent.

A. Defendants cannot be liable under § 632 because they did not specifically intend to record a confidential communication.

This Court holds that in a case involving state-law claims, it has a "duty" to "ascertain and apply the existing California law." *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th Cir. 2008) (per curiam) (internal quotation marks omitted). Accordingly, in interpreting a state statute, this Court "must follow the state's rules of statutory interpretation, here

California." *Killgore v. SpecPro Pro. Servs., LLC*, 51 F.4th 973, 983 (9th Cir. 2022) (citing *Bass v. Cnty. of Butte*, 458 F.3d 978, 981 (9th Cir. 2006)). In the same vein, this Court is "*bound* by pronouncements of the California Supreme Court on applicable state law…." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010) (emphasis added).

In contravention of its binding duty to follow the California Supreme Court's pronouncements on applicable state law, the panel concluded that the California Supreme Court's decision in *People v. Superior Court of Los Angeles County* ("*Smith*"), 70 Cal. 2d 123, 133 (1969), which expressly held that Cal. Penal Code § 632 is a specific-intent offense, is "irrelevant" (Op. 14). That conclusion warrants en banc review.

In *Smith*, the California Supreme Court expressly concluded that "a necessary element" of § 632 (former section 653j) is "[a]n *intent* to record a *confidential* communication." 70 Cal. 2d at 133 (emphasis added). According to the Court: "Fairly read, the statute does not isolate the actor's intent from the object to which it is directed, namely the confidential communication; the two are inextricably bound together." *Id.*

In *Estate of Kramme*, the California Supreme Court reaffirmed *Smith*'s holding that § 632(a) only proscribes *intentionally* recording confidential communications, noting that the statute "required an intent to record a confidential communication, rather than simply an intent to turn on a recording apparatus which happened to record a confidential communication." 20 Cal.3d 567, 573 n.5 (1978).

To summarize the California Supreme Court's binding interpretation: Section 632(a) is a specific-intent offense. Thus, to be found liable under the statute, a defendant must knowingly use a recording device *for the purpose* of capturing a confidential communication. A defendant who does not knowingly use a recording device for the purpose of capturing a confidential communication is not liable for violating § 632(a). *See Smith*, 70 Cal. 2d at 134.

The district court's jury instruction effectively weakened and downgraded § 632(a) into a general intent crime. As a consequence of the district court's erroneous instruction, the jury found Merritt and Daleiden liable for violating § 632(a) based on the simple fact that they intentionally recorded Dr. Nucatola, Dr. Gatter, and the conference attendees, instead of the necessary element that they intended to record

private, confidential conversations. But that is not what the statute requires. *See* Cal. Penal Code. § 632(a). Nor is that how the California Supreme Court has interpreted the provision. *See Smith*, 70 Cal. 2d at 134.

As written, § 632(a) requires that the defendant must intend the end result (*e.g.*, the recording of a confidential communication) instead of merely harboring the intent to do the wrongful act (*e.g.*, recording the individuals) that causes such a result. *See Smith*, 70 Cal. 2d at 133 (declaring that "it is not the purpose of the statute to punish a person who intends to make a recording but only a person who intends to make a recording *of a confidential communication*" (emphasis added)). Because § 632 is a specific intent statute, the district court's instruction—now upheld and approved of by the panel—essentially rewrites the statute's language and disregards California Supreme Court precedent. This court should review and correct the erroneous decisions below.

B. Contrary to the panel's conclusion, tracking a model jury instruction does not preclude a finding of error.

The panel discounted the district court's error in rejecting the correct law for the § 632 instruction, stating that the instruction "closely followed the 2022 California Civil Pattern Jury Instructions." (Op. 14.)

But the pattern jury instructions do not govern this Court's legal analysis. Indeed, this Court has consistently held that the "[u]se of a model jury instruction does not preclude a finding of error." *Coston v. Nangalama*, 13 F.4th 729, 732 (9th Cir. 2021) (quoting *Shorter v. Baca*, 895 F.3d 1176, 1182 (9th Cir. 2018); *accord Bearchild v. Cobban*, 947 F.3d 1130, 1142 (9th Cir. 2020); *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005); *United States v. Warren*, 984 F.2d 325, 328 (9th Cir. 1993). Instead, courts of appeal must "apply the law as it should be, rather than the law as it was read to the jury." *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009) (quoting *Pincay v. Andrews*, 238 F.3d 1106, 1109 n.4 (9th Cir. 2001)). Accordingly, a properly instructed jury could have easily found that Defendants had no intent to record confidential communications.

This Court has previously recognized that when the trial court erroneously adds or removes an element to a plaintiff's burden of proof, it is "unlikely that the error would be harmless." *Caballero v. City of Concord*, 956 F.2d 204, 207 (9th Cir. 1992). In this case, the instruction disconnected intentionality from the act of recording a confidential communication, and it removed the word "confidential" from the

elements altogether. Indeed, the district court never explained to the jury what the word "intentionally" meant even though it was a critical element of the offense and a "pivotal word[] on the jury verdict form." *Clem v. Lomeli*, 566 F.3d 1177, 1183 (9th Cir. 2009).

Because the jury never understood that "intent" and "confidential communication" are "inextricably bound together," *Smith*, 70 Cal. 2d at 134, the verdict would not have been the same without the error. As such, it is more probably than not that the district court's error was prejudicial, not harmless. Rehearing is therefore warranted to correct the panel decision in light of circuit precedent.

III. This case involves a question of exceptional importance because subjecting journalists to punitive damages for carrying out a *20/20*-style undercover investigation is unprecedented.

Subjecting journalists to punitive damages for carrying out an undercover investigation is unprecedented in this Circuit and all other circuits. Indeed, no federal court has ever found journalists liable for punitive damages for using alter egos and undercover identities, misrepresenting their purposes, and using hidden cameras for newsgathering. *See, e.g.*, *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 512–513, 522 (4th Cir. 1999) (reversing liability for fraud and

related punitive damages judgment against television network for hidden camera exposé of grocery chain's food handling practices); *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 135 (1st Cir. 2000) (holding that media defendants' misrepresentations did not give rise to punitive damages because defendants "were [not] motivated by anything more malicious than the zealous pursuit of an emotionally compelling story"); *Med. Lab'y Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 30 F. Supp. 2d 1182, 1208 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) (holding that medical laboratory could not recover punitive damages on fraud claim arising from television network's use of false pretenses to gain entry and secretly videotape meeting with owner because network's conduct was not sufficiently egregious to meet severe standard required for punitive damages).

The panel nevertheless upheld the imposition of punitive damages against Merritt and the other Defendants on the basis that they committed "intentional fraud." (Op. 22.) Not only is that determination unprecedented; it squarely conflicts with this Court's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). In *Wasden*, this Court struck down an Idaho statute that criminalized entry by

misrepresentation into an agricultural production facility. 878 F.3d at 1184. The statute was enacted in response to an "undercover investigation of agricultural operations" during which journalists made "audio and video recordings of the facility without the owner's consent." *Id.* at 1189. In striking down the statute, this Court found that the "targeted speech—a false statement made in order to access an agricultural production facility—*cannot on its face be characterized as 'made to effect a fraud* or secure moneys or other valuable considerations." *Id.* at 1194–95 (emphasis added) (quoting *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion)).

Directly contravening *Wasden*, the panel effectively concluded that the false statements that Defendants made to network with top Planned Parenthood doctors and obtain access at abortion-industry conferences were fraudulent to the extent warranting punitive liability. That conclusion has no basis in this Court's prior decisions and is unprecedented in scope. Because this Court holds that "a false statement" made to enter a place for newsgathering purposes "cannot on its face be characterized as made to effect a fraud," *Wasden*, 878 F.3d at

1194, the panel decision should be reviewed en banc to resolve this conflict and secure uniformity in this Court's decisions.

To be sure, in some cases a jury may award punitive damages for fraud. But Merritt's (and the other Defendants') punitive liability does not depend on whether they are ultimately liable for fraudulent conduct. Instead, the critical issue is whether, at the time the recordings took place, Defendants recorded the conversations with the express intent and purpose to defraud Planned Parenthood of property or legal rights, or otherwise to intentionally cause injury. *See* Cal. Civ. Code § 3294. As Judge Posner observed in a factually analogous case: "It would be different if the false promises were stations on the way to taking [the plaintiff] to the cleaners. An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises." *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1354–55 (7th Cir. 1995) (Posner, J.) As with the undercover reporters in *Desnick*, Merritt and her co-Defendants' "only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme." *Ibid.*

CONCLUSION

The Court should grant the petition for rehearing en banc.

Date: December 5, 2022

Respectfully submitted,

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FORM 11: CERTIFICATE OF COMPLIANCE FOR PETITIONS FOR REHEARING

9th Cir. Case Number: No. 20-16820

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the attached petition for rehearing en banc is prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains 3,940 words.

Date: December 5, 2022

s/ Horatio G. Mihet
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