

No. 22-1168

In The  
Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, et al.,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, et  
al.,

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

BRIEF OF AMICI CURIAE

List of Additional Counsel for Amici :

JUSTIN MARCEAU  
University of Denver, Sturm College of Law  
2255 E. Evans Ave .  
Denver, CO 80208

GABE WALTERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE .....	1

TABLE OF AUTHORITIES

Cases	Page(s)
Animal Legal Def. Fund v. Herbert , 263 F. Supp. 3d 1193 (D. Utah 2017) .....	18, 19
Animal Legal Def. Fund v. Kelly , 9 F.4th 1219 (10th Cir. 2021 ) .....	19
Animal Legal Def. Fund v. Otter , 118 F. Supp. 3d 1195 (D. Idaho 2015) .....	12
Animal Legal Def. Fund v. Reynolds , 8 F.4th 781 (8th Cir. 2021) .....	19
Animal Legal Def. Fund v. Wasden , 878 F.3d 1184 (9th Cir. 2018). .....	12, 18, 19
Baugh v. CBS, Inc. , 828 F. Supp. 745 (N.D. Cal. 1993) .....	18
Branzburg v. Hayes , 408 U.S. 665 (1972) .....	14
% URNHUV · & KRLFH RI \$ P , QF Y Inc. , 757 F.3d 1125 (10th Cir. 2014) .....	20
Citizens United v. FEC , 558 U.S. 310 (2010) .....	14
Cohen v. Cowles Media Co., 501 U.S. 663 (1991) .....	22
CSX Transp., Inc. v. McBride , 564 U.S. 685 (2011) .....	23

1 % & 8 QLYHUVDO

Desnick v. Am. Broad. Cos., Inc. , 44 F.3d 1345 (1995) .....	18
Food Lion, Inc. v. Capital Cities/ABC, Inc. , 194 F.3d 505 (4th Cir. 1999) .....	18, 20
Globe Newspaper Co. v. Sup. Ct. , 457 U.S. 596 (1982) .....	13
Hustler Magazine v. Falwell , 485 U.S. 46 (1988) .....	21
N.Y. Times Co. v. Sullivan , 376 U.S. 254 (1964) .....	13
People for the Ethical Treatment of Animals, Inc. v.	

Snyder v. Phelps , 562 U.S. 443 (2011).....	19
United States v. Alvarez , 567 U.S. 709 (2012).....	15, 16
Constitutional Amendments	
U.S. Const. amend. I .....	13
Statutes	
Id. Rev. Stat. § 18 -7042.....	12
Meat Inspection Act, Pub. L. No. 59 -242, 34 Stat. 1260 (1907) .....	8
Pure Food and Drug Act, Pub. L. No. 59 -384, 34 Stat. 768 (1906) .....	8

Brooke Kroeger, Nellie Bly: Daredevil,  
Reporter, Feminist (1994) .....7

Brooke Kroeger , Undercover Reporting,  
The Truth About Deception (2012) .....

Philip Shenon, Welfare Hotel Families: Life on the Edge, N.Y. Times (Aug. 31, 1983) .....11

Sarah Belle Dougherty, Remembering Henry S. Olcott, The Theosophical Society .....6

Shane Bauer, I Went Undercover With a % R U G H U 0 L O L W L D + H U H · V : K D W , 6 D Z Mother Jones (Nov./Dec. 2016) .....8

Soc. of Pro. Journalists, Code of Ethics (2014) .....14

The Execution of John Brown , N.Y. Tribune (Dec. 3, 1859).....6

Tiffany Hsu, In-N-Out Dumps California Slaughterhouse Accused of Abusing Cows , L.A. Times (Aug. 21, 2012) .....9

Video Shows Alleged Criminal Abuse of Bettencourt Dairy Cows in Idaho , CBS News (Oct. 11, 2012) .....12

W. Keeton, et al., Prosser and Keeton on the Law of Torts § 42 (5th ed. 1984) .....23

Walter Kurtz, The Post Wins 6 Pulitzer Prizes, The Wash. Post (Apr. 8, 2008) .....10





participation as amicus curiae in cases that implicate expressive rights under the First Amendment.

Animal Outlook is a tax-exempt animal - advocacy organization based in Washington, DC.

\$QLPDO 2XWORRN·V PLVVL RQ LV WR FKDQJH WKH animals by deploying an arsenal of strategies to challenge the status

INTRODUCTION AND  
SUMMARY OF THE ARGUMENT

This case implicates the continuing vitality of reporting through covert investigative reporting and deception, which is responsible for some the most noteworthy and impactful stories and exposés in American history. This Court should grant a writ of important federal question in a way that conflicts with UHOHYDQW GHFLVLRQV RI WKLV &RXUW μ 8 6 6X 10(c), by allowing a judgment based on newsgathering and reporting on important public issues and giving insufficient weight to the First Amendment implications of that decision.

7KH 1LQWK &LUFXLW·V GHFLVLRQ WR LJQRU applicability of First Amendment rights in this context may be best summarized by its statement that infiltration damages and security damages[] were awarded by the jury to reimburse Planned Parenthood for losses caused by Appellants' violations of generally applicable laws. μPlanned Parenthood Fed'n of Am., Inc. v. Newman , 51 F.4th 1125, 1134 (9th Cir. 2022) . But by allowing such liability for constitutionally protected conduct, the courts below circumvented well-established standards for determining whether Petitioners caused a legally cognizable reputational injury, threatening the ability of journalists , whistleblowers, activists and others to investigate and publish important stories. Indeed, fURP 0RUWLPHU 7KRPSVRQ·V ILUVWKDQG DFFRXQV VODYH WUDGH OHDGLQJ XS WR WKH &LYLO :DU WI JUDSKLF WUDQVODWLRQ RI Kslaw WLPH LQ %ODFNZ ,QVDQH \$V\OXP WR 8SWRQ 6LQFODLU·V H[SRVp meat-

4

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

7KH 1LQWK & LUFXLWV GHFLVLRQ

stem from public anger over the revealed conduct, and they are inseparable from the published information<sup>3</sup> underscoring that this is a matter of public concern.

#### ARGUMENT

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 slavery in the South through careful concealment and misrepresentation of their motives.<sup>2</sup>

One such undercover journalist documented in horrific detail the sale of black men, women, children, and infants at a slave auction near Savannah, Georgia, in 1859, for a series in the New York Tribune.<sup>3</sup> The journalist was Mortimer Thompson. He wrote under the pen name . . . . The journalist's name was Mortimer Thompson. He wrote under the pen name . . . .

---

<sup>2</sup> See Brooke Kroeger, Undercover Reporting, The Truth About Deception at 17 (2012).

<sup>3</sup> Id. at 19-21.

readers why he needed to conceal his identity and the means by which he did so:

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. <sup>4</sup>

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.<sup>5</sup> Henry Olcott, a New York Tribune journalist who volunteered, posed as a member of the Petersburg Grays, a regiment sent to

&KDUOHV 7RZQ 9LUJLQLD WR JXDUG %URZQ·V ER

---

<sup>4</sup> Id. at 24.

<sup>5</sup> See The Execution of John Brown at 7, N.Y. Tribune (Dec. 3, 1859), <https://undercover.hosting.nyu.edu/files/original/f1d36593c3eb2643fcc2d3fc5fdd8477dac430cc.pdf> [<https://perm.a.cc/4MLU-2B9L>].

<sup>6</sup> See Sarah Belle Dougherty, Remembering Henry S. Olcott, The Theosophical Society, <https://www.theosophical.org/compo>



H[SRVLQJ WKH LQG XVWU\·V KDUVK LQKXP DQH  
 unsanitary working conditions, produced an  
 unprecedented response.<sup>10</sup> 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<sup>2</sup>  
 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<sup>2</sup> I IROORZLQJ 6LQFODLU·V ZRUN

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 stories that exposed corruption by city  
 inspectors based on reporting by undercover  
 journalists who surreptitiously bought and operated a  
 bar, The Mirage Tavern.<sup>11</sup> In 2016, Mother Jones  
 published an account of paramilitary militias on the  
 U.S. border by a reporter who joined a militia  
 undercover.<sup>12</sup>

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 undercover  
 investigator working with amicus Animal Outlook,<sup>13</sup>  
 recorded video footage in a facility that supplied the

---

<sup>10</sup> See Kroeger, supra note 2 at 83<sup>29</sup>1.

<sup>11</sup> Kroeger, supra note 2 at 257<sup>28</sup>00000912 0 612 792 re W\* n BT /F3 12 Tf 1 0 0 1 203.591.



National School Lunch Program and a popular restaurant chain showing inhumane handling of cows, including some who could no longer walk being shot in the head over and over, then having their mouths and nostrils stood upon until they suffocated to death. The video led the federal government to shut down the facility temporarily and the chain to sever ties with it.<sup>14</sup>

\$W ERWWRP ZKDWHYHU WKH VXEMHFW RI UH interests, there is no question that undercover newsgathering has been and remains central to this FRXQWU\·V GHEDWHV RQ PDW·WHUV RI SXEOLF VSHHFK DW WKH )LUVW<sup>3</sup> Since the mid -1800s.

, ,



exposé, reporters engaged in deception to reveal living conditions in welfare hotels,<sup>20</sup> working conditions in New York sweatshops,<sup>21</sup> working conditions of low-wage retail jobs in the United States,<sup>22</sup> and the availability of drugs in prisons.<sup>23</sup>

Reporters and investigators partnering with activist organizations have done similarly. For example, an investigator for amicus Animal Outlook obtained employment at a Tyson Foods contractor in Virginia and documented and exposed workers' conditions.<sup>24</sup> The investigation resulted in the firing of

---

<sup>20</sup> Philip Shenon, *Welfare Hotel Families: Life on the Edge*, N.Y. Times (Aug. 31, 1983), <https://www.nytimes.com/1983/08/31/nyregion/welfare-hotel-families-life-on-the-edge.html> [<https://perma.cc/MM8K-EYMV>].

<sup>21</sup> Jane H. Li, *65 Cents an Hour* <sup>3</sup> A Special Report: Week in Sweatshop Reveals Grim Conspiracy of the Poor, N.Y. Times (Mar. 12, 1995), <https://www.nytimes.com/1995/03/12/nyregion/65-cents-hour-special-report-week-sweatshop-reveals-grim-conspiracy-poor.html> [<https://perma.cc/QV65-9G2R>].

<sup>22</sup> See generally Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (2001).

<sup>23</sup> Athelia Knight, *Drug Smuggling and Hot Goods: A Ride on 3 U L V R Q 9 L V L W R*, *The Wash. Post* (Mar. 4, 1984), <https://www.washingtonpost.com/archive/politics/1984/03/04/drug-smuggling-and-hot-goods-a-ride-on-prison-visitors-buses/f7e604db-70ca-40cb-8f06-9d837a043d94/> [<https://perma.cc/96G2-SZ74>].

<sup>24</sup> Justin Wm. Moyer, *Contractors Caught on Video Mistreating Chickens*, *The Wash. Post* (Dec. 6, 2017), <https://www.washingtonpost.com/local/you-need-to-kill-him-tyson-food-contractors-caught-on-video->



, , , 7KH 1LQWK &LUFXLW.V\*LHFFLVLRQ  
,QVXIILFLHQW :HLJKW WR WKH ,PSRUWDQW )LU  
\$PHQGPHQW ,VVXHV DW 6WDNH LQ WKLV &DVH

The First Amendment prohibits the government IURP 'DEULGJLQJ WKH IUHHGRP RI VSHHFK RI WKH SUHVV μ 8 6 .&ReptActionDf HQG , this fundamental liberty FRPHV IURP D 'SURIRXQG national commitment to the principle that debate on public issues should be uninhibited, robust, and wide - RSHQ.Yμ Times Co. v. Sullivan , 376 U.S. 254, 270 (1964). ,Q WKDW ZD\ WKH )LUVW \$PHQGPHQW VHHN ensure that the individual citizen can effectivel y participate in and contribute to our republican system of self- J R Y H U Q F H D Newspaper Co. v. Sup. Ct., 457 U.S. 596, 604 (1982).

This case implicates two significant aspects of First Amendment protections vital to newsgathering and reporting : Fi/F4 12 65.73 3 12 3 375.19 T. BTW\* n BT /F6 12 Tf 1 00 1 1d66



When is investigative deception protected speech?<sup>80</sup>

The Ninth Circuit ignored free speech principles by deciding that the First Amendment did not apply to

speech of general applicability. In doing so, it presumed that engaging in constitutionally protected speech, with the goal of shedding light on a question of public interest, can give rise to legally cognizable harms under unrelated laws, such as property harms under a trespass statute.

51 F.4th at 1134. The court stated that such speech, (1) is not primarily falsehoods constitute protected speech, (2) a primary goal of the First Amendment, which is to facilitate truth-seeking, and (3) the long-standing and deeply beneficial practice of undercover investigations.

This Court has rejected the view that there is a categorical exception for undercover speech. *United States v. Alvarez*, 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*





that false statements enjoy First Amendment protection unless they cause direct, legally cognizable harm.

Thus, harm resulting from the exposure of an L Q Y H V W L J D W L Y H V X E M i s H o w l e g a l l y Z Q F R Q G X F cognizable harm under Alvarez. And as might be H [ S H F W H G J L Y H Q W K L V F R X Q W U \ . V W U D G L W L R Q R newsgathering, deception used by journalists, activists, and whistleblowers to gain access to private property <sup>3</sup> e.g., omitting or affirmatively misrepresenting political, organizational, or journalistic affiliations, or affirmatively understating certain educational backgrounds <sup>3</sup> 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 first and foremost to the objectionable conduct itself, and only then to its publication and the advocacy that is often enabled (or emboldened) by such publication, not to the use of deception to gain access.

Imagine the perverse <sup>3</sup> and speech chilling <sup>3</sup> outcomes if cognizable harm from the publication of the content of an investigation could 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. Yet an investigation that exposes fraud, abuse, malfeasance, or criminality, could expose the reporter to ruinous damages. That is



and other industrial farming operations 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 one industry and the detriment of the public. 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.*

1 & ) D U P % X a/ @ P "• & ð :Dp^ ' a"è2st , 878 F.3d at 24.6>-42<002500



Live broadcast contained a false statement of fact that  
 ZDV PDGH ZLWK ¶DF.W is clear that the

Lion was not prepared to offer proof meeting the New  
 York Times VWDQG DUDQHG 3DUHQWKRRG )HG·Q RI

Am., Inc. v. Ctr. for Med. Progress , 402 F. Supp. 3d  
 615, 643 (N.D. Cal. 2019) QRWLQJ SODLQWLIIV· GHFLVLRQ W

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).

conference and event security. Id. at 645.<sup>33</sup> In the  
 FRXUW·V YLHZ WKHVH GDPDJHV ZHUH QRW S  
 considered reputational or publication damages;  
 UDWKHU WKH GDPDJHV Direct X of WHG 'IURP WKH  
 GHIHQG'DQDVFHO\ 'WkKusibrs, their  
 misrepresentations, and their targeting and  
 VXUUHSWLWLRXV UHFRUG LQ at 644. SODLQWLIIV· VWD

For support, the d istrict court looked to the  
 6X SUHPH & RXUW·V Cob F. L. O. W. B. S. Media  
 Co., 501 U.S. 663 (1991). There, the Court cleare d 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 & RKHQ GLG QRW VHHN 'GDPDJHV IRU LQM  
 WR KLV UHSXWDWLRQ R 'The Know New DWH RI PLQG..  
 FRXOG QRW VDWLVI\ 'WKH VWULFW UHTXLUHF  
 HVWDEOLVKLQJ D OLEHO RU GHIDPDWLRQ FODLP p  
 disclosed information was true <sup>3</sup> but LQVWHDG 'VRXJKW



politically powerful. Indeed, if left standing, the Ninth  
& L U F X L W · V



Appellants' violations of generally applicable laws. <sup>μ</sup>  
7 K L V ' H [ F H S W I S R Q P X W W R . W K L U V W \$ P H Q G P H Q W  
doctrine threatens to swallow rules necessary for  
undercover reporting.

Again, this case serves as the blueprint.  
Plaintiffs prosecuted 15 claims against defendants <sup>3</sup>  
from RICO and federal wiretapping claims, to  
trespass and fraud claims <sup>3</sup> in a case that has spanned  
more than seven years (and counting), generated over  
1150 docket entries, and resulted in a five -week jury  
trial. 6 H H 3 O D Q Q H G 3 D U H Q W K R R G ) H G . Q R I \$ P , Q  
Ctr. for Med. Progress , 613 F. Supp. 3d 1190, 1195  
(N.D. Cal. 2020) . Bringing a case of this magnitude  
and V F R S H G H P D Q G V O H J L R Q V R I D W W R U Q H \ V \$ Q Q  
F H U W D L Q O \ W U X H K H U H ' O R U H W K D Q D W W R U Q I  
on the case for plaintiffs and 22 of them billed more  
W K D Q K R X U 3 / O B D Q K I G 3 D U H Q W K R R G ) H G . Q R I  
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  
P L O O L R Q L Q D W W R U Q H \ V in I H H V D Q G F R V W  
addition to damages.

It will take little legal imagination to imitate  
plaintiff's strategy if the Ninth Circuit <sup>3</sup> V M X G J P H Q W L V  
affirmed . But 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



27

JUSTIN MARCEAU  
University of Denver, Sturm  
College of Law  
2255 E. Evans Avenue  
Denver, CO 80208

GABE WALTERS  
JT MORRIS  
Foundation for Individual  
Rights and Expression  
700 Pennsylvania Ave., SE  
Suite 340  
Washington, DC 20003

PIPER HOFFMAN  
Animal Outlook  
P.O. Box 9773  
Washington, D.C. 20016

AMANDA HITT  
Director  
Government Accountability  
Project  
1612 K Street, NW  
Suite 1100  
Washington, DC 20006