No. _____ **PUBLIC**

In the Supreme Court of the United States

TROY NEWMAN,

Petitioner,

v.

NATIONAL ABORTION FEDERATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI (REDACTED PUBLIC VERSION)

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QUESTIONS PRESENTED

Petitioner Troy Newman is a former board member of the Center for Medical Progress (CMP). Following the tradition of other investigative journalists, CMP conducted an undercover investigation of fetal tissue procurement companies and abortion providers. CMP videotaped conversations at various locations, including two conferences hosted by Respondent National Abortion Federation (NAF), and subsequently published a series of videos. Two ensuing Congressional investigations concluded that fetal tissue procurement companies and abortion providers committed illegal and unethical acts; criminal and regulatory referrals resulted.

NAF sued Petitioner and others. Relying on nondisclosure agreements signed by NAF conference attendees, the district court issued a preliminary injunction barring the publication of any recordings made, or confidential information learned, at NAF conferences. Defendants are even prohibited from providing the enjoined materials to any government agency, including law enforcement agencies, unless they are subpoenaed and granted permission from the district court. The Ninth Circuit affirmed, with Judge Callahan dissenting to the extent that Defendants are barred from voluntarily communicating with government investigators.

1. Did the Ninth Circuit err by holding, in conflict with decisions of this Court and the First, Tenth, and Federal Circuits, that courts may enforce a nondisclosure agreement to prevent the voluntary

disclosure to law enforcement or regulatory agencies, or the general public, of information concerning conduct that may be criminal, illegal, or unethical?

2. Does the Ninth Circuit's application of an abuse of discretion standard of review to this First Amendment case warrant reversal?

PARTIES TO THE PROCEEDING

The parties to this proceeding are: Plaintiff-Respondent National Abortion Federation; Defendant-Petitioner Troy Newman; Defendant David Daleiden; Defendant Center for Medical Progress; and Defendant BioMax Procurement Services, LLC.

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The lower court decisions in this case are styled *National Abortion Federation v. Center for Medical Progress*. The district court decision granting a preliminary injunction is unpublished but is available at 2016 U.S. Dist. LEXIS 14485 (N.D. Cal. Feb. 5, 2016). App.11a. The opinion of the U.S. Court of Appeals for the Ninth Circuit affirming the district court is unpublished but is available at 2017 U.S. App. LEXIS 5472 (9th Cir. Mar. 29, 2017). App.1a. The Ninth Circuit's order denying rehearing is unreported. App.79a.

JURISDICTION

The Ninth Circuit panel's decision was issued on March 29, 2017. The court denied a timely petition for rehearing/rehearing en banc on May 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.

INTRODUCTION

It has long been a tenet of Anglo-American jurisprudence that individuals who believe that they have information concerning criminal or illegal activities should be permitted, and *encouraged*, to voluntarily provide such information to government authorities. Similarly, investigative journalism

concerning matters of public concern, including the uncovering of illegal, unethical, or troubling activities, is a constitutionally protected, venerable undertaking.

This Petition stems from an injunction forbidding the voluntary disclosure to law enforcement agencies, other governmental bodies, and the general public of recordings and other information that the enjoined individuals and entities—as well as Congressional investigators—believe are evidence of widespread criminal, illegal, and unethical conduct, including felonies. In upholding this injunction, the Ninth Circuit's decision conflicts with decisions of this Court, other federal courts, and state courts, in a manner that significantly hampers the efforts of government investigators and imposes a chilling effect upon investigative journalists and whistleblowers. This Court should grant review.

Moreover, in reviewing this First Amendment case, the Ninth Circuit applied the deferential "abuse of discretion" standard rather than the proper "de novo" standard which this Court's decisions require. This error warrants reversal.

STATEMENT OF THE CASE

1. Investigative work of the Center for Medical Progress

Defendant David Daleiden created the Center for Medical Progress (CMP) to investigate, and educate the public about, fetal organ trafficking and related illegal, unethical, and troubling acts. Petitioner Troy

Newman was a CMP board member from its founding until January 2016.

Similar to an ABC undercover news investigation reporting on the illegal sale of fetal body parts,[1] CMP investigators posed as potential business partners from a start-up tissue procurement company called BioMax Procurement Services, LLC (BioMax). Wearing hidden cameras, these investigators attended several abortion-related conferences—including two conferences of the National Abortion Federation (NAF)—and had numerous face-to-face meetings to discuss fetal organ procurement.

Beginning in July 2015, CMP released a series of videos as part of its "Human Capital Project" exposé, highlighting clips that showed individuals admitting that "their fetal tissue procurement agreements are profitable for clinics" and "that they sometimes changed the abortion procedure in order to obtain a more intact specimen, including relying on the illegal partial-birth abortion procedure."[2] At the conclusion of a meeting in which prices for the sale of various fetal organs were discussed, one doctor stated, "It's been years since I talked about compensation, so let me just figure out what others are getting, if this is in the ballpark, it's fine, if it's still low then we can

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[1] ABC News, *Parts for Sale; People Make Thousands of Dollars Off the Sale of Fetal Body Parts*, Mar. 8, 2000, *available at* https://advance.lexis.com/api/permalink/957b74a6-4b28-4215-aae9-c9c406e2efd3/?context=1000516.

[2] U.S. House of Representatives, Select Investigative Panel, *Final Report*, at 1, Dec. 30, 2016, https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf ("H.Rpt.").

bump it up. I want a Lamborghini." App.86a. CMP also released far lengthier footage to allow viewers to examine the full context.[3]

CMP's investigative exposé drew widespread public interest, including the attention of legislators, law enforcement agencies, candidates for President, and the general public. CMP's videos were the impetus for two Congressional investigations, which documented extensive evidence that numerous fetal tissue procurement companies and abortion providers committed an array of criminal, illegal, and unethical acts.[4] These investigations resulted in the issuance of numerous criminal and regulatory referrals to federal, state, and local law enforcement entities,[5] including for several organizations that are NAF members and/or NAF conference attendees.

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[3] Although the district court faulted the shorter CMP videos for their allegedly "misleading characterizations about the information procured," App.71a-72a, the injunction prevents Defendants from publishing full-length, unedited videos recorded at NAF conferences, or voluntarily providing full-length, unedited videos to government investigators.

[4] H.Rpt.; U.S. Senate, Comm. on Judiciary, *Human Fetal Tissue Research: Context & Controversy*, at 1, S. Prt. 114-27, Dec. 2016, https://www.judiciary.senate.gov/imo/media/doc/2016-12-13%20MAJORITY%20REPORT%20-%20Human%20Fetal%20Tissue%20Research%20-%20Context%20and%20Controversy.pdf ("S.Rpt.").

[5] H.Rpt. at xxv-xxvi, 33-34; Letter to U.S. Attorney General & FBI Director, Dec. 13, 2016, https://www.judiciary.senate.gov/download/grassley-to-justice-dept-and-fbi_-fetal-tissue-investigation-referrals.

2. District court proceedings

Respondent NAF brought suit on July 31, 2015 seeking, *inter alia*, to enjoin publication of videos that CMP investigators recorded at NAF conferences. NAF alleged that it feared that publication of recordings made at NAF conferences would be forthcoming. The district court issued a temporary restraining order the day the lawsuit was filed. In support of its motion for a preliminary injunction, NAF relied upon a breach of contract claim stemming from nondisclosure agreements that CMP investigators signed concerning the NAF conferences.

The district court acknowledged the significant public interest at stake:

> There is no doubt that members of the public have a serious and passionate interest in . . . the contents of defendants' recordings.
>
> . . . [M]embers of the public . . . have an interest in accessing the NAF materials. I also recognize that this case impinges on defendants' rights to speech and the public's equally important interest in hearing that speech.

App.14a, 71a.

The court nevertheless granted a preliminary injunction that barred Defendants and their associates from, among other things, "publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or

any confidential information learned, at any NAF annual meetings." App.77a-78a. The court held that the nondisclosure agreements constituted waivers of Defendants' First Amendment rights. App.57a.

Additionally, although the court acknowledged that "criminal wrongdoing by abortion providers" is "a matter that is indisputably of significant public interest," App.58a, the court concluded that the NAF conference recordings contained no evidence of criminal activity.[6] The court acknowledged, however, that

> public policy may well support the release of a small subset of records—those that defendants believe show criminal wrongdoing—to law enforcement agencies. . . . [M]y review of the recordings relied on by defendants does not show criminal conduct, but I recognize that law enforcement agencies may want to review the information at issue themselves in order to make their own assessment.

App.63a.[7]

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[6] App.59a. That some of the individuals recorded by CMP disclaimed an intent to break the law does not negate the extensive evidence of criminal activity contained in the public and enjoined CMP videos.

[7] The court also held that publication of NAF conference videos could cause harassment, threats, and violence against NAF members, App.61a-63a, 67a-69a, even though CMP's published videos *do not* call for viewers to take any illegal actions.

3. Ninth Circuit decision

The Ninth Circuit affirmed, stating that "the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF." App.5a. Applying the abuse of discretion standard, the court said that the district court's "factual determinations were supported by the evidence." App.4a.

The Ninth Circuit deferred to the district court's finding that there was no evidence of illegal activity in the enjoined videos: "the district court, having reviewed the recordings, concluded as a matter of fact that [Defendants had not obtained evidence of crimes]. That determination is amply supported by the record." App.5a.[8]

Judge Callahan dissented in part, concluding that "[t]he injunction against Defendants sharing information with law enforcement agencies should be vacated because the public policy in favor of allowing citizens to report matters to law enforcement agencies outweighs NAF's rights to enforce a contract." App.8a (Callahan, J., concurring in part and dissenting in part). Judge Callahan's view was similar to that of the Arizona Attorney General's Office, which filed an *amicus curiae* brief, and

[8] More than two months before the Ninth Circuit issued its decision, Defendants notified the panel of the House and Senate Reports and resulting criminal and regulatory referrals. Dkt. #149. Several months earlier, Defendants notified the panel of an Interim Report issued by the House Panel. Dkt. #124.

participated in oral argument, on behalf of fourteen state attorneys general.

The Ninth Circuit denied rehearing and rehearing en banc. App.79a.

4. The enjoined recordings corroborate the determination of two Congressional investigations that fetal tissue procurement companies and abortion providers have engaged in criminal, unlawful, unethical, and disturbing acts.

In light of the illegal and disturbing acts that CMP's public videos uncovered, both houses of Congress conducted their own extensive investigations. The House of Representatives established a Select Investigative Panel that was "authorized and directed to conduct a full and complete investigation and study and issue a final report of its findings" concerning, among other things, "medical procedures and business practices used by entities involved in fetal tissue procurement" and "the practices of providers of second and third trimester abortions, including partial birth abortion and procedures that may lead to a child born alive as a result of an attempted abortion." H. Res. 461, § 3(a) (Oct. 7, 2015). The Senate Committee on the Judiciary conducted its own investigation into "issues involving the buying and selling of fetal tissue in violation of 42 U.S.C. § 289g-2." S.Rpt. at 1.

In December 2016, these investigative bodies issued hundreds of pages of detailed reports documenting extensive evidence that numerous fetal

tissue procurement companies and abortion providers have committed an array of criminal, illegal, and unethical acts, such as:

- profiting from the sale of fetal organs;
- altering abortion procedures for financial gain;
- performing illegal partial-birth abortions;
- killing newborns who survived attempted abortions;
- failing to obtain informed consent for fetal tissue donations;
- violating federal regulations regarding Institutional Review Boards (IRBs); and
- fraudulent overbilling practices.

The House Panel and Senate Committee issued numerous criminal and regulatory referrals to federal, state, and local law enforcement entities, including for several abortion providers and fetal tissue procurement companies that are NAF members and/or NAF conference attendees. Both investigative bodies noted that their findings were consistent with CMP's public videos, which were "the impetus for" the investigations. S.Rpt. at 1, 48; H.Rpt. at 356.

The enjoined CMP videos corroborate the findings of the House and Senate investigations. The House Panel received the enjoined videos pursuant to a subpoena, and *the House Report repeatedly quotes portions of the enjoined videos*, but did not publish the videos. Thus, Petitioner and the other Defendants are barred from publishing—or voluntarily providing to government investigators—videos that a congressional investigative report has

repeatedly quoted as evidence of the commission of numerous felonies and other illegal and unethical acts.

A. Evidence of illegal profiting from the sale of fetal organs

The acquisition, receipt, or transfer of "any human fetal tissue for valuable consideration"—which includes any money other than "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue"—is illegal if the transfer affects interstate commerce. 42 U.S.C. §§ 289g-2(a), (e)(3). Congressman Waxman and other sponsors of this law declared that "[i]t would be abhorrent to allow for a sale of fetal tissue and a market to be created for that sale" and "repeated over and over that 'fetal tissue may not be sold.'" H.Rpt. at 323-24 (quoting 139 Cong. Rec. H1099 (1993)).

The Senate Report concluded that three procurement companies—StemExpress, LLC, Advanced Bioscience Resources, Inc. (ABR), and Novogenix Laboratories, LLC—sold fetal tissue at substantially higher prices than their documented costs. S.Rpt. at 3; H.Rpt. at xxviii, 189, 200-01 (another company "charged considerably more for fetal tissue and cell lines derived from that tissue than the costs it incurs"); *id.* at 21, 28, 31 (one procurement business received payments at least three times higher than its reimbursable costs; "a competent and ethical federal prosecutor could establish probable cause that both the abortion

clinics and the procurement businesses" violated the law).

For instance, "ABR received $423,622.08 more from customers than it paid to the clinics for the fetal tissue." H.Rpt. at 224. From one 20-week-old fetus that ABR obtained from a clinic for $60, "ABR charged its customers a total of $2,275 for tissue specimens, plus additional charges for shipping and disease screening." S.Rpt. at 35; *id.* at 38 (ABR apparently "charg[ed] thousands of dollars in fees beyond the actual direct costs it incurred. . . . Its attempts to justify the fees after being challenged appear to be *post hoc* rationalizations in an attempt to avoid criminal liability.").

Additionally, StemExpress

> developed an aggressive marketing strategy directed toward abortion clinics. . . . [and] had a half-page advertisement in the program for both the 2014 and 2015 NAF meetings. At the conferences, StemExpress distributed a brochure to NAF members that promised abortion clinics they would be "[f]inancially profitable" if they allowed StemExpress to procure tissue from the clinics. The brochure stated: "By partnering with StemExpress" the clinics will not only help research "but [they] will also be contributing to the fiscal growth of [their] own clinic[s]."

H.Rpt. at 143.

The House Report includes redacted versions of several StemExpress ads— **[REDACTED]**

[REDACTED] —that use the words "Financially Profitable" and that state, "Join our partner program that fiscally rewards clinics for contributing to the advancement of life-saving research. . . ." *Id.* at 143-47, 322.

In an enjoined video that is quoted by the House Report, "an executive from a clinic at which StemExpress procured fetal tissue" admitted that "the clinic made approximately $250,000 a year from fetal tissue and blood donations." *Id.* at 174. Additionally, although StemExpress paid several abortion clinics "a total of $152,640 for fetal tissue," "the Planned Parenthood affiliates at which StemExpress procured fetal tissue had no legally reimbursable costs." *Id.* at xxvii. In fact, StemExpress and its clinic partners *would both claim the same expenses as their own costs* in an effort to show a loss on their fetal tissue sales. *Id.* at xxxvii, 327, 336-37.

Furthermore, "StemExpress' tissue technicians had a financial incentive to procure the most body parts and fetal tissue possible" since they "were 'compensated at a rate of $10 per hour plus a per tissue or blood bonus' that varied depending upon the type of tissues and the amount they procured." *Id.* at 169-70. According to a StemExpress "Procurement Technician Compensation Policy for Tissue and Blood Procurement," a three-tiered bonus structure was used; Category A, for which the highest bonus amounts were paid, included fetal organs highly coveted by researchers, such as brain, heart, liver, and thymus. *Id.* at 170-71.

[REDACTED]

The House Report quotes several conversations recorded by CMP that evidence illegal profiting from the sale of fetal organs, and some of these recordings are covered by the injunction. For instance, one individual admitted in public CMP videos that Planned Parenthood Federation of American (PPFA) "cannot prevent affiliates from entering into contracts with tissue procurement companies in order to increase revenue" and also noted that some

of her colleagues "generate a fair amount of income doing this." H.Rpt. at 304. In the enjoined videos, the same individual "seem[ed] to agree with the journalists that fetal tissue programs are indeed profitable to clinics." *Id.* at 304-05.

In another public CMP video, a doctor admitted that PPFA was concerned with avoiding the *appearance* of profiteering, not the reality:

> They just want to do it in a way that is not *perceived* as, "This clinic is selling tissue, this clinic is making money off of this." . . . [T]hey want to come to a number that doesn't *look like* they're making money. . . .
>
> I think for affiliates, at the end of the day, they're a non-profit, they just don't want to—they want to break even. And *if they can do a little better than break even*, and do so in a way that *seems* reasonable, they're happy to do that.

App.81a-82a (emphasis added). "Accounting documents from middleman tissue organizations showed that several PPFA affiliates made a profit from the transfer of fetal tissue." H.Rpt. at 309.

The House Report quoted another video subject to the injunction in which an abortion provider expressed excitement at the idea of receiving a "financial incentive" for fetal tissue sales. *Id.* at 305; **[REDACTED]**

- **[REDACTED]**

- **[REDACTED]**

- **[REDACTED]**

- **[REDACTED]**

B. Evidence of illegal alterations of abortion procedures to procure fetal organs for research

Federal law prohibits the "alteration of the timing, method, or procedures used to terminate the pregnancy . . . solely for the purposes of obtaining the tissue." 42 U.S.C. § 289g-1. Much of the enormous public outrage generated by CMP's exposé sprang from the recordings of abortion providers callously discussing the ways in which they and other individuals alter abortion techniques for the sole purpose of procuring fetal organs for research. For example, in a public CMP video, an abortion provider stated:

> [A] lot of people want liver. And for that reason, most providers will do this case under ultrasound guidance, so they'll know where they're putting their forceps.
>
> . . .
>
> [Y]ou're just kind of cognizant of where you put your graspers, you try to intentionally go above and below the thorax, so that, you know, we've been very good at getting heart, lung, liver, because we know that, so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact. And with the calvarium, in general, some people will actually try to change the presentation so that it's not vertex. . . .

H.Rpt. at 353-54; *see also* App.84a (a doctor expressed willingness to use "a 'less crunchy' technique to get more whole specimens").

The House Panel "found evidence that some abortion providers altered abortion procedures in a manner that substitutes patient welfare with a financial benefit for both the abortion clinic and the procurement business . . . [which] violates federal law. . . ." H.Rpt. at xlv. One clinic director "admitted that the abortion clinic changed its clinical practices to procure more liver. A Planned Parenthood executive acknowledged making changes to obtain tissue as well." *Id.* at xxvii; *id.* at 309 ("[A] PPFA executive . . . admitted that she regularly changed the method of abortion to facilitate intact fetal specimens. . . .").

The House Report noted that, in one CMP video that is subject to the injunction, a doctor admitted to changing her abortion techniques to preserve fetal tissue for research:

> I let the tech tell me what it is that they need, I usually don't let the trainee do those cases, I try to do everything as intact as possible, because I know it's a research case. She seems to be getting what she needs. Sometimes she'll tell me she needs brain, and we'll leave the calvarium until last, and then try to basically take it, or, actually, you know, catch everything and even keep it separate from the rest of the tissue, so it doesn't get lost. There will probably be providers who just want to keep doing things the way that they do

them, and others who kind of want to help facilitate the process.

Id. at 354-55.

[REDACTED]

Additionally, the House Report quoted another enjoined video in which an abortion provider admitted that her facility reduced the use of digoxin in order to meet increased demand for fetal livers: "Liver's a big thing right now. We just actually increased our gestation for dig[oxin], so that we could be able to get more liver, bigger liver." H.Rpt. at 155, 357-59; **[REDACTED]**

C. Evidence of illegal partial-birth abortions

A partial-birth abortion, or "intact D&E," is a felony. 18 U.S.C. §§ 1531(a), (b)(1); *Gonzales v. Carhart*, 550 U.S. 124, 136-37 (2007). The House Report noted that the public CMP videos "show

abortion clinic doctors and executives . . . relying on the illegal partial-birth abortion procedure" as a part of their efforts to preserve sellable fetal organs. H.Rpt. at 1, 4, 7. The House Panel's investigation found additional evidence of illegal partial-birth abortions. *Id.* at 104-17, 287, 290. **[REDACTED]**

Additionally, the House Panel received "eyewitness accounts of [a late-term abortion provider] killing infants who show signs of life both when partially outside the birth canal, in violation of the Partial-Birth Abortion Ban Act, and after they are completely outside the birth canal, in violation of the Born-Alive Infants Protection Act and Texas murder statutes." H.Rpt. at xxvi, 286-91.

D. Evidence of other illegal, unethical, or disturbing acts

The House Report noted that, in an enjoined CMP video, an individual stated concerning her prospective involvement in fetal tissue procurement:

> "If I'm involved, it would have to go through my University of Michigan IRB, and they tend to be pretty easy about stuff and *actually not require*

> *informed consent*. . . . *[T]heir feeling is you don't even need to consent people*." . . . This admission obviously raises serious questions about UMich's compliance with IRB and informed consent requirements.

H.Rpt. at 278 (emphasis added). Informed consent is a universal ethical standard for participation in medical research.

[REDACTED]

[ENTIRE PAGE REDACTED]

[REDACTED]

REASONS FOR GRANTING THE WRIT

By upholding a prior restraint upon speech about matters of significant public interest, including evidence of possible criminal, illegal, and unethical acts, the Ninth Circuit's decision conflicts with decisions of this Court, other federal courts, and state courts.

I. The Ninth Circuit's decision conflicts with decisions of this Court.

This Court has long recognized that important constitutional and public policy principles may be implicated when litigants ask a federal court to enforce provisions of a contract:

> The power of the federal courts to enforce the terms of private agreements is at all times

> exercised subject to the restrictions and limitations of the public policy of the United States . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Hurd v. Hodge, 334 U.S. 24, 34-35 (1948); *Restatement (Second) of Contracts* § 178(1) (A.L.I. 1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."); *Newton v. Rumery*, 480 U.S. 386, 392 (1986).

One clearly established public policy is that "[i]t is the right, as well as the duty, of every citizen . . . to communicate to the executive officers any information which he has of the commission of an offence against [the laws of his country]." *In re Quarles*, 158 U.S. 532, 535 (1895); *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884) ("[I]t is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws . . . ."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.24 (1977) ("The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions . . . .").

In light of this duty, "[t]he reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged, not penalized."

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895 (1984) (citing *Quarles*, 158 U.S. at 535); *Jenkins v. Anderson*, 447 U.S. 231, 243 n.5 (1980) (Stevens, J., concurring) ("There is, of course, no reason why we should encourage the citizen to conceal criminal activity of which he has knowledge."); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("The [informer's] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and . . . encourages them to perform that obligation.").

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court emphasized that contracts that purport to require individuals to hide evidence of possible illegal activities have been highly disfavored throughout Anglo-American history:

> [I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. . . .
>
> [C]oncealment of crime and agreements to do so are not looked upon with favor. . . .
>
> Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests.

Id. at 696-97; *Roberts v. United States*, 445 U.S. 552, 557-58 (1980) ("Concealment of crime has been

condemned throughout our history. . . . [G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.").

Additionally, in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984), the Court rejected the argument that the SEC must notify targets of its investigations when it issues a subpoena to a third party. The Court stated that "when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." *Id.* at 743. The Court also observed that

> the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the Commission.

Id. at 750.

Although the district court acknowledged that "public policy may well support the release of a small subset of records—those that defendants believe show criminal wrongdoing—to law enforcement agencies," App.63a, the injunction bars Defendants,

backed by the threat of civil or criminal contempt sanctions, from voluntarily providing *any* such information to law enforcement agencies, regulatory investigators, or legislative bodies, and from discussing with them any evidence of possible violations of the law that were learned via attendance at NAF's conferences. The Ninth Circuit erred by holding that, in light of the subpoena power, a court may enjoin citizens from voluntarily providing information to government investigators if it makes its own determination that "they uncovered no violations of the law."[9]

The *amici curiae* brief filed with the Ninth Circuit by fourteen state Attorneys General in support of reversal illustrates how the injunction violates well-established public policy:

> The PI . . . sets a troubling precedent for future cases—that an association wishing to avoid law

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[9] This is not the first time that a split decision of a Ninth Circuit panel downplayed the importance of permitting voluntary disclosure of possible wrongdoing in light of the government's subpoena power. *See Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002) (reversing dismissal of a breach of contract claim stemming from a psychologist's voluntary testimony before an administrative law judge that a doctor who he had examined pursuant to a court order "was a pedophile and a danger to children"); *see also id.* at 501-02 (Wood, J., dissenting) ("In Arizona's inquiry into the fitness of one of the state's licensed doctors, the full unslanted truth would be crucial to protect the health and welfare of its citizens."); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002) (distinguishing *Patton* and holding that "JDSU cannot use its confidentiality agreements to chill former employees from voluntarily participating in legitimate investigations into alleged wrongdoing by JDSU").

> enforcement scrutiny can obtain an injunction restricting communications regarding potential wrongdoing.
>
> . . .
>
> The District Court's reasoning in granting the PI would allow any group of individuals desiring to shield communications from law enforcement to merely enter into confidentiality agreements and use the federal courts to short circuit government investigations. A price-fixing cartel, for example, could make its members sign confidentiality agreements and then have that agreement enforced. This is clearly an absurd result and contrary to the public interest law enforcement is sworn to protect.

Amici Curiae Brief of Fourteen Attorneys General at 2, 27, Dkt. #28.

Judge Callahan similarly noted that the Ninth Circuit's decision contravenes public policy and conflicts with this Court's decisions:

> [T]he public policy in favor of allowing citizens to report matters to law enforcement agencies outweighs NAF's rights to enforce a contract. This was recognized by the Supreme Court over thirty years ago in *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) . . . .
>
> [O]ur system of law and order depends on citizens being allowed to bring whatever information they

> have, however acquired, to the attention of law enforcement. This case is no exception. . . .

App.8a-10a.

Federal, state, and local law enforcement and regulatory agencies have the independent duty, and authority, to conduct their own investigations and draw their own determinations concerning whether individuals or entities have acted in accordance with the law. Just as courts may not bar individuals from testifying before other courts in other proceedings,[10] well-established public policy—as well as separation-of-powers and federalism principles—dictate that courts may not bar individuals from voluntarily sharing information with executive branch officials.

Additionally, the Ninth Circuit erred by improperly conflating 1) the issue of whether the injunction is contrary to public policy and an improper prior restraint that cannot overcome the "'heavy presumption' against its constitutional validity," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), with 2) the question of whether CMP's acquisition of the information was consistent with the contracts' terms. App.5a (concluding that the injunction was proper because "one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest"); App.6a. Taking a fundamentally different approach, in *N.Y. Times v. United States*, 403 U.S. 713 (1971), this

[10] *See, e.g.*, *Baker ex rel. Thomas v. GMC*, 522 U.S. 222, 238-39 (1998); *Lana C. v. Cameron P.*, 108 P.3d 896, 901-02 (Alaska 2005).

Court denied the federal government's request to enjoin newspapers from publishing the then-classified Pentagon Papers, which *had been stolen from the Pentagon*. *Id.* at 714 (per curiam).

Similarly, in *CBS v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun issued a stay preventing enforcement of a preliminary injunction that prevented CBS from airing videos surreptitiously recorded at a meat packing factory, despite allegations that CBS engaged in illegal "calculated misdeeds," because "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context." *Id.* at 1316-18 (Blackmun, J., in chambers) (citations omitted); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

The Ninth Circuit's decision conflicts with this Court's jurisprudence, as well as decisions of other circuits, by relying upon the allegedly wrongful acquisition of the material in upholding an injunction that silences Defendants from speaking publicly, or with law enforcement and regulatory agencies, about matters of enormous public interest. *See, e.g.*, *In re Halkin*, 598 F.2d 176, 189-90 (D.C. Cir. 1979), *overruled in part on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984) ("Even where individuals have entered into express agreements not to disclose certain information . . . the courts have held that judicial orders enforcing such agreements are prior restraints implicating First Amendment rights."); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th

Cir. 1972) ("We would decline enforcement of the secrecy oath signed when [defendant] left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights."); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (holding that the district court was without power to enjoin publication of information pursuant to a settlement agreement).

Furthermore, the public has a right to receive information about topics of great public interest, including evidence of possible criminal, illegal, or unethical acts. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). **[REDACTED]**

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[11] The district court's holding that protected speech may be suppressed due to the possibility that unspecified members of the general public could react by committing illegal acts conflicts with this Court's decisions, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and also imposes a chilling effect upon investigative reporting and political commentary.

II. The Ninth Circuit's decision conflicts with decisions of the First, Tenth, and Federal Circuits, as well as other courts.

The Ninth Circuit's decision is contrary to countless lower federal court and state court decisions that have echoed this Court's recognition of the strong public policy favoring voluntary citizen disclosure and reporting of possible evidence of unlawful activities.[12]

For instance, in *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972), the plaintiffs hired a company to survey an oil and gas well, and the parties entered into a contract that prohibited the company from disclosing information concerning the survey to any third party. Employees of the company later notified the owners of the oil and gas rights for an adjacent property that

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[12] *See, e.g.*, *Hickingbottom v. Easley*, 494 F. Supp. 980, 984 (E.D. Ark. 1980) ("Certainly, the potential violation of the law should always be a matter of public concern. It is the duty of everyone to assist in the detection of crime; and if he knows facts that tend to show that a crime has been committed, it is not only proper, but it is his duty to communicate them to the proper officer."); *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 360 (2004) (noting that a California statute reflects "important public policy" and "is intended to 'assure utmost freedom of communication between citizens and *public authorities whose responsibility is to investigate and remedy wrongdoing*'" (citation omitted)); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (public policy favors "citizen crime-fighters" and "the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy"); *Palmer v. Brown*, 752 P.2d 685, 689 (Kan. 1988) ("It has long been recognized as public policy to encourage citizens to report crimes.").

plaintiffs' well was producing oil and gas that belonged to them. This information prompted the neighboring rights-holders to bring a successful lawsuit against plaintiffs concerning the proceeds of oil and gas produced by the well.

Plaintiffs sued the surveying company for breach of contract due to the disclosure of the survey results to the neighboring rights-holders. The Tenth Circuit affirmed the district court's dismissal of the claim on public policy grounds. Although the plaintiffs alleged that they lacked the intent required for their conduct to constitute a crime, the Tenth Circuit stated that

> [i]t is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced by appellants would serve to frustrate this policy. The distinction between a crime and a mere tort can often, as here, be a difference brought about by time, and knowledge. In the present case, the appellee *may reasonably have felt that* in adhering to the terms of its contract with the appellants *it was silently watching a crime being committed or facts developing into such an act*. . . .
>
> By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually

> proven, or honoring the contract while a possible crime goes unnoticed.

Id. at 853-54 (emphasis added).

Similarly, in *Bowman v. Parma Board of Education*, 542 N.E.2d 663 (Ohio Ct. App. 1988), a teacher who had been accused of molesting students entered a settlement agreement that included a nondisclosure clause. He later brought suit claiming a breach of the agreement after learning that a school board member had notified his new employer of the evidence of alleged misconduct. The court held that the nondisclosure clause was "void and unenforceable" as contrary to public policy. *Id.* at 666-67. The court stated:

> [Appellant argues] that [a state crime reporting] statute requires only that knowledge of the commission of a felony be reported to law enforcement authorities, not school boards. Appellant's argument is not well-taken. The non-disclosure clause *was illegal per se* in the respect that it purported to suppress information concerning the commission of felonies.

Id. at 667 (emphasis added). In other words, since the contractual requirement to suppress information concerning possible illegal activities was void, the school board member was free to pass the information along to others, including the plaintiff's new employer.

Additionally, in *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), the First Circuit affirmed a

preliminary injunction to the extent that it barred a company from entering into or enforcing settlement agreements that prevent employees from assisting the EEOC in its investigation of sexual harassment charges, such as by volunteering any information to the EEOC that is beyond the scope of an ongoing investigation. *Id.* at 745. The EEOC had not issued subpoenas to employees covered by the contracts. *Id.* at 741. The First Circuit stated,

> [c]learly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered. . . .
>
> [A]ny agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest. . . .
>
> [N]on-assistance covenants which prohibit communication with the EEOC are void as against public policy.

Id. at 744-45 n.5 (citation omitted).

In response to the company's claim that the EEOC was not irreparably harmed by the contracts because it "could obtain the information it seeks through the use of its subpoena power," the First Circuit stated:

> It would be most peculiar to insist that the EEOC resort to its subpoena power when public policy so clearly favors the free flow of information between victims of harassment and the agency entrusted with righting the wrongs inflicted upon them. Such a protocol would not only stultify investigations but also significantly increase the time and expense of a probe. . . .

Id. at 745; *see also EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (holding "that a waiver of the right to file a charge [with the EEOC] is void as against public policy"); *SEC v. Lipson*, 1997 U.S. Dist. LEXIS 24695, at *2-5 (N.D. Ill. Oct. 29, 1997) (holding that contract provisions barring signatories from discussing pertinent information with government agencies without being subpoenaed were unenforceable).

Furthermore, in *Fomby-Denson v. Department of the Army*, 247 F.3d 1366 (Fed. Cir. 2001), the Federal Circuit held that construing an employment settlement agreement, which stated that its subject matter "shall not be publicized or divulged in any manner, except as is reasonably necessary to administer its terms," to bar the United States from making criminal referrals to German law enforcement concerning the employee's conduct underlying the settlement agreement "would render the agreement unenforceable as a matter of public policy." *Id.* at 1368-69 (citation omitted).

The Federal Circuit stated that "the public policy interest at stake—the reporting of possible crimes to

the authorities—is one of the highest order and is indisputably 'well defined and dominant' in the jurisprudence of contract law." *Id.* at 1375 (quoting *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)). The court discussed numerous opinions and secondary authorities supporting the proposition that "courts will not enforce contracts that purport to bar a party . . . from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution." *Id.* at 1375-78 (citing, *inter alia*, *Roberts*, *Branzburg*, and *Lachman*); *id.* at 1377 n.9 (agreements that "tend to suppress legal investigation[s]" are void as against public policy). The court added that "it is of course appropriate for the Army to provide all details reasonably thought necessary for [the German] authorities to make their decisions regarding the investigation and possible prosecution of Ms. Fomby-Denson." *Id.* at 1378.[13]

In this case, the district court stated that *Fomby-Denson* and similar cases were inapposite since they involve "contracts which expressly prohibit a signatory from reporting criminal behavior to law enforcement agencies." App.64a. That conclusion is erroneous, however, because the nondisclosure agreement in *Fomby-Denson* broadly provided that

[13] *See also Alderson v. United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010) ("Courts have consistently refused to enforce post-employment confidentiality agreements that sought to prevent a former employee from revealing harmful information about the employer's illegality."); *McGrane v. Reader's Digest Ass'n*, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993) ("[T]he courts can hardly be called upon to enforce an employer-employee exit agreement for the covering up of wrongdoing which might violate criminal laws.").

"the parties agree that the terms of this agreement shall not be publicized or divulged in any manner, except as is reasonably necessary to administer its terms." 247 F.3d at 1372 (citations omitted). *Fomby-Denson* and the lower courts' decisions in this case are in direct conflict.

Numerous other decisions have held, contrary to the Ninth Circuit's decision here, that contracts cannot be enforced in a manner that prohibits voluntary discussions with law enforcement agencies.[14] For instance, in the highly publicized litigation involving Bill Cosby, a federal court dismissed breach of contract claims arising out of a confidential settlement agreement entered during prior litigation to the extent that the claims stemmed from voluntary disclosures to law enforcement agencies. *Cosby v. Am. Media, Inc.*, 197 F. Supp. 3d 735, 737 (E.D. Pa. 2016). The agreement included promises "'not to disclose to anyone . . . any aspect of this LITIGATION,' including 'the events or allegations upon which the LITIGATION was based' and 'allegations made about [Mr. Cosby] or [Andrea Constand] by other persons.'" *Id.* at 737-38.

After allegations against Cosby gained national attention, parties to the settlement agreement disclosed information covered by the agreement through a variety of means, including voluntary

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[14] *See, e.g.*, *Armstrong v. Sexson*, 2007 U.S. Dist. LEXIS 33840, at *27-29 (E.D. Cal. Apr. 25, 2007); *EEOC v. Int'l Profit Ass'ns*, 2003 U.S. Dist. LEXIS 6761, at *4-6 (N.D. Ill. Apr. 21, 2003); *D'Arrigo Bros. of Cal. v. United Farmworkers of Am.*, 224 Cal. App. 4th 790, 802-05 (6th Dist. 2014); *Camp v. Eichelkraut*, 539 S.E.2d 588, 597-98 (Ga. Ct. App. 2000).

disclosures to criminal investigators. *Id.* at 738. In considering "whether there is a robust public policy against the enforcement of contracts that purport to prevent individuals from voluntarily providing information concerning alleged criminal conduct to law enforcement authorities," the court noted that *Fomby-Denson* "appears to be the leading case on this subject." *Id.* at 741 (citing, *inter alia*, *Branzburg* and *Lachman*). The court stated,

> Cosby argues that the principle identified in *Fomby-Denson* does not apply to voluntary disclosures to law enforcement officers, but rather only to disclosures elicited through a subpoena. He cites no authorities in support of this proposition. Indeed, to the contrary, *Fomby-Denson* itself involved voluntary disclosures. . . . [T]he public policy reasons underlying the *Fomby-Denson* principle, and outlined extensively in that case, apply equally to voluntary disclosures as to forced disclosures, as there is no reason to conclude that "the reporting of crimes" is necessarily an involuntary activity. 247 F.3d at 1376.
>
> Accordingly, to the extent that the CSA purports to prevent its signatories from voluntarily disclosing information about crimes to law enforcement authorities, it is unenforceable as against public policy.

Id. at 742.

III. The Ninth Circuit's application of the wrong standard of review warrants reversal.

Although the district court reached demonstrably erroneous conclusions about whether the enjoined materials include any evidence of possible illegal activity, the Ninth Circuit separately erred by reviewing that decision for abuse of discretion, contrary to this Court's many decisions requiring *de novo* review of constitutionally decisive facts and an independent examination of the whole record in First Amendment cases. As this Court has explained,

> our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. . . . [T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . *[W]e are obliged to make a fresh examination of crucial facts*. . . . [O]ur obligation is to "'make an independent examination of the whole record' . . . so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression."

Hurley v. Irish-American GLB Grp., 515 U.S. 557, 567-68 (1995) (emphasis added); *see also Claiborne*, 458 U.S. at 924; *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974). Given the Ninth

Circuit's blatant departure from this First Amendment standard, this Court should reverse the decision below.

CONCLUSION

The general public, law enforcement and regulatory agencies, and legislatures have the right to view the enjoined videos, which corroborate the results of the congressional investigations and may also impact how the numerous criminal and regulatory referrals resulting therefrom are handled. The Ninth Circuit's decision conflicts with decisions of this Court, lower federal courts, and state courts on important issues. This Court should grant review.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-15360

D.C. No. 3:15-cv-03522-WHO

NATIONAL ABORTION FEDERATION, NAF,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA ROBERT DAOUD SARKIS; TROY NEWMAN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California.
William Horsley Orrick III, District Judge, Presiding.

October 18, 2016, Argued and Submitted,
San Francisco, California
March 29, 2017, Filed

Appendix A

Before: CALLAHAN and HURWITZ, Circuit Judges, and MOLLOY,* District Judge.

MEMORANDUM**

1. Plaintiff-Appellee the National Abortion Federation ("NAF") is a non-profit professional association of abortion providers whose mission is "ensur[ing] safe, legal, and accessible abortion care." NAF conducts annual meetings of its members and invited guests which are not open to the public. All meeting attendees must sign confidentiality agreements before obtaining meeting materials and access to the meeting areas.

2. The individual Defendants-Appellants are anti-abortion activists. Defendant-Appellant David Daleiden founded the Center for Medical Progress ("CMP") and later created the "Human Capital Project" to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue."

3. In order to obtain an invitation to attend NAF's 2014 and 2015 annual meetings, the individual defendants misrepresented themselves as representatives of a company, BioMax Procurement Services LLC ("BioMax"), purportedly engaging in fetal tissue research. Daleiden—purporting to be a BioMax representative and using an

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

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

alias—signed "Exhibit Agreements" for both annual meetings in which he acknowledged, among other things, that all written, oral, or visual information disclosed at the meetings "is confidential and should not be disclosed to any other individual or third parties" absent written permission from NAF.[1]

4. The individual defendants and several investigators they hired to pose as BioMax representatives also signed "Confidentiality Agreements" that prohibited: (1) "video, audio, photographic, or other recordings of the meetings or discussions at this conference;" (2) use of any "information distributed or otherwise made available at this conference by NAF or any conference participants . . . in any manner inconsistent with" the purpose of enhancing "the quality and safety of services provided by" meeting participants; and (3) disclosure of any such information "to third parties without first obtaining NAF's express written consent."

5. Notwithstanding these contracts, the defendants secretly recorded several hundred hours of the annual conferences, including informal conversations with other attendees. The defendants attempted in those conversations to solicit statements from conference attendees that they were willing to violate federal laws regarding abortion practices and the sale of fetal tissue.

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1. In signing the agreement, Daleiden also falsely affirmed that all information contained in BioMax's application and other correspondence with NAF was "truthful, accurate, complete, and not misleading."

6. The defendants then made some of the recordings public. After the release of the recordings, incidents of harassment and violence against abortion providers increased, including an armed attack at the clinic of one of the video subjects that resulted in three deaths.

7. The district court issued a preliminary injunction enjoining the defendants from, in contravention of their agreements with NAF, "publishing or otherwise disclosing to any third party": (1) any "recordings taken, or any confidential information learned, at any NAF annual meetings;" (2) "the dates or locations of any future NAF meetings;" and (3) "the names or addresses of any NAF members learned at any NAF annual meetings."

8. We have jurisdiction over the defendants' appeal of that preliminary injunction under 28 U.S.C. § 1292(a)(1). We review for abuse of discretion, *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and affirm. The district court carefully identified the correct legal standard and its factual determinations were supported by the evidence. *Id.*; *see also Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (asking whether the "district court's application of the correct legal standards was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record").

9. We add only a few thoughts to the district court's careful discussion. First, the defendants do not contest that they engaged in misrepresentation and breached their contracts. But, they claim that because the information

they obtained is of public interest, the preliminary injunction is an unconstitutional prior restraint. Even assuming arguendo that the matters recorded are of public interest, however, the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF. *See Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994). Nor did the district court abuse its discretion in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality agreements, because one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. . . . simply because the person subjected to the intrusion is reasonably suspected of committing a crime.").

10. The defendants claim that they were released from their contractual obligations because they obtained evidence of criminal wrongdoing. But the district court, having reviewed the recordings, concluded as a matter of fact that they had not. That determination is amply supported by the record. *See Pimentel*, 670 F.3d at 1105.

11. Our dissenting colleague believes that the district court erred in enjoining the defendants from voluntarily providing the purloined information to law enforcement. But even assuming the dubious proposition that the

defendants were entitled to root out what they considered to be illegal activities through fraud and breach of contract, the district court's finding that they uncovered no violations of the law is a sufficient answer to any right claimed by the defendants.[2]

12. The preliminary injunction places no direct restriction on law enforcement authorities. Rather, it enjoins the *defendants* from disclosing information to anyone except in response to a subpoena. If law enforcement officials obtain a subpoena, the defendants have agreed in a stipulated Protective Order to notify NAF so that it can decide whether to oppose the subpoena. The preliminary injunction and protective order explicitly provide that NAF may not "disobey a lawful . . . subpoena." The preliminary injunction therefore in no way prevents law enforcement from conducting lawful investigations.

13. The dissent, citing *S.E.C. v. O'Brien*, 467 U.S. 735, 750, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984), argues that notifying the target of a third-party subpoena might allow that target to thwart an investigation by intimidating the third party and destroying documents. But *O'Brien* involves investigations in which a target is unaware of an ongoing investigation and still possesses materials that would be the subject of a subpoena or

2. The dissent cites no authority for the proposition that "our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement." Dissent at 3. Even if true, however, the proposition would confer no right on citizens to obtain that information through fraud or breach of contract.

potential investigation. *Id.* Here, by contrast, NAF already knows that some law enforcement authorities seek this information, the defendants—not NAF—possess the recordings, and the defendants, who are eager to comply with any subpoena for their own purposes, are hardly likely to destroy the subpoenaed recordings. Moreover, the district court has preserved the recordings.

14. Given the district court's finding, which is supported by substantial evidence, that the tapes contain no evidence of criminal activity, and its recognition of several states' ongoing "formal efforts to secure the NAF recordings," the preliminary injunction carefully balances the interests of NAF and law enforcement. We therefore decline the request by the amici Attorneys General to modify the injunction.

AFFIRMED.

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

Constrained as I am by the applicable strict standards of review, *see Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012), I accept that Defendants have generally failed to carry their burden of showing that the District Court's grant of a preliminary injunction is an abuse of discretion.

I strongly disagree with my colleagues on the application of the preliminary injunction to law enforcement agencies. The injunction against Defendants sharing information with law enforcement agencies should be vacated because the public policy in favor of allowing citizens to report matters to law enforcement agencies outweighs NAF's rights to enforce a contract. This was recognized by the Supreme Court over thirty years ago in *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").[1] Accordingly, I find no justification for not allowing Defendants to share the tapes with any law enforcement agency that is interested.

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1. *See also In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 748 F.2d 1415, 1419 (10th Cir. 1984).

Moreover, the District Court's determination that the tapes contain no evidence of crimes, even if true, is of little moment as the duties of Attorneys General and other officers to protect the interests of the general public extend well beyond actual evidence of a crime. In *United States v. Morton Salt Co.*, 338 U.S. 632, 643, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436 (1950), the Supreme Court recognized that "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *See also Wilson Corp. v. State ex rel. Udall*, 1996- NMCA 049, 121 N.M. 677, 916 P.2d 1344, 1348 (N.M. Ct. App. 1996) (noting that New Mexico's civil investigative demands "enable the Attorney General to obtain information without first accusing anyone of violating the Antitrust Act."); *CUNA Mut. Ins. Soc. v. Attorney General*, 380 Mass. 539, 404 N.E.2d 1219, 1222 (Mass. 1980) (noting that use of civil investigative demands is not limited only to person being investigated, but extends to seeking information from the insurer concerning possible violations of that statute by others); Ariz. Rev. Stat. § 44-1524(A) (allowing the Attorney General in investigating a violation to "[e]xamine any merchandise or sample thereof, or any record book, document, account or paper as he may deem necessary.").

Furthermore, disclosure to a law enforcement agency is not a disclosure to the public. As the Attorneys General amici note: "[l]aw enforcement regularly handles highly sensitive materials, such as the identity of informants, information regarding gangs and organized crime, and the location of domestic violence victims. If law enforcement

cannot be trusted to handle information with the potential to risk bodily harm or even death if it falls into the wrong hands, then it simply cannot do its job." Accordingly, our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement. This case is no exception and the district court erred in preventing Defendants from showing the tapes to law enforcement agencies.

Similarly, the injunction violates this strong public policy by requiring that if a law enforcement agency contacts Defendants and seeks materials covered by the injunction, Defendants must notify NAF of the request and allow NAF time to respond. These conditions inherently interfere with legitimate investigations. *See Jerry T. O'Brien. Inc.*, 467 U.S. at 750. Moreover, the notice requirement does not purport to protect NAF from subsequent disclosures by a law enforcement agency after it had received the materials.

Whatever the balance between NAF's contractual rights and the Defendants' First Amendment rights, law enforcement is entitled to receive information from citizens regardless of how the citizens procure that information. Accordingly, I would vacate the preliminary injunction insofar as it purports to limit Defendants from disclosing the materials to law enforcement agencies and requires that Defendants notify NAF of any request they receive for the materials from law enforcement agencies.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED FEBRUARY 5, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-03522-WHO

Re: Dkt. Nos. 3, 109, 222, 225, 287, 298, 310, 320, 322, 346, 352

NATIONAL ABORTION FEDERATION, *et al.*,

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, *et al.*,

Defendants.

February 5, 2016, Decided
February 5, 2016, Filed

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

On July 31, 2015, plaintiff National Abortion Federation (NAF) filed this lawsuit and sought a Temporary Restraining Order to prohibit defendants David Daleiden, Troy Newman, and the Center for Medical Progress from publishing recordings taken at

NAF Annual Meetings. NAF alleged, and it has turned out to be true, that defendants secured false identification and set up a phony corporation to obtain surreptitious recordings in violation of agreements they had signed that acknowledge that the NAF information is confidential and agreed that they could be enjoined in the event of a breach. In light of those facts, because the subjects of videos that defendants had released in the previous two weeks had become victims of death threats and severe harassment, and in light of the well-documented history of violence against abortion providers, I issued the TRO.

The defendants' principal arguments against injunctive relief rest on their rights under the First Amendment, a keystone of our Constitution and our democracy. It ensures that the government may not — without compelling reasons in rare circumstances — restrict the free flow of information to the public. It provides that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). But Constitutional rights are not absolute. In rare circumstances, freedom of speech must be balanced against and give way to the protection of other compelling Constitutional rights, such as the First Amendment's right to freedom of association, the Fifth and Fourteenth Amendments' protection of liberty interests, and the right to privacy. After fully considering the record before me, I conclude that NAF has made such a showing here.

Appendix B

Discovery has proven that defendants and their agents created a fake company and lied to gain access to NAF's Annual Meetings in order to secretly record NAF members for their Human Capital Project. In furtherance of that Project, defendants released confidential information gathered at NAF's meetings and intend to release more in contravention of the confidentiality agreements required by NAF. Critical to my decision are that the defendants agreed to injunctive relief if they breached the agreements and that, after the release of defendants' first set of Human Capital Project videos and related information in July 2015, there has been a documented, dramatic increase in the volume and extent of threats to and harassment of NAF and its members.

Balanced against these facts are defendants' allegations that their video and audio recordings show criminal activity by NAF members in profiteering from the sale of fetal tissue. I have reviewed the recordings relied on by defendants and find no evidence of criminal activity. And I am skeptical that exposing criminal activity was really defendants' purpose, since they did not provide recordings to law enforcement following the NAF 2014 Annual Meeting and only provided a bit of information to law enforcement beginning in May, 2015. But I have not interfered with the Congressional committee's subpoena to obtain the recordings to make its own evaluation, nor with the subpoenas from the states of Arizona and Louisiana (although I have approved a process to insure that only subpoenaed material is turned over).

Defendants also claim that the injunction is an unconstitutional prior restraint. They ignore that they

agreed to keep the information secret and agreed to the remedy of an injunction if they breached the agreement. Confidentiality agreements are common to protect trade secrets and other sensitive information, and individuals who sign such agreements are not free to ignore them because they think the public would be interested in the protected information.

There is no doubt that members of the public have a serious and passionate interest in the debate over abortion rights and the right to life, and thus in the contents of defendants' recordings. It should be said that the majority of the recordings lack much public interest, and despite the misleading contentions of defendants, there is little that is new in the remainder of the recordings. Weighed against that public interest are NAF's and its members' legitimate interests in their rights to privacy, security, and association by maintaining the confidentiality of their presentations and conversations at NAF Annual Meetings. The balance is strongly in NAF's favor.

Having fully reviewed the record before me, I GRANT NAF's motion for a preliminary injunction to protect the confidentiality of the information at issue pending a final judgment in this case.

BACKGROUND

I. THE CENTER FOR MEDICAL PROGRESS AND THE HUMAN CAPITAL PROJECT

In 2013, defendant David Daleiden founded the Center for Medical Progress ("CMP") for the purpose of monitoring and reporting on medical ethics, with a focus

on bioethical issues related to induced abortions and fetal tissue harvesting. Declaration of David Daleiden (Dkt. No. 265-3, "Daleiden PI Decl.") ¶ 2. CMP is incorporated in California as a nonprofit public benefit corporation, with a stated purpose "to monitor and report on medical ethics and advances." NAF Appendix of Exhibits in Support of Motion for Preliminary Injunction ("Pl. Ex.") 9 (at NAF0000533).[1] In order to obtain CMP's tax-exempt status, in its registration with the California Attorney General and in its application with the Internal Revenue Service Daleiden certified, among other things, that "[n]o substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and this corporation shall not participate or intervene in any political campaign." Pl. Ex. 9 (at NAF0000535); Pl. Ex. 10 (at NAF0001789).

1. Defendants raise a number of objections to NAF's evidence. *See* Dkt. No. 265-7. These evidentiary objections were submitted as a separate document in violation of this Court's Local Rules. Civ. L. R. 7-3(a). Recognizing that error, defendants filed a motion asking for leave to file an amended Opposition or for relief therefrom. Dkt. No. 298. That motion is GRANTED and I will consider defendants' evidentiary objections. *See also* Dkt. No. 301. To the extent I rely on evidence to which defendants object, I will address the specific objection, bearing in mind that on a motion for preliminary injunction evidence is not subject to the same formal procedures as on a motion for summary judgment or at trial and that a court may consider hearsay evidence. *See, e.g., Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). To the extent I do not rely on specific pieces of evidence, defendants' objections to that evidence are overruled as moot. These evidentiary rulings apply only to the admissibility of evidence for purposes of determining the motion for a preliminary injunction.

Appendix B

As part of CMP's work, Daleiden created the "Human Capital Project" ("Project") to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue." Daleiden PI Decl. ¶ 3. The Project's goal is to uncover evidence regarding violations of state and/or federal law due to the sale of fetal tissue, the alteration of abortion procedures to obtain fetal tissue for research, and the commission of partial birth abortions. *Id.* Putting the Project into action, Daleiden created a fake front company that purportedly supplies researchers with human biological specimens and specifically secured funding from supporters in order to infiltrate NAF's 2014 Annual Meeting. Pl. Ex. 26. The express aim of that infiltration was to: "1) network with the upper echelons of the abortion industry to identify the best targets for further investigation and ultimate prosecution, and 2) gather video and documentary evidence of the fetal body parts trade and other shocking activities in the abortion industry." *Id.*

Defendant Troy Newman was, until January 2016, a board member and the secretary of CMP. He counseled Daleiden on the efforts to set up the fake company, to infiltrate meetings, and to secure recordings in support of the Project. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16 (at NAF0004493-94); *see also* Dkt. No. 344.[2] The result of the Project, Newman hoped, would be prosecution of abortion providers, state and Congressional investigations, the

2. Defendants object to Exhibits 14 and 16 for lack of foundation and authentication. Defendants do not contend these transcripts do not accurately represent the contents of the recordings attached as Exhibits 15 and 17. Defendants' objections are overruled.

defunding of Planned Parenthood by the government, and the closure of abortion clinics. Pl. Ex. 16 (at NAF0004494, 4496); Pl. Ex. 136 at 16.[3] Defendant Newman is President of Operation Rescue, an anti-abortion group that posts the names and work addresses of abortion providers on its website and manages another website that lists every abortion facility and all known abortion providers. Pl. Exs. 18, 20, 21, 22.[4]

II. THE CREATION OF BIOMAX AND INFILTRATION OF NAF'S 2014 AND 2015 ANNUAL MEETINGS

In September 2013, Daleiden directed "investigators" on the Project (known by the aliases Susan Tennebaum and Brianna Allen) to attend a conference of the Association of Reproductive Health Professionals (ARHP) as a representative of a fake business, BioMax Procurement Services. That business did not exist, other than to be a "front" for the Project. Daleiden PI Decl. ¶ 8; Pl. Ex. 26. Daleiden's associates spoke with representatives from

3. Defendants object to Exhibit 136 on the grounds of relevance, lack of foundation, and lack of authentication. Defendants to not contend the transcript does not accurately represent the contents of the recording identified. Defendants' objections are overruled.

4. After the public launch of the Project on July 15, 2015, counsel for CMP and Daleiden, Life Legal Defense Foundation, explained that it had also been involved in the Project as a legal advisor "since its inception" and were committed to defunding "contract killer" Planned Parenthood. Pl. Ex. 24. Defendants object to Exhibits 18, 20, 21 and 22 as irrelevant and inadmissible hearsay. Those objections are overruled.

NAF, and BioMax was invited to apply to attend the NAF Annual Meeting in San Francisco, California the following April. Daleiden PI Decl. ¶ 10.

In February 2014, defendant CMP received a grant to fund the "infiltration of the . . . NAF Annual Meeting." Pl. Exs. 26, 36; Deposition Transcript of David Daleiden (Dkt. No. 187-3) 213:14-214:6. To that end, Daleiden followed up with the NAF representatives — posing as Brianna Allen on behalf Tennenbaum and BioMax — and received a copy of the 2014 NAF Annual Meeting Exhibitor Prospectus and Exhibitor Application for the upcoming meeting. Daleiden PI Decl. ¶ 11; Pl. Ex. 43. Daleiden filled out the Exhibitor Application packet — comprised of the "Exhibit Rules and Regulations" ("Exhibit Agreement" or "EA"), the "Application and Agreement for Exhibit Space," and the "Annual Meeting Registration Form." Daleiden signed Susan Tennenbaum's name to the EA, and returned the Application packet. Daleiden PI Decl. ¶ 11; PL. Ex. 3; Daleiden Depo. at 160:8-18.

In February 2015, Daleiden contacted NAF seeking information about BioMax exhibiting at NAF's 2015 Annual Meeting in Baltimore, Maryland. Pl. Ex. 47. Daleiden again filled out the "Application Agreement for Exhibit Space," "Exhibit Rules and Regulations," and "Registration Form," signing Susan Tennenbaum's name to the EA. Pl. Exs. 4, 47; Daleiden Depo. at 287:5-22.[5]

5. On the 2014 EA, Daleiden listed the "exhibitor representatives" as Brianna Allen a Procurement Assistant, Susan Tennenbaum the C.E.O., and Robert Sarkis a V.P. Operations. Pl. Ex. 3. On the 2015 EA, Daleiden listed the exhibitor representatives as Susan Tennenbaum the C.E.O., Robert Sarkis

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Both the 2014 and 2015 EAs contain confidentiality clauses:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information NAF may furnish is confidential and not available to the public. Exhibitor agrees that all written information provided by NAF, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties.

Pl. Exs. 3 & 4 at ¶ 17. Above the signature line, the EAs provide: "*I also agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF.*" Pl. Exs. 3, 4 (emphasis in originals).

The EAs required Exhibitor representatives to "be registered" for the NAF Annual Meeting and wear badges in order to gain entry into exhibit halls and meeting rooms. *Id.* ¶ 8. The EAs also provide that "[p]hotography of exhibits by anyone other than NAF or the assigned

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the Procurement Manager, and Adrian Lopez the Procurement Technician. Pl. Ex. 4.

Exhibitor of the space being photographed is strictly prohibited." *Id.* ¶ 13. The EAs required an affirmation: "[b]y signing this Agreement, the Exhibitor affirms that all information contained herein, contained in any past and future correspondence with either NAF and/or in any publication, advertisements, and/or exhibits displayed at, or in connection with, NAF's Annual Meeting, is truthful, accurate, complete, and not misleading." *Id.* ¶ 19. Finally, the EAs provide that breach of the EA can be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. *Id.* ¶ 18.

In order to gain access to the NAF Annual Meetings, Exhibitor representatives also had to show identification and sign a "Confidentiality Agreement" ("CA"). Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11.[6] For the 2014,

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6. NAF has identified copies of two drivers licenses it claims were used by Daleiden and Tennenbaum to access the NAF meetings. Pl. Exs. 49-50. During his deposition, Daleiden asserted his Fifth Amendment rights and refused to testify about the licenses. Foran PI Decl. ¶¶ 31-32. Defendants object to Exhibits 49 and 50 for lack of personal knowledge. Those objections are overruled.

Relatedly, NAF filed a motion to supplement the Preliminary Injunction record, to include a press release from the Harris County District Attorney's office in Houston Texas. Dkt. No. 346. That motion is GRANTED. In the press release, the District Attorney explained that a grand jury had cleared a local Planned Parenthood affiliate of wrongdoing, but indicted Daleiden and the person posing as Susan Tennenbaum for tampering with governmental records, presumably related to their use of false identification to gain access to meetings in Texas. *Id.*

In his deposition, Daleiden testified that he created false business cards to use at the ARHP meeting and the NAF Meetings

Annual Meeting Daleiden (as Sarkis) and the individuals pretending to be Tennenbaum and Allen, each signed a CA. Pl. Exs. 5, 6; Daleiden PI Decl. ¶ 13. For the 2015 Annual Meeting, the individual pretending to be Adrian Lopez, signed the CA. Pl. Ex. 8.[7] Daleiden (as Sarkis), Tennenbaum, and Allen did not sign the 2015 CAs. When Daleiden, Tennenbaum, and Allen were at the registration table, they were met by a NAF representative. A NAF representative asked Daleiden to confirm that the sign-in staff had checked their identifications and that they had signed the confidentiality forms. Daleiden responded "Yeah yeah yeah. Excellent. Thank you so much . . . ." Declaration of Derek Foran in Support of Preliminary Injunction (Dkt. No. 228-6) ¶ 79C[8]; Daleiden Decl. ¶ 17; Daleiden Depo. 290:2 - 291:14. Daleiden testified that it was his "preference" to avoid signing the 2015 CA. Daleiden Depo. at 291:15-25. The CAs provide:

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for Susan Tennenbaum, Robert Daoud Sarkis, and Brianna Allen. Pl. Ex. 51; Daleiden Depo. at 200:2 — 201:6 (business cards used at the 2014 Meeting); *see also* Pl. Exs. 51, 52 & Daleiden Depo. at 315:23 — 316:19 (business cards for Adrian Lopez and Susan Wagner used at the 2015 Annual Meeting); Declaration of Megan Barr (Dkt. No. 226-27) ¶¶ 4-5 (use of business card at 2015 Meeting).

7. Daleiden testified that all of the "investigators" involved in the Project were CMP "contractors" acting under Daleiden's specific direction. Daleiden Depo. Trans. at 131:7-24, 135:21-136:11, 194:1, 194:10-195:6; *see also* Daleiden Supp. Resp. to NAF Interrogatories (Dkt. No. 227-18) Nos. 2, 6.

8. ¶ 79(C) refers to a specific excerpt of a recording taken by Daleiden. Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50. The Court has reviewed all recording excerpts or transcripts of recording excerpts cited in this Order.

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> It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement. The terms of attendance are as follows:
>
> 1. **Videotaping or Other Recording Prohibited**: Attendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference.
>
> 2. **Use of NAF Conference Information**: NAF Conference Information includes all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means. . . .
>
> 3. **Disclosure of NAF Materials to Third Parties**: Attendees may not disclose any NAF Conference Information to third parties without first obtaining NAF's express written consent . . . .

Pl. Exs. 5-8.

At the 2014 and 2015 Annual Meetings, Daleiden and his associates wore and carried a variety of recording devices that they did not disclose to NAF or any of the meeting attendees. Daleiden Depo. at 118-121; 255; 292-93. Daleiden and his associates did not limit their recording to presentations or conversations regarding fetal tissue, but instead turned on their recording devices before entering the meetings each day and only turned them off

at the end of the day. Daleiden Depo. at 121:24-122:22, 124:1-15. In the end, they recorded approximately 257 hours and 49 minutes at NAF's 2014 Annual Meeting and 246 hours and 3 minutes at NAF's 2015 Annual Meeting. They recorded conversations with attendees at the BioMax Exhibitor booths, the formal sessions at the Meetings, and interactions with attendees during breaks. Foran PI Decl. ¶ 2 & Pl. Ex. 1[9]; Daleiden PI Decl. ¶ 18; Daleiden Depo. at 122:18-123:25; 293:4-25. The interactions with individuals were recorded in exhibit halls, hallways, and reception areas where Daleiden contends hotel staff were "regularly" present. Daleiden PI Decl. ¶ 18. Hotel staff were also present in the rooms during presentations and talks, but hotel staff did not sign confidentiality agreements. *Id.* ¶ 19; Deposition of Vicki Saporta (Defendants' Ex. 7) at 33:10-23. Broadly speaking, the majority of the recordings lack any sort of public interest and consist of communications that are tangential to the ones discussed in this Order.

During the Annual Meetings, Daleiden and his associates would meet to "discuss our . . . strategy for . . . the project and for the meeting," including "specific strategies for specific individuals." Daleiden Depo. at 134:15-135:6. The associates were given a "mark list" to identify their targets. Foran PI Decl. ¶ 79D (Sub-Bates: 15-145; Time stamp: 14:56:02-14:56:50). The group also picked targets based on circumstance: in one instance, Daleiden tells "Tennenbaum" that it "would be really

9. Plaintiff's Exhibit 1 is a copy of the hard drive produced by defendants containing the audio and video recordings made by Daleiden and his associates at the 2014 and 2015 NAF Annual Meetings.

good to talk tonight" with a particular doctor "now that she's been drinking." *Id.* ¶ 79E (Sub-Bates: 15-225; Time stamp 15:33:00 - 15:34:00).

In approaching these individuals, the group used "pitches" in their efforts to capture NAF members agreeing to suggestions and proposals made by the group about the "sale" of fetal tissue or other conduct that might suggest a violation of state or federal law. Daleiden told his associates that their "goal" was to trap people into "saying something really like messed up, like yeah, like, I'll give them, like, live everything for you. You know. If they say something like that it would be cool." *Id.* ¶ 79G (Sub-Bates: 15-021; Time Stamp: 5:13-5:49). Daleiden also instructed his group to attempt to get attendees to say the words "fully intact baby" on tape. *Id.* ¶ 79H (Sub-Bates: 15-152; Time Stamp: 16:06:50-16:07:00). As part of their efforts, "Tennenbaum" would explain to providers that she "can make [fetal tissue donation] extremely financially profitable for you" and that BioMax has "money that is available" and is "sitting on a goldmine" as long as you're "willing to be a little creative with [your] technique." Foran PI Decl. ¶ 79J (Sub-bates: 15-152 Time Stamp: 15:48:00 - 15:52:00). She asked NAF attendees: "what would make it profitable for you? Give me a ballpark figure . . . ." *Id.* Or "[i]f it was financially very profitable for you to perhaps be a little creative in your method, would you be open to" providing patients with reimbursements for tissue donations. *Id.* ¶ 79K (Sub-bates: 15-203; Time Stamp: 12:09:00 - 12:10:21).

The parties dispute whether these goals were met and if defendants' traps worked.[10] Defendants argue that they captured NAF attendees agreeing to explore, or at least expressing interest in exploring, being compensated for the sale of fetal tissue at a profit, which defendants contend is illegal under state and federal laws. Defendants' Opposition to Motion for Preliminary Injunction (Dkt. No. 262-4) at 10-14. However, they tend to misstate the conversations that occurred or omit the context of those statements. For example, defendants rely on a conversation with a clinic owner where Daleiden suggests BioMax could pay $60 per sample instead of $50 per sample. Defs. Ex. 8. The clinic owner doesn't respond to that suggestion,

10. NAF argues that defendants cannot rely on any portion of the recordings to oppose NAF's motion for a preliminary injunction. NAF Reply Br. at 29-30. NAF is correct that under California and Maryland law, recordings taken in violation of state laws prohibiting recordings of confidential communications are not admissible in judicial proceedings, except as proof of an act or violation of the state statutes. *See* Cal. Penal Code § 632(d); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (concluding that § 632(d) is a substantive law, applicable in federal court on state law claims); *see also* Md. Code Ann., Cts. & Jud. Proc. § 10-405; *Standiford v. Standiford*, 89 Md. App. 326, 346, 598 A.2d 495 (1991). Because the accuracy of defendants' allegations of criminal conduct are central to this decision, however, I discuss the portions of the recordings relied upon by plaintiff and defendants in some detail in this section. To place this discussion under seal would undermine my responsibility to the public as a court of public record to explain my decision. Consistent with the TRO and the reasoning of this Order, in describing the protected conversations I balance the interests of the providers' privacy, safety and association by omitting names, places, and other identifying information.

or give any indication about the actual costs to the clinic of facilitating outside companies to come in and collect fetal tissue. *Id.* Instead, the clinic owner responds that providing tissue to outside companies "is a nice way to get extra income in a very difficult time, and you know patients like it." *Id.*[11] Defendants point to another conversation where a provider asks what the "reimbursement rate" is for the clinic, and was told "it varies" by Tennenbaum. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Then, in response to Tennenbaum's suggestion about whether she'd "be open to maybe being a little creative in the procedure," the provider responds that she was not sure and would have to discuss it and run it by the doctors. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Tennenbaum explains that specimens "go for" anywhere from "500 up to 2,000" and so "you can see how profitable" it would be for clinics, to which the provider says "Yeah, absolutely" and a different provider says "that would be great" in response to comments about having further discussions. *Id.* at p. 19.

Another provider responded to defendants' suggestion of financial incentives by indicating that the clinic would be "very happy about it," but admitted others would have to approve it and it wasn't up to her. *Id.*, Dkt. No. 266-4 at p.8. Defendants point to a conversation with a provider who discusses the "fine line" between an illegal partial birth abortion and the types of abortion that they perform, and the techniques that they employ to ensure that they do not

11. Defendants do not suggest the "patients like it" is a suggestion that patients are being paid for the fetal tissue. Instead, in the context of that conversation, it refers to patients that like providing fetal tissue for research purposes.

cross that line. Defs. Ex. 10, Dkt. No. 266-5 at p. 4. That conversation, however, does not indicate that any illegal activity was occurring. Similarly, defendants contend that a provider stated that he ordinarily minimizes dilation, since that is what is safest for the women, but that if he had a reason to dilate more (such as tissue procurement), he might perform abortions differently. Oppo. Br. at 11. But that is not what the provider said. After acknowledging tissue donation was not allowed in his state, he stated that "I could mop up my technique if you wanted something more intact. But right now my only concern is the safety of the woman" and there was no reason to further dilate a woman. Defs. Ex. 11, Dkt. No. 266-6 at p. 5.

Defendants rely on another conversation where an abortion provider explains that how intact aborted fetuses are depends on the procedure used and that she does not ordinarily use digoxin to terminate the fetus before performing 15-week abortions. Defs. Ex. 12, Dkt. No. 266-7, pgs. 1-8. She goes on to say that if there was a possibility of donating the tissue to research, women may choose that, and with the consent of the woman she would be open to attempting to obtain intact organs for procurement. *Id.* Again, this is not evidence of any wrongdoing.

In another conversation, a provider states that his/her clinic has postponed the stage at which digoxin is used and that as a result they can secure more and bigger organs for research so the tissue "does not go to waste," to which the vast majority of women using their

facility consent. Defs. Ex. 13, Dkt. No. 266-8 pgs. 1-8.[12] Defendants contend that a provider commented that he/she may be willing to be "creative" on a case-by-case basis, but the provider was responding to a question about doctors using digoxin in general. Defs. Ex. 9, Dkt. No. 266-4 pg. 13. And while defendants characterize that provider as assenting to being "creative," so that BioMax could "keep them happy financially" (Oppo. Br. at 11-12), the actual discussion was about off-setting the disruption that third-party technicians can have on clinic operations and keeping those disruptions to a minimum. *Id.* at p. 14.

In a different conversation, defendants characterize a provider as agreeing to discuss ways in which a financial transaction would be structured to make it look like a clinic was not selling tissue. Oppo. Br. at 12. The unidentified female (there is no indication of where she works or what role she plays) simply responds to Tennenbaum's suggestions that in response to payment for tissue from BioMax the clinic could offer its services for less money or provide transportation for the patients, with an interested but non-committal response and clarified "that's something we'd have to figure out how to do that." Defs. Ex. 14, Dkt. No. 266-9 pgs. 1-4. Another provider admits that doing intact D&Es for research purposes would "be challenging" and explained that there are layers of people and approvals at the clinic before any agreements to work with a bioprocurement lab could be reached. Defs. Ex. 9, Dkt. No. 266-4 pgs. 8-9.

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12. There is no evidence that a desire to secure more fetal tissue samples caused the clinic to alter its procedures.

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Defendants state that a provider responded to Tennenbaum's comment that with the right vision an arrangement can be "extremely financially profitable," with "we certainly do" have that vision. Oppo. Br. at 12. But defendants omit that the context of the conversation was the "waste" of fetal tissue that could otherwise be going to research. Defs. Ex. 9, Dkt. No. 266-4 pgs. 2-3. In the excerpt relied on by defendants, after Tennenbaum mentioned the profit she went onto describe tissue donation working for those that have the "vision and the passion for research." The provider responded, "Which we certainly do." *Id.* p. 2. Similarly, while defendants are correct that a provider did say, "if guys it looks like you'd pay me for [fetal tissue], that would be awesome," but omit that the provider preceded that comment with "I would love to have it [the fetal tissue] go somewhere" and that the provider was excited about the possibility of the tissue going to be used in research to be "doing something." Defs. Ex. 15, Dkt. No. 266-10. pgs. 1-2.

Defendants cite a handful of similar discussions — where "profit" "sale" or "top dollar" are terms used by Daleiden or Tennenbaum and then providers at some point following that lead in the conversation express general interest in exploring receiving payment for tissue — but those conversations do not show that any clinic is making a profit off of tissue donations or that the providers are agreeing to a profit-making arrangement.[13] Defendants

13. Some of defendants' citations are to comments about providers performing abortions differently, not in terms of gestational timing, but in terms of attempting to keep tissue samples more intact during the procedure if those samples might

are correct that one provider indicates it received $6,000 a quarter from a bioprocurement lab, but there is no discussion showing that amount is profit (in excess of the costs of having third-party technicians on site and providing access and storage for their work). Defs. Ex. 21, Dkt. No. 267-2 p.2. An employee of a bioprocurement lab also agrees in response to statements from Tennenbaum that the clinics know it is "financially profitable" for them to work with bioprocurement labs and that arrangement helps the clinics "significantly." Defs. Ex. 23, Dkt. No. 267-4 p. 2.

Having reviewed the records or transcripts in full and in context, I find that no NAF attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit. The recordings tend to show an express rejection of Daleiden's and his associates' proposals or, at most, discussions of interest in being paid to recoup the costs incurred by clinics to facilitate collection of fetal tissue for scientific research, which NAF argues is legal. *See, e.g.*, Foran PI Decl. ¶ 79(I) (Sub-bates: 14-147; Time Stamp 05:56:00 - 05:57:00 (Dr. Nucatola identifying an

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be of use for research. Oppo. Br. at 12-13. There is no argument that taking those steps violates any law. Defendants also cite provider comments — for example, an abortion provider engaging in conduct "under the table" to get around restrictions — which do not show up in the transcript excerpts they refer to. Oppo. Br. at 13. Finally, defendants rely on comments — from panel presentations and individual conversations — where providers express the personal and societal difficulties they face in performing abortions. There is no indication in those comments of any illegal conduct. Oppo. Br. at 12, 14-15.

"ethical problem" with Daleiden's payment proposal: "We just really want the affiliates to be compensated in a way that is proportionate to the amount of work that's required on their end to do it. In other words, we don't see it as a money making opportunity. That's not what it should be about."); Foran PI Decl. ¶ 79(K) (Sub-bates: 15-203; Time Stamp: 12:09:00 - 12:10:21) (NAF attendee responding to Tennenbaum's proposal" "Do the patients get any reimbursement? No, you can't pay for tissue, right. You can't pay for tissue."); Foran PI Decl. ¶ 79(M) (Sub-bates: 15-010; Time Stamp: 24:29 - 25:43) (NAF attendee responds that "we cannot have that conversation with you about being creative," because it "crosses the line."); Foran PI Decl. ¶ 79(N) (Sub-Bates: 15-010; Time Stamp: 59:18-1:04:32) (NAF attendee responding to Tennenbaum with, "No profiteering or appearance of profiteering . . . we need it to be a donation program rather than a business opportunity.").

Defendants also gathered confidential NAF and NAF-member materials at the Annual Meetings, including lists and biographies of NAF faculty and contact information for NAF members. Foran PI Decl. ¶ 3; Pl. Ex. 56 at 3; Pl. Ex. 58.

Following the 2014 Annual Meeting, Daleiden followed up with the "targets" he met at the Meeting, in part to set up meetings with abortion providers, including Dr. Deborah Nucatola.[14]Pl. Exs. 26 (list of "targets"), 36, 59-61, 64-65, 67-69; Daleiden Depo. 257-259, 265-269. As

14. Dr. Nucatola was identified by defendants as a key target and the Senior Director of Medical Services for Planned Parenthood. Pl. Ex. 26.

he explained to his supporters and funders in a report prepared following the 2014 Meeting — in which he shared some of the confidential NAF information that had been collected at that meeting — he was able to secure the follow up meetings because, following its attendance at the 2014 Annual Meeting, "BioMax is now a known and trusted entity to many key individuals in the upper echelons of the abortion industry." Pl. Ex. 26; *see also* Pl. Exs. 59-63 (emails to targets referencing their meeting at NAF); Pl. Ex. 64 (email to Dr. Nucatola); Daleiden Depo. at 253-259 (Daleiden's follow up with Dr. Nucatola); Pl. Ex. 67 ¶¶ 3-4 (StemExpress representative explaining her initial meeting with Daleiden at the NAF 2014 Annual Meeting, as the reason a subsequent meeting was arranged); Daleiden Tr. at 271-274 (discussing his follow up communications with StemExpress representatives). In a recording following Daleiden and Tennenbaum's meeting with StemExpress representatives, Daleiden credited the ability to secure that meeting to "because like we've been at NAF. Like, we're so vetted and so like." Foran PI Decl. ¶ 12; Pl. Ex. 70 at FNPB02982015052219O849.avi at 19:13:00-19:15:00).

III. DEFENDANTS RELEASE HUMAN CAPITAL PROJECT VIDEOS

On July 14, 2015, CMP released two videos of a lunch meeting that Daleiden had with Dr. Nucatola, a "key" target from the 2014 NAF Annual Meeting. Daleiden PI Decl. ¶ 25; Pl. Ex. 26. Daleiden testified that one of the videos "contained the entire conversation with Nucatola" and the other was "a shorter summary version of the

highlights from the conversation." *Id.* CMP issued a press release in conjunction with the release of these videos entitled "Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortion to Sell Baby Parts." Pl. Ex. 66. NAF counters that the "highlights" video was misleadingly edited and omits Dr. Nucatola's comments that "nobody should be selling tissue. That's just not the goal here," and her repeated comments that Planned Parenthood would not sell tissue or profit in any way from tissue donations. Foran TRO Decl. Ex. 18 at 7, 21-22, 25-26, 34, 48, 52-54.

On July 21, 2015, CMP released two more videos: a 73-minute video and a shorter "highlights summary" from Daleiden's lunch meeting with Planned Parenthood "staff member" Dr. Mary Gatter. Daleiden PI Decl. ¶ 26. CMP issued a press release in conjunction with the release of these videos entitled "Second Planned Parenthood Senior Executive Haggles Over Baby Parts Prices, Changes Abortion Methods." Pl. Ex. 71. NAF again contends the "highlight" video was misleadingly edited, including the omission of Dr. Gatter's comments that tissue donation was not about profit, but "about people wanting to see something good come out" of their situations, "they want to see a silver lining . . . ." Pl. Ex. 82 at NAF0001395.

CMP has continued to release other videos as part of the Project, including one featuring a site visit to Planned Parenthood Rocky Mountains, where Savita Ginde is Medical Director. Daleiden PI Decl. ¶ 27. On July 30, 2015, CMP issued a press release in conjunction with the release of this video entitled "Planned Parenthood VP

Says Fetuses May Come Out Intact, Agrees Payments Specific to the Specimen." Pl. Ex. 74.[15]

Daleiden asserts that when CMP released the "highlight" or summary videos, CMP also released "full" copies of the underlying recordings. Daleiden PI Decl. ¶¶ 25-27. NAF has submitted a report by Fusion GPS, completed at the request of counsel for Planned Parenthood, analyzing the videos released by CMP and concluding that there is evidence that CMP edited content out of the "full" videos and heavily edited the short videos "so as to misrepresent statements made by Planned Parenthood representatives." Pl. Ex. 77; *see also* Pl. Exs. 78-79.[16]

The day before the first set of videos was released, CMP put together a press kit with "messaging guidelines" that was circulated to supporters. Pl. Ex. 135; Deposition Transcript of Charles C. Johnson (Dkt. No. 255-11)

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15. *See also* Pl. Ex. 74 (CMP press release on fifth Project video; "'Intact Fetal Cadavers' at 20 Weeks 'Just a Matter of Line Items' at Planned Parenthood TX Mega-Center; Abortion Docs Can 'Make it Happen.'"); Pl. Ex. 69 (CMP press release on eighth Project video; "Planned Parenthood Baby Parts Buyer StemExpress Wants 'Another 50 Livers/Week,' Financial Benefits for Abortion Clinics."); Pl. Ex. 75 (CMP press release on ninth Project video; "Planned Parenthood Baby Parts Vendor ABR Pays Off Clinics, Intact Fetuses 'Just Fell Out.'"); Pl. Ex. 76 (CMP press release on tenth Project video; "Top Planned Parenthood Exec Agrees Baby Parts Sales 'A Valid Exchange,' Some Clinics 'Generate a Fair Amount of Income Doing This.'").

16. Defendants object to Exhibits 78-79 as inadmissible hearsay, for lack of personal knowledge and authentication, and improper expert testimony. Those objections are overruled.

70:22-71:19. In those guidelines, defendants assert that their aim for the Project is to create "political pressure" on Planned Parenthood, focusing on "Congressional hearings/investigation and political consequences for" Planned Parenthood such as defunding and abortion limits. Pl. Ex. 135.

To be clear, the videos released by CMP as part of the Project to date do not contain information recorded during the NAF Annual Meetings.[17]

With respect to the NAF material covered by the TRO and at issue on the motion for a preliminary injunction, Daleiden affirms that other than: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; (ii) short clips of video to law enforcement in Texas in June or July 2015; (iii) providing the 504 hours of recordings in response to the Congressional subpoena; and (iv) providing a short written report to CMP donors in April 2014, "Daleiden and CMP have made no other disclosures of recordings or documents from NAF meetings." Daleiden PI Decl. ¶ 24. However, a portion of the NAF materials were leaked and posted on the internet on October 20 and 21, 2015.[18]

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17. NAF contends that the meetings Daleiden had with Doctors Nucatola, Gatter, and Ginde that resulted in the CMP videos would not have been possible without BioMax having fraudulently gained access to NAF's Annual Meetings and, thereby, appearing to be a legitimate operation.

18. This leak occurred after defendants produced NAF materials covered by the TRO to Congress. NAF argues —

IV. IMPACT OF DISCLOSURES ON NAF AND ITS MEMBERS

NAF is a not-for-profit professional association of abortion providers, including private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Declaration of Vicki Saporta (Dkt. No. 3-34) ¶ 2. It sets standards for abortion care through Clinical Policy Guidelines (CPGs) and Ethical Principles for Abortion Care, and develops continuing medical education and training programs and educational resources for abortion providers and other health care professionals. *Id.* ¶ 3. NAF also implemented a multi-faceted security program to help

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and moves for an Order to Show Cause asking me to sanction defendants — that defendants violated my order and the TRO by producing to Congress NAF audio and video recordings that were not directly responsive to the Congressional subpoena. *See* Dkt. Nos. 155, 222. NAF complains that as a result of this "over production," the subsequent leak included NAF Materials that had nothing to do with alleged criminal activity. I heard argument on this motion on December 18, 2015. Dkt. No. 310. Having considered the representations of defense counsel, I DENY the motion for an order to show cause. Defendants did produce materials that were not covered by the subpoena, but were covered by the TRO, contrary to my Order allowing a response to the subpoena. Dkt. No. 155. Defense counsel did so because in light of their conversations with Congressional staffers, they believed Congress wanted "unedited" recordings, which defense counsel interpreted to mean the whole batch of recordings, even those where fetal tissue was not being discussed. At the hearing I cautioned defense counsel that in the future, before they take it upon themselves to arguably violate an order from this Court — even if in good faith — they should seek clarification from me first.

ensure the safety of abortion providers by putting in place reference, security, and confidentiality requirements for its membership and for attendance at its Meetings. *Id.* ¶¶ 10-14; Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 5-12. NAF tracks security threats to abortion providers and clinics, and offers technical assistance, on-site security training, and assessments at facilities and homes of clinic staff, as well as 24/7 support to its members when they are "facing an emergency or are targeted. *Id.* ¶ 10, 15; *see also* Declaration of Derek Foran in Support of TRO (Dkt No. 3-2) ¶ 6 & Ex 2 (NAF statistics documenting more than 60,000 incidents of harassment, intimidation, and violence against abortion providers, including murder, shootings, arson, bombings, chemical and acid attacks, bioterrorism threats, kidnapping, death threats, and other forms of violence between 1997 and 2014).

Following the release of the videos in July 2015, the subjects of those videos (including Doctors Nucatola, Gatter, and Ginde), have received a large amount harassing communications (including death threats). Pl. Exs. 80-81 (internet articles and threats by commentators), 83-91; *see also* Saporta Decl. ¶ 19. Incidents of harassment and violence directed at abortion providers increased nine fold in July 2015, over similar incidents in June 2014. Pl. Ex. 92. The incidents continued to sharply rise in August 2015. Pl. Ex. 93. The FBI has also reported seeing an increase in attacks on reproductive health care facilities. Pl. Ex. 94.[19] Since July 2015, there have also been four incidents of

19. Defendants object to Exhibits 92 - 94 on the grounds that Foran lacks personal knowledge and cannot authenticate the exhibits, as hearsay, and on relevance. Those objections are overruled.

arson at Planned Parenthood and NAF-member facilities. Saporta Depo. at 42:1-10; Pl. Exs. 96-99.[20]

Most significantly, the clinic where Dr. Ginde is medical director — a fact that was listed on the AbortinDocs.org website operated by defendant Newman's Operation Rescue group — was attacked by a gunman, resulting in three deaths. Pl. Exs. 18, 20, 21, 22, 148.[21]

NAF's President and CEO testified that there "has been a dramatic increase" in harassment since July 14, 2015, and the "volume of hate speech and threats are nothing I have ever seen in 20 years." Pl. Ex. 95 (Deposition Transcript of Vicki Saporta) at 16:17-23, 39:13-20; *see also id.* at 43:15-18 ("We have uncovered many, many direct threats naming individual providers. Those providers have had to undergo extensive security precautions and believe they are in danger."). In response, NAF hired and committed additional staff to monitoring the internet for harassment and threats. Saporta Depo. at 38:2-20. NAF's security team has also seen an increase in off-hour communications from members about security.

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20. Defendants object to Exhibits 96 - 99 as inadmissible hearsay, lack of personal knowledge, lack of authentication, irrelevant and prejudicial. Those objections are overruled. Defendants also filed a motion to supplement the Preliminary Injunction record with a news article indicating the individual arrested in connection with the fire at the Thousand Oaks Planned Parenthood office was not motivated by politics, but by a "domestic feud." Dkt. No. 322. That motion is GRANTED.

21. Defendants object to Exhibit 148 as irrelevant and inadmissible hearsay. Those objections are overruled.

Mellor Decl. ¶ 15. As a result, NAF has been forced to take increased security measures at increased cost, has cut back on its communications with members, and alerted hotel staff and security for its upcoming events that those meetings have been "compromised." *Id.* ¶ 15.

Two NAF members also submit declarations in support of NAF. Jennifer Dunn, a law professor, submits a declaration explaining her expectation that she was filmed during the 2014 Annual Meeting during a panel presentation and that following the release of the CMP videos, she took steps to protect the safety and privacy of her family. Declaration of Jennifer T. Dunn (Dkt. No. 3-31) ¶ 10.[22] She explains that she is fearful that CMP may release a misleading and highly edited video featuring some or all of her panel presentation that would open her up to the sort of public disparagement and intimidation she saw directed towards Doctors Nucatola and Gatter after the CMP videos were released. *Id.* ¶¶ 9-10.

Dr. Matthew Reeves, the medical director of NAF, submits a declaration explaining his understanding that Daleiden filmed conversations with him during the 2014 Annual Meeting. Declaration of Dr. Matthew Reeves (Dkt. No.) ¶¶ 12-16.[23] Dr. Reeves explains that he has witnessed

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22. Defendants object to paragraph 10 of Dunn's declaration as lacking in personal knowledge, improper expert testimony, inadmissible hearsay, and improper opinion. Those objections are overruled.

23. Defendants object to paragraph 12 of Dr. Reeves declaration as speculative, improper expert testimony, improper opinion testimony, and for lack of personal knowledge. Those

"the terrible reaction towards the prior doctors" who were featured in CMP's videos and he expects he "will suffer similar levels of reputational harm should a heavily edited and misleading video of me be released." *Id.* ¶ 17. Because of his expectation that defendants could "target" him, since the release of the videos, he had his home inspected by NAF's security team and is installing a security system, but given the current atmosphere he remains fearful for his safety and that of his family. *Id.* ¶¶ 19, 21.

V. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

On July 31, 2015, based on an application from NAF and after reviewing the preliminary evidentiary record, I granted NAF's request and entered a Temporary Restraining Order that restrained and enjoined defendants and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them from:

> (1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;
>
> (2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

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objections are overruled.

> (3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Dkt. No. 15. On August 3, 2015, after reviewing the arguments and additional evidence submitted by defendants, I issued an order keeping the TRO in place pending the hearing and ruling on NAF's motion for a preliminary injunction. Dkt. No. 27. On August 26, 2015, I entered a stipulated Protective Order, which provided that before responding to any subpoenas from law enforcement entities for information designated as confidential under the Protective Order, the party receiving the subpoena must notify the party whose materials are at issue and inform the entity that issued the subpoena that the materials requested are covered by the TRO. Dkt. No. 92 ¶ 9. The purpose of the notice provision is to allow the party whose confidential materials are sought the opportunity to meet and confer and, if necessary, seek relief from the subpoena in the court or tribunal from which the subpoena issued. *Id.*

In NAF's motion for preliminary injunction, NAF asks me to continue in effect the injunction provided in the TRO, but also to expand the scope to include the following:

> (4) enjoin the publication or disclosure of any video, audio, photographic, or other recordings taken of members or attendees Defendants first made contact with at NAF meetings; and publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

> (5) enjoin the defendants from attempting to gain access to any future NAF meetings.

Motion (Dkt. No. 228-4) at i.

LEGAL STANDARD

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). Where an injunction restrains speech, a showing of "exceptional" circumstances may be required, as the Reporters Committee for Freedom of the Press pointed out.[24] *See, e.g., Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008). On this record, I conclude that exceptional circumstances exist, meriting the continuation of injunctive relief pending final resolution of this case.

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24. The Reporters Committee for Freedom of the Press resubmitted their motion asking the Court to consider their *amici curiae* letter brief. Dkt. No. 287. I GRANT that motion and consider the Reporters Committee letter, as well as NAF's response, and the Reporters Committee's reply. Dkt. Nos. 109, 111, 114, 287.

Appendix B

DISCUSSION

I. LIKELIHOOD OF SUCCESS

NAF's Amended Complaint asserts eleven different causes of action against the three defendants. Dkt. No. 131. In moving for a preliminary injunction, NAF rests on only two — breach of contract and violation of California Penal Code section 632 — to argue its likelihood of success on the merits.

A. Breach of Contract

Under California law, to succeed on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, (2) plaintiff performed or is excused for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *See, e.g., Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377 (1968). NAF argues that defendants' conduct: (i) breached the EAs, by misrepresenting BioMax and their own identities; (ii) breached the EAs and CAs by secretly recording during the Annual Meetings; and (iii) breached the EAs and CAs by disclosing and publishing NAF's confidential materials.

1. Existence of a Contract; Consideration for the Confidentiality Agreements

Defendants argue that NAF cannot enforce the CA because that particular agreement was not supported by consideration for the 2014 or 2015 Meetings. *See Chicago*

Title Ins. Co. v. AMZ Ins. Servs., Inc., 188 Cal. App. 4th 401, 423, 115 Cal. Rptr. 3d 707 (2010) ("Every executory contract requires consideration, which may be an act, forbearance, change in legal relations, or a promise.").[25] They contend that the only document that needed to be signed to gain access to the NAF Meetings was the EA. Therefore, according to defendants, there was no separate consideration given with respect to the CAs that were signed by or sought from the attendees at the NAF registration tables because NAF already had a legal obligation to permit them access to the meetings. Oppo. Br. at 19-20.

Defendants' argument is not supported by the facts. The EAs on their face provided access to the exhibition area ("Exhibit Rules and Regulations") *and also* required that any exhibitor's representatives be registered for the NAF Annual Meetings. Pl. Exs. 3,4. The CAs were required as part of the registration for the NAF Annual Meeting, and NAF's evidence demonstrates that no one was supposed to be allowed into the Meetings unless their identification was checked and they signed a CA. Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11; Dunn Decl. ¶ 6; *see also* Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50) (NAF representative confirming that Daleiden and associates had their identification checked and signed confidentiality agreements). Nothing in the language of the EAs or CAs, or the other facts in the record, support

25. Defendants make no argument that the EA was not supported by consideration. It plainly was; access to the exhibition hall in exchange for submission of the Application and payment of the exhibitor fee.

defendants' argument that upon signing the EAs, NAF had the legal obligation to permit Daleiden's group access to the meetings without further requirement.

Other than lack of consideration, the only other argument defendants appear to make with respect to the CA is that the CA cannot be enforced against Daleiden and two of his associates (Tennenbaum and Allen) because they did not execute CAs for the 2015 NAF Annual Meeting. Oppo. Br. at 19-20 & fn. 7. As an initial matter, there is no dispute that everyone in Daleiden's group signed the CAs for the 2014 Meeting. There is also no dispute that the reason Daleiden and two of his associates did not sign the CAs for the 2015 Meeting is that Daleiden lied about it to a NAF representative. Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50). There is likewise no dispute that at least one of the CMP associates working at Daleiden's direction, "Lopez," signed the 2015 CA. Given these facts, on this record, the 2015 CA can be enforced against defendants for purposes of determining likelihood of success on NAF's breach of contract claim.

I find that NAF has shown a likelihood of success on their breach of contract claim based on the 2014 and 2015 CAs.

2. Whether Defendants' Conduct Breached the EA

Defendants argue that NAF cannot prevail on its claim that defendants misrepresented themselves in violation of the EA because Paragraph 15 of the EA only requires

Exhibitors to "identify, display, and/or represent their business, products, and/or services truthfully, accurately, and consistently with the information provided in the Application." Defendants contend that this requirement applies only to BioMax, not Daleiden and his associates "individually," and that NAF is attempting to base its breach claim on representations defendants made about BioMax and/or CMP outside of the NAF Annual Meetings. Oppo. Br. at 20-21.

By signing the EA on behalf of a fake company, defendants CMP and Daleiden necessarily violated paragraph 19 of the EA, which required the signatory's affirmation that the information in the Agreement, as well as any information displayed at the Meetings, was "truthful, accurate, complete, and not misleading." Pl. Exs. 3,4. Similarly, by signing the EA and then displaying and representing false and inaccurate information about BioMax at the Meetings, defendants CMP and Daleiden violated paragraph 15 as well.[26] Defendants' conduct with respect to the information they conveyed in the EA and

26. Defendants assert in their brief, without any citation to evidence, that BioMax's "business" was to "assess the market for clinics and abortion providers willing to partner with it in buying and selling fetal tissue." Oppo. Br. at 21. This post-hoc rationalization is contrary to the defendants' own contemporaneous statements and their statements on the EAs themselves which required the applicant to "5. List the products or services to be exhibited" and which Daleiden filled out as "biological specimen procurement, stem cell research" and "fetal tissue procurement, human biospecimen procurement." Pl. Exs. 3,4; *see also* Pl. Ex. 26 (describing BioMax as a "front organization.").

their conduct at the NAF meeting is sufficient — on this record — to show a violation of that agreement, regardless of how defendants may have portrayed BioMax outside of the NAF Meetings.

Defendants' argument that paragraph 15 of the EA restricts the remedies NAF can seek for breach to cancellation of the EA and removal of exhibits at the Meetings, and excludes the injunctive relief sought in this motion is likewise without support. Defendants continue to ignore paragraphs 18 and 19, which provide that if there is a breach of the EA, NAF is entitled to seek specific performance, injunctive relief and "all other remedies available at law or equity." Pl. Exs. 3,4.

On the record before me, NAF has a strong likelihood of success on its argument that defendants breached the EA for the 2014 and 2015 NAF Annual Meetings.[27]

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27. Defendants also argue that their recordings could not have violated the EA because the EA did not prohibit audio and video recording, it only prohibited photography. Oppo. Br. at 19-20; EA at ¶ 13. Disputes over whether a ban on "photography" would prohibit video and audio recording aside, the CAs clearly prohibited all forms of recording and are enforceable against defendants, even for the 2015 meeting as discussed above. In a footnote, defendants assert that the CAs should be read as limiting the prohibition on recording to only formal sessions at the Meetings and not informal discussions. Oppo. Br. at 20, fn. 8. That argument is not supported. There is nothing in the text of the CA that indicates that "discussions" is limited to formal panel or workshop presentations and does not encompass information that is conveyed outside of those "formal" events.

3. Scope and Reasonableness of the EA

Defendants argue that the EA is unenforceable because it is overbroad, imprecise, and unreasonable. Specifically, they rely on NAF's characterization of the EA (and presumably the CA as well) as "broad" and encompassing all NAF communications and things learned at the NAF Meetings to argue that the EA's breadth is problematic.

That a confidentiality provision is broad does not mean it is unenforceable. The cases cited by defendants on this point are not to the contrary.[28] For example, in *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1178 (N.D. Miss.) *aff'd*, 979 F.2d 209 (5th Cir. 1992), after applying Mississippi's contract interpretation doctrine and determining that the contract language was ambiguous, the Court concluded that "an ambiguous contract should be read in a way that allows viewership and encourages debate." The problem in *Wildmon* was not breadth, but ambiguity.

In *In re JDS Uniphase Corp. Secs. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002), a securities class action, the state of Connecticut moved the court to limit the scope

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28. *Cf. Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 684, 99 Cal. Rptr. 2d 809 (2000), *as modified* (Sept. 7, 2000) (giving full effect to "contractual language [that] is both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties.").

of a confidentiality agreement the employer imposed on its employees so that the employees could respond to a state investigation. The court concluded, to "the extent that those agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with the public policy in favor of allowing even current employees to assist in securities fraud investigations." *Id.* at 1137. The considerations the court addressed in *In re JDS Uniphase Corp. Secs. Litig* that led it to limit the scope of the employee confidentiality agreement may have some persuasive value with respect to the interests of the Attorney General *amici* discussed below, but do not weigh against enforcement of NAF's confidentiality agreements against defendants generally. This is especially true considering that there are significant, countervailing public policy arguments weighing in favor of enforcing NAF's confidentiality agreements. *See, e.g.*, Cal. Govt. Code § 6215(a) (recognizing that persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups).

The final case relied on by defendants in support of their argument that the EA should be interpreted narrowly, consistent with the public's interest in hearing speech on matters of public concern, did not address a confidentiality agreement at all. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). The *Curtis* case found that absent clear and compelling circumstances, the Court would not find that a defendant had waived a First Amendment defense to libel

(where that specific defense had not been established by the Supreme Court at the time of defendants' libel trial).

Defendants also rely on established case law directing courts to interpret ambiguous contracts in a manner that is reasonable and does not lead to absurd results. Oppo. Br. at 22-23. Defendants argue that the broad coverage NAF contends the EA imposes on defendants is unreasonable and absurd because NAF's interpretation of the broad scope of the EA would cover all information discussed at NAF's Meetings, even publicly known information. Oppo. at 22-23. Defendants' argument might have some merit if it was made concerning a challenge to the application of the EAs' confidentiality provisions with respect to specific pieces or types of information that are otherwise publicly known or intended by NAF to be shared with individuals not covered by the EA. Defendants do not make that type of "as applied," narrow argument. Instead, they argue that the whole EA is unenforceable. There is no legal support for that result or for defendants' speculation that the EA might be enforced in an unreasonable manner against other NAF attendees.[29]

29. I agree with defendants that NAF's intent with respect to the EA and CA is irrelevant for purposes of this motion. Under California contract law, intent comes into play only when contract language is ambiguous. There is no ambiguity concerning meaning of the EA or CA with respect to defendants' conduct here and, therefore, no need to construe otherwise ambiguous terms against the drafter. *But see Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913, 175 Cal. Rptr. 3d 612 (2014) ("ambiguities in standard form contracts are to be construed against the drafter.").

4. What Information is Covered by EA

Defendants argue that even if enforceable, the EA should be read to create confidentiality only for the information *provided* by NAF in formal sessions and should not be construed to cover information provided by conference attendees in informal conversations. Oppo. Br. at 26-27. Defendants rely on the two portions of paragraph 17 of EA for their restrictive interpretation of its coverage; they argue that paragraph 17 only restricts disclosure of information "NAF may furnish" and "written information provided by NAF." Those provisions, defendants say, should be read to modify "any information which is disclosed orally or visually." Taken together, defendants argue, this language "connotes formality" and therefore should cover only oral and visual information provided in formal sessions at the Meetings. Oppo. Br. at 26.

As an initial matter, defendants wholly ignore the provision in the EAs that signatories agree — on behalf of entities and their employees and agents — to "hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF." Pl. Exs. 3,4. The only reason defendants gained access to the NAF Annual Meetings was under their guise as exhibitors and all information they received was in the course of that role, even if gathered in places other than the exhibition hall. Moreover, defendants' constrained reading of paragraph 17 is illogical. The text of paragraph 17, when read as a whole, covers all written, oral, and visual information, and the "formality" of the language does not restrict

its requirements to only the "formal" workshops and presentations as argued by defendants.[30]

In sum, on the record before me, NAF has demonstrated a strong likelihood of success on its breach of contract claims both with respect to the EAs that were signed by all CMP operatives in 2014 and 2015, and with respect to the CAs that were signed by Daleiden and his associates in 2014 and signed by Lopez in 2015.

B. California Penal Code section 632

NAF also contends that it has demonstrated a likelihood of success on its claim that defendants violated California Penal Code section 632. That provision makes it a crime to, "without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device." Cal. Penal Code § 632(a). "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be

30. The same is true of defendants "implications of formality" argument made with respect to the CAs in a footnote. *See* Oppo. Br. at 27, n.12.

overheard or recorded." *Id.* § 632(c). And "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." *Id.* § 632(d).

Defendants argue that because section 632 does not prohibit publication of recordings made in violation of the statute, NAF cannot justify an injunction against defendants based upon an alleged violation of that statute. Indeed, California courts have held that "Penal Code section 632 does not prohibit the disclosure of information gathered in violation of its terms." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 167, 1 Cal. Rptr. 3d 536 (2003); *cf. Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1393, 133 Cal. Rptr. 3d 450 (2011) ("Although a recording preserves the conversation and thus could cause greater damage to an individual's privacy in the future, these losses are not protected by section 632.").

In reply, NAF argues that its section 632 claim is not being asserted as a basis for enjoining release of the recordings already made, but in support of its request that defendants be enjoined from "attempting to gain access to any future NAF meetings in order to tape its members, a form of relief specifically provided under § 637.2(b) ("Any person may . . . bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).").

Penal Code section 632, therefore, is not relevant to NAF's chances of success on the merits, but only with respect to the appropriate scope of injunctive relief, discussed below.[31]

C. The First Amendment and Public Policy Implications of the Requested Injunction

Defendants argue that, assuming NAF demonstrates a likelihood of success on the breach of contract claim, the EAs and CAs should not be enforced through an injunction prohibiting defendants from publishing the recordings because that is an unjustified prior restraint and against public policy. NAF counters that even if First Amendment issues are raised by the injunction it seeks, any right to speech implicated by publishing the NAF recordings has been waived by defendants knowing agreement to the EAs and CAs.

NAF relies primarily on a line of cases holding that where parties to a contract agree to restrictions on speech, those restrictions are generally upheld. For example, in *Leonard v. Clark*, the Ninth Circuit addressed a union and union members' challenge to a Collective Bargaining Agreement that arguably restricted their

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31. Both sides spend much time arguing whether section 632 prohibits recording panel presentations as opposed to conversations between individuals, because section 632's protections only extend to information as to which the speaker has a "reasonable expectation" of privacy. I need not reach these arguments as NAF no longer asserts section 632 as a ground for its likelihood of success on this motion.

First Amendment rights to petition the government. 12 F.3d 885, 886 (9th Cir. 1993), *as amended* (Mar. 8, 1994). The court, following Supreme Court precedent, recognized that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent," and concluded that in negotiating the CBA the union knowingly waived any First Amendment rights that may have been implicated. *Id.* at 890.

Other cases have likewise found that speech rights can be knowingly waived. *ITT Telecom Prod. Corp. v. Dooley*, 214 Cal. App. 3d 307, 317, 319, 262 Cal. Rptr. 773 (1989) (recognizing, in a case determining the scope of California's litigation privilege, that "it is possible to waive even First Amendment free speech rights by contract."); *Perricone v. Perricone*, 292 Conn. 187, 202, 972 A.2d 666 (2009) (Supreme Court of Connecticut enforced non-disclosure agreement as knowing and voluntary waiver of First Amendment rights and enjoined ex-wife from "appearing on radio or television" for purposes of discussing her former marriage or spouse); *Brooks v. Vallejo City Unified Sch. Dist.*, No. 2:09-CV-1815 MCE JFM, 2009 U.S. Dist. LEXIS 101262, 2009 WL 10441783, at *5 (E.D. Cal. Oct. 30, 2009) (recognizing, in denying a third-party's attempt to secure a copy of a public entities' settlement agreement with two individual plaintiffs, that individuals "were entitled to bargain away their free speech rights by agreeing to confidentiality provisions or other contractual provisions that restrict free speech").

Defendants respond that NAF has not shown that Daleiden knowingly and intelligently waived his First Amendment rights by signing the NAF confidentiality agreements, resting their argument on Daleiden's position that he believed the agreements were unenforceable and void. Daleiden PI Decl. ¶ 12 ("I understood that no nondisclosure agreement is valid in the face of criminal activity. In the course of my investigative journalism work, I have seen other confidentiality agreements, all of which were far more specific and detailed in terms of what the protected information was. I believed the working of the nondisclosure portions of the Exhibit Agreement was too broad, vague, and contradictory to be enforced."). However, even if Daleiden honestly believed he had *defenses* to the enforcement of the confidentiality agreements, there is no argument — and no case law cited — that his signature on them and his agreement to them was not "knowing and voluntary." Daleiden and his associates *chose* to attend the NAF Annual Meetings and voluntarily and knowingly signed the EAs and CAs.

Daleiden's argument would vitiate the enforceability of confidentiality agreements based on an individual's correct *or mistaken* belief as to the enforceability of those agreements. It is contrary to well-established law. *See, e.g., Leonard v. Clark*, 12 F.3d at 890 ("The fact that the Union informed the City of its view that Article V was 'unconstitutional, illegal, and unenforceable' does not make the Union's execution of the agreement any less voluntary."); *see also Griffin v. Payne*, 133 Cal. App. 363, 373, 24 P.2d 370 (Cal. Ct. App. 1933) ("A secret intent to violate the law, concealed in the mind of one party to an

otherwise legal contract, cannot enable such party to avoid the contract and escape his liability under its terms.").

Defendants contend that the public policy at issue — allowing free speech on issues of significant public importance — weighs against finding a waiver and/or enforcing the confidentiality agreements. The Ninth Circuit has recognized that courts should balance the competing public interests in determining whether to enforce confidentiality agreements that restrict First Amendment rights. *Leonard*, 12 F.3d at 890 ("even if a party is found to have validly waived a constitutional right, we will not enforce the waiver 'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'") (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir.1991)); *see also Perricone v. Perricone*, 292 Conn. 187, 221-22, 972 A.2d 666 (in weighing the public interests as to whether to enforce the agreement, the court observed: "The agreement does not prohibit the disclosure of information concerning the enforcement of laws protecting important rights, criminal behavior, the public health and safety or matters of great public importance, and the plaintiff is not a public official.").

On the record before me, balancing the significant interests as stake on both sides supports enforcement of the confidentiality agreements at this juncture. As the Supreme Court recognized in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991), "the First Amendment does not confer on the

press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672. "'[T]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Id.* at 670 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953 (1937)); *see also Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime."). That defendants intended to infiltrate the NAF Annual Meetings in order to uncover evidence of alleged criminal wrongdoing that would "trigger criminal prosecution and civil litigation against Planned Parenthood and to precipitate pro-life political and cultural ramifications when the revelations become public," does not give defendants an automatic license to disregard the confidentiality provisions. Pl. Ex. 26.

Defendants passionately contend that public policy is on their side (and the side of public disclosure) because the recordings show criminal wrongdoing by abortion providers — a matter that is indisputably of significant public interest. *Cf. Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 358, 9 Cal. Rptr. 3d 197 (2004) (approving judicial notice "of the fact that abortion is one of the most controversial political issues in

our nation.").[32] I have reviewed the recordings relied on by defendants and find no evidence of criminal wrongdoing. At the very most, some of the individuals expressed an interest in exploring a relationship with defendants' fake company in response to defendants entreaties of how "profitable" it can be and how tissue donation can assist in furthering research. There are no express agreements to profit from the sale of fetal tissue or to change the timing of abortions to allow for tissue procurement.[33]

I also find it significant that while defendants' repeatedly assert that their primary interest in

32. Defendants ask for leave to supplement the record to include the January 20, 2016 Order in the *StemExpress LLC, Inc. v. Center for Medical Progress* case pending in Los Angeles Superior Court. Dkt. No. 352. Defendants ask me to take notice that the Superior Court found defendants' Project video regarding StemExpress was "constitutionally protected activity in connection with a matter of public interest" under California's anti-SLAPP statute. That motion is GRANTED.

33. The first piece of evidence that defendants repeatedly point to show "illegality" is an advertisement by StemExpress that was in both of the NAF 2014 and 2015 Meeting brochures. That ad states that clinics can "advance biomedical research," that partnering with StemExpress can be "Financially Profitable*Easy to Implement Plug-In Solution*Safeguards You and Your Donors" and that the "partner program" "fiscally rewards clinics." *See* Dkt. No. 270-1 at p. 3 of 10. However, the ad explains that StemExpress is a company that provides human tissue products "ranging from fetal to adult tissues and healthy to diseased samples" to many of the leading research institutions in the world. *Id.* The ad, therefore, is a general one and not one aimed solely at providers of fetal tissue. The ad does not demonstrate that StemExpress was engaged in illegal conduct of paying clinics at a profit for fetal tissue.

infiltrating NAF was to uncover evidence of criminal wrongdoing, and that the NAF recordings show such wrongdoing, defendants *did not* provide any of the NAF recordings to law enforcement following the 2014 Annual Meeting. Nor did defendants provide any of the NAF recordings to law enforcement immediately following the 2015 Annual Meetings. Instead, defendants decided it was more important to "curate" and release the Project videos starting in July 2015. Sworn testimony from Daleiden establishes that the only disclosure of NAF materials he made to law enforcement officers was: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; and, providing (ii) "short clips" of video to law enforcement in Texas in June or July 2015. Daleiden PI Decl. ¶ 24. If the NAF recordings truly demonstrated criminal conduct — the alleged goal of the undercover operation — then CMP would have immediately turned them over to law enforcement. They did not.

Perhaps realizing that the recordings do not show criminal wrongdoing, defendants shift and assert that there is a public interest in the recordings showing "a remarkable de-sensitization in the attitudes of industry participants." Oppo. Br. at 14. As part of that shift, defendants' opposition brief highlights portions of the recordings where abortion providers comment candidly about how emotionally and professionally difficult their work can be. Oppo. Br. at 14-15. I have reviewed defendants' transcripts of these portions of the recordings. Some comments can be characterized as callous and some may

show a "de-sensitization," as defendants describe it. They can also be described as frank and uttered in the context of providers mutually recognizing the difficulties they face in performing their work. However they are characterized, there is some public interest in these comments. But unlike defendants' purported uncovering of criminal activity, this sort of information is already fully part of the public debate over abortion. Oppo. Br. at 49-50 (citing *Gonzales v. Carhart*, 550 U.S. 124, 158, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 962, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000)); *see also* VALUE OF HUMAN LIFE, 162 Cong Rec S 162, 163 (January 21, 2016); PROVIDING FOR CONSIDERATION OF H.R. 1947, FEDERAL AGRICULTURE REFORM AND RISK MANAGEMENT ACT OF 2013, 159 Cong Rec H 3708, 3709 (June 8, 2013 testimony on the PAIN-CAPABLE UNBORN CHILD PROTECTION ACT). The public interest in additional information on this issue cannot, standing alone, outweigh the competing interests of NAF and its members' expectations of privacy, their ability to perform their professions, and their personal security.

It is also this very information that could — if released and taken out of the context that it was shared in by NAF members — result in the sort of disparagement, intimidation, and harassment of which NAF members who were recorded during the Annual Meetings are afraid. Dunn Decl. ¶ 10; Reeves Decl. ¶ 17. In sum, the public interest in these comments is certainly relevant, but does not weigh heavily against the enforcement of the NAF confidentiality agreements.

On the other side, public policy also supports NAF's position. NAF has submitted extensive evidence that in order to fulfill its mission and allow candid discussions of the challenges its members face — both professional and personal — confidentiality agreements for NAF Meeting attendees are absolutely necessary. Dunn Decl. ¶¶ 5-6; Reeves Decl. ¶ 7; Saporta Decl. ¶¶ 11, 13-16; Mellor Decl. ¶¶ 7, 10-14. Release of the recordings procured by fraud and taken in violation of NAF's stringent confidentiality agreements, which disclose the identities of NAF members and compromise steps NAF members take to protect their privacy and professional interests, is also contrary to California's recognition of the dangers faced by providers of abortion, as well as California's efforts to keep information regarding the same shielded from public disclosure and protect them from threats and harassment. *See* Cal. Govt. Code § 6215(a) ("(a) Persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups."); Cal. Civ. Code § 3427 *et seq.* (creating cause of action to deter interference with access to clinics and health care); Cal. Govt. Code § 6218 ("Prohibition on soliciting, selling, trading, or posting on Internet private information of those involved with reproductive health services"); Cal. Govt. Code § 6254.28; Cal. Penal Code § 423 ("California Freedom of Access to Clinic and Church Entrances Act."). As noted above, since defendants' release of the Project videos (as well as the leak of a portion of the NAF recordings), harassment, threats, and violent acts taken against NAF members and facilities have increased dramatically. It is not speculative to expect that harassment, threats, and violent acts will continue to rise

if defendants were to release NAF materials in a similar way. Weighing the public policy interests on the record before me, enforcement of the confidentiality agreements against defendants is not contrary to public policy.

That said, public policy may well support the release of a small subset of records — those that defendants believe show criminal wrongdoing — to law enforcement agencies.[34] Defendants rely on a line of cases where courts have refused to enforce, or excused compliance with, otherwise applicable confidentiality agreements for the limited purpose of allowing cooperation with a specified law enforcement investigation. *See, e.g., Alderson v. United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010); *In re JDS Uniphase Corp. Secs. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972); *see also United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 965 (9th Cir. 1995) (refusing to enforce a prefiling release of a False Claims Act claim); *Siebert v. Gene Sec. Network, Inc*, No. 11-CV-01987-JST, 2013 U.S. Dist. LEXIS 149145, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (declining to enforce a nondisclosure agreement with respect to documents relevant to a FCA claim because application of the NDA to those documents would "would frustrate Congress' purpose in enacting the False Claims Act—namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts."); *but see*

34. As I have said, my review of the recordings relied on by defendants does not show criminal conduct, but I recognize that law enforcement agencies may want to review the information at issue themselves in order to make their own assessment.

Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1062 n.15 (9th Cir. 2011) (upholding breach of confidentiality claim, despite plaintiff's attempt to "excuse her conduct on the grounds that she was in contact with, and providing information to, government investigators," in part because that justification "neither explains nor excuses the overbreadth of her seizure of documents.").[35]

I do not disagree with the analysis and results in those cases, but note that the posture of this case is different. Defendants' purported desire to disclose the NAF recordings to law enforcement does not obviate the confidentiality agreements *for all purposes*. At most, defendants might have a defense to a breach of contract claim based on production of NAF materials to law enforcement. However, the question of whether defendants should be excused from complying with NAF's confidentiality agreements in order to provide NAF materials to law enforcement has not been placed directly at issue. In this case, Attorney General *amici* have appeared (with leave of court) to present their arguments on the scope of the TRO and the requested preliminary injunction.[36] They have not directly sought

35. Defendants also rely on a related line of cases holding that contracts which expressly prohibit a signatory from reporting criminal behavior to law enforcement agencies are void as against public policy. *See, e.g.*, Oppo. Br. at 52-55 (citing *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001); *Bowyer v. Burgess*, 54 Cal. 2d 97, 98, 4 Cal. Rptr. 521, 351 P.2d 793 (1960)). Those cases are inapposite.

36. I have granted the Attorneys General of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and

relief from the confidentiality agreements, the TRO, or the requested preliminary injunction by intervening and moving for declaratory relief in this Court or by seeking enforcement of their subpoenas in the courts of their own states. And contrary to their assertion, the TRO in place and the Preliminary Injunction requested do not prevent law enforcement officials from investigating defendants' claims of criminal wrongdoing. For example, law enforcement agencies from the states of Arizona and Louisiana have instituted formal efforts to secure the NAF recordings. Under procedures outlined in the Protective Order in this case, NAF and defendants have been and continue to meet and confer with those state authorities about the scope of the subpoenas and defendants' responses.[37]

The record before me demonstrates that defendants infiltrated the NAF meetings with the intent to disregard the confidentiality provisions and secretly

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Oklahoma leave to participate as *amici curiae* in this matter. Dkt. Nos. 99, 100, 285. As represented by the office of the Attorney General of Arizona, the *amici* filed a brief and argued in court during the hearing on the Motion for a Preliminary Injunction.

37. There have only been three subpoenas served on CMP for NAF materials; the Congressional subpoena that has been complied with, as well as subpoenas from Louisiana and Arizona. Negotiations between NAF, CMP, and the states of Louisiana and Arizona are ongoing. While NAF and the defendants have repeatedly stipulated to extend the timeframe for NAF to file a challenge to the state subpoenas in state court (*see* Dkt. Nos. 246, 300), those were decisions reached by the parties and not imposed by the Court.

record participants and presentations at those meetings. Defendants also admit that only a small subset of the total material gathered implicate any potential criminal wrongdoing. Oppo. Br. at 10-14. I have reviewed those transcripts and recordings and find no evidence of actual criminal wrongdoing. That defendants did not promptly turn over those recordings to law enforcement likewise belies their claim that they uncovered criminal wrongdoing, and instead supports NAF's contention that defendants' goal instead is to falsely portray the operations of NAF's members through continued release of its "curated" videos as part of its strategy to alter the political landscape with respect to abortion and the public perception of NAF's members.[38] I conclude that NAF has shown a strong likelihood of success on its breach of contract claims against CMP and Daleiden. Enforcement of NAF's confidentiality provisions for purposes of continuing the injunction prohibiting defendants from releasing the NAF materials is not against public policy.

D. Claims Against Newman

Defendant Newman argues that NAF has failed to show a likelihood of success against him because there is no evidence of his role in the NAF infiltration

38. In opposing NAF's request that the Court order Daleiden to turn over the NAF materials to his outside counsel, Daleiden's counsel explained that Daleiden needed access to the NAF materials because "Mr. Daleiden continues to work on the Human Capital Project, including the work of curating available raw investigative materials for disclosure to law enforcement and for release of videos to the public." Dkt. No. 195.

and no argument that Newman breached any of NAF's agreements. Newman's argument would be more relevant if this were a motion for summary judgment. However, it is not. The only question is whether NAF has made a strong showing of the likelihood of success on its contract claim against CMP and Daleiden, which it has. NAF submitted evidence of Newman's own admissions that he advised Daleiden on how to infiltrate the NAF meetings as part of the Project, which is relevant to the appropriate scope of an injunction. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16 (at NAF0004493-94). That evidence makes clear that Newman should remain covered by the Preliminary Injunction, even if he is no longer serving as a board member of CMP. Dkt. No. 344.

II. IRREPARABLE INJURY

To sustain the request for a preliminary injunction, NAF must demonstrate that "irreparable injury is likely in the absence of" the requested injunction" and establish a "sufficient causal connection" between the irreparable harm NAF seeks to avoid and defendants' intended conduct — release of the NAF materials. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011).

Defendants argue that NAF has not shown that it will suffer irreparable injury to justify a preliminary injunction. However, as detailed above, the release of videos as part of defendants' Human Capital Project has directly led to a significant increase in harassment, threats, and violence directed not only at the "targets"

of CMP's videos but also at NAF and its members more generally. This significant increase in harassment and violent acts — including the most recent attack in Colorado Springs at the clinic where "target" Dr. Ginde is the medical director — has been adequately linked to the timing of the release of the Project videos by CMP. Saporta Decl. ¶ 19; Saporta Depo. 42:1-10; Pl. Exs. 92, 93, 96-99.[39] If the NAF materials were publicly released, it is likely that the NAF attendees shown in those recordings would not only face an increase in harassment, threats, or incidents of violence, but also would have to expend more effort and money to implement additional security measures. *See, e.g,*. Dunn Decl. ¶ 10; Reeves Decl. ¶ 19.[40] The same is true for NAF itself, which provides security assessments and assistance for its members. Mellor Decl., ¶ 15; Saporta Decl. ¶ 10.

Defendants contend that they cannot be held responsible for the threats, harassment, and violence caused by "third-parties" in response to the release of the Project videos, and that defendants' ability to publish the NAF materials cannot be prevented when defendants have not themselves been linked to the threats, harassment, and violence. Oppo. Br. at 43-44. But they fail to contradict NAF's evidentiary showing that a significant increase in

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39. Defendants object to Exhibits 98 and 99 as inadmissible hearsay, for lack of personal knowledge, lack of authentication, and as irrelevant. Those objections are overruled.

40. Defendants object to paragraph 19 of Dr. Reeves' declaration as speculative, improper expert testimony, and for lack of foundation. Those objections are OVERRULED.

these acts followed CMP's release of its Project videos. Moreover, a report submitted by NAF of an analysis of many of the "highlight" and "full" videos released by CMP concluded that the "curated" or highlight Project videos were "misleading" and suggests that the "full" videos defendants released along with their "highlights" were also edited. Pl. Ex. 77. Defendants do not counter this evidence, other than pointing to Daleiden's assertion that the highlight videos were accompanied by the release of the "full" recordings. Given the evidence of defendants' past practices, allowing defendants to use the NAF materials in future Project videos would likely lead to the same result — release of misleading "highlight" videos disclosing the identity and comments of NAF members and meeting attendees, resulting in further harassment and incidents of violence against the individuals shown in those recordings. The NAF members and attendees in the recordings have a justifiable expectation that release of the materials — in direct contravention of the NAF confidentiality agreements — will result not only in harassment and violence but reputational harms as well. *See, e.g.*, Dunn Decl. ¶¶ 9-10;[41] Reeves Decl. ¶ 17.

Defendants miss the point in their attempt to shift the responsibility to overly zealous third-parties for the actual and likely injury to NAF and its members that would stem from disclosure of the NAF materials. If defendants are allowed to release the NAF materials, NAF and its

41. Defendants object to paragraph 9 of the Dunn Declaration as lacking in personal knowledge, improper expert testimony, inadmissible hearsay, improper opinion testimony, and under the best evidence rule. Those objections are overruled.

members would suffer immediate harms, including the need to take additional security measures. The "causal connection" between NAF's and its members' irreparable injury and the conduct enjoined (release of NAF materials) has been shown on this record.[42]

On the other side of the equation is defendants' claim of irreparable injury. They focus on their First Amendment right to disseminate the information fraudulently obtained at the NAF Meetings, and the injury to the public of being deprived of the NAF recordings. But freedom of speech is not absolute, especially where there has been a voluntary agreement to keep information confidential. While the disclosure of evidence of criminal activity or evidence of imminent harm to public health and safety could outweigh enforcement of NAF's confidentiality agreements (as discussed above), there is no such evidence in defendants' recordings. Viewed in a light most favorable to defendants, what does appear is information that is already in the public domain that defendants characterize as showing a "de-sensitization" as to the work performed by abortion providers. The balance of NAF's strong showing of

42. The sum of defendants' argument and evidence on this point is that they cannot be blamed for the "hyperbolic comments of anonymous Internet commenters" and that "hyperbolic 'death threats' on the Internet and through social media has become an ubiquitous feature of online discourse." Oppo. Br. at 44-45. But the misleading nature of the Project videos that they have produced — reflective of the misleading nature of defendants' repeated assertions that the recordings at issue show significant evidence of criminal wrongdoing — have had tragic consequences, including the attack in Colorado where the gunman was apparently motivated by the CMP's characterization of the sale of "baby parts."

irreparable injury to its members' freedom of association (to gather at NAF meetings and share their confidences), to its and its members' security, and to its members' ability to perform their chosen professions against preventing (through trial) defendants from disclosing information that is of public interest but which is neither new or unique, tilts strongly in favor of NAF.

III. BALANCE OF EQUITIES

Similar to the discussion of competing claims of irreparable injury, the balance of equities favors NAF. Defendants will suffer the hardship of being restricted in what evidence they can release to the public in support of their ongoing Human Capital Project, at least through a final determination at trial. However, the hardships suffered by NAF and its members are far more immediate, significant, and irreparable.

IV. PUBLIC INTEREST

I fully recognize that there is strong public interest on the issue of abortion on both sides of that debate, and that members of the public therefore have an interest in accessing the NAF materials. I also recognize that this case impinges on defendants' rights to speech and the public's equally important interest in hearing that speech. But this is not a typical freedom of speech case.[43] Nor is

43. None of the "prior restraint" cases defendants rely on address the types of exceptional facts established here: (i) enforceable confidentiality agreements, knowingly and voluntarily entered into, in which defendants agreed to the remedy of injunctive relief in the event of a breach; (ii) extensive and

this a typical "newsgathering" case where courts refuse to impose prior restraints on speech, leaving the remedies for any defamatory publication or breach of contract to resolution post-publication. *See, e.g., CBS, Inc. v. Davis*, 510 U.S. 1315, 1318, 114 S. Ct. 912, 127 L. Ed. 2d 358 (1994); *see also Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

Instead, this is an exceptional case where the extraordinary circumstances and evidence to date shows that the public interest weighs in favor of granting the preliminary injunction. Weighing against the public's

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repeated fraudulent conduct; (iii) misleading characterizations about the information procured by misrepresentation; and (iv) a strong showing of irreparable harm if the confidentiality agreements are not enforced pending trial. *See* Oppo. Br. at 32-35. Several of defendants' prior restraint cases expressly left open the possibility of limits on speech where "private wrongs" and "clear evidence of criminal activity" occurred. *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971) (overturned broad injunction prohibiting "peaceful" pamphleteering across a city where injunction was not necessary to redress a "private wrong"); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318, 114 S. Ct. 912, 127 L. Ed. 2d 358 (1994) (emergency stay overturning prior restraint where damage to meat packing company was readily remedied by post-publication damages action and "the record as developed thus far contains no clear evidence of criminal activity on the part of CBS, and the court below found none."); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (striking down wiretap statutes to extent they penalized the publishing of secretly recorded phone conversations by reporters who played no role in the illegal interception; rejecting proposition that "speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

general interest in disclosure of the recordings showing the "de-sensitization" of abortion providers, is the fact that there is a constitutional right to abortions and that NAF members also have the right to associate in privacy and safety to discuss their profession at the NAF Meetings, and need that privacy and safety in order to safely practice their profession. On the record before me, NAF has demonstrated the release of the NAF materials will irreparably impinge on those rights.

The context of how defendants came into possession of the NAF materials cannot be ignored and directly supports preliminarily preventing the disclosure of these materials. Defendants engaged in repeated instances of fraud, including the manufacture of fake documents, the creation and registration with the state of California of a fake company, and repeated false statements to a numerous NAF representatives and NAF members in order to infiltrate NAF and implement their Human Capital Project. The products of that Project — achieved in large part from the infiltration — thus far have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions (at least with respect to the NAF materials) of criminal misconduct. Defendants did not — as Daleiden repeatedly asserts — use widely accepted investigatory journalism techniques. Defendants provide no evidence to support that assertion and no cases on point.[44]

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44. Defendants rely on cases where reporters misrepresented themselves in the course of undercover investigations, but those cases do not show the level of fraud and misrepresentation defendants engaged in here. For example, in *Med. Lab. Mgmt. Consultants v. A*BC, 306 F.3d 806, 812 (9th Cir. 2002), reporters

posed as employees of fictitious labs, in order to investigate whether an existing lab was violating federal regulations and misreading pap smear tests. There is no evidence that the reporters in the *Med. Lab.* case did anything other than verbally misrepresent themselves to the lab owner; the reporters did not create fictitious documents, register a fictitious company, or intentionally agree to confidentiality agreements before making their undercover recordings. *Id.* at 814 n.4 (noting the plaintiffs failed to obtain confidentiality agreements from defendants). It is also important to note that while the Ninth Circuit affirmed the district court's order granting summary judgment to defendants on plaintiffs' intrusion on seclusion, trespass, and tortious interference claims under Arizona law, the district court denied in part defendants' motion as to plaintiffs' fraud claim. *Id.* at 812. In *J.H. Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1348 (7th Cir. 1995), the reporters posed as patients of an eye center and secretly recorded their eye exams. The misrepresentations in that case simply do not rise to the level of the misrepresentations here or the fraudulent lengths defendants went through to secure their recordings. Also, in that case, the Court of Appeals remanded the defamation claim for further proceedings, and affirmed the dismissal of the trespass, privacy, wiretapping, and fraud claims based on an analysis of the facts under the state and federal laws at issue. The district court did not dismiss the breach of contract claim. *Id.* at 1354. Finally, defendants' citation to *Animal Legal Def. Fund v. Otter*, No. 1:14-CV-00104-BLW, 118 F. Supp. 3d 1195, 2015 U.S. Dist. LEXIS 102640, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), for the proposition that using deceptive tactics to conduct an undercover investigation "is not 'fraud' and is fully protected by the First Amendment," is not supported. In that case, the district court struck down a state law that criminalized the use of "misrepresentation" to gain access to and record operations in an agricultural facility. In striking down the law as a content-based regulation of protected speech which failed strict scrutiny, the court noted that the law did not "limit its misrepresentation

V. SCOPE OF INJUNCTION

A. Coverage of Third Party Law Enforcement Entities and Governmental Officials

Defendants and the Attorney Generals of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and Oklahoma (AG *Amici*) argue that any continuing injunction on the release of the NAF materials should not run to third-party law enforcement entities or government officials because NAF has not shown that disclosure of the NAF materials to law enforcement entities or government officials will result in irreparable harm and the public interest strongly favors governments being free to exercise their investigatory powers. *See* AG *Amici* Brief (Dkt. No. 285).

The Protective Order and the injunction in this case do not hinder the ability of states or other governmental entities from conducting investigations. Nor do they bar defendants from disclosing materials in response to subpoenas from law enforcement or other government entities. Instead, those orders simply impose a notice requirement on defendants; requiring them to notify NAF prior to defendants' production of the NAF materials so

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prohibition to false speech amounting to actionable fraud," and any harm from the speech at issue would not be compensable as "harm for fraud or defamation" because the harm did not stem from the misrepresentation made to access the facility. 2015 U.S. Dist. LEXIS 102640, [WL] at * 5-6. That case *did not* hold that undercover operations could not result in actionable fraud, breach of contract, or libel.

that NAF may (if necessary) challenge the subpoenas in the state court at issue. Contrary to the AG *Amici* position, these limited procedures do not purport to bind the states or prevent them from conducting investigations or seeking relief in their own courts. The Protective Order and injunction simply create an orderly procedure to allow production of relevant information to state law enforcement or other governmental entities. As far as I am aware, that procedure has worked well and negotiations are ongoing between NAF, defendants, and the two states that have issued subpoenas to CMP, Arizona and Louisiana.[45]

B. Expansion of Injunctive Relief

NAF also seeks to expand the injunctive relief to prevent defendants and those acting in concert with them from publishing or disclosing "any video, audio, photographic, or other recordings taken of members or attendees Defendants first made contact with at NAF meetings" and "enjoin the defendants from attempting to gain access to any future NAF meetings." Motion at i, 2.

On this record, NAF has not demonstrated that an expansion of the injunction is warranted. NAF does not

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45. Similarly defendants appropriately notified the Court that CMP was subpoenaed to testify in front of a grand jury, and explained that if Daleiden was called upon to disclose information he learned at the NAF Annual Meetings in responding to the grand jury's questions, Daleiden intended to do so absent further order from this Court. Dkt. No. 323-5. This Court did nothing to prevent Daleiden from testifying fully in front of that grand jury.

identify (under seal or otherwise) the NAF members or attendees whom it believes have been recorded and whom defendants "first made contact with" at a NAF Annual Meeting. A request for injunctive relief must be specific and reasonably detailed, but NAF's request would import ambiguity into the scope of the injunction. Absent a more specific showing supported by evidence, I will not expand the preliminary injunction to ban CMP from releasing unspecified recordings of unspecified NAF members or attendees defendants "first made contact with" at the NAF Meetings.

Similarly, NAF has not shown that an "open-ended" expansion of the injunction to prohibit the "defendants from attempting to gain access to any future NAF meetings," is necessary. Defendants and their agents are now well known to NAF and its members and absent evidence that defendants intend to continue to attempt to infiltrate NAF meetings, there is no need to extend the preliminary injunction at this juncture.

CONCLUSION

Considering the evidence before me, and finding that NAF has made a strong showing on all relevant points, I GRANT the motion for a preliminary injunction. Pending a final judgment, defendants and those individuals who gained access to NAF's 2014 and 2015 Annual Meetings using aliases and acting with defendant CMP (including but not limited to the following individuals/aliases: Susan Tennenbaum, Brianna Allen, Rebecca Wagner, Adrian Lopez, and Philip Cronin) are restrained and enjoined from:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

IT IS SO ORDERED.

Dated: February 5, 2016

/s/ William H. Orrick
WILLIAM H. ORRICK
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS, FILED MAY 5, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-15360
D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco

NATIONAL ABORTION FEDERATION, NAF,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; *et al.*,

Defendants-Appellants.

ORDER

Before: CALLAHAN and HURWITZ, Circuit Judges, and MOLLOY,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Callahan voted to grant the petition.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Appendix C

Judge Hurwitz voted to deny the petition for rehearing *en banc* and Judge Molloy so recommends. Judge Callahan voted to grant the petition.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc.* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing *en banc*, Dkt. 158, is **DENIED.**

APPENDIX D — SELECT RECORD EXCERPTS: PUBLIC MATERIALS

ER 131-32

Buyer: So, the main thing, well, not the main thing that I would like to discuss is, I'd really like to connect with people who feel they don't know we're out there. They don't know there's this opportunity. And that could be a little touchy, for them more for us, and I want to be delicate to any reservations.

PP: Yeah, you know, I don't think it's a reservations issue so much as a perception issue, because I think every provider has had patients who want to donate their tissue, and they absolutely want to accommodate them. They just want to do it in a way that is not perceived as, 'This clinic is selling tissue, this clinic is making money off of this.' I know in the Planned Parenthood world they're very very sensitive to that. And before an affiliate is gonna do that, they need to, obviously, they're not— some might do it for free—but they want to come to a number that doesn't look like they're making money. They want to come to a number that looks like it is a reasonable number for the effort that is allotted on their part. I think with private providers, private clinics, they'll have much less of a problem with that.

Buyer: Okay, so, when you are, or the affiliate is determining what that monetary—so that it doesn't create, raising a question of this is what it's about, this is the main—what price range, would you—?

PP: You know, I would throw a number out, I would say it's probably anywhere from $30 to $100 [per specimen], depending on the facility and what's involved. It just has to do with space issues, are you sending someone there who's going to be doing everything, is there shipping involved, is somebody gonna have to take it out. You know, I think everybody just wants, it's really just about if anyone were ever to ask them, "What do you do for this $60? How can you justify that? Or are you basically just doing something completely egregious, that you should be doing for free." So it just needs to be justifiable. And, look, we have 67 affiliates. They all have different practice environments, different staff, and so that number—

Buyer: Did you say 67?

PP: 67.

Buyer: Okay. And so of that number, how much would personality of the personnel in there, would play into it as far as how we're speaking to them—

PP: I think for affiliates, at the end of the day, they're a non-profit, they just don't want to— they want to break even. And if they can do a little better than break even, and do so in a way that seems reasonable, they're happy to do that.

Really their bottom line is, they want to break even. Every penny they save is a just pennies they give to another patient. To provide a service the patient wouldn't get.

Buyer: Because of the losses in that area.

PP: Exactly. So, I don't know your, what you're thinking as far as range. If you're thinking about just California, if you're thinking about just the West Coast, if you're thinking about bigger regions.

Appendix D

ER 211-13

Buyer: Definitely, yea that would be helpful. So even though you don't have high volume, I see that their are other niches you could fill for us. Don't you think so?

Gatter: Here is my suggestion. Write me a three of four paragraph proposal, which I will then take to Laurel and the organization to see if we want to proceed with this. And then, if we want to pursue this, mutually, I talk to Ian and see how he feels about using a "less crunchy" technique to get more whole specimens. Then, if we agree to move forward, the steps, I would need to apply for a waiver at PPFA, in order to do this, we need to have a contract, do you have a contract?

Buyer: What we've used in the past is a materials transfer agreement. And obviously, that's open to discussion.

Gatter: It needs to say exactly what your staff is going to do. It needs to say exactly what your expectations are. Exactly what the compensations is. That you're agreeing that your person will only use specified the Federal government tissue donation form, you can add extra forms if you want. California-

Buyer: Do you have a copy of your form that you could send us and-

Gatter: Our form?

Buyer: Your form for tissue donation. The standard one.

Gatter: Outline this in the email you send, because I will forget as soon as I walk out.

Buyer: And are we agreed that $100 would keep you happy.

Laurel: I think so—

Dr. Gatter: Well let me agree to find out what other affiliates in California are getting, and if they're getting substantially more, then we can discuss it then.

Buyer: Yes.

Dr. Gatter: I mean, the money is not the important thing, but it has to be big enough that it is worthwhile.

Buyer: No, no, but it is something to talk about. I mean, it was one of the first things you brought up, right? So.

Dr. Gatter: Mhm.

Buyer: Now here's another thought, is we could talk about specimen, per specimen per case, or per procured tissue sample.

Dr. Gatter: Mhm.

Buyer: So if we're able to get a liver/thymus pair, maybe that is $75 per specimen, so that's a liver/thymus pair and that's $150.

Dr. Gatter: Mhm.

Buyer: Versus if we can get liver, thymus, and a brain hemisphere, and all that, then that's—

Dr. Gatter: Okay.

Buyer: So that protects us so that we're not paying for stuff we can't use. And I think it also maybe illustrates things—

Dr. Gatter: It's been years since I talked about compensation, so let me just figure out what others are getting, if this is in the ballpark, it's fine, if it's still low then we can bump it up. I want a Lamborghini. [laughs]

Buyer: [Laughs] What did you say?

Dr. Gatter: I said I want a Lamborghini! [laughs]

Buyer: Don't we all, right?

Dr. Gatter: [laughs] Exactly! I wouldn't know how to drive a Lamborghini. Oh god I was hysterical, three months ago, driving on the wrong side of the road. Thinking oh my god, I'm too close to that side.

APPENDIX E — SELECT RECORD EXCERPTS: ENJOINED MATERIALS [REDACTED]

[PAGES 87a-124a REDACTED]