No. 17-482

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Introduction: NAF's Glaring Omissions

NAF's Brief in Opposition ("BIO") fails to refute the fact that the Ninth Circuit's decision conflicts with decisions of this Court and other Circuits on matters of national importance by holding that federal courts may enjoin individuals from voluntarily sharing information concerning possible criminal, illegal, or unethical acts with federal, state, and local government investigators and the general public.

Given the extent to which NAF's arguments are premised upon the claim that CMP's undercover investigation revealed nothing of significance, it is quite remarkable that NAF ***completely ignores*** fifteen pages of the Petition that explain how the enjoined recordings ***corroborate the determination of two Congressional investigations*** that fetal tissue procurement companies and abortion providers—many of which are NAF members and NAF conference attendees—have engaged in criminal, illegal, and unethical acts.[1]

For example, Congress concluded that several entities made illegal profits related to fetal tissue sales, technicians received bonuses based on the type of fetal organs procured, and abortion providers illegally altered procedures to preserve more sellable fetal organs. Pet. at 10-12, 17. CMP's public videos, along with the enjoined videos, were quoted in the

[1] Pet. at 8-22. The Petition was filed under seal because it quotes enjoined materials.

Congressional reports as evidence that supported the reports' findings.[2]

NAF also ignores the following facts:

- The Congressional investigators issued numerous criminal and regulatory referrals to federal, state, and local agencies concerning illegal acts committed by abortion providers and fetal tissue procurement companies. Pet. at 5, 9.[3]

- The Department of Justice confirmed that it is investigating the practices of many of the referred entities.[4]

- A $7.8 million settlement was reached in a lawsuit filed by the Orange County (CA) District Attorney—after a complaint was submitted by CMP—under which two entities admitted

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[2] That CMP's investigative reporting ***led to two Congressional investigations that uncovered voluminous evidence of criminal and other illegal acts*** defeats NAF's attempt to undermine Defendants' credibility, ethics, and motives. Similarly, NAF's suggestion that CMP should have approached more government agencies than it did (prior to being enjoined from doing so at NAF's insistence) ignores the reality that investigative journalists often compile information for many months or even years before sharing their findings.

[3] That *some* states have found no evidence of wrongdoing or declined to investigate is irrelevant: not every state has abortion clinics that sold fetal tissue to researchers.

[4] Letters from Assistant Attorney General to Committee Chairman and Ranking Member, Dec. 7, 2017, *available at* http://cdn.cnn.com/cnn/2017/images/12/07/pp.pdf.

liability for their role in the unlawful sale of fetal tissue.[5]

- ***Twenty*** State Attorneys General filed an amici curiae brief in support of Petitioners (hereafter "AGs' Br.").[6]

In short, the claim that there is no evidence of illegal trafficking in fetal tissue is clearly incorrect.

I. The Ninth Circuit erred by holding that enjoining individuals from voluntarily cooperating with government investigators is permissible because investigators may issue subpoenas.

NAF's argument that the Ninth Circuit's decision does not improperly impede government investigations because government entities may issue subpoenas to the Defendants (which NAF will then seek to severely limit compliance with) conflicts with decisions of this Court that recognize that restraints upon the ability to *volunteer* information to investigators—*without* being asked or compelled to do so—violate longstanding public policy. *See, e.g.,* Pet. at 22-30; *Roberts v. United States*, 445 U.S. 552, 557-58 (1980); *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972).

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[5] *OCDA Obtains $7.8 Million Settlement and Admission of Liability in Lawsuit Against Two Companies Who Unlawfully Sold Fetal Tissue and Cells for Profit*, Dec. 8, 2017, http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=5406.

[6] The brief appears at Docket No. 17-202 but expressly supports Newman's Petition as well. *Id.* at 2, n.2.

For instance, in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984), the Court rejected the claim that the SEC must notify targets of its investigations when it issues subpoenas to third parties, holding 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 (emphasis added). The Court also held 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 (emphasis added).

Conversely, the Ninth Circuit decision allows investigatory targets to "object" and "impede legitimate investigations" by "delay[ing] disclosure of damaging information" to investigators. *See id.*; AGs' Br. at 5-12; App.8a (Judge Callahan's dissenting opinion noting the conflict with *O'Brien*).

Additionally, contrary to NAF's suggestion, the Ninth Circuit's decision conflicts with decisions of other federal Circuits. Pet. at 31-38; *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366 (Fed. Cir. 2001) (holding that contracts that prohibit disclosures to a

law enforcement agency violate public policy); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972) (affirming dismissal of a breach of contract claim premised upon disclosure of illegal acts to victims of those acts).

Indeed, it is impossible to square the Ninth Circuit's decision with the First Circuit's holding that

> [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.

EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 & n.5 (1st Cir. 1996).

The First Circuit expressly rejected the argument—adopted by the Ninth Circuit here—that investigators are not harmed by prohibitions on voluntary cooperation because they may issue subpoenas:

> This boils down to a contention that employees who have signed settlement agreements should speak only when spoken to. We reject such a repressive construct. 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.[7]

Furthermore, as the Amici Attorneys General explain,

> [i]n direct contravention of *O'Brien*, the injunction here imposes material restrictions on petitioners' ability to disclose information . . . [which] precludes law enforcement from receiving and evaluating the full slate of information a knowledgeable person would otherwise freely disclose.

AGs' Br. at 5-6.

Similarly, that government investigators may be "well aware of the presence of the recordings," BIO at 36, is irrelevant in light of the manner in which the injunction has "detrimentally affected the flow of information to multiple state investigations." AGs' Br. at 6-7.[8]

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[7] *Astra USA* cannot be distinguished on the basis that it involved federal law; the injunction here bars Defendants' voluntary cooperation with the ongoing federal investigation into violations of federal law.

[8] Cases in which a party obtained sensitive materials *through the compulsory process of discovery*, pursuant to a protective

II. The Ninth Circuit erred by holding that courts may forbid voluntary cooperation with government investigators if they make their *own* determination that the disclosing individual cannot *definitively prove* that a crime has occurred.

Longstanding public policy—as well as federalism and the separation-of-powers—dictate that individuals must be free to voluntarily share information concerning possible criminal, illegal, or unethical acts with investigative bodies *so that those agencies* may determine what further actions should be taken concerning those acts. Judge Callahan's dissenting opinion explained that

> 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*.

App.9a (emphasis added); *Restatement (First) of Contracts* § 548(1) & cmt. a (A.L.I. 1932) (the public policy at issue applies "whether the accused is innocent or guilty of the crime").

NAF's attempt to distinguish the conflicting court of appeals decisions on the basis that they involved "clear violations of the law" fails because those decisions recognized that the right to voluntarily communicate with investigators *so that*

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order, are not relevant here because CMP obtained the relevant information *on its own* before this lawsuit was filed.

they may make their own determinations is well-established. In *Fomby-Denson*, the Federal Circuit concluded that, because "courts will not enforce contracts that purport to bar a party . . . from reporting another party's *alleged* misconduct to law enforcement authorities *for investigation*," individuals may "provide all details reasonably thought necessary *for those authorities to make their decisions* regarding the investigation." 247 F.3d at 1378 (emphasis added). The court also noted that courts should be reluctant to "second-guess" "the quantum of information" provided to investigators. *Id.*

Similarly, in *Lachman*, the Tenth Circuit stated,

> [b]y 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.

457 F.2d at 853-54 (emphasis added); *see also Astra USA*, 94 F.3d at 747 (permitting voluntary cooperation with investigators will ensure that they can "get to the bottom of the unsavory *(but, as yet, unproven)* allegations") (emphasis added); AGs' Br. at 11.

III. This Court has the authority to decide whether federal injunctions violate public policy.

NAF's novel suggestion that this Court lacks the authority to decide whether federal courts may exercise the "extraordinary and drastic" preliminary injunction power, *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), to forbid citizens from freely cooperating with investigators, BIO at 29-32, 35, is foreclosed by this Court's decisions.

Earlier in this litigation, the Attorneys General of four states filed an amici brief arguing that the then-existing TRO should allow "disclosures to government officers or agencies conducting official investigations." Dkt. #99, at 1.[9] NAF's response stated—***in stark contrast to its position before this Court***—that, "in arguing from *state law* principles that the Court should make substantial modifications to a *federal* court order, the State AGs have the wrong end of the stick. . . . '[F]ederal cases concerning the modification of federal protective orders' should guide the Court. . . ." Dkt. #112, at 3.

In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court explained that

> [t]he 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

[9] Many Attorneys General also filed two briefs with the Ninth Circuit, and the Ninth Circuit panel granted the Attorney General of Arizona's motion to participate in oral argument.

> States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. 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.

Id. at 34-35; *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("[T]he public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.").

Here, "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." *Fomby-Denson*, 247 F.3d at 1375 (quoting *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)). The Petition raises issues well within the Court's jurisdiction. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (reversing state court decisions that upheld the enforcement of *contracts governed by state law* that included racially restrictive covenants); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356-58 (1931) (considering whether a contract "contravenes the public policy of Arkansas"); *cf. Vogel v. Gruaz*, 110 U.S. 311, 314-16 (1884).[10]

[10] *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015), which considered whether a contract was pre-empted by federal law, is inapposite.

Tellingly, although NAF claims that *Lachman* confirms "[t]he state-law nature of the public-policy inquiry" because the Tenth Circuit cited Oklahoma authorities, BIO at 30-31, NAF failed to mention that *Lachman* ***also relied upon a California state court decision***. 457 F.2d at 852. That courts considering similar cases often review authorities from a variety of jurisdictions is unsurprising because the principle that courts may not enforce contracts to bar voluntary cooperation with investigators has been universally accepted, aside from the lower court decisions here.[11]

NAF's novel argument that *the First Amendment* guarantees it a right, enforceable by *federal* court order, to prevent third parties from voluntarily cooperating with government investigators, BIO at 22-23, 32-33, further illustrates that the Ninth Circuit's decision implicates principles of *federal* law. NAF's argument, besides being meritless,[12] is misplaced because the district court did not find a likelihood of irreparable harm to NAF from voluntary disclosures *to investigators*.[13]

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[11] Even if California law actually supported the remarkable proposition that individuals may be prevented from voluntarily sharing information with federal investigators and Attorneys General from other states, a federal injunction enforcing such a policy would clearly raise important federal questions.

[12] Private parties cannot violate anyone's First Amendment rights. *Hurley v. Irish-American GLB Grp.*, 515 U.S. 557, 566 (1995).

[13] "[D]isclosure to a law enforcement agency is not a disclosure to the public." App.10a; AGs' Br. at 9-10 & n.7. Nevertheless, the District Court's holding that disclosures *to the general public* would irreparably harm NAF due to the possible reactions of *third parties* is flawed. By this reasoning, injunctions could be routinely obtained to prevent news

Nevertheless, the argument highlights the conflict with the First Circuit's holding that the government would be irreparably harmed by the enforcement of agreements that prevented voluntary cooperation, *Astra USA*, 94 F.3d at 745, since there obviously cannot be a constitutional "right" to irreparably harm a federal agency.

IV. The Petition raises important questions of nationwide significance.

As the Amici Attorneys General brief explains,

> the decision below contravenes this Court's guidance, creates tension with other circuits, and in doing so sets a dangerous precedent that applies to innumerable law enforcement efforts under a broad range of state and federal statutes. The Court should correct this glaring error of law and ensure the just and efficient functioning of law enforcement in ongoing and future cases across the country.

AGs' Br. at 4.

In recent months, a wave of high profile cases in which individuals have come forward—to the media or to investigators—with allegations of illegal acts, despite contracts under which the individuals agreed to keep such information secret, has sparked widespread discussion concerning the enforceability of such contracts.[14] For instance, a former assistant

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organizations from publishing evidence of misconduct due to the public's predictably adverse reaction to such evidence.

[14] *See, e.g.,* Daniel Hemel, *How nondisclosure agreements protect sexual predators*, Oct. 13, 2017,

to Harvey Weinstein *intentionally* violated her non-disclosure agreement—by publicizing allegations of sexual misconduct—in order to spark "a debate about how egregious these agreements are. . . ."[15]

In light of recent events, it is notable that some courts have found attorneys in violation of ethics rules for utilizing contracts to discourage the voluntary disclosure of information to investigators.[16] Additionally, in litigation involving allegations that Bill Cosby committed crimes, a court dismissed breach of contract claims on public policy grounds to the extent that they stemmed from voluntary disclosures to law enforcement agencies. *Cosby v. Am. Media, Inc.*, 197 F. Supp. 3d 735, 737, 742 (E.D. Pa. 2016). A court adopting the Ninth Circuit's reasoning would wrongly hold otherwise.

Furthermore, it violates the First Amendment and public policy for a federal court to enjoin individuals from disclosing evidence of possible illegal or unethical acts *to the general public*.[17] Protecting the public's right to receive evidence of possible illegal acts is a critical step toward

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https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda.

[15] Matthew Garrahan, *Harvey Weinstein: how lawyers kept a lid on sexual harassment claims*, Financial Times, Oct. 23, 2017, https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589.

[16] *See, e.g.,* Model Rules of Prof. Conduct 3.4(f) & 8.4(d); *In re Nwakanma*, 397 P.3d 403, 427 (Kan. 2017); *Ky. Bar Ass'n v. Unnamed Attorney*, 414 S.W.3d 412, 418-19 (Ky. 2013).

[17] *See, e.g.,* Pet. at 28-30; Gabriel Arana, *Journalists aren't as tied by NDAs as they think*, Columbia Journalism Review, Dec. 11, 2017, https://www.cjr.org/watchdog/journalists-nda-nondisclosure-harassment-metoo-newsrooms.php.

encouraging others who have similar information to voluntarily come forward. AGs' Br. at 2. The Ninth Circuit's decision imposes a chilling effect upon the public discussion and disclosure of information concerning criminal, illegal, and unethical acts by the countless legions of individuals who are subject to non-disclosure agreements. Moreover, NAF's attempt to distinguish *N.Y. Times v. United States*, 403 U.S. 713 (1971), and *CBS v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers), misses the point that courts are loath to issue prior restraints, regardless of what legal theories the moving party raises.

V. The Ninth Circuit failed to engage in de novo review of the constitutional facts.

As explained in the Petition (§ III), the Ninth Circuit blatantly disregarded this Court's clear teaching that, in First Amendment cases, reviewing courts must independently assess the constitutionally determinative facts, rather than simply deferring to lower court fact-finding. *Hurley*, 515 U.S. at 567-68. NAF's attempts to obscure this clear constitutional error amounts to offering distinctions without differences.

Conclusion

The Court should grant certiorari.

Respectfully submitted,

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