Case No. _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; and DAVID DALEIDEN

THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN,
Defendants-Petitioners,
v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent,

NATIONAL ABORTION FEDERATION, Plaintiff-Real Party in Interest

---

From the United States District Court
Northern District of California
The Honorable William H. Orrick, III, Presiding
Case No. 3:15-cv-3522 (WHO)

PETITION FOR WRIT OF MANDAMUS

D. John Sauer
James Otis Law Group, LLC
231 South Bemiston Ave., Suite 800
St. Louis, Missouri 63105
(314) 854-1372
jsauer@jamesotis.com

Attorneys for Defendants and Petitioners The Center For Medical Progress, Biomax Procurement Services, LLC, and David Daleiden

Catherine W. Short; SBN 117442
Post Office Box 1313
Ojai, California 93024-1313
Tel: (707) 337-6880
Fax: (805) 640-1940
LLDFOjai@earthlink.net

Additional counsel listed on signature pages

CORPORATE DISCLOSURE STATEMENTS

Petitioner Center for Medical Progress is a nonprofit public benefit corporation organized under the laws of California. It does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Petitioner Biomax Procurement Services, LLC, is a privately held limited liability company. It does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pending in this Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

This case involves an extraordinary gag order, followed by an equally extraordinary discovery order. On July 31, 2015, the district court entered an unprecedented temporary restraining order, prohibiting Defendants/Petitioners Center for Medical Progress, Biomax Procurement Services, LLC, and David Daleiden (collectively, "CMP") from speaking publicly on matters of paramount public interest that have dominated national headlines for weeks. Shortly thereafter, the district court ordered CMP to participate in burdensome and intrusive discovery relating to a motion for preliminary injunction, even though CMP had filed an anti-SLAPP[1] motion requiring a stay of all discovery proceedings in the case. This Court should hold that the district court's order compelling CMP to participate in discovery must be dissolved for two independent reasons: (1) no discovery is necessary to resolve the pending motion for preliminary injunction, because any injunction in this case would manifestly violate the First Amendment's ironclad prohibition on prior restraints on free speech; and (2) California law, applicable in federal court under *Erie*, requires the district court to rule on the anti-SLAPP motion prior to conducting discovery in the case.

ISSUE PRESENTED

Whether the district court clearly erred in ordering Petitioners to participate in preliminary-injunction-related discovery when Petitioners had filed an anti-SLAPP motion that stayed discovery by operation of law, and no discovery was

[1] "SLAPP" stands for "strategic lawsuit against public participation." *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 965 n.2 (9th Cir. 1999). California's "anti-SLAPP" statute is codified at Cal. Civ. Pro. Code § 425.16.

necessary to resolve the preliminary injunction because any injunctive relief would plainly violate the First Amendment's prohibition on prior restraints of speech.

RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the district court stay all discovery in the proceedings below pending ruling on Petitioners' motion to strike or dismiss the Complaint under California's anti-SLAPP law, and to rule on the pending motion for preliminary injunction without conducting discovery.

FACTUAL AND PROCEDURAL BACKGROUND

As is widely known, CMP conducted a thirty-month undercover investigation of the practice of buying and selling fetal tissue within the abortion industry. Their investigation revealed evidence of widespread criminal practices in the industry, including the selling of fetal tissue for profit, the alteration of abortion methods to procure better fetal tissue specimens, the collection of intact fetuses born with beating hearts for research purposes, and the procurement of fetal tissue for research without patients' knowledge and consent. Each of these practices is a crime under federal law, as well as many analogous state laws. *See, e.g.*, 1 U.S.C. § 8; 18 U.S.C. § 1531; 42 U.S.C. §§ 289g-1, 289g-2. The undercover videos taken during CMP's investigation have dominated national and international headlines for months, sparked state and congressional investigations of industry participants, and triggered debates over public funding of abortion-providing entities in the U.S. Congress.

Plaintiff-Respondent National Abortion Federation ("NAF") is a trade association of abortion providers that holds an annual conference. On Friday, July 31, 2015, NAF filed a sixty-page Complaint against CMP and other defendants in

federal court, alleging one federal cause of action and twelve state-law causes of action. Complaint, Doc. 1, A117. NAF also applied for a temporary restraining order seeking to enjoin CMP from speaking about or publishing undercover videos allegedly recorded during NAF's annual meetings in 2014 and 2015.

On Friday, July 31, 2015, the district court granted NAF's application for an ex parte restraining order, forbidding CMP to disclose any information received during NAF's annual meetings. Doc. 15, A114. On Monday, August 3, 2015—the next business day—the district court extended the temporary restraining order pending the court's ruling on NAF's motion for preliminary injunction. Doc. 27, A111. The extended TRO continued to impose a prior restraint on CMP's ability to speak on matters of paramount public importance. *Id.* at 1, A111. The district court also granted NAF's motion for expedited discovery relating to the preliminary injunction, setting an aggressive timetable for preliminary injunction-related discovery. *Id.* at 3, A113.

On August 17, 2015, CMP filed a motion to strike or dismiss the Complaint pursuant to California's anti-SLAPP law, Cal. Civ. Pro. Code § 425.16, and Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 66-1, A29. CMP filed its anti-SLAPP motion less than three weeks after the Complaint was filed, before the parties had exchanged any discovery. *Id.* CMP's anti-SLAPP motion was "based solely on the adequacy of Plaintiff's pleading" and challenged only the sufficiency of the allegations in the Complaint. Doc. 66-1, at 1, A29.

Among other things, CMP's anti-SLAPP motion raised grave questions about the district court's subject matter jurisdiction. The motion highlighted clear pleading

deficiencies in NAF's sole federal cause of action—its civil RICO claim—and noted that NAF had failed to properly allege diversity jurisdiction, so there was no basis for federal jurisdiction. *See* Doc. 66-1, at 5-17, A45-57.

On August 19, 2015, the parties filed a joint discovery letter with the district court. Doc. 74, A23. In the letter, CMP claimed that the filing of its anti-SLAPP motion had effected a mandatory stay of all discovery pursuant to Cal. Civ. Proc. Code § 425.16(g). *Id.* at 10-14, A24-28. This stay of discovery should have shielded CMP from the burdens of discovery until the district court could rule on whether NAF had stated any valid claims for relief, or if the court even had jurisdiction of the case. *See id.* CMP noted that, because the temporary restraining order would remain in effect pending the court's ruling on the anti-SLAPP motion, there could be no prejudice to NAF from the discovery stay. *Id.* at 12-13, A26-27.

On August 21, 2015, the district court held a discovery hearing. The district court announced from the bench that it would not stay discovery pursuant to the anti-SLAPP motion and ordered the parties to meet and confer regarding discovery immediately. Aug. 21, 2015 Tr. of Hrg, at 4-5, A19-20. Counsel for CMP orally moved the district court to stay its ruling on the discovery issue pending application for a writ of mandamus from this Court. *Id.* at 18, A21. The district court denied the oral motion and indicated that a written order would follow. *Id.* at 18-19, A21-22. On August 27, 2015, the district court entered a fifteen-page order denying CMP's request for a stay of discovery pending ruling on the anti-SLAPP motion. Doc. 95, A1. The discovery schedule, however, was temporarily stayed by agreement of the parties until hearing on September 18 on disputed privilege issues.

ARGUMENT

When considering whether to grant mandamus relief, this Court looks to five primary factors:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Perry v. Schwarzenegger, 591 F.3d 1126, 1136 (9th Cir. 2009). Here, these factors support granting mandamus relief and requiring the district court to stay discovery.

I. Petitioners Have No Other Means to Obtain Their Desired Relief.

Because discovery orders are not final orders and thus cannot be appealed directly, "[m]andamus is appropriate to review discovery orders when particularly important interests are at stake." *Perry*, 591 F.3d at 1136 (quotation omitted). This case undoubtedly implicates "particularly important interests." *Id.* And because the purpose of the discovery stay is to protect SLAPP defendants from having to submit to discovery at all before a ruling on their motion to strike, review of a final judgment in this case after discovery will not provide an adequate means of relief.

II. Absent Mandamus Relief, Petitioners Will Be Damaged and Prejudiced in Ways That Cannot Be Corrected on Direct Appeal.

Absent mandamus relief, Petitioners will irretrievably lose their substantive rights under California law to receive the court's ruling on the motion to strike before being subjected to the burdens and intrusion of discovery. California's anti-SLAPP

statute "protect[s] defendants from the burden of traditional discovery pending resolution of the [anti-SLAPP] motion." *Britts v. Superior Court*, 145 Cal.App.4th 1112, 1124 (2006) (quotation omitted). The "point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal.4th 180, 193 (2005) (quotation omitted; emphasis in original); *see also Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) ("California's anti-SLAPP rule reflects a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity."). "[N]ot only did the Legislature desire early resolution to minimize the potential costs of protracted litigation, it also sought to protect defendants from the burden of traditional discovery pending resolution of the motion." *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 99 Cal.App.4th 1179, 1190 (2002).

For similar reasons, this Court has held that a defendant can appeal the denial of an anti-SLAPP motion immediately under the collateral order doctrine. *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003). "If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant has been compelled to defend against a meritless claim brought to chill rights of free expression." *Id.* at 1025.

III. There Is No Cause to Conduct Any Discovery on the Motion for Preliminary Injunction, Because Any Injunctive Relief Would Violate the First Amendment's Prohibition on Prior Restraints.

The third—and perhaps most important—mandamus factor is "whether the district court's order is clearly erroneous as a matter of law." *Perry*, 591 F.3d at 1136. "[T]he necessary 'clear error' factor does not require that the issue be one as to which there is established precedent." *Id.* at 1138. And "[w]here a petition for mandamus raises an important issue of first impression, . . . a petitioner need show only ordinary (as opposed to clear) error." *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999) (quotation omitted). Here, the district court's denial of a stay of discovery was clearly erroneous for two reasons: (1) no discovery is necessary to resolve NAF's motion for preliminary injunction, because any injunctive relief would violate the First Amendment's prohibition on prior restraints; and (2) CMP's anti-SLAPP motion stayed all discovery, so the district court had no authority to order discovery to continue.

First, any injunctive relief necessarily will violate the First Amendment's near-absolute prohibition on prior restraints. A writ of mandamus is appropriate to prevent a discovery order when "it is clear and indisputable that the discovery ordered by the district court is not relevant to any claim that should survive a motion to dismiss." *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014) (en banc). In this case, the First Amendment mandates that NAF's claim for injunctive relief should be dismissed as a matter of law. *See* Doc. 66-1, at 18-26, A58-66. It would be "a clear abuse of discretion for the district court to allow the claim to proceed and to order on that basis discovery of sensitive information." *Lombardi*, 741 F.3d at 896.

A. Any injunctive relief in this case constitutes an unconstitutional prior restraint on CMP's ability to speak publicly on matters of paramount public interest and importance.

"[P]rior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Prior restraints are the essence of censorship, and our distaste for censorship reflecting the natural distaste of a free people is deep-written in our law." *Id.* at 589 (Brennan, J., concurring) (internal citations and punctuation omitted). "Any prior restraint on expression comes to [the court] with a heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). "Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

NAF's requested injunctive relief constitutes a textbook example of prior restraint on speech. "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). NAF asserts no interest that could meet the exacting standard required to justify a prior restraint.

The First Amendment tolerates a prior restraint on speech only to advance the most fundamental, weighty, and immediate interests. A prior restraint must relate to speech that "threaten[s] an interest more fundamental than the First Amendment itself." *Proctor & Gamble Co.*, 78 F.3d at 227. "[P]rior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to

justify." *Neb. Press Ass'n*, 427 U.S. at 592 (Brennan, J., concurring).

Courts have consistently rejected interests like those asserted by NAF as insufficient to justify a prior restraint on speech. In *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court held that serious threats to national security, foreign relations, and the lives of American troops in Vietnam could not justify an injunction preventing the publication of stolen classified documents. *Id.* at 714. As Justice Blackmun's dissent observed, the disclosures at issue threatened "the death of soldiers, the destruction of alliances, . . . prolongation of the [Vietnam] war and of further delay in the freeing of United States prisoners." *Id.* at 763 (Blackmun, J. dissenting) (internal quotation marks omitted). Yet the Court held that those most compelling interests still could not justify a prior restraint on the publication of stolen classified documents. *Id.* at 714.

Courts also have held that interests in personal privacy and reputation do not warrant prior restraints on speech. For example, in *Organization for a Better Austin v. Keefe*, the court rejected the notion that "an invasion of privacy" could justify a prior restraint against circulating pamphlets claiming that a real-estate agent was facilitating de facto segregation. 402 U.S. at 419-20. Moreover, under the First Amendment, "[t]he right of privacy does not prohibit any publication of matter which is of public or general interest." *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (internal quotation marks omitted).

In addition, reputational harm cannot justify prior restraints on speech. *See, e.g.*, *Thompson v. Hayes*, 748 F. Supp. 2d 824, 831 (E.D. Tenn. 2010) (holding that "plaintiffs' business interests and their reputations" were insufficient interests to

warrant injunction against speech); *Saad v. Am. Diabetes Ass'n*, Case No. 15-10267, 2015 WL 751295, at *2 (D. Mass. Feb. 23, 2015) ("Whatever interest Dr. Saad has in preserving his professional reputation, it is not enough to overcome the heavy presumption against [a prior restraint's] validity."). And courts have rejected the threat of emotional distress as justifying prior restraints on speech. *See A.M.P. v. Hubbard Broad., Inc.*, 216 F. Supp. 2d 933, 935 (D. Minn. 2001).

NAF alleges that CMP obtained any information unlawfully—a contention that CMP vigorously disputes. *See* Doc. 66-1, A29. But even if NAF could show unlawful activity in the collection of information, that would not justify a prior restraint. "If [Petitioners have] breached [their] state law obligations, the First Amendment requires that [NAF] remedy its harms through a damages proceeding rather than through suppression of protected speech." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them . . . beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). "The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Neb. Press Ass'n*, 427 U.S. at 589 (1976) (Brennan, J., concurring).

For example, in *CBS v. Davis*, CBS News acquired video footage of meat-packing plants by placing an undercover camera on an employee. *CBS*, 510 U.S. at 1315. The meat-packing company sued and obtained an injunction preventing CBS from broadcasting the footage on television, based on a judicial finding that the footage had been obtained through "calculated misdeeds." *Id.* at 1316. These

alleged misdeeds included claims that arose under contract law, as well as statutory violations and torts. *See id.* at 1316. Noting that "the gagging of publication has been considered acceptable only in 'exceptional cases,'" *id.* at 1317, Justice Blackmun held that the injunction against the broadcast was an unconstitutional prior restraint, *id.* at 1318. "Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation and other misdeeds in the First Amendment context." *Id.* at 1318. "If [a defendant] has breached its state law obligations, the First Amendment requires that [the plaintiff] remedy its harms through a damages proceeding rather than through suppression of protected speech." *Id.*

Likewise, NAF's assertion of risk of physical harms to its members is insufficient to justify a prior restraint as a matter of law. NAF has not alleged concrete or imminent threats of physical harm, only speculative possibilities that it might suffer harm from unidentified third parties as a result of reputational damage. *See* Complaint, Doc. 1, ¶¶ 32, 34, 37, 40, 87-89, 91-92, A130-33, A151-53. But the First Amendment permits prior restraints "only where the evil that would result from the reportage is both great and *certain*." *CBS*, 510 U.S. at 1317 (emphasis added). "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times Co.*, 403 U.S. at 725-26 (Brennan, J., concurring). NAF has alleged only the possibility of future harm, not the certainty of imminent harm. And that showing fails to satisfy the First Amendment's stringent demands. *See CBS*, 510 U.S. at 1318 ("[W]e previously have refused to rely on such speculative predictions as based on

'factors unknown and unknowable'") (quoting *Neb. Press Ass'n*, 427 U.S. at 563).

In fact, NAF effectively seeks to hold CMP's speech hostage to the hyperbolic comments of anonymous Internet commenters who are strangers to the lawsuit. *See* Doc. 1, ¶¶ 32-37; A130-32. Because CMP's speech addresses a controversial topic of paramount public importance, NAF cannot hold CMP's First Amendment rights hostage to anonymous hecklers. This violates fundamental First Amendment principles. "It is remarkable that this late in our history we have still not learned that the First Amendment prohibits us from banning free speech in order to appease terrorists, religious or otherwise, even in response to their threats of violence." *Garcia v. Google, Inc.*, 786 F.3d 727, 730 (9th Cir. 2015) (Reinhardt, J., dissenting from initial denial of emergency rehearing en banc) ("*Garcia I*").

B. Any putative "waiver" of CMP's First Amendment rights would be unenforceable as a matter of public policy.

Against the near-ironclad presumption against prior restraints, NAF relies heavily on its argument that CMP "waived" its First Amendment rights by signing putative non-disclosure agreements with NAF before attending NAF conventions. But this argument is insufficient to justify any prior restraint in this case, because even if a "waiver" of CMP's First Amendment rights had occurred, the waiver would be plainly unenforceable as a matter of public policy.

"[E]ven 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." *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1994) (internal quotation marks

omitted). The court must "balance the public policies favoring enforcement of the [constitutional] waiver against those favoring non-enforcement." *Id.* at 891.

Where a private waiver of First Amendment rights interferes with the *public's* ability to access information of critical public interest and importance, the "balance of the public policies," *id.*, shifts decisively in favor of disclosure. Regardless of the private rights among the parties, any gag order in this case violates "the *public's* First Amendment right to view . . . film[s] of immense significance and public interest." *Garcia I*, 786 F.3d at 730 (emphasis added). "The Constitution protects the right to receive information and ideas, and that protection is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.* (internal citation and punctuation omitted) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982)). "Factors that have weighed against the enforcement of contractual waivers [of free-speech rights] include the critical importance of the right to speak on matters of public concern . . . and the fact that the agreement requires the suppression of criminal behavior." *Perricone v. Perricone*, 292 Conn. 187, 220 (2009) (quotation marks omitted).

Garcia involved a challenge to the publication of *Innocence of Muslims*, an Internet video blamed for the September 11, 2012 attacks on the U.S. Embassy in Benghazi, Libya, that resulted in the death of the U.S. Ambassador. The challenge was brought by an actress who "was bamboozled when a movie producer transformed her five-second acting performance into part of a blasphemous video proclamation against the Prophet Mohammed." *Garcia v. Google, Inc.*, 786 F.3d

733, 736 (9th Cir. 2015) (en banc) ("*Garcia II*"). Though she had participated unknowingly and unwillingly in the project, "an Egyptian cleric issued a fatwa against anyone associated with *Innocence of Muslims*," and the actress "received multiple death threats." *Id.* at 738. This Court, sitting en banc, dissolved an injunction against the continued publication of *Innocence of Muslims* on YouTube.com. *Id.* at 747. In so ruling, this Court observed that the injunction "gave short shrift to the First Amendment values at stake." *Id.* "The mandatory injunction censored and suppressed a politically significant film . . . . In so doing, the panel deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar." *Id.* This Court noted that the "takedown order of a film of substantial interest to the public is a classic prior restraint of speech," and "[p]rior restraints pose the 'most serious and least tolerable infringement on First Amendment rights.'" *Id.* (quoting *Hunt v. NBC*, 872 F.2d 289, 293 (9th Cir. 1989)).

Similarly, in *Davies v. Grossmont Union High School District*, 930 F.2d 1390 (9th Cir. 1991), this Court declined to enforce a waiver in a settlement agreement that would have prevented the signer from running for public elective office. *Id.* at 1392. Davies signed a settlement agreement with the school district in which he agreed not to seek "any employment, position, or office" with the school district. *Id.* A year later, he ran for and was elected to the school board. *Id.* The school district sued to prohibit him from taking office under the settlement agreement. *Id.* at 1392-3. This Court held that the waiver of his right to hold elected office with the school district was void for public policy, in large part because enforcement would violate

the right of *the public* to elect the candidate of their choice. *See id.* at 1396 (holding that "enforcement would violate . . . the constitutional right of the voters to elect" Davies). Davies' election "involves the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office." *Id.* at 1397; *see also Pansy v. Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (holding that, in considering whether to enforce a confidentiality agreement, "the district court should consider whether the case involves issues important to the public," and if it "involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality").

Likewise, in this case, the public's First Amendment right to receive information on issues of paramount public importance necessarily outweighs any private interests asserted by NAF. As in *Davies*, few interests hold a more revered place in our constitutional order than does the right to free expression. "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949). "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Id.*

Critically, as in *Davies*, the interests opposing enforcement of any putative waiver belong not only to CMP, but to society at large. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

IV. The District Court Had No Authority to Order Discovery Because CMP's Anti-SLAPP Motion Stayed All Discovery.

Moreover, the district court's discovery order was clearly erroneous for another reason—the filing of CMP's anti-SLAPP motion stayed all discovery until the district court ruled on the anti-SLAPP motion. This Court has "repeatedly held that California's anti-SLAPP statute can be invoked by defendants who are in federal court." *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010). Under the anti-SLAPP statute, "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to [the statute]." Cal. Civ. Pro. Code § 425.16(g). This mandatory discovery stay plays an integral role in the anti-SLAPP framework. *See Britts*, 145 Cal.App.4th at 1124.

A. Under *Erie*, the anti-SLAPP statute's mandatory discovery stay applies in federal court when the anti-SLAPP motion contests only the legal sufficiency of the allegations in the Complaint, as would a motion to dismiss under Rule 12(b)(6).

The discovery requests at issue here all relate to three state-law causes of action. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *see also* 28 U.S.C. § 1652 (Rules of Decision Act). The same rule applies when a federal court considers state-law claims pursuant to its supplemental jurisdiction. *Cortez v. Skol*, 776 F.3d 1046, 1054 n.8 (9th Cir. 2015).

When presented with an *Erie* issue, a federal court "must first determine whether [a Federal Rule of Civil Procedure or a federal statute] answers the question in dispute." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Courts often have framed this inquiry as whether there is a

"conflict" or "direct collision" between a Federal Rule and a state rule. *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999). If the court concludes that no Federal Rule answers the question, then the court must proceed to determine whether the state rule is "substantive"—in which case it applies—or "procedural"—in which case it does not apply. *See Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 830-31 (9th Cir. 2006).

This Court has held that California's anti-SLAPP statute creates critical substantive rights. *See Newsham*, 190 F.3d at 973; *see also Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) ("California's anti-SLAPP rule reflects a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity."). Thus, when considering whether to apply the anti-SLAPP statute under *Erie*, the sole question is whether the statute conflicts with any Federal Rule.

Whether the anti-SLAPP statute conflicts with a Federal Rule depends on whether the defendant's anti-SLAPP motion contests the legal sufficiency of the complaint, or instead contests the sufficiency of plaintiff's evidence. Under California's anti-SLAPP regime, a defendant can seek dismissal of a lawsuit if the plaintiff's complaint fails to allege legally sufficient claims, *or* if the plaintiff cannot provide sufficient evidence to support those claims. *See Navellier v. Sletten*, 29 Cal.4th 82, 88-89 (2002). For *Erie* purposes, where an anti-SLAPP motion contests the legal sufficiency of the Complaint, courts must treat the motion as a motion to dismiss under the Rule 8 and 12 standards. *See Z.F. v. Ripon Unified Sch. Dist.*, 482 F. App'x 239, 240 (9th Cir. 2012). In contrast, an anti-SLAPP motion contesting

the plaintiff's evidentiary showing must be treated like a Rule 56 motion for summary judgment. *Id.*

Under *Erie*, § 425.16(g)'s mandatory discovery stay applies in federal court if the anti-SLAPP motion contests the legal sufficiency of the Complaint. The Federal Rules do not guarantee discovery prior to the resolution of a motion to dismiss under Rule 12. Quite the contrary, the Federal Rules implement a strong policy *against* such discovery. "The purpose of F. R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). As the Supreme Court has explained, Rule 12(b)(6) plays a critical role in preventing plaintiffs from using the threat of costly and invasive discovery to force settlement or capitulation, even when the plaintiff's claims lack legal merit. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Thus, when an anti-SLAPP motion contests the sufficiency of the Complaint as would a Rule 12 motion, the anti-SLAPP statute does not conflict with any Federal Rules, and it applies under *Erie*. *See, e.g.*, *Stutzman v. Armstrong*, No. 2:13-cv-0116-MCE, 2013 WL 3992416, at *6-7 (E.D. Cal. Aug. 2, 2013); *Schwartz v. At the Cove Mgmt. Corp.*, No. 12cv3077-GPC, 2013 WL 1103479, at *1-2 (S.D. Cal. Mar. 14, 2013); *Smith v. Payne*, No. C-12-01732-DMR, 2012 WL 6712041, at *4 n.7 (N.D. Cal. Dec. 26, 2012); *Moser v. Triarc Cos.*, No. 05cv1742-JLS, 2007 WL 3026425, at *3-4 (S.D. Cal. Oct. 16, 2007).

In contrast, where an anti-SLAPP motion contests the plaintiff's *evidence*, § 425.16(g)'s mandatory discovery stay does not apply under *Erie*. In *Metabolife*

International, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001), the Court explained that "if [the anti-SLAPP statute's] expedited procedure were used in federal court to test the plaintiff's ***evidence*** before the plaintiff has completed discovery, it would collide with Federal Rule of Civil Procedure 56." *Id.* at 846 (internal punctuation omitted; emphasis added). Applying this principle, this Court reversed the grant of an anti-SLAPP motion premised on the plaintiff's failure to present adequate evidence to support its claims, where the discovery stay prevented the plaintiff from presenting evidence to support its claims. *Id.* at 840, 850. The Court recognized that the stay of discovery directly conflicted with what is now Rule 56(d), which requires that, in the summary-judgment context, the district court allow "discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Id.* at 846 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). Thus, as the district court acknowledged, where an anti-SLAPP motion contests only the legal sufficiency of the complaint, the discovery stay applies. Doc. 95, at 5, A5 (Discovery Order) ("If an anti-SLAPP motion is founded on 'purely legal arguments,' then the analysis of Rules 8 and 12 applies, section 425.16(g) does not conflict with the federal rules, and discovery must be stayed pursuant to that statute." (quoting *Z.F.*, 482 F. App'x at 240)).

B. Petitioners' anti-SLAPP motion contested only the legal sufficiency of the allegations in NAF's Complaint, and thus the discovery stay applies under *Erie*.

Petitioners' anti-SLAPP motion contested only the legal sufficiency of NAF's Complaint, and thus the District Court should have applied § 425.16(g)'s mandatory

discovery stay under *Erie*. The anti-SLAPP motion argued only that the allegations in the Complaint are legally insufficient, ***not*** that NAF has failed to present sufficient evidence. *See generally* Doc. 66-1, A29. The motion contained ubiquitous references to the allegations in the Complaint, and no references to evidentiary matters. *Id.* Indeed, CMP combined its anti-SLAPP motion with a motion to dismiss under Rule 12(b)(6). *Id.* There can be no serious question that the anti-SLAPP motion contested only the legal sufficiency of the Complaint and thus must be treated as a motion under Rules 8 and 12. *Z.F.*, 482 F. App'x at 240.

Nevertheless, the district court did treat the motion as one contesting NAF's evidentiary showing. But none of its reasons for doing so was persuasive. First, the district court erroneously concluded that, because (in its view) CMP's motion demanded more factual matter from the Complaint than the *Twombly-Iqbal* standard requires, the motion necessarily constituted a Rule 56 motion rather than a Rule 12 motion. Doc. 95, at 10-13, A10-13. But a district court cannot convert a motion to dismiss into a motion for summary judgment merely because it finds the defendant's arguments for dismissal unpersuasive, or because it believes that the complaint contains sufficient factual allegations to state a claim.

The district court here did not identify any instances in which the anti-SLAPP motion relied on any materials other than the allegations in NAF's Complaint, and there are none. For example, the anti-SLAPP motion asserts that "Plaintiff cannot raise its promissory-fraud claim, because it has reaffirmed its agreements with Defendants rather than rescinding them." Doc. 66-1, at 30, A29. The district court held that "[t]he determination of whether NAF reaffirmed or rescinded agreements

is a factual one." Doc. 95, at 11, A11. But this holding mischaracterizes CMP's argument—CMP clearly argued that NAF had reaffirmed its contracts *by suing for breach of them in the Complaint*: "Plaintiff's Fifth and Sixth Causes of Action allege breaches or anticipated breaches of the Exhibitor Agreement and the Confidentiality Agreements . . . . These are the same agreements that underlie NAF's promissory-fraud claim." Doc. 66-1, at 30-31, A70-71. In other words, CMP plainly argued that NAF's reaffirmation of the agreements *appeared on the face of the Complaint*. *Id.* If the district court disagreed, the proper course would have been to deny that portion of the motion to dismiss, not to recharacterize it as a Rule 56 motion.

The same error underlies the other instances in which the district court discerned factual disputes in the anti-SLAPP motion. The district court held that the question of proximate cause on the promissory-fraud claim requires "a factual determination, and one that cannot be made at the pleading stage." Doc. 95, at 11, A11. Again, the anti-SLAPP motion merely contended that NAF had failed to plead sufficient facts to raise a plausible inference of proximate cause. *See* Doc. 66-1, at 32, A72 ("NAF has failed to plead adequately that Defendants breached the [putative agreements]. Because NAF's Complaint fails to allege that Defendants breached their contracts with NAF, any promissory misrepresentations by Defendants could not have proximately caused the harm allegedly sustained by NAF."). Similarly, the district court held that "any argument that NAF did not adequately allege fraud amounts to a factual attack, or is baseless." Doc. 95, at 11, A11. The anti-SLAPP motion plainly argued that the fraud allegations should be dismissed for failure to state a claim, based solely on the sufficiency of the allegations in the Complaint.

Doc. 66-1, at 32-34, A72-74. If the district court believed that these arguments were "baseless," it should have denied this portion of the motion, not recharacterized it as a summary-judgment motion.

In sum, the district court held that "the motion to strike frequently posits that the Complaint lacks certain factual details that are required to state a claim. However, few of the cases cited to support this position held that such facts were required at the pleading stage." Doc. 95, at 12, A12. If the district court believed that CMP's arguments lacked merit "at the pleading stage," the proper recourse was simply to deny them, not to recast the motion as a summary-judgment motion. This would have allowed CMP the benefit of its substantive right to receive a ruling on its anti-SLAPP motion testing the claims' legal sufficiency, prior to discovery.

Second, the district court claimed that the case could not be resolved without discovery because it involves questions of contractual interpretation. Doc. 95, at 13, A13. Without identifying any potentially ambiguous provisions in the relevant contracts, the district court nevertheless concluded that discovery is necessary because some unspecified extrinsic evidence *might* affect the interpretation of those agreements. *Id.* Where the court does not identify any ambiguous provisions in a contract, the interpretation of the contract is appropriate for a 12(b)(6) motion. *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1017-18 (9th Cir. 2012); *see also id.* at 1017 n.11 (citing *Hervey v. Mercury Cas. Co.*, 185 Cal.App.4th 954 (2010)). Under the district court's view, a court could never grant a 12(b)(6) motion that implicates the interpretation of a contract governed by California law; yet this Court affirms such dismissals routinely. *See, e.g.*, *id.*; *Block v. eBay, Inc.*, 747 F.3d

1135, 1138-40 (9th Cir. 2014). And if the district court believed that the contracts in question were ambiguous and required extrinsic evidence to interpret, the proper course would have been simply to deny the motion to dismiss on this point.

Third, the district court held that discovery was necessary to determine whether NAF's claims arise from CMP's protected activity. Doc. 95, at 9-10, A9-10. This holding was clearly erroneous, because the applicability of the anti-SLAPP law appears on the face of the Complaint. The anti-SLAPP statute applies to, among other things, any claims that arise from "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," as well as "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Pro. Code § 425.16(e)(3)-(4). NAF's Complaint alleges that CMP recorded conversations with NAF members and/or presentations at NAF meetings, and that NAF believes CMP will publish these videos. *See, e.g.*, Doc. 1, ¶¶ 93, 121-22, 137, 143-44; A153, A161, A164-65. The Complaint further alleges that CMP previously released similar recordings, and that those recordings attracted significant media attention and generated considerable public discussion and debate. *Id.*, ¶¶ 84-85, A150; *see also id.*, ¶ 34, A131. The Complaint specifically alleges that CMP's conduct involved speaking to and through the national media on the issues of abortion and the propriety of human-tissue purchasing. *See id.*, ¶¶ 2, 3; A118-19. These allegations conclusively bind NAF. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

Both this Court and California courts have held consistently that similar

conduct falls within the scope of the anti-SLAPP statute. "California courts have held that pre-publication or pre-production acts such as investigating, newsgathering, and conducting interviews constitute conduct that furthers the right of free speech." *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 953 (9th Cir. 2013). Applying this rule, this Court has held that investigative filming and the publication thereof falls under the anti-SLAPP statute. *See, e.g.*, *id.* ("Plaintiff's claims are based on Defendants' acts of interviewing Plaintiff for a documentary television show and broadcasting that interview. These acts were in furtherance of Defendants' right of free speech."); *Greater L.A. Agency on Deafness v. CNN, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014) (holding that claims implicated protected conduct because plaintiff's "action arises directly from CNN's decision to publish . . . [and plaintiff] would have no reason to sue CNN absent the news videos on CNN.com"). Similarly, California courts have held that allegedly unlawful undercover investigative recordings of a doctor fall within the scope of the anti-SLAPP statute. *Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156, 166 (2003). And there can be no meaningful doubt that speech regarding illegal fetal tissue procurement relates to "an issue of public interest." Cal. Civ. Pro. Code § 425.16(e)(3), (4); *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App.4th 322, 358 (2004) (holding that speech regarding abortion fell within anti-SLAPP statute because "abortion is one of the most controversial political issues in our nation"). The Complaint itself shows that NAF's claims arise from activity covered by the anti-SLAPP statute.

The district court seemed to focus primarily on the possibility that Petitioners had waived their First Amendment rights by executing certain agreements. Doc. 95,

at 9-10, A9-10. But the District Court's analysis rests on the false premise that, if the First Amendment would not protect Petitioners' conduct (because of waiver), the anti-SLAPP statute would not apply. *Id.* at 9, A9. In fact, the anti-SLAPP statute applies more broadly than the First Amendment does. "By its terms, the anti-SLAPP statute includes not merely actual exercise of free speech rights but also conduct that furthers such rights." *Doe*, 730 F.3d at 953 (internal punctuation omitted); *see also* Cal. Civ. Pro. Code § 425.16(e). To invoke the anti-SLAPP statute, a defendant need not "first establish her actions are constitutionally protected under the First Amendment as a matter of law." *Navellier v. Sletten*, 29 Cal.4th 82, 95 (2002). Instead, the Complaint made clear that CMP's alleged conduct fell within the protection of the anti-SLAPP statute.

C. The district court's discovery order has no effect on the *Erie* analysis.

The district court also refused to apply § 425.16(g)'s stay of discovery on the ground that it would conflict with the district court's August 3, 2015 order authorizing expedited discovery. Doc. 95, at 6-7, A6-7. But under *Erie*, a court looks to whether a Federal Rule of Civil Procedure or a federal statute governs the precise issue in dispute, not whether the district court has entered an order relevant to the issue. *See, e.g.*, *Kohlrautz*, 441 F.3d at 831 (looking to whether "there is an applicable federal rule of civil procedure"); *Metabolife*, 264 F.3d at 845 (looking to whether applying a state rule "would result in a 'direct collision' with a Federal Rule of Civil Procedure"); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (looking to whether "a situation is covered by one of the Federal Rules"). If no Federal Rule or statute directly answers the precise issue in dispute, then the state rule governs if it

is "substantive." *Kohlrautz*, 441 F.3d at 830-31. No stage of the *Erie* analysis inquires whether the state rule conflicts with a prior order of the district court.

Several factors support this conclusion. First, were the contrary true, a judge almost always could circumvent *Erie* by issuing an order conflicting with a disfavored state rule early in the case, and then declining to apply the state rule based on that conflict. *Erie*'s fundamental principles cannot be evaded so easily. Second, the Rules of Decision Act provides that state law applies "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652. A district court's order is not an Act of Congress, a treaty, or a constitutional provision and cannot displace state law under the Act. *Id.* Third, the Federal Rules hold an exalted position under the *Erie* framework largely because they have received the imprimatur of "the Advisory Committee, [the Supreme] Court, and Congress." *Hanna*, 380 U.S. at 471. A district court order has not run this three-part gauntlet. Thus, a district court cannot decline to apply a state rule merely because the rule purportedly conflicts with its own prior order.

D. The anti-SLAPP statute does not directly collide with Rule 26.

There also is no direct collision between the anti-SLAPP statute's discovery stay and Rule 26. First, as explained above, Rule 26 does not authorize NAF's requested discovery, because the Complaint does not forecast any set of facts under which the First Amendment would tolerate NAF's requested preliminary injunction.

Several additional factors demonstrate that § 425.16(g) does not "directly collide" with Rule 26. First, the text of Rule 26 does not guarantee any discovery prior to the resolution of a motion contesting the legal sufficiency of the Complaint.

See Fed. R. Civ. P. 26(d)(1). The first stage of the *Erie* analysis requires a careful "textual analysis" of the relevant Federal Rules. *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw and Callahan, JJ, concurring in the denial of rehearing en banc). The plain text of the Rule does not conflict with the anti-SLAPP statute, and thus federal courts can apply both the state rule and the Federal Rule side by side. *See Newsham*, 190 F.3d at 972 (applying anti-SLAPP statute because it could "exist side by side" with Federal Rules).

Second, California's strong substantive interests reflected in the anti-SLAPP statute counsel against reading Rule 26 so broadly as to find a conflict with § 425.16(g). When engaging in *Erie* analysis, federal courts must interpret the Federal Rules "with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n.7. Federal courts generally must avoid interpretations of the Federal Rules that would impinge on substantive rights under state law. *See Shady Grove*, 559 U.S. at 422-23 (Stevens, J., concurring in the judgment). "California's interest in securing its citizens' free speech rights also cautions against finding a direct collision with the Federal Rules." *Makaeff*, 736 F.3d at 1183-84 (Wardlaw and Callahan, JJ, concurring in the denial of rehearing en banc); *see also Newsham*, 190 F.3d at 973 (noting that California's anti-SLAPP statute advances "important, substantive state interests"); *Liberty Synergistics*, 718 F.3d at 148. The discovery stay is an essential component of the substantive rights established by the statute. *See Britts*, 145 Cal.App.4th at 1124. Thus, this Court should avoid construing Rule 26 to conflict with substantive rights under the anti-SLAPP statute.

Third, § 425.16(g)'s discovery stay operates harmoniously alongside state

procedural rules that substantially mirror Rule 26. The fact that the anti-SLAPP statute works alongside California's "statutory equivalent to Rule 56" suggests that there is no conflict between them. *Makaeff*, 736 F.3d at 1183 (Wardlaw and Callahan, concurring in the denial of rehearing en banc). California similarly has statutory equivalents to Rule 26, *see* Cal. Civ. Pro. Code §§ 2017.010, 2017.020, 2019.010-.040, and California courts apply these rules in tandem with the anti-SLAPP statute, even when, for example, a plaintiff seeks preliminary-injunctive relief. *See, e.g.*, *Thomas v. Quintero*, 126 Cal.App.4th 635, 650 (2005) (explaining that "the norm would have both the hearings on the petition [for a preliminary injunction] and the special motion to strike proceed without discovery"). That the California analogues to Rule 26 function harmoniously alongside the anti-SLAPP statute further emphasizes that the statute does not conflict with Rule 26.

V. This Case Presents a New and Important Issue; Resolving That Issue Will Assist the District Courts in Properly Applying This Court's Precedents.

The fifth factor supporting mandamus relief is that "the district court's order raises new and important problems or issues of first impression." *Perry*, 591 F.3d at 1136.[2] This case raises both "new and important problems" and "issues of first impression," *id.*, so it is a proper candidate for mandamus relief.

First, until this case, every district court to confront the issue had concluded

[2] The fourth mandamus factor—"an oft repeated error or [one which] manifests a persistent disregard of the federal rules"—likely does not apply here. *Perry*, 591 F.3d at 1136. However, as this Court has noted, "[n]ot every factor need be present at once; indeed the fourth and fifth will rarely be present at the same time." *Burlington N. & Santa Fe Ry. v. United States Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005); *see also San Jose Mercury News*, 187 F.3d at 1103 (noting that the fourth and fifth factors "are often mutually exclusive").

that the stay of discovery *does* apply under *Erie* when the anti-SLAPP motion challenges only the sufficiency of the complaint. *See, e.g.*, *Schwartz*, No. 12cv3077-GPC, 2013 WL 1103479, at *1-2; *Stutzman*, No. 2:13-cv-0116-MCE, 2013 WL 3992416, at *6-7; *Smith*, No. C-12-01732-DMR, 2012 WL 6712041, at *4 n.7; *Moser*, No. 05cv1742-JLS, 2007 WL 3026425, at *3-4. An unpublished decision by this Court suggests the same. *Z.F.*, 482 F. App'x at 240. The district court's departure from these authorities in this case invites conflicts among the district courts, which inevitably would result in disparate and inequitable outcomes between similarly situated litigants. Thus, resolving the issue presented by this case will "have a substantial impact on the administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982).

Second, the district court's holding undermines California's anti-SLAPP statute by removing the central mechanism for protecting litigants. Without the stay, the anti-SLAPP statute cannot effectively shield defendants from abusive litigation tactics. "[P]rotect[ing] defendants from the burden of traditional discovery pending resolution of the [anti-SLAPP] motion" constitutes a core component of the anti-SLAPP regime. *Britts*, 145 Cal.App.4th at 1124 (quotation omitted).

Third, declining to enforce key components of the anti-SLAPP statute in federal court will encourage enterprising plaintiffs to bring SLAPP claims in federal court rather than state court. "Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities." *Makaeff*, 736 F.3d at

1187 (Wardlaw and Callahan, JJ., concurring in the denial of rehearing en banc).

CONCLUSION

For these reasons, this Court should grant Petitioners mandamus relief and order the district court to apply the mandatory stay of discovery prescribed by Cal. Civ. Pro. Code. § 425.16(g), and to rule on the pending motion for preliminary injunction without conducting discovery.

Dated: September 14, 2015

Respectfully Submitted,

/s/ D. John Sauer

D. John Sauer
James Otis Law Group, LLC
231 S. Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Tel: (314) 854-1372
jsauer@jamesotis.com

Catherine W. Short, Esq.; SBN 117442
Post Office Box 1313
Ojai, California 93024-1313
Tel: (707) 337-6880
Fax: (805) 640-1940
LLDFOjai@earthlink.net

Thomas Brejcha
Corrine Konczal
Thomas More Society
19 La Salle St., Ste. 603
Chicago, Illinois 60603
(312) 782-1680
tbrejcha@thomasmoresociety.org

Attorneys for Defendants/Petitioners The Center for Medical Progress, Biomax Procurement Services, LLC, and David Daleiden.

CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2015, I caused the foregoing Petition for Writ of Mandamus with attached Appendix to be served by electronic mail and first-class mail upon the following counsel of record for the parties:

Linda E. Shostak
Derek F. Foran
Nicholas S. Napolitan
Christopher L. Robinson
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
LShostak@mofo.com
DForan@mofo.com
NNapolitan@mofo.com
ChristopherRobinson@mofo.com

Brian R. Chavez-Ochoa
CHAVEZ-OCHOA LAW OFFICES, INC.
4 Jean Street, Suite 4
Valley Springs, CA 95252
brianr@chavezochoalaw.com

Vladamir F. Kozina
MAYALL HURLEY, P.C.
2453 Grand Canal Boulevard
Stockton, California 95207
vkozina@mayallaw.com

Jay Alan Sekulow
Stuart J. Roth
Andrew J. Ekonomou
Cecilia N. Heil
Carly F. Gammill
Abigail A. Southerland
Joseph Williams
AMERICAN CENTER FOR LAW & JUSTICE

201 Maryland Avenue, NE
Washington, DC 20002
sekulow@aclj.org

Edward L. White III
Erik M. Zimmerman
AMERICAN CENTER FOR LAW & JUSTICE
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
ezimmerman@aclj.org

/s/ D. John Sauer
D. John Sauer
Counsel for Petitioners