No. 15-A____

In the Supreme Court of the United States

In re The Center for Medical Progress, BioMax Procurement Services, LLC, David Daleiden, and Troy Newman,

Petitioners-Appellants,

v.

United States District Court for the Northern District of California, and National Abortion Federation,

Respondents-Appellees

To the Honorable Anthony Kennedy
Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

Emergency Application for Stay by December 4, 2015

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Introduction

To the Honorable Anthony Kennedy, Associate Justice of the United States Supreme Court and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

Petitioners seek relief from a discovery order of the United States District Court for the Northern District of California. The discovery order violates Petitioners' First Amendment rights to freedom of association by requiring Petitioner The Center for Medical Progress ("CMP") to disclose the confidential identities of its supporters, thereby putting those supporters at serious risk of retaliation for backing CMP.

As is widely reported, CMP conducted a three-year undercover investigation of tissue-procurement practices in the late-term abortion industry. The results of CMP's investigation have generated enormous public interest, dominated national headlines, sparked debates about late-term abortion practices in Congress, and triggered state and federal investigations into the sale of fetal tissue for profit among late-term abortion providers. Plaintiff National Abortion Federation ("NAF") sued CMP and its officers, alleging breach of confidentiality agreements and commission of various torts in CMP's undercover investigation of NAF meetings. In discovery, NAF has demanded the disclosure of the identities of a small group of CMP's key supporters, who were not directly involved in CMP's investigative activities, but who provided financial support and received a progress

report containing information that NAF contends is confidential. CMP is under court order to disclose the identities of these supporters by midnight Pacific time **tonight, December 4, 2015**. CMP therefore seeks an emergency stay to protect the associational freedom of itself and its supporters under the First Amendment.

On November 25, 2015, Petitioners CMP, BioMax Procurement Services, LLC, David Daleiden, and Troy Newman filed their Emergency Motion for Stay of Discovery Order Pending Appeal and Pending Writ of Mandamus in the Ninth Circuit. (9th Cir. Doc. 4.) On November 30, 2015, NAF filed its Opposition to Petitioners' Emergency Motion for Stay of Discovery Order Pending Appeal and Pending Writ of Mandamus. (9th Cir. Doc. 12.) On December 3, 2015, the Ninth Circuit denied Petitioners all relief. (9th Cir. Doc. 16.) This included the temporary stay Petitioners sought on December 3 so that the Circuit Justice, and by extension this Court, would not have to rush to rule on a stay today. (9th Cir. Doc. 18.) Unless this Court grants relief today, Petitioners must comply with the district court's discovery order by 11:59 p.m. PST December 4, 2015, or 2:59 a.m. EST December 5, 2015, thereby potentially mooting this appeal. Therefore, Petitioners request a stay **today, December 4, 2015. Otherwise Petitioners will suffer the very harms from which they seek relief.**

This case arises from CMP's investigative journalism and release of videos over the summer of 2015 exposing controversial and likely criminal conduct occurring in the abortion industry including human-fetal-tissue procurement, which

has generated a national debate and multiple investigations, including Congressional hearings about Planned Parenthood. Respondent NAF sued CMP to enjoin the release of recordings and information obtained at NAF conferences. Respondent District Court granted a temporary restraining order enjoining release of that information, granted limited discovery pending a preliminary injunction hearing, and has ordered CMP to disclose the identities of its supporters. The First Amendment right of association protects those identities, and less restrictive means exist to preserve those rights and protect the rights of NAF as well. Therefore, this Court should stay that discovery Order and direct the District Court to implement the less restrictive means.

The key issue here is the disclosure of the identities of CMP's supporters. While NAF emphasizes its own alleged harms, they are not at issue here.

Petitioners' First Amendment right of association are at risk. The Ninth Circuit itself has recognized that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment. Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking such discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights." *Perry v. Schwarzenegger,* 591 F.3d 1147, 1152 (9th Cir.), *cert. dismissed,* 559 U.S. 1118 (2010).

First, NAF argues that Petitioners' First Amendment rights are not implicated because NAF seeks identities of individuals who received "NAF confidential information." (9th Cir. Doc. 12 at 12.) However, the individuals who received NAF confidential information are the same individuals who are supporters, members, donors, and associates of CMP's activities. These individuals are the most critical supporters of CMP. Therefore, since these lists are one and the same, it would be "blatantly unconstitutional" to compel CMP to disclose its "membership list." (9th Cir. Doc. 12 at 11 (quoting D.Ct. Doc. 156-3 at 37).)

In the First Amendment privilege context, one of the primary harms "is the disclosure itself," and once it occurs, "this injury will not be remediable on appeal." *Perry,* 591 F.3d at 1158.

Second, NAF argues that Petitioners effectively waived their First Amendment rights by associating with an organization that they knew was engaged in supposedly "criminal" activity. However, investigative journalism is not inherently "criminal" activity. NAF's contention that such an investigation necessarily constituted "fraud" has no merit. In *United States v. Alvarez*, 132 S. Ct. 2537, 2545-47 (2012), this Court reaffirmed that even false statements enjoy the protection of the First Amendment. This protection naturally extends to the exercise of deception in undercover journalistic investigations. "The effect of [NAF's contention] will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance." *Animal Legal Defense*

Fund v. Otter, ____ F. Supp. 3d ____, 2015 WL 4623943, at *3 (D. Idaho Aug. 3, 2015). Absent defamation, the "target [of an undercover investigation] has no legal remedy even if the investigatory tactics used by the [journalist] are surreptitious, confrontational, unscrupulous, and ungentlemanly." *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 982 (9th Cir. 2002) (quoting *Desnick v. ABC*, 44 F.3d 1345, 1355 (7th Cir. 1995)). To the extent that the lower court's judgment adopts NAF's theory that undercover journalism is inherently "fraudulent" or criminal, therefore, it conflicts with both this Court's precedent and the considered decisions of other Circuits, as well as threatening fundamental First Amendment values. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 194 F.3d 505, 512-13 (4th Cir. 1999); *Desnick*, 44 F.3d at 1355 (both rejecting fraud claims based on undercover journalism).

Finally, compelled disclosures of associations and internal strategies during discovery, such as the ones sought here, can have a chilling effect. *Perry*, 591 F.3d at 1160; *see AFL-CIO v. FEC,* 333 F.3d 168, 175 (D.C. Cir. 2003). Petitioners submitted the affidavit of CMP's supporter "Chris Doe" (a pseudonym), describing in detail the chilling effect that compelled disclosure of his/her identity would inflict on his/her freedom of association under the First Amendment. (*See* D.Ct. Doc. 179-1 at 1.) Chris Doe explains that he/she "would not have contributed to CMP if [he/she] had known that NAF or other pro-abortion groups would learn [his/her] identity." *Id.* Chris Doe fears harassment because "[his/her] business has already been subject

to boycotting and picketing, including a massive mail campaign to [his/her] customers." *Id.*

Although this declaration is the only evidence submitted and NAF criticizes this as "thin" (9th Cir. Doc. 12 at 14), in the First Amendment privilege context, courts almost without exception rely on representative declarations rather than requiring the near-impossible task of collecting declarations from each one of the numerous individuals who would be deterred from association by the disclosure. *See, e.g.*, *Perry*, 591 F.3d at 1163 (relying primarily on a single declaration to conclude that the challenged disclosures would chill First Amendment interests); *Dole v. Serv. Emps. Union*, 950 F.2d 1456, 1459 (9th Cir. 1991) (relying on letters from two union members to conclude that challenged disclosures would chill association of other union membership generally). Thus, a declaration such as the Chris Doe declaration here "creates a reasonable inference that disclosure would have the practical effects of discouraging political association." *Id.*

Most notably, NAF openly avows that it will sue CMP's supporters if their identities are revealed. (9th Cir. Doc. 12 at 16-17.) This threat of litigation alone suffices to raise a *prima facie* case of chilling effect on First Amendment freedoms. Where "Plaintiff intends to sue other persons who assisted or participated with Defendants" in their allegedly tortious expressive activities, it follows that

"Defendants have stated a valid First Amendment claim." *Marfork Coal Co. v. Smith*, 274 F.R.D. 193, 206 (S.D. W.Va. 2011).[1]

NAF's only justification for knowing the supporters' identities is to serve these supporters with a copy of the preliminary injunction, assuming one is even issued in this case. (9th Cir. Doc. 12 at 16; D.Ct. Doc. 208 at 1-2, 5, 6.) However, the district court could implement reasonable alternatives that accomplish NAF's same end of ensuring that those that received NAF confidential information are served with a preliminary injunction, if need be. *See Perry*, 591 F.3d at 1161.

The reasonable alternative is for the district court to order CMP to serve the preliminary injunction upon CMP's supporters without publicly revealing the identities of these individuals, thereby protecting their First Amendment rights.

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[1] Moreover, NAF fails to forecast any plausible grounds to bind CMP's supporters to a preliminary injunction, further undermining the necessity of its requested discovery. NAF's primary theory in support of their request for a preliminary injunction is a California contract claim. *See, e.g.,* D.Ct. Doc. 225 at 15. However, NAF makes no argument that these supporters were parties to the alleged contracts, much less even knew of them. Even so, NAF alleges that these supporters are in "active concert or participation" with CMP under Fed. R. Civ. P. 65(d)(2)(C). But that phrase refers only to persons who either are "legally identified with a party" or are "in active concert or participation with a party in *postinjunction* activity." *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 35 (1st Cir. 1980) (emphasis added) (citing *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14-15 (1945)). Rule 65(d)(2)(C) focuses on those who "have had a material role in the *subsequent violation of that injunction*." *Id.* (emphasis added). NAF cites no evidence of "postinjunction activity" by CMP's supporters; the evidence at issue predates the TRO in this case by over a year. Further, to be "legally identified with" CMP, its supporters must be so closely associated and intertwined with a party's "participation in the injunction proceedings that it can be fairly said that he has had his day in court in relation to the validity of the injunction." *G. & C. Merriam*, 639 F.2d at 37. NAF has not made, and cannot make, any such showing.

Assuming that there were a basis to enjoin these individuals, once they received actual notice of the injunction, it would bind them automatically. Fed. R. Civ. P. 65(d)(2)(C). This is the same end that NAF desires, but it would not violate anyone's constitutional rights. This resolution demonstrates that NAF does not "need[] to know the identities of the individuals who received its information in order to bind them to the TRO [or] to any preliminary injunction." (Doc. 12 at 20.) CMP can just as easily bind the proper individuals to a potential preliminary injunction without implicating their First Amendment rights.

While NAF derides this less intrusive approach as ineffective self-policing, the approach would rely on CMP's attorneys to certify to the court—on penalty of sanction—that they have, in fact, provided the requisite notice, just like numerous provisions of the Federal Rules already do. *Compar*e, *e.g.*, Fed. R. Civ. P. 26(g) (policing the accuracy and completeness of civil discovery through attorney certification); Fed. R. App. P. 37(a)(3) (policing appellate brief word limits through attorney certification of compliance); Fed. R. App. P. 25(d)(1)(B) (relying on attorney certification to show service of pleadings on opposing parties).

NAF contends that the disclosures ordered by the district court would not violate the First Amendment, because the Protective Order in this case adequately protects the First Amendment interests at stake. This position lacks merits for three reasons.

First, and most tellingly, NAF wholly ignores the holding in *Perry* that a protective order does not sufficiently protect First Amendment interests under circumstances such as these. *Perry* recognized that "[a] protective order limiting dissemination of this information . . . cannot eliminate [the] threatened harms" associated with disclosure. 591 F.3d at 1164. On that basis, *Perry* rejected the argument that the petitioners should be compelled to make the contested disclosures pursuant to the protective order entered in the case. *Id.* That conclusion accords with the overwhelming majority of cases addressing compelled disclosures that would implicate First Amendment associational interests. *See Tree of Life Christian Schools v. City of Upper Arlington*, Case No. 2:11-cv-00009, 2012 WL 831918, at *3 (S.D. Ohio Mar. 12, 2012) (holding that the threat of involvement in litigation entailed that a protective order was insufficient to protect First Amendment associational interests); *Marfolk,* 274 F.R.D. at 206 (holding that the First Amendment protected the identities of members of a protest group whom plaintiff wished to sue to enforce an injunction, because "knowing they might be sued or charged" under the injunction would deter their participation in environmental protests). NAF has not pointed to any aspects of *Perry* that made the protective order in that case ineffective but would make the Protective Order here somehow effective.

Second, NAF has repeatedly disclosed sensitive materials in its public filings, including public disclosures of materials which are now covered by the Protective

Order due to the allegedly private information they contain. *See, e.g.*, D.Ct. Doc. 225, at 13:6-10, 23:12-16; *see also* D.Ct. Doc. 3, 28, 30, 31, 65. This pattern of public disclosure of sensitive information, even if the result of inadvertence, makes it highly doubtful that the Protective Order will in fact prevent disclosure of the identities at issue here. This contrasts sharply with *Center for Competitive Politics v. Harris* where the Court found that the risk that "donors' names might be inadvertently accessed or released" was entirely "speculative." 784 F.3d 1307, 1316 (9th Cir. 2015), *cert. denied,* 84 USLW 3080 (U.S. Nov. 9. 2015). Past experience shows that here, that risk is anything but speculative.

Third, NAF overlooks the fact that one of NAF's stated reasons for seeking the identities—to *sue* those who have associated with CMP—would chill constitutionally protected association even if the disclosures were made under the Protective Order. As many courts have recognized, the threat of being swept into costly and intrusive litigation alone will chill association protected by the First Amendment. *See, e.g.*, *Tree of Life*, 2012 WL 831918, at *3; *Marfork*, 274 F.R.D. at 206; *Art of Living Found. v. Does 1-10*, No. 10-CV-05022-LHK, 2011 WL 5444622, at *9 (N.D. Cal. Nov. 9, 2011). For these reasons, even disclosures pursuant to the Protective Order would impermissibly chill core First Amendment association and must be rejected.

The Ninth Circuit rejects Petitioners' request for a stay partly because "the emails in question were sent to 'only a handful of [s]upporters'" of CMP, "not

general lists of the Center's rank-and-file membership." (9th Cir. Doc. 16 at 5 (citing D.Ct. Doc. 244 at 5).) However, the number of supporters CMP contacted does not affect whether Petitioners are entitled to relief.

Notwithstanding the Ninth Circuit's order (*id.* at 5-6), the district court's protective order is not "carefully tailored," and limiting production to "Attorneys' Eyes Only" does not solve the problem. NAF's attorneys have threatened to file suit against the people whom the discovery would name.

Background

1. In this case, NAF seeks injunctive relief prohibiting Petitioners from speaking publicly on controversial and likely criminal conduct occurring in the human-tissue-procurement and abortion industries. NAF also seeks monetary damages.

2. Petitioners' prior speech on these issues has generated a national debate on the legality and ethics of these practices and has received extensive media attention. Petitioners' speech also has triggered public interest and investigations on the federal and state levels, leading to the opening of several law-enforcement investigations into the practices unveiled by CMP.

3. On July 31, 2015, NAF obtained a temporary restraining order ("TRO") prohibiting Petitioners from releasing certain videos and other information. *See* D.Ct. Doc. 15 (Order Granting TRO). The TRO is still in place pursuant to a stipulation by the parties. D.Ct. Doc. 27.

4. On July 31, 2015, NAF moved for an order to show cause for a preliminary injunction that would impose the same restrictions as the TRO currently imposes. *See* D.Ct. Doc. 3.

5. On August 3, 2015, the district court ordered expedited discovery relating to the requested preliminary injunction, and this discovery was to be completed before NAF filed its motion for preliminary injunction. *See* D.Ct. Doc. 27, at 3.

6. On October 7, 2015, Petitioners served written discovery responses, and hundreds of pages of documents were produced to NAF, along with hundreds of hours of recordings, pursuant to NAF's requests for production. *See* D.Ct. Doc. 157 (Joint Discovery Letter) at 2-3.

7. Among these hundreds of pages of responsive documents were two brief reports sent from Daleiden to members, supporters, and/or associates of CMP (CMP # 001-007 and CMP 009-014). *See id.*

8. These reports provided extremely general information regarding CMP's activities. The only portions of the reports that were redacted in the production to NAF were the names of certain individuals or organizations who had provided funding to CMP and about twelve lines of budget information relating to financial contributions made to CMP.

9. Also among the documents produced by CMP were emails between Daleiden and CMP's members, supporters, and/or associates transmitting and/or

commenting on the reports. The emails were left unredacted except for the names and addresses of CMP's supporters, and specific amounts of funding to CMP.

10. CMP made these minor redactions pursuant to its timely objections based on the First Amendment associational privilege. *See* D.Ct. Doc. 157, at 32.

11. NAF and Petitioners both submitted briefs regarding whether CMP could properly withhold the redacted information based on the First Amendment privilege. *See* D.Ct. Docs. 178-3, 178-4, 179, 205-3, 205-4, 206, 208.

12. On October 30, 2015, the district court entered an Order overruling Petitioners' assertion of the First Amendment privilege and ordering CMP to produce unredacted copies of the reports and emails, which would disclose the identities of individuals and organizations who have associated with Petitioners. *See* D.Ct. Doc. 185.

13. On November 4, 2015, Petitioners requested that the district court stay its disclosure Order pending appellate review. D.Ct. Doc. 205-3, 206; *see also* Fed. R. App. P. 8(a)(1)(A).

14. On November 14, 2015, NAF filed its updated Motion for Preliminary Injunction. *See* D.Ct. Docs. 225-227.

15. On November 20, 2015, The district court denied the requested stay and ordered CMP to comply with the disclosure Order by **Friday, December 4, 2015**. (D.Ct. Doc. 244.)

16. On November 25, 2015, Petitioners filed their Emergency Motion for Stay of Discovery Order Pending Appeal and Pending Writ of Mandamus in the Ninth Circuit. (9th Cir. Doc. 4.) On November 30, 2015, NAF filed its Opposition to Petitioners' Emergency Motion for Stay of Discovery Order Pending Appeal and Pending Writ of Mandamus. (9th Cir. Doc. 12.) On December 3, 2015, the Ninth Circuit denied Petitioners all relief. (9th Cir. Doc. 16.) This included the temporary stay Petitioners sought on December 3 so that the Circuit Justice, and by extension this Court, would not have to rush to rule on a stay today. (9th Cir. Doc. 18.)

Factors Warranting a Stay

17. Petitioners seek to stay the district court's order compelling discovery responses. Title 28, United States Code, Section 2101(f) provides that "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." For a stay to be granted, the moving party must show "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of S.E. Pa. v. Casey*, 510 U.S. 1309, 1310 (1994).

18. First, there is a reasonable probability that the Court will grant *certiorari* and a fair prospect that Petitioners will ultimately prevail on the merits. The district court clearly erred when it overruled Petitioners' assertion of the First Amendment privilege. The First Amendment protects against compelled disclosure of political or expressive association, especially the identities of an association's members, supporters, or donors. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This Court has emphasized that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (quotation omitted). "Disclosures of political affiliations and activities that have a deterrent effect on the exercise of First Amendment rights are therefore subject to . . . exacting scrutiny." *Perry*, 591 F.3d at 1160 (granting mandamus relief against discovery order on First Amendment grounds).

19. When applying such "exacting scrutiny," *id.*, to a claim of First Amendment privilege, "[t]he party asserting the privilege must demonstrate a prima facie showing of arguable first amendment infringement. This prima facie showing requires [the party asserting the privilege] to demonstrate that enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which

objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* (quotations, internal citations, brackets, and ellipsis omitted). If a party makes this prima facie showing, the burden shifts to the party seeking disclosure to show that the disclosure "is rationally related to a compelling governmental interest and the least restrictive means of obtaining the desired information," and that "the information sought is *highly relevant* to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Id.* at 1161 (emphasis added; quotation, brackets, and ellipsis omitted). "The request must also be carefully tailored to avoid unnecessary interference with protected activities." *Id.*

20. Here, Petitioners established that the disclosures demanded by NAF, and ordered by the district court, would significantly infringe their First Amendment associational rights, as well as those of the individuals whose identities would be disclosed. *See* D.Ct. Doc. 179, at 4-6; Doc. 179-1. In particular, Petitioners submitted unrebutted evidence indicating that the individuals in question had a reasonable fear of economic retaliation, threats, litigation, and other reprisals if their identities were revealed. *See* D.Ct. Doc. 179-1; *compare Perry*, 591 F.3d at 1163 (describing similar evidence submitted in support of a claim of First Amendment privilege). Such evidence "creates a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal . . . communications that are essential to effective association

and expression." *Perry*, 591 F.3d at 1163. This is "consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiff's discovery requests." *Id.* Accordingly, Petitioners made a clear prima facie showing of threat to First Amendment rights.

21. Moreover, NAF cannot satisfy the "exacting scrutiny" of the "more demanding heightened relevance standard" (*id.* at 1164), or even show any legitimate need for the disclosures it demands. The requested identities have no relevance to whether NAF can obtain a preliminary injunction against Petitioners, the sole purpose for which the district court authorized discovery. *See* D.Ct. Doc. 27; *see also* D.Ct. Doc. 5. The identities also are not relevant to the legal arguments at the heart of the disputes over NAF's motion for preliminary injunction. And NAF has not articulated *any* plausible theory for injunctive relief against CMP's supporters, who indisputably did not execute any confidentiality agreements with NAF, did not conduct any undercover recordings at issue in this case, and received only a general and limited disclosure about the nature of the project. Thus, NAF plainly has failed to satisfy its burden under *Perry* and is not entitled to the unredacted documents that the district court ordered CMP to produce.

22. NAF asserts that it must know the redacted identities to bind the individuals to a preliminary injunction. (D.Ct. Doc. 208 at 1-2, 5, 6.) However, this is not so because the district court could implement less-restrictive means to accomplish NAF's ends *at the preliminary-injunction stage* – which is where this

action stands now. *See Perry*, 591 F.3d at 1161. Petitioners submit that the best of these means is to order CMP to inform those with redacted identities of any preliminary injunction. NAF does not need to know the redacted identities for the district court to bind those with redacted identities to any preliminary injunction. In addition, the purpose of the current discovery is to determine *whether* a preliminary injunction is warranted: NAF has already filed its updated Motion for Preliminary Injunction. The redacted identities are irrelevant to *whether* a preliminary injunction is warranted. Their identities may be relevant, if at all, if one of the individuals violates a preliminary or permanent injunction. Even then, the only identity that may be relevant – if it *is* relevant – is the identity of the person who violates the injunction, not the identities of everyone else. Furthermore, if, at the end of this action, NAF receives a permanent injunction, then the redacted identities are still available to whatever extent they are relevant and to whatever extent identifying them is appropriately tailored.

23. Notwithstanding NAF's assertion in the district court, merely designating the redacted identities "as 'Confidential' under the Protective Order" (D.Ct. Doc. 208 at 6) does not solve the problem. Saying NAF's lawyers "are bound by the Protective Order" (Doc. 208 at 6-7) does not solve the problem. For starters, Plaintiff has not conceded that a "confidential" designation would be proper. (*See* Doc. 178-3 at 3 n.2.) It is NAF's lawyers who are threatening to bring litigation

against these people and organizations. This is not an idle threat. And NAF has suggested that the information can "become[] public." (D.Ct. Doc. 208 at 7.)[2]

24. Second, Petitioners face imminent and irreparable harm absent a stay. The district court has ordered CMP to disclose the identities at issue by **Friday, December 4.** Thus, absent a stay, CMP must make the disclosures at issue in this case, thus mooting the issue and extinguishing Petitioners' claim of First Amendment privilege. *See Garrison v. Hudson*, 458 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) ("When . . . the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted" (citation and internal quotation marks omitted)). In the First Amendment privilege context, one of the primary harms at issue "is the disclosure itself," and once it occurs, "this injury will not be remediable on appeal." *Perry*, 591 F.3d at 1147. "A post-judgment appeal would not provide an effective remedy, as no such review could prevent the damage that [Petitioners] allege they will suffer or afford effective relief therefrom." *Id.* (quotation marks omitted) (quoting *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1302 (9th Cir. 1982)). Indeed, "the irreparable harm a party likely will suffer if erroneously required to disclose [First Amendment] privileged materials or communications," *id.*, is self-evident.

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[2] While the district court noted that "the information sought [must be] highly relevant to the claims or defenses in the litigation" (D.Ct. Doc. 244 at 3 (quoting *Perry,* 591 F.3d at 1161), the court did not explain how the redacted identities are highly relevant to NAF's already-filed motion for preliminary injunction. (*See* D.Ct. Doc. 244 at 5-6.) As explained previously, NAF cannot meet this standard.

25. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Hollingsworth v. Perry* is instructive in this regard. *Hollingsworth* involved a petition for mandamus to prevent a federal district court from allowing broadcasting of a trial on the constitutionality of California's Proposition 8 referendum, which involved same-sex marriage. The Court held that the petitioners in *Hollingsworth* had established "that irreparable harm will likely result" absent relief, and that they "may not be able to obtain adequate relief through an appeal" because by that point "[t]he trial will have already been broadcast." 130 S.Ct. 705, 712-13 (2010). Similarly, irreparable harm will likely result absent a stay as the information at issue here would be required to be disclosed before the appeal could be resolved.

26. Furthermore, a stay will not substantially prejudice NAF. As noted above, the identities at issue have no bearing on whether NAF is entitled to a preliminary injunction in this case. Thus, delaying NAF's receipt of the identities will not substantially prejudice NAF. Currently there is a stipulated TRO in place pending the outcome of NAF's renewed motion for preliminary injunction. NAF can articulate no substantial prejudice from a temporary stay of the discovery order to allow this Court to preserve its jurisdiction to resolve these issues in due course.

27. Finally, the public interest favors granting a stay. Courts have repeatedly emphasized "the significant public interest in upholding First

Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quotation omitted); *see also, e.g.*, *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("*IRLC-I*") ("[T]he public interest favors protecting core First Amendment freedoms."); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983) (recognizing the "strong public interest in protecting First Amendment values").

Conclusion

The Court should stay the district court's November 20, 2015 Order in Case No. 3:15-cv-3522-WHO (currently pending before the United States District Court for the Northern District of California).

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Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on December 4, 2015, I served a copy of the foregoing on the following by Federal Express, and served a courtesy copy *via* e-mail on:

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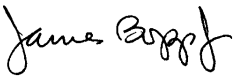

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