Case No. 16-15360

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION (NAF),

Plaintiff-Appellee

v.

THE CENTER FOR MEDICAL PROGRESS, BIOMAX PROCUREMENT SERVICES LLC, DAVID DALEIDEN (AKA "ROBERT SARKIS"), AND TROY NEWMAN,

Defendants-Appellants,

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

ANSWERING BRIEF OF PLAINTIFF-APPELLEE (NAF)
PUBLIC REDACTED VERSION

Linda E. Shostak (CA SBN 64599)
LShostak@mofo.com
Derek F. Foran (CA SBN 224569)
DForan@mofo.com
Nicholas S. Napolitan (CA SBN 251762)
NNapolitan@mofo.com
Christopher L. Robinson (CA SBN 260778)
ChristopherRobinson@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Marc A. Hearron
MHearron@mofo.com
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW Suite 6000
Washington, D.C. 20006-1888
Telephone: 202.887.1500
Facsimile: 202.887.0763

Attorneys for Plaintiff-Appellee
National Abortion Federation (NAF)

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee National Abortion Federation ("NAF") is a not-for-profit corporation organized under the General Not for Profit Corporation Law of the State of Missouri. It does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 3

A. National Abortion Federation and Its Mission to Ensure Safe and Legal Access to Abortion Care 3

B. The "Center for Medical Progress" and the Individuals Behind It 7

C. Defendants' [redacted] to Infiltrate NAF's Meetings 9

D. Defendants Follow Up With [redacted] After NAF's Meetings 16

E. Defendants Begin Releasing Surreptitiously Recorded Videotapes 16

F. Proceedings in the District Court 21

SUMMARY OF ARGUMENT 23

STANDARD OF REVIEW 26

ARGUMENT 28

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING DEFENDANTS FROM RELEASING INFORMATION OBTAINED IN VIOLATION OF THEIR CONTRACTUAL PROMISES 28

A. NAF Has a "Strong Likelihood" of Success on Its Breach-of-Contract Claims 28

1. Defendants Unquestionably Breached NAF's Agreements 28

2. Defendants' Arguments Regarding the Enforceability and Scope of NAF's Agreements Are Meritless 30

TABLE OF CONTENTS
(continued)

Page

3. The District Court's Holding That Defendants Waived Their First Amendment Rights Is Not Challenged on Appeal 36

4. Public Policy Considerations Strongly Favor Enforcement of NAF's Agreements 40

a. The Interests in Enforcing NAF's Confidentiality Agreements Are Overwhelming....40

b. Defendants' "Right" to Publish NAF's Materials Cannot Overcome the Compelling Public Policy Interests in Enforcing NAF's Agreements 43

B. NAF Made a "Strong Showing" of Irreparable Harm 54

C. The Balance of Hardships Clearly Favors Preliminary Injunctive Relief 59

D. The Public Interest Clearly Favors Injunctive Relief....60

E. Defendants' Desire to "Freely Communicate" With Law Enforcement Provides No Grounds for Reversal....65

CONCLUSION 70

TABLE OF AUTHORITIES

Cases **Page(s)**

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 26

Animal Legal Defense Fund v. Otter,
No. 1:14-CV-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015).....62

Blasiar, Inc. v. Fireman's Fund Ins. Co.,
76 Cal. App. 4th 748 (1999) 33

Branzburg v. Hayes,
408 U.S. 665 (1972).....62

Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 87 (1982).....41

Burton v. Sosinsky,
203 Cal. App. 3d 562 (1988) 34

Cafasso v. Gen. Dynamics C4 Sys.,
637 F.3d 1047 (9th Cir. 2011) 42, 65, 69

Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.,
2 Cal. 4th 342 (1992) 40

Cates Constr., Inc. v. Talbot Partners,
21 Cal. 4th 28 (1999) 34

CBS v. Davis,
510 U.S. 1315 (1994).....39

Coast Plaza Drs. Hosp. v. Blue Cross of Cal.,
83 Cal. App. 4th 677 (2000) 31, 32

Cohen v. Cowles,
501 U.S. 663 (1991).....26, 37, 39, 62

Cruz v. Int'l Collection Corp.,
673 F.3d 991 (9th Cir. 2012) 36, 43

Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Co. Sheriff Dep't,
533 F.3d 780 (9th Cir. 2008) 56

D.H. Overmeyer Co. v. Frick Co.,
405 U.S. 174 (1972).....23

Davies v. Grossmont,
930 F.2d 1390 (9th Cir. 1991) 40, 41

De Guere v. Universal City Studios,
56 Cal. App. 4th 482 (1997) 34

Diamond Multimedia Sys. Inc. v. Super. Ct.,
19 Cal. 4th 1036 (1999) 42

Dietemann v. Time, Inc.,
449 F.2d 245 (9th Cir. 1971) 26, 62

EPA v. Envt'l Waste Control, Inc.,
917 F.2d 327 (7th Cir. 1990) 59

Erie Telecomms., Inc. v. City of Erie,
853 F.2d 1084 (3d Cir. 1988) 37

Feldman v. Allstate Ins. Co.,
322 F.3d 660 (9th Cir. 2003) 47

Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.,
109 Cal. App. 4th 944 (2003) 31

Fuentes v. Shevin,
407 U.S. 67 (1972).....35

Gonzalez v. Carhart,
550 U.S. 124 (2007).....51, 52, 53, 54

Griffin v. Payne,
133 Cal. App. 363 (1933) 37

Griswold v. Conn.,
381 U.S. 479 (1965).....41

Hagberg v. Cal. Fed. Bank FSB,
32 Cal. 4th 350 (2004).....66

Hill v. Nat'l Collegiate Athletic Assn.,
7 Cal. 4th 1 (1994).....42

In re Beef Indus. Antitrust Litig.,
589 F.2d 786 (5th Cir. 1979).....68

In re CMP,
No. 15-17318 (9th Cir. Dec. 3, 2015).....21

In re CMP,
No. 15-72844 (9th Cir. Sep. 23, 2015).....21

In re JDS Uniphase Corp. Sec. Litig.,
238 F. Supp. 2d 1127 (N.D. Cal. 2002).....35

ITT Telecom Prod. Corp. v. Dooley,
214 Cal. App. 3d 307 (1989).....38, 66

J.H. Desnick v. Am. Broad. Cos.,
44 F.3d 1345 (7th Cir. 1995).....62

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1993).....passim

Lowry v. Barnhart,
329 F.3d 1019 (9th Cir. 2003).....63

McDonell v. Hunter,
746 F.2d 785 (8th Cir. 1984).....56

Med Laboratory Management Consultants v. ABC,
306 F.3d 806 (9th Cir. 2002).....62

Meyers v. Guarantee Sav. & Loan Assn.,
79 Cal. App. 3d 307 (1978).....34

Ohno v. Yasuma,
723 F.3d 984 (9th Cir. 2013) 37, 38

Perricone v. Perricone,
292 Conn. 187 (2009) 24, 37, 38

Peters v. United States,
853 F.2d 692 (9th Cir. 1988) 69

Pierce v. St. Vrain Valley Sch. Dist. RE-1J,
981 P.2d 600 (Colo. 1999).....38

Reichert v. Gen. Ins. Co. of Am.,
68 Cal. 2d 822 (1968) 28

Robinson Helicopter Co., Inc. v. Dana Corp.,
34 Cal. 4th 979 (2004) 43

San Antonio Community Hosp. v. S. Cal. Dist. Council of Carpenters,
125 F.3d 1230 (9th Cir. 1997) 56

Sanchez v. Cnty. of San Bernardino,
176 Cal. App. 4th 516 (2009) 33

Sanders v. Am. Broad. Cos.,
20 Cal. 4th 907 (1999) 47

Sellers v. Regents of the University of California,
432 F.2d 493 (9th Cir. 1970) 44

Shaw v. Regents,
58 Cal. App. 4th 44 (1997) 30

Shell Offshore, Inc. v. Greenpeace,
709 F.3d 1281 (9th Cir. 2013) 27

Shulman v. Grp. W Prods., Inc.,
18 Cal. 4th 200 (1998) 62

Small v. Avanti Health Sys. LLC,
661 F.3d 1180 (9th Cir. 2011) 58

Snepp v. United States,
444 U.S. 507 (1980).....37

Stenberg v. Carhart,
530 U.S. 914 (2000).....53, 54

Sterling v. Taylor,
40 Cal. 4th 757 (2007).....29

United States v. Schiff,
379 F.3d 621 (9th Cir. 2004).....27

Walsh v. Board of Administration,
4 Cal. App. 4th 682 (1992).....36

Wildmon v. Berwick Universal Pictures,
803 F. Supp. 1167 (N.D. Miss. 1992).....35

Williams v. Alabama,
341 F.2d 777 (5th Cir. 1965).....35

Winter v. NRDC,
555 U.S. 7 (2008).....58

STATUTES

18 U.S.C.
§ 248.....25, 42
§ 875(c).....19
§ 1531.....51
§ 1531(b).....52
§ 1964.....3
§ 2520.....3

28 U.S.C.
§ 1292(a)(1).....3
§ 1331.....3
§ 1332.....3
§ 1367.....3

42 U.S.C.
§ 289g-1(b)(2).....50
§ 289g-2(e).....48

Cal. Civ. Code
§ 1642 31
§ 3427 *et seq.* 25, 42

Cal. Govt. Code
§ 6215(a) 42
§ 6218 ..... 25, 42

Cal. Penal Code
§ 423 *et seq.* 25, 42
§ 632(d) 46

Md. Code Ann., Cts. & Jud. Proc.
§ 10-405 46

OTHER AUTHORITIES

Ted Anderson, *Why The Undercover Planned Parenthood Videos Aren't Journalism* 61

INTRODUCTION

Far from being "unprecedented" and a "radical departure from governing precedents," as defendants misleadingly claim, the district court properly applied binding Ninth Circuit and Supreme Court precedent in enjoining defendants from releasing information obtained in violation of express confidentiality agreements that specifically provided for injunctive relief. The district court correctly found that NAF "made a strong showing on all relevant points," a "strong showing of likelihood of success on the merits of its breach of contract claims," a "strong showing of irreparable injury" to it and its members, and that the "compelling" and "extraordinary circumstances" of this "exceptional case" warranted enjoining the defendants through trial. In so holding, the district court acted well within the bounds of its considerable discretion.

Defendants' arguments on appeal are all meritless and do not in any way undermine the soundness of the district court's order. They claim that they have a First Amendment "right" to infiltrate NAF's meetings, tape its members, and smear them. Defendants ignore that, as the district court found, they waived any such right by fraudulently entering into confidentiality agreements to gain access to NAF's meetings—*a finding that is not challenged on this appeal*. In claiming that the district court's order constitutes a "prior restraint," they further ignore an

overwhelming body of law holding that judicial enforcement of a contractual confidentiality obligation constitutes no such thing.

In arguing that NAF's agreements should be vitiated because of the "public interest" in disclosure of materials protected by those agreements, defendants next ignore the powerful public interests weighing against disclosure, including NAF's right to freedom of association, liberty, and privacy, as well as its members' right to be free from intimidation and physical violence. As the district court found, defendants' release of recordings has caused a dramatic, unprecedented spike in incidents of harassment, intimidation, and physical violence targeting NAF and its members, up to and including the murder of three people in an attack on a NAF-member clinic. As for defendants' claim concerning the "public interest" in disclosure, the district court correctly found that defendants repeatedly make "misleading assertions" and "misstate" the content of the enjoined materials in support of that claim. On this record, the balance is overwhelmingly in NAF's favor.

In sum, far from being "privileged" under the First Amendment, defendants' outrageous conspiracy to infiltrate NAF's meetings and place its members in harm's way is an attack on the constitutional rights of others, on the right of NAF and its members to liberty and free assembly, and on the constitutional rights of the women to whom they provide care. The district court's ruling should be affirmed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court exercised subject matter jurisdiction under 18 U.S.C. §§ 1964, 2520, and 28 U.S.C. §§ 1331, 1332, 1367.

STATEMENT OF THE ISSUE

Whether the district court acted within its discretion in issuing a preliminary injunction enforcing confidentiality agreements that expressly provided for injunctive relief and that defendants entered into in order to infiltrate NAF's meetings.

STATEMENT OF THE CASE

A. National Abortion Federation and Its Mission to Ensure Safe and Legal Access to Abortion Care

NAF is a not-for-profit professional association of abortion providers, with the mission of ensuring safe, legal, and accessible abortion care. (ER217.)[1] Its members include physicians, reproductive-rights advocates, private and non-profit clinics (including Planned Parenthood clinics), women's health centers, and hospitals. (*Id.*) NAF sets medical standards for abortion care and develops continuing medical education and training programs for abortion providers and other medical professionals. (*Id.*; ER16; SER269-325.)

[1] "ER" refers to the Excerpt of Record. "SER" refers to the Supplemental Excerpts of Record.

Since 1977, NAF has hosted annual meetings where it provides essential accredited continuing medical education and training related to abortion care. (ER219.) Approximately 700 to 850 abortion providers, researchers, and reproductive-rights advocates attend NAF's annual meetings, one of the only places where abortion providers can come together to learn about the latest research in the field and network with other professionals. (*Id*.) Venues for these critical services have become vanishingly rare. (SER248-66.)

One of NAF's most important roles is to assist its members in preventing and coping with harassment, intimidation, and violence perpetrated by anti-abortion extremists, who have waged an escalating campaign against abortion providers for decades. (ER217-18.) As the district court noted, there have been over 60,000 recorded instances of harassment, intimidation, and violence against abortion providers in the last 30 years, including murders, shootings, arsons, bombings, chemical and acid attacks, bioterrorism threats, kidnappings, death threats, and other forms of violence. (ER17; SER1044.) NAF's own office was bombed in 1984, along with several member clinics. (ER218.) Its members have been relentlessly stalked, threatened, and intimidated. (ER218, 220-21.) They have been picketed at their homes, churches, and their children's schools. (*Id*.)

As a result, many NAF members go to great lengths to preserve their privacy and identity. (ER220-21.) Some member clinics have security protocols in place

to protect the identities of their staff, which may entail not having doctors enter the building wearing scrubs, driving a different way to the clinic each day, or wearing disguises when entering and exiting facilities. (*Id.*) Some NAF members wear bulletproof vests to work. (*Id.*) Others try to remain under the radar in their communities, and do not speak publicly about their work out of fear for their personal safety or the safety of their families. (*Id.*; SER192-94.)

In light of this awful reality, NAF has been forced to adopt extensive security measures to ensure the safety and security of its annual meetings and attendees. (ER219-21; SER1100-02.) Each year, NAF's full-time security staff helps select a venue that meets NAF's strict security guidelines. (SER1100.) Security staff meet with hotel staff, local police officials, FBI and/or ATF agents, and fire-and-rescue personnel to review security issues and potential threats. (SER1100-01.) Security staff arrive before each meeting to set up the security team, put in place protocols, and finalize the K-9 teams. (SER1101.) During the meetings, they are available on a 24/7 basis for any issues that occur. (*Id.*) Security officers stand posted at strategic locations throughout the meeting areas and outside entrances to meeting rooms. (*Id.*) Bomb-sniffing dogs patrol the meeting venue. (*Id.*) Attendees and staff must wear security badges to enter meeting spaces, and are advised to remove them when leaving the meeting areas. (*Id.*)

NAF also seeks to ensure that its meeting dates and locations are not publicly known. (SER1100.) All emails about the conferences remind recipients: "Please be mindful of security concerns and do not forward this email or share information about NAF meetings." (*Id.*)

After a group called "Life Dynamics" offered bounties to infiltrate NAF's meetings in the 1990s, NAF was forced to begin requiring all attendees to sign confidentiality agreements before gaining entry to its meetings. (ER220.)

First, NAF requires exhibitors at NAF's annual meetings to sign Exhibitor Agreements ("EAs"), in which exhibitors promise to hold "in trust and confidence any confidential information received in the course of exhibiting" at NAF's meeting. (*E.g.*, ER123 ¶¶1-2, 15, 19, & Sig. Line.) By executing an EA, exhibitors (1) represent that they have a legitimate business interest in reaching reproductive-health-care professionals (*id.* ¶¶1-2); (2) agree to identify their businesses "truthfully" and "accurately" (*id.* ¶¶15, 19); and (3) promise to keep "any information which is disclosed orally or visually" to exhibitors "confidential" on penalty of "civil and/or criminal penalties" (*id.* ¶¶17-18, & Sig. Line). The EAs provide that any breach may be remedied by "injunctive relief." (*Id.* ¶18.)

Second, NAF requires all meeting attendees to present valid identification and sign Nondisclosure Agreements ("NDAs," and collectively with EAs, "Agreements") before being admitted to NAF's meetings. (*E.g.*, ER127; ER220;

SER1101.) Under the NDAs, all meeting attendees promise not to (1) make any "video, audio, photographic, or other recordings of the meetings or discussions" at the conference (ER127 ¶1); (2) use any information "distributed or otherwise made available" at the conference in any manner inconsistent with NAF's purpose, *i.e.*, "to help enhance the quality and safety of services provided by NAF members and other participants" (*id.* ¶2); and (3) disclose any NAF conference information without NAF's consent (*id.* ¶3).

These Agreements, with the other security measures described above, give NAF members and meeting attendees confidence that NAF's meetings are private, and that their identities and conversations will not be made public to violent extremists. (ER386; SER1090; SER1094; [redacted].)

B. The "Center for Medical Progress" and the Individuals Behind It

Defendants founded CMP in 2013. (SER629.) In order to obtain tax-exempt status, defendants certified in CMP's registration with the California Attorney General and its application to the IRS that CMP is a "nonprofit," that "[n]o substantial part of [its] activities . . . shall consist of carrying on propaganda, or otherwise attempting to influence legislation," and that CMP would "not participate or intervene in any political campaign." (SER631; SER653; SER684.) In reality, CMP is a [redacted] for partisans with one aim: "[C]ompletely destroy the entity called Planned Parenthood," by, among other things, [redacted]

[redacted] (SER119; [redacted]; SER693-94; CD2[2]; SER715; CD3; *compare* SER686 *with* SER690.)

CMP's co-founder, Troy Newman, is the president of Operation Rescue, an anti-abortion group with a long history of surreptitiously taping abortion providers. (SER721; SER739-43; SER748-49.) Newman advocates publicly identifying abortion providers through websites like "AbortionDocs.org" (run by Operation Rescue) to stigmatize and intimidate them. (SER744; SER752; SER754.) He has written that the "responsibility" of the United States is to "execut[e] . . . abortionists[] for their crimes in order to expunge bloodguilt from the land and people." (SER758.) While defendants now claim that Newman had "minimal involvement" with CMP (Defs.' Br. at 5), Newman has repeatedly touted his role as an "advisor" and "consultant" from "the very beginning." (SER693-94; CD2; SER715; CD3.)

CMP's CEO, David Daleiden[redacted] CMP's Agent for Service of Process, Catherine Short, refers to Planned Parenthood physicians as "contract

[2] NAF has submitted four CDs containing audio/video evidence, cited herein as CD1-CD4. Specific files on CD1 are cited as CD1(A)-CD1(O).

killers," and has "been with the project from its inception." (SER760; SER763; [redacted] ER4-5 n.4.)

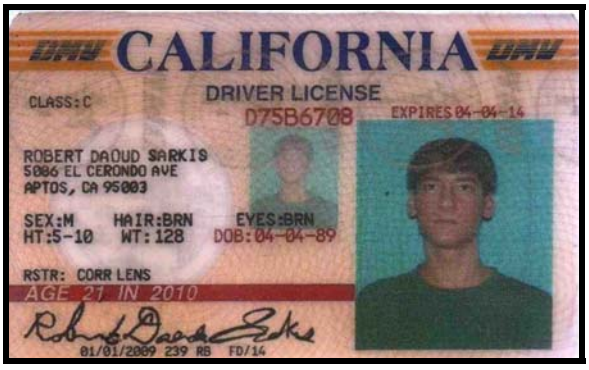
C. Defendants' "[redacted]" to Infiltrate NAF's Meetings

[redacted] (SER1122; SER766; SER768; SER1049.) According to its fake website (now locked), Biomax "provides tissue and specimen procurement for academic and private bioscience researchers." (SER768; SER412; SER244.)

[redacted] "Brianna Allen," "assistant" to fake Biomax CEO "Susan Tennenbaum"—sent NAF emails inquiring about exhibitor space at NAF's upcoming 2014 conference in San Francisco. (ER683-ER714;

[redacted].) NAF's staff provided the EA to "Allen." (ER686.) The fake "Allen" returned the EA, signed with the fake name "Susan Tennenbaum." (ER123; ER690.)

[redacted]



(SER419-21; [redacted].)

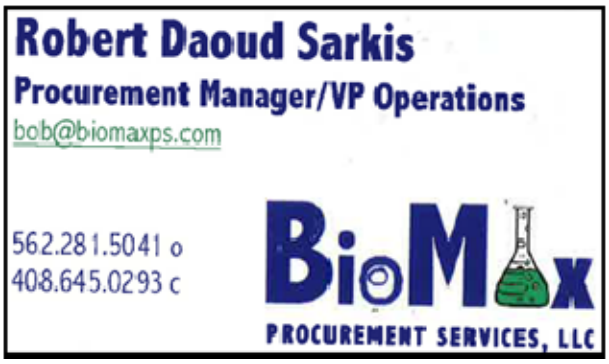
"Sarkis" and "Tennenbaum" also signed NDAs to access the meeting. (ER127; SER622.) [redacted]

[redacted]

Once inside NAF's meetings, Biomax's agents set up an exhibit table replete with signage advertising its fake "business":

[3] Defendants also infiltrated NAF's 2015 meeting in Baltimore, Maryland, after again sending fraudulent emails to NAF (ER711-14; SER414-17) [redacted] Another Biomax agent, "Adrian Lopez," signed an NDA for the 2015 meeting. (SER626.)

(SER1052; SER242.) They also mingled with NAF members—including some of the highest-profile targets of anti-abortion extremists—using false names and handing out fake business cards:

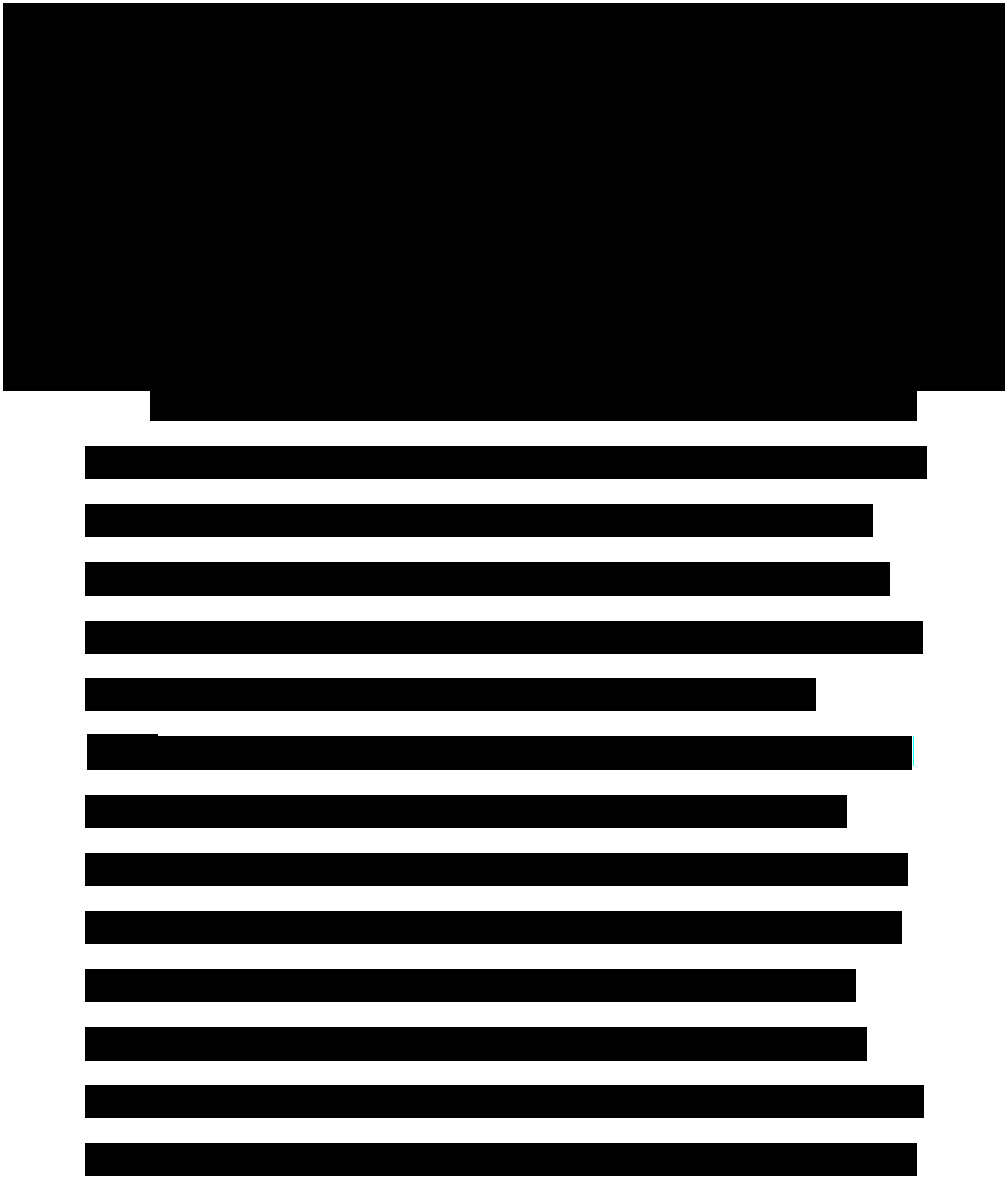


(SER423; *see also* SER425-27.)

The Biomax agents secretly hid recording devices on their persons—in purses, water bottles, ties, glasses, and even shirt buttons. (SER428-67; [redacted]

Biomax's agents secretly recorded 257 hours, 49 minutes of material at NAF's 2014 meeting and 246 hours, 3 minutes at NAF's 2015 meeting—totaling nearly 504 hours. (ER654.) This videotaping campaign was sweeping, indiscriminate, and without regard to subject matter. They taped discussions concerning [redacted]

The videos also show [redacted] also took USB drives containing sensitive NAF meeting materials, [redacted] (SER469; [redacted]; ER654.)



[redacted]

As the district court found, many recordings "show an express rejection of Daleiden's and his associates' proposals." (ER13.) [redacted]

[redacted]

D. Defendants Follow Up With [redacted] After NAF's Meetings

After the 2014 meeting, defendants followed up with the [redacted] they met at NAF's meetings. (SER1122-23; SER1214-1225; SER477-78; [redacted]) Daleiden (still posing as "Sarkis"), sent emails with titles like "Nice meeting you at NAF!" and "Hi from NAF!" (SER1215-17; SER477; [redacted] (SER1122.) In one tape, Daleiden boasted that his "[redacted]" "totally like are willing to do this because like we've been at NAF. Like, we're so vetted and so like." (ER656; CD4.)

E. Defendants Begin Releasing Surreptitiously Recorded Videotapes

On July 14, 2015, defendants began releasing secretly recorded videotapes of their follow-up meetings with abortion providers. (SER471-74; SER487-90; SER494-522.)

The first target was Dr. Nucatola. [redacted]

[redacted] The highly edited video's release was accompanied by accusations on CMP's website that Dr. Nucatola was selling "baby parts." (SER472-74.) Although defendants edited the video to make it appear as though Dr. Nucatola was discussing "selling" fetal tissue, Dr. Nucatola actually told Daleiden that "nobody should be selling tissue. That's just not the goal here." (ER162.) But this statement and ten other similar statements were cut from the video that defendants released. (SER135, 149-50, 153-54, 162, 176, 180-82.)

Within hours of the posting, inflammatory and threatening comments—including death threats—proliferated against Dr. Nucatola. (*E.g.*, ER83-86; SER1086.) One person offered: "I'll pay ten large to whomever kills Dr. Deborah Nucatola. Anyone. Go for it." (ER222; *see also* SER571.) That person followed up with: "Doctor Deborah Nucatola should be summarily executed. I'll do it myself if no one else does." (SER464.)

One week later, defendants went after Drs. Mary Gatter and Savita Ginde, releasing edited videos falsely portraying them as sellers of fetal tissue. (SER494-507.) Defendants released a video of Dr. Gatter that edited out her explanation that tissue donation was not about profit but "about people wanting to see something good come out" of their situations, "they want to see a silver lining . . . ."

(SER589.) Defendants manipulated dialogue to make it sound like Dr. Ginde said words ("it's a baby") that she never said. (ER77-78; SER538.)

Predictably, defendants' publication triggered another hate campaign against these physicians. Dr. Gatter was called a "baby butcher," "evil," and "a vicious demonic force" who deserves "no mercy" and "the hangman's noose." (SER1065.) One commenter threatened: "FILTHY OLD ROACH!!!!! PLANNED PARENTHOOD NEEDS TO BE BLOWN INTO HELL!!!!!" (ER94.) A group of fifty individuals papered Dr. Ginde's neighborhood with fliers saying, "Savita Ginde Murders Children," and hoisted signs outside her home saying, "Planned Parenthood sells baby parts." (SER591-94.) Comments on CMP's YouTube page featuring Dr. Ginde read: "They need to be executed!!!!!!!!!!" and "Abortionists deserve death, just like any murderer!" (SER601-02.) Another commenter stated: "I really hope it gets bombed and every abortion supporter gets publicly lynched by lynch mobs." (SER605.) And another: "they need to be rounded up and executed because they are vile subhuman cockroaches." (SER604.)

Newman's organization posted the surreptitiously recorded videos of Dr. Ginde alongside the map and address for her Colorado clinic. (SER196.) On November 27, 2015, a gunman attacked that clinic, murdering three people, including a police officer. (ER50.) After his capture, the murderer parroted the

precise words that defendants used to publicize their video campaign: "no more baby parts." (*Id.*; ER15.)

A similar pattern occurred after defendants released edited video of StemExpress CEO Cate Dyer. After the release, one commenter promised to "be out in front of your bloody business Cate. [This] county does not need you and your ilk." (SER608.) One individual called Ms. Dyer "a death-profiteer" who "should be hung by the neck using piano wire and propped up on the lawn in front of the building with a note attached . . . ." (ER222.) The individual identified where Ms. Dyer lived and stated: "I'm going there . . . I'll pay ten grand to whomever beats me to [her] . . . [She] must die to save the innocents." (*Id.*) The individual behind these posts pleaded guilty in federal district court to making threats in violation of 18 U.S.C. § 875(c).[4]

As the district court found, defendants' conduct "directly led to a significant increase in harassment, threats and violence *not only* at the 'targets' of defendants' videos but also at NAF and its members more generally." (ER36 (emphasis added).) [redacted]

[4] Plea Agreement, *United States v. Orton*, No. 15-00233, Dkt. No. 27 (E.D. Cal. Apr. 19, 2016). (SER57-58.)

[redacted] The FBI reported an uptick in attacks on reproductive-healthcare facilities by "the pro-life extremist movement" (ER96-97), and NAF's security staff observed a sharp increase in its members' "off hour" requests for security (SER1102). Unrebutted evidence demonstrates a "dramatic increase" in harassment, and "the volume of hate speech and threats are nothing . . . seen in 20 years." (ER369, 375.) There have been multiple arsons at abortion-care facilities. (SER221-30.) NAF has significantly increased its security staff in general, as well as the security safeguards at its national and regional meetings. (SER1102; ER374-75.) NAF has also changed how it communicates with its members, significantly limiting invitations to its meetings. (ER383.)

Meanwhile, defendants stand ready to compound this damage. Daleiden told the district court that he "continues to work on the Human Capital Project, including the work of curating available raw investigative materials . . . for release of videos to the public." (SER792.) Newman says that "this is just the beginning . . . at a time of our choosing, we will release more damning evidence of illegal, ghastly and repugnant butchery." (SER238.)

In the wake of defendants' campaign, nine states have opened and closed investigations, finding no evidence of wrongdoing by Planned Parenthood, while eleven other states have publicly refused to pursue any investigations based on defendants' false accusations. (SER326-377; SER406-08.) A grand jury in Harris

County, Texas, indicted Daleiden and "Tennenbaum" for their use of false government documents to access Planned Parenthood facilities. (ER6-7 n.6; SER16.) Daleiden was separately indicted for offering to purchase fetal tissue for profit. (ER6-7 n.6; SER16.)

F. Proceedings in the District Court

NAF sued defendants on July 31, 2015, alleging (*inter alia*) breach of the EAs and NDAs. NAF sought a temporary restraining order enjoining defendants from releasing recordings or confidential information learned at NAF's meetings. The district court issued the TRO. (SER1040-42; SER1012-14; SER1215-24.) Defendants agreed to extend the TRO and the preliminary injunction hearing "to allow the parties more time to engage in discovery." (SER1007-11.)

Rather than engage in discovery, defendants tried every gambit to prevent discovery into their conduct, [redacted], and filing two unsuccessful mandamus petitions in this Court. This Court denied both petitions, holding that discovery was "essential" to answer "questions regarding whether defendants entered into a confidentiality and waiver agreement and what that agreement covers." *In re CMP*, No. 15-72844 (9th Cir. Sep. 23, 2015); *In re CMP*, No. 15-17318 (9th Cir. Dec. 3, 2015) (denying second mandamus petition to block discovery of identities of individuals "intimately involved in the planning and funding of defendants'

alleged conspiracy"). The district court described defendants' litigation tactics as a "shell game" and an improper "attempt to hide the ball." (SER212, 216.)

After limited discovery, NAF moved for a preliminary injunction. The district court held that NAF made a "compelling" showing and that the "exceptional circumstances" of this case merited "the continuation of injunctive relief pending final resolution of this case." (ER2, ER20.) The court thus issued a preliminary injunction barring defendants from "publishing or otherwise disclosing to any third party [1] any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings; [2] . . . the dates or locations of any future NAF meetings; and [3] . . . the names or addresses of any NAF members learned at any NAF annual meetings." (ER42.)

Applying settled precedent, the district court held that (1) defendants breached NAF's Agreements; (2) defendants waived their First Amendment "right" to publish information obtained in violation of those Agreements; (3) the balance of the public policy interests weighs "strongly" in favor of enforcing those Agreements; (4) NAF made a "strong showing of irreparable injury" based on unrebutted evidence that defendants' unlawful conduct "directly led to a significant increase" in harassment, death threats, and violence directed at NAF and its members; and (5) the balance of equities and public interest clearly favored an injunction.

SUMMARY OF ARGUMENT

The district court acted well within its discretion in preliminarily enjoining defendants from releasing information they obtained in violation of express confidentiality agreements that specifically provided for injunctive relief.

First, the district court correctly held that NAF "demonstrated a strong likelihood of success on its breach of contract claims." (ER26.) Specifically, the district court correctly found that the Agreements defendants executed to gain access to NAF's meetings were valid, enforceable, and supported by consideration. (ER20-25.) Defendants breached these Agreements, which unambiguously cover all 504 hours of the material recorded at NAF's meetings. (ER25-26, ER34-35.) Defendants offer no serious argument to the contrary.

Having concluded the Agreements were valid and enforceable, the district court then held that NAF had presented clear and convincing evidence that defendants waived their First Amendment "right" to publish information stolen at NAF's meetings. (ER27-29.) This ruling is based on undisputed facts, properly applied binding precedent, and is not challenged on appeal. *See*, *e.g.*, *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) ("First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent."); *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 184-85 (1972) ("It is acknowledged . . . that . . . in a context of 'contract waiver,' . . . parties to a

contract may agree in advance" to "intentional[ly] relinquish[] or abandon[] . . . a known right or privilege.") (quotation omitted).

Ignoring the applicable law, defendants instead misleadingly recast the district court's order as a "prior restraint." Defendants have not and cannot cite any case that has ever held that judicial enforcement of contractual promises constitutes a "prior restraint." No such case exists. *Perricone v. Perricone*, 292 Conn. 187, 202 (2009) ("The defendant has not cited, however, and our research has not revealed, a single case in which a Court has held that a judicial restraining order that enforces an agreement restricting speech between private parties constitutes a . . . prior restraint[] on speech.").

Again applying settled Ninth Circuit law, *Leonard*, 12 F.3d at 890-91, the district court carefully balanced the interests for and against enforcing NAF's Agreements, and concluded that public policy interests weigh "strongly in NAF's favor." (ER3.) Overwhelming and unrebutted evidence supports this conclusion. The district court found that NAF's Agreements were "absolutely necessary" to protecting the rights of freedom of association, liberty, and privacy of NAF and its members. (ER32.) Absent enforcement, NAF's members would face threats, intimidation, harassment, and physical violence, contravening the interests embodied in state and federal statutes enacted to protect abortion providers. *See*,

e.g., Cal. Govt. Code § 6218; Cal. Civ. Code § 3427 *et seq.*; Cal. Penal Code § 423 *et seq.*; 18 U.S.C. § 248.

The district court also carefully weighed defendants' right to speak on matters of public interest, and found that defendants overstated this interest by repeatedly "misstat[ing] the conversations that occurred or omit[ting] the context of those statements," and that there was "no evidence" that NAF's meeting attendees engaged in "any wrongdoing." (ER9, 11.) After reviewing them in detail, the district court correctly found that "the majority of the recordings lack any sort of public interest," and that "there is little that is new in the remainder." (ER3.) On this record, the balance of interests is not even close.

Second, the district court correctly concluded that NAF made a "strong showing" that it and its members would suffer irreparable injury absent an injunction. (ER38.) Defendants' release of surreptitious videotapes to date has "directly led to a significant increase in harassment, threats and violence not only at the 'targets' of defendants' videos but also at NAF and its members more generally," including the murder of three individuals at a NAF member clinic in Colorado. (ER36-37 & n.42.)

Third, the district court correctly balanced the hardships and considered the public interest in holding that an injunction was warranted in the circumstances of this "exceptional case." (ER39.) Defendants incorrectly claim that the district

court ignored factors it expressly took into account, and that the findings of fact underlying its conclusions were "clearly erroneous." (Defs. Br. at 56.) The opposite is true. For example, defendants' claim that their conduct is privileged under the law because they are "journalists" is absurd *ipse dixit*; as the district court correctly noted, defendants "provide no evidence to support" this claim. (ER39.) It is also foreclosed by binding precedent. *See, e.g.*, *Cohen v. Cowles*, 501 U.S. 663, 672 (1991) ("the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.").

The district court's entry of the preliminary injunction should be affirmed.

STANDARD OF REVIEW

In entering its preliminary injunction, the district court applied the traditional four-factor test for injunctive relief: (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) balance of hardships, and (4) the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

This Court reviews the application of these standards for "abuse of discretion." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004). "A trial court abuses its discretion if it bases its decision on an erroneous legal standard or on clearly erroneous factual findings." *Id.* (quotation omitted). This review "is limited and deferential," and the district court "will not be reversed simply because the appellate court would have arrived at a different result." *Shell Offshore, Inc. v. Greenpeace*, Inc., 709 F.3d 1281, 1286 (9th Cir. 2013) (citations omitted).

Citing out-of-circuit precedent, defendants claim that in cases involving "a prior restraint on pure speech," the "hurdle is substantially higher" and the enjoined publication "must threaten an interest more fundamental than the First Amendment itself." (Defs.' Br. 15 (citing *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996)).) This is incorrect. *Proctor & Gamble* did not address the legal issue presented here—whether to enforce contractual promises—and no case has ever held that an injunction enforcing such promises constitutes a "prior restraint on pure speech." Rather, the applicable substantive standard is derived from *Leonard*, in which this Court held that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent," and that courts should enforce such waivers if the balance of public policy interests weigh in favor of enforcement. 12 F.3d at

889. Under *Leonard*, "a stricter test" does *not* apply merely because defendants assert "a constitutional right" against enforcement. *Id*. at 891 n.9.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING DEFENDANTS FROM RELEASING INFORMATION OBTAINED IN VIOLATION OF THEIR CONTRACTUAL PROMISES

A. NAF Has a "Strong Likelihood" of Success on Its Breach-of-Contract Claims

1. Defendants Unquestionably Breached NAF's Agreements

To succeed on its breach-of-contract claim, NAF must prove: (1) the existence of a contract, (2) plaintiff performed or is excused for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *See Reichert v. Gen. Ins. Co. of Am*., 68 Cal. 2d 822, 830 (1968). Applying settled law, the district court correctly found that NAF has "a strong likelihood of success on its breach of contract claims." (ER35.)

As an initial matter, the facts underlying the district court's holding are undisputed. Defendants mounted an extraordinary campaign to infiltrate NAF's meetings under false pretenses and tape its members. Defendants set up "a phony corporation," "secured false identification," used fake names, set up a fake website, sent fake emails, and knowingly signed confidentiality agreements they had no intention of honoring—all to bypass NAF's security measures, infiltrate its meetings, and surreptitiously record its members. (*Supra*, pp.9-16.) Once inside,

they set up a booth for their [redacted]" with fake signage, handed out fake business cards, misrepresented themselves to NAF and its members, taped everything they saw and heard without regard to subject matter, and attempted to entrap NAF's members. (*Id.*)

Defendants do not dispute that they breached NAF's Agreements. By agreeing to the EAs, defendants affirmed that all of their correspondence to NAF, and all of their advertisements and displays used at NAF's meetings, would be "truthful, accurate, complete, and not misleading." (ER123 ¶ 19.) They promised to represent their business "truthfully" and "accurately." (*Id.* ¶ 15.) They agreed to maintain in confidence "any information which is disclosed orally or visually" and "to hold in trust and confidence any confidential information learned in the course of exhibiting at the NAF Annual Meeting." (*Id.* ¶ 17 & Sig. Line.) In entering into the NDAs,[5] defendants further agreed that "videotaping or other recording [was] prohibited," that they would only use information learned at NAF's meetings "to help enhance the quality and safety of services provided by NAF members and other participants," and to hold in trust and confidence "any"

[5] Defendants do not challenge on appeal the district court's findings that the NDA signed by their agent, "Lopez," to access NAF's 2015 meeting is enforceable against them. (ER21-22.) *Sterling v. Taylor*, 40 Cal. 4th 757, 773 (2007) ("A contract made in the name of an agent may be enforced against an undisclosed principal").

information learned at NAF's meetings. (ER127 ¶¶1-3.) Defendants breached each and every one of these promises, and threaten to violate their confidentiality obligations if not enjoined. (SER238; SER792.)

2. Defendants' Arguments Regarding the Enforceability and Scope of NAF's Agreements Are Meritless

Rather than challenge the district court's finding of breach, defendants offer up a hodge-podge of unsupported arguments attacking the validity and scope of their confidentiality obligations. Applying settled law, the district court correctly rejected these arguments.

First, defendants incorrectly argue that the NDAs are not supported by consideration because the EAs gave them the legal right to access NAF's meetings. (Defs.' Br. 42). The EAs state in plain English that, as a condition of entry, all exhibitors "must be registered" for NAF's meeting, and must "fully comply" with all of NAF's "rules and regulations." (ER123 ¶¶ 8, 9.) One of NAF's rules is that, to "be registered," "all people attending its conferences" must sign an NDA. (ER127.) Executing and complying with an NDA was therefore a condition of access to the meetings.[6]

[6] Without explanation, defendants cite *Shaw v. Regents*, 58 Cal. App. 4th 44, 54 (1997), which concerns requirements for incorporating terms into a contract by reference. Defendants signed and committed to both the EAs and the NDAs. Neither agreement needs to be "incorporated" into the other, so defendants' citation is inapposite.

Second, defendants claim that both the EAs and the NDAs apply "only to a small subset of the NAF Materials—information provided by NAF in formal presentations" and "not to informal conversations with conference attendees." (Defs.' Br. 39-44.) This argument, as the district court found, "ignores" the plain language of the Agreements. (ER25.)

Taken together or separately,[7] the Agreements imposed intentionally broad confidentiality obligations on defendants which unambiguously covers "any" and "all" information shared at NAF's meetings. "In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties." *Coast Plaza Drs. Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 684 (2000). And "[a]n interpretation rendering contract language nugatory or inoperative is disfavored." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 957 (2003).

In the EAs, defendants agreed to maintain in confidence "*any* information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee," and that "*all* information is confidential and should not be disclosed to

[7] Cal. Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.")

any other individual or third parties." (ER123 (emphasis added).) This promise is reiterated immediately above the signature block, where defendants again "agree[d] to hold in trust and confidence *any* confidential information received in the course of exhibiting at the NAF Annual Meeting and agree[d] not to produce or disclose confidential information without express permission from NAF." (ER123 (emphasis added).) Defendants further agreed that NAF would be entitled to "specific performance and injunctive relief" for "any breach." (ER123.)

The NDAs are equally broad. They expressly prohibit "videotaping or other recording," and stated that "*all* information distributed or otherwise made available at this conference *by NAF or any conference participants* through *all written materials, discussions, workshops, or other means*," was confidential and "not [to be] disclose[d] . . . to third parties." (ER127 (emphasis added).) Contrary to the post-hoc arguments they now make, defendants clearly understood that these promises had a broad sweep at the time they were made. [redacted]

Courts recognize that the term "any" is "both clear and plain" and "also very broad," *Coast Plaza*, 83 Cal. App. 4th at 684 (citing *Bank of the West v. Super Ct.*,

2 Cal. 4th 1254, 1264 (1992), and routinely enforce confidentiality agreements broader than this to protect important privacy interests. *See, e.g.*, *Sanchez v. Cnty. of San Bernardino*, 176 Cal. App. 4th 516, 518, 527 (2009) (upholding agreement prohibiting disclosure of all "facts, events and issues which gave rise to this Agreement" because the "broad, general public policy in favor of privacy" favored enforcement). Defendants' self-serving interpretation of the Agreements would read this critical language out of the contracts.

Third, defendants argue that the district court's interpretation would lead to "absurd results." (Defs.' Br. 45.) This is an abbreviated version of the cynical argument defendants made below, that the agreements could "hamper a doctor's ability to provide appropriate, timely care, if he cannot communicate the best course of treatment for a patient" without first obtaining NAF's consent to use information learned at its meetings. (SER1169.) This hypothetical "absurdity" has no application to the facts of this case. "[L]anguage in a contract must be interpreted . . . in the circumstances of that case, and cannot be found to be ambiguous in the abstract." *Blasiar, Inc. v. Fireman's Fund Ins. Co.*, 76 Cal. App. 4th 748, 754-55 (1999) (refusing to interpret contract based on "hypothetical ambiguity unrelated to the facts of this case").

Moreover, it is *defendants*' parsimonious interpretation of NAF's Agreements that would lead to an "absurd" result, and defeat the entire purpose of

the Agreements, *i.e.*, to prevent precisely this type of infiltration of NAF's meetings. Contracts must "be fairly construed with a view to effect the object for which it was given and to accomplish the purpose for which it was designed." *Cates Constr., Inc. v. Talbot Partners*, 21 Cal. 4th 28, 39 (1999). Defendants' interpretation of NAF's Agreements would render it and its members helpless to prevent future partisan attacks of precisely the kind at issue in this case.

Fourth, defendants argue that the NDAs and EAs must be "construed narrowly" because they involve "waivers of First Amendment rights" and are "standard-form adhesion contracts." This argument presupposes that there is an ambiguity in the Agreements to construe. As the district court concluded, "[t]here is no ambiguity concerning the meaning of the EA or [NDA] with respect to defendants' conduct here." (ER25 n.29.) There is therefore no need to "construe" them, except according to their plain language. *Meyers v. Guarantee Sav. & Loan Assn.*, 79 Cal. App. 3d 307, 312 (1978) (characterizing a contract as "an adhesion contract" is "of no avail" where the defendant "read and understood" the contract). Besides, CMP cannot enter into a contract in bad faith, then appeal to this Court's equitable discretion for leniency in the application if its plain terms. *See De Guere v. Universal City Studios*, 56 Cal. App. 4th 482, 501 (1997) (whether a contract is one of adhesion is an "equitable issue[]"); *Burton v. Sosinsky*, 203 Cal. App. 3d

562, 573 (1988) ("a court will neither aid in the commission of a fraud, nor relieve one of the two parties to a fraud from its consequences").

Indeed, the non-California cases that defendants use to argue that waivers should be construed "narrowly" discuss inferring waiver from conduct, or from contracts that "included nothing about" the waiver of the particular rights at issue. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (contracting party did not waive hearing rights because the "contracts included nothing about the waiver of a prior hearing"); *Williams v. Alabama*, 341 F.2d 777 (5th Cir. 1965) (by refusing services of particular counsel at trial, criminal defendant did not waive right to counsel during earlier arraignment). The district court correctly and thoroughly distinguished the remaining authorities cited by defendants for this point. (ER24 (distinguishing *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1178 (N.D. Miss. 1992), and *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002)).)

Fifth, as to the EAs, defendants argue that their promise not to represent themselves falsely to NAF cannot support an award of injunctive relief because that provision only allows NAF to cancel the agreement in the event of a breach. (Defs.' Br. 46-47.) As the district court correctly found, this argument wholly "ignore[s] paragraphs 18 and 19, which provide that if there is a breach of the EA, NAF is entitled to seek specific performance, injunctive relief and "all other

remedies available at law or equity." (ER23.) The lone case cited by defendants to support their argument, *Walsh v. Board of Administration*, 4 Cal. App. 4th 682, 712 (1992), dealt with the constitutionality of the California Legislators' Retirement Law. It has nothing to do with contractual remedies or contract interpretation.

3. The District Court's Holding That Defendants Waived Their First Amendment Rights Is Not Challenged on Appeal

Having found that the Agreements were enforceable and unambiguously covered defendants' unlawful videotaping campaign, the district court, applying settled law, held that defendants waived any "right" to publish information obtained in violation of their plain terms. (ER27-29.) Defendants do not contest this finding on appeal, and any such argument is now waived. *See Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012).

Undisputed evidence supports the district court's holding. [redacted] (*Supra*, pp.9-11.) Any argument that this conduct was not a knowing, intelligent, and voluntary waiver would therefore fly in the face of settled law. *See, e.g.*, *Leonard*, 12 F.3d at 890 ("The fact that the Union informed the City of its view that Article V was 'unconstitutional, illegal,

and unenforceable' does not make the Union's execution of the agreement any less voluntary."); *Griffin v. Payne*, 133 Cal. App. 363, 373 (1933) ("A secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, cannot enable such party to avoid the contract and escape his liability under its terms.").

Courts have uniformly held that knowingly entering into a confidentiality agreement results in a valid waiver of First Amendment rights. *Cohen*, 501 U.S. at 672 ("the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law"); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (dismissing in a footnote as meritless the argument that "a voluntarily signed . . . agreement that expressly obligated [defendant] to submit any proposed publication for prior review" was "unenforceable as a prior restraint on protected speech").

The cases on point are legion. *See, e.g.*, *Ohno v. Yasuma*, 723 F.3d 984, 999 & n.16 (9th Cir. 2013) (collecting cases that "enforce restrictions on speech arising from domestic contracts that could not have been enacted into law due to the First Amendment"); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988) ("we know of no doctrine [and are aware of] no case law, providing a . . . rule that . . . first amendment claims may not be waived"); *Perricone*, 292 Conn. at 202 ("private parties who voluntarily enter into an agreement to restrict their own

speech thereby waive their first amendment rights"); *ITT Telecom Prod. Corp. v. Dooley*, 214 Cal. App. 3d 307, 317, 319 (1989) (parties waive "First Amendment free speech rights by contract" by entering into "an express contract of confidentiality or nondisclosure"); *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999) ("Enforcement of [an] agreement does not violate the First Amendment, but merely applies the law of contract . . . , which 'simply requires those making promises to keep them.'").

Accordingly, defendants' repeated mantra that the district court's order is an unconstitutional "prior restraint" is a deceptive exercise in misdirection, and has been soundly rejected by every court to have considered this issue. *Perricone*, 292 Conn. at 204 (noting absence of "a single case in which a court has held that a judicial restraining order that enforces an agreement restricting speech between private parties constitutes a . . . prior restraint[] on speech"). Indeed, courts have even held that enforcement of contractual speech restrictions does not involve "state action" that would trigger any First Amendment scrutiny. *Ohno*, 723 F.3d 998-99 ("In the context of First Amendment challenges to speech-restrictive provisions in private agreements . . . judicial enforcement of terms that could not be enacted by the government has not ordinarily been considered state action.").

Not one of defendants' "prior restraint" cases (Defs.' Br. 15-19) involved confidentiality agreements or contractual promises.[8] Instead, defendants simply string together quotes—most of which are pure dicta—from cases that do not involve express promises of confidentiality and have no application here. For example, defendants cite *CBS v. Davis* for the proposition that NAF's only remedy for defendants' contractual breaches is "through a damages proceeding rather than through suppression of protected speech." (Defs.' Br. 17 (citing 510 U.S. 1315, 1318 (1994)).) The case does not remotely support that proposition. Neither party in *CBS* was subject to contractual promises, and Justice Blackmun did not even discuss, much less disturb, the Supreme Court's holding in *Cohen* that the First Amendment is not implicated where "[t]he parties themselves . . . determine the scope of their legal obligations" and therefore "any restrictions that may be placed on the publication of truthful information are self-imposed." 501 U.S. at 671. Moreover, the record in *CBS* "contain[ed] no clear evidence of criminal activity on the part of CBS." 501 U.S. at 1318. The opposite is true here. (*Supra*, pp.9-16.) *CBS* has no application whatsoever to the extraordinary facts of this case.

[8] The same is true for the amicus curiae brief filed by eleven First Amendment scholars in support of neither party. (Ninth Cir. Dkt. No. 31.) None of the cases cited in that brief involved confidentiality agreements or waivers of constitutional rights. That brief does not even *attempt* to address the district court's finding that defendants waived their constitutional rights.

The district court's injunction is emphatically *not* a prior restraint on speech, because the defendants in this case fraudulently, but voluntarily, agreed to restrain themselves.

4. Public Policy Considerations Strongly Favor Enforcement of NAF's Agreements

Again applying settled Ninth Circuit and Supreme Court law, the district court carefully weighed the public policy for and against enforcement of NAF's Agreements, and held that "[t]he balance is strongly in NAF's favor." (ER3.) *Davies v. Grossmont*, 930 F.2d 1390, 1396 (9th Cir. 1991) (courts enforce waivers of First Amendment rights "if the interest in enforcement" outweighs "public policy harmed by enforcement of the agreement.'") (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)). The district court acted well within its discretion in so holding.

a. The Interests in Enforcing NAF's Confidentiality Agreements Are Overwhelming

First, public policy clearly favors enforcement of private agreements. "'[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.'" *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 363 (1992). As the district court

correctly noted, confidentiality agreements are widely used "to protect trade secrets and other sensitive information, and individuals who sign such agreements are not free to ignore them because they think the public would be interested in the protected information." (ER2.) This proposition can hardly be gainsaid. In addition, many other compelling public policy interests support enforcement of NAF's Agreements. *Davies*, 930 F.2d at 1398 (enforcement of contractual waiver is proper where "important interest[s] in addition to" enforcement of private agreements are present).

Second, the district court correctly found that enforcement of NAF's Agreements was "absolutely necessary" to protect NAF and its members from infiltration by those opposed to NAF's mission, and that its members' constitutional rights to freedom of association, liberty, and privacy would be severely undermined if NAF's Agreements were not enforced. (ER1-2.) The Supreme Court has emphasized that "freedom to associate and privacy in one's associations" are among the most fundamental rights deemed "necessary in making the express guarantees [of the First Amendment] fully meaningful." *Griswold v. Conn.*, 381 U.S. 479, 483 (1965). This protection recognizes that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982).

Third, the district court correctly found that release of NAF's confidential information would "compromise steps NAF members take to protect their privacy" from exactly the kinds of threats that defendants and their cohorts pose. (ER32.) Enforcement of NAF's Agreements uphold the "inalienable right" of "privacy" enshrined in California's Constitution, which protects "the activities of voluntary associations of persons" and "carries its own mantle of constitutional protection in the form of freedom of association." *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39 (1994). "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." *Id*. at 18.

Fourth, the district court correctly found that refusing to enforce NAF's Agreements would run counter to the public policy of protecting abortion providers from invasions of privacy that threaten their personal safety and security, a policy that is manifest in many state and federal laws enacted for their benefit. *See, e.g.*, Cal. Govt. Code § 6215(a); Cal. Govt. Code § 6218; Cal. Civ. Code § 3427 *et seq.*; Cal. Penal Code § 423 *et seq.*; 18 U.S.C. § 248.

Fifth, refusal to enforce NAF's Agreements would license odious conduct that is inimical to the rule of law. *See Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1062 (9th Cir. 2011) (wholesale theft of confidential information in violation of express agreement "cannot be sustained by reference to a public policy exception"); *Diamond Multimedia Sys. Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1064

(1999) (there is a "legitimate and compelling" public interest in maintaining "a business climate free of fraud and deceptive practices"); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 992 (2004) ("fraudulent conduct cannot be considered a 'socially useful business practice[]" (alteration in original)). In this case, the district court found that defendants engaged in "extensive and repeated fraudulent conduct" to infiltrate NAF's meetings (ER38 n.43), including by "secur[ing] false identification and set[ting] up a phony corporation to obtain surreptitious recordings in violation of agreements they had signed" (ER1), and "infiltrat[ing] the NAF meetings with the intent to disregard the confidentiality provisions and secretly record participants and presentations at those meetings" (ER34). These facts are undisputed.

The district court's findings (1) are not even *mentioned* in this appeal by defendants,[9] and (2) compellingly weigh in favor of enforcing NAF's Agreements.

b. Defendants' "Right" to Publish NAF's Materials Cannot Overcome the Compelling Public Policy Interests in Enforcing NAF's Agreements

Defendants claim that the contractual waiver of their First Amendment rights is void as against public policy because the Agreements supposedly "involve

[9] *See Cruz*, 673 F.3d at 998 ("We review only issues which are argued specifically and distinctly in a party's opening brief.") (quotation omitted).

the suppression of criminal behavior" and inhibit their "right to speak on matters of public concern." (Defs.' Br. 18.)[10] Defendants are incorrect for multiple reasons.

First, while there is no question that the right "to speak on matters of public concern has long been recognized to be a fundamental right of critical importance," *Leonard*, 12 F.3d at 891, defendants ignore that freedom of speech "is not absolute." (ER37.) *Sellers v. Regents of the Univ. of Cal.*, 432 F.2d 493, 499 (9th Cir. 1970) ("we must recognize that First Amendment rights are not absolute"). That is "especially" true, the district court correctly found, "where there has been a voluntary agreement to keep information confidential." (ER37.) *Leonard*, 12 F.3d at 892 n.13 (citing "a long line of Supreme Court precedent holding such waivers are permissible"). NAF must be able to rely on those Agreements to safeguard its meetings; failure to enforce them would be to declare open season on it and its members. In contexts not nearly as compelling as here, countless businesses and individuals routinely rely on such agreements to safeguard legitimate and important interests that would be undermined by public disclosure. As the district court correctly explained, "individuals who sign such agreements are not free to ignore them." (ER2.)

[10] Defendants also claim the public interest weighs against enforcement based on "protecting the public health and safety" (Defs.' Br. 18), but present no evidence or argument to support this specious claim.

Second, any interest in voiding NAF's Agreements pales in comparison to the interests weighing in favor of enforcement. In *Leonard*, this Court enforced a contractual waiver of First Amendment rights suppressing a Union's right "to speak on matters of public concern" based on *statutory* interests favoring the enforcement of collective bargaining agreements and the finality of compensation packages for public employees. 12 F.3d at 891. This Court held that, "[i]f constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce individuals' waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent holding that such waivers are permissible under certain circumstances." *Id*. at 892 n.13. Here, by contrast, the *constitutional* and other compelling interests weighing in favor of enforcement of NAF's Agreements are far more fundamental than the statutorily-grounded interests present in *Leonard*. Very simply, absent the ability to shut its doors to partisans opposed to the fundamental rights NAF and its members work tirelessly to protect, their right to freely associate, their right of privacy, and their right to be secure from intimidation, harassment, and physical violence would be vitiated. (ER32 (Agreements "are absolutely necessary" to its ability "to fulfill" its "mission").)

Third, and critically, the district court's order emphatically does *not* prevent defendants from speaking on matters of public concern. In *Leonard*, this Court

enforced a union's contractual waiver of First Amendment rights based on an agreement that did not constitute "a complete ban on all Union political speech." 12 F.3d at 891. The same is true here. *All* that the district court's order requires is that defendants keep their promises. Indeed, the district court declined to extend the injunction to tapes of physicians *outside* of NAF's meetings, and that were not covered by the Agreements. (ER41; SER970-71.) Thus, before and after entry of the TRO, defendants have published multiple surreptitious videos not covered by the district court's order. (SER487-90; SER494-502; SER508; SER522.) Defendants continue to campaign loudly and publicly against physicians who provide abortion services, falsely accusing them of being "contract killers" who "sell baby parts." (SER760; SER763.) Defendants continue to campaign to end the constitutional right to lawful abortion. (*See*, *e.g.*, SER119.) Defendants continue to argue publicly that Planned Parenthood should be completely destroyed. (SER185; SER188.) Their continued ability to do so is fatal to defendants' appeal. *See Leonard*, 12 F.3d at 891.

Fourth, the district court correctly found that defendants grossly overstated the "public interest" in the content of the videos and materials stolen from NAF's meetings.[11] The district found that, "despite the misleading contentions of

[11] Defendants' entire showing in this regard is based on inadmissible evidence. NAF's meeting attendees held a "legitimate[] expectation that their

(Footnote continues on next page.)

defendants," the (1) "majority of the recordings lack any sort of public interest;" and (2) "there is little new in the remainder of the recordings." (ER3, 8.) Defendants do not challenge the former finding on appeal. Their only argument is that the latter finding was "factually incorrect" and clearly "erroneous." (Defs.' Br. 38.) The opposite is true.

The district court carefully reviewed the handful of clips, culled from 504 hours that defendants submitted in opposition to NAF's motion, and found "no evidence of criminal activity." (ER30.)[12] As the district court noted, defendants all but admit they have no such evidence. Rather, they misleadingly assert that a handful of clips show NAF members "*express[ing] interest in*" selling fetal tissue, altering abortion procedures, performing partial-birth abortions, and engaging in other "illegal and unethical practices." (Defs.' Br. 20, 27 (emphasis added).) Even

(Footnote continued from previous page.)

conversations and other interactions will not be secretly videotaped" in a place to which "the general public does not have unfettered access." *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907, 911 (1999). Thus, California and Maryland law render these recordings inadmissible in *any* judicial proceeding, except as proof of an act or violation of the state statutes. *See* Cal. Penal Code § 632(d); Md. Code Ann., Cts. & Jud. Proc. § 10-405; *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (Penal Code § 632(d) is a substantive law and applies in federal court). NAF objected to defendants reliance on this evidence below. (ER9 n.10.)

[12] As the district court also pointed out, while defendants "repeatedly" asserted they found such evidence, they "*did not* provide any of the NAF recordings to law enforcement" following NAF's annual meetings in 2014 and 2015. (ER31 (original emphasis).) If the NAF recordings "truly demonstrated criminal conduct . . . then defendants would have immediately turned them over to law enforcement. They did not." (ER31.)

as to this specious fallback argument, the district court found that defendants time and again "misstate the conversations that occurred or omit the context of those statements." (ER9.) That finding is far from clearly erroneous, as defendants claim. To the contrary, it is demonstrably correct.

Defendants' "Misleading Assertions" About "Selling" Fetal Tissue.

Fetal-tissue donation is legal under federal law. Federally funded institutions that participate in such programs are entitled to recoup "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. § 289g-2(e). (SER268.)

Defendants point to a sum total of seven clips they claim show NAF's members' "willingness to profit illegally from the sale of fetal tissue." (Defs.' Br. 20.) While defendants' rationales constantly shift, their main argument appears to be that [redacted] (Defs.' Br. 21.) This spurious assertion is made without reference to a shred of evidence

[13] The district court found that the StemExpress advertisement containing the words [redacted] which CMP relies on, was a "general" advertisement relating to StemExpress's *entire* business of providing human tissue products "ranging from fetal to adult tissues and healthy to diseased samples." (ER30 n.33; ER305, 348.) The ads do not reflect any "willingness" to profit from fetal tissue.

concerning the "reasonable" costs for any particular clinic, in any particular location, for any particular transaction, as expressly allowed under federal law.

Moreover, after the district court carefully reviewed each of these clips, it correctly found that defendants had repeatedly mischaracterized their content, and that "no NAF attendee . . . expressed interest in engaging in potentially illegal sale of fetal tissue for profit." (ER13.)

To take a few illustrative examples, [redacted] The district court correctly found that defendants "misstate" these and the other conversations. (ER9-13.) The district court correctly found that defendants "misstate" these and the other conversations. (ER9-13.)

Defendants' "Misleading Assertions" About "Altering" Abortion Procedures. The district court also correctly rejected defendants' "misleading" assertions that their curated clips show NAF attendees expressing a "willingness" to "alter[] abortion techniques to procure fetal-tissue specimens." (Defs.' Br. 27.)

Federal law prohibits federally funded research using human fetal tissue without a declaration from the procuring physician that "no alteration of the *timing, method, or procedures used to terminate the pregnancy* was made solely for the purposes of obtaining the tissue." 42 U.S.C. § 289g-1(b)(2) (emphasis added). Defendants present no evidence that any NAF meeting attendee engaged in federally funded research without the required declaration. Further, defendants provide no support for their assertion that minor alterations in *technique to extract more intact tissue* during an abortion, as opposed to changing the *timing, method, or procedures used to terminate the pregnancy*, violate any laws or any "widely held" ethical principles. The evidence before the district court directly refutes this claim. (SER397 ("As is common across the medical profession, techniques are different for each physician, and physicians commonly make clinical judgments to adjust their approach in the course of a surgery.").)

The district court, moreover, carefully reviewed each of the four clips defendants submitted in support of this claim, and found that defendants, once again, repeatedly misstated and misrepresented the content of these recordings.

(ER10-11.) As just one example, [redacted] The district court's order contains detailed and careful findings concerning the other clips defendants rely on for this proposition. (ER9-13.)

Defendants' "Misleading Assertions" About Partial Birth Abortions.

Defendants also claim that NAF meeting attendees purportedly admitted to or expressed "willingness" to violate the Partial Birth Abortion Act ("PBA"), 18 U.S.C. § 1531. (Defs.' Br. 31-33.)

The entire premise of this argument is based on a misstatement of the law. Defendants incorrectly assert that the phrase "intact D&E" is exactly the same as a prohibited "partial-birth abortion." (Defs.' Br. 32.) While the Supreme Court in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), referred to partial birth abortions as "intact D&E" "[f]or *discussion* purposes," it went on to specify multiple "exceptions and qualifications" in which "performing the intact D&E procedure"

was lawful, and expressly held that the fact that a physician "begin[s] every D&E abortion with the objective of removing the fetus as intact as possible . . . does *not* . . . suggest that every D&E . . . violate[s] the Act." *Id.* at 137, 147 (emphasis added); *see also id.* at 164 (specifying exceptions where "the intact D&E procedure" would not violate the Act).

Moreover, the PBA has a number of technical requirements. It prohibits "(A) deliberately and intentionally vaginally deliver[ing] a living fetus" past a specific anatomical marker "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and "(B) perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b). The law also "does not apply to a partial-birth abortion necessary to save the life of a mother . . . ." § 1531(a). Defendants present no evidence concerning these requirements or exceptions.

Thus, the district court correctly found that the two clips defendants rely on for this claim "do[] not indicate that any illegal activity was occurring." (ER10.) Contrary to defendants' "misleading" assertions, [redacted]

[redacted] *Carhart*, 550 U.S. at 156 ("doctors who intend to perform a D&E . . . must adjust their conduct to the law").

Defendants' "Misleading Assertions" About Supposedly Unethical Practices. Defendants' final set of clips allegedly show the "callousness" of NAF's members, what they label "unethical and shocking practices," and the "devaluation of human life." (Defs.' Br. 33-36.) As the district court found, and as the Supreme Court has observed, any discussion of abortion procedures might "seem clinically cold or callous to some." *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000). A professional gathering of heart surgeons or gastroenterologists would sound no different to a lay audience. But as the district court also found, the clips in question could equally be characterized as "abortion providers comment[ing] candidly about how emotionally and professionally difficult their work can be" and were "uttered in the context of providers mutually recognizing the difficulties they face in performing their work." (ER31.) Providing a safe forum for the discussion of these difficulties is, of course, the whole point of NAF's annual meetings. (ER220-21.)

However characterized, the district court found that, while there may be "some public interest in these comments, . . . this sort of information is already fully part of the public debate over abortion." (ER31.) That finding was

demonstrably correct. *See e.g.*, *Carhart*, 550 U.S. at 134-140 (describing in detail multiple abortion procedures, including "clinical description[s]" of D&E and other late-term procedures); *Stenberg*, 530 U.S. at 923-929 (same); ER31-32 (district court's evidence). Further, as the district court correctly pointed out, it is "*this very information* that could," if released, "result in the sort of disparagement, intimidation, and harassment of which NAF members who were recorded during the Annual Meetings are afraid." (ER32 (emphasis added).)

In sum, the district court correctly concluded that the limited public interest in disclosure cannot "outweigh the competing interests of NAF and its members' expectations of privacy, their ability to perform their professions, and their personal security," and that NAF had demonstrated "a strong likelihood of success on its breach of contract claims." (ER26, 32.)

B. NAF Made a "Strong Showing" of Irreparable Harm

The district court next found that NAF made a "strong showing of irreparable injury to its members' freedom of association (to gather at NAF meetings and share their confidences), to its and its members' security, and to its members' ability to perform their chosen professions," which would occur absent a preliminary injunction. (ER11.) Undisputed evidence overwhelmingly supports this conclusion. (*See supra*, pp. 16-20.)

Dr. Nucatola and Ms. Dyer faced death threats and $10,000 rewards for their murders. (SER222; SER542; SER571.) Dr. Ginde faced threats of being "publicly lynched" and was confronted at her home by picketers. (SER605; SER591-94.) Dr. Ginde's clinic was then attacked by a gunman who, after murdering two bystanders and a police officer, recited defendants' credo of "no more baby parts" to police. (SER196; ER50.) The list goes on.

In light of this overwhelming evidence, the district court found: "If the NAF materials were publicly released, it is likely that the NAF attendees shown in those recordings would . . . face an increase in harassment, threats, or incidents of violence," and NAF and its members would "have to expend more effort and money to implement additional security measures," and suffer "reputational harms as well." (ER36; *see also* SER1091; SER1096-97; SER1102; ER219.) It also found other harms, such as harm to the "right to associate in privacy and safety . . . at the NAF Meetings." (ER39.) On the record before the district court, these findings are inescapable.

Moreover, the fallout of harassment, threats, and violence was directed "*not only* at the 'targets' of defendants' videos *but also* at NAF and its members more generally." (ER36 (emphases added).) Unrebutted evidence shows that incidents of threats and harassment skyrocketed in the wake of defendants' misleading videos. (*See, e.g.*, ER 94; ER222; [redacted]; SER219; SER601-02; SER605-16;

SER591-94.) And the FBI warned of increased attacks using tactics "typical of the pro-life extremist movement." (ER94.) The following months saw multiple incidents of arson at abortion facilities around the country. (ER375-76; SER221-30.)

Defendants offer three meritless arguments in response. *First*, defendants claim it is "impermissible" to consider the conduct of third parties when weighing irreparable harm. This argument ignores the "immediate harms" that would directly result from defendants' release of videos of NAF members, without regard to any third-party conduct, including irreparable injury to reputation and privacy. (ER37.) This kind of harm *alone* supports the district court's injunction. *See, e.g.*, *San Antonio Community Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997) (enjoining conduct that injured hospital's reputation); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (violation of privacy constitutes irreparable harm).

Defendants' "attempt to shift the responsibility to overzealous third-parties" (ER37), moreover, is based exclusively on the "heckler's veto" line of cases that has no application here. (Defs.' Br. 48-49.) Those cases consider whether statutes or regulations are "content neutral" for First Amendment purposes where they prohibit speech based on the reaction of the audience. *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Co. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir.

2008) (statute was content-based because it prohibited "disruptive" speech). Defendants cite no case that has ever applied this requirement to disregard irreparable injuries flowing directly from breach of a voluntary confidentiality agreement. The whole point of NAF's Agreements was to protect against these very harms.

Second, defendants argue that the "protected speech [of] third parties" cannot cause irreparable harm. (Defs.' Br. 49.) Defendants cite no precedent to support their claim that harassment and death threats by third parties that are the result of a breach of contract cannot constitute irreparable harm.

Defendants also attempt to trivialize the volume and severity of the threats and harassment against NAF's members. [redacted] Defendants' description of the unrebutted record is riddled with this sort of deceptive spin.

Third, defendants argue that, "to the extent that the injunction is designed to protect NAF members from physical violence," the district court's order "is based solely on speculation." (Defs.' Br. 53.) NAF need only show that violence is "likely," *Winter v. NRDC*, 555 U.S. 7, 21 (2008); it "need not prove that irreparable harm is certain or even nearly certain." *Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011). The record here easily meets this standard. It is replete with evidence of individuals avowing to do, and doing, exactly what defendants claim is "speculative," *i.e.*, committing acts of arson against clinics and violence against defendants' targets. (ER375-76; SER221-30 (documenting arsons at clinics); *see also* ER376 (recounting that "One guy went through a plate glass window recently at a clinic").) All of these incidents occurred after defendants began releasing their videos. Contrary to defendants' arguments, the temporal proximity of their videos and these incidents directly supports a causal link between them.

In particular, the district court found that defendants' videos had "tragic consequences, including the shooting at the clinic in Colorado where Dr. Ginde, one of CMP's targets, was the medical director. The gunman was—based on his own words—motivated by defendants' characterization of the sale of 'baby parts.'" (ER37 n.42.) Defendants attempt to avoid the direct link between its videos and the attack by claiming that "the phrase 'baby parts' does not appear in CMP's

videos." But defendants repeatedly used the phrase "baby parts" when publishing their videos, (*see, e.g.*, SER471; SER488), including in the hashtag defendants used ("#PPSellsBabyParts") when posting videos of Dr. Ginde. (SER504-07.) The website of Newman's organization even posted the videos adjacent to the address of Dr. Ginde's clinic where the murders subsequently took place. (SER196.) The district court's finding is based on far more than "speculation."

The district court did not abuse its discretion in holding that NAF made a "strong showing" of irreparable harm absent injunctive relief.

C. The Balance of Hardships Clearly Favors Preliminary Injunctive Relief

While it was unnecessary to do so,[14] the district court balanced the hardships for and against enforcement of defendants' contractual promises, and found that "the hardships suffered by NAF and its members are far more immediate, significant, and irreparable" than any hardship suffered by defendants. (ER38.)

Defendants argue that the district court "accorded no weight to the ongoing irreparable harm to both CMP and the public from the suppression of CMP's speech." (Defs.' Br. 55.) But the district court issued a detailed order in which it *expressly* considered "defendants' claim of irreparable injury," including "their

[14] "It is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *EPA v. Envt'l Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (citation omitted).

First Amendment right to disseminate the information fraudulently obtained at the NAF Meetings, and the injury to the public of being deprived of the NAF recordings." (ER37.) Defendants' claim that the district court did not consider these issues is demonstrably false.

Defendants also argue that the "timing" of the release of further videotapes is critical. (Defs.' Br. 56.) They ignore that they repeatedly stipulated to extend the preliminary injunction hearing (originally set for August 28, 2015). (SER1001-02; SER1007-11; SER851-52.) When the district court finally issued its order, defendants waited until the last day permissible to appeal, then stipulated *again* to extend the briefing schedule before this Court. (Ninth Cir. Dkt. 13-1.)

The balance of hardships clearly weighs in favor of injunctive relief.

D. The Public Interest Clearly Favors Injunctive Relief

Weighing the public's interest for and against injunctive relief, the district court found that this was "an exceptional case where the extraordinary circumstances and evidence to date shows that the public interest weighs in favor of granting the preliminary injunction." (ER39.) Defendants incorrectly claim that, in so holding, the district court relied on "clearly erroneous and irrelevant factors." (Defs.' Br. 56.)

First, defendants argue that the district court's finding that it had "engaged in repeated instances of fraud" was clearly erroneous and legally irrelevant.

(Defs.' Br. 56.) As described above, the district court's finding of fraud is supported by extensive, undisputed evidence in the record. To describe the defendants' conduct as fraudulent hardly does it justice. Rather than refute the undisputed evidence, defendants seek to excuse their conduct by labeling themselves "journalists" who utilized "standard" journalistic techniques. (Defs.' Br. 3-4, 57.) As the district court found, defendants failed to provide a shred of "evidence to support that assertion." (ER39.) The *only* evidence on this point in the record refutes this claim. *The Society of Professional Journalist's Code of Ethics* (2015) provides that journalists should be "accurate," "fair," and "honest," "[t]ake special care not to misrepresent . . . a story," "minimize harm," and "show compassion for those who might be affected by news coverage," to "[a]void conflicts of interest," and to "be accountable and transparent." (SER380.) Defendants' conduct violated each of these norms. *See also* Ted Anderson, *Why The Undercover Planned Parenthood Videos Aren't Journalism*, Columbia Journalism Review, May 12, 2016.[15]

In any event, the notion that defendants are somehow privileged under the law to behave in the manner that they did by labeling themselves "journalists" is contrary to binding precedent. "The [First] Amendment does not reach so far as to

[15] http://www.cjr.org/analysis/why_the_man_who_made_undercover_planned_parenthood_videos_isnt_a_journalist.php.

override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972); *Cohen*, 501 U.S. at 670 ("'the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others'" (citation omitted)); *Dietemann*, 449 F.2d at 249; *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 242 (1998) ("no constitutional precedent or principle . . . gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast"). Defendants do not even mention these cases, and the cases they do cite are easily distinguishable, as the district court held.[16]

[16] *Animal Legal Defense Fund v. Otter*, No. 1:14-CV-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), did not hold that an "undercover investigation" is not "fraud" as defendants claim. The district court in that case struck down a state law that criminalized the use of "misrepresentation" to gain access to agricultural facilities as a content-based regulation on protected speech. The decision expressly avoided addressing cases (like this one) that are based on laws of general applicability (like contract law, theft, and fraud). *Id.* at *4. Similarly, *Med Laboratory Management Consultants v. ABC*, 306 F.3d 806, 812 (9th Cir. 2002) and *J.H. Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1348 (7th Cir. 1995), are not on point. They have nothing to do with a supposed First Amendment "right" to violate generally applicable laws, and factually "do not rise to the level of the misrepresentations here or the fraudulent lengths defendants went through to secure their recordings." (ER39-40 n.44.)

Second, defendants challenge as clearly erroneous the district court's finding of fact that the videos released to date were "misleading and deceptive." (Defs.' Br. 59.) Contrary to defendants' claim, the brutally dishonest nature of their smear campaign is clear for all to see. (*Supra*, pp.17-19.) Expert analysis that defendants did not rebut before the district court showed that they "heavily edited the short videos so as to misrepresent statements made by Planned Parenthood representatives," that defendants even "edited content out of the alleged 'full footage' videos" which were "substantially manipulated," and that "the videos also lack credibility as journalistic products." (ER75-76.) Defendants' only counter is to mischaracterize the evidence and to rely on an "expert report" (the "Coalfire Report") that it did not present to the district court.[17] The argument is also legally irrelevant. Defendants agreed to not to publish "any information" it obtained at NAF's meetings, misleadingly edited or otherwise.

Third, defendants claim that the *district court* "violated the First Amendment" because it did not seal its order. (Defs.' Br. 64.) But the district

[17] Defendants cannot accuse the district court of abusing its discretion by pointing to evidence it failed to present below. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (appellate courts "consider only the district court record on appeal"). Moreover, even if it was in evidence it would change nothing, because the Coalfire Report conspicuously does not address "the heavily edited short videos" which "misrepresent[ed] statements made by Planned Parenthood representatives." (SER73.)

court had no such obligation. To the contrary, as the district court explained, placing its order under seal "would undermine [its] responsibility to the public as a court of record." (ER9 n.10.) Further, the district court had an obligation to "state the reasons" for its order. Fed. R. Civ. Proc. 65(d)(1)(A); *see also* Fed. R. Civ. Proc. 52(a)(2). Defendants cite no case for its argument that the First Amendment forbids a district court from publicly describing or characterizing the information protected by a nondisclosure agreement in its injunction order, or requires a court instead to publish all underlying confidential materials and to allow the *public* to decide whether a court injunction is warranted.

As for defendants' claim that the district court's order undermines its "own conclusions about irreparable harm" (Defs.' Br. 65), the point is frivolous. The district court did not unseal any videotape with incendiary or false accusations about physicians selling "baby parts," as defendants have done and promise to do in the event that the district court is reversed. (SER238; SER792.) Any disclosure of these tapes would lead to yet another round of irreparable harm, "not only" at the individuals identified in the tapes, "but also at NAF and its members more generally." (ER36.) Nor does the district court's preliminary injunction "effectively rewr[i]te" NAF's Agreements. (Defs.' Br. 65.) To the contrary, the district court enforced the broad nondisclosure provisions of NAF's Agreements against defendants.

The district court acted well within its discretion in holding that the public interest favored an injunction, and its findings of fact in support of that conclusion were not clearly erroneous.

E. Defendants' Desire to "Freely Communicate" With Law Enforcement Provides No Grounds for Reversal

Finally, defendants argue that public policy requires reversal of the injunction because it "substantially interferes with CMP's ability to freely communicate with law enforcement." (Defs.' Br. 19.) Separately, thirteen amici attorneys general have filed a brief in support of defendants, claiming the injunction should be reversed "to the extent it relates to the disclosure of materials in compliance with lawfully issued subpoenas." (Ninth Cir. Dkt. 28 at 34.) This argument is factually and legally incorrect.

Legally, it is contrary to Ninth Circuit precedent. In *Cafasso*, 637 F.3d at 1061-62, the Ninth Circuit rejected an employee's argument, that her breach of a confidentiality agreement and "wholesale" theft of confidential information was justified because she believed she had evidence of a crime and wanted to provide it to law enforcement. *Id.* at 1062 & n.15. This Court held that the employee's desire to "provid[e] information to government investigators . . . neither explains nor excuses the overbreadth of her seizure of documents" which "*cannot be sustained by reference to a public policy exception*." *Id.* at 1062 (emphasis added). The same is true here.

Defendants cite *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350 (2004), for the proposition that they have an "absolute" privilege to "freely" communicate with "law-enforcement agents" without any court oversight whatsoever. (Defs.' Br. at 17.) *Hagberg* says no such thing. That case discusses the so-called "litigation privilege" under California law, which applies exclusively to tort claims. *Id*. at 360. A long line of California authority recognizes that the same privilege does not apply to contract claims like NAF's. *See, e.g.*, *ITT Telecom Prods.*, 214 Cal. App. 3d at 317.

Factually, the record demonstrates that the district court's order does *not* interfere with defendants' ability to respond with *responsive* information to *lawful* subpoenas. Just three governmental entities have issued document subpoenas to defendants, seeking information concerning "the involvement of Planned Parenthood and its affiliates in the sale of fetal tissue" and "manipulation of abortion procedures." (SER846-50; SER1003-06; SER840.) Defendants do not challenge the district court's finding that the overwhelming majority of the NAF materials does not relate to these issues, and is not responsive to these subpoenas. (ER16 n.18.)

One subpoena was served on CMP by the House Committee on Government Reform and Oversight. (SER846-50.) The district court permitted CMP to respond to that subpoena, but admonished CMP "not [to] provide to Congress any

footage, documents or communications that have not been specifically requested by the subpoena." (SER844.) *Defendants immediately produced all 504 hours of footage covered by the TRO, without regard to subject matter*. Within days, ten unedited hours of video from NAF's meetings were published online by a "great friend" of Daleiden's, who claimed he received them via a "leak" from Congress. (SER770-73; SER776-77; SER784-89.) Predictably, NAF's members were subject to immediate irreparable harm in the form of invasion of privacy, threats, harassment, and intimidation.[18] The district court later found that defendants "produce[d] materials that were not covered by the subpoena, but were covered by the TRO, contrary to my Order allowing a response to the subpoena." (ER16.)

Just two other subpoenas are outstanding, from the Arizona Attorney General and the Louisiana Inspector General. Like many contracts, NAF's NDAs require defendants to provide NAF with notice, and to "cooperate" with NAF if served with a subpoena for NAF's information. (ER127 ¶4.) The stipulated protective order also requires defendants to notify NAF upon receipt of any "legislative or executive branch subpoena" to allow NAF "an opportunity to try to

[18] One poster announced: "[I]t wasn't that long ago in this country that we hung murderers on the spot. That's all these people are murderers." (SER612.) Another posted: "I wonder if these abortionists would enjoy being drawn and quartered." (SER614-16; SER219.) Still another threatened: "I'll roast marshmallows on the fires of a burned down PP!" (SER610.)

protect its confidentiality interests in the court or tribunal from which the subpoena or order issued." (SER989-90.)[19]

Accordingly, the district court issued an order specifying a timeline for NAF "to move to quash or otherwise challenge the state subpoenas" in an appropriate forum, before defendants can turn over NAF material. (SER796-97.) Since then, CMP has stipulated multiple times to extend the schedule for NAF to quash or otherwise challenge those subpoenas, *and the Arizona and Louisiana authorities have agreed to these schedules*. (SER872-73; SER198-204; SER95-101; SER17-23; SER1-14.) None of the foregoing stipulated orders, nor the district court's stipulated protective order, are before this Court on appeal.

In the meantime, as the district court noted, the Arizona and Louisiana authorities have taken no steps to intervene in the proceedings to challenge these stipulated orders. Intervention is no mere technicality. Because a district court has no jurisdiction over parties not before it, "it is reversible error to conduct any proceedings at the behest of parties who have failed to intervene formally pursuant to Rule 24." *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 788-89 (5th Cir. 1979) (government must "obtain status . . . as intervenors" before gaining access to

[19] Contrary to the assertions of amici, this protection is not limited to material "disclosed to CMP in the course of discovery"—the order explicitly allows NAF to designate (and NAF did designate) the videos produced by defendants. (SER980.)

information covered by a protective order). Nor have these authorities taken steps to enforce their subpoenas in their own courts.

The amici Attorneys General also claim that NAF made no showing with respect to irreparable harm and the public interest regarding defendants' "right" to produce material subject to a federal injunction in response to government-issued subpoenas. Putting aside the fact that defendants have no such "right," *Cafasso*, 637 F.3d at 1061-62, the record belies this assertion. The Court need look no further than defendants' wholesale disclosure of irrelevant materials in response to the Congressional subpoena, and the subsequent irreparable harm suffered by NAF's members when they were promptly and publicly "leaked." Beyond that, absent the ability to assert its legal rights in the appropriate fora, as specified in multiple stipulated orders not before this Court, NAF and its members will suffer irreparable harm in the form of invasion of privacy, the chilling effect on its First Amendment rights of association, and the loss of its Fourth Amendment right to object to "indefinite or broad" subpoenas that seek information not "relevant and material to the investigation." *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988).

Defendants' claim to an unfettered right to violate the Agreements and the injunction by disclosing anything and everything to government authorities—

without any court supervision whatsoever, and without giving NAF an opportunity to assert its legal rights regarding those subpoenas—is meritless.

CONCLUSION

For the foregoing reasons, this Court should affirm the preliminary injunction issued by the district court.

Dated: May 31, 2016

By: */s/ Derek Foran*
DEREK F. FORAN

Linda E. Shostak (CA SBN 64599)
LShostak@mofo.com
Derek F. Foran (CA SBN 224569)
DForan@mofo.com
Nicholas S. Napolitan (CA SBN 251762)
NNapolitan@mofo.com
Christopher L. Robinson (CA SBN 260778)
ChristopherRobinson@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Marc A. Hearron
MHearron@mofo.com
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW Suite 6000
Washington, D.C. 20006-1888
Telephone: 202.887.1500
Facsimile: 202.887.0763

Attorneys for Plaintiff-Appellee
National Abortion Federation (NAF)

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 15,391 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14-point font.

May 31, 2016

By: */s/ Derek F. Foran*
Derek F. Foran

Attorney for Plaintiff-Appellee

STATEMENT OF RELATED CASES

NAF is not aware of any related cases pending in the Court.