Docket No. 16-15360

In the

United States Court of Appeals

for the

Ninth Circuit

NATIONAL ABORTION FEDERATION,
Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS, BIOMAX PROCUREMENT SERVICES, LLC, DAVID DALEIDEN, aka Robert Daoud Sarkis, and TROY NEWMAN,
Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Northern District of California, Case No. 3:15-cv-03522-WHO · Honorable William H. Orrick, District Judge

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PUBLIC REDACTED VERSION

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CORPORATE DISCLOSURE STATEMENT

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Secondary Sources

INTRODUCTION

This appeal challenges an unprecedented injunction against the free speech of investigative journalists, imposed in the midst of their shattering exposé of criminal and unethical behavior by late-term abortion providers. Appellants' exposé dominated headlines for months and roiled America's domestic politics, yet the district court held that the public had no legitimate interest in Appellants' speech.

The injunction transgresses the First Amendment. Notwithstanding the overwhelming public interest in Appellants' project, the district court gagged their speech. In a demonstrably erroneous ruling, the court held that undercover recordings of late-term abortion providers openly discussing selling fetal tissue for profit, and altering abortion procedures to procure intact organs for research, contained no evidence of criminal or unethical behavior. The court violated "bedrock First Amendment principles" by finding irreparable injury solely in the *audience's* anticipated negative reaction to Appellants' speech. The court impugned Appellants' undercover journalism as "fraud," contrary to precedents holding that undercover investigation is not "fraud" and merits First Amendment protection. The court effectively unsealed its own commentary on the enjoined materials while prohibiting any other speaker from reviewing or addressing them, thus privileging its own viewpoint and shielding its reasoning from public scrutiny.

In short, the district court's ruling departs radically from governing precedents and strikes at the heart of First Amendment values. It must not stand.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over the state-law claims at issue in this appeal under 28 U.S.C. § 1367, because Plaintiff-Appellee National Abortion Federation ("NAF") asserted claims arising under federal law. This appeal challenges an order granting a preliminary injunction; thus the Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered its preliminary injunction on February 5, 2016. On March 5, 2016, all Appellants (collectively, "CMP") filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the district court's preliminary injunction constitutes an unconstitutional prior restraint on CMP's speech.

2. Whether the purported contractual obligations on which the preliminary injunction rests are unenforceable as a matter of public policy, because they suppress speech on matters of paramount and legitimate public interest.

3. Whether NAF's confidentiality agreements apply, at most, only to information disclosed by NAF in formal presentations, not to informal conversations with conference attendees.

4. Whether NAF failed to show any cognizable irreparable harm warranting a preliminary injunction, because all alleged injuries arise from actions of third parties unrelated to CMP, and because NAF seeks to enjoin CMP's speech to protect NAF from third parties' speech.

5. Whether the district court erred by concluding that the balancing of harms and the public interest favored a preliminary injunction that suppresses speech.

ADDENDUM

Pertinent statutes are included in the Addendum to this Brief.

STATEMENT OF THE CASE

Appellant David Daleiden is an investigative journalist who founded Appellant Center for Medical Progress to monitor and report on medical issues and advances, including the use of fetal tissue for research.[1] ER 63, ¶ 2. CMP seeks to educate and inform the public, and to serve as a catalyst for reform of unethical and inhumane medical and research practices, including the buying and selling of fetal tissue from aborted fetuses. *Id.* Beginning in 2013, CMP launched a project, titled the "Human Capital Project," to investigate, document, and report on the sale of fetal organs for research. ER 63, ¶ 3. CMP used standard undercover investigative-

[1] "Tissue" in this context refers to any fetal parts, typically organs such as liver, brain, thymus, lungs, kidneys, and limbs.

journalism techniques, conducted extensive background research, and took careful steps to comply with applicable laws. ER 63-64, ¶¶ 2, 6-7. Posing as representatives of a start-up tissue procurement company called BioMax Procurement Services, LLC ("BioMax"), Daleiden and investigators working under his direction attended several abortion-related conferences and had numerous face-to-face meetings with abortion providers to discuss fetal organ procurement. *Id.* Under this guise, and at the invitation of NAF, Daleiden and other investigators attended NAF's annual conferences in 2014 and 2015. ER 66-67, ¶¶ 13, 16.

In registering for the NAF conferences, Daleiden, representing BioMax, signed a document entitled "Exhibit Rules and Regulations." ER 122 ("Exhibitor Agreement"). Upon arriving at the conferences, some BioMax representatives signed an additional document entitled "Confidentiality Agreement for NAF Annual Meeting." ER 127 ("Confidentiality Agreement").

During the NAF conferences, Daleiden and other BioMax investigators, using pseudonyms including "Robert Sarkis" and "Susan Tennenbaum," engaged in many conversations with conference attendees. ER 66, ¶ 14. Openly and repeatedly, they offered to outbid other tissue-procurement companies by offering higher prices for usable fetal-tissue specimens, rather than merely reimbursing the clinic for out-of-pocket costs associated with collecting fetal organs. *Id.* In fact, similar to other tissue-procurement companies, BioMax's stated business plan involved no out-of-

pocket costs to the abortion clinics, because BioMax would collect the tissue itself. *Id.* By and large, attendees raised no concerns about BioMax's plainly illegal stated business plan. Rather, BioMax became welcome and trusted among late-term abortion providers. *Id.*

In the course of attending the NAF conferences, Daleiden and other investigators' hidden body cameras captured late-term abortion practitioners discussing fetal tissue procurement and other practices. The recordings included formal presentations and panel discussions, but they also included numerous hours of informal conversations with conference attendees at the exhibitor booths and in hallways and reception rooms—areas frequented by hotel staff as well as attendees. ER 67, ¶¶ 18-20. CMP made no attempt to have any private conversations with individual NAF attendees or staff outside the presence of others, ER 67, ¶ 18, or to collect personal information from attendees or staff, ER 69, ¶ 29. CMP never intended to subject NAF members or any other persons to threats, criminal harassment, or violence, and CMP has never participated in any such behavior. *Id.* Appellant Troy Newman is a former board member of the Center for Medical Progress [redacted] *See* ER 4; [redacted]

At the NAF conferences, [redacted]

[redacted]

In addition to the NAF conferences, CMP collected recordings in other conferences and meetings with high-level abortion providers and others involved in fetal-tissue procurement. CMP also conducted interviews and collected documents from numerous sources, as part of a comprehensive exposé of fetal-organ procurement and related practices.

Beginning on July 14, 2015, CMP began releasing a series of videos—including both the full video footage of conversations, and excerpted "highlight" videos—of senior abortion providers discussing practices such as profiting from the sale of fetal organs and altering abortion methods to procure fetal specimens. CMP first released video footage of Dr. Deborah Nucatola, Senior Medical Director for

Planned Parenthood Federation of America ("PPFA"), openly admitting that she alters abortion techniques to procure intact fetal organs for research. ER 137-39. Next, on July 21, 2015, CMP released a video of Dr. Mary Gatter, President of PPFA's Medical Directors' Council, openly haggling with investigators about the price of fetal specimens, even after stating that profit from the sale of fetal tissue is not allowed. ER 198-99. Several additional videos ensued. The content of these conversations strongly corroborated and reinforced the conversations recorded at the NAF conferences.

From its first video release, the Human Capital Project generated enormous public interest. CMP's video releases dominated national headlines for months. The disclosures sparked multiple state and federal investigations. In the wake of the videos, "more than a dozen states have sought to halt or reduce public funding for Planned Parenthood." David Crary, *State-by-state Strategy Wielded to Defund Planned Parenthood*, Associated Press (Apr. 3, 2016), http://salinapost.com/2016/04/03/state-by-state-strategy-wielded-to-defund-planned-parenthood/. The videos incited a congressional debate that nearly shut down the federal government—resolved only by impaneling a Select Committee to investigate the revelations in the videos. Wesley Lowery & Mike DeBonis, *Boehner: There Will Be No Government Shutdown; Select Committee Will Probe Planned Parenthood*, WASHINGTON POST (Sept. 27, 2015),

https://www.washingtonpost.com/news/post-politics/wp/2015/09/27/boehner-there-will-be-no-government-shutdown-select-committee-will-probe-planned-parenthood/.

On July 31, 2015, NAF filed this lawsuit and immediately sought and obtained a temporary restraining order ("TRO"). ER 19. The TRO prohibited CMP from publishing any recordings or other information obtained at the 2014 and 2015 NAF conventions (collectively, "NAF Materials"). *Id.* On August 3, 2015, the district court extended the TRO pending ruling on NAF's motion for preliminary injunction. During this time, CMP continued its publication of the Human Capital Project's comprehensive exposé without publishing any NAF Materials, but the TRO has substantially interfered with CMP's ability to publicize its full message.

After months of discovery, briefing, and hearings, the district court granted NAF's motion for preliminary injunction on February 5, 2016. ER 1-42. Among other things, the district court enjoined CMP from "publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings . . . ." ER 42. This appeal followed.

SUMMARY OF ARGUMENT

To justify an injunction against CMP's speech on matters of overwhelming public interest, NAF was required to show that the "publication [] threaten[ed] an

interest more fundamental than the First Amendment itself." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996). NAF failed to make this exacting showing.

NAF failed to establish likelihood of success on the merits on its breach-of-contract claim, the sole claim supporting its request for injunctive relief. The injunction constitutes a quintessential prior restraint against speech, which can be justified only by the most compelling reasons. Not even such critical interests as national security and due process justify prior restraints. *N.Y. Times v. United States*, 403 U.S. 713 (1971). The interest in enforcing a private confidentiality agreement falls far short of these critical interests.

Similarly, any putative contractual restriction on CMP's ability to speak on matters of enormous public interest is unenforceable as a matter of public policy. Private contracts must yield to the "'critical importance' of the right to speak on matters of public concern." *Perricone v. Perricone*, 972 A.2d 666, 688 (Conn. 2009) (quoting *Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1992)).

The district court opined that there was little or no legitimate public interest in the NAF Materials, largely because it found that they showed no evidence of willingness to engage in criminal and unethical behavior by late-term abortionists. ER 30-32. This finding is demonstrably erroneous. First, the NAF Materials contain [redacted]

[redacted]

The NAF Materials also provide [redacted]

[redacted]

The NAF Materials reveal [redacted]

In short, the NAF Materials directly implicate the "'critical importance' of the right to speak on matters of public concern," *Perricone*, 972 A.2d at 688, and the public's "right to receive information and ideas," especially those of enormous public interest. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Private contracts to suppress such information are not enforceable.

Moreover, even if NAF's contracts were enforceable, they would apply far more narrowly than the district court held. Under their plain terms, the Exhibitor Agreements restrict disclosure only of information "NAF may furnish" and

"provided by NAF." ER 123. The Confidentiality Agreements are not supported by consideration and do not authorize injunctive relief, and they apply at most to information provided in formal presentations, workshops, and discussions. ER 122. Neither contract applies to informal conversations with conference attendees in hallways or at BioMax's exhibition booth, which comprise most of the recordings in the NAF Materials.

NAF made no legally cognizable showing of irreparable harm from CMP's anticipated speech, and this shortcoming alone warrants reversal. *Winter v. NRDC*, 555 U.S. 7, 23 (2008). NAF's assertion of irreparable injury consists entirely of anticipated harms from unrelated third parties who may react negatively to CMP's speech. The injunction therefore constitutes a classic heckler's veto, which violates "bedrock First Amendment principles." *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 788-90 (9th Cir. 2008). Moreover, the "threats" and "harassment" that NAF fears consist almost entirely of First Amendment-protected speech by third parties. Thus, the district court issued an injunction against CMP's speech to shield NAF from the protected speech of others.

The district court cited no evidence showing the requisite causal connection between CMP's speech and the harms forecast by NAF. The prediction that CMP's speech will result in acts of physical violence by unrelated third parties against abortion providers rests entirely on speculation. But "the First Amendment tolerates

absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times*, 403 U.S. at 725-26 (Brennan, J., concurring). Rather, the evils predicted must be "both great and ***certain***." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (emphasis added).

Further, the district court plainly erred in concluding that the balancing of harms and the public interest favored an injunction against speech on matters of critical public importance. The court accorded virtually no weight to the manifest irreparable injury to CMP and the public from its ongoing gag order, even though "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Instead, it relied on the legally and factually erroneous conclusion that CMP had engaged in "fraudulent" behavior in conducting its undercover investigation. However, undercover journalism is not "fraud," and CMP's techniques mirror those of numerous other journalistic investigations.

In conducting its balancing, the district court relied on its judgment that CMP's previous disclosures "have not been pieces of journalistic integrity, but misleadingly edited videos." ER 39. Thus, the district court effectively appointed itself censor to determine whether CMP's Human Capital Project has involved "journalistic integrity." In doing so, it relied heavily on the long-discredited Fusion

GPS report, commissioned by Planned Parenthood as a piece of political "spin," that falsely accused CMP of editing relevant content out of its full videos.

The district court compounded this error by unsealing and publicly disclosing its own editorial commentary on the NAF Materials, while enjoining any disclosure or discussion of the materials themselves. It thus effectively screened its own erroneous conclusions from public scrutiny and permitted the public to receive only an "official" government message on these hotly disputed issues.

The First Amendment allocates responsibility to the *public*, not the district court, to "make its own judgment about [the videos'] role and significance, and debate the appropriate response of a pluralistic society." *Garcia v. Google, Inc.*, 786 F.3d 727, 731 (9th Cir. 2015) (Reinhardt, J., dissenting from initial denial of emergency rehearing en banc) ("*Garcia I*"). The fundamental premise of the district court's order is that the public cannot handle the truth, and thus NAF must be protected from the consequences of public disclosure of its wrongdoing. This premise is anathema to the First Amendment.

ARGUMENT

Standard of Review. This Court generally reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc) ("*Garcia II*"). "The Supreme Court has emphasized that preliminary injunctions are an 'extraordinary remedy never

awarded as of right.'" *Id.* at 740 (quoting *Winter*, 555 U.S. at 24). Typically, "'[a] plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest.'" *Id.* (quoting *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012)). However, "[i]n a case of a prior restraint on pure speech, the hurdle is substantially higher: a publication must threaten an interest more fundamental than the First Amendment itself." *Proctor & Gamble*, 78 F.3d at 226-27. When reviewing an injunction against speech, as in this case, "[w]e review First Amendment questions de novo." *Id.* at 227.

I. The Injunction Against CMP's Speech on Matters of Enormous Public Interest Is an Unconstitutional Prior Restraint, Violates Public Policy, and Exceeds the Scope of NAF's Contracts.

Because this case involves an injunction against speech, to establish likelihood of success on the merits, NAF was required to show that CMP's speech "threaten[ed] an interest more fundamental than the First Amendment itself," by "falling into that 'single, extremely narrow class of cases' where publication would be so dangerous to fundamental government interests as to justify a prior restraint." *Id.* at 225, 227 (quoting *N.Y. Times*, 403 U.S. at 726 (Brennan, J., concurring)). NAF failed to make this exacting showing.

A. The Preliminary Injunction Is an Unconstitutional Prior Restraint.

The district court's injunction is an unconstitutional prior restraint. "[P]rior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Prior restraints are the essence of censorship, and our distaste for censorship reflecting the natural distaste of a free people is deep-written in our law." *Id.* at 589 (Brennan, J., concurring) (internal quotation marks and citation omitted). "Any prior restraint on expression comes to [the] Court with a heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). "Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Proctor & Gamble*, 78 F.3d at 227. "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

Enforcing NAF's private confidentiality agreement is not "an interest more fundamental than the First Amendment itself." *Proctor & Gamble*, 78 F.3d at 227. Courts have rejected interests far more compelling than those asserted by NAF as insufficient to justify a prior restraint on speech—including the publication of the Pentagon Papers, at grave risk to American national security and the lives of

American troops. *N.Y. Times*, 403 U.S. at 714; *see also id.* at 763 (Blackmun, J. dissenting). "If allegations of grave and irreparable danger to national security were insufficient to allow suppression of the Pentagon Papers, then threats to persons . . . could not justify the suppression of speech of great national import in this case either." *Garcia I*, 786 F.3d at 731 (internal citation omitted).

The district court held that CMP's speech would breach contractual obligations to NAF. Even if this were true, it would be irrelevant. "If [CMP has] breached its state law obligations, the First Amendment requires that [NAF] remedy its harms through a damages proceeding rather than through suppression of protected speech." *Davis*, 510 U.S. at 1318. "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them . . . beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

B. Contractual Obligations Suppressing Speech on Matters of Enormous Public Interest Are Unenforceable as a Matter of Public Policy.

Likewise, as a matter of public policy, any provision of the Agreements suppressing CMP's speech cannot be enforced to prevent the publication of information of enormous public interest.

"A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (2D) OF CONTRACTS § 178(1) (1979). Likewise, a waiver of First

Amendment rights cannot be enforced "'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'" *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

"Factors that have weighed against the enforcement of contractual waivers [of free-speech rights] include the 'critical importance' of the right to speak on matters of public concern; . . . the fact that the agreement requires the suppression of criminal behavior; . . . the fact that the information being suppressed is important to protecting the public health and safety . . . ." *Perricone*, 972 A.2d at 688. All these factors are present here.

The public policy against restricting speech on matters of public importance has deep roots in the First Amendment, especially in the public's First Amendment right to receive information. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley*, 394 U.S. at 564. "[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original). "The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression. . . . [T]he First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 8

(1986) (plurality opinion) (quotation and internal citation omitted); *see also Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

This public policy has unique force where, as here, the suppressed information concerns criminal behavior. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972); *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1376, 1377 n.9 (Fed. Cir. 2001); *Lachman v. Sperry-Sun Well Surveying Co*., 457 F.2d 850, 853 (10th Cir. 1972). The *public*—not just law-enforcement agencies—has a legitimate interest in receiving information about criminal and unethical practices in the abortion industry, topics that have "'always rested on the highest rung of the hierarchy of First Amendment values.'" *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 249 (2d Cir. 2014) (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982)).

Moreover, the injunction substantially interferes with CMP's ability to communicate freely with law-enforcement agencies conducting official investigations, by requiring CMP to meet and confer in advance with potential *targets* of such investigations. ER 40-41. This interference violates the strong public policy of California and every other state. *See, e.g.*, *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 359-60 (2004).

C. The NAF Materials Include Information of Tremendous and Legitimate Public Interest and Importance.

The district court concluded that the NAF Materials held little or no legitimate public interest. ER 30-32. The enormous public interest already generated by the

Human Capital Project directly contradicts this conclusion. The NAF Materials corroborate information already released during the Human Capital Project, and they form an integral part of its narrative exposé.

1. Profiting from sale of fetal organs.

The district court found that "no NAF attendee admitted to engaging in, agreed to engage in, or *expressed interest in* engaging in potentially illegal sale of fetal tissue for profit." ER 13 (emphasis added). This finding is demonstrably erroneous. Under federal law, it is a felony "to knowingly acquire, receive, or otherwise transfer any fetal tissue for valuable consideration if the transfer affects interstate commerce." 42 U.S.C. § 289g-2(a); *see also id.* § 289g-1(e)(3). The NAF materials contain extensive evidence of willingness to profit illegally from the sale of fetal tissue and of pre-existing arrangements to do so.

[redacted]

The district court opined that this ad refers to "fetal to adult tissues" and thus "is a general one and not one aimed solely at providers of fetal tissue." ER 30 n.33. But *any* advertising of fetal tissue for profit suggests criminal commerce. Further,

[redacted]

[2] ER citations of recorded conversations refer to the transcripts. Each transcript's heading includes a folder-pathway indicating where to review the actual footage on the hard drive containing all NAF footage.

[redacted]

The district court held that this conversation did not show evidence of crime because the provider did not directly respond to the offer of $60 rather than $50 per specimen. *See* ER 10. [redacted]

[redacted]

The district court opined that the social worker's comment that "we certainly do" was referring to "the vision and the passion for research." ER 12. [redacted] The district court noted that the provider, after stating that the "financial incentive" would make people at the clinic "very happy," *id.*, also "admitted others would have to approve it and it wasn't up to her." ER 10. [redacted]

[redacted]

The district court concluded that "the provider was excited about the possibility of the tissue going to be used in research to be 'doing something.'" ER 12. [redacted]

[redacted]

The district court held that this conversation stated that "how intact aborted fetuses are depends on the procedure used," and that "with the consent of the woman [the provider] would be open to attempting to obtain intact organs for procurement." ER 11[redacted]

[redacted]

The district court stated that "there is no discussion showing that amount [$6,000] is profit (in excess of the costs of having third-party technicians on site and

providing access and storage for their work)." ER 12. [redacted]

2. Altering abortion techniques to procure fetal-tissue specimens.

Under federal law, fetal tissue may be used for federally-funded research only if "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), (c)(4). Moreover, the alteration of abortion methods to procure fetal organs is widely viewed as unethical. *See*, *e.g.*, Baruch A. Brody, THE ETHICS OF BIOMEDICAL RESEARCH 105, 107 (1998); U.S. Dep't of Health & Human Servs., Institutional Review Board Guidebook Chapter VI, A (1993), *at* http://www.hhs.gov/ohrp/archive/irb/irb_chapter6.htm ("IRB Guidebook") ("The timing and method of abortion should not be influenced by the potential uses of fetal tissue for transplantation or medical research."). The NAF Materials contain numerous examples of willingness to engage in such illegal and unethical practices.

[redacted]

The district court discounted this conversation by stating that the provider had "acknowledge[d] tissue donation was not allowed in his state." ER 10. [redacted] The district court also observed that the provider stated that "right now my only concern is the safety of the woman." ER 10. [redacted]

[redacted]

The district court interpreted this statement as stating that the clinic "has postponed the stage at which digoxin is used and that as a result they can secure more and bigger organs for research so the tissue 'does not go to waste.'" ER 11 & n.12. [redacted]

[redacted]

The district court discounted these exchanges by interpreting the statement referring to "a case-by-case basis" as "responding to a question about doctors using digoxin in general." ER 11. [redacted] The district court stated that the reference to being "creative" actually referred to "off-setting the disruption that third-party technicians can have on clinic operations and keeping those disruptions to a minimum." ER 11 (citing ER 440). [redacted]

[redacted]

3. Illegal partial-birth abortion.

[redacted]

"Intact D&E," ER 11, is shorthand for "intact dilation and evacuation," by which the cervix is dilated ("dilation") and the living fetus is removed ("evacuation")

while still "intact"—in other words, partial-birth abortion. *Gonzales v. Carhart*, 550 U.S. 124, 136-37 (2007). Intact D&E is a felony under federal law. 18 U.S.C. § 1531(a), (b)(1) (defining partial-birth abortion as "deliberately and intentionally vaginally deliver[ing] a living fetus until . . . in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus").

The district court held that the provider merely stated that it would be "challenging" to convince the clinic's doctors to perform intact D&Es for research purposes. ER 11-12. [redacted]

[redacted]

The district court commented that this "conversation . . . does not indicate that any illegal activity was occurring." ER 10. [redacted]

4. Other unethical and shocking practices.

[redacted]

[redacted] Informed consent is a universal ethical standard for patients' participation in medical research. *See, e.g.*, IRB Guidebook Chapter VI, A ("Fetal tissue from induced abortions should not be used in medical research without the prior consent of the pregnant woman."); *see also* 42 U.S.C. § 289g-1(b)(A)-(C).

5. Devaluation of human life.

The devaluation of human life among late-term abortion providers is unquestionably a matter of legitimate public interest. *See Gonzales*, 550 U.S. at 158 (holding that the government could ban an abortion procedure "laden with the power to devalue human life").

The NAF Materials contain numerous powerful depictions of this devaluation of human life. [redacted]

The NAF Materials also contain [redacted]

[redacted]

6. The district court's putative counterexamples.

The district court identified only four counterexamples in which NAF attendees purportedly expressed unwillingness to profit from fetal-organ donation or otherwise refused to participate in illegal behaviors. ER 13 (citing ER 290-91, ¶¶ 79(I), (K), (M), (N)).

First, the district court cited Dr. Nucatola's statements that profiting off fetal tissue presents an "ethical problem" and that "we don't see it as a money-making opportunity. That's not what it should be about." ER 13, 561-62. [redacted]

[redacted]

Moreover, in a subsequent recorded conversation, Dr. Nucatola repeatedly stated that PPFA was concerned with the *appearance* of profiteering, not the reality: "They just want to do it in a way that is not *perceived* as, 'This clinic is selling tissue, this clinic is making money off of this. . . . [T]hey want to come to a number that doesn't *look like* they're making money.'" ER 131 (emphasis added). "I think for affiliates, at the end of the day, they're a non-profit, they just don't want to—they want to break even. And *if they can do a little better than break even*, and do so in a way that seems reasonable, they're happy with that." ER 132 (emphasis added). She also stated that for-profit clinics would be willing to profit much more openly: "[The PP affiliates] want to come to a number that looks like it is a reasonable number for the effort that is allotted on their part. I think with private providers, private clinics, they'll have much less of a problem with that." ER 131.

Second, the district court cited a conversation in which an attendee stated, "You can't pay for tissue." ER 13 (citing ER 673, ¶ 79(K)). [redacted]

[redacted]

[redacted]

Other than these, the district court cited only two counterexamples of instances in which NAF attendees refused to engage in illegal and unethical behavior. *See* ER 674 ¶ 79(M-N). These two isolated instances, however, do not undercut the impact or the public's right to know of the numerous other instances in which NAF attendees stated the opposite.

D. The District Court's Finding That the NAF Materials Lack Legitimate Public Interest Is Legally and Factually Incorrect.

In light of this overwhelming evidence, the district court's finding that there is little or no legitimate public interest in the NAF Materials is plainly erroneous. First, the district court conceded that "criminal wrongdoing by abortion providers" is "a matter that is indisputably of significant public interest," but it held that it could "find no evidence of criminal wrongdoing" in the NAF Materials. ER 30. This holding is insupportable for the reasons just discussed.

Second, as to the devaluation of human life caused by late-term abortion, the district court again conceded that "there is some public interest in these comments," but it held that "this sort of information is already fully part of the public debate over abortion." ER 31-32. But the district court cited nothing already in "the public debate" that is remotely comparable to the NAF Materials. Moreover, the First Amendment gives the court no warrant to determine how much speech is "enough."

"The First Amendment creates an open marketplace [of] ideas," and it emphatically "does not call on the federal courts to manage" the supply and demand in that marketplace. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). The First Amendment leaves such decisions in "the hands of each of us," recognizing "that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

For all these reasons, NAF's putative confidentiality agreements provide no basis to enjoin CMP's speech.

E. The Agreements Apply, at Most, Only to Information Disclosed by NAF in Formal Presentations, Not to Informal Conversations with Attendees.

Moreover, even if the Exhibitor and Confidentiality Agreements were enforceable, those Agreements would apply, at most, only to a small subset of the NAF Materials—information provided by NAF in formal presentations, not to informal conversations with conference attendees. Such informal conversations include almost all the evidence of profiting from fetal-tissue sales and altering abortion techniques discussed above; none comes from formal presentations.

1. The Exhibitor Agreements apply only to information "provided by NAF."

Paragraph 17 of the Exhibitor Agreement, which sets forth that contract's confidentiality obligations, provides:

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

ER 123, ¶ 17 (emphases added). Under traditional principles of contract interpretation, this paragraph applies only to materials provided by NAF itself, not by conference attendees or exhibitors.

Courts should "interpret [contractual] language in context, rather than interpret[ing] a provision in isolation." *Am. Alternative Ins. Corp. v. Superior Court*, 135 Cal.App.4th 1239, 1245 (2006). The first sentence of Paragraph 17 explains that "any information ***NAF may furnish*** is confidential and not available to the public." ER 123, ¶ 17 (emphasis added). The immediately subsequent phrase reinforces that the contract restricts disclosure of "written information ***provided by NAF***." *Id.* (emphasis added).

Under the doctrine of *noscitur a sociis*, courts "adopt a restrictive meaning of a listed item if acceptance of a broader meaning would . . . make the item markedly dissimilar to the other items in the list." *Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court*, 192 Cal.App.4th 727, 740 (2011). Paragraph 17's non-disclosure obligation extends to "written information provided by NAF, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee."

ER 123, ¶ 17. Applying *noscitur a sociis*, the limitation "provided by NAF" modifies all items enumerated in the second sentence of Paragraph 17. *See Blue Shield*, 192 Cal.App.4th at 740. Moreover, if "provided by NAF" modifies only "written information" but not "information which is disclosed orally or visually," information provided by exhibitors and attendees would be covered if disclosed orally or visually, but *not* covered if disclosed in written form.

The district court relied on language above the signature block in the Exhibitor Agreements, stating that the signor will "hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting." ER 25. But this general reference to "confidential information" should be construed in light of the specific description of confidential information in Paragraph 17 limited to information provided or furnished by NAF, so this reference cannot expand the scope of the confidentiality obligations in the contract. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1099 (9th Cir. 2006); Cal. Code Civ. Proc. § 1859.

2. The Confidentiality Agreements are not supported by consideration, and they apply only to information provided through formal sessions in any event.

NAF cannot enforce the Confidentiality Agreements, because they are not supported by consideration. "[D]oing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding

contract." *Auerbach v. Great W. Bank*, 74 Cal.App.4th 1172, 1185 (1999); Cal. Civ. Code §§ 1605, 3391. The only purported benefit that the Confidentiality Agreements conferred to CMP was the right to enter the NAF Conferences. ER 122. But the previously executed Exhibitor Agreements, accompanied by payment of the requisite fee, already granted CMP this contractual right. ER 123.

The district court concluded that CMP agreed to the Confidentiality Agreements when it executed the Exhibitor Agreement, which requires exhibitors to be "registered" for the NAF conferences. ER 21 (citing ER 123, ¶ 8). But under California law, "[f]or the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Shaw v. Regents of Univ. of Cal.*, 58 Cal.App.4th 44, 54 (1997) (quotation omitted). Paragraph 8's "registration" requirement does not constitute a "clear and unequivocal" reference to the Confidentiality Agreement, and no evidence suggests that NAF "called [the Confidentiality Agreement] to [CMP's] attention" or that the terms of the Confidentiality Agreements were "known or easily available to" CMP. *Id.* Rather, NAF's contemporaneous emails confirm that BioMax was fully "registered" *before*

its personnel arrived at the conferences and were confronted with the Confidentiality Agreements. *See* ER 683-714.

Moreover, the Confidentiality Agreements define "NAF Conference Information" to include "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***." ER 127, ¶ 2 (emphasis added). By its plain terms, this language extends only to information provided in workshops, panel presentations, and similar formal events—not to informal conversations in the hallways and break rooms.

As noted, "courts will adopt a restrictive meaning of a listed item if acceptance of a broader meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." *Blue Shield*, 192 Cal.App.4th at 740. Here, in the phrase "written materials, discussions, workshops, and other means," the terms "written materials" and "workshops" naturally refer to formal presentations, not informal conversations. Pre-printed "written information"—such as brochures, agendas, lecture notes, or presentation slide shows—refers to formal presentations. Similarly, the term "workshop" refers to a formal and organized environment, such as a "course or seminar." WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 2635 (3d ed. 2002). In this context, "discussions" is also naturally read in its formal, not informal

sense. *See id.* at 648 (defining "discussion" as "a formal or orderly treatment of a topic in speech or writing"). Interpreting the terms "discussions" and "other means" to include every conversation taking place at the conferences would "make the[se] item[s] markedly dissimilar to the other items in the list." *Blue Shield*, 192 Cal.App.4th at 740.

Second, the Agreements also provide that "NAF Conference Information material is provided to attendees . . . ." ER 127, ¶ 2. It would be unnatural to say that informal conversations between participants are "provided to attendees." *See* Cal. Civ. Code § 1644. But it is perfectly natural to describe information presented in formal contexts as "provided to attendees."

3. The district court's interpretation violates basic principles of contractual interpretation.

With scant analysis, the district court concluded that "[t]he text of paragraph 17 [of the Exhibitor Agreement], when read as a whole, covers all written, oral, and visual information" acquired at NAF meetings. ER 26.

The holding violates several basic principles of contract interpretation. First, courts must avoid interpretations that render contractual terms superfluous and inoperative. *See Brandwein v. Butler*, 218 Cal.App.4th 1485, 1507 (2013). In the Exhibitor Agreement, the first sentence of Paragraph 17 refers to information that "NAF may furnish," and the second sentence includes the limitation "provided by NAF." ER 123, ¶ 17. These limitations must mean something. Yet the district court

read the phrases "NAF may furnish" and "provided by NAF" out of the contract entirely by interpreting Paragraph 17 to apply indiscriminately to "all written, oral, and visual information," regardless of who made the disclosure. *Id.* Similarly, the Confidentiality Agreement enumerates several specific media of disclosure that fall within the agreement, *i.e.*, "written materials, discussions, workshops." ER 127, ¶ 2. Under the district court's interpretation, the Agreement applies to all information, and these limitations have no meaning.

Second, courts "must interpret a contract in a manner that is reasonable and does not lead to an absurd result." *Roden v. AmerisourceBergen Corp.*, 186 Cal.App.4th 620, 651 (2010); *see also* Cal. Civ. Code §§ 1638, 1643. Under the district court's interpretation, the Agreements apply to every informational statement made by anyone at the NAF conferences, regardless of the context of the disclosure and regardless of whether the statement was private, personal, or professional. *See* ER 26. To disclose the content of any conversation with another attendee to any third party, the parties would first need to obtain NAF's written consent. *See* ER 118, ¶ 17. This result is plainly absurd.

Third, putative waivers of First Amendment rights "must be construed narrowly." *Williams v. Alabama*, 341 F.2d 777, 781 (5th Cir. 1965); *see also Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972). Similarly, courts narrowly construe contractual provisions that restrict the free flow of information, particularly on

matters of public interest. *See, e.g.*, *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1174, 1177-78 (N.D. Miss. 1992), *aff'd without op.* 979 F.2d 209 (5th Cir.); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002). Here, the district court adopted the broadest possible reading of the non-disclosure provisions—a reading so broad that it is facially unsupportable.

Fourth, to the extent that there was any ambiguity, the district court should have construed the contracts against the drafter, NAF. The Agreements constituted standard-form contracts of adhesion. *See Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 925 (1985). Under the *contra proferentem* canon, "ambiguities in standard form contracts are to be construed against the drafter." *Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913 (2014) (internal quotation marks omitted).

4. CMP's putative breaches of collateral provisions of the Agreements do not support an injunction against CMP's speech.

The district court also held that CMP breached Paragraph 15 of the Exhibitor Agreement, which requires exhibitors to "represent their businesses, products, and/or services truthfully, accurately, and consistently with the information provided in the Application." ER 123. Even if this were so, this breach would not support an award of injunctive relief. The very next sentence of Paragraph 15 provides the specific remedy for breaches of this provision: "Any display, conduct, or offer of any information of any kind that, at NAF's sole discretion, is determined to be incomplete, inaccurate, misleading, or inconsistent with the information provided in

this Application is grounds for cancellation of this Agreement and/or removal of the exhibit by the Exhibitor, at the Exhibitor's expense, promptly upon notification from NAF." *Id.* This specific remedy forecloses NAF's attempt to invoke the more general remedy of an injunction against CMP's speech. *Walsh v. Bd. of Admin.*, 4 Cal.App.4th 682, 712 (1992). Similarly, it would be unreasonable to interpret Paragraph 15 as tacitly broadening the scope of the confidentiality provisions specifically set forth in Paragraph 17.

The district court also held that CMP breached Paragraph 1 of the Confidentiality Agreement, which prohibits recordings of the "meetings or discussions at this conference." ER 127. As noted above, however, the Confidentiality Agreement was not supported by consideration. Further, unlike the Exhibitor Agreement, it does not provide for injunctive relief as a remedy, but provides only for "termination" and legal action to "seek redress" for violations. *Id.* ¶ 6. In any event, even if it were enforceable, Paragraph 1's reference to "meetings or discussions" would naturally refer to the same "written materials, discussions, workshops, or other means" cited in the very next Paragraph. Again, Paragraph 1 does not tacitly broaden the scope of the confidentiality provision in Paragraph 2—it is coextensive with it.

For all these reasons, NAF failed to make a showing of likelihood of success on the merits sufficient to justify an unconstitutional prior restraint.

II. NAF Made No Cognizable Showing of Irreparable Harm Because All Alleged Injuries Arise from Actions of Unrelated Third Parties, Including the Protected Speech of Third Parties.

"A plaintiff seeking a preliminary injunction must show that . . . she is likely to suffer irreparable harm in the absence of preliminary relief . . . ." *Garcia II*, 786 F.3d at 740 (quotation omitted). The plaintiff must also establish a "causal connection" between the irreparable injury it faces and the conduct it seeks to enjoin. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011). The absence of legally cognizable harm, standing alone, warrants reversal of the injunction. *Winter*, 555 U.S. at 23. Moreover, despite NAF's attempts to create irreparable harm contractually, NAF still bore the burden of demonstrating actual harm. *Id.* at 22; *Smith, Bucklin & Assocs. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996).

A. The District Court's Finding of Irreparable Harm Impermissibly Relies on the Anticipated Actions of Unrelated Third Parties.

A heckler's veto arises "where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." *Rosenbaum v. City & Cnty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007). "[B]edrock First Amendment principles" direct that "the government may not give weight to the audience's negative reaction," and "the government cannot silence messages simply because they cause discomfort, fear, or even anger . . . ." *Ctr. for Bio-Ethical Reform*, 533 F.3d at 788-90. "If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the

speech." *Santa Monica Nativity Scene Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292-93 (9th Cir. 2015).

The district court ran afoul of this doctrine. ER 37-38. The district court acknowledged that any prospective harassment, threats, or violence would come from third parties entirely unrelated to CMP. *Id.* at 36-37. Nevertheless, the district court found that the threat of potential misconduct by unrelated third parties justified restrictions on CMP's speech. *Id.* These "harms" are simply not cognizable under the First Amendment. "It is remarkable that this late in our history we still have not learned that the First Amendment prohibits us from banning free speech in order to appease terrorists, religious or otherwise, even in response to their threats of violence." *Garcia I*, 786 F.3d at 730.

B. The "Threats and Harassment" That the District Court Sought to Prevent Constitute Speech Protected by the First Amendment.

Moreover, the injunction is principally designed to shield NAF from *protected speech* by third parties. The district court emphasized the risk that NAF would face "harassment" and "threats" if CMP were allowed to publish the NAF Materials. ER 36. [redacted]—for its conclusion that "[i]ncidents of harassment and violence directed at abortion providers increased nine fold in July 2015, over similar incidents in June 2014 [*sic*]." *See* ER 17 (citing ER 95, 680). [redacted]

[redacted] there is no basis for the district court's finding of a "nine fold" increase in such incidents. [redacted] Protesters indisputably have a First Amendment right to protest outside abortion clinics. *See,*

e.g., *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). The district court thus enjoined CMP's speech largely to protect NAF from the "injury" of being subjected to more negative speech by others.

Similarly, the evidence of "harassment" and "threats" on which the court relied includes online news or opinion articles, comments to those online articles, and social-media posts. *See* ER 17. None of these involved direct communications to NAF or to the subjects of the videos. *Id.* [redacted]

Like the so-called "protestors" and "harassment" at abortion clinics, online comments, even if inflammatory, fall squarely within the First Amendment. "The First Amendment does not permit government 'to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Similarly, only "true threats"—statements communicating "a serious expression of intent to inflict bodily harm upon [a] person"—are proscribable under the First Amendment. *Planned Parenthood of the Columbia/ Willamette, Inc. v. Amer. Coal. of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc). "[T]he First Amendment does not preclude calling people

demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position." *Id*. at 1086.

Thus, even if CMP ***itself*** had published statements such as "rope is cheap and trees are strong. It would save a lot of little babies," ER 89, or "Planned Parenthood needs to be blown into hell," ER 94, such statements would merely constitute "highly charged political rhetoric lying at the core of the First Amendment." *Claiborne Hardware*, 458 U.S. at 926-27. But CMP did not engage in such inflammatory speech. Rather, CMP published videos of abortion providers speaking on which *third parties* commented with political hyperbole.

Relying on California statutes designed to protect the physical safety of abortion providers, the district court discerned a supposed public policy that favors protecting them from "harassment." *See* ER 24, 32. None of these statutes, however, expresses a policy of protecting the absolute anonymity of abortion providers, much less of shielding them from "harassment" in the form of public criticism—nor could such statutes do so under the First Amendment.

In short, the vast majority of anticipated "harm" from which the injunction protects NAF is actually speech protected by the First Amendment. The district court silenced CMP's speech to quell further protected speech by third parties.

C. NAF's Claim That CMP's Speech Might Provoke Physical Violence Is Based Solely on Speculation.

To the extent that the injunction is designed to protect NAF members from physical violence resulting indirectly from CMP's speech, it plainly errs. As noted above, the acts of unrelated third parties—even violent acts—are not cognizable harms that can justify an injunction against speech. Moreover, NAF failed to show the requisite "causal connection" between CMP's speech and anticipated violent acts by unknown third parties. *Perfect 10*, 653 F.3d at 982; *see also Garcia II*, 786 F.3d at 748 (Watford, J., concurring in the judgment). This requirement is particularly stringent when seeking an injunction against speech. "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times*, 403 U.S. at 725-26 (Brennan, J., concurring). Rather, "we have imposed this most extraordinary remedy [of a prior restraint] only where the evil that would result from the reportage is both great and ***certain***." *Davis*, 510 U.S. at 1317 (emphasis added).

Here, hypothetical third-party acts of violence are not "certain," *id.*, but rest entirely on speculation. The district court relied solely on temporal proximity to support its findings that the CMP videos had led to four arsons. ER 17. However, undisputed evidence showed that at least one of the fires had nothing to do with abortion, while the others, all unsolved, occurred at Planned Parenthood clinics unrelated to the people or clinics featured in the videos. ER 47-48.

For similar reasons, the district court's references to the tragic shooting at a Colorado Planned Parenthood do not support the preliminary injunction. The only evidence that CMP "caused" this shooting are reports that, while in police custody, the shooter uttered the phrase "no more baby parts." ER 50. From this fragmentary evidence, the district court concluded that the CMP videos "directly led" to the shooting, ER 36, in that "the gunman was apparently motivated by the CMP's *characterization* of the sale of 'baby parts.'" *Id.* at 37, n.42 (emphasis added). But the phrase "baby parts" does not appear in CMP's videos, but in the *public debate* that the videos incited. The First Amendment does not tolerate suppression of public debate to appease the criminally insane. Moreover, nothing but speculation supports the conclusion that yet another mentally disturbed individual might commit acts of violence in reaction to CMP's speech—let alone that such future evils are "certain." *Davis*, 510 U.S. at 1317.

Finally, NAF made no showing of irreparable harm that might arise from CMP's free communication with law enforcement agencies. Therefore, NAF demonstrated no cognizable irreparable harm and no causal connection to CMP's speech other than speculation.

III. The District Court Plainly Erred by Concluding that the Balancing of Harms and the Public Interest Favored Suppression of Speech.

The district court held that the balancing of harms and the public interest favored suppressing CMP's speech to protect NAF and its members from criticism. ER 38. This holding was plainly erroneous.

A. The District Court Erred by Giving No Weight to the Ongoing Irreparable Harm to CMP and the Public From Suppression of CMP's Speech.

The district court accorded no weight to the ongoing irreparable harm to both CMP and the public from the suppression of CMP's speech. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss . . . in the immediacy, the impact, of speech." *Neb. Press Ass'n*, 427 U.S. at 609 (Brennan, J., concurring in the judgment) (quotation omitted). This ongoing irreparable harm injures the public, as well as CMP.

Moreover, the district court's gag order interferes with the Human Capital Project's broader exposé of illegal and unethical practices among late-term abortion providers. The NAF Materials corroborate, provide context for, and reinforce the evidence revealed through the rest of the Human Capital Project, and vice versa. The Human Capital Project is "more than the sum of its parts. . . . [T]he parts become a coherent . . . whole." *Wildmon*, 803 F. Supp. at 1168.

Additionally, the timing of the gag order hampers CMP's ability to present an effective public message. "The timeliness of political speech is particularly important." *Elrod*, 427 U.S. at 374 n.29. Congress and the states are currently debating how to respond to the illegal and unethical practices uncovered by CMP's investigative journalism. Hampering CMP's speech now—while these issues are at the center of public debate on matters of critical public interest—cannot be remedied by permitting them to speak later. "Restoring First Amendment freedoms after a lengthy period of unconstitutional judicial censorship does not cure the problem." *Garcia I*, 786 F.3d at 732.

B. The District Court Erred by Relying on Clearly Erroneous and Irrelevant Factors in Suppressing CMP's Speech.

In finding that the public interest favored an injunction, the district court relied on two erroneous and irrelevant factors—that CMP allegedly used "fraud" to procure its information, and that CMP's speech in the Human Capital Project has supposedly been "misleading."

1. CMP's investigation was not "fraud," and it employed undercover techniques common in journalistic investigations.

The district court stated that "Defendants engaged in repeated instances of fraud" in their investigation, and that other instances of undercover journalism "do not show the level of fraud and misrepresentation defendants engaged in here." ER 39 & n.44. These statements are both legally and factually erroneous.

Legally, the use of deception in undercover investigation of illegal practices is not "fraud." In *Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015), the court correctly held that undercover investigations are not "fraud" because they do not seek "material gain," but to expose information of public interest: "[U]ndercover investigators tell such lies in order to find evidence . . . and expose any abuse or other bad practices the investigator discovers." *Id.* at 1204. "Indeed, the lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest. This type of politically-salient speech is precisely the type of speech the First Amendment was designed to protect." *Id.*; *see also Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 813 (9th Cir. 2002); *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme.").

Second, the deceptive techniques that the district court attributed to CMP, ER 39, are commonplace in undercover investigations. "For more than a century, undercover investigations have relied on lies to uncover politically important information otherwise unavailable to forthright journalists." Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1457 (2015). "There is also a long tradition of using deception as a means of

gaining access to knowledge that would otherwise be obscured from public view." *Id.* at 1455.

High-profile examples of such deception abound. *See, e.g.*, Ken Silverstein, *Their Men in Washington: Undercover with D.C.'s Lobbyists for Hire*, Harper's Magazine 53, 55 (July 2007), *at* http://faculty.maxwell.syr.edu/rdenever/NatlSecurity2008_docs/Silverstein_MenWashington.pdf (*Harper's* exposé of Washington lobbyists created a fake company with false names, false business cards, false London addresses and phone numbers, and a phony website); Brooke Kroeger, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 261-63 (2012) (*Chicago Sun-Times* exposé created and operated the fake tavern "Mirage," purchased through a "straw buyer," and obtained liquor licenses under false pretenses, to expose municipal corruption); NYU Undercover Reporting Database, http://dlib.nyu.edu/undercover/mirage-pamela-zekman-zay-n-smith-chicago-sun-times (collecting articles about the "Mirage" sting); *Med. Lab. Mgmt. Consultants*, 306 F.3d at 810 (*Prime Time Live* investigators represented themselves to an Arizona laboratory both as employees "of a fictitious Michigan women's health clinic" seeking pap-smear-testing services, and as a group "who wanted to start a pap smear laboratory"); 60 Minutes, *Anonymous, Inc.* (Jan. 31, 2016), *at* http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation (exposé featuring undercover recordings between lawyers and

investigators posing as representatives of a West African government seeking to launder corruptly obtained funds). There is no indication, moreover, that such journalists deemed it essential to approach law enforcement *before* publishing their exposés, contrary to common journalistic priorities. *Cf.* ER 34-35. Nor was such material deemed to be of minimal public interest because it principally exposed the *willingness* to engage in criminal and unethical acts, rather than completed illegal contracts or transactions. *Cf.* ER 34 ("I have reviewed those transcripts and recordings and find no evidence of actual criminal wrongdoing")

2. The district court's holding that CMP's speech to date has been misleading and deceptive has no evidentiary support.

The district court held that "[t]he products of that [Human Capital] Project . . . thus far have not been pieces of journalistic integrity, but misleadingly edited videos . . . ." ER 39; *see also id.* at 36-37, 37 n. 42, 38 n. 43. The district court's sole support for these findings is the discredited Fusion GPS report, which Planned Parenthood commissioned as part of its public-relations campaign against CMP. *See* ER 36 (citing ER 71-81). Even if this long-discredited report were treated as authoritative, it fails to provide any support for the district court's conclusions.

First, Fusion GPS was forced to conclude that CMP had not falsified any video or audio content. Fusion GPS "found no evidence that CMP inserted dialogue not spoken by Planned Parenthood staff," and their "analysis did not reveal widespread evidence of substantive video manipulation." ER 73, 74. With respect to specific

segments, Fusion GPS did not "identif[y] any evidence of audio manipulation within the video segments provided"; it reported that "[n]either internal nor expert analysis found any artifacts of editing in or around this segment that would suggest the audio was inserted or manipulated using technical tools"; and it concluded that "neither internal nor external analysis found evidence that CMP inserted or manipulated this dialog post hoc." *Id.* at 76, 77.

The Fusion GPS report concluded that there were time gaps in the full videos released, indicating that the full videos did not provide continuous footage. *See* ER 74. But Fusion GPS identified no evidence that any *relevant* content was omitted during these time gaps. In fact, the report concluded that "it is impossible to characterize the extent to which CMP's undisclosed edits and cuts distort the meaning of the encounters the videos purport to document." ER 73. The report speculated that there *might* be some relevant content omitted, without any evidence of what such content might be. ER 77, 78. With respect to the Nucatola video, for example, Fusion GPS was forced to admit that "[i]t is not possible to estimate the extent to which CMP's undisclosed edits and cuts distort the meaning of the first California video." ER 79. In short, the Fusion GPS report concluded that there were breaks in the full footage, but it provided only speculation as to what footage was omitted. By contrast, CMP's evidence indicated that no pertinent footage had been omitted from the full videos released. ER 68-69, ¶¶ 25-27.

Moreover, the subsequent Coalfire report refuted Fusion GPS's speculation on this point. Like Fusion GPS, the Coalfire report concluded that "the video recordings are authentic and show no evidence of manipulation or editing." Coalfire Systems, Inc., *Digital Forensics Analysis Report* 2 (Sept. 28, 2015), *at* http://www.adflegal.org/content/docs/ADF_Forensic_Analysis_Report-09282015.pdf?_ga=1.196852900.947187693.1415313477. Coalfire also concluded that the "raw audio recordings support the completeness and authenticity of the raw video recordings." *Id.*

Unlike Fusion GPS, moreover, Coalfire actually reviewed the original video files underlying the released full videos. Coalfire concluded that "[w]ith regard to the 'Full Footage' YouTube videos released by [CMP], edits made to these videos were applied to eliminate non-pertinent footage, including 'commuting,' 'waiting,' 'adjusting recording equipment,' 'meals,' or 'restroom breaks,' ***lacking pertinent conversation***. Any discrepancies in the chronology of the timecodes are consistent with the intentional removal of this non-pertinent footage as described in this report." *Id.* (emphasis added).

Additionally, the district court relied on the Fusion GPS report to conclude that CMP's *highlight* videos of non-NAF footage were "misleading." ER 36, 37 n.41. But the Fusion GPS report provides no support for this conclusion. The report itself cites only two examples of supposedly "misleading" editing in the highlight

videos: (1) "Melissa Farrell's statement about 'diversifying the revenue stream' for her clinic in the Texas video occurs in the context of a conversation about expanding the services available to patients," ER 80; and (2) "Dr. Nucatola's statement that Planned Parenthood wants to donate tissue 'in way that is not perceived as "This clinic is selling tissue. This clinic is making money off of this"' precedes a discussion of the costs involved in collecting tissue," *id.*

These two examples provide no support for the district court's conclusion that the highlight videos are "misleading." First, Dr. Nucatola repeatedly stated that PPFA tolerates profit-making by its affiliates from fetal-organ procurement so long as the profits are not so excessive as to raise eyebrows. ER 131 (stating that "[t]hey just want to do it in a way that is not ***perceived*** as making money," and "they want to come to a number that doesn't ***look like*** they're making money"); ER 132 (stating that if Planned Parenthood affiliates "can do ***a little better than break even***, and do so in a way that seems reasonable, they're happy to do that") (emphases added). And the immediate context of Melissa Farrell's statement about "diversification of the revenue stream" directly contradicts Fusion GPS's conclusion that the reference was to "expanding the services available to patients." ER 80. Farrell stated: "In terms of areas that I can contribute to the organization both locally and nationally is ***diversification of the revenue stream***, so we can continue to do good work, because as you said we have tremendous opportunity there, and knowing that our operations

make us unique, in terms of ***research, sample acquisition, specimen procurement***. . . ." *Transcript by the Center for Medical Progress*, CENTER FOR MEDICAL PROGRESS 69, *at* http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PPGCtranscript04092015_final.pdf (emphases added).

More fundamentally, the district court's conclusion that the NAF Materials should be suppressed because CMP's previous highlight videos have supposedly been "misleading" offends basic First Amendment principles. The First Amendment does not permit a court to adopt the role of "censor" to protect the public (or NAF's members) from CMP's supposedly "misleading" speech. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . [T]he forefathers did not trust any government to separate the truth from the false for us." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988) (quotation omitted).

The public has the right to view the full videos from the NAF Materials, as well as any highlight videos CMP sees fit to prepare, and judge for itself whether it believes CMP's highlight videos are "misleading" propaganda or compelling exposés of shocking practices in the late-term abortion industry. "Widespread and uncensored access to [CMP's videos] [i]s critical so that the public could view the film[s], make its own judgment about [their] role and significance, and debate the appropriate response of a pluralistic society." *Garcia I*, 786 F.3d at 731. CMP has

highlighted the segments that it considers most relevant and representative, and abortion rights advocates are free to do the same, thanks to CMP's transparent provision of the full videos on-line. "[T]he First Amendment does not allow the government to require independent filmmakers to present all views on a subject, or indeed any view contrary to the filmmakers' own." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 510 (9th Cir. 1988). "[T]he remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

3. The district court violated the First Amendment by prohibiting public review of the NAF Materials while unsealing its own commentary on the materials.

One of the most extraordinary features of the district court's gag order is that, while enjoining any public review of the NAF Materials and requiring the parties to discuss them under seal, the district court declined to place its own commentary on them under seal. *See* ER 8-13. The district court explained: "To place this discussion under seal would undermine my responsibility to the public as a court of public record to explain my decision." ER 9 n.10.

This statement offends fundamental First Amendment principles. The district court deemed that it had a "responsibility to the public" to provide the court's official description and selective quotation of the NAF Materials, without allowing the public to view the NAF Materials themselves. In effect, the district court shielded

its decision from public scrutiny by permitting only the "official" version of the NAF Materials to be publicly available. But the First Amendment does not allow a district court to privilege its own official version of events. "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion). "[T]he forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This ruling also contradicts the district court's own conclusions about irreparable harm. The district court concluded that publication of its own discussion of the contents of the NAF Materials would not threaten NAF because the district court "balance[d] the interests of the providers' privacy, safety and association by omitting names, places, and other identifying information." ER 9 n.10. The district court thus acknowledged that it is not the content of the recordings, but only the identity of the speakers, which it believes must be suppressed. This is significant for two reasons.

First, while purporting to hold CMP to the terms of the Exhibitor and Confidentiality Agreements, the court effectively rewrote those agreements to say that "confidential information" principally means the identities of any attendees. No fair reading of the agreements discloses that meaning. There is no mention of identities, privacy, or safety in the Agreements; rather, the Agreements refer to

information from written materials, workshops, and discussions. The focus on identities and personal privacy is a gloss put on the Agreements after the fact by NAF and the court.

Second, the district court did not give ***CMP*** the benefit of any such "balancing" of the purported privacy interests. Many NAF Materials could be readily published without identifying previously unknown abortion providers, while retaining much of their public-interest value. But the district court imposed a complete gag order on CMP.

"Injunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion." *NRDC v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). When an "injunction impinges upon first amendment interests," it must be "the least restrictive means of" advancing the plaintiff's interests. *Johansen v. San Diego Cnty. Dist. Council of Carpenters*, 745 F.2d 1289, 1295 (9th Cir. 1984). The injunction was not so tailored here.

CONCLUSION

For the reasons stated, the district court's order granting a preliminary injunction should be reversed and the injunction should be immediately dissolved.

Dated: April 18, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the enlargement of brief size to 15,400 words granted by court order dated April 7, 2016. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 15,396 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Catherine W. Short

STATEMENT REGARDING RELATED CASES

Appellants are not aware of any related cases pending in the Court.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellants request that the Court hear oral argument in this case. This case presents issues of great importance to the public, in particular regarding the scope of the First Amendment. Oral argument will assist this Court in considering the issues presented and the underlying facts.

ADDENDUM

TABLE OF CONTENTS

A. 18 U.S.C. § 1531

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

(b) As used in this section--

(1) the term "partial-birth abortion" means an abortion in which the person performing the abortion--

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term "physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include--

(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

(B) statutory damages equal to three times the cost of the partial-birth abortion.

(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

B. 42 U.S.C. § 289g-1

(a) Establishment of program

(1) In general. The Secretary may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes.

(2) Source of tissue. Human fetal tissue may be used in research carried out under paragraph (1) regardless of whether the tissue is obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth.

(b) Informed consent of donor

(1) In general. In research carried out under subsection (a) of this section, human fetal tissue may be used only if the woman providing the tissue makes a statement, made in writing and signed by the woman, declaring that--

(A) the woman donates the fetal tissue for use in research described in subsection (a) of this section;

(B) the donation is made without any restriction regarding the identity of individuals who may be the recipients of transplantations of the tissue; and

(C) the woman has not been informed of the identity of any such individuals.

(2) Additional statement. In research carried out under subsection (a) of this section, human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that--

(A) in the case of tissue obtained pursuant to an induced abortion--

(i) the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research;

(ii) no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue; and

(iii) the abortion was performed in accordance with applicable State law;

(B) the tissue has been donated by the woman in accordance with paragraph (1); and

(C) full disclosure has been provided to the woman with regard to--

(i) such physician's interest, if any, in the research to be conducted with the tissue; and

(ii) any known medical risks to the woman or risks to her privacy that might be associated with the donation of the tissue and that are in addition to risks of such type that are associated with the woman's medical care.

(c) Informed consent of researcher and done

In research carried out under subsection (a) of this section, human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual--

(1) is aware that--

(A) the tissue is human fetal tissue;

(B) the tissue may have been obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth; and

(C) the tissue was donated for research purposes;

(2) has provided such information to other individuals with responsibilities regarding the research;

(3) will require, prior to obtaining the consent of an individual to be a recipient of a transplantation of the tissue, written acknowledgment of receipt of such information by such recipient; and

(4) has had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research.

(d) Availability of statements for audit

(1) In general. In research carried out under subsection (a) of this section, human fetal tissue may be used only if the head of the agency or other entity conducting the research involved certifies to the Secretary that the statements required under subsections (b)(2) and (c) of this section will be available for audit by the Secretary.

(2) Confidentiality of audit. Any audit conducted by the Secretary pursuant to paragraph (1) shall be conducted in a confidential manner to protect the privacy rights of the individuals and entities involved in such research, including such individuals and entities involved in the donation, transfer, receipt, or transplantation of human fetal tissue. With respect to any material or information obtained pursuant to such audit, the Secretary shall--

(A) use such material or information only for the purposes of verifying compliance with the requirements of this section;

(B) not disclose or publish such material or information, except where required by Federal law, in which case such material or information shall be

coded in a manner such that the identities of such individuals and entities are protected; and

(C) not maintain such material or information after completion of such audit, except where necessary for the purposes of such audit.

(e) Applicability of State and local law

(1) Research conducted by recipients of assistance. The Secretary may not provide support for research under subsection (a) of this section unless the applicant for the financial assistance involved agrees to conduct the research in accordance with applicable State law.

(2) Research conducted by Secretary. The Secretary may conduct research under subsection (a) of this section only in accordance with applicable State and local law.

(f) Report

The Secretary shall annually submit to the Committee on Energy and Commerce of the House of Representatives, and to the Committee on Labor and Human Resources of the Senate, a report describing the activities carried out under this section during the preceding fiscal year, including a description of whether and to what extent research under subsection (a) of this section has been conducted in accordance with this section.

(g) "Human fetal tissue" defined

For purposes of this section, the term "human fetal tissue" means tissue or cells obtained from a dead human embryo or fetus after a spontaneous or induced abortion, or after a stillbirth.

C. 42 U.S.C. § 289g-2

(a) Purchase of tissue

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.

(b) Solicitation or acceptance of tissue as directed donation for use in transplantation

It shall be unlawful for any person to solicit or knowingly acquire, receive, or accept a donation of human fetal tissue for the purpose of transplantation of such tissue into another person if the donation affects interstate commerce, the tissue will be or is obtained pursuant to an induced abortion, and--

(1) the donation will be or is made pursuant to a promise to the donating individual that the donated tissue will be transplanted into a recipient specified by such individual;

(2) the donated tissue will be transplanted into a relative of the donating individual; or

(3) the person who solicits or knowingly acquires, receives, or accepts the donation has provided valuable consideration for the costs associated with such abortion.

(c) Solicitation or acceptance of tissue from fetuses gestated for research purposes

It shall be unlawful for any person or entity involved or engaged in interstate commerce to--

(1) solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue; or

(2) knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal.

(d) Criminal penalties for violations

(1) In general. Any person who violates subsection (a), (b), or (c) of this section shall be fined in accordance with Title 18, subject to paragraph (2), or imprisoned for not more than 10 years, or both.

(2) Penalties applicable to persons receiving consideration. With respect to the imposition of a fine under paragraph (1), if the person involved violates subsection (a) or (b)(3) of this section, a fine shall be imposed in an amount not less than twice the amount of the valuable consideration received.

(e) Definitions

For purposes of this section:

(1) The term "human fetal tissue" has the meaning given such term in section 289g-1(g) of this title.

(2) The term "interstate commerce" has the meaning given such term in section 321(b) of Title 21.

(3) The term "valuable consideration" does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.

D. California Civil Code § 1605

GOOD CONSIDERATION, WHAT. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

E. California Civil Code § 1638

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

F. California Civil Code § 1643

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

G. California Civil Code § 1644

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

H. California Civil Code § 3391

WHAT PARTIES CANNOT BE COMPELLED TO PERFORM. Specific performance cannot be enforced against a party to a contract in any of the following cases:

1. If he has not received an adequate consideration for the contract;

2. If it is not, as to him, just and reasonable;

3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,

4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

I. California Code of Civil Procedure § 1859

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Edward L. White III
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