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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INTRODUCTION

The NAF Materials contain information of tremendous, legitimate public interest. They include numerous instances of late-term abortion providers openly discussing [redacted] NAF's Response Brief ("NAF Br.") utterly fails to engage this evidence. NAF does not address three-quarters of the excerpts from the NAF Materials cited in Appellants' Opening Brief ("CMP Br.").

No court has ever held that an agreement between private parties may be enforced to enjoin speech on matters of such enormous public interest, especially where the suppressed information concerns illegal and unethical behavior. Every court to consider the question has stated exactly the opposite—such agreements are unenforceable. And several federal appellate courts have held that injunctions against speech based on contracts are prior restraints under the First Amendment.

Moreover, no injunction against pure speech can be upheld on the basis of the anticipated actions of third-party hecklers. NAF's "irreparable harm" consists almost exclusively of speculation about possible injuries that may be inflicted by the audience of CMP's future speech. This claim violates "bedrock First

Amendment principles." The preliminary injunction should be immediately dissolved.

ARGUMENT

I. The Preliminary Injunction Is a Prior Restraint on Speech.

NAF asserts that no case has "ever held that judicial enforcement of contractual promises constitutes a 'prior restraint.'" NAF Br. 24, 38. NAF is demonstrably incorrect. Several federal Courts of Appeals have held that an injunction that enforces contractual promises by prohibiting speech constitutes a prior restraint implicating the First Amendment. As the D.C. Circuit stated, "[e]ven where individuals have entered into express agreements not to disclose certain information . . . the courts have held that judicial orders enforcing such agreements are prior restraints implicating First Amendment rights." *In re Halkin*, 598 F.2d 176, 189-90 (D.C. Cir. 1979), *overruled in part on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984); *see also Crosby v. Bradstreet*, 312 F.2d 483, 485 (2d Cir. 1963) (holding that a stipulated injunction enforcing a voluntary settlement agreement by prohibiting the publication of credit-reporting information constituted an unconstitutional "prior restraint by the United States"); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (holding that judicial enforcement by injunction of a CIA employee's secrecy agreement with the CIA constituted a "prior restraint upon speech"); *Nat'l Polymer*

Prods., Inc. v. Borg-Warner Corp., 641 F.2d 418, 424 (6th Cir. 1981) (holding that an injunction enforcing a pre-trial agreement among private parties, preventing disclosures of events at trial, constituted "a prior restraint" which "bear[s] a heavy presumption against [its] constitutional validity").

NAF also argues that court enforcement of a private contract does not involve state action. NAF Br. 38-39. This argument contradicts the foregoing cases holding that injunctions that enforce contracts by prohibiting speech implicate First Amendment rights. It also contradicts this Court's case law. "[B]ecause [plaintiff] has obtained an injunction that restricts . . . permittees from exercising their purported First Amendment rights, and because ***an injunction constitutes state action***, it is proper for us to conduct a First Amendment analysis." *Gathright v. City of Portland*, 439 F.3d 573, 576 n.2 (9th Cir. 2006) (emphasis added). Even when injunctive relief merely requires a party to comply with obligations that the party voluntarily assumed, the injunction flows from and is "supported by the full panoply of state power." *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948); *see also In re Late Fee and Over-Limit Fee Litig.*, 741 F.3d 1022, 1031 (9th Cir. 2014) (Reinhardt, J., joined by Nelson, J., concurring in the judgment) (concluding that court enforcement of certain adhesion contracts violates due process, "because such enforcement would constitute unconstitutional state action").

NAF relies on *Ohno v. Yasuma*, 723 F.3d 984 (9th Cir. 2013), but *Ohno* expressly distinguished between a domestic court's enforcement of a *money judgment* issued by a foreign court—which ordinarily does not involve state action—and the enforcement of an *injunction* issued by a foreign court—which typically does involve state action. *Id.* at 1000. "Injunctions directly compel or forbid a party's actions, and thus may be seen as placing the domestic court's imprimatur behind the substance of the foreign court's order to that extent." *Id.* "[E]nforcement of injunctions implies the authority to exercise contempt and modification powers after the injunction issues; the exercise of such authority may entangle the enforcing court in the merits of the underlying dispute." *Id.*

Therefore, an injunction that prohibits speech based on purported contractual obligations involves state action. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467-70 (5th Cir. 1980) (en banc) (emphasizing that constitutional limitations on prior restraints stem from the hardships associated with an injunction against speech, as opposed to post-speech money damages). NAF's heavy reliance on cases involving *money damages* due to speech is thus misplaced. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991).

II. A Private Confidentiality Agreement Cannot Be Enforced to Suppress Publication of Matters of Enormous Public Interest.

NAF argues that the prior restraint is justified because injunctions against speech are upheld in cases that "involved confidentiality agreements or contractual

promises." NAF Br. 39. On the contrary, no case has ever held that a contract among private parties may be enforced to suppress publication of information of tremendous, legitimate public interest. In *Crosby v. Bradstreet*, the Second Circuit held that an injunction that enforced a voluntary settlement agreement by prohibiting publication of information of public interest—namely, credit-reporting information—was an unconstitutional "prior restraint by the United States against the publication of facts which the community has a right to know," and that "[t]he court was without power to make such an order; that the parties may have agreed to it is immaterial." 312 F.2d at 485. Likewise, *Perricone v. Perricone* stated that confidentiality agreements cannot be enforced to "prohibit the disclosure of information concerning . . . criminal behavior, the public health and safety, or matters of great public importance." 972 A.2d 666, 688-89 (Conn. 2009).

This principle has deep roots in the ***public's*** First Amendment right to receive information of legitimate public import—a right to which NAF gives extremely short shrift. The Supreme Court has emphasized "the role of the First Amendment . . . in affording the public access to discussion, debate, and the dissemination of information and ideas." *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion); *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949); *accord 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*"). NAF's repeated contention that CMP supposedly "waived" *its own* First Amendment rights by signing NAF's confidentiality agreements, even if it were accurate, is simply not determinative. "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*, 475 U.S. at 8 (quotation omitted).

Moreover, a legion of cases holds that private confidentiality agreements cannot be enforced to suppress disclosure of ***criminal or illegal*** behavior. "[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972). "It is the public policy . . . everywhere to encourage the disclosure of criminal activity." *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) (holding that a non-disclosure agreement could not be enforced to prevent notifying a private landowner of tortious or criminal extractions from his land); *see also Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1376, 1377 n.9 (Fed. Cir. 2001); *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744-45 (1st Cir. 1996); *McGrane v. Reader's Digest Ass'n, Inc.*, 822 F. Supp. 1044, 1051 (S.D.N.Y. 1993). NAF has no

response to these cases, other than simply to deny that the NAF Materials contain any evidence of criminal or unethical behavior. NAF is demonstrably wrong on that point.

III. Public Policy Overwhelmingly Favors Publication of the Illegal, Unethical, and Dehumanizing Conduct in the NAF Materials.

A. The NAF Materials contain numerous examples of illegal, unethical, and shocking behavior.

NAF contends that there is little or no legitimate public interest in the NAF Materials. NAF Br. 46-54. This contention is manifestly erroneous. CMP's Brief identified 23 excerpts from the NAF Materials—[redacted]—containing information of undeniable public interest, including [redacted] CMP Br. 20-36. NAF's Brief discusses only *six* of these excerpts, and says nothing of the other seventeen. NAF Br. 46-54.

1. Profiting from the sale of fetal organs.

NAF studiously ignores the most palpable evidence of profiting from the sale of fetal tissue in the NAF Materials, including: [redacted]

[redacted]

Moreover, NAF's discussion of the few excerpts that it does address is woefully unconvincing. [redacted]

Further, the Select Investigative Panel of the House of Representatives recently found that StemExpress's contracts with "several abortion clinics"

included "provisions for the payment of fees by StemExpress to the abortion clinics for fetal tissue," and that "StemExpress paid the abortion clinic for each fetal tissue . . . sample ***and then marked up the tissue four to six hundred percent for sale to the researcher***." Letter of Hon. Marsha Blackburn to Ms. Jocelyn Samuels of U.S. Dep't of Health and Human Servs. 1, 3 (June 1, 2016) ("Blackburn Letter"), *at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160603HIPAA.pdf (emphasis added).

Regarding the only two video clips that NAF does address on this point, NAF concedes [redacted]

[redacted] Such statements are manifestly matters of public interest.

2. Altering abortion procedures to procure intact fetal organs.

NAF addresses only one of CMP's video clips discussing alteration of abortion techniques. NAF Br. 50-51. NAF does not discuss [redacted]

NAF contends that such changes constitute "minor alterations in technique to extract more intact tissue during an abortion, as opposed to changing the timing, method, or procedures used to terminate the pregnancy." NAF Br. 50 (emphasis omitted). But both legal and ethical norms categorically forbid ***any*** change to the "timing, method, or procedures used to terminate the pregnancy . . . ***solely for the purposes of obtaining the tissue***." 42 U.S.C. § 289g-1(b)(2) (emphasis added). There is no "minor alteration" exception to this rule. Any change to the "timing, method, or procedures used" violates these norms, so long as the change is "solely for the purposes of obtaining tissue." *Id.* Indeed, HHS guidelines emphasize that

the "timing and method of abortion" should not be "***influenced by*** the potential uses of fetal tissue for transplantation or medical research," indicating that even so-called "minor alterations" are unethical. U.S. Dep't of Heath & Human Servs., Institutional Review Board Guidebook Chapter VI, A (1993), *at* http://www.hhs.gov/ohrp/archive/irb/irb_chapter6.htm.

Though NAF is blind to this simple distinction, the ***public*** is not. CMP's exposé generated enormous public outrage beginning in July 2015. Much of this outrage sprang from the recordings of Dr. Nucatola and Dr. Gatter callously discussing the just sort of changes to abortion procedures—for the sole purpose of procuring fetal organs for research—that NAF now dismisses as "minor alterations." For example, Dr. Nucatola stated, "we've been very good at getting heart, lung, liver, because we know that, so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above . . . . And with the calvarium, in general, some people will actually try to change the presentation so that it's not vertex." ER139. Likewise, Dr. Gatter expressed interest in using "a 'less crunchy' technique to get more whole specimens." ER211. Such statements are matters of intense public interest.

In any event, NAF's contention that the NAF Materials discuss only "minor alterations in technique," NAF Br. 50, is plainly incorrect. [redacted]

[redacted] do not constitute "minor alterations in technique" under any plausible view of abortion procedures.

3. Performing illegal partial-birth abortion.

NAF contends that [redacted] does not constitute an admission of illegal partial birth-abortion, because there are "exceptions and qualifications" in the Federal Partial-Birth Abortion Ban. NAF Br. 51. NAF identifies only three such "exceptions," however, and all three are clearly inapplicable. First, the Supreme Court stated that an "intact D&E" does not violate the Act if the provider begins

the abortion intending to perform a standard D&E, but the fetus accidentally emerges intact due to unanticipated dilation of the cervix. *Gonzales v. Carhart*, 550 U.S. 124, 155 (2007). [redacted]

Second, as NAF points out, the Act contains an exception for intact D&E abortions that are "necessary to save the life of the mother." 18 U.S.C. § 1531(a). [redacted]

Third, the Supreme Court in *Gonzales* noted "[i]f the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." 550 U.S. at 164. [redacted]

NAF argues that another provider's statement [redacted]

[redacted]

4. Other unethical and shocking practices.

NAF's Brief does not even acknowledge the NAF Materials' shocking revelations [redacted]

NAF contends that CMP "presented no evidence or argument" to support its claim that the interest in "protecting the public health and safety" strongly favors disclosure of the NAF Materials. NAF Br. 44 n.10. On the contrary, [redacted] as highly relevant to "public health and safety." *Perricone*, 972 A.2d at 689.

5. Devaluing human life.

NAF does not directly address *any* of the numerous excerpts from the NAF Materials cited by CMP as evidence of the shocking devaluation of human life in NAF members' unguarded discussions. NAF Br. 53. Rather, NAF contends that "[a] professional gathering of heart surgeons or gastroenterologists would sound no different to a lay audience." *Id.*

NAF's analogy is profoundly unconvincing. Heart surgeons and gastroenterologists do not discuss [redacted] Gastroenterologists do not discuss [redacted] Heart surgeons do not [redacted] And, unlike late-term abortionists, their practice is not at the epicenter of a massive public and political controversy.

NAF contends that the devaluation of human life among its members must be suppressed because "*this very information*" could provoke the most public

outrage against NAF members if published. NAF Br. 54. This is an argument for disclosure, not suppression. To state that the videos would provoke massive public outrage is to concede that they are matters of enormous public interest. Moreover, by making this argument, NAF concedes, as it must, that the public outrage at CMP's disclosures stems from the contents of the videos themselves, not from any supposedly "misleading" edits to the video footage.[1]

B. The NAF Materials bear directly on an ongoing Congressional investigation that has generated intense public interest.

Recent events in the ongoing Congressional investigation have accentuated the public interest and relevance in the NAF Materials. Responding directly to CMP's undercover exposé, the U.S. House of Representatives convened a Select Investigative Panel to investigate whether illegal or unlawful activity has occurred in that industry. See H. Res. 461, § 6 (Oct. 7, 2015). The Select Panel held public hearings on April 20, 2016, two days after CMP's Opening Brief was filed. One critical exhibit at these hearings is an advertisement touting the "**Financially Profitable**" nature of fetal-tissue procurement for abortion clinics. *See* U.S. House of Representatives, Energy & Commerce Comm., Select Investigative Panel

[1] NAF's *Amici* Journalism Scholars and Journalists pronounce CMP's highlight videos to be "misleading" based solely on the district court's opinion, not on a review of the full-footage videos. *See* Doc. 87, at 7 n.4. By contrast, the Brief of *Amici* Susan B. Anthony List et al. relies on an independent review of the full video footage. Doc. 27, at 16-31. While rushing to pass judgment on CMP's journalistic ethics, *Amici* Journalism Scholars and Journalists sadly neglect a cardinal rule of responsible journalism: look at the evidence.

("Select Panel"), Majority Exhibits, Ex. B2 (Apr. 20, 2016), *at* http://docs.house.gov/meetings/IF/IF04/20160420/104822/HHRG-114-IF04-20160420-SD004.pdf. Because this advertisement openly proposes the commission of felonies and demonstrates a widespread practice for selling fetal tissue for profit, some Panel members and witnesses expressed doubts about its authenticity. *See* Select Panel, Preliminary Transcript of April 20, 2016 Hearing, at 9:1-12 (Member of Congress questioning the source and authenticity of Panel Exhibit B2), 115:9-12 (witness suggesting that Panel Exhibit B2 "probably ha[d] been altered"), *at* http://docs.house.gov/meetings/IF/IF04/20160420/104822/HHRG-114-IF04-20160420-SD020.pdf. The NAF Materials demonstrate [redacted]

Similarly, on June 1, 2016, the Select Panel reported that StemExpress paid fees to abortion clinics for fetal tissue and "then marked up the tissue four to six hundred percent for sale to the researcher." Blackburn Letter, at 1, 3. The Select Panel also found StemExpress's fetal-tissue business involved "contractual arrangements that financially benefitted StemExpress ***and the clinics***." *Id.* at 3 (emphasis added); *see also id.* at 7 ("Planned Parenthood affiliates permitted

StemExpress to use [patient health information] to directly encourage patients to donate human fetal tissue—tissue that would later be sold by StemExpress to researchers at a huge mark-up."); *id.* Attachment A, at 3 ("StemExpress' . . . entire work flow was designed to maximize the firm's profits."). The NAF Materials include [redacted] The public has the right to view the NAF Materials and assess how they corroborate and support the ongoing Congressional investigation. *See Garcia I*, 786 F.3d at 730.

C. NAF's other arguments against publication are uniformly meritless.

NAF contends that the injunction should be upheld because it does not gag *all* speech by CMP on the topic of abortion. NAF Br. 45-46. But "[a] prior restraint is no less offensive to the First Amendment simply because it enjoins only a certain quantity of words or a small portion of a film. To the contrary, 'it is wholly inconsistent with the philosophy of the First Amendment' for a court to pick and choose which speech and how much of it may be permitted as opposed to being enjoined." *Garcia I*, 786 F.3d at 732 (quoting *Stanley*, 394 U.S. at 566). "The First Amendment creates an open marketplace where ideas, most especially

political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling on a single product." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (internal citations omitted). "The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). Moreover, the speech that NAF seeks to suppress—publication of the NAF Materials—is unique, distinctly powerful, and categorically different from other speech that the injunction permits.

NAF contends that *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1992), holds that the court may determine when CMP has been permitted "enough" speech on the topic of abortion. This is clearly incorrect. *Leonard* did not involve speech on matters of public interest at all. Rather, it concerned a voluntary restriction by a public-employees' union against lobbying the legislature for economic benefits. *See id.* at 886.

D. NAF overstates its own interests in suppressing the NAF Materials.

NAF argues that "public policy clearly favors enforcement of private agreements." NAF Br. 40. But the mere interest enforcing a private agreement is "present in every dispute over the enforceability of an agreement," and thus "where

a substantial public interest favoring nonenforcement is present, the interest in [enforcement] is insufficient." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1398 (9th Cir. 1991). Moreover, when it comes to agreements *suppressing speech on matters of enormous public import*, NAF gets the policy dead wrong. Public policy strongly disfavors the enforcement of private agreements to restrain such speech. *Crosby*, 312 F.2d at 485; *Perricone*, 972 A.2d at 688-89.

NAF also emphasizes that private agreements are used to "protect trade secrets." NAF Br. 41 (quoting ER2). But NAF does not contend that the NAF Materials contain trade secrets, nor do its confidentiality agreements serve other recognized public interests, such as facilitating settlement or protecting personal privacy in the intimate details of one's life. *See Hinshaw Winkler v. Superior Court*, 51 Cal. App. 4th 233, 241 (1996); *Sanchez v. Cnty. of San Bernandino*, 176 Cal.App.4th 516, 527 (2009). On the contrary, there is little benefit to the public from agreements between members of an entire trade group, profession, or industry to keep their communications confidential and secret from the public.

NAF contends that the preliminary injunction was proper, because "its members' constitutional rights to freedom of association, liberty, and privacy would be severely undermined if NAF's Agreements were not enforced." NAF Br. 41. But CMP's investigation and exposé did not violate any federal constitutional

right of NAF or its members, because only state action violates constitutional rights. *See NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). Likewise, publishing the NAF Materials does not implicate any privacy right under the California Constitution, which does not shield information about an individual's profession, particularly a licensed profession that involves providing services to the public. Rather, the California Constitution permits disclosures that further public interests such as exposing criminal activity, *see Baughman v. State*, 38 Cal.App.4th 182, 190 (1995), and publishing information that is "newsworthy," *Taus v. Loftus*, 40 Cal.4th 683, 719 (2007).

NAF asserts that California and federal statutes reflect a "policy of protecting abortion providers from invasions of privacy that threaten their personal safety or security." NAF Br. 42. The statutes identified by NAF reflect policies against blocking physical access to abortion clinics and engaging in violence against abortion providers, but they assuredly do not reflect a policy of stifling speech critical of abortion providers. Nor could they. The First Amendment guarantees the right to speak about matters of public interest or debate, including abortion. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Any supposed statutory "policy" providing special protection to abortion providers from critical speech would involve facially unconstitutional viewpoint discrimination.

NAF contends that "refusal to enforce NAF's Agreements would license odious conduct that is inimical to the rule of law." NAF Br. 42. But the only "odious conduct" that NAF identifies is CMP's use of deception to infiltrate the NAF conferences and gather information for its exposé. Such deception is not "odious," but extremely socially valuable. *See generally* Amicus Brief of Law Professors, Doc. 31; *see also, e.g.*, LAST WEEK TONIGHT WITH JOHN OLIVER, *Debt Buyers* (June 5, 2016), https://www.youtube.com/watch?v=hxUAntt1z2c (recent exposé based on deception and undercover filming of the trade conferences of the debt-buyers' industry). Indeed, "the lies used to facilitate undercover investigations actually advance core First Amendment interest values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest." *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1204 (D. Idaho 2015).

IV. NAF's Contractual Interpretation Arguments Lack Merit.

Even if NAF's Agreements were enforceable, those agreements would apply, at most, to recordings of formal presentations at NAF meetings, not to other conversations that may have occurred at the conferences. *See* CMP Br. 39-47. For example, [redacted]

[redacted]

NAF's arguments to the contrary lack merit. First, the Confidentiality Agreements lack independent consideration, CMP Br. 41-42, and NAF does not identify any, NAF Br. 30. NAF contends that the Confidentiality Agreements did not require independent consideration, because Paragraph 8 of the Exhibitor Agreement incorporated their requirements into the Exhibitor Agreement. *Id.* (citing ER123, ¶¶ 8, 9). But BioMax was fully registered and had paid non-refundable fees for the right to attend the NAF conferences before being presented with the Confidentiality Agreements. CMP Br. 42-43.

Second, NAF asserts that the plain language of the Exhibitor Agreements and Confidentiality Agreements "unambiguously cover[] 'any' and 'all' information shared at NAF's meetings." NAF Br. 31. NAF ignores the fact that its overbroad interpretation of the agreements renders numerous provisions of those agreements superfluous. CMP Br. 43-45. Similarly, NAF fails to address that the well-established doctrine of *noscitur a sociis* indicates that the agreements cover only formal presentations at NAF conferences, not informal conversations that took place outside formal presentations. *Id.* at 40-41, 43-44. NAF also fails to point to any language in the contracts suggesting that the "whole point of NAF's agreements," NAF Br. 57, is to protect the safety and anonymity of attendees.

Third, NAF's overbroad interpretation of the agreements would lead to absurd results. *Id.* at 45. NAF does not dispute this point, but instead claims that it is irrelevant, arguing that a party cannot use hypotheticals to inject ambiguity into a contract. NAF Br. 33 (citing *Blasiar, Inc. v. Fireman's Fund Ins. Co.*, 76 Cal.App.4th 748, 754-55 (1999)). But CMP does not contend that the agreements are ambiguous. CMP contends that NAF's interpretation of the agreements is plainly untenable because it yields absurdity.

Fourth, CMP noted that if, as NAF has contended, the agreements constituted waivers of Appellants' First Amendment right to speak about matters of paramount and legitimate public interest, then those waivers must be construed narrowly. CMP Br. 45-46. NAF argues that this rule applies only if the waiver is ambiguous. NAF Br. 34. To the extent that this Court determines that NAF's meritless contract-interpretation arguments create any doubt about the meaning of NAF's contracts, the Court should resolve such doubts in CMP's favor and against NAF. *United States v. Hamdi*, 432 F.3d 115, 123 (2d Cir. 2005).

V. NAF Makes No Legally Cognizable Showing of Irreparable Harm.

"A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief . . . ." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). A contractual provision is an "insufficient prop" to establish irreparable harm, which must be proved by independent

evidence and satisfy independent legal standards. *Smith, Bucklin & Assocs. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996); *see also Riverside Pub'g Co. v. Mercer Pub'g LLC*, No. C11-1249RAJ, 2011 WL 3420421 (W.D. Wash. Aug. 4, 2011) (noting that several federal "circuits have declined to presume irreparable harm based on a contract clause," and citing numerous cases).

A. NAF argues for suppression of speech based on an unconstitutional heckler's veto.

The district court violated "bedrock First Amendment principles" by seeking to restrict CMP's speech based on the anticipated reaction of third-party hecklers unrelated to CMP. *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 788-90 (9th Cir. 2008). NAF argues that the "heckler's veto" doctrine applies only to First Amendment challenges to *statutes and regulations* as content-based restrictions on speech. NAF Br. 56-57. But the heckler's veto doctrine provides a method for determining whether ***any*** governmental restriction on speech is content neutral. "A listener's reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (striking down a permit scheme imposing discretionary security fees for provocative speech). Because "injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances," the Supreme Court imposes a "somewhat more stringent application of general First Amendment principles" in reviewing injunctions, and requires that injunctions be

"content-neutral." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

In fact, CMP's speech could not be suppressed based on third parties' reactions even if CMP expressly advocated violence against abortion providers—which CMP strongly condemns. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that advocacy of violence is proscribable only if "directed to inciting or producing imminent lawless action"). *A fortiori*, CMP's publication of the NAF Materials cannot be suppressed on the theory that it might provoke a violent reaction.

Second, NAF relies on two putative harms that it contends would result "directly" from CMP's censored speech, even if third parties do not intervene—reputational injury and violation of privacy. NAF Br. 56. Relying solely on *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), NAF asserts that the threat of reputational harm alone warrants a preliminary injunction. NAF Br. 56. To the contrary, "as a matter of well-settled law, allegations of reputational injury *do not* rise to the level of irreparable harm that could justify injunctive relief." *Hunter v. Hirsig*, 614 F. App'x 960, 963 (10th Cir. 2015) (collecting cases); *see also Sampson v. Murray*, 415 U.S. 61, 91-92 (1974) (explaining that a party's "claim that her reputation would be damaged . . . falls far short of the type of irreparable

injury which is a necessary predicate to the issuance of a temporary injunction"). *San Antonio* did not depart from this well-established rule, and NAF ignores the case's extremely narrow, fact-bound holding. *See San Antonio*, 125 F.3d at 1238 ("We emphasize the narrowness of our decision."). Among other differences from this case, in *San Antonio*, the speech at issue had already occurred, and the Court could assess both its accuracy and its concrete effects with some degree of confidence. *See id.* at 1235-38. Given the serious First Amendment risks posed by an injunction like the one at issue in *San Antonio*, *see id.* at 1239-40 (Kozinski, J., dissenting), the Court should decline NAF's invitation to expand that case's holding dramatically.

NAF also urges that a threat to privacy can constitute irreparable harm. NAF Br. 56. The lone case on which NAF relies involved a preliminary injunction against strip searches, blood tests, and urine tests of prison employees that violated the Fourth Amendment. *See McDonnell v. Hunter*, 746 F.2d 785, 786-87 (8th Cir. 1984); *see also McDonnell v. Hunter*, 809 F.2d 1302, 1305-10 (8th Cir. 1987). In contrast, the conduct at issue here will not involve any actionable invasion of privacy. The circumstances of the recordings—open discussions between strangers taking place at a large industry convention—could not support a claim for invasion of privacy. *See Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 819 (9th Cir. 2002) ("The covert videotaping of a business conversation

among strangers in business offices does not rise to the level of an exceptional prying into another's private affairs, which the Restatement's illustrations indicate is required for 'offensiveness.'"). And the public disclosure of facts "of legitimate public concern" cannot give rise to a claim for invasion of privacy. *Shulman v. Grp. W. Prods., Inc.*, 18 Cal.4th 200, 215 (1998). No case law supports NAF's contention that individuals who provide abortion services to the public have a "privacy" interest in remaining entirely anonymous.

Third, without citing any authority, NAF asserts that "the temporal proximity of their videos" and four incidents of arson "directly supports a causal link between them." NAF Br. 58. When applied to three unsolved acts of arson, NAF's argument amounts to *post hoc ergo propter hoc*: because certain incidents occurred after CMP's prior speech, that speech must have caused the incidents—even though undisputed evidence has already established that the only *solved* arson had nothing to do with CMP's videos. ER47-48. The other three arsons remain unsolved, and no evidence links them to CMP's speech. *See* ER221-230. "*Post hoc ergo propter hoc* is the name of a logical error, not a reason to infer causation." *United States v. Thompson*, 484 F.3d 877, 879 (7th Cir. 2007). Thus, even if there were any link between the earlier videos and these sporadic acts of third parties, and even if—contrary to "bedrock First Amendment principles"—CMP could be held responsible for such acts of third parties, NAF cites no

evidence that any future acts of arson are "likely" to occur if the injunction is lifted—far less that they are "certain." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers).

B. NAF greatly overstates its threat of harm from unrelated third parties.

Moreover, even if it were cognizable under the First Amendment, NAF greatly overstates the "irreparable harm" it may face from third parties upon publication of the NAF Materials. The vast majority of the anticipated harm is "harassment"—a slippery term calculated to cast the pall of criminality over constitutionally protected speech. In fact, the very first instance of "harassment" NAF cites is an online column by nationally syndicated columnist Michelle Malkin sharply criticizing Dr. Nucatola. *See* NAF Br. 17 (citing ER83-86). This column is plainly protected by the First Amendment. NAF also contends that Dr. Ginde suffered "irreparable harm" when she faced a lawful, peaceful, prayerful protest by fifty "grandparents [and] young moms and dads along with their children." SER592-93. Again, this conduct is protected by the First Amendment.

Other than these, NAF's only concrete examples of "harassment" comprise 16 hyperbolic statements in the comment threads of Internet articles. None of these comments was communicated directly to the subject. Rather, NAF is only aware of them because [redacted]

[redacted] Such hyperbole is ubiquitous in online discourse, on even the most innocuous topics. *See* Jim Pagels, *Death Threats on Twitter Are Meaningless. You Should Ignore Them*, SLATE.COM (Oct. 30, 2013), *at* http://www.slate.com/blogs/future_tense/2013/10/30/twitter_death_threats_are_meaningless_you_should_ignore_them.html (noting that online death threats are typically "frivolous incidents" that are "entirely toothless"). Given the enormous media coverage of CMP's exposé, such comments are inevitable. If vicious online comments to news articles constituted "irreparable harm" justifying an injunction against speech, virtually all online reporting could be suppressed.

Finally, NAF's reliance on the tragic shooting at a Planned Parenthood facility in Colorado does not support the preliminary injunction. As has been widely reported, the perpetrator was found mentally incompetent to stand trial based on the unanimous assessment of the experts who examined him. *Judge Rules Colorado Planned Parenthood Shooter Mentally Incompetent*, WALL STREET JOURNAL (May 11, 2016), *available at* http://www.wsj.com/articles/judge-rules-colorado-planned-parenthood-shooter-mentally-incompetent-1462998309. In other words, he is criminally insane. Thus, his conduct does not provide a reasonable basis for predicting what other individuals are likely to do in the future. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. Co. v. Balridge*, 844

F.2d 668, 674 (9th Cir. 1988). Only "certain" future injuries could possibly justify a prior restraint. *CBS*, 510 U.S. at 1317. Suppressing speech to avoid provoking the criminally insane offends fundamental First Amendment values.

"By suppressing protected speech in response to such a threat" of violence by third parties, the district court "imposed a prior restraint on speech in violation of the First Amendment and undermined the free exchange of ideas that is central to our democracy and that separates us from those who condone violence in response to offensive speech." *Garcia I*, 786 F.3d at 729.

CONCLUSION

This Court should reverse the district court's order granting a preliminary injunction and dissolve the injunction immediately.

Respectfully submitted on June 16, 2016,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,992 words.

/s/ Catherine W. Short

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 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.

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