No. 16-15360
Unpublished Opinion issued Mar. 29, 2017
Consuelo M. Callahan and Andrew D. Hurwitz, Circuit Judges,
and Donald W. Molloy, District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION,
Plaintiff-Appellee,
v.

CENTER FOR MEDICAL PROGRESS, *et al.*,
Defendants-Appellants.

On Appeal from the
United States District Court for the Northern District of California
Case No. 3:15-CV-3522-WHO, Hon. William H. Orrick

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

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

Defendant-Appellant BioMax Procurement Services, LLC, is a privately held limited liability company, wholly owned by the Center for Medical Progress. No publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION AND FRAP 35 STATEMENT

At issue in this appeal is a gag order, a preliminary injunction imposed specifically for the purpose of hiding information from the public, precisely *because* the information is of significant public interest and concern—the sale of fetal body parts. Erroneously reviewing only for abuse of discretion, the Panel took the unprecedented step of making this Court the first federal circuit to uphold a prior restraint of speech, based on the private agreement of parties, to defeat the public's right to know.

This appeal raises at least two issues of exceptional importance. The first is the validity of imposing a prior restraint on speech, based on private agreements, to suppress information of undisputed public interest, information neither classified nor subject to trade secret protection but concerning one of the most hotly-debated political and social issues of our day.

The second issue is whether the mere fact of an individual signing a form contract constitutes clear and convincing evidence of a knowing, voluntary, and intelligent waiver of First Amendment rights.

The Panel's opinion also creates conflicts with Supreme Court and Ninth Circuit precedent. First, the Panel reviewed the lower court's order for abuse of discretion, contrary to this Court's decision in *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233-34 (9th Cir.

1997), mandating de novo review and an "independent examination of the whole record" in cases involving free expression.

Second, contrary to this Court's holding in *Davies v. Grossmont High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991), the Panel failed to consider the public interest weighing against enforcement of a putative waiver of First Amendment rights, specifically the public's interest in receiving information, an interest inextricably intertwined with the individual's right to expression.

Finally, contrary to *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010), and numerous other Supreme Court and Ninth Circuit precedents, the Panel upheld the preliminary injunction at issue with no showing of irreparable harm to the Plaintiff, much less the "particularly strong showing" of harm required when a preliminary injunction risks infringing on free expression. *Overstreet ex rel. NLRB v. United Bhd. of Carpenters & Joiners of Am., Local 1506*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005); *McDermott*, 593 F.3d at 957-58.

STATEMENT OF FACTS

Appellant David Daleiden is an investigative journalist who founded Appellant Center for Medical Progress ("CMP") to monitor and report on medical issues and advances, including the use of fetal tissue for research. ER 63.

In 2013, CMP launched a project to investigate, document, and report on the sale of fetal organs for research. ER 63. CMP used standard undercover investigative-journalism techniques, conducted extensive background research, and took careful steps to comply with applicable laws. ER 63-64. 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 tissue procurement. *Id*. Under this guise, and at the explicit invitation of representatives of the National Abortion Federation ("NAF"), Daleiden and other investigators attended NAF's annual conferences in 2014 and 2015. ER 66-67.

In registering for the NAF conferences, Daleiden, representing BioMax, signed an exhibitor agreement. ER 123. Upon arriving at the conferences, some BioMax representatives signed an additional document entitled "Confidentiality Agreement for NAF Annual Meeting." ER 127.

In the course of attending the NAF conferences, Daleiden and other investigators' hidden body cameras recorded presentations and panel discussions, but also numerous hours of informal conversations with conference attendees in the exhibitor area, hallways and reception rooms, areas frequented by hotel staff as well as conference attendees. ER 67.

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 expose of fetal-organ procurement and related practices.

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. From the first release, the CMP videos generated enormous public interest, including spurring investigations in the United States Senate and House, both of which issued reports recommending prosecution of various entities involved in fetal tissue trafficking. CTA Dkt. #s 124-1, 149-1.

On July 31, 2015, NAF filed this lawsuit and immediately sought and obtained a temporary restraining order. This order remained in place until the district court granted a preliminary injunction in substantially the same terms on February 5, 2016. The district court enjoined Defendants 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.

Defendants appealed. On March 29, the Panel issued an unpublished memorandum decision affirming the preliminary injunction. Judge Callahan dissented to the portion of the opinion affirming the injunction as prohibiting disclosing information to law enforcement without a subpoena and notice to NAF.

I. THE PANEL DECISION GENERATES TWO ISSUES OF EXCEPTIONAL IMPORTANCE

A. The Panel's unprecedented decision upholding a prior restraint against disclosure of information of undisputed public interest generates an issue of exceptional importance.

The Panel decision upheld a prior restraint on Defendants' speech activity. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints"). Prior 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). "The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." *Id*. In upholding the preliminary injunction here, "the panel deprived the public of the ability to view firsthand, and judge for themselves, [] film[s] at the center of an international uproar." *Garcia v. Google, Inc*., 786 F.3d 733, 747 (9th Cir. 2015) (en banc).

The Panel's sole justification for upholding this extraordinary, damaging, and "presumptively unconstitutional," *Neb. Press Ass'n*, 427 U.S. at 558, remedy is that these private parties entered into agreements to hide information from the public, agreements drafted by NAF precisely because the information is of such enormous public interest.

Outside the context of trade secrets and classified information, *no* federal court has upheld an order suppressing information of public interest, based simply on the agreement of the parties to do so. Federal courts decline to put the weight of their contempt power behind the enforcement of private agreements to defeat the public's right to know.

For example, the Second Circuit in *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir. 1963), examined a provision in a settlement agreement where the one party agreed not to publish any comment on the business activities of several individuals. When the party later moved to be relieved of the order, the Second Circuit stated,

> We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order**; that the parties may have agreed to it is immaterial.**

Id. at 485 (emphasis added).

In *U.S. v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972), concerning enforcement of a CIA employment termination agreement governing classified information, the Fourth Circuit stated, "We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights." *See also 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) ("Even 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").

Other than cases involving trade secrets or classified information, where there are recognized societal interests in protecting the confidentiality of information, neither the district court nor the parties found *any* case in which federal courts have imposed and upheld an injunction prohibiting the disclosure of information to the public, based on an agreement between private parties.[1]

Until this Court's decision in *San Antonio*, "[o]nly unprotected '*commercial* speech'--i.e., '[f]alse, deceptive, or misleading, advertising,' *In re R.M.J.*, 455 U.S.

[1] NAF's sole authority supporting a prior restraint based on an agreement between private parties is a state divorce case, *Perricone v. Perricone*, 972 A.2d 666 (Conn. 2009).

191, 200 [] (1982)--has ever been subjected to prior restraint." *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 137 F.3d 1090, 1092 (1998) (Reinhardt, J. dissenting from denial of reh'g en banc). But in *San Antonio*, the speech at issue, if not commercial, was at least allegedly "false, deceptive, and misleading." It was not the purpose of the preliminary injunction to keep *true* information from the public.

In the instant case, the Panel upheld a prior restraint on speech for the precise purpose of withholding information from the public, based on the alleged agreement of private parties to do so. The Panel decision raises an issue of exceptional importance in the Ninth Circuit and nationally.

B. The Panel's finding of a waiver of constitutional rights, particularly First Amendment rights, on the basis of contracts of adhesion raises an issue of exceptional importance.

The Panel found that the "district court did not clearly err in finding that the defendants had waived any First Amendment rights to disclose [] information publicly by knowingly signing the agreements with NAF." Op. ¶9. The Panel here accurately restates the entire reasoning behind the district court's finding that Defendants knowingly, voluntarily, and intelligently waived their First Amendment rights: they signed the form agreements. ER 28-29.

Both the Panel and district court equated the mere fact of an individual signing a form waiver with "*clear and convincing evidence* that the waiver is

knowing, voluntary, and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994) (emphasis added). Such an equation inverts the test, from a burden of proof on the party asserting there has been a waiver of First Amendment rights, to a presumption of waiver that the opposing party can only rebut by affirmative evidence of, e.g., fraud, coercion, or mental incompetence.

In *Leonard*, this Court found a knowing, voluntary, and intelligent waiver of First Amendment rights where the party "was advised by competent counsel during the negotiations." *Id*. at 890. Moreover, the party "originally proposed the language of the agreement; it is disingenuous for it now to claim that it did not know what it was proposing." *Id.* The contested term "was a contractual term that resulted from the give-and-take of negotiations between parties of relative equal bargaining strength." *Id*.; *see also D.H. Overmyer Co. v. Frick Co*., 405 U.S. 174, 186 (1972) (finding waiver where corporation, represented by counsel, had been party to thousands of contracts with contractors; "this is not a case of unequal bargaining power or overreaching. . . . [the contract] was not a contract of adhesion"); *contrast with Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (finding no waiver where "[t]here was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale"); *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) (waiver can be found

where "parties to the contract have bargaining equality and have negotiated the terms of the contract").

By contrast, the NAF Exhibitor Agreement and Confidentiality Agreement were indisputably contracts of adhesion, i.e., "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 925 (1985). Indeed, the NAF Confidentiality Agreement, which prohibited making recordings at the meetings, was presented to the Defendants only when they arrived at and checked into the NAF meeting, after having paid several thousand dollars in non-refundable fees to attend. ER 66; 123 ¶ 3.

Moreover, 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) ("[I]n the civil no less than the criminal area, courts indulge every reasonable presumption against waiver") (citation omitted). By contrast here, the Panel approved the district court's construction of the waiver in the broadest possible terms to cover all information learned at the NAF meetings, no matter the source, including the informal conversations with other attendees that were the focus of Defendants' activity. Both the Panel and the district court read limiting language out of the two

agreements, opting instead for the broadest possible reading of both.

Finally, both the Panel and the district court found that the putative waiver encompassed a waiver of the right of citizens to voluntarily provide information to law enforcement. Op. ¶12.

This sweeping interpretation of the agreement, approved by the Panel, compounds the peril posed by the decision: not only can First Amendment rights be waived merely by signing contracts of adhesion, but those contracts will be construed broadly, not against the drafter, but against the signer.

The Panel's decision thus generates an issue of exceptional importance: whether individuals can be held to "knowingly, voluntarily, and intelligently" waive their First Amendment rights, including their right to provide information to law enforcement, simply by signing form contracts. Appellants are aware of no prior case so holding; both Supreme Court and this Court's precedents strongly suggest otherwise.

II. THE PANEL DECISION CONFLICTS WITH NINTH CIRCUIT AND SUPREME COURT PRECEDENT

A. Contrary to Ninth Circuit and Supreme Court precedent, the Panel reviewed the district court's decision for abuse of discretion, rather than conducting an "independent examination of the whole record" as required in a case where free expression is at issue.

In conducting its review, the Panel rejected Defendants' argument that de novo review should apply, and instead reviewed the lower court decision for abuse of discretion. Op. ¶8. While abuse of discretion is "generally" the correct standard for reviewing the grant of a preliminary injunction, "when a case involves free expression, 'we must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *San Antonio Community Hosp.*, 125 F.3d at 1233-34 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974)).

Indeed, in this Circuit, preliminary injunctive relief that even *risks* restraining constitutionally protected speech may be awarded only on a "particularly strong showing" of success on the merits and irreparable harm. *Overstreet*, 409 F.3d at 1208 n.13; *McDermott*, 593 F.3d at 957-58.

The Panel decision creates a conflict within the Circuit as to the correct standard of review for the grant of a preliminary injunction restraining free expression.

B. The Panel's decision enforces a putative waiver of First Amendment rights in the face of the public's right to know.

The Panel held that the district court did not "abuse its discretion in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality agreements, because one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest." Op. ¶9 (citing *Dietemann v. Times, Inc*., 449 F.2d 245, 249 (9th Cir. 1971)).

However, *Dietemann* involved a damages award based on an invasion of privacy claim, not the issuance of a preliminary injunction preventing release to the public of the information based on a putative waiver of First Amendment rights.[2] Enforcement of Defendants' alleged waiver of their First Amendment rights here involves a public interest "of the highest order," the suppression of information of undisputed public interest, concerning one of the most hotly debated political, religious, and moral topics in our time, as well as the subject of intense public attention since Defendants first began releasing videos. The Panel's dismissal of

[2] In addition to injunctive relief, NAF is also seeking damages. "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." *CBS v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers).

this public interest not only misconstrues *Dietemann*, but it also conflicts with *Davies v Grossmont High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991).

In *Davies*, the parties had entered into a settlement agreement, one term of which was that Dr. and Mrs. Davies would never apply or run for any position or office on the Grossmont High School District. About a year after the settlement, Dr. Davies ran for and won a seat on the board, and the District sought and obtained a district court order holding him in contempt and ordering him to resign. *Id.* at 1393.

This Court reversed. After first finding that Davies's argument that he had not knowingly waived his constitutional right to run for office was "without merit," this Court nonetheless found that the waiver violated public policy, as it "violated his constitutional right to run for political office and the constitutional right of the voters to elect him." *Id.* at 1394-95, 1396. Noting that "[t]he United States Supreme Court has repeatedly held that the individual's right to seek public office is inextricably entwined with the public's fundamental right to vote," this Court concluded that "the public interest favoring non-enforcement is of critical importance." *Id.* at 1397-98. On the other side of the balance, this Court found that the interests proffered by the District favoring enforcement were either tautological (the interest favoring enforcement of private agreements "will be present in every dispute over the enforceability of an agreement") or "pernicious" (taking away

from voters the ability to "make their own mistakes" in choosing whom to elect). *Id*. at 1398.

The United States Supreme Court has also long held that the right of the individual to speak and the right of the public to hear are inextricably entwined. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech and press embraces the right to distribute literature "and necessarily protects the right to receive it"); *Thomas v. Collins*, 323 U.S. 515, 534 (1944) (temporary restraining order was "restriction on Thomas's right to speak and the rights of the workers to hear what he had to say"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read").

In this instance, however, the Panel used Defendants' putative waiver of First Amendment rights through confidentiality agreements as the beginning and end of the balancing of public interest. In so doing, the Court cited *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1994). *Leonard*, however, did not involve the suppression of information from public disclosure. The First Amendment right waived in *Leonard* was simply the right of the Portland firefighters' union, for a limited time, to lobby the legislature for payroll-increasing legislation for its members without forfeiture of other benefits. *Id*. at 891-92. Unlike in the instant

case, information on a matter of great interest was not being hidden from the public.

Moreover, as the dissent noted, the preliminary injunction contravenes the public policy "in favor of allowing citizens to report matters to law enforcement agencies." Op., Callahan, J. dissenting, citing *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984).

The Panel decision creates a conflict within the Circuit, specifically with *Davies*, as to whether a waiver of constitutional rights should be enforced to the detriment of inextricably intertwined public interests of the highest order: the public's right to receive information on an issue of widespread and undeniable public interest and the citizen's right to speak freely to law enforcement.

C. The Panel decision upheld a preliminary injunction in the absence of irreparable harm to the party seeking the preliminary injunction.

Under both United States Supreme Court and Ninth Circuit precedent, the requirements for issuance of a preliminary injunction are clear: "[T]he Supreme Court in *Winter* [*v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)] held that a party seeking a preliminary injunction 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

public interest.'" *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010).

Moreover, where there is "at least some risk that constitutionally protected speech will be enjoined, . . . a particularly strong showing" of harm is required. *Overstreet*, 409 F.3d at 208 n.13; *McDermott*, 593 F.3d at 957-58.

The Panel here upheld a prior restraint, "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n*, 427 U.S. at 559; *Garcia*, 786 F.3d at 747, without any showing of irreparable harm. The Panel's decision omits any mention of irreparable harm, instead resting on Defendants' putative waiver of constitutional rights to substitute for a finding of irreparable injury. This ruling conflicts with both Supreme Court and Ninth Circuit precedent tolerating no exceptions to Plaintiff's burden to establish irreparable harm before a preliminary injunction may issue.

The Panel's only nod to any threatened harm to anyone are the two sentences of paragraph 6 in its memorandum opinion. The first sentence ("The defendants then made some of the recordings public") is incorrect: "To be clear, the videos released by CMP as part of the Project do not contain information recorded at the NAF Annual Meetings." ER 15. All of Defendants' publicly released videos came from meetings and conferences in other venues. The Panel then states that, following the release of the recordings, "incidents of harassment

and violence against abortion providers increased, including an armed attack at the clinic of one of the video subjects that resulted in three deaths." Op. ¶ 6.

If the Panel intended this statement to serve as establishing the threat of irreparable harm to NAF, its opinion raises even more conflicts with Supreme Court and Ninth Circuit precedent. A finding of likely irreparable harm cannot be premised on protected speech activity (release of earlier recordings), spurring more protected free speech activity in the form of Internet comments and picketing ("harassment"), and allegedly inspiring some unlawful activity directed *at third parties*, including a tragic but indisputably random act of violence by a criminally insane person. *Planned Parenthood of the Columbia/Willamette, Inc. v. Amer. Coal. of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc) ("First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position").

None of the prior released recordings called for any unlawful activity or the use of force or violence, yet the Panel hints that Defendants' release of the NAF recordings should be suppressed based on the chance that certain individuals may, without any suggestion much less advocacy from Defendants, *respond* to the recordings with violence against NAF or its members. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State 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"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (original emphasis) ("[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment"). If advocacy of violence and unlawful actions is constitutionally protected, then there can be no legally cognizable harm to NAF in Defendants' verbatim reporting of the statements of abortion providers.

The Panel decision conflicts with unambiguous Supreme Court and Ninth Circuit precedent requiring a showing that the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20; *McDermott*, 593 F.3d at 958.

CONCLUSION

This Court should grant panel rehearing or en banc rehearing.

Respectfully submitted,

/s/ Catherine W. Short

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 16-15360

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,195 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: /s/ Charles S. LiMandri

Date: Apr 12, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

APPENDIX

NOT FOR PUBLICATION

FILED

MAR 29 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION, NAF, Plaintiff-Appellee, v. CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis; TROY NEWMAN, Defendants-Appellants.	No. 16-15360 D.C. No. 3:15-cv-03522-WHO MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick III, District Judge, Presiding

Argued and Submitted October 18, 2016
San Francisco, California

Before: CALLAHAN and HURWITZ, Circuit Judges, and MOLLOY,** District Judge.

1. Plaintiff-Appellee the National Abortion Federation ("NAF") is a non-

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

profit professional association of abortion providers whose mission is "ensur[ing] safe, legal, and accessible abortion care." NAF conducts annual meetings of its members and invited guests which are not open to the public. All meeting attendees must sign confidentiality agreements before obtaining meeting materials and access to the meeting areas.

2. The individual Defendants-Appellants are anti-abortion activists. Defendant-Appellant David Daleiden founded the Center for Medical Progress ("CMP") and later created the "Human Capital Project" to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue."

3. In order to obtain an invitation to attend NAF's 2014 and 2015 annual meetings, the individual defendants misrepresented themselves as representatives of a company, BioMax Procurement Services LLC ("BioMax"), purportedly engaging in fetal tissue research. Daleiden—purporting to be a BioMax representative and using an alias—signed "Exhibit Agreements" for both annual meetings in which he acknowledged, among other things, that all written, oral, or visual information disclosed at the meetings "is confidential and should not be disclosed to any other individual or third parties" absent written permission from NAF.[1]

4. The individual defendants and several investigators they hired to pose as

[1] In signing the agreement, Daleiden also falsely affirmed that all information contained in BioMax's application and other correspondence with NAF was "truthful, accurate, complete, and not misleading."

BioMax representatives also signed "Confidentiality Agreements" that prohibited: (1) "video, audio, photographic, or other recordings of the meetings or discussions at this conference;" (2) use of any "information distributed or otherwise made available at this conference by NAF or any conference participants . . . in any manner inconsistent with" the purpose of enhancing "the quality and safety of services provided by" meeting participants; and (3) disclosure of any such information "to third parties without first obtaining NAF's express written consent."

5. Notwithstanding these contracts, the defendants secretly recorded several hundred hours of the annual conferences, including informal conversations with other attendees. The defendants attempted in those conversations to solicit statements from conference attendees that they were willing to violate federal laws regarding abortion practices and the sale of fetal tissue.

6. The defendants then made some of the recordings public. After the release of the recordings, incidents of harassment and violence against abortion providers increased, including an armed attack at the clinic of one of the video subjects that resulted in three deaths.

7. The district court issued a preliminary injunction enjoining the defendants from, in contravention of their agreements with NAF, "publishing or otherwise disclosing to any third party": (1) any "recordings taken, or any confidential information learned, at any NAF annual meetings;" (2) "the dates or locations of any

future NAF meetings;" and (3) "the names or addresses of any NAF members learned at any NAF annual meetings."

8. We have jurisdiction over the defendants' appeal of that preliminary injunction under 28 U.S.C. § 1292(a)(1). We review for abuse of discretion, *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and affirm. The district court carefully identified the correct legal standard and its factual determinations were supported by the evidence. *Id.*; *see also Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (asking whether the "district court's application of the correct legal standards was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record").

9. We add only a few thoughts to the district court's careful discussion. First, the defendants do not contest that they engaged in misrepresentation and breached their contracts. But, they claim that because the information they obtained is of public interest, the preliminary injunction is an unconstitutional prior restraint. Even assuming arguendo that the matters recorded are of public interest, however, the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF. *See Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994). Nor did the district court abuse its discretion in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality

agreements, because one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest. *See Dietemann v. Times, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. . . . simply because the person subjected to the intrusion is reasonably suspected of committing a crime.").

10. The defendants claim that they were released from their contractual obligations because they obtained evidence of criminal wrongdoing. But the district court, having reviewed the recordings, concluded as a matter of fact that they had not. That determination is amply supported by the record. *See Pimentel*, 670 F.3d at 1105.

11. Our dissenting colleague believes that the district court erred in enjoining the defendants from voluntarily providing the purloined information to law enforcement. But even assuming the dubious proposition that the defendants were entitled to root out what they considered to be illegal activities through fraud and breach of contract, the district court's finding that they uncovered no violations of the law is a sufficient answer to any right claimed by the defendants.[2]

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[2] The dissent cites no authority for the proposition that "our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement." Dissent at 3. Even if true, however, the proposition would confer no right on citizens to obtain that information through fraud or breach of contract.

12. The preliminary injunction places no direct restriction on law enforcement authorities. Rather, it enjoins the *defendants* from disclosing information to anyone except in response to a subpoena. If law enforcement officials obtain a subpoena, the defendants have agreed in a stipulated Protective Order to notify NAF so that it can decide whether to oppose the subpoena. The preliminary injunction and protective order explicitly provide that NAF may not "disobey a lawful . . . subpoena." The preliminary injunction therefore in no way prevents law enforcement from conducting lawful investigations.

13. The dissent, citing *S.E.C. v. O'Brien*, 467 U.S. 735, 750 (1984), argues that notifying the target of a third-party subpoena might allow that target to thwart an investigation by intimidating the third party and destroying documents. But *O'Brien* involves investigations in which a target is unaware of an ongoing investigation and still possesses materials that would be the subject of a subpoena or potential investigation. *Id*. Here, by contrast, NAF already knows that some law enforcement authorities seek this information, the defendants—not NAF—possess the recordings, and the defendants, who are eager to comply with any subpoena for their own purposes, are hardly likely to destroy the subpoenaed recordings. Moreover, the district court has preserved the recordings.

14. Given the district court's finding, which is supported by substantial evidence, that the tapes contain no evidence of criminal activity, and its recognition

of several states' ongoing "formal efforts to secure the NAF recordings," the preliminary injunction carefully balances the interests of NAF and law enforcement. We therefore decline the request by the amici Attorneys General to modify the injunction.

AFFIRMED.

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

Constrained as I am by the applicable strict standards of review, *see Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012), I accept that Defendants have generally failed to carry their burden of showing that the District Court's grant of a preliminary injunction is an abuse of discretion.

I strongly disagree with my colleagues on the application of the preliminary injunction to law enforcement agencies. The injunction against Defendants sharing information with law enforcement agencies should be vacated because the public policy in favor of allowing citizens to report matters to law enforcement agencies outweighs NAF's rights to enforce a contract. This was recognized by the Supreme Court over thirty years ago in *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").[1] Accordingly, I find no justification for not

[1] *See also In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 748 F.2d 1415, 1419 (10th Cir. 1984).

allowing Defendants to share the tapes with any law enforcement agency that is interested.

Moreover, the District Court's determination that the tapes contain no evidence of crimes, even if true, is of little moment as the duties of Attorneys General and other officers to protect the interests of the general public extend well beyond actual evidence of a crime. In *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950), the Supreme Court recognized that "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *See also Wilson Corp. v. State ex rel. Udall*, 916 P.2d 1344, 1348 (N.M. Ct. App. 1996) (noting that New Mexico's civil investigative demands "enable the Attorney General to obtain information without first accusing anyone of violating the Antitrust Act."); *CUNA Mut. Ins. Soc. v. Attorney General*, 404 N.E.2d 1219, 1222 (Mass. 1980) (noting that use of civil investigative demands is not limited only to person being investigated, but extends to seeking information from the insurer concerning possible violations of that statute by others); Ariz. Rev. Stat. § 44-1524(A) (allowing the Attorney General in investigating a violation to "[e]xamine any merchandise or sample thereof, or any record book, document, account or paper as he may deem necessary.").

Furthermore, disclosure to a law enforcement agency is not a disclosure to the public. As the Attorneys General amici note: "[l]aw enforcement regularly handles highly sensitive materials, such as the identity of informants, information regarding gangs and organized crime, and the location of domestic violence victims. If law enforcement cannot be trusted to handle information with the potential to risk bodily harm or even death if it falls into the wrong hands, then it simply cannot do its job." Accordingly, our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement. This case is no exception and the district court erred in preventing Defendants from showing the tapes to law enforcement agencies.

Similarly, the injunction violates this strong public policy by requiring that if a law enforcement agency contacts Defendants and seeks materials covered by the injunction, Defendants must notify NAF of the request and allow NAF time to respond. These conditions inherently interfere with legitimate investigations. *See Jerry T. O'Brien. Inc.*, 467 U.S. at 750. Moreover, the notice requirement does not purport to protect NAF from subsequent disclosures by a law enforcement agency after it had received the materials.

Whatever the balance between NAF's contractual rights and the

Defendants' First Amendment rights, law enforcement is entitled to receive information from citizens regardless of how the citizens procure that information. Accordingly, I would vacate the preliminary injunction insofar as it purports to limit Defendants from disclosing the materials to law enforcement agencies and requires that Defendants notify NAF of any request they receive for the materials from law enforcement agencies.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on April 12, 2017, using CM/ECF, which will send notification of such filing to counsel of record.

Respectfully submitted,

/s/ Charles S. LiMandri

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