No. 16-15360

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.

DEFENDANTS/APPELLANTS' UNOPPOSED MOTION TO STAY THE ISSUANCE OF THE MANDATE

Pursuant to Fed. R. App. P. 41 and Ninth Circuit Rule 41-1, Defendants-Appellants (collectively, "CMP") jointly move this Court for an order granting a stay of the issuance of the mandate in this case pending the filing of a petition for a writ of certiorari in the United States Supreme Court and until the final disposition of the case by the Supreme Court.

Marc Hearron, counsel for Plaintiff-Appellee, National Abortion Federation ("NAF"), has authorized the undersigned to state that NAF does not oppose this motion.

On March 29, 2017, this Court issued its opinion in which it affirmed the district court's grant of a preliminary injunction against CMP. CMP then timely filed a joint petition for panel rehearing and for rehearing en banc. The petition was denied on May 5, 2017. CMP plans to file a petition for a writ of certiorari with the

United States Supreme Court within the allotted ninety days. S.Ct. R. 13.1, 13.3. CMP will notify this Court of the filing of the petition to continue the stay until the Supreme Court's disposition. Fed. R. App. P. 41(d)(2)(B).

As set forth below, this Court should grant CMP's motion for a stay because CMP's certiorari petition (1) will present substantial questions of law and (2) good cause exists for a stay. *See* Fed. R. App. P. 41(d)(2). A stay will not prejudice NAF. Soon after the entry of the preliminary injunction, the district court proceedings were stayed—based on the parties' stipulation—pending the issuance of the mandate in this appeal. DCT Dkt. No. 358. The preliminary injunction has been in effect during the pendency of this appeal and it will be maintained during a continued stay.[1]

In light of the standards for granting a certiorari petition, CMP respectfully submits that the Panel's decision (1) decided an important question of federal law that has not been, but should be, settled by the Supreme Court and (2) conflicts with decisions of the Supreme Court and other circuit courts. S.Ct. R. 10. There is a substantial probability that four members of the Supreme Court will consider the

[1] Moreover, the district court on April 24, 2017, entered an order, based on the parties' stipulation, that NAF has thirty days after the deadline for CMP to file a certiorari petition with the Supreme Court or the conclusion of all appellate proceedings on the preliminary injunction order, whichever is later, to complete its discussions with the Arizona and Louisiana Attorneys General or initiate litigation concerning the subpoenas issued by those offices. DCT Dkt. No. 405.

legal issues to be sufficiently meritorious for the grant of certiorari. A certiorari petition in this case would not be frivolous or filed merely for purposes of delay. *See* Ninth Cir. R. 41-1.

Accordingly, CMP requests that this Court stay the issuance of the mandate in this case pending the filing of a certiorari petition and until the final disposition of the case by the Supreme Court.

ARGUMENT

I.
CMP'S PETITION WILL PRESENT SUBSTANTIAL QUESTIONS OF LAW

A.
The Panel decision presents an important question of federal law that has not been, but should be, decided by the Supreme Court.

The Panel decision upheld a prior restraint on CMP's speech, which relates to matters of public interest and the possible commission of felonies that has drawn widespread attention from Congressional panels, State Attorneys General, the media, and the general public. 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). In upholding the preliminary injunction, "the panel deprived the public of the ability to view firsthand, and judge for themselves, [] film[s] at the center of an international uproar." *See Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. Cal. 2015) (en banc). The Panel's sole justification for upholding this

extraordinary, damaging, and "presumptively unconstitutional" remedy, *Neb. Press Ass'n*, 427 U.S. at 558, is that 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 of the context of trade secrets and classified information, *no* federal court—other than now this Court—has upheld an order suppressing information of high public interest, based simply on the agreement of the parties to do so. Other federal courts have declined to put the weight of their contempt power behind the enforcement of private agreements to defeat the public's right to know. *See, e.g., In re Halkin*, 598 F.2d 176, 189-90 (D.C. Cir. 1979) ("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"), *overruled in part on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) ("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.").

The Panel's upholding of 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 (outside the context of trade secrets and classified information) creates an issue of exceptional importance that has not yet been decided by the Supreme Court but should be.

B.

The Panel decision conflicts with Supreme Court and circuit court decisions.

The Panel incorrectly equated the mere fact of CMP signing NAF's contract of adhesion (not drafted by or negotiated by CMP), which included some waiver language, 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). This improperly inverted 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, for example, fraud, coercion, or mental incompetence.

The Panel's decision thus brought this Court into conflict with Supreme Court and other circuit court precedent. *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) (the Supreme Court has held that "constitutional rights . . . may be contractually waived where the facts and circumstances surrounding the waiver

make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequence of its waiver. . . . [such as] where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations").

In addition, the Panel found that the putative waiver encompassed a waiver of the right of citizens to voluntarily provide information about possible felonies to law enforcement. The Panel's sweeping interpretation of the form agreement compounded 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 to be addressed by the Supreme Court: whether individuals can be held to "knowingly, voluntarily, and intelligently" waive their First Amendment rights, including their right to provide information about matters of high public importance, including the possible commission of crimes, to law enforcement and public officials, simply by signing form contracts. As Judge Callahan noted, "[t]he 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." Op. at 1 (Callahan, J.,

concurring in part and dissenting in part).

Furthermore, the Panel decision conflicts with Supreme Court and other circuit court decisions requiring an independent *de novo* review of the record in First Amendment cases. *E.g.*, *Hurley v. Irish-American GLB Grp.*, 515 U.S. 557, 567-68 (1995); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 (1984); *Mullin v. Fairhaven*, 284 F.3d 31, 37 (1st Cir. 2002); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996).

Instead of applying an independent review of the record, the Panel afforded a degree of deference to the district court's factual findings. In free speech cases, however, a court must examine the whole record to assure itself that there is no forbidden intrusion into a person's free expression rights. *Bery v. N.Y.*, 97 F.3d 689, 693 (2nd Cir. 1996) ("[S]ince appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court.") (citations omitted); *accord Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002). Given the important constitutional issues at stake, it is likely the Supreme Court will grant certiorari on this question to ensure uniform application of the law in the First Amendment context.

Lastly, the Panel 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, without any showing of irreparable harm. This ruling conflicts with Supreme Court precedent which recognizes no exceptions to a plaintiff's burden to establish irreparable harm before a preliminary injunction may issue. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008).

II.
GOOD CAUSE EXISTS FOR THE STAY

A stay of the issuance of the mandate will conserve the resources of the district court and the parties and will preserve the status quo pending Supreme Court consideration of this case. The district court proceedings have been stayed pending the issuance of the mandate. A stay will not prejudice NAF, as the preliminary injunction will remain in force during the stay.

It would not be in the best interests of judicial economy, or in the best interest of the parties, for this Court to issue the mandate in this case before resolution of CMP's certiorari petition. In the absence of a stay, while the certiorari petition is pending with the Supreme Court, the parties and the district court would be moving forward with pleadings and motions under the legal framework provided by the Panel's decision, which could be modified or abandoned altogether should the Supreme Court grant certiorari. The important questions to be raised in the certiorari petition should first be considered and resolved by the Supreme Court before this case continues to the district court, which would benefit

the parties and the district court since the ultimate resolution of the issues raised in the certiorari petition will impact the rest of this litigation moving forward.

III.
CONCLUSION

This Court should grant this unopposed motion and stay the issuance of the mandate pending CMP's filing of a petition for writ of certiorari in the United States Supreme Court and until final disposition of the case by the Supreme Court.

Respectfully submitted on May 5, 2017,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitations in Fed. R. App. P. 27(d)(2)(A). According to the word count feature of Microsoft Word, the motion contains 1,919 words, excluding the exempted parts under Rule 32. The motion has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on May 5, 2017, using CM/ECF, which will send notification of such filing to counsel of record.

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