

No. 16-15360

In the United States Court of Appeals for the Ninth Circuit

National Abortion Federation, et al.
Plaintiffs-Appellees,

v.

Center for Medical Progress, et al.
Defendants-Appellants

**On Appeal from the United States District Court
for the Northern District of California,
Hon. William H. Orrick, United States District Judge
Civil Action No. 15-cv-03522-WHO**

**Brief Amicus Curiae of Southern Poverty Law Center
and Feminist Majority Foundation in Support of
Appellees and Affirmance**

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1) For non-governmental corporate parties please list all parent corporations:

None.

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Dated: June 7, 2016

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INTEREST OF AMICI CURIAE

Amici Curiae submit this brief¹ pursuant to Fed. R. App. P. 29(a) to assist this Court in understanding the context of anti-abortion extremism in this country, its effect on abortion providers,² and the special importance California has placed on fighting this extremism. The district court properly considered each of these elements in its decision preliminarily enjoining the Center for Medical Progress (CMP) from releasing videos recorded at the 2014 and 2015 National Abortion Federation (NAF) annual meetings.

Amici Curiae are two non-profit organizations dedicated to fighting extremism in this country, both generally and as it relates to abortion. Founded in 1971, the Southern Poverty Law Center (SPLC) is one of the nation's leading civil rights organizations and is dedicated to fighting hate and bigotry and to seeking justice for vulnerable members of our society. SPLC is internationally known for its work tracking the activities of hate groups and other domestic extremists throughout the United States and for exposing their activities to the public, the media, and law enforcement. The Feminist Majority Foundation (FMF), which was founded in 1987, is a cutting-edge organization dedicated to promoting

¹ No counsel for any party authored this brief in whole or in part. No party or any person other than counsel for *Amici Curiae* contributed money to fund the preparation or submission of this brief.

² Throughout the brief, the term "abortion provider" refers to anyone working in the provision of abortion, not just doctors.

women's equality, protecting and advancing reproductive freedom, and embracing non-violence. In all spheres, FMF utilizes research and action to empower women economically, socially, and politically.

Both *Amici* have long studied anti-abortion extremism as part of their work. SPLC has produced reports as part of Hate Watch and the Intelligence Report about anti-abortion extremism and has litigated cases against associates of anti-abortion assassins. FMF spearheads the National Clinic Access Project to reduce anti-abortion violence, keep providers safe and clinics open, and bring anti-abortion extremists to justice. Since 1993, FMF has conducted periodic National Clinic Violence Surveys, which measure anti-abortion violence and harassment. The most recent survey was released in early 2015.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Harassment, intimidation, targeting, threats, and violence became a regular part of anti-abortion activity in the United States almost immediately following *Roe v. Wade*, and they continue to this day. CMP's actions that form the basis of this case have already had profound and deadly consequences, and the release of their illegally obtained videos from the 2014 and 2015 NAF meetings could lead to even more violence. This Court is no stranger to actions like those at issue in this case, as it has previously ruled -- in a case involving an ominous and extensive online hit list of abortion providers -- that anti-abortion threats and intimidation are not protected under the First Amendment. CMP's actions fit within the same pattern of activity intended to threaten abortion providers and make them feel that they are not safe while working in their lawful professions providing constitutionally-protected medical care.

As a result of anti-abortion extremism, abortion providers suffer greatly. Many live their lives in fear that they will be targeted, that their families will be harassed, or that their colleagues will be harmed. To deal with this harassment, they alter their lives in significant ways, such as wearing disguises, taking different routes to work, concealing their identities, and living in protected locations. Some leave the profession, while others choose not to take the risk and never enter the field, even after extensive training in professional school.

To its immense credit, California's long-standing public policy against anti-abortion extremism and in favor of protecting abortion providers is a model for the rest of the country. Through various laws -- civil and criminal, statewide and local -- California has proclaimed loud and clear that it is contrary to the public policy of the state to target and harass abortion providers and in particular, to use the disclosure of private information to put abortion providers in danger. Releasing the videos at issue in this case would directly contravene this strongly-held California policy.

In the sections of the district court's opinion considering the public policy behind enforcing confidentiality agreements, the possibility of irreparable harm to NAF, and the balance of the equities, the district court properly considered all of these issues. *Amici* submit this brief to assist this Court in further understanding the context in which this case arises and to demonstrate exactly why the district court's preliminary injunction is essential to protecting the safety of healthcare professionals providing lawful medical care throughout this country and should be affirmed.

ARGUMENT

I. **CMP's surreptitious recordings of NAF meetings are consistent with decades of extremist tactics against abortion providers.**

The videos at the heart of this case are part of a long history of anti-abortion extremism dating to the years immediately following *Roe v. Wade*, 410 U.S. 113 (1973), and continuing to the present day. According to the most recent statistics from NAF, the leading source of data about anti-abortion violence,³ since 1977 there have been 11 murders, 26 attempted murders, 42 bombings, 185 arsons, 98 attempted bombings or arsons, 404 clinic invasions, 100 butyric acid attacks, 203 physical attacks or batteries, 4 acts of kidnapping, and 189 burglaries. There have also been 663 anthrax or bioterrorism threats, 634 bomb threats, 516 death threats or threats of harm, 561 acts of stalking, over 15,000 incidents of hate mail or harassing phone calls, and over 26,000 incidents of hate email or internet harassment. National Abortion Federation, *2015 Violence and Disruption Statistics* 3 (2016), available at <http://prochoice.org/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf>.

The first acts of anti-abortion violence and extremism date from the mid-1970s. In the two years immediately following *Roe*, those opposed to abortion

³ NAF's data is the best in the field, but it is based on clinics reporting to NAF. Accordingly, the real numbers are most likely "significantly higher, because not all providers report to NAF and not all incidents are reported." *Brief of National Abortion Federation et al. as Amici Curiae in Support of Respondents and Affirmance in McCullen v. Coakley*, 134 S. Ct. 2518 (2014), at 8 n.3.

took a peaceful political approach to reform. *See generally* Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* 27-91 (2015) (detailing the anti-abortion movement's tactics in the years following *Roe*). This commitment to peaceful political responses ended in 1975, when a small group of abortion opponents staged the first reported clinic invasion. On August 2, 1975, six women entered the Sigma Reproductive Health Services clinic in Rockville, Maryland, sat down in front of the doors that led from the waiting room to the procedure room, and refused to move. They were arrested after a several-hour stand-off with the police. James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War* 61-62 (1998).

More extreme acts of anti-abortion terrorism followed later in the decade. The first known violent anti-abortion act occurred in March 1976 when Joseph Stockett set fire to a Planned Parenthood clinic in Eugene, Oregon. Jennifer Jefferis, *Armed for Life: The Army of God and Anti-Abortion Terror in the United States* 22-23 (2011). Just before he set fire to the building, Stockett spoke with his friends not only about his opposition to abortion but also about burning down the Planned Parenthood building. *State v. Stockett*, 565 P.2d 739, 740 (Ore. 1977) (reinstating the jury verdict against Stockett).

Not long after Stockett's attack, others followed. In February 1977, someone set fire to the Planned Parenthood clinic in St. Paul, Minnesota, and

caused a quarter million dollars' worth of damage. Risen & Thomas, *supra*, at 74. A year later, on February 18, 1978, a man entered the Concerned Women's Clinic in Cleveland, Ohio, and threw a bag of flammable liquid in the receptionist's face, blinding her. He then set fire to the clinic, which was filled with patients at the time; fortunately, none of them was injured. Patricia Baird-Windle & Eleanor J. Bader, *Targets of Hatred: Anti-Abortion Terrorism* 54 (2001); Jefferis, *supra* at 23. The violence escalated even further on February 15, 1979, when Peter Burkin bombed a clinic in Hempstead, New York, by throwing a flaming torch and a can of gasoline into a room where a doctor was performing an abortion at the time. Fifty people were in the clinic, but luckily the staff evacuated them all safely. Baird-Windle & Bader, *supra* at 57; Jefferis, *supra* at 23.

While the arsons and firebombings continued in the late 1970s and early 1980s, anti-abortion extremism took an even more disturbing turn in 1982, when a doctor and his wife were kidnapped for over a week by people who identified with a shadowy new group called the Army of God. Hector Zevallos, who owned and was the doctor at the Hope Clinic for Women in Granite City, Illinois, was kidnapped from his home on August 12 along with his wife, Rosalee Jean. The three kidnapers held the couple for eight days in an abandoned munitions bunker where they forced Dr. Zevallos at gunpoint to make an anti-abortion video to send to President Ronald Reagan. The kidnapers made clear in their discussions with

the Zevallooses as well as in several written screeds that they believed that they were on a mission from God to “kill the baby killers.” Baird-Windle & Bader, *supra* at 64-66; Jefferis, *supra* at 23-25.

While kidnapping did not become a common tactic of anti-abortion extremists, arsons, firebombs, and other direct attacks on clinics continued through the 1980s as the loose-knit Army of God expanded its reach. Operation Rescue, of which Appellant Troy Newman has been president since 1999, also became active in the late 1980s, employing its tactic of blockading clinic entrances through massive numbers of its followers who refused to move. Baird-Windle & Bader, *supra* at 88-89. Also in the 1980s, several books or pamphlets were written advocating extreme actions against abortion providers, some, like the *Army of God Manual*, going so far as to advocate murder. One such book that stopped short of advocating murder but did advocate other extreme measures, *Closed: 99 Ways to Stop Abortion*, was written by Joseph Scheidler, the founder of the Pro-Life Action Network. One tactic Scheidler used was to attend NAF annual meetings, before they were closed to the public. At one meeting in the mid-1980s, Scheidler threatened then-NAF president Glenna Halverson-Boyd, pinning her against a wall and saying, “I’m gonna see the death of you and the likes of you.” Baird-Windle & Bader, *supra* at 116. Among the many reasons that NAF meetings are now

closed to the public is to prevent these types of threats and invasions from anti-abortion extremists.

The world of anti-abortion violence changed on December 28, 1991, when abortion providers became victims of gun violence for the first time. That day, Don Catron and Claudia Gilmore, two administrators at the Central Health Center, an abortion clinic in Springfield, Missouri, were shot by a man in a ski mask who entered the clinic asking to see a doctor but instead shot them with a sawed-off shotgun. Both survived, though Gilmore was left paralyzed. Less than a month later, Dr. Douglas Karpen was shot at the Women's Pavilion, an abortion clinic in Houston, Texas. He survived. Neither gunman was ever caught, though the Army of God subsequently took credit for the attacks. Jefferis, *supra* at 30.

On March 10, 1993, anti-abortion extremism turned deadly. Dr. David Gunn was shot and killed while walking from his car to the entrance of the Pensacola Women's Medical Services clinic in Pensacola, Florida. Since Dr. Gunn's murder, there have been ten other anti-abortion murders in this country.⁴

⁴ Dr. George Wayne Patterson was murdered in Mobile, Alabama, on August 21, 1993; however, even though abortion rights advocates suspect the murder was abortion-related, the authorities have never solved the case. Remarkably, in stark contrast to the experience in the United States, only *one* abortion-related murder has been recorded anywhere else in the entire world. On July 16, 2001, Steven Rogers, a clinic security guard, was murdered by an anti-abortion extremist in Melbourne, Australia. Paul Anderson, *Deluded Pro-Life Crusader Peter James Knight Kills Guard, but Wanted More Dead After He Brought His Gun and Hatred to an Abortion Clinic in Melbourne*, Herald Sun, Mar. 11, 2014.

July 29, 1994: Dr. John Britton and James Barrett, a clinic volunteer, were shot and killed at The Ladies Center in Pensacola, Florida.

December 30, 1994: Clinic receptionists Shannon Lowney and Leanne Nichols were shot and killed in Brookline, Massachusetts. Lowney was working at the Planned Parenthood clinic; Nichols was working at Preterm Health Services.

January 29, 1998: Security officer Robert Sanderson was killed when a bomb exploded at the New Woman, All Woman Health Care Clinic in Birmingham, Alabama.

October 23, 1998: Dr. Barnett Slepian was murdered by a sniper when he was standing at his kitchen window making dinner on a Friday night in Amherst, New York, just outside Buffalo.

May 31, 2009: Dr. George Tiller was murdered while he was performing his usher duties at his church on a Sunday morning in Wichita, Kansas.

November 27, 2015: Police officer Garret Swasey and patient companions Ke'Arre Stewart and Jennifer Markovsky were murdered at the Planned Parenthood clinic in Colorado Springs, Colorado.

During this time-frame, there have also been twenty-nine attempts at anti-abortion murder via gunshots or bombings. Most recently, during the same attack that killed three individuals in Colorado Springs last year, nine others (five police officers and four civilians) were also shot but survived. See Joyce Arthur, *Anti-Choice Terrorism: Murders and Attempted Murders* (May 2016), available at <http://www.arcc-cdac.ca/anti-choice-terrorism-murders-attempted-murders.pdf> (comprehensively setting forth all anti-abortion murders and attempted murders).

Anti-abortion extremism since the 1990s has encompassed tactics other than murder and attempted murder. Indeed, while the tactics of the 1980s -- arson, bombings, blockades -- have continued, the massive clinic protests of previous decades have for the most part been replaced with newer tactics.⁵ The internet has become the newest battleground for anti-abortion threats and harassment. As NAF has chronicled, death threats and other threats of harm have skyrocketed in the past decade, particularly those online and during the months following the release of the videos at issue in this case. National Abortion Federation, *supra*.

The progenitor of almost all internet-related harassment of abortion providers, including the CMP videos, is the Nuremberg Files website. The site was first unveiled at the White Rose Banquet in 1996, a banquet that honored individuals convicted of anti-abortion violence. Neil Horsley created the website which included photos, addresses, telephone numbers, and other detailed personal information for over 200 abortion providers. The site functioned as a hit list of sorts, indicating those who had been murdered with a strike-through font and those who had been injured by anti-abortion violence shaded in gray. Along with the website, the American Coalition of Life Activists (ACLA), an extremist group

⁵ Anti-abortion harassment and threats on the whole appear to be increasing, however: NAF members reported that “[t]he number of clinic blockades nearly doubled from 2014 to 2015. Incidents of picketing at facilities, which had been decreasing in previous years, increased from 5,402 in 2014 to 21,715 reported incidents in 2015—a number larger than numbers reported for any other year.” National Abortion Federation, *supra*.

associated with the Army of God, launched its campaign of “WANTED” posters, featuring the pictures and names of abortion doctors. ACLA offered a reward to anyone who stopped these physicians from providing abortions.⁶ ACLA also previously published a “Deadly Dozen” poster with thirteen abortion providers labeled as “GUILTY OF CRIMES AGAINST HUMANITY.” Jefferis, *supra* at 34-36. In 2002, an *en banc* panel of this Court found that, taken together, the Nuremberg Files website, the WANTED posters, and the Deadly Dozen poster were “true threats,” a violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and not protected by the First Amendment. *See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). Although the defendants were ordered to remove the Nuremberg Files website from the internet, fragments of it still exist online to this day.

Online harassment of abortion providers reminiscent of the chilling Nuremberg Files have become commonplace. Websites such as AbortionDocs.org⁷ compile personal information about providers of abortion care

⁶ Posters like these appeared before the murders of Dr. Gunn and Dr. Britton and before the first attempt on Dr. Tiller’s life. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (D. Ore. 1999).

⁷ AbortionDocs.org is a project of Pro-Life Nation, whose president is Appellant Troy Newman. *See Feminist Majority Foundation, Who is Troy Newman? What is*

nationwide for anyone to use. Local anti-abortion extremists have created webpages with clinic workers' photos and personal information and have used Facebook and Twitter to harass and threaten providers. David S. Cohen & Krysten Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 72-74 (2015).

Beyond online threats, abortion providers also must live with other forms of non-violent but targeted harassment. This kind of harassment, distinct from attacks on and protests at clinics, is focused on specific individuals who work in the field, rather than on the issue of abortion in general or a collective entity like a clinic. For some abortion providers, this kind of targeted harassment is an everyday part of their lives. Providers are harassed at home and at other jobs, followed to and from work, and stalked. They receive hate mail, middle-of-the-night phone calls, abusive emails, and death threats. Their personal information is discovered and disseminated; they are victims of slurs based on their race, religion, or sexuality; and their property is trespassed upon. Their loved ones can also become targets, as anti-abortion extremists also harass abortion providers' partners, parents, children, neighbors, and colleagues in order to intimidate and indirectly target the provider. This type of targeting, almost completely foreign to the experience of other medical professionals, may never lead to violence, but it conveys the very clear

AbortionDocs.org?, available at <http://www.feminist.org/anti-abortion-violence/abortiondocs.html>

message that providers have to be constantly vigilant about their personal safety and privacy. *Id.*

The CMP videos at issue in this case fit within this long line of post-*Roe* anti-abortion extremism. Although the videos themselves are not violent, they have led to death threats against some of the people who appear in them and appear to have inspired one anti-abortion extremist to a murderous rampage. By infiltrating NAF meetings, which were closed to the public in part to exclude anti-abortion extremists, and then posting information about individual abortion providers on the internet, CMP has drawn upon some of the most threatening tactics of the anti-abortion extremist movement. The district court properly considered this history in its decision.

II. Extremist actions against abortion providers have severe consequences for providers, including substantially restricting their ability to provide lawful reproductive healthcare and forcing them to live their lives in constant fear.

Anti-abortion extremism can have devastating effects on abortion providers' lives. The district court took note of this when it found that, if CMP were to release the videos at issue in this case, "it is likely that the NAF attendees shown in those recordings would not only face an increase in harassment, threats, or incidents of violence, but also would have to expend more effort and money to implement additional security measures." Order Granting Motion for Preliminary Injunction at ER 36. The district court also found that providers could suffer

reputational harms as well. *Id.* at 37. The court relied on two declarations in particular to support these findings, one from a law professor who was likely filmed by CMP and who asserted that, because of the videos, “she took steps to protect the safety and privacy of her family.” *Id.* at 18. The other declaration, from NAF’s medical director, stated that he “had his home inspected by NAF’s security team and is installing a security system, but given the current atmosphere he remains fearful for his safety and that of his family.” *Id.*

Consequences of anti-abortion extremism are not limited to the types described by the two declarants on which the district court relied. Rather, they are widely-varied and well-documented not only in the literature that has studied the issue but also in case law.

In their 2015 book about anti-abortion extremism, Professor David S. Cohen and attorney Krysten Connon (two of the authors of this brief) undertook an in-depth study of the many ways that targeted harassment affects abortion providers. Cohen & Connon, *supra*. Cohen and Connon interviewed 87 abortion providers around the country about their experiences being targeted by anti-abortion extremists, how this targeting impacted their lives, and the ways that law and society could better address the problem. The chapters in the book explaining how providers react to targeted harassment and how they change their lives in order to avoid being targeted and to protect themselves confirm that the two declarations

relied upon by the district court relate activity that is as commonplace among the provider community as is anti-abortion harassment. *See id.* at 123-171.

For instance, Cohen and Connon detail the various emotional reactions abortion providers experience because of targeted harassment. Because of anti-abortion extremism and the concern that it could impact them at any time, many providers live their lives in a constant state of fear. As one doctor emphatically stated, after explaining all the ways that anti-abortion extremists have targeted him, including gathering his personal information and disseminating it online, “Let them know, let them know I am frightened. I feel physically threatened.” *Id.* at 124. Another clinic worker who had experienced decades of harassment, including violence against people she worked with as well as having her and her family’s personal information broadcast throughout her city, revealed how deeply it affected her. She said, “I suppose if I wanted to be really honest, I’d have to say I was scared sometimes, not knowing what I was going to find at home or at the clinic.” *Id.* at 126-27.

Other providers stopped short of saying that they were fearful, but instead described their emotional state as a result of the targeting they have faced as angry, anxious, frustrated, paranoid, insecure, and/or vulnerable. One provider in particular explained that she felt this sense of vulnerability, especially after detailed personal information about her was included in hate mail she received at

home. She said that this kind of invasion of privacy concerned her because her phone number and home address, neither of which was public, had been discovered and used to threaten her. *Id.* at 131.

The strong emotional reactions reach far beyond just the individual abortion provider. Many providers expressed a stronger sense of concern for others in their lives -- including patients, co-workers, neighbors, and family members -- than they did about themselves. One doctor explained the impact of a recently-uncovered plot to assassinate people who worked at her clinic by talking about her family more than about herself:

I have three young children at home, and I never know what someone is going to do, especially with the recent incident. I was on maternity leave when the person who was planning to attack our clinic [was caught], and so that kind of concerns me to the point where I had thought do I need to keep doing this? Do I need to keep coming to this clinic as a provider? Everyone has their reason, but I have two infants at home now.

Id. at 132. Providers' family members can also have similar reactions. When anti-abortion extremists disseminated one doctor's personal information throughout the state, the doctor's husband had a difficult time dealing with the situation and the resulting safety concerns. She explained that her husband "hadn't really gotten his mind around that fear of being in our home. He hadn't thought about if you stand at the sink, there are nine windows." *Id.* at 140.

Providers employ many different strategies that help most of them continue with their work despite the extremists' efforts. For many providers, this means living their lives in a constant state of vigilance. One clinic administrator explained just how much this kind of harassment changed her life, particularly after the extremists targeting her revealed that they knew her home town. She said, "I feel like now I really just watch my back. I pay a lot more attention to my surroundings. Like when I leave, I'll look at my car for anything." She added that she is "very uncomfortable" when she goes to her home town. When she is there, her mother closes the blinds and demands that, when she leaves, she call her mother when she reaches her destination. *Id.* at 149.

This increased vigilance, foreign to most people, changes the most minute aspects of abortion providers' lives. For instance, many providers regularly check their cars before they get into them for any sign of tampering. They look around at who may be following them when they leave the clinic where they work. They keep detailed records about people who may be targeting them. They alter their daily routines so as not to be predictable. They park in different locations, drive different routes to work, vary their modes of transportation, go outside for breaks in groups, and close the window shades wherever they are. *Id.* at 148-55.

Some of the most extraordinary actions providers take are to prevent their identities from being discovered, reflecting just how invasive and potentially

harmful the CMP videos are. Some providers hide their home address by using a post office box, registering their property under a relative's name, or relying on government programs that allow certain people to protect their personal information. To prevent anti-abortion extremists from knowing what they look like, some providers wear disguises to and from work, such as Halloween masks or baseball hats and dark sunglasses, or they pose as a patient or patient supporter. *Id.* at 155-61.

Providers take these actions not because they are ashamed of their work, but rather because they fear the kind of harassment, threats, and violence that anti-abortion extremists have been engaging in for decades and has already happened as the direct result of the CMP videos released since July 2015. Hiding their identities can have an unfortunate consequence for abortion providers -- they are silenced from speaking out about a topic about which they have strong feelings. One doctor said that she was proud of her work, but because she has to protect her "ability to live a free life, I have to act like someone who has done something wrong or criminal." *Id.* at 160. Another doctor lamented that because of the targeting he and others have faced, he had to reduce his public advocacy around abortion. *Id.* at 159.

Publicly disclosing information about providers, as the CMP videos would do, can be very costly for the affected individuals. Abortion providers modify their

homes and offices to protect themselves, including installing extensive security systems. Some even move to more secure locations that are more difficult to discover or threaten. *Id.* at 161-66. And almost all of the providers that Cohen and Cannon talked with seriously considered the question of whether to purchase a gun and a bulletproof vest in response to the threats to their safety. Providers had very different answers to this question, but because of the threats to those in their profession, they were forced to consider it. *Id.* at 167-71. One doctor expressed his incredulity about the issue by saying, “If anybody told me when I was in medical school that I would go to work armed and with a bulletproof vest, I would have thought they were nuts. But I do have a bulletproof vest, and I do go to clinics armed these days.” *Id.* at 147.

This Court is familiar with the ways that abortion providers are affected by anti-abortion extremism. In the Nuremberg Files/ACLA case described above, the plaintiffs described being terrified and altering their lives and medical practices as a result. *Planned Parenthood*, 290 F.3d at 1065-66. Because of the extent of the injury to the plaintiffs and the extremism directed at them, a federal jury awarded over \$100 million in compensatory and punitive damages (eventually reduced to just over \$5 million on appeal). *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 518 F.3d 1013 (9th Cir. 2008). Most relevant for the purposes of this discussion, in its 2005 decision considering the

appropriateness of punitive damages in the case, this Court described the reprehensibility of the defendants' conduct and the effect it had on the abortion providers. "Physicians were terrified and took the threat seriously. FBI and other law enforcement officials regarded the posters and files as sufficiently dangerous that they warned physicians to purchase bullet proof vests, obtain protection, and take other protective measures." *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005).

The Fifth Circuit has also considered the ways abortion providers are affected by anti-abortion extremism. In *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000), a Texas doctor and his wife sued a group of anti-abortion protesters for various state torts, including invasion of privacy, infliction of emotional distress, and tortious interference. *Id.* at 777. The torts stemmed from the group incessantly picketing, harassing, threatening, and surveilling the plaintiffs. *Id.* at 775-77. As a result of these actions, Dr. Tompkins and his wife suffered. They hired security, wore bullet-proof vests, altered their routines, warned family members, lost business at Dr. Tompkins's medical practice, and suffered mentally. *Id.* at 776-77. After hearing the evidence, a jury awarded the Tompkinses a total of \$8,000,000 in damages, *id.* at 777, which the Fifth Circuit largely affirmed on appeal (only partially reducing the verdict for a duplicative award). *Id.* at 788.

The concern that otherwise-willing medical professionals will not enter the field of abortion provision or will leave the field after entering it because of the harassment is real. Many of Cohen and Connon's research subjects told of colleagues who refused to become an abortion provider as a result of the harassment, and one of the plaintiffs in the Nuremberg Files case stopped practicing medicine entirely for a time because of the threat. *Planned Parenthood*, 290 F.3d at 1066. Sociologist Lori Freedman's work shows the same. She studied doctors who were trained to be abortion providers and were committed to the cause but who decided that they could not follow through on that commitment. Although doctors expressed several other reasons for not becoming abortion providers, harassment or extremism was one reason for some, especially doctors practicing in rural areas. One of the doctors Freedman interviewed explained her decision to not provide abortions by citing "the violence of the anti-abortion movement, which she felt could put her family at risk." Lori Freedman, *Willing and Unable: Doctors' Constraints in Abortion Care* 48-49 (2010).

Other studies of abortion providers bear this out. Political scientist Alesha Doan quantitatively assessed the correlation between anti-abortion harassment and the number of abortion providers throughout the country. Her study concluded that "anti-abortion harassment is not the most powerful factor influencing the number of abortion providers, but it certainly plays a role." Alesha E. Doan, *Opposition &*

Intimidation: The Abortion Wars and Strategies of Political Harassment 151 (2007). She found that one of the harassing tactics that had the greatest impact on the number of abortion providers was intruding upon providers' privacy by picketing at their homes. *Id.* at 145.

A 2010 study from *Amicus* Feminist Majority Foundation confirms that abortion providers generally persevere despite the harassment, but that it causes some providers to leave the field. Out of a total of 357 abortion clinics surveyed for the study, FMF found that the percentage of staff who resigned because of anti-abortion extremism was 2.2% (down from 4.0% in 2008, 10% in 1999, and 23% in 1993). For clinics that experienced high levels of violence, 10% reported staff resignations. The report's conclusion on this point mirrored that of Doan -- that there is a "strong correlation between the incidence of violence and harassment and staff resignation." Feminist Majority Foundation, *2010 National Clinic Violence Survey* 7 (2010).

As these studies show, if CMP were allowed to release the confidential NAF videos, the harm to the abortion providers in the videos would be real and substantial. Fearing harassment and violence, some might leave the field. For those who persevered, their lives would change in an instant as their privacy would be invaded and they and their loved ones would be forced to live with the increased

possibility of extremist violence and threats, as has already happened to several who have been featured in CMP's already-released videos.

III. California law reflects a deep-seated public policy against actions that threaten, intimidate, and terrorize abortion providers, particularly those actions that compromise their privacy.

In assessing the public interest at stake in this case, the district court concluded that public policy supports upholding the confidentiality agreement and binding CMP members to their contractual undertaking. Among the many factors that the court weighed, it held that the release of the recordings at issue in this case would be “contrary to California’s recognition of the dangers faced by providers of abortion, as well as California’s efforts to keep information regarding the same shielded from public disclosure and protect them from threats and harassment.” Order Granting Motion for Preliminary Injunction at ER 32.

These comprehensive protections demonstrate that California law contains a strong public policy that condemns anti-abortion extremism generally and invasions of abortion provider privacy specifically. The state also has adopted several measures that not only condemn these violations but also give abortion providers powerful ways to protect themselves before the occurrence of any violence or invasion of privacy and to have recourse in the courts and administrative agencies if such actions do occur.

Perhaps the aspect of California law most directly on point is its expansion of the Safe at Home program in 2002. The program was created in 1988 as a way to assist victims of domestic violence. The basic protection the program offers is to allow those who register to use a substitute address in all public databases so that no one can search through public records to find out where that person lives. In 2002, the program was expanded to include any “reproductive health care service provider, employee, or volunteer who is fearful for his or her safety or the safety of his or her family because of his or her affiliation with a reproductive health care services facility.” Cal. Gov’t Code § 6215.2(a)(1). The extension of the Safe at Home program to providers of reproductive health care manifests California’s understanding of the importance of abortion providers’ privacy and its intention to protect them from the dangers of anti-abortion harassment.

Moreover, California’s legislators did not leave the purpose of the law to guesswork, as they included detailed findings as part of the law that prove beyond a doubt the high importance the State puts on protecting abortion providers from anti-abortion harassment through invasions of privacy:

The Legislature finds and declares the following:

- (a) Persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups.
- (b) In 2000, 30 percent of respondents to a Senate Office of Research survey of 172 California reproductive health care providers reported

they or their families had been targets of acts of violence by groups that oppose reproductive rights at locations away from their clinics or offices.

(c) Persons and groups that oppose reproductive rights attempt to stop the provision of legal reproductive health care services by threatening reproductive health care service providers, clinics, employees, volunteers, and patients. The names, photographs, spouses' names, and home addresses of these providers, employees, volunteers, and patients have been posted on Internet Web sites. From one Web site list that includes personal information of reproductive health care service providers, seven persons have been murdered and 14 have been injured. As of August 5, 2002, there are 78 Californians listed on this site. The threat of violence toward reproductive health care service providers and those who assist them has clearly extended beyond the clinic and into the home.

(d) Nationally, between 1992 and 1996, the number of reproductive health care service providers declined by 14 percent. Nearly one out of every four women must travel more than 50 miles to obtain reproductive health care services dealing with the termination of a pregnancy. There exists a fear on the part of physicians to enter the reproductive health care field and to provide reproductive health care services.

(e) Reproductive health care services are legal medical procedures. In order to prevent potential acts of violence from being committed against providers, employees, and volunteers who assist in the provision of reproductive health care services and the patients seeking those services, it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential.

Cal. Gov't Code § 6215.

Separately, California law explicitly protects providers' home addresses, home telephone numbers, and images from being posted on the internet in certain situations. California Government Code §§ 6218-6218.05 prohibits anyone from posting this information with the intent to incite a third person to cause harm to the

provider or to threaten the provider. Cal. Gov't Code §§ 6218(a)(1)(A) & (B). An aggrieved provider can sue for injunctive, declaratory, or monetary relief and has a statutory right to demand that the information be removed from the internet. This law is further evidence of California's commitment to protecting providers from extremism and the unauthorized use of their personal information.

Beyond the protection of personal information from public disclosure, California also has strong protection against acts that injure, intimidate, or interfere with abortion providers. The California Freedom of Access to Clinic and Church Entrances Act, Cal. Penal Code §§ 423-423.6, is modeled after the federal Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and applies similar protections under California law. The lead sponsor of the law recognized the importance of supplementing the federal law in her cover letter introducing the bill: “[T]he federal government cannot take the place of local police in protecting abortion clients and providers on a day-to-day basis. California must give its police the laws, training, tools, and backup they need to do that job.” Letter from Deborah V. Ortiz to Senate Colleagues Introducing SB 780 (May 2001), available at http://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/ctools/Crimes_Against_Reproductive_Rights.pdf. This law, which took effect January 1, 2002, addressed the “need to develop a plan to protect women’s reproductive rights in California,” a need “clearly demonstrated by national trends in both anti-choice legislation and

anti-reproductive-rights crimes.” Robert Richard Springborn, *Special Report to the Legislature on Senate Bill 780: California Freedom of Access to Clinic and Church Entrances Act and Reproductive Rights Law Enforcement Act 8* (2003), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/misc/net780/rpt.pdf>. The Attorney General further noted that the “incidence of anti-reproductive-rights crimes across our nation is also increasing” which “clearly show[s] the necessity to protect women’s reproductive rights in California by developing a plan to prevent, apprehend, prosecute, and report anti-reproductive-rights crimes in California.” *Id.*

This law recognizes the importance of protecting not only the safety of abortion providers but also their privacy. As the legislative counsel’s digest indicates in the preamble to the Senate bill that became Sections 423-423.6, the law requires “a court in proceedings regarding the prohibited acts to take all actions reasonably required to protect the safety and privacy of the parties, witnesses, and persons who are victims, or at risk of becoming victims, of the prohibited activities. This bill would allow specific persons to use pseudonyms in civil actions related to prohibited acts.” Sen. Bill 780, Ch. 899 1-2. Accordingly, section 423.5 orders courts in proceedings under the law to “take all action reasonably required [] to safeguard the health, safety, or privacy” of providers and other victims under the law. *See also* Cal. Civ. Code § 3427.3 (allowing courts to

safeguard privacy in civil actions by health care facilities suing for the tort of “commercial blockade” and those bringing such suits to use pseudonyms “to protect their privacy”).

California municipalities have also taken steps to protect abortion providers from invasions of privacy by prohibiting or limiting picketing at their homes. Davis, Glendale, Huntington Beach, Irvine, Los Angeles, Riverside, San Jose, Santa Ana, Solana Beach, and Tustin all protect providers at home.⁸ San Jose’s law was challenged, and the California Court of Appeals found it constitutional in 1995. *City of San Jose v. Superior Court*, 32 Cal. App. 4th 330 (Cal. Ct. App. 1995). In that decision, the court noted the importance of protecting abortion providers’ privacy, both as a matter of California law and United States Supreme Court precedent. *Id.* at 341.

Taken together, these laws bespeak a strong public policy in California to protect abortion providers from anti-abortion extremism generally and invasions of privacy in particular. Allowing CMP to release its videos would contravene this clearly and forcefully articulated public policy.

⁸Davis, Cal, Mun. Code § 35.06; Glendale, Cal., Mun. Code § 9.20.080; Huntington Beach, Cal., Mun. Code § 9.20.030; Irvine, Cal., Mun. Code §§ 4-14.104, 4-14.107; Los Angeles, Cal., Mun. Code ch. 5, art. 6.1, § 56.45(e); Riverside, Cal., Mun. Code §§ 8.54.010, 9.54.030-9.54.050; San Jose, Cal., Mun. Code § 10.09.010; Santa Ana, Cal., Mun. Code § 10-110; Solana Beach, Cal., Mun. Code §§ 7.38.010-7.38.020; Tustin, Cal., Mun. Code §§ 6510-6520.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Court affirm the Order of the district court dated February 5, 2016, granting NAF preliminary injunctive relief.

DATED: June 7, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The text of the attached Brief Amici Curiae (excluding the signature in the Conclusion) contains 6,967 words. I used the word count function of Microsoft Word to count these words.

I used Times New Roman 14 point font.

Dated: June 7, 2016

/s/ Krysten L. Connon
Krysten L. Connon

CERTIFICATE OF SERVICE

I hereby certify that 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 on June 7, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 7, 2016

/s/ Krysten L. Connon
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