NO.: 16-15360

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION (NAF),
Plaintiff–Appellees,

v.

THE CENTER FOR MEDICAL PROGRESS, ET AL.,
Defendants-Appellants.

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

Brief Amicus Curiae of Constitutional Law Professors Naomi Cahn, June Carbone, Michele Goodwin, Martha Field, Lisa Ikemoto, Kevin Johnson, Ronald Krotoszynski, Melissa Murray, Burt Neuborne, Radhika Rao, Dorothy Roberts, Priscilla Smith, and Ruqaiijah A. Yearby in Support of Plaintiff-Appellees and Affirmance

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

BRIEF AMICUS CURIAE OF CONSTITUTIONAL SCHOLARS

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are legal scholars who study, teach, and write about the Constitution. They include the authors of treatises, casebooks, and numerous scholarly books, law review articles, and book chapters. Amici believe this case raises important questions about the First Amendment, reproductive rights, and freedom of association.

Amici are the following scholars:

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SUMMARY OF ARGUMENT

First Amendment speech interests are not implicated in this case because the Center for Medical Progress (CMP) waived those rights by knowingly and voluntarily signing both Exhibitor Agreements (EA) and Confidentiality Agreements (CA) at National Abortion Federation (NAF) meetings in 2014 and 2015. The District Court did not err in enforcing those agreements, because it is well established that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent." *Leonard v. Clark*, 12 F.3d 885, 886 (9th Cir. 1993), *as amended* (Mar. 8, 1994).

CMP cannot escape the clear terms of the non-disclosure agreements it signed, including this preliminary injunction, simply because the CA and EA no longer suit their interests or because they mistakenly believed that express agreements are non-enforceable. To the contrary, as this Court ruled in *Leonard v. Clark*, a mistaken belief as to enforceability does not make an organization's "execution of the

agreement any less voluntary." 12 F.3d at 890. Nor can CMP claim its publications were "lawfully obtained, truthful information," *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101 (1979) given its strategic efforts to mislead the public.

Neither is the public's minimal interest in fraudulently obtained, private information, so paramount as to ignore Supreme Court guidance on this issue. As the Supreme Court made clear in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672; *Associated Press v. NLRB*, 301 U.S. 103 (1937). Indeed, the Supreme Court has not carved out First Amendment protection for journalists or news organizations that commit illegal acts in order to obtain information, even if it is relevant to public debate. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (distinguishing a "stranger's illegal conduct" in secretly recording union negotiations from journalists who lawfully obtained that information). Simply put, CMP's recordings were neither truthfully nor lawfully obtained.

The District Court correctly balanced the competing constitutional and public policy interests in this case, including protecting the vital associational interests of NAF, its membership, and their convention attendees and presenters. Supreme Court rulings make it abundantly clear "that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of

association." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Gibson v. Florida Legislative Investigation Comm.* 372 U.S. 539, 544 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

The ability to freely associate without threats of violence, intimidation, and retaliation, is a fundamental constitutional value that reaches groups like NAF that "historically [have] been the object of harassment." *Brown v. Socialist Workers Comm.*, 459 U.S. 87, 91-98 (1982). According to the District Court, "NAF statistics document[] more than 60,000 incidents of harassment, intimidation, and violence against abortion providers, including murder, shootings, arson, bombings, chemical and acid attacks, bioterrorism threats, kidnapping, death threats, and other forms of violence between 1997 and 2014." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 17 (2016). In the wake of CMP's illegal release of videos, at least three doctors featured in those surreptitious recordings received death threats and "harassing communications," *Id.* (citing Pl. Exs 80-81). That "incidents of harassment and violence directed at abortion providers increased nine fold" over the prior year (in the wake of CMP's release of illegally obtained information) provides ample justification for the District Court's protection of NAF's freedom of association interests. *Id.*

ARGUMENT

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION DOES NOT VIOLATE FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE THE CENTER FOR MEDICAL PROGRESS WAIVED SUCH RIGHTS BY VOLUNTARILY SIGNING CONFIDENTIALITY AGREEMENTS AND ENTERING THE NATIONAL ABORTION FEDERATION ANNUAL MEETINGS UNDER FALSE PRETENSES TO ENGAGE IN FRADULENT ACTIVITY.

The Supreme Court has made clear that "even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that '[f]reedom of speech . . . does not comprehend the right to speak on any subject at any time.'" *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984), (citing *American Communications Assn. v. Dods*, 339 U. S. 382, 394-395 (1950)).

In *Seattle Times Co. v. Rhinehart*, the Supreme Court found that a lower court did not abuse discretion when it issued a protective order restricting a newspaper's "right to disseminate information…obtained pursuant to a court order that both granted [it] access to that information and placed restraints on the way in which the information might be used." *Id.* at 31. The Court explained, where "[t]here is an opportunity…for litigants to obtain -- incidentally or purposefully -- information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy," of a foundation, its membership, and leadership, "[t]he government clearly has a substantial interest in preventing this sort of abuse of its processes." *Id.* at 35.

A. SPEECH INCIDENTAL TO UNLAWFUL CONDUCT DOES NOT IMPLICATE THE FIRST AMENDMENT.

Nearly seventy years ago, in a unanimous decision, the Supreme Court ruled that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). In *Giboney*, the Court emphasized that the mere fact that speech was involved in illegal conduct "could not immunize…unlawful conduct from state control." *Id.* In that case, the fact that protestors used placards to express their message did not alter the fact that they were engaged in illegal conduct that the State could lawfully enjoin.

Justice Hugo Black wrote that it could hardly be suggested that "that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498. The Court reasoned that the "circumstances…and the reasons advanced by the Missouri courts justif[ied] restraint of the picketing," since it was engaged in for the sole purpose of inducing a violation of a valid state law. *Id.* at 501.

Likewise, in *Ohralik v. Ohio State Bar Ass'n,*, the Court ruled that the State does not cede its power to regulate harmful conduct simply because "speech is a component of that activity." 436 U.S. 447, 456 (1978) (upholding sanctions against

a lawyer for violating a regulation banning in-person solicitation of clients). As well, in *California Motor Transport Co. v. Trucking Unlimited*, the Court stressed "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 404 U.S. 508, 514 (1972). The Court reached a similar conclusion in *Cox v. Louisiana,* holding that illegal conduct that engages speech is nonetheless subject to State regulation. 369 U.S. 536 (1965).

In this case, CMP violated a legally binding, enforceable contract with NAF by securing "false identification" and "set[ting] up a phony corporation to obtain surreptitious recordings in violation of agreements they had signed. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 1. These agreements "acknowledged that the NAF information is confidential and [CMP] agreed they could be enjoined in the event of breach." *Id. Nahrstedt v. Lakeside Vill. Condo. Assn.*, 878 P.2d 1275, 1288 (Cal. 1994) (a contract is not a "worthless piece of paper"); *Vernon v. Drexel Burnham & Co.*, 125 Cal. Rptr. 147, 153 (Cal. Ct. App. 1975) ("[t]he sanctity of valid contractual agreements…is of paramount importance and is rooted in both the United States and California Constitutions."). CMP's breach amounted to a direct

harm to NAF and its members. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 17.

It is well established in California law that "a secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, cannot enable such a party to avoid the contract and escape liability." *Griffin v. Payne*, 133 Cal.App.363, 371 (Cal. Ct. App. 1933). Indeed, only under strong public policy considerations will courts void the plain meaning of contracts. CAL. CONST. art. I, § 9 (a "law impairing the obligation of contracts may not be passed."); *Kaufman v. Goldman*, 124 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2011); *VL Systems, Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818, 822 (Cal. Ct. App. 2007) ("[f]reedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions."); *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1115 n. 53 (Cal. 2007) (Courts should abstain from voiding contracts and do so only when there is no doubt).

That CMP used speech to engage in unlawful conduct does not place it beyond the reach of law for punishment. The Supreme Court makes it clear, the First Amendment does not provide special license for unlawful conduct by the press, picketers, lawyers, or CMP. *Cohen v. Cowles Media Co.*, 5501 U.S. 663, 672 (1991) (stressing that the First Amendment does not confer upon the press a special privilege to disregard the law).

B. FIRST AMENDMENT RIGHTS MAY BE WAIVED UPON CLEAR AND CONVINCING EVIDENCE THAT THE WAIVER IS KNOWING, VOLUNTARY AND INTELLIGENT.

Consistent with the principles established in *Giboney*, the Supreme Court has made clear that core constitutional values are not implicated where a party has "full awareness of the legal consequences" of his agreements and waives due process rights pursuant to a contract. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) ("the due process rights to notice and hearing prior to a civil judgment are subject to waiver") *Id.* at 185.

As this Court ruled in *Leonard v. Clark,* "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent," *Leonard v. Clark*, 12 F.3d 885, 886 (9th Cir. 1993), *as amended* (Mar. 8, 1994). This Court also adopted that principle in *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) ("The Supreme Court has recognized that constitutional rights may ordinarily be waived if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent."). *Id.* at 1394.

The District Court relied on extensive discovery to reach the conclusion that CMP's confidentiality agreements with NAF are enforceable because they were knowingly and voluntarily signed and then violated. During discovery it was "proven that defendants and their agents created a fake company and lied to gain

access to NAF's Annual Meetings in order to secretly record NAF members for their Human Capital Project." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 2. The District Court describes in significant detail the preparation CMP took to gain access to NAF's meetings, including filling out "the Exhibitor Application packet-comprised of the 'Exhibit Rules and Regulations' ('Exhibit Agreement' or 'EA') the 'Application and Agreement for Exhibit Space,' and the 'Annual Meeting Registration Form" in 2014 and 2015." *Id.* at 5.

The District Court correctly reached its conclusion that CMP violated NAF's confidentiality agreements, because both the 2014 and 2015 Exhibitor Agreements contain clearly written confidentiality clauses, which CMP signed:

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

Pl. Exs. 3 & 4 at ¶ 17. As the District Court noted, directly above the signature line, the EAs provide in clear terms "*I also agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF*." Pl. Exs. 3, 4 (emphasis in originals).

Indeed, CMP signed two confidentiality agreements in 2014 and 2015, because NAF also required that Exhibitor representative sign its Confidentiality Agreement (CA) in order to gain access to the Annual Meetings. The CAs provide in plain language for all attendees:

> It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement. The terms of attendance are as follows:
>
> 1. **Videotaping or Other Recording Prohibited**: Attendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference.
> 2. **Use of NAF Conference Information**: NAF Conference Information includes all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means. . . .
> 3. **Disclosure of NAF Materials to Third Parties**: Attendees may not disclose any NAF Conference Information to third parties without first obtaining NAF's express written consent . . . .

Pl. Exs 5-8.

This Court's ruling in *Leonard v. Clark* serves as an important guide in this case. 12 F.3d at 886. That is, CMP cannot escape the clear terms of the non-disclosure agreements it signed, including this preliminary injunction, simply because the CAs and EAs no longer suit their interests or because they mistakenly believed that express agreements are non-enforceable. To the contrary, as this Court ruled that a mistaken belief as to enforceability does not make an organization's "execution of the agreement any less voluntary." *Id.* at 890.

In *Leonard v. Clark*, a union "sought to have the district court declare a provision of its collective bargaining agreement with the City a violation of the First Amendment and enjoin its enforcement." *Id.* at 886. This Court upheld the District Court's decision that the "Union waived the full and unrestricted exercise of what it contends are its First Amendment rights by entering into the labor agreement." *Id.* at 887. In reaching that decision, this Court offered important guidance regarding the appropriate legal standard to evaluate cases like the present.

First, this Court noted that "the district court made no determination" as to whether the collective bargaining agreement violated First Amendment rights. *Id.* at 889. Second, this Court agreed that even if the District Court had concluded "that such rights were violated, the Union voluntarily 'restricted or agreed to waive the full exercise of those constitutional rights' by entering into its labor agreement with the City." *Id.* The standard articulated in *Leonard v. Clark* has relevance in the dispute regarding the enforceability of NAF's confidentiality agreements with CMP.

As the Supreme Court made clear in *Cohen v. Cowles Media Co.*, "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." 501 U.S. 663, 672 (1991); *Associated Press v. NLRB*, 301 U.S. 103 (1937). Thus, even if CMP claims its

motivation was to expose supposed criminal activity at NAF meetings,[1] the State has the authority to enforce confidentiality agreements that are knowingly and voluntarily executed. Indeed, the Supreme Court has not carved out First Amendment protection for journalists or news organizations that commit illegal acts in order to obtain information, even if it is relevant to public debate. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (distinguishing a "stranger's illegal conduct" in secretly recording union negotiations from journalists who lawfully obtained that information); *Huskey v. Nat'l Broad. Co.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) (holding that a television broadcasting company failed to adhere to contract law by violating an agreement not to photograph an inmate without his written consent). The law, "simply requires those making promises to keep them." *Cohen*, 501 U.S. at 671.

C. INJUNCTIVE RELIEF IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT, BECAUSE CMP EXPRESSLY AGREED TO THOSE TERMS.

The Supreme Court ruled in *Cohen v. Cowles Media Co.* that press must adhere to generally applicable laws, which include the enforcement of contracts.

[1] The District Court was skeptical of CMP's claims that their audio and video recordings were to catch NAF in criminal deception, because the recordings were not provided to law enforcement after the 2014 Annual Meeting and only a "bit of information" was given to authorities in May 2015. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 2.

501 U.S. 663, 669 (1991). Consistent with *Cohen*, it can be reasonably construed that the District Court's injunction specifically enforces clear terms of two confidentiality agreements that CMP expressly executed with NAF and any restrictions on speech are incidental to enforcing provisions of binding contracts. There is strong reason for this interpretation. For example, CMP does not dispute that it agreed to injunctive relief if it breached the confidentiality agreements. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 2.

Moreover, in the wake of CMP's unlawful release of recordings, the very threats of violence against abortion providers that NAF seeks to guard against by requiring confidentiality agreements, "increased nine fold" over the period one year prior, including "four incidents of arson at Planned Parenthood and NAF-member facilities." *Id.* at 17. Most disturbingly, three individuals were gunned down at a clinic where one of doctors outed by CMP works as the medical director. *Id.* CMP and its affiliates not only recorded the doctor, but also listed her on their AbortinDocs.org website. *Id.* (*citing* Pl. Exs. 18, 20, 21, 22, 148).

II. THE DISTRICT COURT'S PRELIMINARY INJUNCTION DOES NOT WARRANT STRICT SCRUTINY BECAUSE IT IS CONTENT AND VIEWPOINT NEUTRAL.

Content based laws, where the application of the law depends on the subject matter, viewpoint or speaker, must meet strict scrutiny, because the government may

not favor one perspective, subject, or speaker over another. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("government…'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'")(citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (holding that a New York law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an account to be made available to crime victims, "plainly imposes a financial disincentive only on speech of a particular content.") *Id.* at 116; *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (holding that a university's denial of funding to a Christian student publication, due to the content of its message, imposed a financial burden on his speech and amounted to viewpoint discrimination).

In *Reed*, a unanimous Court emphasized that "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.) *Id.* at 2228 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). In that case, a municipality's signage code "impose[d] more stringent restrictions" on certain signs "based on the type of information they convey[ed]." *Id.* (holding that the Code's "provisions are content-based regulations of speech that cannot survive strict scrutiny".) *Id.* at 2224.

However, content neutral government actions only need meet intermediate scrutiny. The Supreme Court has "repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989); *Hill*, 530 U.S. at 720 (citing *Ward*, 491 U.S. at 791); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). For example, in *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, the Court held that a law school's refusal to recognize a religious student group that limited its membership to students who took an oath affirming "God's son, is Lord of my life," among other pledges was viewpoint neutral. 561 U.S. 661, 700 (2010). The Court found the law school's action to be viewpoint neutral because California state law required all registered student organizations to allow "any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." *Id.* at 671.

In *Madsen,* the Supreme Court held that an injunction establishing a buffer zone around abortion clinics is "incidental to their antiabortion message because they repeatedly violated the court's original order." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). The Court stressed, "[t]hat petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content-or viewpoint-based purpose motivated the issuance of the order." *Id.*

Rather, the order suggested "only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic." *Id.* The Court posited that "to accept petitioners' claim to the contrary would be to classify virtually every injunction as content or viewpoint based." *Id.* at 762.

The Supreme Court's analysis in *Hill* provides further guidance for distinguishing between unlawful government action that selectively targets and chills viewpoints, subjects, and speakers from that which is permissible and bypasses strict scrutiny analysis based on the neutrality of its content. *Hill*, 530 U.S. at 719. In *Hill*, the Supreme Court rejected petitioner's claims that a Colorado statute, which "prohibits speakers from approaching unwilling listeners," regulated speech based on viewpoint. *Id.* at 707-08. The statute in question[2] specifically made it "unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...." *Id.* at 707. Petitioners, who distributed leaflets and other materials about alternatives to abortion challenged the law, claiming it discriminated against them based on the content and viewpoint of their message. *Id.* at 709.

[2] Colorado Rev. Stat. § 18-9-122(3).

While noting that the "First Amendment interests of petitioners are clear and undisputed," the Supreme Court ruled that the State had not regulated speech. *Id.* at 714. Instead, the Court characterized legislation at issue in *Hill* as simply "a regulation of the places where some speech may occur." *Id.* at 719. The Court was not persuaded by petitioner's claims that the regulation selectively targeted their anti-abortion messaging. For example, the Court noted that the regulation was not adopted "because of disagreement with the message it conveys." *Id.* (citing *Ward*, 491 U.S. at 791). To this latter point, the Court relied on the State Supreme Court's "unequivocal holding" that the "'restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech.'" *Id.* at 719 (citing *Madsen*, 512 U.S. at 762–763).

In the present case, the District Court's order was content neutral, because the injunction was not selectively applied based on CMP's viewpoint, the subject matter of its speech, or because organization opposes abortion. CMPs viewpoints were irrelevant to the District Court's injunction. Simply put, CMP violated an enforceable contract under California law, committed fraud,[3] used fictitious names and identities to gain access to the NAF Annual Meetings,[4] misled NAF

[3] *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 39.
[4] *Id.* at 5-7.

representatives,[5] secretly recorded everyone in which they came within contact,[6] and generated over 500 hours of unauthorized audio of private conversations and interactions.[7] There is no evidence in this record that the District Court would not "equally restrain similar conduct directed at a target having nothing to do with abortion" who also violated NAF's confidentiality agreement. *Hill v. Colorado*, 530 U.S. 703, 719, n. 27 (2000) (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762-63 (1994)).

NAF's concerns included the circulation of any private information from their meetings regardless of the speaker. Thus if the speaker had not been CMP, but an abortion provider who intentionally released private information, such as lists of attendees and speakers or photographs from NAF Annual Meetings to social media or reporters, the same principles would apply. This case would be no different under those circumstances; the contract would be no less enforceable if the speaker shared NAF's viewpoint or published the same information CMP unlawfully distributed.

Indeed, it would create an absurd result if the District Court's injunction in the current case rested on pro-abortion advocates committing unlawful acts and also breaching NAF's confidentiality agreements in order to prove content neutrality.

[5] *Id.* at 39.
[6] *Id.* at 8.
[7] *Id.*

Most importantly the record demonstrates that CMP was not singled out to sign the CAs and EAs. That is, CMP was nevertheless required to sign the CAs and EAs even though it went to great lengths to camouflage itself as a corporation working arm in arm with abortion providers. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 21. Pro-abortion advocates, attendees and exhibitors were not exempt from the non-disclosure agreements and their enforceability simply because they agreed with NAF's message.

Neither the viewpoint of the messenger nor the subject of the message was relevant in the District Court enforcing the terms of CMP's contract with NAF. The fact that District Court's injunction did not prohibit activities of any attendees recording a pro-abortion message may simply be the fact that others chose not the breach the confidentiality agreement. *Madsen*, 512 U.S. at 762-63. ("The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion...") *Id.*

III. FREEDOM OF ASSOCIATION IS A FUNDAMENTAL VALUE THAT ENABLES INDIVIDUALS AND GROUPS TO ORGANIZE AND EXPRESS IDEAS WITHOUT FEAR OF STIGMA, VIOLENCE, RETALIATION, OR INTIMIDATION.

A. THE FOURTEENTH AMENDMENT PROTECTS THE PRIVACY OF ASSOCIATION.

It is well established that the right to freely associate is an "indispensable" constitutional liberty. *Patterson,* 357 U.S. at 461; *Gibson*, 372 U.S. 539 at 544; *Bates*, 361 U.S. 516 at 523. In fact, the Supreme Court has made absolutely clear that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Patterson,* 357 U.S. at 460. It is beyond debate that the ability to speak freely in one's association, without fear of exposure, is crucial to the right of association. *Id.* at 460 ("this Court has more than once recognized…the close nexus between the freedoms of speech and assembly"). *Id.*; *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Thomas v. Collins,* 323 U.S. 516, 530 (1945).

The Supreme Court refers to the close link between the "freedom to engage in association for the advancement of beliefs and ideas" as an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Patterson,* 357 U.S. at 460. Supreme Court cases substantively and extensively discuss the historical relevance and importance of group association, frequently drawing attention to the intertwined rights of privacy and anonymity of speech and the freedom of association. *Patterson*, 357 U.S. 449, 462 (1958); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v.*

Connecticut, 302 U.S. 319, 324 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958).

Importantly, the Court finds it immaterial whether the beliefs sought to be advanced by group association relate to religious, economic, political, or economic concerns, because "curtailing the freedom to associate is subject to the closest scrutiny" regardless of what the group advocates. *Patterson*, 357 U.S. at 461. Rather, the Supreme Court has long recognized, "the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 462. The Court has stressed that the freedom to associate and the privacy of association are core values embedded within the U.S. Constitution. *Id.*; *De Jonge*, 299 U.S. at 364; *Thomas*, 323 U.S. at 530. For example, compelling the revelation of an advocacy organization's membership amounts to a fundamental restraint on the freedom of association. *Patterson*, 357 U.S. at 462. In *Patterson*, the Court made clear that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462.

The facts of *Patterson* bear reflection here. In that case, the Court held that an order requiring the N.A.A.C.P to produce records of the names and addresses of all members and agents amounted to a denial of due process and a restraint on members' exercise of their right to freedom of association. *Id.* The Court stressed that the

N.A.A.C.P "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members…exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id*. Equally in *Bates*, the Court found that an ordinance mandating compulsory disclosure of membership lists may violate freedom of association, particularly where the disclosure could manifest in harm to the organization in the form of harassment, threats of bodily harm, economic reprisals, and community intimidation. 361 U.S. at 523-24.

Thus, the freedom to associate without the ability to do so privately undermines the very nature of the liberty interest in group association. Equally, one's ability to freely speak, advocate, and dissent about government policy within an association becomes more illusory than real when the association's membership and their private conversations are subject to disclosure, "particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462.

B. THE FREEDOM TO ASSOCIATE PRIVATELY IS ESPECIALLY CRUCIAL FOR VULNERABLE GROUPS, BECAUSE HISTORICALLY THEY HAVE BEEN THE TARGETS OF RETRIBUTION, VIOLENCE AND INTIMIDATION.

In the present case, it should not be a controversial fact that NAF seeks to associate and do so privately, because they, just as other associations historically

have had the right "to pursue …[and]…foster beliefs which they admittedly have the right to advocate." *Patterson,* 357 U.S. at 463. Historically, organizing privately and safely has been the primary means of producing social change and advancing fundamental constitutional rights, like voting. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 155, 168 (Beacon Press 2010) (1967). Dr. King characterized freedom of association as a form of "solidarity" essential to "the oppressed." *Id.*

That NAF's chosen advocacy is abortion rights rather than ending racial discrimination or advancing a particular religious view is irrelevant to this constitutional analysis. *Patterson,* 357 U.S. at 462 (stressing that revealing group members' identities "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.") *Id.* at 463; *Bates*, 361 U.S. at 524; *Watchtower Bible & Tract Soc. Of NY, Inc. v. Village of Stratton,* 536 U.S. 150 (2002) (noting that "Jehovah's Witnesses are not the only "little people" who face the risk of silencing") *Id.* at 163.

However, the fact that abortion remains a hard-fought constitutional right, further underscores the importance of NAF's right to associate and to do so privately, precisely because reproductive rights and those who advocate for women's reproductive health have been under relentless attack by anti-abortion groups. *Nat'l*

Abortion Fed'n v. Ctr. for Med. Progress, WL 454082 at 17. The very real threats of silencing and chilling speech, intimidation, harassment, and physical harm justifiably motivates NAF's confidentiality agreements. Quite reasonably, NAF's confidentiality agreements are aimed to protect its membership's anonymity and private speech from unfettered and unauthorized probing, recording, and publication by any person or group.

According to the District Court, "NAF statistics document[] more than 60,000 incidents of harassment, intimidation, and violence against abortion providers, including murder, shootings, arson, bombings, chemical and acid attacks, bioterrorism threats, kidnapping, death threats, and other forms of violence between 1997 and 2014." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 17. In the wake of CMP's illegal release of videos, at least three doctors featured in those surreptitious recordings received death threats and "harassing communications," *Id.* (citing Pl. Exs 80-81). That "incidents of harassment and violence directed at abortion providers increased nine fold" over the prior year (in the wake of CMP's release of illegally obtained information) provides ample justification for the District Court's protection of NAF's freedom of association interests. *Id.*

Quite simply, for vulnerable groups, the consequences of infiltration and exposing private information can be lethal to freedom of association and injurious group privacy. JAMES FORMAN, THE MAKING OF BLACK REVOLUTIONARIES 318,

320-21 (University of Washington Press 1997) (1972) (discussing violence targeted at individuals found to be members of civil rights organizations).

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities investigated violence against civil rights groups, which resulted in a final report with six books. See S. REP. NO. 94-755 (1976). The Report noted among other things, the FBI sought to inhibit and interfere with coalition building, "prevent the rise of…Martin Luther King," and prevent civil rights groups and leaders "from gaining respectability." S. REP. NO. 94-755, Book III, at 187 (1976). The extreme efforts to silence Dr. King by thwarting his group associations, infiltrating his organizations, and chilling the speech of those who worked with him, deserves more than a quick observation here, precisely given that his advocacy, like NAF's sought to further core constitutional values.

> The FBI's program to destroy Dr. King as the leader of the civil rights movement entailed attempts to discredit him with churches, universities, and the press. . . . The FBI offered to play for reporters tape recordings allegedly made from microphone surveillance of Dr. King's hotel rooms. The FBI mailed Dr. King a tape recording made from its microphone coverage. . . . the tape was intended to precipitate a separation between Dr. King and his wife in the belief that the separation would reduce Dr. King's stature. The tape recording was accompanied by a note which Dr. King and his advisers interpreted as a threat to release the tape recording unless Dr. King committed suicide.

S. REP. NO. 94-755, Book III, at 82 (1976).

As the District Court observed in the current case, CMPs recordings seemingly had little to do with their purported purpose to report criminal activity among NAF associates. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, WL 454082 at 2. Similarly, the Report on Dr. King pointed out that these investigations, while carried out on the pretext of preventing communism, largely obtained information unrelated to the stated purposes of the investigation. The reports on King were more about harassment and interfering with group association than exposing any possible link between Dr. King and communism.

Furthermore, beyond the infiltration of civil rights groups by the FBI, civil rights leaders and activists were under surveillance by individuals, organizations, and groups that sought to undermine voting and other fundamental constitutional rights under a variety of pretexts, including claims that such groups were breaking the law. JAMES FORMAN, THE MAKING OF BLACK REVOLUTIONARIES 318, 320-21 (University of Washington Press 1997) (1972) (noting the economic reprisals, threats, and other actions taken against members in the Student Nonviolent Coordinating Committee by private groups opposed to civil rights); JAMES KIRKPATRICK DAVIS, SPYING ON AMERICA: THE FBI'S DOMESTIC COUNTERINTELLIGENCE PROGRAM 92 (Praeger 1992) (discussing the murder of "Mrs. Viola Liuzzo, a white mother of five from Detroit" whose death was

precipitated by her association with African American civil rights groups by Klansmen).

Such historical patterns of intimidation, bullying, and threat against vulnerable groups remain a concern for organizations like NAF. Carving out spaces for private speech and free association remain vital to the health of the organization and the furtherance of women's reproductive rights to and access to abortion.

CONCLUSION

For these reasons the order of the District Court should be affirmed.

DATED: June 8, 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 6,036 words. I used the word count function of Microsoft Word to count these words. I used Times New Roman 14-point font.

Dated: June 8, 2016

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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 8, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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