Charles S. LiMandri (CA Bar No. 110841)
Paul M. Jonna (CA Bar No. 265389)
Jeffrey M. Trissell (CA Bar No. 292480)
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
Tel: (858) 759-9948
cslimandri@limandri.com

Attorneys for Defendant the Center for Medical Progress

Thomas Brejcha, *pro hac vice*
Peter Breen, *pro hac vice*
THOMAS MORE SOCIETY
19 S. La Salle St., Ste. 603
Chicago, IL 60603
Tel: (312) 782-1680
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

Matthew F. Heffron, *pro hac vice*
THOMAS MORE SOCIETY
C/O BROWN & BROWN, LLC
501 Scoular Building
2027 Dodge Street
Omaha, NE 68102
Tel: (402) 346-5010
mheffron@bblaw.us

Attorneys for Defendant David Daleiden

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF CALIFORNIA

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiffs, v. CENTER FOR MEDICAL PROGRESS, et al., Defendants.	Case No. 3:16-cv-00236 (WHO) Judge William H. Orrick, III **DEFENDANTS' NOTICE TO DISTRICT COURT OF FILING OF PETITION FOR WRIT OF MANDAMUS**

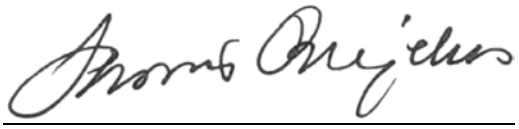
Pursuant to Federal Rule of Appellate Procedure 21(a)(1), Defendants the Center for Medical Progress and David Daleiden hereby give notice to the Court that they have filed a Petition for Writ of Mandamus relating to this action in the United States Court of Appeals for the Ninth Circuit. A copy of the Petition for Writ of Mandamus is attached as Exhibit 1 hereto.

Respectfully submitted,

December 13, 2017,

Charles S. LiMandri (CA Bar No. 110841)
Paul M. Jonna (CA Bar No. 265389)
Jeffrey M. Trissell (CA Bar No. 292480)
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
Tel: (858) 759-9948
Facsimile: (858) 759-9938
cslimandri@limandri.com

Attorneys for Defendant CMP



Thomas Brejcha, *pro hac vice*
Peter Breen, *pro hac vice*
THOMAS MORE SOCIETY
19 S. La Salle St., Ste. 603
Chicago, IL 60603
Tel: (312) 782-1680
Facsimile: (312) 782-1887
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

Attorneys for Defendant David Daleiden

ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories.

Charles S. LiMandri
Counsel for Defendant CMP

EXHIBIT 1

Docket No. 17-_____

In the

United States Court of Appeals Ninth Circuit

IN RE THE CENTER FOR MEDICAL PROGRESS, and DAVID DALEIDEN,
Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
Respondent,

PLANNED PARENTHOOD FED. OF AM., PLANNED PARENTHOOD: SHASTA-DIABLO, INC., PLANNED PARENTHOOD MAR MONTE, INC., PLANNED PARENTHOOD OF THE PAC. SW., PLANNED PARENTHOOD LOS ANGELES, PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC., PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA & SAN LUIS OBISPO COUNTIES, INC., PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD GULF COAST, and PLANNED PARENTHOOD CENTER FOR CHOICE.
Plaintiffs-Real Parties in Interest

IN RE THE CENTER FOR MEDICAL PROGRESS, and DAVID DALEIDEN,
Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
Respondent,

NATIONAL ABORTION FEDERATION
Plaintiff-Real Party in Interest

From Decisions of the United States District Court for the Northern District of California, Case Nos. 3:16-cv-236, 3:15-cv-3522 • Honorable James Donato, District Judge

CONSOLIDATED PETITIONS FOR WRIT OF MANDAMUS

CHARLES S. LIMANDRI
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
Attorneys for Petitioner
The Center for Medical Progress

THOMAS BREJCHA
THOMAS MORE SOCIETY
19 South La Salle Street, Suite 603
Chicago, Illinois 60603
(312) 782-1680 Telephone
tbrejcha@thomasmoresociety.org
Attorneys for Petitioner
David Daleiden

Additional Counsel Listed On Next Page

Docket No. _____

United States Court of Appeals
for the Ninth Circuit

Additional Counsel

PETER BREEN
THOMAS MORE SOCIETY
19 South La Salle Street, Suite 603
Chicago, Illinois 60603
(312) 782-1680 Telephone
pbreen@thomasmoresociety.org

MATTHEW F. HEFFRON
THOMAS MORE SOCIETY
C/O BROWN & BROWN, LLC
501 Scoular Building
2027 Dodge Street
Omaha, NE 68102
(402) 346-5010 Telephone
mheffron@bblaw.us

Attorneys for Petitioner David Daleiden

PAUL M. JONNA
JEFFREY M. TRISSELL
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
pjonna@limandri.com
jtrissell@limandri.com

Attorneys for Petitioner the Center for Medical Progress

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner the Center for Medical Progress is a nonprofit public benefit corporation organized under the laws of the State of California. It does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock. Defendant BioMax Procurement Services, LLC, is a privately held limited liability company, wholly owned by the Center for Medical Progress. No publicly held corporation owns ten percent or more of its stock.

STATEMENT OF RELATED CASES

The two Northern District of California cases from which the present petitions are being taken are related. *Planned Parenthood Federation of America, et al. v. Center for Medical Progress, et al.*, Case No. 3:16-cv-236-WHO and *National Abortion Federation v. Center for Medical Progress, et al.*, Case No. 3:15-cv-3522-WHO. (PPFA v. CMP and NAF v. CMP).

An appeal from PPFA v. CMP is pending before this Court in Case No. 16-16997. An appeal from NAF v. CMP has already been adjudicated by this Court in Case No. 16-15360. A petition for certiorari has been taken from that NAF v. CMP appeal in Supreme Court Case No. 17-202. Two more appeals from NAF v. CMP are also pending before this Court in Case Nos. 17-16862 and 17-16622.

CERTIFICATE OF INTERESTED PARTIES
IN PETITION FROM *PPFA V. CMP*

The first District Court action from which this consolidated petition arises is entitled, *Planned Parenthood Federation of America, et al. v. Center for Medical Progress, et al.*, pending in the United States District Court for the Northern District of California, District Court No. 3:16-cv-236-WHO, the Honorable William H. Orrick III presiding.

Petitioners

Petitioners are Defendants the Center for Medical Progress and David Daleiden. Petitioner the Center for Medical Progress is represented by:

CHARLES S. LIMANDRI, SBN 110841
PAUL M. JONNA, SBN 265389
JEFFREY M. TRISSELL, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com

Petitioner David Daleiden is represented by

THOMAS BREJCHA, *pro hac vice*
PETER BREEN, *pro hac vice*
THOMAS MORE SOCIETY
19 South La Salle Street, Suite 603
Chicago, Illinois 60603
(312) 782-1680 Telephone
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

MATTHEW F. HEFFRON, *pro hac vice*
THOMAS MORE SOCIETY
C/O BROWN & BROWN, LLC
501 Scoular Building
2027 Dodge Street
Omaha, NE 68102
(402) 346-5010 Telephone
mheffron@bblaw.us

Respondent

Respondent is the United States District Court for the Northern District of California.

Real Parties in Interest

Real Parties in Interest are Planned Parenthood Federation of America, Planned Parenthood: Shasta-Diablo, Inc., dba Planned Parenthood Northern California, Planned Parenthood Mar Monte, Inc., Planned Parenthood of the Pacific Southwest, Planned Parenthood Los Angeles, Planned Parenthood/Orange and San Bernardino Counties, Inc., Planned Parenthood of Santa Barbara, Ventura

& San Luis Obispo Counties, Inc., Planned Parenthood Pasadena and San Gabriel Valley, Inc., Planned Parenthood of the Rocky Mountains, Planned Parenthood Gulf Coast, and Planned Parenthood Center for Choice. Real Parties in Interest are represented by:

AMY BOMSE, SBN 218669
SHARON MAYO, SBN 150469
JEE YOUNG YOU, SBN 241658
ERICA CONNOLLY, SBN 288822
STEPHANIE FINE, SBN 305485
ARNOLD AND PORTER, LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 471-3100 Telephone
Amy.Bomse@apks.com
JeeYoung.You@apks.com

HELENE KRASNOFF, *pro hac vice*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., N.W., Suite 300
Washington, DC 20005
(202) 973-4800 Telephone
Helene.Krasnoff@ppfa.org

BETH PARKER, SBN 104773
PLANNED PARENTHOOD
AFFILIATES OF CALIFORNIA
551 Capitol Mall, Suite 510
Sacramento, CA 95814
(916) 446-5247 Telephone
Beth.Parker@ppacca.org

Other Parties before the District Court

Other Parties before the District Court include Defendant BioMax Procurement Services, LLC, Defendant Sandra Susan Merritt, Defendant Gerardo Adrian Lopez, Defendant Troy Newman, Defendant Albin Rhomberg, and Defendant Phillip Cronin. BioMax Procurement Services, LLC is represented by

CHARLES S. LIMANDRI, SBN 110841
PAUL M. JONNA, SBN 265389
JEFFREY M. TRISSELL, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com

CATHERINE W. SHORT, SBN 117442
LIFE LEGAL DEFENSE FOUNDATION
Post Office Box 1313
Ojai, California 93024-1313
(707) 337-6880 Telephone
lldfojai@earthlink.net

Sandra Susan Merritt is represented by:

HORATIO G. MIHET, *pro hac vice*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776 Telephone
hmihet@lc.org

NICOLAIE COCIS, SBN 204703
LAW OFFICE OF NIC COCIS AND ASSOCIATES
38975 Sky Canyon Dr., Suite 211
Murrieta, CA 92563
(951) 695-1400 Telephone
nic@cocislaw.com

Gerardo Adrian Lopez is represented by:

CHARLES S. LIMANDRI, SBN 110841
PAUL M. JONNA, SBN 265389
JEFFREY M. TRISSELL, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com

Troy Newman is represented by:

EDWARD L. WHITE III, *pro hac vice*
ERIK M. ZIMMERMAN, *pro hac vice*
AMERICAN CENTER FOR LAW & JUSTICE
3001 Plymouth Rd., Ste. 203
Ann Arbor, MI 48105
(734) 680-8007 Telephone
ewhite@aclj.org
ezimmerman@aclj.org

VLADIMIR F. KOZINA, SBN 95422
MAYALL HURLEY, P.C.
2453 Grand Canal Blvd.
Stockton, CA 95207
(209) 477-3833 Telephone
vkozina@mayallaw.com

Albin Rhomberg is represented by:

MICHAEL MILLEN, SBN 151731
LAW OFFICES OF MICHAEL MILLEN
119 Calle Marguerita, #100
Los Gatos, CA 95032
(408) 866-7480 Telephone
mikemillen@aol.com

Phillip Cronin is represented by:

GLENN DICKINSON, SBN 159753
LIGHTGABLER, LLP
760 Paseo Camarillo, Ste. 300
Camarillo, CA 93010
(805) 248-7416 Telephone
gidickinson@lightgablerlaw.com

CERTIFICATE OF INTERESTED PARTIES
IN PETITION FROM *NAF V. CMP*

The second District Court action from which this consolidated petition arises is entitled *National Abortion Federation v. Center for Medical Progress, et al.*, pending in the United States District Court for the Northern District of California, District Court No. 3:15-cv-3522-WHO, the Honorable William H. Orrick III presiding.

Petitioners

Petitioners are Defendants the Center for Medical Progress and David Daleiden. Petitioner the Center for Medical Progress is represented by:

CHARLES S. LIMANDRI, SBN 110841
PAUL M. JONNA, SBN 265389
JEFFREY M. TRISSELL, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com

Petitioner David Daleiden is represented by

THOMAS BREJCHA, *pro hac vice*
PETER BREEN, *pro hac vice*
THOMAS MORE SOCIETY
19 South La Salle Street, Suite 603
Chicago, Illinois 60603
(312) 782-1680 Telephone
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

Respondent

Respondent is the United States District Court for the Northern District of California.

Real Party in Interest

Real Party in Interest is the National Abortion Federation. Real Party in Interest is represented by:

LINDA E. SHOSTAK, SBN 64599
DEREK F. FORAN, SBN 224569
MARGARET E. MAYO, SBN 259685
CHRISTOPHER L. ROBINSON, SBN 260778
ALEXANDRA E. LAKS, SBN 291861
MORRISON & FEORSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7522 Telephone
lshostak@mofo.com
dforan@mofo.com
mmayo@mofo.com
christopherrobinson@mofo.com
alaks@mofo.com

Other Parties before the District Court

Other Parties before the District Court include Defendant BioMax Procurement Services, LLC, and Defendant Troy Newman. Defendant BioMax Procurement Services, LLC is represented by:

CHARLES S. LIMANDRI, SBN 110841
PAUL M. JONNA, SBN 265389
JEFFREY M. TRISSELL, SBN 292480
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, California 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com

Troy Newman is represented by:

EDWARD L. WHITE III, *pro hac vice*
ERIK M. ZIMMERMAN, *pro hac vice*
AMERICAN CENTER FOR LAW & JUSTICE
3001 Plymouth Rd., Ste. 203
Ann Arbor, MI 48105
(734) 680-8007 Telephone
ewhite@aclj.org
ezimmerman@aclj.org

VLADIMIR F. KOZINA, SBN 95422
MAYALL HURLEY, P.C.
2453 Grand Canal Blvd.
Stockton, CA 95207
(209) 477-3833 Telephone
vkozina@mayallaw.com

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (Cont.)

Cases:

TABLE OF AUTHORITIES (Cont.)

Cases:

TABLE OF AUTHORITIES (Cont.)

Cases:

Statutes & Rules:

Other Authorities:

TABLE OF AUTHORITIES (Cont.)

Other Authorities:

PETITION FOR WRIT OF MANDAMUS

Defendants-Petitioners the Center for Medical Progress (CMP) and David Daleiden seek a writ of mandamus regarding Civil Action Nos. 3:16-cv-236-WHO and 3:15-cv-3522-WHO, currently pending in the United States District Court for the Northern District of California, ordering the recusal of the Hon. William H. Orrick III pursuant to 28 U.S.C. §§ 144 and 455.[1]

Judge Orrick must be recused for the following reasons:

1. He has an ongoing and longstanding professional relationship with one of the named Plaintiffs, whose security and property are allegedly at risk here.
2. His image has been used, by his own spouse, to endorse inflammatory public statements about the disputed facts of this case – statements that denigrated the principal Defendant in the harshest terms, while lauding Plaintiffs.
3. He neglected to bring these facts to the attention of the parties early in the case when a motion could otherwise have been brought.
4. Neither he nor the judge to whom he referred the recusal motion properly followed the statutory recusal procedures.

[1] Hereafter "§144" and "§455."

This is a high-profile case with national public policy implications. Congress, the media, and the public are all watching. This Court should not permit it to proceed to trial when it is certain that any outcome unfavorable to Defendants will be clouded by the appearance of bias. That cloud can still be prevented at this point, but not later.

Defendants have no other means besides this Writ of Mandamus of ever redressing Judge Orrick's bias, and they will be gravely and irreparably harmed if it is not addressed at this stage in the lawsuit.

ISSUES PRESENTED

Whether the District Court, Hon. James Donato, to whom Defendants' recusal motion was referred, clearly erred by neglecting to accept as true the facts stated in Defendants' §144 affidavit supporting the inference that Judge Orrick is personally biased in favor of Plaintiffs and against Defendants, particularly in light of Judge Orrick's failure to refute them.

Whether the District Court, Hon. James Donato, clearly erred in denying Defendants' §455 request for recusal based on the appearance of impropriety emanating from (i) Judge Orrick's lengthy and continuing public relationship with an entity whose real property and employees are alleged in the Complaint to be at physical risk because of Defendants' acts, and (ii) the repeated association of Judge

Orrick's image and name with strident public comments condemning Defendants and supporting Plaintiffs.

INTRODUCTION

These cases arise in a highly charged context. Defendants' investigative reporting about Plaintiffs' activities has provoked a contentious national debate over whether Planned Parenthood is a praiseworthy healthcare organization deserving continued taxpayer support – or a criminal organization that must be defunded and prosecuted. As a result, Congress and the Executive Branch are weighing various policies that will negatively affect Planned Parenthood. Plaintiffs hope to discredit Defendants' investigative reporting by any possible means, including these lawsuits.

Before these cases came before Judge Orrick, he had already picked a side in the dispute they instantiate. Judge Orrick has had a significant decades-long relationship with an organization whose real property and employees are alleged in the Complaint to be in grave physical danger, due to the allegedly unlawful actions of Defendants. Judge Orrick was a founder and longtime officer and director of the Good Samaritan Family Resource Center (GSFRC), which houses one of Plaintiffs' Planned Parenthood facilities – a relationship established during Judge Orrick's leadership tenure on the board – and is in active joint venture with the associated

Plaintiff.[2] During the pendency of this case, Judge Orrick has been held out to the public as serving as an Emeritus Board Member of GSFRC. Judge Orrick did not disclose that relationship to the parties here, nor did he disclose the full extent or duration of that relationship to the U.S. Senate at the time of his consideration for confirmation.

Judge Orrick's extrajudicial affinity for Plaintiff PPSP is underscored by the use of his image in public support of Planned Parenthood Federation of America (PPFA), another named plaintiff,[3] and denigration of Defendants – applauding Defendant Daleiden's felony indictment in Texas (later dismissed) and describing Defendants' work as "heavily edited videos by a sham organization run by extremists who will stop at nothing to deny women legal abortion services" and "domestic terrorism." His image was not used by a stranger or other unaffiliated third party, but by Judge Orrick's own spouse, and Judge Orrick has indicated his sympathy with those public comments by accusing Defendant Daleiden of "try[ing] to . . . cause real harm to human beings," without any evidence to support that claim. *See* PPFA-Dkt. 164-1, ¶14.

[2] Specifically, the Planned Parenthood "Wohlford Family Clinic" of Plaintiff Planned Parenthood Shasta-Diablo, dba Planned Parenthood Northern California, formerly Planned Parenthood Shasta Pacific (PPSP).

[3] PPFA is the first named plaintiff in the PPFA v. CMP complaint; PPSP is the second.

Under these circumstances, a reasonable person has good reason to question Judge Orrick's impartiality and to believe he harbors personal bias and prejudice in relation to this case. "If it is a close case, the balance tips in favor of recusal." *U.S. v. Holland*, 519 F.3d 909, 911 (9th Cir. 2008). But Judge Orrick has not recused himself. Instead, faced with a motion for his recusal, both Judge Orrick and Judge Donato misconstrued and misapplied the law of recusal pursuant to §144 and §455.

Defendants moved for Judge Orrick's recusal on the grounds of both *actual* bias under §144 and the *appearance* of partiality under §455. Judge Orrick erred by referring Defendants' joint §144 and §455 recusal motion to another judge without first addressing the factual allegations in the motion or finding that it was legally sufficient – both statutorily required. Instead, he improperly commented during transfer that, in his view, the affidavit was *not* legally sufficient.[4] Judge Donato, for his part, adopted Judge Orrick's opinion that the recusal motion was not legally sufficient and improperly dismissed (rather than crediting, as required by law) the

[4] Without elaboration, Judge Orrick in his referring order expressed doubt about the legal sufficiency and timeliness of the Motion and Affidavit. This runs precisely *opposite* to the command of §144 and N.D. Cal. L.R. 3-14 that a judge must first analyze the Motion and Affidavit and only refer *after* finding them timely and sufficient. It also implicates due process concerns because Judge Orrick may have been trying to influence Judge Donato. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016) (due process concerns arise when biased judge sits on a panel due to possibility "that the judge was successful in persuading most members of the court to accept his or her position.").

undisputed facts presented in the affidavit. Moreover, Judge Donato confused and misapplied the relevant standards for actual bias and appearance of partiality.

Because of clear error on the part of both judges, Defendants never received a reasoned decision based on the factual or legal sufficiency of their motion to recuse Judge Orrick, and instead they have been left to try to vindicate their rights and reputations before a judge who is plainly biased against them.

FACTUAL HISTORY

I. THE SUBJECT LITIGATION.

At the core of both of the instant cases is whether Defendants unlawfully recorded conversations with Planned Parenthood officials, including PPSP staff, in public settings. Defendants maintain, and two Congressional committee investigations agreed, that these recordings evince criminal misconduct by Planned Parenthood and its agents. By comparison, Judge Orrick has found "no evidence of criminal wrongdoing" in the recordings; has impugned Defendants' motives for investigating wrongdoing; has called Defendants' videos "misleadingly edited"; and has even attributed the murder of several innocent people to Defendants' actions. *See, e.g.*, NAF-Dkt 354, at 2, 37, n. 42, 39.

Congressional investigations following from Defendants' recordings resulted in criminal referrals for the prosecution of nine entities, including Plaintiff PPSP, Plaintiff PPFA, and three other Planned Parenthood plaintiffs. PPFA-Dkt.

164-1 at 187-188.[5] Plaintiffs remain under active federal investigation.[6] DaVinci Biosciences, a longtime partner of Planned Parenthood, recently admitted guilt in a $7.8 million settlement with the Orange County District Attorney for selling fetal body parts products from Plaintiffs for profit.[7] The OCDA's office credited Defendants' citizen journalism with prompting the case.[8]

II. JUDGE ORRICK'S RELATIONSHIP WITH GSFRC AND PLAINTIFF PPSP.

GSFRC is a non-profit organization, incorporated by Judge Orrick, that assists Latino immigrant families. PPFA-Dkt. 164-1 at 11; 181-1 at 80.[9] GSFRC provides a family planning clinic operated by Plaintiff PPSP on its premises. PPFA-Dkt. 164-1

[5] *See also Select Investigative Panel: Criminal and Regulatory Referrals*, ENERGY & COMMERCE COMMITTEE (Dec. 21, 2016), https://energycommerce.house.gov/news/letter/select-investigative-panel-criminal-and-regulatory-referrals/.

[6] Laura Jarrett, *Justice Dept. investigating use of fetal tissue*, CNN (Dec. 8, 2017, 4:26 AM), http://www.cnn.com/2017/12/07/politics/justice-department-fetal-tissue-investigation/index.html.

[7] Daniel Langhorne, *Firms reach $7.8-million settlement over allegations of selling fetal tissue*, LOS ANGELES TIMES (Dec. 9, 2017, 9:25 AM), http://www.latimes.com/local/lanow/la-me-fetal-tissue-20171209-story.html.

[8] Press Release, Orange Cnty. Dist. Att'y, OCDA Obtains $7.8 Million Settlement and Admission of Liability in Lawsuit Against Two Companies Who Unlawfully Sold Fetal Tissue and Cells for Profit (Dec. 8, 2017), *available at* http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=5406.

[9] Although the Excerpts of Record contain the motions to disqualify from both PPFA v. CMP and NAF v. CMP, for the sake of brevity, Defendants will only cite to the motion in the PPFA v. CMP action because "the grounds raised in th[e] motion[s] are identical[.]" PPFA-Dkt. 186 at 2 (Judge Donato quoting Judge Orrick).

at 13, 104.[10] After incorporating GSFRC, Judge Orrick served as a board member and officer, Secretary of the Board, and then as an Emeritus Board Member through at least September 2015. GSFRC opened the PPSP clinic in 2001, following a needs assessment conducted while Judge Orrick was both Secretary of GSFRC's Board and an attorney for the organization. PPFA-Dkt. 164-1 at 73; 181-1 at 26.

Since its opening, the family planning clinic has been a joint venture between Planned Parenthood and GSFRC. PPFA-Dkt. 181-1 at 29 (Goal is to "[i]ntegrat[e] family planning into the fabric of the agency"); 164-1 at 80 ("In collaboration with Planned Parenthood, an on-site family planning clinic is open one day per week"). Until August 2016, the PPSP clinic operated on GSFRC premises rent-free. PPFA-Dkt. 170-1 at 1:24-26. GSFRC also provides the services of its receptionist, who distributes PPSP promotional material. PPFA-Dkt. 170-1 at 2:3-5; 171-1 at 2, 4. In 2008, GSFRC advertised for an employee to be paid by GSFRC for work in the PPSP clinic. PPFA-Dkt. 171-2 at 1, 4-5. That employee's necessary qualifications included "[k]nowledge of reproductive health and family planning services" and "[e]ducation or training in Family Planning and Reproductive Health or related field[.]" PPFA-Dkt. 171-2 at 5. In the previous year, Judge and Mrs. Orrick together had made a $5,072 donation to GSFRC. Such gifts from "community

[10] Plaintiff PPSP operated the clinic from 2001 to 2005, and then from 2010 to the present. It was operated between 2005 and 2010 by another Planned Parenthood affiliate. PPFA-Dkt. 164-1 at 104.

donors," the CEO of PPSP told local news media, were necessary to maintain and expand PPSP's partnership with GSFRC. PPFA-Dkt. 164-1 at 3, 104.

As GSFRC's Secretary during the creation of its partnership with PPSP, Judge Orrick oversaw that partnership and was informed about it.[11] Judge Orrick provided personal, professional, and financial assistance to PPSP by using a nonprofit he oversaw and supported to help open and operate a PPSP facility.

III. JUDGE ORRICK'S ASSOCIATION WITH PUBLIC SUPPORT FOR PLAINTIFFS AND OPPOSITION TO DEFENDANTS.

In late 2015, Judge Orrick's image was used in support of a Facebook post[12] stating that Defendants' work is "domestic terrorism," consisting of "heavily edited

[11] California law presumes that directors comply with their fiduciary duty to be informed about their organization's activities. *Potter v. Hughes*, 546 F.3d 1051, 1059, fn. 3 (9th Cir. 2008); *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694, 715 (1996); *Jones v. Martinez*, 230 Cal.App.4th 1248, 1254 (2014).

[12] The posts were "liked." "[T]he act of 'liking' a Facebook post makes the post attributable to the 'liker, even if he or she did not author the original post."

videos by a sham organization run by extremists who will stop at nothing to deny women legal abortion services." In early 2016, Judge Orrick's image was also used in support of a post showing Defendant Daleiden's image and applauding his felony indictment in Texas, which has since been dismissed. PPFA-Dkt. 164-1, at 161, 166-169.

These posts were not the expression of views about an abstract "issue" or "cause." They contained: (1) the defense of a Plaintiff against alleged "attacks" which were ***the subject of a lawsuit pending before Judge Orrick***; (2) applause for the criminal prosecution of ***a party before Judge Orrick for activity that is the subject of that lawsuit***; and (3) accusations that ***Defendants appearing before Judge Orrick*** were a "sham organization run by extremists" that published "heavily edited videos" that amounted to "domestic terrorism." These were all disputed positions that later formed the cornerstone of Judge Orrick's issuance of a preliminary injunction in NAF v. CMP. *See Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2016 WL 454082, at *23, fn. 42, 43 (N.D. Cal. Feb. 5, 2016). And it was not a stranger or unconnected third party who deployed Judge Orrick's image in support of one party to this case and opposition to the other; it was his own spouse.

Grutzmacher v. Howard Cty., 851 F.3d 332, 340, fn. 3 (4th Cir. 2017); *see also Buker v. Howard Cty.*, No. CIV.A. MJG-13-3046, 2015 WL 3456750, at *22 (D. Md. May 27, 2015) (same).

PROCEDURAL HISTORY

In late May 2017, Defendants learned that – despite Judge Orrick stating in his Senate Judiciary Questionnaire that he left the board of GSFRC in *1999* – Judge Orrick had actually been Secretary of the Board of GSFRC in *2001*, when GSFRC entered into its "key partnership" with PPSP by establishing a Planned Parenthood clinic inside GSFRC headquarters. Defendants also learned that until at least September 2015 – i.e., *after* Judge Orrick entered the temporary restraining order in NAF v. CMP blocking Defendants from publishing further undercover videos of Planned Parenthood officials, including PPSP employees – Judge Orrick was still publicly affiliated with GSFRC. The organization named him as an Emeritus Board Member in materials disseminated to donors and the public. At no time did Judge Orrick disclose to Defendants his relationship with PPSP, an organization Defendants alleged, both in public statements and as part of their defense, was involved in violations of state and federal law. At or around that same time, Defendants also discovered the public use of Judge Orrick's image in support of strident online posts condemning Defendants.

On June 7, 2017, convinced of Judge Orrick's actual and apparent bias, Defendants moved in NAF v. CMP to disqualify Judge Orrick. NAF-Dkt. 428. On June 8, 2017, instead of ruling on the NAF v. CMP motion, Judge Orrick referred it to another judge, and Hon. James Donato was assigned to hear it. NAF-Dkt. 430,

431. On June 26, 2017, four days after hearing argument, Judge Donato denied the motion to disqualify. NAF-Dkt. 452.

Judge Orrick also referred the motion to disqualify in PPFA v. CMP, filed on June 13, 2017, to Judge Donato. PPFA-Dkt. 164, 167. On July 13, 2017, Judge Donato ordered the parties to file supplemental briefs, addressing why his order in NAF v. CMP did not resolve the motion to disqualify in PPFA v. CMP. PPFA-Dkt. 175. On October 17, 2017, Judge Donato, without a hearing, issued a ruling denying the motion. PPFA-Dkt. 186. This consolidated petition for a writ of mandamus followed.

ARGUMENT

When considering whether to grant mandamus relief, this Court looks to five factors: "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the District Court's order raises new and important problems or issues of first impression." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1136 (9th Cir. 2009). The "factors serve as guidelines, a point of departure for [the] analysis of the

propriety of mandamus relief. Not every factor need be present at once." *Id*. at 1156. Here, these factors support granting mandamus relief.

I. THE FIRST FACTOR: DEFENDANTS HAVE NO OTHER MEANS TO OBTAIN THEIR DESIRED RELIEF.

"***[Q]uestions under §455(a) may not be raised on appeal from the final decision***" "[b]ecause procedural rulings that do not affect the merits of the case . . . are not good reasons to reverse the final judgment." "So if the problem is one of the appearance of impropriety . . ., ***it is mandamus or nothing, and [we] expressed a strong preference for mandamus over nothing***." *New York City Dev. Corp. v. Hart*, 796 F.2d 976, 978-79 (7th Cir. 1986) (emphases added); *see also In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992) ("Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear, and virtually every circuit has so held."). Similarly, "[i]n the exceptional case, where the issue of disqualification [under §144] appears to be a significant one, the court may consider the motion to disqualify upon a petition for a writ of mandamus." *United States v. State of Wash.*, 573 F.2d 1121, 1122-23 (9th Cir. 1978).

Defendants have amply demonstrated Judge Orrick's bias, but without this Court's intervention, that apparent bias cannot be remedied. Defendants' only remedy is via the present writ of mandamus.

II. THE SECOND AND FIFTH FACTORS: DUE TO IMPORTANT PROBLEMS RAISED BY THE ORDER, ABSENT MANDAMUS RELIEF, DEFENDANTS WILL BE DAMAGED AND PREJUDICED IN WAYS THAT CANNOT BE CORRECTED ON DIRECT APPEAL.

Defendants will be irreparably damaged if their case has to proceed in front of Judge Orrick, and so will the public interest. As noted above, the core of these cases is whether incriminating video footage of Planned Parenthood officials was unlawfully recorded. Two congressional committees have found that the videos are evidence of criminal misconduct by Planned Parenthood and its agents. Two full years after the videos came to light, Congress continues to urge both criminal investigation and defunding of Planned Parenthood, either of which could jeopardize the financial viability of GSFRC's PPSP clinic.

With the stakes for both parties so high, Defendants deserve to have their arguments heard by a judge who was not instrumental in the founding of one of the Plaintiff's clinics. Judge Orrick's bias has already resulted in unjustified judgments (such as the unfounded claim that Defendant Daleiden intends "to cause real harm to human beings," *see* PPFA-Dkt. 164-1, ¶14) and clearly erroneous decisions (such as the decision not to recuse himself despite evidence of partiality), and Defendants stand to suffer much greater harm if they are compelled to continue arguing their case in a hostile court.

Meanwhile, Defendants are under attack in other venues as well. The California Attorney General has charged Defendant Daleiden with criminal

violations of California's unlawful recording statute, but the Editorial Board of the Los Angeles Times stated that "[i]t's disturbingly aggressive for [Attorney General] Becerra to apply this criminal statute to people who were trying to influence a contested issue of public policy, regardless of how sound or popular that policy may be."[13] Meanwhile, the California Legislature reacted to the CMP videos by voting on legislation proposed by Planned Parenthood and former California Attorney General Kamala Harris, aimed at increasing the penalty for unlawful recording of abortion providers. Cal. Pen. Code § 632.01. The ACLU, the Electronic Frontier Foundation, and the California Newspaper Publishers Association all vehemently opposed the legislation – but it became law.[14] At the other end of the spectrum, Congress took an immediate interest in Defendants' videos, subpoenaed them, and launched several investigations based on Defendants' findings. These investigations then led to an ongoing investigation by the federal Department of Justice. *See* Footnotes 5 and 6, *supra*.

---

[13] The Times Editorial Board, *Felony charges are a disturbing overreach for the duo behind the Planned Parenthood sting videos*, LOS ANGELES TIMES (Mar. 30, 2017, 5:00 AM), http://beta.latimes.com/opinion/editorials/la-ed-planned-parenthood-charges-20170330-story.html.

[14] Tony Biasotti, *How the fight over undercover videos is pitting Planned Parenthood against the mainstream media*, COLUMBIA JOURNALISM REVIEW (Aug. 5, 2016), https://www.cjr.org/united_states_project/planned_parenthood_undercover_videos_california_media.php.

The diametrically opposed responses of the state and federal legislatures and justice departments should be enough to give any court pause. This is a controversy with societal impact extending beyond the Complaint. The rulings here may influence the debate over defunding Planned Parenthood or the future prosecutions of Defendants and other investigative journalists. Because of these likely effects – including the prosecutions of both Defendants and the subjects of their investigations – there is an especially substantial public interest in assigning a judge to this case who is unmistakably free of bias, whether actual or apparent.

III. THE THIRD FACTOR: JUDGE DONATO'S ORDERS ARE CLEARLY ERRONEOUS AS A MATTER OF LAW.

A. CMP And Daleiden Set Forth Facts In Their Affidavit Requiring Recusal Under 28 U.S.C. § 144.

"Whenever a party to any proceeding in a district court makes and files a *timely and sufficient* affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144 (emphasis added).

The indicia of a legally sufficient affidavit under §144 are: (1) the facts are material and stated with particularity; (2) the facts are such that, if true, they would convince a reasonable person that a bias exists; and (3) the facts show that the bias is personal, as opposed to judicial, in nature. *Reiffen v. Microsoft Corp.*, 158

F.Supp.2d 1016, 1022 (N.D. Cal. 2001). When evaluating a §144 affidavit for legal sufficiency, "all facts stated with particularity are to be taken as true." *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976); *see also Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976) ("Neither the truth of the allegations nor the good faith of the pleader may be questioned.").

The facts stated in Defendants' affidavit are material and stated with particularity. The affidavit alleges that Judge Orrick: (1) was an Officer of GSFRC as Secretary of the Board at the time GSFRC embarked on a "key partnership" with Planned Parenthood by opening a PPSP clinic; (2) remained in a leadership capacity as a Director at GSFRC while GSFRC maintained the PPSP clinic; (3) served GSFRC, including during this lawsuit, as an Emeritus Board Member while GSFRC continued to host and promote PPSP's clinic; (4) imputed to Defendant Daleiden, based on *no evidence*, an intent to hurt people; (5) has a personal bias and prejudice against Defendants and in favor of Planned Parenthood and NAF; and (6) has been a key donor together with his spouse to the GSFRC-PPSP partnership. These facts fall into two categories: Judge Orrick's relationship with Plaintiff PPSP, and Judge Orrick's apparent public opposition to Defendants and support of Plaintiff PPFA.

1. Judge Orrick's Relationship with PPSP and Comments on the Record Show Actual Bias.

In his rejection of Defendants' argument regarding Judge Orrick's

relationship with PPSP, Judge Donato improperly dismissed numerous "facts stated with particularity" that had never been repudiated by Judge Orrick, reducing Defendants' affidavit to one word: "speculative." NAF-Dkt. 452 at 8. The cases on which the Court relied involved factual showings that were nowhere near as robust as Defendants'. *See Yagman v. Republic Insurance*, 987 F.2d 622, 626 (9th Cir. 1993) (the affiant "*pointed to no evidence*" of "invidious motive" "other than [the Judge's] pursuit of the petition for certiorari itself") (emphasis added); *Clemens v. U.S. District Court for Cent. Dist. of Cal.*, 428 F.3d 1175, 1180 (9th Cir. 2005) (the affiant "speculate[d] – but *[did] not tender any evidence* – about personal relationships among the judges") (emphasis added); *see also In re Lebbos*, No. 06 22225 D 7, 2007 WL 1129189, at *4 (Bankr. E.D. Cal. Apr. 13, 2007) (accusation that the court had acted out of "financial self-interest" was speculation with no evidence whatsoever to support it).

In contrast to these instances of actual "speculation" – i.e., pure conjecture on the basis of *no* evidence – Defendants did not speculate that a relationship exists that would make a reasonable observer believe Judge Orrick is biased. On the contrary, Defendants alleged with particularity and *provided evidence* of bias, including that up to 2009, Judge Orrick had "assisted the [GSFRC] on many legal issues"; that as recently as 2015, after this lawsuit had commenced, he was publicly held out as an Emeritus Board Member on GSFRC mailings; and that he

"was the Secretary of the Board of GSFRC in 2001 when GSFRC entered into its 'key partnership' with PPSP to embed a Planned Parenthood clinic inside GSFRC's premises." Furthermore, Defendants pointed out that, under California law, Judge Orrick must be presumed to have accessed extra-judicial confidential information about PPSP. PPFA-Dkt. 164-1 at 2-3, 18, 20, 42, 44, 73, 96, 100-101. Far from being "speculative," these allegations were supported by documentary evidence, and Judge Donato was required to "take[] as true" these well-pled and substantiated facts in the absence of a repudiation by Judge Orrick. *See Haldeman*, 559 F.2d at 131.

Judge Donato singled out only one specific point – that as Secretary of the Board of GSFRC, Judge Orrick would have had access to confidential information – that might affect his recusal decision if Defendants had provided more evidence. For reasons discussed in Section III.B.1, *infra*, Defendants cannot be blamed for being unable to provide more detailed information about Judge Orrick's activities as an officer of GSFRC. Moreover, the presumption that a small non-profit's cofounder, corporate officer, and lawyer was intimately informed and involved in a significant joint venture between his organization and a much larger nonprofit is the only reasonable one. The alternative – i.e., that such a key person was *not* so informed – is implausible, at best. Meanwhile, the remainder of Defendants' evidence is well-documented and stands unrebutted.

A non-profit that Judge Orrick incorporated and governed for over 15 years entered into (under his authority) and has maintained to this day a close relationship with an organization whom plaintiffs in both PPFA v. CMP and NAF v. CMP have alleged that Defendants "demonized" and "smeared" with charges of criminal activity, exposing the organization to investigation and referral for prosecution. PPFA-Dkt. 59, ¶¶1, 12. NAF-Dkt. 131 at ¶¶4, 142. Judge Orrick has a clear personal and professional interest in ensuring that the public does not perceive that he created and then led a non-profit to partner with an entity that Congress has deemed a criminal actor and is now under federal investigation by the Department of Justice. Further, having been involved in the leadership of GSFRC for decades, Judge Orrick also has a personal interest in seeing that the property and employees of GSFRC remain safe from the alleged "threats, harassment, and criminal activities targeting . . . Planned Parenthood health centers," one of which is housed within the organization's own headquarters. PPFA-Dkt. 1, ¶139.

If the above were not enough evidence of Judge Orrick's bias, the affidavit also reports Judge Orrick's own comments on May 25, 2017, when the Judge accused Defendant Daleiden of intending to hurt people – a charge based on nothing in the record, borne purely of extrajudicial animus, and providing

undeniable evidence of the speaker's personal prejudice. PPFA-Dkt. 164-1 at 4, 183.

Any of the facts alleged in the affidavit would suffice to show that Judge Orrick is partial to Plaintiffs in these actions. Cumulatively, they are indisputable.

2. The Public Linking of Judge Orrick's Image with Vicious Statements About Defendants is Evidence of Judge Orrick's Actual Bias.

Further evidence of Judge Orrick's bias comes from the repeated association of his image with public condemnations of Defendants and the actions at issue in this case. Judge Orrick's image was publicly linked to the claims that Defendants' videos were "heavily edited," that CMP is "run by extremists," and that Defendants "will stop at nothing to deny women legal abortion services." It was also associated with support for Daleiden's now-dismissed felony criminal prosecution in Texas. The placement of Judge Orrick's image, by his own spouse, is indicative of actual bias, particularly when taken together with Judge Orrick's own past activities and his own words, as described above. *See* Section III.A.1, *supra*.

The courts have long regarded the spousal relationship as sufficiently intimate that one spouse can be assumed to be partial to the position of the other. *See, e.g.*, *Nichols v. Thomas*, 788 F.Supp. 570, 572 (N.D. Ga. 1992) ("An average person . . . as the husband of a volunteer worker at the district attorney's office

would be partial to the prosecutor's case."); *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1313 (10th Cir. 2015) (new trial not ordered because "as soon as the law clerk became aware of her husband's situation, she informed the judge, who screened her from substantive work on the case"); *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (After "the marriage of one of the Judge's law clerks to the prosecutor in this case" was discovered, "the Judge took pains to see [that clerk] did not work on DeTemple's case"). That assumption is especially warranted in relation to such a controversial issue as abortion. *See, e.g., Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998) (refusing standing to "two husbands of pregnant women" because husbands had not met burden of showing "that their wives disagree with them about the issue and so might consider undergoing" an abortion). The fact that Judge and Mrs. Orrick have a history of joint charitable and political contributions – including together donating $5,072 to GSFRC after it opened the clinic – supports that assumption in this case.[15]

Most significant of all is the subject matter of the posts with which Judge Orrick's image was associated: e.g., the integrity of the videos, Defendants' history

[15] Judge and Mrs. Orrick also jointly bundled over $200,000 of political contributions for President Obama, the first sitting President to make a speech to Planned Parenthood. PPFA-Dkt. 164-1 at 136; 181 at 10. Their support for President Obama is publicly available information that will be interpreted as just more evidence – along with Judge Orrick's participation in opening a Planned Parenthood clinic and Mrs. Orrick's social media activism using Judge Orrick's image, *see supra* at 7-10 – that Judge Orrick and his wife share pro-Planned Parenthood views.

of nonviolence, and Defendants' intentions in undertaking their investigative journalism. Those are disputed factual questions at the heart of both District Court cases. *See King v. U.S. Dist. Court for Cent. Dist. of California*, 16 F.3d 992, 995 (9th Cir. 1994) (Reinhardt, J., concurring) ("[R]ecusal is required . . . not only when a judge feels personal animosity toward a party but . . . even when he has simply formed a strong opinion with respect to how the critical issues of fact should be decided"). When a judge's spouse comments publicly on a subject matter before her spouse, the judge's eventual ruling may be perceived as a response to his spouse's statements. *See, e.g.*, *Tyson v. State*, 622 N.E.2d 457, 459-60 (Ind. 1993) (Supreme Court justice recused himself after his wife expressed support to counsel for one party, observing that however he held, his decision could be interpreted as a response to his wife's conduct, and noting that "[s]ubstantial concerns about fairness arise when a judge who arguably should disqualify remains as a voting participant").

Whether Judge Orrick approved or merely acquiesced to the use of his image in support of controversial conclusions about the disputed facts of these cases, the fact that his own spouse used his image to convey such sentiments about issues in these cases is ample reason to conclude that his decisions with respect to those issues will be biased.

B. Disqualification Is Required Under 28 U.S.C. § 455 In Order To Avoid An Appearance Of Partiality.

> (a) Any . . . judge . . . shall disqualify himself in any proceeding *in which his impartiality might reasonably be questioned*.
>
> (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party. . . .

28 U.S.C. § 455 (emphasis added).

Although Defendants have presented sufficient evidence of *actual bias* to warrant recusal of Judge Orrick under §144, the bar for recusal is actually much lower. In 1974, Congress rewrote 28 U.S.C. § 455 to broaden the grounds for disqualification in the federal courts from "*actual* bias" to "the *appearance* of partiality":

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists[.]

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-61 (1988). "It is the appearance of bias or partiality that matters here, not actual bias." *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996).

For example, in *Tucker*, prosecutors, relying "primarily on news articles," sought the recusal of District Court Judge Woods from the trial of Governor Tucker, because of Woods's close association with Hillary Clinton. Governor Tucker was indicted for financial crimes related to an investigation of President

and Mrs. Clinton. *Id*. at 1315-16. News articles indicated that the Clintons had a close relationship with Judge Woods and had expressed their support of Governor Tucker, including after he was indicted. Based solely on such articles and the appearance of partiality, the court in *Tucker* ordered recusal. *Id*. at 1324-25.

In these high-profile cases, even if Judge Orrick's relationship with PPSP and association with public condemnations of Defendants do not suffice to demonstrate actual bias, they certainly give rise to an appearance of partiality that itself requires recusal.

1. Judge Orrick's Relationship with Plaintiff PPSP Creates an Appearance of Partiality.

In addition to the evidence of actual bias above, Judge Orrick's past and ongoing fiduciary duties to GSFRC create an appearance of partiality. As noted above, because Judge Orrick was GSFRC's Counsel/Secretary at the time of the formation of GSFRC's partnership with PPSP, there is an unrebutted presumption that he accessed confidential information of both GSFRC and PPSP to perform his duties. Now, he has the duty to protect and preserve that information, as well as the duty to not injure GSFRC in a way relating to his legal representation of it – which likely includes its partnership with PPSP.

In addition, PPSP seeks recovery for "being forced to expend additional, extensive resources on security" because Defendants' "conspiracy has cost Plaintiffs millions of dollars and put the safety and security of Planned Parenthood's personnel

and patients at serious risk[.]" PPFA-Dkt. 59 at ¶¶10, 188. This directly implicates Judge Orrick's fiduciary duties to GSFRC because the security interests of PPSP are inextricably intertwined with those of GSFRC. If PPSP's clinic at GSFRC were the subject of vandalism or picketing, GSFRC employees to whom Judge Orrick has fiduciary duties will necessarily be affected. Judge Orrick's duties to GSFRC create at least an appearance of partiality toward PPSP.

Judge Donato rejected all of Defendants' arguments as solely "speculative" and "conjecture." PPFA-Dkt. 186 at 4. But it was not Defendants' burden to substantiate them. The only reason that these arguments were purportedly speculative is because Judge Orrick wrongly referred the adjudication of his disqualification under §455 to Judge Donato. As explained more fully below, Judge Orrick had an independent duty under §455 to enlighten the parties as to the facts, especially if Defendants' Affidavit was inaccurate, based on his own superior knowledge of the facts. *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980).

Instead, Judge Orrick transferred both Defendants' §144 and Defendants' §455 motions to Judge Donato, and did not provide his own version of the facts to challenge Defendants' allegations or to otherwise explain why his recusal was not warranted. *Contrast Morris v. Petersen*, No. 12-CV-02480-WHO, 2015 WL 78769 (N.D. Cal. Jan. 5, 2015) (Hon. William Orrick III adjudicating motion to disqualify and discussing each fact alleged as evidence of his bias); *Carolina Cas. Ins. Co. v.*

Helsley, No. 1:10-CV-916-LJO-MJS, 2010 WL 4955547, at *2 (E.D. Cal. Nov. 30, 2010) ("The Court has set forth in detail above the entire relationship between the undersigned and Chris Wanger.").

Although both GSFRC and PPSP filed declarations, neither rebutted the relevant allegations about Judge Orrick's involvement with PPSP, GSFRC, and his public association with negative extrajudicial statements about Defendants. PPFA-Dkt. 170-1; NAF-Dkt. 447-2.

2. The Public Association of Judge Orrick's Image with Extrajudicial Statements Create an Appearance of Partiality.

Similarly, even if the use of Judge Orrick's image in support of statements condemning Defendants were insufficient evidence of *actual* bias on Judge Orrick's part, they certainly create the *appearance* of partiality, which requires recusal. *See Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984) ("[A]n appearance of impropriety is created by the close nature of the marriage relationship. Generally, the public views married people as 'a couple,' as 'a partnership,' and as participants in a relationship more intimate than any other kind of relationship between individuals.").

It is undisputed that Mrs. Orrick enjoys the "right to speak out on the issues she cares about," regardless of Judge Orrick's views. NAF-Dkt. 452 at 6:14-18. Still, her exercise of that right can have ramifications for Judge Orrick. *See In re Boggia*, 203 N.J. 1, 14 (2010) ("[F]or spouses of judges, certain amenities of life,

and perhaps even some legal rights, have to be sacrificed or curtailed for the larger purpose of avoiding the fact or appearance of participation by the judge in the political effort of a spouse."); *Greenberg v. Kimmelman*, 99 N.J. 552, 575-76 (1985) ("The state interest in preserving the integrity of the judiciary outweighs [a judge's spouse's] interest in unrestricted employment opportunities.").

To find that the comments of judges' spouses do not create an appearance of partiality, Judge Donato cited Judge Reinhardt's decision not to recuse himself based on his wife's political activism in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011). *Perry* does not determine the outcome here for two reasons. First, Judge Reinhardt's logic in Perry applies to appellate judges, not to trial judges who sit alone, and for whom there are numerous options for substitution. *See id.* at 915, fn. 6 (noting that the Supreme Court's recusal policy "emphasizes that one unnecessary recusal impairs the functioning of the Court") (quotation marks omitted); *see also id.* at 916 ("Were I to be recused because of the facts Proponents cite, it would not be merely from serving on the present panel but from voting on whether to rehear the case en banc and taking part in any en banc proceedings held by this court."). At the district court level, there is no need for a presumption against recusal in close cases. On the contrary, "[t]he United States Court of Appeals for the Ninth Circuit has instructed that when a case is close, the balance should tip in favor of recusal." *Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM,

2009 WL 2132693, at *15 (D. Ariz. July 15, 2009) (finding recusal appropriate where court's impartiality might reasonably be questioned based on judge's sister's publicly-held positions "highly disparaging of specific Defendants" and "tak[ing] a strong stand on disputed factual matters lying at the heart of the litigation"). This is at the very least a close case, if not a compelling one. Therefore, Judge Orrick should be recused.

The second reason that *Perry* doesn't control the outcome here is that, in *Perry*, Judge Reinhardt's wife's activities were the only reason to doubt his partiality, and – in his estimation – they did not call his impartiality into question because she "ha[d] no tangible interest in th[e] case's outcome." *Perry*, 630 F.3d at 915. Here, Defendants have shown that Judge Orrick himself has a long personal history of working in support of one of the named Plaintiffs. As an Emeritus Board Member of GSFRC during the pendency of this case, Judge Orrick retains an interest in the success of GSFRC's operations and the security of its property and personnel, clearly a "tangible interest in this case's outcome." *Id.*

Considered alongside Judge Orrick's own personal history, the use of his image to endorse strident public condemnations of Defendants compounds the appearance of partiality and warrants Judge Orrick's recusal.

IV. THE FOURTH FACTOR: AN OFT REPEATED ERROR.

The relationship between §144 and §455 is complex. Because §455 includes provisions covering both actual and apparent bias, its *substance* overlaps to an extent with §144's, and thus "a motion properly brought pursuant to section 144 will raise a question concerning recusal under section 455(b)(1) as well as section 144." *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). However, "[a]lthough the substantive test for bias or prejudice is identical in sections 144 and 455, the procedural requirements of the two sections are different." *Id*. With respect to section 144:

> [i]f the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and ***the motion must be referred to another judge*** for a determination of its merits.

Id. (emphasis added). "[S]ection 455[, by contrast,] includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under section 455, that judge has a duty to recuse himself or herself." *Id*. at 868. When a motion is brought under both sections 144 and 455, "section 455 modifies section 144 in requiring the [challenged] judge ***to go beyond the section 144 affidavit and consider the merits of the motion pursuant to section 455(a) & (b)(1).***" *Id.*

> The net result is that a party submitting a proper motion and affidavit . . . can get two bites of the apple. If, ***after considering all the***

> ***circumstances***, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144.

Id.

Under these precedents, faced with Defendants' §144 and §455 recusal motion, Judge Orrick should have (a) granted or declined recusal on the basis of his own determination of actual bias or the appearance of partiality under §455, and then (b) determined the sufficiency of Defendants' §144 affidavit. Only after performing both of these steps, and only if he had found the affidavit legally sufficient, should Judge Orrick have transferred the motion to a different judge. Judge Orrick neglected to do either (a) or (b) but transferred anyway.

The failure of the challenged judge to initially adjudicate the motion "will significantly affect the appellate standard of review" because "the reviewing court [can only] determine whether the district court erred in failing *sua sponte* to recognize obvious grounds for recusal." *Sibla*, 624 F.2d at 868. In other words, Judge Orrick's failure to address Defendants' §455 claims before transferring the motion to Judge Donato left later courts with only Defendants' affidavit and not the more developed record that Judge Orrick should have provided in his order regarding Defendants' §455 claims.

For this reason, this Court has repeatedly held that when a motion for recusal is brought, the challenged judge should rule on the motion in the first instance because:

> only the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged. This is a valid consideration, since inquiry into the circumstances surrounding the ***presumptively true allegations*** is often appropriate in determining whether they are such as would prevent a fair decision on the merits.

United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978) (emphasis added).

Furthermore, without Judge Orrick's response to the factual allegations, Judge Donato's only choice should have been to accept those allegations as true: "[A] judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed . . . [unless the] allegation . . . relates to facts that were peculiarly within the judge's knowledge." *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 701 (9th Cir. 1981), *rev'd on other grounds sub nom. Hoover v. Ronwin*, 466 U.S. 558 (1984). But Judge Donato did not.

These rules governing transfer of a §144 motion are repeated both in the statute itself and in Northern District of California Local Rule 3-14, which reads:

> Whenever an affidavit of bias or prejudice directed at a Judge of this Court is filed pursuant to 28 U.S.C. § 144, ***and the Judge has determined not to recuse*** him or herself ***and found that the affidavit is n[ot] legally insufficient. . .***, the Judge shall refer the request for disqualification to the Clerk for random assignment to another Judge.

(Emphasis added.) But the commentary to that local rule erroneously provides: "This rule does not preclude a Judge from referring matters arising under 28 U.S.C. § 455 to the Clerk so that another Judge can determine disqualification." As noted above, recusal motions arising under §455 actually require determination by the challenged judge, *before* possible transfer under §144.

The text of Local Rule 3-14 is clear, however, that a challenged judge may transfer a §144 motion only (a) after the Judge has determined not to recuse himself and (b) so long as the judge does ***not*** find the affidavit legally insufficient. Yet twice in a row, Judge Orrick declined to make any recusal determination and asserted that the affidavits were not legally sufficient, but nevertheless transferred the motions under Local Rule 3-14. NAF-Dkt. 430; PPFA-Dkt. 167. Judge Orrick thus improperly advocated for denial of the motions, while depriving the second court of the record it needed to evaluate them.

In support of Judge Orrick's decision not to address the recusal motions himself, Judge Donato stated that Defendants "got more, not less than [they] w[ere] entitled to, and [are] therefore in no position to complain." NAF-Dkt. 452 at 3 (quoting *United States v. Zagari*, 419 F.Supp. 494, 499 (N.D. Cal. 1976)). But Judge Donato fundamentally misunderstood what Defendants were entitled to: not just an impartial judge ruling on the legal sufficiency of the affidavit, ***but the challenged judge ruling on the actual merits of the affidavit based on his actual knowledge***. In

Zagari the motion was first adjudicated by the challenged judge; after the record was developed, the motion for reconsideration was transferred to another judge. In that instance, the defendants received what they were supposed to receive; Defendants here did not. *See also United States ex rel Hamilton v. Yavapai Cmty. Coll. Dist.*, No. CV-12-08193-PCT-PGR, 2014 WL 12656540, at *1 (D. Ariz. Dec. 9, 2014) ("Since a disclosure of the relevant facts is required to explain the Court's decision that recusal is not statutorily mandated, the Court notes the following . . . .").

Judge Orrick's refusal to address his close association with PPSP under §455 was clear error. Judge Donato compounded that error by not giving Defendants' undisputed and unrebutted factual allegations the credit to which they were entitled. Judge Donato's mistakes in handling the §144 affidavit procedure proceeded from Judge Orrick's clear error, which, given (a) overlapping-but-not-identical statutes with different procedural requirements, (b) confusing case law, and (c) erroneous commentary on Local Rule 3-14, is likely to recur. This Court should grant writ review to ensure that it does not.

CONCLUSION

These cases are not merely high-profile; they involve one of the most contentious moral and political issues of our time. The public is well aware that abortion is a topic on which many people, including judges, are apt to have very strong feelings they would find difficult to set aside in order to be impartial. In

such a charged context, there is considerably more than the "slightest chance" that Judge Orrick's relationship with GSFRC and PPSP and the publicly expressed opinions associated with him "could taint the public's perception of the fairness of the outcome" of these cases. *Melendres*, 2009 WL 2132693, at *15. Therefore, this Court should grant a writ of mandamus requiring Judge Orrick's recusal.

Respectfully submitted,

Dated: December 13, 2017

/s/ Charles S. LiMandri
Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
Tel: (858) 759-9948
Facsimile:(858) 759-9938
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com
Attorneys for the Center for Medical Progress

/s/ Thomas Brejcha
Thomas Brejcha
Peter Breen
THOMAS MORE SOCIETY
19 S. La Salle St., Ste. 603
Chicago, IL 60603
Tel: (312) 782-1680
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org

Matthew F. Heffron
THOMAS MORE SOCIETY
C/O BROWN & BROWN, LLC
501 Scoular Building
2027 Dodge Street
Omaha, NE 68102
(402) 346-5010 Telephone
mheffron@bblaw.us
Attorneys for David Daleiden

CERTIFICATE OF COMPLIANCE

This motion complies with the word count limitation of Fed. R. App. P. 21(d)(1) and Ninth Circuit Rule 32-3(2). The motion's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 8,077 words, excluding the portions exempted by Ninth Circuit Rule 27(a)(2)(B) and Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Charles S. LiMandri
Charles S. LiMandri
FREEDOM OF CONSCIENCE DEFENSE FUND

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Charles S. LiMandri
Charles S. LiMandri
FREEDOM OF CONSCIENCE DEFENSE FUND