Docket No. 18-17195

In the

United States Court of Appeals

for the

Ninth Circuit

NATIONAL ABORTION FEDERATION (NAF)
Plaintiff-Appellee,

v.

THE CENTER FOR MEDICAL PROGRESS, BIOMAX PROCUREMENT SERVICES, LLC, and DAVID DALEIDEN, aka Robert Daoud Sarkis
Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Northern District of California, Case No. 3:15-cv-3522-WHO • Honorable William H. Orrick, District Judge

BRIEF OF APPELLANTS

PUBLIC VERSION

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CORPORATE DISCLOSURE STATEMENT

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

STATEMENT OF RELATED CASES

This appeal is related to two parallel appeals, Case Nos. 17-16622 and 17-16862. That appeal of contempt sanctions is currently pending before this Court, along with a Motion for Reassignment on Remand. This Court previously considered an interlocutory appeal of the preliminary injunction in this case in Case No. 16-15360. A petition for certiorari was taken from this Court's denial of that appeal, and that petition was denied by the United States Supreme Court in Case No. 17-202. The District Court case from which this appeal is taken is related to *Planned Parenthood Federation of America, et al. v. Center for Medical Progress, et al.*, Case No. 3:16-cv-236-WHO ("*PPFA*"). In *PPFA*, this Court denied an interlocutory appeal concerning a special motion to strike under Cal. Civ. Proc. Code § 425.16 in Case No. 16-16997. A petition for writ of certiorari was taken from that opinion and is

currently pending before the Supreme Court in Case No. 18:696. This Court also heard a consolidated petition for writ of mandamus from both cases, concerning motions for recusal under 28 U.S.C. §§ 144 and 455, in Case No. 17-73313. After requesting responses from opposing counsel and the District Court, the Court denied that petition.

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INTRODUCTION

> [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

Plaintiff-Appellee National Abortion Federation ("NAF") is determined to prevent Appellants from communicating true information about a subject of profound public significance. To that end, NAF brought a lawsuit featuring unsupportable (and since abandoned) federal claims and petitioned a federal district court—one with whom its members enjoy a longstanding extrajudicial relationship—for a preliminary injunction imposing a prior restraint on Appellants' truthful speech. NAF's legal basis for being in federal court was pretextual; its legal arguments were weak; and its factual proffer comprised unproven assertions and hearsay that fell woefully short of establishing a balance of harms that could justify "one of the most extraordinary remedies known to our jurisprudence." *Id.* at 562. Nevertheless, the District Court granted Plaintiff an injunction, enabling a powerful special interest group to conceal true but unflattering information from public view.

Appellants appealed the preliminary injunction, to no avail. Appellants also challenged the injustice of having their case heard by a judge who has a longstanding, well-documented relationship with Appellee—also to no avail. Dkt. 428; 9th Cir.

Case No. 17-73313.[1] And while Appellants have been fighting the prior restraint on their truthful speech and its imposition by a manifestly biased judge, nearly three years have passed, with no end in sight.

The passage of years has not cast this fundamentally flawed injunction in any better light; to the contrary, intervening developments have only highlighted its legal and factual deficiencies. First, NAF has abandoned its spurious federal claims, making even more obvious the fact that this lawsuit never belonged in federal court. Second, intervening case law has further eroded NAF's chances of prevailing in what remains of this lawsuit. Third, discovery in a related case has confirmed that Appellants' truthful speech would not cause NAF any harm, much less irreparable harm, given NAF's open and notorious embrace of the very positions it seeks to gag Appellants from discussing. And fourth, NAF's ever-escalating campaign to railroad Appellants—most notably, by orchestrating a politically motivated criminal prosecution in California state court and then weaponizing this preliminary injunction to handicap their defense—has proven that the party actually at risk of irreparable harm here is not the powerful abortion lobbying group plaintiff, but the target of its ire, Defendant David Daleiden.

[1] Citations to "Dkt." refer to the District Court docket.

The legal and factual developments of the last three years dictate that this case should be dismissed, or at the very least, the preliminary injunction should be dissolved. But asked to consider these new developments, the District Court gave them the back of its hand. The District Court engaged in no reconsideration of Plaintiffs' insufficient evidentiary proffer in light of new facts. The District Court engaged in no re-weighing of the public interests relevant to the preliminary injunction. And on most of the legal questions presented, the District Court simply referred to its earlier preliminary injunction order, ignoring the intervening years of legal and factual developments mandating the opposite result.

That the District Court refused even to engage in the reconsideration requested with good cause by Appellants constitutes an abuse of discretion warranting reversal. It is also more evidence of the District Court's bias and the impossibility that Appellants can receive a fair hearing in the District Court. The arguments the District Court did deign to address were met with barely-disguised disdain and erroneous conclusions. For all of these reasons, to the extent that this Court even agrees that any part of this matter remains subject to federal jurisdiction, it should reverse the District Court; dissolve the preliminary injunction; and either reassign on remand or dismiss this case.

JURISDICTIONAL STATEMENT

The District Court originally exercised jurisdiction over the state-law claims at issue in this appeal under 28 U.S.C. § 1367, because Plaintiff originally asserted federal claims. Plaintiff recently dismissed all federal claims, however, eliminating federal question jurisdiction. Plaintiff now claims diversity jurisdiction over the residual state claims under 28 U.S.C. § 1332, but the validity of that jurisdiction is contested here.

This appeal challenges an order denying a motion to dissolve or modify the preliminary injunction and an anti-SLAPP motion, both filed by Defendant-Appellants the Center for Medical Progress ("CMP"), BioMax Procurement Services, LLC ("BioMax"), and David Daleiden.[2] This Court has jurisdiction over the denial of the motion to dissolve or modify the preliminary injunction under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction over the denial of the anti-SLAPP motion under the collateral order doctrine. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 900 (9th Cir. 2010).

The District Court entered its order denying the motions on November 7, 2018. On November 13, 2018, Appellants filed a timely notice of appeal, Fed. R. App.

[2] The same order addressed a motion to dismiss filed by Defendant Troy Newman, which is not part of this appeal, and a motion to dismiss filed by Appellants, the substance of which was incorporated into their anti-SLAPP motion. ER410.

P. 4(a)(1)(A), which this Court expedited pursuant to Ninth Circuit Rule 3-3 on November 14, 2018.

STATEMENT OF ISSUES

1. Whether the federal courts have subject-matter jurisdiction over this lawsuit involving only state claims between non-diverse real parties in interest.

2. If so, whether the preliminary injunction should be dissolved or modified in light of new facts or law, including (a) that it prevents David Daleiden from mounting a constitutionally adequate defense to criminal charges instigated by the same parties who brought this lawsuit, and (b) that it violates principles of comity and federalism by interfering with a state criminal proceeding.

3. Whether Appellants' anti-SLAPP motion should be granted as to all of Plaintiff's facially-defective claims because Plaintiff (a) refused to adduce sufficient admissible evidence to establish a prima facie contract claim; and (b) failed to plead any compensable damages.

ADDENDUM

The pertinent statutes are included in the Addendum to this brief.

STATEMENT OF THE CASE

Appellants appeal the denial of two jointly-filed motions: (a) a motion to dissolve or modify the preliminary injunction; and (b) an anti-SLAPP motion to

strike. The two motions were distinct but related and mutually reinforcing, each enumerating legal and factual bases for freeing Appellants from this meritless lawsuit.

Daleiden is an investigative journalist who founded the Center for Medical Progress ("CMP") to monitor and report on medical issues and advances. ER268. Daleiden and CMP launched the "Human Capital Project" to investigate, document, and report on questionable practices involving fetal tissue and organs, including the sale of fetal tissue for profit, the modification of abortion procedures to obtain fetal tissue for federally-funded research, partial-birth abortions, and the killing of babies born alive following abortion procedures. ER268.

Many NAF members were subjects of CMP's investigation. As part of the investigation, Daleiden attended two NAF-sponsored abortion industry tradeshows under an assumed name, as a representative of BioMax, a company testing the market for fetal tissue procurement.

Beginning on July 14, 2015, CMP released a series of videos of Daleiden and other BioMax representatives' meetings with abortion providers and fetal tissue procurement company executives. Each release consisted of a short highlight video and a longer video containing full recordings of the meetings. This investigation has,

from the first hours of its release to the public, generated a tremendous amount of attention and controversy, including considerable negative publicity for NAF.

NAF filed its Complaint on July 31, 2015, and its First Amended Complaint ("FAC") on September 18, 2015. Dkt. 1; ER657. NAF requested dismissal of all but four claims from its FAC on July 20, 2018, Dkt. 542, and the District Court granted dismissal on November 7, 2018. ER4 n.2. The FAC now alleges state law claims for breach of four separate contracts and claims for fraud, promissory fraud, and conspiracy to defraud. ER657.

SUMMARY OF ARGUMENT

In February 2016, the District Court granted NAF a preliminary injunction imposing an indefinite prior restraint on Appellants' speech on an issue of profound public significance. To justify such an extraordinary remedy, the District Court had to find not only that NAF had satisfied the four prongs of the preliminary injunction standard but also that "publication [] threaten[ed] an interest more fundamental than the First Amendment itself." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996).

Those now-three-year-old conclusions were based on factual premises that have since been disproven, most notably: (a) that Appellants' reporting was inaccurate; (b) that Defendant's reporting revealed no evidence of illegality; and (c)

that Plaintiff's members would suffer immediate and irreparable harm at the hands of third parties if Appellants were permitted to publish their findings. Without those factual findings, there is no longer any basis for the District Court's conclusions as to two of the four preliminary injunction factors (i.e., the likelihood of irreparable injury and the balance of equities).Also since February 2016, NAF and its associates have secured the criminal prosecution of Defendant David Daleiden in California state court, which he and his counsel have so far had to defend within the inhibiting constraints of a federal civil court's highly unorthodox gag order.

Appellants therefore asked the District Court to revisit the balancing of public interests underlying its preliminary injunction, noting how intervening factual developments have weakened several of the public interests favoring the prior restraint, while Mr. Daleiden's Sixth Amendment rights and venerable principles of federalism and comity must now be added to the weighty First Amendment considerations already militating against it. The District Court declined (without explanation) to recalibrate its out-of-date analysis of the relevant public interests. Three years later, NAF cannot legally or factually sustain the extraordinary prior restraint on Appellants' speech, which should lead this Court to dissolve the preliminary injunction.

Appellants also moved to strike NAF's remaining claims under California's anti-SLAPP statute, as this lawsuit is the quintessential Strategic Lawsuit Against Public Participation: a well-funded abortion industry trade organization aggressively attacking a small group of critics who had the audacity to record and publish unflattering information about the unseemly, and illegal, activities of its members. Having no actual federal claims nor any meritorious state ones, NAF is nevertheless pursuing this federal lawsuit against Appellants in the hopes of bullying them into forfeiting their First Amendment rights. Required by California law to demonstrate a "probability of prevailing" on its various claims, NAF could not meet either of the applicable standards. NAF did not even attempt to produce any admissible evidence that Appellants had breached any contract, as it was explicitly required to do under the statute. Moreover, NAF failed to plead any compensable damages for any of Appellants' alleged offenses. This Court should strike all of NAF's remaining non-diverse, state law claims and clear the federal court's docket of this meritless, politically motivated lawsuit.

STANDARD OF REVIEW

I. Motion to Dissolve the Preliminary Injunction

The grant or denial of a preliminary injunction is typically reviewed for abuse of discretion, *see Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc),

but where, as here, constitutional rights are at stake, the Supreme Court requires reviewing courts to "make an independent examination of the whole record so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on" constitutional rights. *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982); *Hurley v. Irish American GLIB*, 515 U.S. 557, 567-68 (1995).

De novo review further extends to "constitutional facts" underlying restrictions on constitutional rights. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (whether facts supported finding of actual malice); *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 304 n.5 (2007) (challenge to sanction for violating recruiting rule); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003) (fraud conviction).

This duty of *de novo* review, even of findings of fact, in fundamental rights cases specifically applies in the preliminary injunction context. *See, e.g., Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (Alito, J.); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996).

Finally, Appellants argue that the preliminary injunction is invalid under the Anti-Injunction Act, which is "a question of law reviewed de novo." *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002).

II. Anti-SLAPP Special Motion to Strike

Because the purpose of California's anti-SLAPP statute is to protect speakers from unfounded speech-suppressing lawsuits, *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003), all aspects of the adjudication of an anti-SLAPP motion—both legal and factual challenges—are reviewed *de novo* on appeal. *Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th 1057, 1067 (2017); *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595, 598–99 (9th Cir. 2010); *see also* THOMAS R. BURKE, RUTTER GRP. PRACTICE GUIDE: ANTI-SLAPP LITIGATION § 2:81 (2018) ("*De novo* review of a trial court's ruling of an anti-SLAPP motion is consistent with the independent appellate review required as a matter of substantive First Amendment law.").

ARGUMENT

I. THE COURT SHOULD DISMISS THIS ACTION FOR LACK OF SUBJECT-MATTER JURISDICTION.

There is no longer subject-matter jurisdiction with respect to this lawsuit, since NAF has dismissed all of its federal claims, and there is no diversity between Appellants and NAF's members, who are the real parties in interest.

NAF originally pleaded eleven causes of action, only two of which arose under federal law. ER657. Having obtained its preliminary injunction three years ago, NAF recently dismissed all but four state-law causes of action, leaving diversity jurisdiction as the sole potential basis for federal court jurisdiction. Dkt. 542; ER4.

NAF pleads that Appellants are citizens of California and Kansas, ER664-65, and NAF is a Missouri corporation headquartered in Washington D.C. ER661-62. But NAF's citizenship is not material for determining diversity; its *members'* citizenship is. NAF does not (and cannot) plead that it has no members who are citizens of California or Kansas. ER661-62. That fact destroys diversity.

"The Supreme Court has established that the relevant citizens for diversity purposes must be 'real and substantial parties to the controversy.'" *N. Tr. Co. v. Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990) (citing *Navarro Savings Association v. Lee*, 446 U.S. 458, 460 (1980)). The issue is who is "the real party to the controversy"—which is akin to "the real party in interest." *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc.*, 23 F. Supp. 2d 1151, 1155 (N.D. Cal. 1998).

When a nonprofit membership corporation, i.e., an association, brings a lawsuit, the court must ask: who actually is damaged, the members or the association? *Nat'l Ass'n of Realtors v. Nat'l Real Estate Ass'n, Inc.*, 894 F.2d 937, 940 (7th Cir. 1990) ("*NAR*") ("The members were in the front line. They received the

blow."). When a trade association brings a lawsuit to vindicate the interests of its members, those members' citizenship *must* be taken into account for diversity purposes. "Since it is the members of [the trade association] who are the real parties in interest so far as the claim for damages on their behalf is concerned, it is their citizenship that counts for diversity purposes." *Id.*; *see also N. Tr. Co.*, 899 F.2d at 594 ("[F]ederal courts must look to the individuals being represented rather than their collective representative to determine whether diversity of citizenship exists.").

In *NAR*, the Seventh Circuit dismissed a lawsuit for lack of subject matter jurisdiction on the basis that the association's members were not diverse with the opposing party. *NAR*, 894 F.2d at 941–43. Considering whether "the[] suit [could] be maintained on [the association]'s own behalf, without reference to the interests and entitlements of its members," the Seventh Circuit concluded it could not. *Id.* This is because "[e]ven if the association had an interest in this lawsuit sufficient to entitle it to sue on its own behalf, the members who are the real victims of the alleged fraudulent scheme [would] . . . be indispensable parties." *Id.* Thus, if the association itself and its members are *both* real parties to the controversy, then the citizenship of both matters for determining diversity.

NAF's Complaint explicitly asserts that it is suing Appellants on behalf of its members: "This case is about an admitted, outrageous conspiracy . . . against NAF

and its constituent members." ER658; *see also, e.g.,* ER720-26 (asserting "harm to the safety, security, and privacy of Plaintiff *and its members*, harm to the reputation of Plaintiff *and its members*."); ER722-23 ("the purpose of these agreements was to protect NAF and NAF Confidential Information, and to protect NAF's staff, *its members*, and the attendees at NAF's annual meetings. NAF staff, *NAF members*, and attendees at NAF's annual meetings are intended third party-beneficiaries to each and every contract described in the preceding paragraphs"); ER724 ("Plaintiff and *the intended third-party beneficiaries* described above have suffered and/or will suffer economic harm and other irreparable harm caused by Defendants' breaches, including harm to the safety, security, and privacy of Plaintiff *and its members*, harm to the reputation of Plaintiff *and its members*.") (emphases added).

These citations are not mere background and do not pertain solely to dismissed causes of action. Rather, as stated in NAF's conspiracy to defraud cause of action, NAF contends that "Defendants and Defendants' co-conspirators knowingly and willfully conspired and/or agreed among themselves to defraud Plaintiff and to injure Plaintiff with a pattern of fraudulent and malicious conduct, including but not limited to . . . defrauding NAF *and its constituent members*[,] . . . portraying NAF *and its constituent members* in a false light[,] . . . carrying out a campaign of intimidation and harassment against NAF *and its constituent members*[,]

. . . [and] unlawfully burdening *NAF members'* constitutional right to freedom of association." ER719 (emphases added).

The District Court erroneously held that "[i]t is NAF's citizenship that must be compared to defendants," because "NAF is alleging that defendants broke contracts that they had with NAF, not with NAF's members." ER8-9. Not only does this ignore NAF's members' interests in those contracts, it also ignores the plain language of NAF's complaint, including one remaining state court fraud claim specifically on behalf of NAF's members—i.e., Californians suing a Californian. ER719; ER272:20-22, 273:17-19.

Moreover, in issuing its preliminary injunction in this case (based solely on the breach of contract claim), the district court relied heavily on NAF's member's interests and rights, including their right to freedom of association. "The balance of NAF's strong showing of irreparable injury to *its members' freedom of association* (to gather at NAF meetings and share their confidences), to its and *its members' security*, and to *its members' ability* to perform their chosen professions against preventing (through trial) defendants from disclosing information that is of public interest . . . , tilts strongly in favor of NAF." ER492:1–5 (emphases added). Indeed, the precise alleged irreparable harms on which the District Court predicated the injunction—

"harassment and incidents of violence against the individuals shown in those recordings"—apply exclusively to the members themselves, ER489-90, 492.

Because NAF specifically brought this action on behalf of both itself and its members, and the extraordinary prior restraint imposed by the District Court was predicated on alleged harms to those individual members, ER492:1-5, NAF members are "real and substantial parties to [this] controversy." *N. Tr. Co.*, 899 F.2d at 594, and their citizenship must be considered when determining diversity. Because NAF has members in both California and Kansas, ER272:20-22, 273:17-19, there is no diversity, and therefore no subject-matter jurisdiction here. Therefore, dismissal is mandatory. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1092 (9th Cir. 1983).

II. THE COURT SHOULD DISSOLVE THE UNJUSTIFIED INJUNCTION ON SPEECH.

In February 2016, the District Court awarded NAF truly extraordinary relief: an indefinite prior restraint on Appellants' constitutionally protected expression about an issue of tremendous significance. Appellants may not publish any information learned at NAF tradeshows, or publish any news videos containing footage shot at NAF tradeshows. In enacting that gag order, which has now been in effect for nearly three years, the District Court relied crucially on (a) NAF's claims that releasing the videos would cause its members substantial harm, and (b) a

balancing of various public interests, which the District Court concluded justified suppressing Appellants' First Amendment rights.

Appellants continue to maintain that they did not breach NAF's contracts, and further that NAF has not pleaded a sufficient case for any breach of contract, nor any cognizable damages. But the motion to dissolve or modify the preliminary injunction on appeal here argued only that the preliminary injunction is now obsolete because facts discovered since February 2016 have given the lie to the District Court's findings regarding the likelihood of harm to NAF, while other intervening developments have shifted the balance of the various public interests sharply in Appellants' favor.

Given these new developments, Appellants asked the District Court to reconsider its outdated factual conclusions and its balancing of the shifted public interests implicated by the preliminary injunction. The District Court effectively declined to do so. This Court should reverse and dissolve the preliminary injunction.

A. Preliminary Injunction Prongs 2 and 3: New Data Undermine NAF's Likelihood of Irreparable Injury and the District Court's Balancing of the Equities.

"A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction

is in the public interest." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (quotation marks omitted).

In 2016, analyzing the "irreparable harm" prong of the preliminary injunction, the District Court accepted NAF's claims that Mr. Daleiden's earlier videos had "directly led to a significant increase in harassment, threats, and violence directed ... at NAF and its members," including the murderous attack on a Colorado Springs abortion clinic. ER489-90. The District Court concluded that, "[g]iven the evidence of defendants' past practices, allowing defendants to use the NAF materials in future Project videos would likely lead to the same result ... further harassment and incidents of violence against the individuals shown in those recordings." ER489-90.

Later, considering the "balance of equities," the District Court concluded without analysis that it "favors NAF," because Appellants would suffer only "the hardship of being restricted in what evidence they can release to the public," while "the hardships suffered by NAF and its members are far more immediate, significant, and irreparable." ER492. Both of these determinations depend on the truth of the underlying factual claim that the publication of Appellants' earlier videos caused a "significant increase" in cognizable harms to legally relevant parties. That claim is false.

1. NAF member harms cannot be considered if this lawsuit remains in federal court.

As stated above, Plaintiff's claim to diversity jurisdiction is premised on the erroneous claim that NAF's members are not real parties in interest. ER7–9. In issuing its preliminary injunction, however, the District Court relied heavily on NAF's *members'* interests and rights, and the potential harm to the *members'* rights in the absence of a prior restraint. ER492:1–5. The District Court invoked NAF member harms at least forty times in issuing its injunction, and relied explicitly on the declaration of a California NAF member to justify the prior restraint. ER486:5-7.

Appellants submit that there is no diversity here, but if this Court should find that there is, then the only harms relevant to the preliminary injunction would be harms to NAF itself, not those alleged by its members. NAF has not alleged any harm to itself that could possibly warrant the extraordinary remedy of the indefinite prior restraint on Appellants' speech. *See, e.g.*, ER718 ("[D]epriving NAF of its . . . right to exclude from its annual meetings . . . anti-abortion [activists] whose goals are not consistent with those of NAF").

2. NAF's own statistics disprove its claims of harm.

NAF monitors the Internet and curates yearly misleading reports on the supposed threat posed to abortion providers by individuals who oppose abortion. ER669 (listing statistics). Curiously, NAF chose not to release its 2015 statistics on

"Violence and Disruption" until April 2016—two months after the District Court had made its preliminary injunction findings. *See* ER281-84, 354-60. Those statistics contradict the District Court's findings, revealing that Appellants' journalism has so far caused *no* significant increase in harm to abortion providers. ER826-29, 354-60, 832-53. This in turn undermines the Court's speculation that releasing the enjoined materials will cause NAF or its members harm, ER470-72, 486-87, and its conclusion, on balancing the equities, that the prospect of harm to NAF outweighs Appellants' constitutional freedom of speech. ER492.

NAF's 2015 statistics contain no evidence of an overall increase in violence toward abortion providers. Only 0.67% of the instances of "Violence and Disruption" listed on NAF's 2015 report were categorized as "violence," which is *significantly lower* than the percentage in the preceding two years—1.6% and 4.6%. The raw number of alleged "violence" incidents also did not increase substantially, with 2015 showing only an 8% increase over 2013. ER826-29, 354-60. Planned Parenthood Federation of America ("PPFA") has corroborated that there was no significant increase in violence toward its providers in 2015. The abortion giant reported a minor increase in July and August 2015, but noted that by September 2015, "[redacted]" with [redacted]" ER836.

The lack of increase in violence overall is borne out in individual categories. NAF listed four instances of arson in 2015[3]—fewer than in 2012—and six instances of "invasion"—fewer than in 2013. ER283, 354-60. Similarly, NAF reported fewer instances of "assault & battery" than in 2012; fewer "burglar[ies]" than in 2010; and less than half as much "stalking" than in 2013. ER284, 354-60.

NAF did list three murders and nine attempted murders in 2015, but all related to the attack on the Planned Parenthood Rocky Mountains clinic in Colorado Springs, which the District Court originally relied on, ER491, but which turned out to have had nothing whatsoever to do with CMP.[4] ER283, 429-30, 855-57.

Meanwhile, more than one-third (36%) of NAF's reported instances of "violence" were trespassing—a recognized form of civil protest that does not

[3] Proving a well-known logical principle—that correlation does not entail causation—the cause of one of these arsons is known to have been a domestic dispute having nothing to do with CMP's revelations about the fetal tissue industry. *See* ER497-98. Plaintiff has produced no evidence that any other instance of harm or violence toward abortion providers was actually caused by CMP's journalism either.

[4] Not only have subsequent interviews with the criminally insane shooter disproven the connection, but both Planned Parenthood Federation of America and Planned Parenthood of the Rocky Mountains have declared in court filings that the shooting attack was "random" and "unforeseeable." ER429. The shooter was most recently held incompetent to stand trial on July 27, 2018. Even in Planned Parenthood's own internal email communications about the shooting, Planned Parenthood nowhere connects the shooting to CMP. Indeed, in the HotSpots report for November 2015, CMP is not mentioned at all. ER854-57.

typically involve physical harm to anyone. It is easy to mistake innocent conduct for trespassing, and to accuse innocent protesters or passersby of it. Such accusations are frequently leveled against nonviolent sidewalk pregnancy counselors and patient advocates. ER283. Alleged instances of trespassing are hardly evidence of a spike in violence toward abortion providers.

There are only two categories of violence that showed any noticeable increases in 2015: "vandalism" and "death threats/threats of harm." With respect to the latter, NAF expanded the prior category of "death threats" to include "threats of harm" in 2015. Therefore, the apparent increase in the category is artificially inflated. ER357 n.3.

"Vandalism" incidents approximately doubled from 27 in 2011 to 67 in 2015, but that is hardly grounds for suppressing Appellants' First Amendment rights. ER284, 354-60. For one thing, vandalism is perfectly reparable with measurable monetary damages.[5] More than that, though, an anomalous increase in vandalism reports in 2015 could just as easily be the result of greater sensitivity and reporting than of any actual increase in harm. Planned Parenthood itself admits that an increase reflected in its own 2015 reports of harm does not prove an *actual* increase in threats

[5] Further, the District Court's order of contempt, awarding NAF nearly $200,000 for a filing Defendant Daleiden's counsel made in the California criminal case, Dkt. 495, shows that all of NAF's alleged damages are measurable monetary damages.

of harm, because its staff was suddenly on heightened alert and so presumably exercised "greater reporting diligence" than in previous years. *See* ER850 [redacted].

Thus, far from showing the "dramatic increase in the volume and extent of threats" and "significant increase in harassment, threats, and violence" that the District Court found based on a preliminary record in February 2016, ER456, 490, NAF's 2015 statistics and Planned Parenthood's internal reporting, both confirm that NAF members saw no increase in actual harm compared to previous years—much less any such harm proximately tied to Appellants' speech.

Indeed, 98.6% of NAF's 2015 "Violence and Disruption" statistics are actually instances of First Amendment protected speech. (This is in contrast to NAF's "violence" statistics, which include unprotected speech such as "threats of harm.") The "disruption" statistics do significantly increase post-release of Appellants' investigation, but that actually cuts against NAF's arguments. Because of Appellants' investigation, there was an 800% increase in protected speech from the public about abortion. Courts should not weigh protected speech about abortion as a basis for judicial intervention. *Cf. McCullen v. Coakley*, 134 S. Ct. 2518, 2545

(2014) (Scalia, J., concurring) (The majority "treat[s] abortion-related speech as a special category"); *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361, 2388 (2018) (*NIFLA*) (Breyer, J., dissenting) ("[T]he majority's decision [] mean[s] that speech about abortion is special").

It is bald viewpoint discrimination for a court to "facilitate speech on only one side of the abortion debate." *McCullen*, 134 S. Ct. at 2534. It would be highly improper for any court to hold that Appellants' First Amendment advocacy must be restrained because it has been *too successful*, inspiring too many other people to engage in their own protected speech about abortion. In fact, the "[]controversial" nature of abortion means that speech about abortion merits special protection and cannot even be regulated in the commercial speech context. *NIFLA*, 138 S. Ct. at 2366.

Appellants' speech does not burden others' constitutional abortion-related rights. Providing truthful information about abortion practices *per se* cannot impose an undue burden on others' ability to access abortion. *NIFLA*, 138 S. Ct. at 2384 (Breyer, J., dissenting) (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992)). Because of congressional investigations and successful prosecutions demonstrating that Appellants' allegations were true, *see* § II.B.1, *infra*,

it is improper to hold that third-parties' repetition of Appellants' speech infringes different third-parties' ability to access abortion.

Finally, because NAF's own data show that there has not been a significant increase in cognizable harms to abortion providers—let alone to NAF itself, as required by NAF's jurisdictional theory—there is no credible argument that NAF stands to suffer "irreparable injury" if the preliminary injunction is dissolved. Nor is there any significant interest to weigh against the infringement of Appellants' First Amendment rights in the balancing of equities—indeed, as discussed below in § II.B.3-4, Appellants' now have even more Constitutional interests that decisively tip the equities in their favor. Therefore, both of those prongs favor dissolving the preliminary injunction.

B. Preliminary Injunction Prongs 1 and 4: The Public Interest Does Not Justify an Extraordinary Prior Restraint on Appellants' Speech.

In 2016, the District Court found—on the record before it—that, with respect to the "likelihood of success on the merits" prong, Plaintiff NAF was likely to be able to show that Appellants had entered into contracts cloaking all information learned at NAF tradeshows from disclosure, and that Appellants had knowingly waived their First Amendment rights, permitting the imposition of a prior restraint on their speech. ER475:1-483:24; *see Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993).

Although Appellants emphatically reject both of those conclusions, their motion to dissolve the preliminary injunction focused on a different aspect of the District Court's "likelihood of success" analysis.

Courts "will not enforce the waiver [of First Amendment rights] if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Leonard*, 12 F.3d at 890 (quotation marks and citation omitted). This is because "[p]rior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss[,] a loss in the immediacy, the impact, of speech. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975)) (ellipses omitted). Therefore, as part of its likelihood of success analysis, the District Court separately considered whether the balance of the various public policies at stake justified an extraordinary prior restraint on Appellants' speech, concluding that it did.

In 2016, the District Court based that conclusion on the following public policy considerations: (1) the public interest in evidence of illegal conduct in the enjoined materials, ER484:14-19; (2) the public interest in evidence of a de-sensitization in the attitudes of abortion industry participants, taking into account

the potential for that evidence, if published, to lead to intimidation and harassment of NAF members, ER485:14-486:9; (3) the public interest in protecting abortion providers by hiding information about them, ER486:10-487:3; and (4) the public interest in the constitutional right to privacy and how that right regulates governmental action relating to abortion, ER455:28-456:3, 493:5-6.

The District Court's public interest balancing in the context of considering whether to enforce the putative waiver of Appellants' First Amendment rights overlapped substantially with its analysis with respect to the "public interest" prong of the preliminary injunction, where the District Court balanced Appellants' right to free speech and the public's right to hear "recordings showing the 'desensitization' of abortion providers" against the public's right to abortion and NAF members' "right to associate in privacy." ER492-93.

In their motion to dissolve or modify the preliminary injunction, Appellants asked the District Court to revisit its balancing of the public interests in light of new facts and law. Specifically, the Appellants asked the District Court to reconsider its underlying factual conclusions that "the recordings relied on by defendants [contained] no evidence of criminal wrongdoing," ER484:14-15, and that "since defendants' release of the Project videos . . . harassment, threats, and violent acts taken against NAF members and facilities ha[d] increased dramatically," ER486:26-

487:1, in light of facts discovered over the last three years. Appellants also asked the District Court to review recent case law, including by this Circuit, indicating that Appellants cannot be held liable for the harms complained of by NAF's members.

And finally, Appellants asked the Court to add two further public policy considerations into the balance: (5) the public interest in protecting a criminal defendant's Sixth Amendment right to a fair trial, including the right to cure the jury pool, ER30:10–20, and (6) the public interest in preserving comity between the federal and state judiciaries, and specifically in shielding a state court criminal tribunal from undue interference from a federal district court, ER30:21–32:1.

Instead of engaging in meaningful consideration of the public interests, the District Court rejected the new evidence presented to it and cavalierly dismissed Daleiden's Sixth Amendment rights and comity concerns. The District Court's refusal to give meaningful consideration to Appellants' motion to dissolve the extraordinary indefinite prior restraint on their constitutionally-protected speech violated both the spirit and letter of the Constitution. *Nebraska Press Ass'n*, 427 U.S. at 561 ("[T]he barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.").

1. The enjoined materials do contain evidence of illegality.

a. Congressional investigations and successful prosecutions confirm that Appellants' reporting exposed illegal fetal tissue trafficking.

On July 14, 2015, CMP began publicly releasing the results of its "Human Capital Project." Within two weeks, three committees of the U.S. House of Representatives began investigations into the fetal tissue procurement practices exposed by Appellants' reporting, which were later consolidated into a single Select Investigative Panel. Meanwhile, the Senate Judiciary Committee launched its own investigation. In December 2016, the House and Senate released extensive final reports. ER814-17; SELECT INVESTIGATIVE PANEL OF THE ENERGY & COMMERCE COMM., U.S. H.R., FINAL REP. (2016); MAJ. STAFF OF S. COMM. ON THE JUD., 114TH CONG., HUM. FETAL TISSUE RES.: CONTEXT AND CONTROVERSY 114-27 (Comm. Print. 2016). Both committee reports noted that their findings were consistent with CMP's public videos, which had been "the impetus for" their investigations. ER816; Senate Report at 1, 48; House Report at 356.

The House and Senate committees' final reports documented extensive evidence of criminal, unlawful, and unethical acts by abortion providers and fetal tissue procurement companies, including:

- profiting from the sale of fetal organs;
- altering abortion procedures for financial gain;

- performing illegal partial-birth abortions;
- killing newborns who survived attempted abortions;
- failing to obtain informed consent for fetal tissue donations;
- violating HIPAA;
- violating federal regulations regarding Institutional Review Boards;
- fraudulent overbilling practices; and
- destroying documents that were the subject of congressional inquiries.

The committees issued numerous criminal and regulatory referrals to federal, state, and local law enforcement entities, including for several abortion providers and fetal tissue procurement companies that are NAF members and/or NAF conference attendees. ER816-18.

The status of most of these referrals is unknown because law enforcement agencies do not comment on, or even confirm, active investigations. However, in a rare move, the Department of Justice has confirmed that it has an ongoing and active investigation based on the referrals made to it. ER273, 307-12. Moreover, one investigation based on a House referral has concluded. On December 8, 2017, DV Biologics and DaVinci Biosciences—referred by the House to the Orange County District Attorneys' Office for prosecution—admitted guilt in a $7.8 million settlement with the OCDA. ER273, 313-53. Those companies admitted to selling fetal body parts obtained from NAF-member Planned Parenthood Orange & San Bernardino Counties for profit. ER273. The OCDA's office credited CMP's investigative journalism with prompting the case, stating: "In September 2015, the

OCDA opened an investigation into DaVinci Biosciences and DV Biologics after a complaint was submitted by the Center for Medical Progress regarding the illegal sale of aborted fetal tissue by both companies." ER351-53.

The enjoined CMP videos corroborate the findings of the House and Senate investigations. The House Panel received the enjoined videos pursuant to a subpoena, and *the House Report repeatedly quotes portions of the enjoined videos* but for unknown reasons did not publish the video files. Thus, the District Court's preliminary injunction now bars Appellants from publishing—or using in their defense in a politically motivated criminal case—videos that congressional investigative reports have repeatedly quoted as evidence of the commission of numerous felonies and other illegal and unethical acts.

b. The District Court improperly rejected this decisive counterevidence to a critical finding.

The District Court originally found that the recordings covered by the temporary restraining order did not show evidence of illegal conduct, and that this weighed in favor of granting a preliminary injunction. ER484:11–19. The District Court also found that other recordings which Appellants had published (unrelated to NAF) also did not show evidence of illegal conduct, even though Appellants had publicly claimed that they did. ER491. The District Court expressed these conclusions in tendentious terms, relying on a Planned Parenthood-commissioned

report by notorious opposition research firm Fusion GPS to claim that Appellants' published results "have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions (at least with respect to the NAF materials) of criminal misconduct." ER469:9-13, 490:19-22, 493:17–19.

In their motion to dissolve, Appellants pointed to the congressional investigations identifying rampant criminal activity in the fetal tissue procurement industry, and applauding Appellants for bringing that activity to light. ER268-75. They also noted that their investigation had led to a successful prosecution of two companies for profiteering from the sale of fetal tissue. ER274-75. And Appellants pointed out that the Fusion GPS report on which the District Court had relied for its assessment of Appellants' vides as "misleading" turned out to be so devoid of credibility that *even Planned Parenthood had repudiated it*. ER260 (citing ER469:9-13; Dkt. 286 in Case No. 3:16-cv-236, 7:20-22.)

In response to this new evidence, the District Court stated: "To start, it bears emphasizing that I have never broadly discussed the legitimacy or illegitimacy of defendants' investigation into the sale of human fetal tissue. . . . My findings were narrow and specific." ER28. Thus, at least for the purpose of the preliminary injunction, the District Court claims to have assumed that Appellants' investigation *was* legitimate—i.e., that it was searching for, and documenting, what Appellants

believed to be evidence of criminal activity. *But see* ER493:11–16 & n.44 (criticizing Appellants' methods as extreme); Dkt. 279 in Related Case No. 3:16-cv-236, 65:24–25 (Magistrate Judge interpreting preliminary injunction as stating that Appellants' project "was not really [a] journalistic effort.").[6]

Yet *even assuming the investigation's legitimacy*, the District Court still believes Appellants' speech should be enjoined because it may only be the smoke, not the fire. *See* ER29 (noting that the congressional "referrals do not identify the specific information on which they are based, let alone any of the materials reviewed by me prior to issuing the Preliminary Injunction Order"). That conclusion is erroneous. The congressional investigations explicitly base their criminal referrals on their final reports, which repeatedly quote enjoined materials. ER820-25. More than that, though, the District Court's reasoning is utterly without foundation. It cites virtually no precedent for any of its analysis of the motion to dissolve, and certainly none for

[6] This claim is hard to countenance from a court that has missed no opportunity to criticize Appellants' methods and impugn their motives: e.g., stating that Appellants "tend to misstate the conversations that occurred or omit the context of those statements," ER463; professing to be "skeptical that exposing criminal activity was really defendants' purpose," ER456; calling it "plausible … that the co-conspirators had an unlawful purpose," ER27 n.22; declaring that "the majority of the recordings lack much public interest, and *despite the misleading contentions of defendants*, there is little that is new in the remainder of the recordings," ER457 (emphasis added); stating "that defendants' goal … is to *falsely* portray the operations of NAF's members through continued release of its 'curated' videos." ER489 (emphasis added).

its "nothing-short-of-a-smoking-gun" definition of "evidence of illegality." ER28-29.

Ultimately, the District Court denied Appellants' motion to dissolve the preliminary injunction because, "having reviewed all of the video segments defendants relied on in opposition to the motion for a preliminary injunction, I disagree with the [congressional] Report[s'] characterization" that Appellants' videos show criminal activity. ER29 n.25.

But "[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (citing *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487 (1955)). Moreover, the Congressional committees issued hundreds of pages of detailed reports consistent with CMP's public videos showing extensive evidence of criminal, unlawful, and unethical acts by abortion providers and fetal tissue procurement companies. *See* ER269-72. And those findings have yielded at least one successful prosecution of a pair of fetal tissue procurement companies so far. ER273-74.

The District Court's refusal to credit decisive counterevidence to one of its factual findings was an abuse of discretion. At the very least, the use of Appellants' work in official investigations and prosecutions warrants modification of the

preliminary injunction to permit Appellants to publish and comment on the video recording of any conversations that are relied on by investigators or prosecutors. But that would leave out key contextual information that need not be enjoined, and therefore the preliminary injunction should be dissolved in its entirety.

c. Appellants' decision to publish their findings does not undermine their worthiness of First Amendment protection.

The District Court also opined that "[i]f the NAF recordings truly demonstrated criminal conduct . . . then CMP would have immediately turned them over to law enforcement. They did not." ER485. That assumption is both unsupportable and irrelevant. The congressional investigations and ensuing prosecutions confirm that the NAF recordings contain evidence of illegal activity—period. *See* § II.B.1. Appellants' choice to publicize the information at the same time it was provided to law enforcement makes no legal or practical difference. *See, e.g.*, Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. Marshall L. Rev. 649, 685 (2017) (noting that a best practice for journalism on a controversial topic is to wait until all of the evidence is gathered and then publish it at the same time as turning it over to law enforcement, to create public pressure on public officials to act). The District Court's choice to ignore hard evidence in favor of rank speculation based on its own

unproven assumptions about Appellants' motives is a clear abuse of judicial discretion.

Even if the videos did not contain evidence of illegality, though, they would still be journalism—and on an exceptionally newsworthy topic at that. It is undeniable that CMP's reporting on fetal tissue procurement has already had a profound influence on public conversation and even public policy. *See, e.g.*, *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. ____, 2018 WL 6440538 (2018) (Thomas, J., joined by Justices Gorsuch and Alito, dissenting from the denial of certiorari) (noting that high-profile Medicaid cases "arose after several States alleged that Planned Parenthood affiliates had . . . engaged in 'the illegal sale of fetal organs' . . . and thus removed Planned Parenthood as a state Medicaid provider").

Journalism is no less protected by the First Amendment if it does not contain "evidence of illegality." The District Court's use of "evidence of illegality" as a proxy for the videos' constitutional value is a corruption of First Amendment jurisprudence. *See Perricone v. Perricone*, 292 Conn. 187, 220 (2009) (discussing "the 'critical importance' of the right to speak on matters of public concern"); *Nebraska Press Ass'n*, 427 U.S. at 613 (Brennan, J., concurring) ("[T]he press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision

of what, when, and how to publish is for editors, not judges."). The enjoined videos are truthful reporting on a matter of tremendous public concern. Therefore, the public interest weighs profoundly against suppressing them.

2. Third-party harms to non-parties are not a legitimate basis for suppressing Appellants' constitutional rights.

Although the District Court grudgingly admitted that there was "some public interest" in the enjoined materials because they "show[] 'a remarkable de-sensitization in the attitudes of industry participants,'" it discounted that interest because "this very information [] could . . . result in . . . disparagement, intimidation, and harassment of [] NAF members" "if released and taken out of the context [in which] it was shared [] by NAF members." ER485-86.

For the District Court to give weight to a heckler's veto—i.e., for it to consider the prospect of harassment, threats, or violence from third parties completely unrelated to Appellants—in severing Appellants' First Amendment rights was constitutionally illegitimate. *See Santa Monica Nativity Scene Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't*, 533 F.3d 780, 788–90 (9th Cir. 2008); *see* ER490-91. It was also legal error to consider harms to NAF's members if, as NAF claims, they are not real parties in interest. *See* §§ I, II.A.1, *supra*. Regardless, NAF's claims of

harm to its members on account of CMP's videos have been disproven, leaving no basis to expect future harm. *See* § II.A, *supra*.

3. The constitutional right to an impartial jury favors lifting the gag order.

In addition to the original factors listed above, Appellants' motion to dissolve asked the District Court to consider Daleiden's Sixth Amendment right to have his criminal defense counsel defend him publicly. Appellants argued that countering the negative publicity generated by this very preliminary injunction and the abortion industry's media campaign is a necessary part of his criminal defense:

> In the absence of this Court's preliminary injunction, Mr. Daleiden's criminal defense team would presumably be attempting to cure the jury pool of the misimpression created by this Court's outdated conclusions—expressly contradicted by two congressional investigations—that CMP's recordings do not show evidence of criminality by NAF attendees. That is their job as his criminal defense counsel, and the preliminary injunction is preventing them from doing it, thereby depriving Mr. Daleiden of a full-throated defense.

ER262. As the Supreme Court put it, "An attorney's duties do not begin inside the courtroom door.... A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991); *see also* Michael

Jay Hartman, *Yes, Martha Stewart Can Even Teach Us About the Constitution*, 10 U. PA. J. CONST. L. 867, 879 (2008) ("In high-profile cases, the only way some lawyers can offer clients their Sixth Amendment right to a fair trial is to set the record straight in the media").

The effect of the present injunction on a criminal defendant's ability to defend himself is a "public interest" well worthy of the District Court's consideration. Appellants presented to the District Court a thoughtful, good-faith argument to that effect, based on constitutional principles and uncontested facts. Nevertheless, the District Court did not consider it. Instead, after noting that Appellants had asked for a "reassessment of the balancing of the public interest," and that they were concerned about the effect of the gag order on the jury pool, the District Court opinion simply moved on without comment. The opinion offered no analysis and cited no case law. The only case it cited was *Gentile*, with a "but see" citation. ER30. Thus, in all of *four* sentences, the District Court gave Mr. Daleiden's concerns about the fairness of his criminal trial no consideration at all. Instead, the District Court stated, without explanation: "*Defendants may hold as many press conferences as they care too* [sic] (unless restricted by Judge Hite).... But they have no constitutional right to further disobey the Preliminary Injunction Order." ER30 (emphasis added).

Appellants made an amply justified request that the Court re-assess the public interests at stake in the preliminary injunction in light of the public interest in preserving a criminal defendant's Sixth Amendment right to a fair trial. The District Court's response was at best dismissive, and at worst contemptuous, of Mr. Daleiden's right to a fair criminal trial.

4. Federalism and comity favor lifting the gag order.

a. The District Court abused its discretion and violated federal statute by re-imposing the preliminary injunction notwithstanding its interference with a state court proceeding.

The District Court's dismissiveness of Mr. Daleiden's state criminal proceeding extends not only to the criminal defendant but also to his counsel and even to the state criminal court itself. While declining to dissolve or modify its preliminary injunction, the District Court effectively deputized the state criminal court to administer its injunction, notwithstanding the state court's right, as an independent tribunal, to be free of such interference. ER262-65.

The federal Anti-Injunction Act, 28 U.S.C. § 2283, forbids a federal court from "grant[ing] an injunction to stay proceedings in a State court." This prohibition "is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403 (1935). Moreover, "[i]t is settled that the

prohibition of § 2283 cannot be evaded by addressing the [injunction] to the parties" instead of the state court itself. *Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 287 (1970). And it applies to any state court proceeding that is "pending at the time the federal court acts on the request for injunctive relief." *Denny's, Inc. v. Cake*, 364 F.3d 521, 531 (4th Cir. 2004).

The preliminary injunction that the District Court refused to dissolve constrains the parties to a state court proceeding, precisely as prohibited by the Anti-Injunction Act as interpreted in *Atlantic Coast Line*. Mr. Daleiden's criminal defense counsel have already been held in contempt of the injunction on appeal for a decision they made in a state court filing. *See* ER433:15–17, 434:7–8; 9th Cir. Case No. 17-16622. As the District Court acknowledged, Mr. Daleiden and his counsel must seek a special dispensation in advance for any step taken in his defense that could *potentially* run afoul of the three-year-old federal injunction, and may not attempt to cure the jury pool via public comment. ER30. Such constraints on the conduct of parties to a state court proceeding are prohibited by the Anti-Injunction Act and *Atlantic Coast Line*, 398 U.S. at 287 ("Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts").

The District Court appears to think that delegating the authority to grant exemptions to its injunction to the state criminal court makes this *not* an improper

federal intrusion on the state court proceeding, but it provides no legal basis for that claim.

> If Daleiden believes he *needs* to use Preliminary Injunction materials to support his defense, he can notify Judge Hite in advance of the specific portions of the materials he wants to use and seek leave from Judge Hite to file those materials *under seal or in the public record* or show those materials *in open or closed court*. If Judge Hite orders that some of *the Preliminary Injunction materials* may be released in *some public manner* to allow Daleiden *to fully contest the criminal charges*, Judge Hite may do so without my interference.

ER30-31 (emphasis added). But by deputizing the state criminal court to administer its injunction, the District Court is imposing not just on Mr. Daleiden and his counsel but on the state court itself. The District Court is requiring that court to engage in decisions that have nothing to do with the criminal proceeding itself and dictating the framework and criteria on the basis of which the state court must make those decisions. The District Court is effectively providing the state court with an additional source of law—the preliminary injunction itself. The state court will have to study and interpret the preliminary injunction in order to determine which materials are enjoined and whether or not it thinks an exemption to the injunction is justified. And the District Court has ordered the state court to interpret and apply it in accordance with its expectations as not-so-subtly signaled in the order under review.

The District Court's ostensibly deferential language is in fact laden with legal and factual determinations that the federal court expects the state court to make *in light of the federal court's injunction*—and in clear violation of federalism principles. In a footnote, the District Court further points out that the state court is equipped to determine "*what portion* of the *Preliminary Injunction materials* Daleiden *legitimately needs* to use for his defense, *whether any of those materials should be publicly disclosed in open court or unsealed filings,* and if disclosed *whether any further restrictions* should be placed on the materials' use or dissemination." ER31 n.26 (emphases added).

Although the District Court authorizes the state court to grant isolated exemptions to its preliminary injunction, it is obvious that the District Court expects the criminal court to grant Mr. Daleiden the freedom to use the materials in his defense only on the terms provided by the federal court. The state court *must* engage those materials on the understanding that they are enjoined and grant Mr. Daleiden permission to use them *only* after he demonstrates a "legitimate need" and after considering ways to limit their public exposure. To characterize such obvious marching orders as something *other* than federal court interference in a state court proceeding is impossible. The state court is not at liberty to make its own, independent assessment of what the equities require with respect to the enjoined materials; it has to play by the federal court's rules.

b. The District Court abused its discretion by re-imposing the preliminary injunction on parties to the state criminal court despite the state court's own differing determination as to the confidentiality of the enjoined materials.

If the District Court's determination to influence the state court proceedings were not obvious from its dismissive response to Appellants' federalism and comity arguments, then surely the District Court's treatment of Judge Hite's protective order makes this crystal clear. *See* ER15. Appellants pointed out to the District Court that, with full knowledge of the federal injunction, the state criminal court had already made its own independent determination about what evidence must be kept confidential—requiring confidentiality of only materials that "portray, relate to, or mention" the 14 Doe complainants in that case. ER264-65, 377-407. Given the District Court's claim that it would defer to the state criminal court's determinations with respect to the enjoined materials, Appellants asked the federal court to acknowledge that its injunction had been superseded.

The District Court's response revealed its determination to compel the state court (and parties thereto) to toe *its* line in dealing with the enjoined materials:

> There is, finally, no merit to defendants' argument that Judge Hite's recent protective order, requiring the use of Doe monikers and allowing the individuals who were allegedly illegally recorded by defendants to remain anonymous at least up to the preliminary hearing, supersedes the Preliminary Injunction Order. *There is*

> *nothing in the protective order that discussed or otherwise allows defendants to use in open court (or unsealed filings) any of the Preliminary Injunction materials.*

ER31 (emphasis added). Apparently, the state court's deliberate choice *not* to subject the materials to a protective order is not enough to elicit the District Court's deference to its authority as a separate tribunal. Rather, the state court must address the enjoined materials on the District Court's terms, explicitly accounting for the preliminary injunction, or else the federal court will not credit its decision.

The District Court's response to Appellants' Motion for Clarification (not directly appealed here) sounds in the same register: No matter what the state criminal court decides about the use of the enjoined materials, even if it permits the use of some item in the public domain, Appellants and their counsel still may not "comment on it, share it, or otherwise use it" in Mr. Daleiden's defense without coming back, hat in hand, to seek the further consent of a federal court that has already expressed marked disregard for Mr. Daleiden's Sixth Amendment rights. *See* ER31. That is not deference—it is interference.

The District Court's determined lack of deference to the independent determinations of a state court flies in the face of fundamental principles of comity and federalism. A court should exercise its discretion in light of the principles of equity, comity and federalism and refrain from granting an injunction that would

effectively enjoin the state court proceeding. *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. . . . [T]he fundamental principle of a dual system of courts leads inevitably to that conclusion." *Atl. Coast Line*, 398 U.S. at 297.

The constitutional principles of federalism and comity that underlie the Anti-Injunction Act should prevent this Court from preserving the preliminary injunction against Appellants. The federal injunction in this case prevents Mr. Daleiden's criminal defense counsel from defending him effectively from state criminal charges by sealing from public view the chief evidence of his innocence. *See Gentile*, 501 U.S. at 1043. This Court should apply the Act and its strong interest in comity to dissolve the injunction.

III. THE COURT SHOULD STRIKE ALL FOUR CAUSES OF ACTION BECAUSE NAF FAILED TO MEET ITS MINIMAL BURDEN UNDER CALIFORNIA'S ANTI-SLAPP STATUTE.

Courts determine whether a defendant is entitled to immunity under the anti-SLAPP statute by a two-step analysis. *Navellier v. Sletten*, 29 Cal.4th 82, 88-89 (2002). At the first step, the defendant "must make a threshold showing that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's

right of petition or free speech under the United States or California Constitution[s] in connection with a public issue, as defined in subsection (e) of the statute." *Hilton*, 599 F.3d at 903 (quotation marks, brackets, and ellipsis omitted). If a defendant satisfies that threshold showing, then the burden shifts to the plaintiff to demonstrate a "probability of prevailing" on each of the challenged claims. *Id.*

Distinct from state court, in federal court, "[i]f a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments" then the plaintiff only has to respond to a defendant's anti-SLAPP motion as if it were a motion to dismiss. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018). If the moving defendant does not limit his motion to "purely legal arguments," however, the plaintiff must meet one or both of two anti-SLAPP evidentiary burdens. *Id.*

The first evidentiary burden is to respond to any arguments put forth by the defendant which allegedly defeat the plaintiff's case—similar to responding to a motion for summary judgment. *Bently Reserve L.P. v. Papaliolios*, 218 Cal. App. 4th 418, 434 (2013). The second evidentiary burden is to demonstrate that each element of each claim is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002); *see also Mindys Cosmetics, Inc.*

v. Dakar, 611 F.3d 590, 599-600 (9th Cir. 2010) ("Mindys has made a sufficient prima facie showing of facts"). This is akin to responding to a summary judgment argument that discovery has revealed that the plaintiff cannot meet a certain element—but with respect to every element of every claim. *Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1239 (2003).

If a plaintiff cannot meet its second-step burden as to a particular challenged claim, that claim for relief is stricken. *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1189 (9th Cir. 2017).

A. Anti-SLAPP Step 1: NAF's claims arise from conduct taken in furtherance of Appellants' right of free speech in connection with a public issue.

The California anti-SLAPP statute—which should be "construed broadly," *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (quoting Cal. Civ. Proc. Code § 425.16(a))—defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," to broadly include "any [] conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e).

This case easily satisfies the first prong of the anti-SLAPP analysis. Plaintiff's four causes of action all arise from Appellants' undercover investigative filming and/or

Appellants' publication of their investigative journalistic efforts, which then gained widespread media attention. ER670-76, 704-06; ER415-17. Both the Ninth Circuit and California courts repeatedly have held that such conduct falls within the scope of the anti-SLAPP statute. *See, e.g.*, *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 953 (9th Cir. 2013); *Greater L.A. Agency on Deafness v. CNN, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014). California courts have also held that allegedly unlawful undercover investigative recordings of a doctor fall within the scope of the anti-SLAPP statute. *Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156, 166 (2003).

Speech about abortion and fetal tissue procurement also undeniably relates to "an issue of public interest." Cal. Civ. Pro. Code § 425.16(e)(4); *see Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App.4th 322, 358 (2004). Thus, all of NAF's claims against Appellants arise from conduct within the scope of the anti-SLAPP statute.

B. Anti-SLAPP Step 2: Plaintiff cannot establish a probability of prevailing.

Appellants' motion to strike NAF's fraud claims was "founded on purely legal arguments," and so NAF's only burden was to respond as if the motion were a

motion to dismiss.[7] ER410-12. However, with respect to its contract claims, NAF announced to the District Court in a Case Management Conference statement that "NAF does not believe any additional discovery is required to resolve . . . NAF's contract claim at this point in the litigation." ER425. As a result, Appellants' motion to strike NAF's contract claims was expressly based on evidentiary deficiencies, giving NAF the burden to establish a prima facie case using admissible evidence. ER411-12. Plaintiff failed to satisfy either one of those standards, and therefore all of its claims should be stricken.

1. NAF's contract claims should be stricken for lack of admissible evidence of breach.

NAF's breach of contract claim alleges fourteen distinct alleged breaches of four different contracts. Appellants' anti-SLAPP motion expressly contested NAF's ability to establish a prima face case with admissible evidence substantiating each of those breaches. ER411-12. NAF then had a burden to substantiate with "competent, admissible evidence" each element of breach of contract with respect to each of the

[7] Appellants' anti-SLAPP motion leveled separate motion-to-dismiss-style challenges to all four of Plaintiff's remaining claims, noting fatal pleading deficiencies particular to each. ER410; Dkt. 545. Defendants do not abandon those arguments, each of which provides a sufficient basis for striking one of NAF's claims, but they have focused here on the broadest bases for reversal: NAF's inability to present even minimal admissible evidence to support its breach of contract allegations, and NAF's inability to point to any compensable damages caused by Appellants' conduct.

fourteen separate alleged breaches, to prevent that alleged breach from being stricken. *Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016). A plaintiff "cannot simply rely on the allegations in the pleadings . . . to make the evidentiary showing," but must present independent evidence to establish its prima facie case. *Church of Scientology of Cal. v. Wollersheim*, 42 Cal.App.4th 628, 656 (1996). *Accord Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1110 (N.D. Cal. 1999).

NAF refused even to *try* to satisfy an evidentiary burden that is so low that that this Court has described it as the "minimal merit" standard. *Mindys*, 611 F.3d at 598. Instead, NAF made two arguments aimed at avoiding its evidentiary burden under the anti-SLAPP motion: (a) it only had to respond to affirmative arguments made by Appellants, and (b) its showing at the preliminary injunction phase sufficed to establish a prima facie case. Both of those evasive tactics fail.

The Ninth Circuit has repeatedly confirmed the requirement for SLAPP plaintiffs to establish the elements of their claims with prima facie evidence:

> While a court's evaluation of a claim under the anti-SLAPP statute has been called a 'summary-judgment-like procedure,' a motion to strike **does not impose an initial burden of production on the moving defendant. The applicable burden 'is much like that used in determining a motion for nonsuit or directed verdict,**

> which mandates dismissal when no reasonable jury could find for the plaintiff.'

Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 599 (9th Cir. 2010) (citations omitted; emphasis added). *See also Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) ("This burden is 'much like that used in determining a motion for nonsuit or directed verdict'"); *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1123 (9th Cir. 2017) (same); *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 957 (9th Cir. 2013) (same); *Manufactured Home Communities, Inc. v. Cty. of San Diego*, 655 F.3d 1171, 1177 (9th Cir. 2011) (same).

NAF's cursory reference to the preliminary injunction record is also insufficient. ER257. The evidentiary burden for obtaining preliminary relief is lower than the burden for defeating an anti-SLAPP motion. Lacking the urgency of a motion for preliminary relief, an anti-SLAPP challenge requires more credible evidence to justify maintaining a burdensome lawsuit aimed at suppressing First Amendment expression. In particular, in the preliminary injunction context, a court may rely on hearsay. *See Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). But in the context of an anti-SLAPP motion, a Plaintiff's evidentiary burden "must be made through 'competent and admissible evidence.'" *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007). "Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay,

or conclusory are to be disregarded." *Id.*; *see also Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 830 (1994); *Morrow v. Los Angeles Unified Sch. Dist.*, 149 Cal. App. 4th 1424, 1445 (2007) (excluding improper lay opinion); *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 83–84 (2007) (excluding hearsay); *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1497 (1995) (excluding "information and belief" statements).

The damages evidence NAF submitted in support of its preliminary injunction motion fails to meet the anti-SLAPP's "competent and admissible evidence" standard. For purposes of the preliminary injunction, the District Court relied on the following material as evidence of harm to NAF: Saporta Decl., ¶ 19; Mellor Decl., ¶ 15; Saporta Depo., 16:17–23, 39:2–20, 42:1–10, 43:15–18; and Appendix Exhibits 18, 20–22, 80, 81, 83-99, 148. *See* ER471:7–472:7, 490:1–13.

In their anti-SLAPP papers, Appellants reasserted objections to Exhibits 18, 20–22, 92–94, 96–99, and 148 on the bases of hearsay and lack of personal knowledge. ER71; ER858-87, 499-503. Those objections were overruled with respect to the preliminary injunction, ER457-58, 460, 469, 471-73, 490-91, but they are nevertheless valid with respect to the anti-SLAPP motion. Further, these exhibits comprise: (1) news articles regarding alleged criminal behavior committed by third parties (a shooting and several arsons), (Exs. 94, 96–99; ER629-56), (2) Planned Parenthood Federation of America's collection of statistics on third party acts (Exs.

92 and 93; ER888-95), and (3) the website of a nonprofit run by a former CMP board member which lists abortion providers (intended to show that the third parties *may* have obtained the clinics' addresses there) (Exs. 18, 20–22, 148; ER537-50, 504-06).

As explained above in Section II.A.2, the evidence shows that the third parties responsible for these incidents were not motivated by Appellants' reporting at all: the shooter was insane and motivated out of hatred for the government, and at least one arson was the result of a domestic dispute. Further, subsequently published statistics demonstrate *these numbers are in line with previous years*; thus, they provide no evidence of an increase as a result of Appellants' protected speech..

NAF's remaining evidence includes exhibits 80, 81, 83–91, and 95, and the declarations. All exhibits except 95 (the Saporta deposition transcript) are printouts or screenshots of the comment threads on internet articles and comments posted on Facebook. *See* ER551-628. The Saporta declaration and deposition merely repeat some of the more disturbing comments and reaffirm that they exist. *See* ER740-46, 896-904. The Mellor declaration just states that, due to the internet commentary, as a security consultant he has "advised [NAF] members to be on heightened alert." *See* ER739.

Although the internet comments are disturbing, they have nothing to do with Appellants. Without some connection to appellants, they are irrelevant and entitled

to no weight in the merits analysis. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 n. 9 (9th Cir. 2018) ("We disagree with the . . . suggestion that" "publication of a story about the facility" would be "harm from gaining access to property by misrepresentation"; "This approach . . . places a value judgment on the reporting itself and undermines the First Amendment right to critique and criticize."); *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018) ("It follows that if Trump's speech is protected—because it, like that of the Bible Believers, did not include a single word encouraging violence—then the fact that audience members reacted by using force does not transform Trump's protected speech into unprotected speech. The reaction of listeners does not alter the otherwise protected nature of speech.").

The procedural history of this case mirrors that of *Lam v. Ngo*, 91 Cal. App. 4th 832 (2001), a case on which Appellants' anti-SLAPP motion relied. In *Lam*, the trial court granted a preliminary injunction, but the court of appeal granted an anti-SLAPP motion to strike the complaint. Mr. Lam was both a politician and a restauranteur, who rented land for his restaurant from Mr. Ngo. Protesters showed up at Lam's restaurant, and Ngo refused to prevent them from gathering in the parking lot. Lam then filed a lawsuit, naming various protesters and Ngo, and he was granted a preliminary injunction creating a 50-foot buffer zone around his restaurant.

But Ngo filed an anti-SLAPP motion on the basis that there was no evidence that *he* had harmed Lam's restaurant. Very like the District Court here, the trial court summarily denied the anti-SLAPP motion "based on the fact that Ngo had already lost the preliminary injunction battle and was presenting nothing 'new.'" *Id.* at 837-39; *compare* ER21 ("Defendants point to no *new* evidence or material changes of law to cause me to revisit any of the findings in the Preliminary Injunction Order.").

The court of appeals reversed, granting Ngo's anti-SLAPP motion because there was no admissible evidence establishing a "connection of Ky Ngo to any of the wrongful or violent activity done by some of the protesters." *Lam*, 91 Cal. App. 4th at 845 (capitalizations removed); *see also id.* at 846 ("None of the declarations delineating the clearly wrongful acts . . . show that such acts were authorized, directed or ratified by Ngo."). The same principle applies here: "None of the [exhibits or] declarations . . . show that such acts were authorized, directed or ratified by [Appellants]." *Id.* at 846.

Because NAF made not just an insufficient showing but *no showing at all* in response to Appellants' anti-SLAPP motion, the District Court's straightforward obligation was to strike NAF's breach of contract claim. *Jordan-Benel*, 859 F.3d at 1189. Instead, the District Court affirmed NAF's decision to shirk its legal obligations and then chastised Appellants for failing to do what no law required of

them: raise affirmative arguments to defeat NAF's claims. ER20-21; *contrast Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1239 (2003) ("[I]t [i]s not [Defendants'] burden to show [Plaintiff] *could not* demonstrate a probability of prevailing on its claims; its only burden was to establish that the claims fell within the ambit of the statute.").

The District Court's refusal to require NAF to produce any evidence was especially surprising given its insistence in another context that NAF *needed* evidence precisely in order to respond to Appellants' then-pending anti-SLAPP motion:

> [D]iscovery is **essential to NAF's opposition to defendants' anti-SLAPP motion**. . . . [T]he crux of the defense in this case involves the facts that **NAF lacks or has not yet developed**, including what information defendants obtained, where and how they obtained it, the circumstances in which the confidentiality agreements were signed, the reasonableness of various expectations, and the intent of both parties and of third parties.

ER733. It is peculiar, to say the least, that the same District Court that issued that Order denied the anti-SLAPP motion here without *any*—let alone the "essential"—factual showing that it went out of its way to enable NAF to produce.

The District Court's holding was a complete inversion of both law and fact. Appellants' only obligation in the context of its nonsuit-style anti-SLAPP challenge was to "expressly challenge plaintiffs' ability to prove with evidence the substance

of any of plaintiffs' state law claims." *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 852 (N.D. Cal. 2016). Appellants expressly did just that. *See* ER409-10. All remaining evidentiary obligations under the anti-SLAPP motion fell to NAF, which flatly refused to fulfill them. ER257.

The fact that NAF did not support its claims with competent, admissible evidence in opposition to Appellants anti-SLAPP motion necessitates striking NAF's breach of contract claim. It is not this Court's burden (nor Appellants') to wade through the preliminary injunction record truffle-hunting for evidence to substantiate every element of each of NAF's breach of contract claims. Moreover, as shown above, Appellants' wading (far beyond their own requirements for the motion they brought) shows that NAF has never produced sufficient admissible evidence to establish the element of damages.

2. NAF's fraud and contract claims should be stricken for lack of legally cognizable damages.

NAF's allegations of breach of contract and fraud fail to state a viable claim for damages. All of the damages claimed by NAF result from Appellants' *publication* of videos, not the alleged independent torts or breach of contract by which Appellants were able to record those videos. *See, e.g.,* ER670, 672-73, 677, 708-09, 715. Damages from the *publication* of videos are not recoverable under the First Amendment unless accompanied by a defamation claim, which NAF does not assert.

La Luna Enterprises, Inc. v. CBS Corp., 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999) (fraud); *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 530–33 (6th Cir. 2007) (breach of contract). Therefore, NAF has not pleaded any compensable damages.

The District Court agreed that "reputational damages" resulting from publication of any videos are not recoverable under the First Amendment without a claim of defamation. ER8. However, the District Court held that "NAF's damages allegations … are distinguishable from" prohibited defamation-type damages, because "NAF incurred [them] to deal with the immediate aftermath of Daleiden's infiltration of NAF's conferences and his threatened release of NAF confidential information in violation of the parties' agreements." ER9. According to the District Court, these damages included "diversion of resources, out-of-pocket expenses, increased expenditures on security measures, and attorneys' fees" incurred to mitigate the harm caused by "fraud, breach of contract, and illegal conspiracy." ER8. That finding was clearly erroneous.

The District Court improperly filled in causation for NAF when it found that NAF had adequately pleaded "damages" resulting from Appellants' alleged offenses. The District Court simply imagined, with no factual basis in the FAC and no legal basis supported by relevant case law, that NAF's claimed injuries are attributable to Appellants alleged fraud, conspiracy and breach of contract.

The FAC clearly states that only one thing resulted from Appellants' alleged fraud, conspiracy and breach of contract: their admission to the NAF tradeshows—which is not harm, as a matter of law. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194–95 (9th Cir. 2018) (a reporter's lying to gain access to property does not cause the property owner "legally cognizable harm"); *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (A tester "scheme to expose publicly any bad practices that the investigative team discovered" is not fraudulent.); *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979) ("This element of deceit has no significant effect here."). Because the Complaint lacks any claim for damages (1) resulting from that admission *and* (2) *not* resulting from the videos they later released, the fraud, conspiracy and breach of contract claims fail as a matter of law. *Compare, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 513 (4th Cir. 1999) (exposed grocery store chain sought fraud damages from reporters who had infiltrated it as employees and won virtually no damages for trespass and breach of loyalty claims).

In the paragraphs of the FAC cited by the District Court, NAF claims two types of injury. First, disruption to normal operations and diversion of resources to "mitigate the harm caused by Defendants' theft of NAF Confidential Information and to combat Defendants' conspiratorial and fraudulent smear campaign." ER9

(citing FAC ¶142-46). Nowhere does NAF identify any harmful use of its Confidential Information other than the "smear campaign," which straightforwardly (if tendentiously) refers to Appellants' publication of truthful information NAF believes Appellants obtained at its meetings. Since the District Court agrees that damages from the release of the videos are unrecoverable, these "damages" simply do not give legal life to NAF's claims of fraud, breach of contract, or conspiracy.

NAF's examples of its harms are exclusively costs associated with responding to the release of information in the videos: increased security measures and cell phone and data usage for out-of-the-country staff to respond to the videos, and increased travel to soothe ruffled feathers of members. ER707. These are the natural consequences of public outcry over the information revealed in Appellants' videos, and classic reputational damages. They cannot be recovered without some allegation of defamation, which has not and cannot be made, due to the vindication of Appellants' reporting by congressional reports and successful prosecutions. ER5; *see* ER418-23.

Secondly, NAF cites a prospective type of "injury": namely, the cost of improving its security online, at meetings, and in its offices, to "prevent further breaches or hacks" and foil "moles and spies." ER706-08. No doubt NAF felt

inclined to improve its security measures after learning that they were insufficient to prevent journalists from gaining access to their tradeshows. However, that does not mean that Appellants' entry into the tradeshows (i.e., their alleged fraud, conspiracy, and breach of contract) *caused* the security holes NAF felt compelled to fill. Thus, the costs of those security measures are not "damages" resulting from any action of the Appellants.

In sum, the only injury NAF has suffered at the hands of Appellants is truthful public exposure of acts NAF claims to be legal. Therefore, what NAF is truly seeking in its FAC is (1) compensation for the natural consequences of public exposure of the practices of some of its members, and (2) subsidization of the costs of preventing future public exposure. *See Compuware*, 499 F.3d at 530–33 ("[A]lthough Compuware . . . purports to seek only rescission of the contract and return of the sums it paid to Moody's, it is inescapable that Compuware seeks compensation for harm caused to its reputation. . . . [I]ts only injuries are defamation-type harm."). Since the First Amendment protects the rights of journalists to dispel concealment and secrecy and expose wrongdoing, a court could not possibly award NAF compensation for the expense of more securely concealing itself and its members.

This Court should strike NAF's allegations of breach of contract, conspiracy and fraud for failure to plead any damages *actually caused by those alleged offenses*, rather than by NAF's unwanted public exposure.

CONCLUSION

For all of these reasons, this Court should REVERSE the lower court decision, DISSOLVE the preliminary injunction, and either REASSIGN on remand or DISMISS this lawsuit.

Respectfully submitted,

Dated: December 12, 2018

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellants request that the Court hear oral argument in this case. The case is complex in that it involves multiple appellants and multiple complex procedural issues. It is also complex because it concerns constitutional issues, including both individual rights and federalism issues. Oral argument will assist the Court in considering the issues presented and the underlying facts.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature /s/ Charles S. LiMandri **Date** December 12, 2018
*(use "*s/[typed name]*" to sign electronically-filed documents)*

ADDENDUM

I. 28 U.S. Code § 2283

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

II. Cal. Civ. Proc. Code § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)

(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)

(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney′s fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney′s fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than

30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)

(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, 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