Docket Nos. 20-16068, 20-16070, 20-16773, 20-16820

In the

United States Court of Appeals

for the

Ninth Circuit

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD: SHASTA-DIABLO, INC., dba Planned Parenthood Northern California, PLANNED PARENTHOOD MAR MONTE, INC., PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST, PLANNED PARENTHOOD LOS ANGELES, PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC., PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA & SAN LUIS OBISPO COUNTIES, INC., PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD GULF COAST, and PLANNED PARENTHOOD CENTER FOR CHOICE.
Plaintiffs-Appellees,

v.

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

Appeal from a Decision of the United States District Court for the Northern District of California, Case No. 3:16-cv-236-WHO • Hon. William H. Orrick, District Judge

APPELLANTS' OPENING BRIEF OF CMP, BIOMAX, DALEIDEN, AND LOPEZ

CHARLES S. LiMANDRI
PAUL M. JONNA
JEFFREY M. TRISSELL
MILAN L. BRANDON
FREEDOM OF CONSCIENCE DEFENSE FUND
Post Office Box 9520
Rancho Santa Fe, CA 92067
(858) 759-9930 Telephone
cslimandri@limandri.com
Attorneys for Appellants CMP, BioMax, Daleiden, & Lopez

THOMAS BREJCHA
PETER BREEN
MATTHEW HEFFRON
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606
(312) 782-1680 Telephone
tbrejcha@thomasmoresociety.org
Attorneys for Appellant David Daleiden

HARMEET K. DHILLON
MARK P. MEUSER
DHILLON LAW GROUP INC.
177 Post Street
Suite 700
San Francisco, CA 94108
(415) 433-1700 Telephone
harmeet@dhillonlaw.com
Attorneys for Appellants CMP, BioMax, & Daleiden

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.

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INTRODUCTION

The district court issued a $16,000,000 judgment against the Defendants for doing what undercover reporters have been doing for over 150 years. This massive penalty against a team of journalists runs roughshod over the First Amendment. If allowed to stand, the judgment is not only an affront to the rule of law, but it threatens the existence of undercover journalism itself, a critical means to effect societal change.

Starting in July 2015, the Center for Medical Progress (CMP) and David Daleiden released undercover video footage of Planned Parenthood officials candidly and graphically discussing their *quid pro quo* harvesting of human fetus body parts, prompting widespread public outcry and investigations by federal and state officials. Planned Parenthood publicly apologized for the "tone and statements" of one recorded executive, calling her actions "unacceptable."[1]

But six months later, a group of Planned Parenthood entities ("Plaintiffs" or "Planned Parenthood") filed this lawsuit in retaliation.

[1] Planned Parenthood Fed. of Am., "Planned Parenthood President Releases Video Response to Latest Smear Campaign," Jul. 16, 2015, https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-president-releases-video-response-to-latest-smear-campaign.

Though Plaintiffs brought 15 claims against Defendants, they did not bring a defamation claim. That omission is itself an admission. While Planned Parenthood continues to insist publicly that the videos published by CMP and Mr. Daleiden are "deceptively edited" and "misleading," it has never even attempted to prove those assertions. That is because CMP and Mr. Daleiden published Planned Parenthood's *own words*, and it was those distasteful words that provoked public outcry.

Planned Parenthood asserts it suffered damages because of Mr. Daleiden's reporting. It sued "to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign," and to recover "financial losses . . . all stemming from Defendants' campaign of lies." First Amended Complaint, 24-ER-6629, 6672. But not only did Planned Parenthood decline to prove that CMP's accurate publications constituted a "smear campaign," it also failed to prove its alleged damages were traceable to Mr. Daleiden's investigation, rather than his publication of *its own words*.

The First Amendment bars the award of damages from the publication of truthful information in the public interest, so it should have barred the award of damages flowing from CMP's publication. That

critical point of law was lost here because of the profound errors of the district court. The district court acknowledged such publication damages were unrecoverable, but redefined damages sought by Planned Parenthood as recoverable "economic damages." Because it had supposedly excluded publication damages, the district court refused to consider, or let the jury consider, Defendants' First Amendment rights or the credibility and truth of their publications. The district court would not even permit the jury to hear what Planned Parenthood said on the videos.

Given the importance of the First Amendment, those errors alone warrant reversal. If the district court's decision is upheld, the Ninth Circuit would split with Supreme Court authority and sister Circuits that have held truthful speech on a matter of public concern is protected by the First Amendment, and that plaintiffs must prove falsity and actual malice to recover damages caused by such speech. It would also endanger the practice of undercover journalism, one of the most important forces for uncovering corruption and illegal activity for the past two centuries.

The district court also erred in other ways that warrant reversal. Because the district court refused to probe whether CMP's publication of

Planned Parenthood's speech was truthful, it refused to permit Defendants any meaningful discovery on Planned Parenthood's controversial fetal tissue transfers. This made it impossible to respond to Planned Parenthood's mischaracterization of the videos as "false," which the district court explicitly permitted. The district court also improperly granted Planned Parenthood partial summary judgment on some claims, allowed Planned Parenthood to enforce contracts to which it was not a party, and misinterpreted RICO and four jurisdictions' recording laws.

As a result of these errors, which severely handicapped Defendants, Planned Parenthood prevailed at trial even though it failed to present sufficient evidence in support of its claims. The jury returned a verdict for Planned Parenthood on all claims, and the district court granted injunctive relief and entered a $2,425,084 judgment, including trebled RICO damages and punitive damages. The court denied Defendants' post-judgment motions and awarded $13,781,010.42 in fees and costs, which Defendants have appealed separately.

Aside from constituting grounds for reversal, these errors compound a foundational and even more egregious error: The district

judge refused to recuse himself despite evidence raising reasonable questions about his impartiality.

One need not approve of Defendants' viewpoint or methods for gathering information to recognize that the district court's errors contradict established law. The district court's judgment should be reversed.

JURISDICTIONAL STATEMENT

The district court entered final judgment on April 29, 2020. 1-ER-48. Defendants filed an initial notice of appeal on May 29, 2020, Dkt. 1086, and an amended notice of appeal on September 17, 2020, Dkt. 1128. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED[2]

I.a. Whether the district court misapplied the First Amendment by permitting Plaintiffs to pursue publication damages without proving falsity.

I.b. Whether the district court's errors in allowing Plaintiffs to freely impugn Defendants' credibility while excluding all evidence that

[2] Defendants hereby incorporate by reference the issues presented in co-Defendants' briefs.

would establish their credibility—through discovery rulings, evidentiary rulings, and jury instructions, etc.—were sufficiently pervasive as to warrant a new trial on any remaining claims.

II.a. Whether the district court erred in striking Defendants' public-policy affirmative defense to the breach-of-contract claims, where Defendants' videos revealed evidence of Planned Parenthood's illegal activities.

II.b. Whether the district court erred in (1) awarding judgment on the PPFA contract claims when Defendants did not breach; and (2) not granting judgment as a matter of law to Defendants on the other contract claims because: (a) Defendants did not breach the PPGC non-disclosure agreement because no "confidential information" was released; (b) Planned Parenthood lacks standing to enforce NAF contracts; and (c) the NAF non-disclosure agreements lack consideration.

II.c. Whether the court erred in instructing the jury that the court had already ruled Defendants had breached the NAF contracts by disclosing confidential information, when it had not so ruled.

III. Whether the district court erred in entering judgment against Lopez on any claims, given his limited role.

IV. Whether the district judge should have been disqualified because his impartiality might reasonably be questioned.

STATEMENT OF ADDENDUM

The full text of relevant constitutional provisions, statutory provisions, and rules are set forth in the addendum filed with this brief. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

1. Factual Background

A. Undercover reporting

"Investigative journalism has long been a fixture in the American press. . . ." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1189 (9th Cir. 2018). Examples abound.

Undercover techniques aided the abolitionist movement in the 1850s. *See* Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 15-30 (Northwestern Univ. Press, Evanston, Ill., 2012).[3] One reporter, Albert Deane Richardson, posed as a resident of New Mexico

[3] *Available at* www.jstor.org/stable/j.ctt22727sf.6.

Territory to talk to Southerners frankly about secession. *Id.* at 17-18. Posing as potential purchasers, Northern reporters infiltrated slave auctions and spoke directly to slaves. *Id.* at 21.

Elizabeth Cochrane Seaman posed as a mentally ill woman to document abuses at the Women's Lunatic Asylum in New York, which led to a grand jury investigation and increased funding for asylums. *See* Nellie Bly, *Ten Days in A Mad-House* (New York: Ian L. Munro, 1877). Upton Sinclair worked in disguise in a meatpacking plant for seven weeks, resulting in *The Jungle*, his celebrated exposé of the U.S. meatpacking industry. Upton Sinclair, *The Jungle* (Doubleday, New York, 1906). White journalist John Howard Griffin darkened his skin in the Jim Crow South to report to "white Americans what they had long refused to believe" about racism. *See* Bruce Watson, *Black Like Me, 50 Years Later*, Smithsonian Magazine, Oct. 2011.[4]

Disguise has thus been an essential tool for undercover journalists seeking to raise public awareness of hidden abuses. As technology has advanced, undercover journalists have added the use of hidden cameras

[4] *Available at* https://www.smithsonianmag.com/arts-culture/black-like-me-50-years-later-74543463/.

to ensure reporting accuracy and prevent cover-ups. Brooke Kroeger, *Why Surreptitiousness Works*, 13 J. Magazine & New Media Research 5 (2012).[5]

B. Center for Medical Progress's investigation

Planned Parenthood, the largest abortion provider in the United States, receives hundreds of millions of dollars in taxpayer funds annually. 9-ER-2273-4. Beginning in 2010, Defendant David Daleiden discovered troubling information that led him to believe Planned Parenthood and others were involved in criminality related to harvesting and selling fetal body parts. These included a congressional investigation in 2000 into the practices of a Planned Parenthood affiliate in Kansas, 10-ER-2722, and a related hidden-camera investigation by ABC 20/20, 10-ER-2723-24. Daleiden became motivated to conduct his own investigative reporting after discovering more evidence like what he saw in the ABC 20/20 report, as well as evidence connecting fetal tissue procurement companies with Planned Parenthood abortion facilities. 11-ER-2799; 11-ER-2804.

[5] *Available at* https://aejmcmagazine.arizona.edu/Journal/Spring2012/Kroeger.pdf.

Daleiden formed CMP, a California nonprofit public benefit corporation and 501(c)(3), to monitor and report on medical ethics and advances, with a special focus on the abortion industry and fetal experimentation's risks to the vulnerable. 11-ER-2829; 25-ER-6835-36. CMP carries out its work through investigative research and journalism. 9-ER-2475. Daleiden is the Chief Executive Officer of CMP. 9-ER-2449. Defendants Albin Rhomberg and Troy Newman served as board members. 9-ER-2474, 10-ER-2495.

In 2013, CMP began investigating fetal organ and tissue procurement practices launching a comprehensive study to investigate, document, and report on the procurement and transfer of aborted fetal tissue. 25-ER-6804-18. CMP suspected its investigation would uncover abuses such as the sale of aborted fetal tissue, the improper altering of abortion procedures to obtain fetal tissue for research, the commission of partial birth abortions, and the killing of babies born alive during and after abortion procedures, all of which are violations of federal and/or state law. *Id.*; 42 U.S.C. §§ 289g, 289g-1, 289g-2, 274e; 18 U.S.C. §§ 1958, 1531; 1 U.S.C. § 8; 45 C.F.R. § 46.204. Before embarking on this project of investigating, recording, and publishing—which Daleiden released as

the "Human Capital Project," to highlight the problem of human beings and body parts being treated like commodities—Daleiden researched the legality and ethics of undercover methods. 11-ER-2873-75, 11-ER-3036-37. Based on that research, he believed that undercover methods were both legal and ethical. 11-ER-2873-75, 11-ER-3036-37. Daleiden managed every aspect of the Human Capital Project. 10-ER-2495, 11-ER-2878. The other individual Defendants—Adrian Lopez, Sandra Merritt, Newman, and Rhomberg—had no role in the management of the project. 10-ER-2495, 11-ER-2878.

During the undercover reporting project, Daleiden used standard undercover journalism techniques including assumed identities and concealed recording equipment. 5-ER-1001-02, 10-ER-2582-97, 11-ER-2833, 11-ER-2876. As part of the investigation, CMP organized BioMax Procurement Services, LLC, to explore the market for fetal tissue, although Daleiden refused on conscience to consummate such a transaction. 10-ER-2513, 2526-30. CMP hired contractors to help with specific parts of the undercover journalism, including Defendant Merritt, who recorded business conversations posing as the CEO of BioMax, 12-

ER-3083-84, and Defendant Lopez, who recorded at tradeshows using his own name, 10-ER-2508; 5-ER-1060.

Defendants recorded conversations they had with potential fetal tissue suppliers at crowded public restaurants, industry tradeshows, and Planned Parenthood facilities in Texas and Colorado, nine sessions total at issue here. 10-ER-2659, 11-ER-2929, 11-ER-3019, 11-ER-3034-38. These interactions revealed PPFA officials and offices were eager to supply fetal tissue for experiments and happy to modify patient treatment in abortion procedures to get better specimens—and that PPFA officials expected monetary payments in return based on the specimen. *See* Exs. 5496, 5220, 5091, 5126, 5128-3, 5130, 5121, 5241, 5242, 5168, 5196, 5191, 5269, 5840, and 5760 (videos); 10-ER-2764-65 (proffered but excluded).

C. Defendants' Publication of the Undercover Videos

CMP successfully obtained evidence of wrongdoing in the fetal tissue procurement industry. *See id.*; *see also Planned Parenthood of Greater Texas Family Planning & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 351-52 (5th Cir. 2020) (en banc); *id.* at 380 (Elrod, J., concurring) *id.* at 386 (Higginson, J., concurring in part);

People v. DV Biologics, No. 30-2016-00880665-CU-BT-CJC (Cal. Super., Dec. 8, 2017). Daleiden released summary and full versions of his team's undercover conversations with PPFA officials and others beginning July 14, 2015. 7-ER-1866-67, 10-ER-2683, 11-ER-3032-33, 10-ER-2714. The next day, two committees of the U.S. House of Representatives launched investigations into illegal fetal tissue procurement practices. 20-ER-5308-09; 20-ER-5316-23. A third House investigation began in August. 20-ER-5309; 20-ER-5324-30. These investigations were consolidated in October 2015 into a Select Investigative Panel within the Energy and Commerce Committee, with the Senate retaining its own investigation. 20-ER-5309; 20-ER-5331-35.

The House Panel and Senate Committee issued a host of criminal and regulatory referrals to federal, state, and local law enforcement entities, including for several abortion providers and fetal tissue procurement companies and many of the Planned Parenthood Plaintiffs here. 22-ER-5946; 20-ER-5402, 5488 *et seq*. Both investigative bodies noted that their findings tracked what was in CMP's public videos, which were "the impetus for" the investigations. 22-ER-5885-23-ER-6433 (Majority Staff Report of the U.S. Senate Judiciary Committee) at 22-ER-

5919; 20-ER-5310-11; 20-ER-5397-21-ER-5883 (Final Report of the Select Investigative Panel of the U.S. House of Representatives Energy & Commerce Committee).

One investigation flowing from House referrals has concluded. In 2017, two companies, DV Biologics and DaVinci Biosciences—partnered with Plaintiff Planned Parenthood Orange & San Bernardino Counties and referred by the House to the Orange County District Attorneys' Office (OCDA) for prosecution—admitted to transferring fetal body parts from Planned Parenthood illegally for valuable consideration and paid a $7.8 million settlement. The OCDA credited CMP as the catalyst for the case: "[T]he OCDA opened an investigation . . . after a complaint was submitted by the Center for Medical Progress regarding the illegal sale of aborted fetal tissue by both companies." 20-ER-5312-13; 20-ER-5342-84.

Various states also responded. For example, relying on the CMP video recording from Plaintiff PPGC, both Louisiana and Texas disqualified Planned Parenthood from their Medicaid programs. *Kauffman*, 981 F.3d at 351-52; *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445, 450 (5th Cir. 2017). The en banc Fifth Circuit recently

vacated a preliminary injunction against Texas's disqualification of Planned Parenthood, also overruling a panel decision that had affirmed an injunction against Louisiana's. *Kauffman*, 981 F.3d at 351-52, 368. A majority of the court found that the record, in which CMP's investigative work was the primary evidence, supported disqualification. *Id.* at 379-383 (Elrod, J., concurring); 386 (Higginson, J., concurring in part).

Planned Parenthood changed its own fetal-tissue policies in response to the videos. 18-ER-5003-07.

2. Procedural History

In retaliation for publishing the videos, Planned Parenthood filed this lawsuit, accusing Defendants of fraud, trespass, breach of contract, racketeering, and other statutory claims. First Amended Complaint, 24-ER-6625-25-ER-6738. In its Complaint, Planned Parenthood stated that it sued "to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign." 24-ER-6629. Notably, Planned Parenthood did not allege defamation, even though Defendants' video publications were the crux of its complaint and its sole source of alleged injury.

Supported by an affidavit and exhibits, Daleiden and CMP moved to disqualify the district judge. Dkt. 164; 24-ER-6437 (Daleiden affidavit). The district judge did not respond to the attested-to facts and did not rule on the motion. He referred the matter to another judge who denied the motion. 2-ER-347; 2-ER-341.

In several pretrial rulings, the district court prohibited Defendants from pursuing discovery to oppose Planned Parenthood's claims and support their defenses related to Planned Parenthood's illegal conduct, including their First Amendment and public policy defenses. *See, e.g.*, 2-ER-312, 305, 294, 289, 284, 281, 278, 276; 19-ER-5232.

In August 2019, the district court ruled on the parties' cross-motions for summary judgment. 2-ER-139. The court granted partial summary judgment for Planned Parenthood, holding that (1) Defendants' public policy defense fails, (2) Daleiden and BioMax breached certain provisions of the PPFA Exhibitor Agreements, (3) Defendants BioMax, Daleiden, Lopez, and Merritt trespassed at certain locations, and (4) Planned Parenthood satisfied the "interstate commerce" element of RICO. *Id.*

Before trial, the district court held that Defendants' legitimacy as journalists was a "central issue," and therefore invited Plaintiffs to impugn Defendants by calling their work a "smear campaign" and questioning their motives as illegal. 1-ER-124. In the same order, the district court excluded all evidence that would establish Defendants' credibility, *including the videos themselves*. *Id.* At the same time, Plaintiffs were permitted to introduce evidence of past violence by antiabortion extremists, totally unconnected to Defendants, and evidence of emotional distress experienced by their personnel as a result of the video publication, even though emotional-distress damages are not recoverable here. *Id.*

The district court instructed the jury repeatedly that the content of the videos—and whether Planned Parenthood engaged in illegal activities—was irrelevant. *See, e.g.*, 3-ER-612, 662-63, 667; 4-ER-906, 912; 5-ER-1039; 9-ER-2382; 16-ER-4265. The court also excluded the videos generally, and, of those that were admitted, many were played without sound to prevent the jury from hearing Plaintiffs' own words that might "prejudice" Plaintiffs. 1-ER-124; 4-ER-974-78 (clarifying that videos are generally excluded); 5-ER-1069-70; 5-ER-1192-93 (denying

relevance of audio to recording claims). At the close of evidence, the court granted in part Planned Parenthood's Rule 50(a) motion for judgment as a matter of law, holding two provisions of different NAF contracts were breached: a requirement to exhibit accurately (NAF Exhibitor Agreements) and a prohibition on recording (NAF NDAs). 1-ER-110.

Over Defendants' objections, the district court issued a jury instruction that "[t]he First Amendment is not a defense to the claims in this case for the jury to consider." 16-ER-4274. This was the only reference to the First Amendment in the jury instructions. 16-ER-4263-4334; 15-ER-4178-80. The court refused to issue an instruction that, without a defamation claim, the jury should evaluate Defendants' investigative conduct alone and assume that the content of the videos was true. 16-ER-4263-4334; 18-ER-5058, 5065; 15-ER-4178-80. The district court also refused to issue an instruction informing the jury that Plaintiffs were prohibited from recovering damages caused by Defendants' publications, despite allowing testimony on damages resulting from publication—even testimony suggesting unrecoverable emotional-distress damages. 18-ER-5079; 13-ER-3617; 16-ER-4263-4334.

The court further instructed the jury that "I have found that Defendants breached the NAF Agreements by misrepresenting their identities, recording private conversations, and disclosing confidential information." 16-ER-4282. In fact, the court had not found that Defendants breached the NAF Agreements by "disclosing confidential information." 1-ER-110. Following this erroneous instruction, the jury awarded Planned Parenthood $49,360 as a result of Defendants' supposed breach of the NAF contracts. 18-ER-4884.

The jury found for Plaintiffs on all claims submitted to it: trespass; breach of PPFA's exhibitor agreements; breach of NAF agreements; breach of PPGC non-disclosure agreement; fraudulent misrepresentations; false promise fraud; RICO; and federal and state recording laws. 18-ER-4876. The parties submitted further briefing and the district court ruled on the unfair competition claim, holding that Defendants were liable. 1-ER-48. The court awarded Planned Parenthood injunctive relief and entered judgment for $2,425,084, including trebled RICO damages and punitive damages. *Id.* The court denied Defendants' timely post-judgment motions. 1-ER-2.

After Defendants appealed the judgment to this Court, the district judge awarded Planned Parenthood attorneys' fees and costs in excess of $13.7 million, even though this was many times the amount of damages the jury awarded, and even though Planned Parenthood's counsel refused to submit its billing statements in support of its fee application. Dkt. ##1150, 1154. Defendants have appealed the fee award separately.

SUMMARY OF THE ARGUMENT

In addition to the arguments presented in this brief, Defendants incorporate by reference several arguments (noted below) raised by co-Defendants in their briefs. The judgment below should be reversed for several independent reasons:

1. The district court erred in awarding compensatory damages because they are barred by the First Amendment. Planned Parenthood's claimed damages all resulted from publication protected by the First Amendment, and Planned Parenthood did not bring a defamation claim challenging Defendants' truthful publications. *See* Part I.A-B *infra*; Opening Brief of co-Defendant Rhomberg ("Rhomberg Brief"), Section I.B. The court's erroneous ruling allowing publication damages led to pervasive errors—in

discovery rulings, evidentiary rulings, and jury instructions—entitling Defendants to a new trial on any claims this Court deems still viable after appeal. At bottom, the district court fundamentally skewed the proceedings by allowing Plaintiffs' to freely impugn Defendants while barring Defendants from showing the jury any evidence of the legitimacy of their investigation, including the videos themselves. *See* Part I.C *infra*; *see also* Rhomberg Brief, Section III.

2. The district court also erred in permitting compensatory damages because Defendants did not proximately cause any cognizable compensatory damages. Planned Parenthood voluntarily incurred the costs it identified as "damages," so any award was a windfall rather than compensation. *See* Rhomberg Brief, Section I.A.
3. The court also erred as to each individual claim, for other reasons.
    a. All of the breach-of-contract claims fail because enforcement of the contracts would be contrary to public policy. Moreover, the court erred in granting judgment as

to breach of the PPFA contracts; there was insufficient evidence to conclude that Defendants revealed any "confidential information" under the PPGC NDA; Planned Parenthood lacked standing to enforce any NAF contract; and the NAF NDA's lacked consideration. The court also erroneously instructed the jury that it had previously decided Defendants breached the NAF contracts by disclosing confidential information, when it had not so ruled. *See* Part II *infra*.

b. The RICO claim fails because the alleged predicate acts were not in interstate commerce; the sparse predicate acts were not a continuous "pattern" of racketeering; and the predicate acts themselves did not directly cause any damages. *See* Opening Brief of co-Defendant Newman ("Newman Brief"), Section I; Rhomberg Brief, Section I.C.

c. The recording claims fail for several reasons. The federal claim fails because there is no evidence that Defendants recorded for an illegal purpose. The federal and Florida claims fail because the court wrongly did not require that

each recordee "exhibit" an expectation of privacy. The California claim fails because the court misapplied California recording laws, including by misconstruing the "intent" requirement of § 632 and "reasonabl[e] belief" under § 633.5. As to all recording claims, the court erroneously instructed the jury, and Defendants were entitled to judgment as a matter of law based on insufficiency of the evidence. *See* Opening Brief of co-Defendant Merritt ("Merritt Brief"), Sections I, II & III.

d. The trespass claim fails because misrepresentations by Defendant investigative journalists to gain entry did not constitute trespass and Defendants' purpose of entry, as investigative journalists, was not unlawful. *See* Rhomberg Brief, Section IV.

e. The fraud claim fails because Defendants' representations: (1) were "pure speech" protected under the First Amendment; (2) were not made for the purpose of material gain or advantage; and (3) inflicted no legally cognizable harm. *See* Rhomberg Brief, Section IV; Part I *infra*.

f. The claim for injunctive relief fails because there was no threat of recurrence and any harm flowed from constitutionally protected publication. *See* Rhomberg Brief, Section VI; Merritt Brief, Section V.

4. The court erred in awarding punitive damages by unconstitutionally refusing to instruct the jury not to punish Defendants for harm to non-parties, and because Defendants' efforts to uncover criminal conduct were not ill-willed. *See* Merritt Brief, Section IV.

5. The court erred in finding Lopez liable on any claims given his limited role. *See* Part III *infra*.

6. The district judge should have been disqualified given the (at least) appearance of partiality. *See* Part IV *infra*.

STANDARDS OF REVIEW

- Constitutional issues: de novo. *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017); *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1069-70 (9th Cir. 2002) (en banc).
- Interpretation and meaning of contracts: de novo. *Int'l Bhd. of Teamsters v. NASA Servs.*, 957 F.3d 1038, 1041 (9th Cir. 2020).

- Grant or partial grant of summary judgment: de novo. *Branch Banking & Tr. Co. v. D.M.S.I.*, 871 F.3d 751, 759 (9th Cir. 2017).
- Jury instructions misstating the law: de novo. *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017).
- Denial of post-judgment motion for judgment as a matter of law: de novo. *Hagen v. City of Eugene*, 736 F.3d 1251, 1256 (9th Cir. 2013). This Court will reverse if insufficient evidence supports the jury verdict. *Id.* at 1260.
- Denial of a recusal motion: abuse of discretion. *In re Marshall*, 721 F.3d 1032, 1039 (9th Cir. 2013).

ARGUMENT

I. The District Court Denied Defendants the Protection of the First Amendment, Tainting the Entire Trial.

The district court's erroneous rulings allowed the jury to hit Defendants with a multi-million-dollar verdict for "causing" the public's outraged response to Planned Parenthood's *own words* about its fetal-tissue practices. To get to that point, the district court first erred in authorizing Plaintiffs to pursue damages resulting from a truthful publication, then in allowing Plaintiffs to present evidence of how Defendants' publication "damaged" them, and again in allowing the jury

to award damages without instructing it on Defendants' First Amendment rights.

The First Amendment prohibits punishing speech that is critical of public entities unless the statements are false and made with actual malice. But the district court mischaracterized Plaintiffs' damages resulting from unwanted publicity as "directly caused" by Defendants themselves, rather than by their protected speech. This not only twisted facts but ignored Plaintiffs' own allegations, which made clear that their damages resulted from publication of the videos: Plaintiffs sued to recover "financial losses . . . all stemming from Defendants' campaign of lies"; and Plaintiffs presented evidence that they incurred costs to repair their "brand," to "restore" a "sense of trust" and "confidence," which were "broken" and "damaged" as a result of the publication. 24-ER-6629, 6672; 13-ER-3601-02; 18-ER-4810, 4816.

The district court's fundamental error in misinterpreting the scope of allowable damages pervaded all aspects of the trial. It formed the basis for a series of erroneous discovery and evidentiary decisions, which, taken together, denied Defendants a complete and just defense.

A. The district court erred by failing to apply the First Amendment to Plaintiffs' claims for damages.

While lack of proximate cause also precludes Plaintiffs' damages in this case,[6] the First Amendment precludes judgment in Plaintiffs' favor as a separate, threshold matter. *See*, *e.g.*, *Food Lion v. Capital Cities/ABC*, 194 F.3d 505, 522 (4th Cir. 1999) ("We do not reach the matter of proximate cause because an overriding (and settled) First Amendment principle precludes the award of publication damages in this case. . . .").

In its rulings, the district court either failed to apply publication damages limitations altogether and *only* considered proximate causation, or it improperly conflated the two. 2-ER-153-160; 1-ER-12-14. Either way, the district court failed to properly apply the First Amendment to Plaintiffs' claim for damages. This is reversible error.

All of Plaintiffs' alleged injuries resulted from Defendants' publication of recordings of the statements of Plaintiffs' employees. Plaintiffs did not allege that the recordings were false and disclaimed any damages resulting from publication. The First Amendment therefore

[6] *See* Rhomberg Brief, Section I.A. Defendants further deny that Planned Parenthood's claimed damages are, in fact, damages. *Id.*, Section I.

bars any compensation for injury they suffered as a result of the publications.

i. The First Amendment bars damages resulting from a truthful publication.

a. Truthful speech, especially on matters of public importance, has a "constitutional shield." *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964). Criticism of public figures "does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* Indeed, "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical" of public figures. *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). In order to preserve the "constitutional shield" for truthful speech even when it offends or angers, therefore, the Supreme Court has "consistently ruled that a public figure may hold a speaker liable" for damages only if the plaintiff establishes the speech is defamation. *Id.* at 52.

Thus, where plaintiffs seek damages resulting from a defendant's publication, they must satisfy the First Amendment requirements that govern defamation claims (including establishing the falsity of the published statements and actual malice on the part of the speaker),

regardless of the specific cause of action raised. *See, e.g.*, *id.* at 56 (claim for intentional infliction of emotional distress must satisfy defamation standard); *Time v. Hill*, 385 U.S. 374, 387-88 (1967) (claim for invasion of privacy must satisfy defamation standard); *Blatty v. N.Y. Times*, 42 Cal. 3d 1033, 1042-46 (1986) (claim for intentional interference with prospective economic advantage must satisfy defamation standard).

b. This Court has followed this important principle. On a "subject of unquestionable public concern," "the First Amendment requires [plaintiffs] to demonstrate the falsity of the statements . . . as well as Defendants' fault in [publishing] them, before recovering damages." *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 821 (9th Cir. 2002); *see also Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (tort claims brought with failed defamation claim are "subject to the same first amendment requirements").

In *Medical Lab*, journalists from ABC's *Prime Time Live* conducted an investigation into whether laboratories were processing pap smear slides so quickly that it caused testing errors. 306 F.3d at 810. Posing as employees of a fictitious clinic, the journalists asked the target laboratory to process 623 pap smear slides over a single weekend. *Id.* The journalists

also used hidden cameras to record a visit to the laboratory and a conversation with the owner. *Id.* at 810-11.

After a segment aired asserting that the laboratory missed cervical cancer on some slides, the owner sued ABC, alleging, inter alia, intrusion on seclusion, tortious interference with contractual relations, and trespass. *Id.* at 811. This Court affirmed the district court's summary dismissal of all three claims, in part because Medical Lab could not recover publication damages without showing falsity. *Id.* at 821-26.

c. Other circuits agree. As the Fourth Circuit held in *Food Lion*, a plaintiff that suffers injury because of unwanted but truthful publicity cannot bring "non-reputational tort claims" such as trespass, fraud, and breach of contract seeking "defamation-type damages." *Food Lion*, 194 F.3d at 522. "[S]uch an end-run around First Amendment strictures is foreclosed by *Hustler*." *Id.*

In *Food Lion*, *Prime Time Live* sent two undercover reporters to secretly film Food Lion's meat-handling practices. The reporters obtained jobs at Food Lion by using fake identifications and making false representations. *Id.* at 510-11. The reporters secretly filmed Food Lion employees handling meat and broadcast the footage on *Prime Time Live*.

Id. Like Plaintiffs here, the plaintiffs in "Food Lion did not sue for defamation, but focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." *Id.* at 510. The Fourth Circuit held that because Food Lion did not bring a defamation claim, proving falsity and actual malice, it could not recover any damages for injuries attributable to the *publication* of the videos, even under other tort theories. *Id.* at 522-24.

Other cases are in accord with *Food Lion* and *Medical Lab*. *Compuware v. Moody's*, 499 F.3d 520, 532 (6th Cir. 2007) ("The Supreme Court and our sister circuits have not hesitated to apply the actual-malice standard to tort claims that are based on the same conduct or statements that underlie a pendant defamation claim.") (citing *Hustler,* 485 U.S. at 56; *Beverly Hills Foodland v. United Food & Commercial Workers Union, Loc. 655*, 39 F.3d 191, 196 (8th Cir. 1994); *Unelko,* 912 F.2d at 1057-58; *Medical Lab,* 306 F.3d at 821); *Redco Corp. v. CBS*, 758 F.2d 970, 973 (3d Cir.1985) (unless defendants "can be found liable for defamation, the intentional interference with contractual relations count is not actionable"); *Desnick v. ABC*, 44 F.3d 1345, 1355 (7th Cir. 1995) (similar).

Plaintiffs' tort claims here closely mirror those raised by the plaintiffs in *Medical Lab* and *Food Lion* and fail for the same reasons. Plaintiffs brought various claims, including fraud, trespass, and unfair competition, seeking monetary damages only for alleged harms arising from Defendants' publications. *See* 24-ER-6625-25-ER-6738; 20-ER-5395. To satisfy the First Amendment and recover damages from a publication, Plaintiffs must allege both that Defendants' publications included false assertions of fact, and that Defendants made those assertions with malice. *Food Lion*, 194 F.3d at 522-23 (quoting *N.Y. Times*, 376 U.S. at 279-80). Plaintiffs disclaimed any intention of making such a showing. *See* 20-ER-5395; *see also* 2-ER-305. Given the holdings of *Hustler*, *New York Times*, *Medical Lab*, *Food Lion*, and related cases, they thereby also disclaimed all right to damages resulting from publication of videos.

ii. "Publication damages" refers to all damages resulting from a publication, not just certain types of injury.

Although the district court recited the First Amendment's prohibition on damages "stemming from the publication conduct of the defendants," in the same breath, the court wrongly defined those

damages to include only "reputational damages (lost profits, lost vendors)." 2-ER-383; *see also* 2-ER-306; 2-ER-157-58. The court thus failed to prohibit so-called "economic" damages, even when they resulted from publication. 2-ER-383.

But the First Amendment protects all non-defamatory publications, prohibiting recovery of *any* resulting damages, no matter what "type." When a plaintiff seeks recovery of "damages *resulting from speech covered by the First Amendment*, the plaintiff must satisfy" the constitutional standard for defamation claims. *Food Lion*, 194 F.3d at 523 (emphasis added). In *Blatty*, the California Supreme Court held the First Amendment prohibition on publication damages "appl[ies] to *all claims* whose gravamen is the alleged injurious falsehood of a statement." 42 Cal.3d at 1042-43 (emphasis added). The Seventh Circuit in *Desnick* dismissed various state law claims and a federal wiretapping claim because the alleged injuries stemmed from the "dissemination" of a broadcast segment. *See Desnick*, 44 F.3d at 1355. In *Medical Lab*, this Court applied First Amendment scrutiny to tortious interference claims where the supposed interference was effected by a publication in the public interest. 306 F.3d at 821. In *Unelko*, this Court applied to business

claims centering on defendants' speech the "same first amendment requirements that govern actions for defamation." 912 F.2d at 1057-58.

Cases cited by the district court are not to the contrary. In *Cohen v. Cowles Media*, 501 U.S. 663 (1991), the plaintiff shared newsworthy information with two media outlets, consenting to the publication of the information in reliance on their promise to keep his identity secret. *Id.* at 665. He sued when the media outlets revealed his name, causing him to lose his job. *Id.* at 666. The Supreme Court held the First Amendment did not prohibit him from recovering under a promissory estoppel theory. *Id.* at 670-72. Unlike Plaintiffs' claims here and Falwell's emotional-distress claim in *Hustler*, Cohen's promissory-estoppel claim did not seek to "to avoid the strict requirements for establishing a libel or defamation claim. . . . Cohen is not seeking damages for injury to his reputation or his state of mind." *Id.* at 671 (distinguishing *Hustler*). Rather, Cohen sought damages related solely to the breach of the promise, *not* the publication of speech or its content. *Id.*

By contrast, Plaintiffs here sued "to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign," to recover "financial losses . . . all stemming from Defendants'

campaign of lies," to recover costs of trying to remove themselves from the "spotlight" the videos put them under, and to recover costs of trying to "restore" a "sense of trust" and "confidence" at conferences where "anxieties were high" post-publication. 24-ER-6629, 24-ER-6672; 13-ER-3601-02; 18-ER-4810, 18-ER-4816. These are all consequences of the public's reaction to Defendants' publications, classic damages to "reputation" and "state of mind."

The First Circuit in *Veilleux v. NBC* suggested *Hustler* and *Cohen*, taken together, prohibit recovery of only "reputational," rather than "pecuniary" or "economic," injury resulting from publication. 206 F.3d 92, 127-29 (1st Cir. 2000). However, that distinction is illusory, and *Veilleux* is an outlier among the Courts of Appeals for making it. As another court pointed out, there is inherent difficulty interpreting *Veilleux*'s proposed distinction because some "economic losses . . . flow directly from the loss of reputation." *Smithfield Foods v. United Food and Com. Workers Intern. Union*, 585 F. Supp. 2d 815, 822 (E.D. Va. 2008) (citation omitted). That court held only one out of five types of pecuniary losses before the court was recoverable as purely "economic" damage: loss of free advertising on the Oprah Winfrey show, a unique interference with

business expectancy that was not tied to the overall loss in reputation as a result of publication. *Id.* at 23-24. Four other types of pecuniary loss were "reputational" in nature (used as a proxy for "publication damages"), including the company's expenses incurred in reacting to the unwanted publicity resulting from publication—like the damages awarded in this case. *Id.*

In sum, *Veilleux* and *Smithfield Foods* are consistent with the interpretation that "reputational damages" and "publication damages" synonymously refer to all damages, including economic losses, that would not have occurred without an unwanted publication. Thus, no matter how Plaintiffs label their claims or their damages, to recover for any injuries sustained as a result of Defendants' protected speech, the First Amendment requires they meet the actual-malice standard applicable to defamation claims. *See Compuware*, 499 F.3d at 532 ("[W]e must look beyond the damages sought by the plaintiff to the injuries actually sustained.").

iii. Plaintiffs' damages resulted from Defendants' publications.

Sidestepping First Amendment principles, the district court authorized Plaintiffs to seek damages where they were "caused by the

Defendants" (rather than by an intervening third party, borrowing a concept from proximate causation) and manufactured two damages sub-categories: "security" and "infiltration" damages. 2-ER-169; 16-ER-4322; 1-ER-12-14. No matter how the court characterized them, however, the awarded damages were for costs Plaintiffs incurred as a result of Defendants' *publication of the videos*.

No one pretends otherwise. In their complaint, Plaintiffs characterize their damages as resulting from Defendants' publication. Plaintiffs sued "to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign," to recover "financial losses . . . all stemming from Defendants' campaign of lies." 24-ER-6629, 6672 (allegations incorporated into each claim). *See Smithfield Foods*, 585 F. Supp. 2d at 822-23 ("[I]t is evident that a party's own characterization of its damage claims [in its complaint] is highly persuasive in determining whether the damages sought are 'reputational.' "). While Plaintiffs later putatively disclaimed "publication damages," 2-ER-305, they never amended or disavowed these express allegations in their complaint.

Indeed, PPFA's corporate designee admitted all claimed damages resulted from release of the videos, but the court refused to admit this deposition testimony at trial. 18-ER-4997-8; 13-ER-3414-15.

At trial, Plaintiffs again conceded the costs they claimed as damages were incurred in response to the publication of the videos:

- To counteract the perceived attack on Plaintiffs' "brand" resulting from the publication.
- To "restore" a "broken" "sense of trust" and "confidence" at conferences post-infiltration and post-publication; "anxieties were high. Concerns were high."
- Because the publication put certain personnel under a "spotlight," "created an environment that was significantly changed for people who worked at Planned Parenthood," and otherwise drew attention to Plaintiffs and their personnel.
- Because "after the video . . . [b]eing exposed in the way that we were . . . we wanted to mitigate the risk of exposure. . . ."

7-ER-1839-42; 9-ER-2230-31; 9-ER-2257-58, 2272, 2243; 7-ER-1713-14, 1834-35; 13-ER-3601-02. Plaintiffs also admitted they incurred all their claimed costs soon after or in anticipation of publication, 18-ER-4807-10;

14-ER-3919. In any event, Plaintiffs offered insufficient evidence they would have incurred such costs absent publication.

Because Plaintiffs incurred these costs as a result of publication, they "result[] from speech covered by the First Amendment." *Food Lion*, 194 F.3d at 523; 24-ER-6629. Thus, they are publication damages, to recover which Plaintiffs had to prove Defendants' videos included false statements of fact, maliciously made. *Hustler*, 485 U.S. at 56; *Food Lion*, 194 F.3d at 523. Even though the Plaintiffs' complaint is riddled with accusations of "lies" and a "smear campaign," they were never actually forced to *prove* those accusations, which (along with malice) is the fundamental prerequisite of a claim arising out of publication. As soon as Plaintiffs disclaimed any intention of making such a showing, 20-ER-5395; 2-ER-305, the district court should have eliminated all publication damages from the case, including those the court characterized as "directly caused" by Defendants.[7]

[7] If any awarded damages could somehow be construed as not being publication damages, they are still non-recoverable for lack of proximate cause. *See* Rhomberg Brief, Section I.A.

B. The district court's error in defining "publication damages" led to further errors that prevented defendants from mounting an effective defense.

Shortly after the district court held publication damages were unrecoverable in its ruling on the Defendants' motions to dismiss, 2-ER-383, Plaintiffs disclaimed such damages, 20-ER-5395; 2-ER-305. Plaintiffs, however, stated they *were* pursuing compensation for their actions taken "in the aftermath of the videos," in response to "a nine-fold spike in security incidents nationally." *Id.* (describing what eventually became known as "security damages"). This false dichotomy between publication damages and "direct" or "economic" damages led to discovery and evidentiary errors that were compounded at trial and in the jury instructions. Combined, these errors denied Defendants a full and fair defense by producing a fundamentally skewed and asymmetric proceeding in which Plaintiffs were allowed to tar Defendants with non-parties' prior bad acts while Defendants were categorically prohibited from defending their actions.

i. Discovery and evidentiary errors

First, the district court relied on its putative exclusion of publication damages to curtail discovery into matters tending to show the

credibility, good intent, and positive results of Defendants' journalism. For example, Defendants were repeatedly denied discovery into Plaintiffs' compliance (or non-compliance) with fetal tissue procurement laws and Plaintiffs' procedures for acquiring fetal tissue for donation, because Defendants need not prove the veracity of its publications, absent a claim for publication damages. *See* 2-ER-312, 305, 294, 289, 284, 281, 278, 276.

Later, deciding pretrial motions, the district court used Plaintiffs' putative disclaimer of publication damages to exclude evidence that lent credibility to Defendants' undercover investigation and publications. Although the court anticipated that the dispute whether Defendants were engaged in a malicious "smear campaign" would be "central to the context of and the background to this case," the court dismissed nearly all of Defendants' key evidence on that point as "barely if at all relevant." 1-ER-124-5. The court excluded essentially all evidence of the content of the contested videos, all evidence of illegalities that would justify investigation and reporting, and all evidence of positive developments resulting from publication of the videos, including government investigations and law enforcement activity. 1-ER-124-5; 4-ER-972-78.

The court also explicitly prohibited any mention of the fact that Plaintiffs had declined to make a defamation claim, or the limitations that decision placed on Plaintiffs' claims for damages under the First Amendment. 1-ER-129.

At the same time, the court invited Plaintiffs to characterize Defendants as liars and harassers engaged in a "smear campaign," without forcing them to *prove* those accusations and without giving Defendants an opportunity to prove otherwise. 1-ER-124, 130. Plaintiffs were also invited to prove the reasonableness of their security expenditures in reaction to Defendants' videos, 18-ER-5128, including with testimony about (unrecoverable) emotional distress. 1-ER-130; 4-ER-730-31; 18-ER-5184-85. Defendants could not dispute this emotional testimony by showing the videos (or any evidence of their credibility) because the court deemed the videos irrelevant. 1-ER-125.

The court also wrongly admitted the testimony of one expert witness and several other witnesses on the history of violence against abortion providers, even though Plaintiffs never alleged Defendants had been involved in violence. 1-ER-130; *see also* Rhomberg Brief, Section III. In other words, actions long ago by non-parties was relevant to the

reasonableness of Plaintiffs' security expenditures, even though watching the actual videos that purportedly warranted those expenditures was not. *Compare* 1-ER-130 *with, e.g.*, 4-ER-972-78.

At the same time, Defendants' experts supporting the credibility of their videos and the importance of their work were all excluded, because, without a claim for publication damages, "whether the strategy that was taken, whether it was for—you know, for a great reason or not is not relevant." 18-ER-5142, 5135.

ii. Trial errors

The Court's application of its unjust evidentiary rulings continued to handicap Defendants throughout trial. A few examples include:

- The Court allowed Plaintiffs' witness Tosh to testify to fear and concern at her Planned Parenthood affiliate following release of the first video. 4-ER-730-31; *see also* 6-ER-1403-07, 1555-57 (two more Plaintiff witnesses describing emotional distress after videos). The Court then denied Defendants the opportunity to cross-examine using the video, because the content would be prejudicial to Plaintiffs. 4-ER-796-98. (This flatly contradicted the Court's assurance at the Hearing on

Pre-Trial Motions: "I can promise you that . . . if there is evidence that Planned Parenthood puts in that is relevant to this trial and you have evidence that is relevant to this trial to rebut it, you'll be able to do that." 18-ER-5218.)

- The Court would not allow Defendant Adrian Lopez to show two videos he had transcribed for Defendant Daleiden prior to joining his investigation, nor even to proffer the transcriptions that he had made, because of the risk of prejudice to Plaintiffs. 4-ER-972-79 (Plaintiffs' counsel urging that it is "perfectly appropriate" not to show the videos because they have not sued for damages for "harm to their reputation").
- The Court required Defendants to play video clips without audio and disallowed reference to the topics of conversations even where it was necessary for the jury to determine whether the speaker had a reasonable expectation of privacy in the circumstances. *See, e.g.*, 5-ER-1069-70; 5-ER-1192-93; *see also* Merritt Brief, Section I.C.3. (providing numerous examples).

This set of lopsided, unjust and prejudicial decisions stemmed from the court allowing Plaintiffs to putatively "disclaim publication damages" but still to pursue and prove "damages resulting from Defendants' publications." In the end, Defendants were deprived of a fair opportunity to defend themselves against Plaintiffs' claims seeking massive monetary recovery and sweeping injunctive relief.

iii. Jury instruction errors

a. Defendants had the right to an instruction that the jury should assume the content of the videos was true.

In the context of a case involving publication protected by the First Amendment and unchallenged by a defamation claim, the court should assume, or instruct the jury to assume, the truth of the publication. *See, e.g.*, *Food Lion v. Capital Cities/ABC*, 964 F. Supp. 956, 959 (M.D.N.C. 1997) ("For the purposes of this opinion and this case, it is assumed that the content of the . . . broadcast . . . was true. Food Lion did not challenge the content of the broadcast by bringing a libel suit."), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).

If defendants in journalism cases were not given the assumption of truth, plaintiffs would be free to undermine the credibility and truth of

defendants and their protected publications before the jury, while avoiding the burdens of a defamation claim, such as undergoing discovery on the truth of the statements (*e.g.*, did Planned Parenthood sell fetal tissue for profit, change abortion procedures and commercialize fetal tissue procurement without informed consent of its patients, perform illegal partial birth abortions to obtain more valuable "intact" tissues, etc.) and proving actual malice falsity at trial. Assuming that the content of the publication is true ensures that a jury is not manipulated into assigning deceitfulness or other fault to protected speech, as Plaintiffs sought to do in this case. *See also* Section I.A.i above.

But instead of the First Amendment burden they should have borne for avoiding a defamation claim, Plaintiffs were instead given a double benefit: they successfully kept the jury from seeing Defendants' publications, and they were given free rein to malign Defendants and their videos, all while Defendants were forbidden from presenting evidence to defend themselves. The court here refused the required protective instruction, *see, e.g.*, 18-ER-5112-13, offering instead an instruction directing that the topics in the videos were not for the jury to decide, including whether Plaintiffs engaged in illegal activity and

whether they profited from the sale of fetal tissue. 1-ER-97. Moreover, the court instructed the jury repeatedly that the truth of the videos, including whether Plaintiffs had acted illegally, was not at issue. *See, e.g.*, 3-ER-612, 662-63, 667, 4-ER-906, 912; 5-ER-1039; 9-ER-2382; 16-ER-4265.

Meanwhile, the district court contradicted its own assertion that the truth of the videos was irrelevant by allowing Plaintiffs repeatedly to characterize the videos as false, misleading, harassing "smears," from the Complaint to closing arguments. *See, e.g.*, First Amended Complaint, 24-ER-6625-25-ER-6738 *passim*; 1-ER-124; 4-ER-819-25; 10-ER-2566-67, 2485-94, 2513-18; Plaintiffs' Closing Argument, 16-ER-4335-4430 (featuring the theme that Defendants are liars). When defense counsel tried to question witnesses on similar assertions, they were admonished. *See, e.g.*, 6-ER-1565-1567, 7-ER-1714-15, 9-ER-2444-45.

By the time the jury was deliberating, Defendants and their work had been thoroughly maligned, with no opportunity of rebuttal. From the preliminary instructions through the final instructions, the court erroneously refused Defendants the requisite curative instructions.

b. Defendants had the right to an instruction that the First Amendment bars publication damages.

Similarly, once the court had wrongly allowed testimony establishing the emotional distress of Plaintiffs' employees following Defendants' publications, *which all parties agreed were unrecoverable* publication damages, *see* supra Sections I.B.i & I.B.ii, and had compounded its error by handicapping cross-examination by excluding the videos, *id.*, it may have been impossible for any jury instruction to undo the prejudice to the Defendants. However, it was further error for the court to refuse to instruct the jury that the First Amendment prohibited them awarding emotional distress or any other publication damages. 18-ER-5079; 13-ER-3617. Compounding this error further, the court explicitly instructed the jury that the First Amendment was *not* a defense to the allegations or damages in this case. 16-ER-4274 ("The First Amendment is not a defense to the claims in this case for the jury to consider."). It is impossible to believe that unrebutted emotional testimony did not influence the jury's damages award, particularly with the court refusing to instruct the jury otherwise.

* * *

Defendants were prejudiced by the district court's erroneous definition of publication damages as only applying to "reputational" and "non-economic" damages. Either Defendants' speech should have been assumed true and Plaintiffs should have been limited to trying to prove damages that did not result from publication, or Plaintiffs should have been required to prove falsity and actual malice to get defamation-style damages. The district court's errors on damages wrongfully gave Plaintiffs the best of both worlds.

C. The district court's errors were pervasive and prejudicial to the entire case.

Given the comprehensive effect of the district court's misapplication of the First Amendment to the damages here, if this Court does not reverse as to all claims, it should grant a new trial on all remaining claims. "[A] partial new trial . . . may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prod. v. Champlin Ref.*, 283 U.S. 494, 500 (1931). The errors here are like those this Court and others have found to require a new trial, because they permeated the whole case. *See City of Pomona v. SQM N. Am. Corp.*, 801 F. App'x 488, 491 (9th Cir. 2020) (ordering a new trial

even on a previously decided causation issue because causation and damages are "too intertwined"); *Buckley v. Mukasey*, 538 F.3d 306, 320-21 (4th Cir. 2008) (awarding entirely new trial because wrongful exclusion of evidence could have "permeate[d] the trial"); *Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993); *Payton v. Abbott Labs*, 780 F.2d 147, 154-55 (1st Cir. 1985). Because the district court's First Amendment errors compromised Defendants' ability to present a robust defense to all claims, this Court should grant a new trial on any claims that it does not reverse altogether.

II. The Breach-of-Contract Claims Fail As a Matter of Law.

The court erred in dismissing Defendants' public policy defense to enforcement of all the contracts; in awarding judgment to Plaintiffs on the PPFA contract claims; in denying Defendants judgment as a matter of law that they did not breach their contract with PPGC; in permitting Planned Parenthood to enforce Defendants' agreements with NAF, to which it was not a party and/or which lacked consideration; and in giving a false, prejudicial instruction to the jury.

A. Public policy bars Plaintiffs' contract claims.

Public policy is a defense to enforcement of a contract where, for example, enforcement would result in the concealment of criminal activity, undermines the public good, or improperly prohibits free speech rights. *See, e.g.*, *Bovard v. Am. Horse Enterprises*, 201 Cal. App. 3d 832, 838 (1988); *Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 210 (Tex. App. 2006); Restatement (First) of Contracts § 548 (1932); Restatement (Second) of Contracts § 178 (1981). As this Court has held, "even if a party is found to have validly waived a constitutional right, we will not enforce the waiver if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993), *as amended* (Mar. 8, 1994) (internal quotation omitted).

The public policy defense applies to all the agreements at issue here.[8] Defendants proffered evidence that Defendants' investigation revealed serious wrongdoing and that exposure of that wrongdoing was

[8] The district court also erred in rejecting Defendants' unclean hands defense, which asserted that Planned Parenthood's claims against Defendants for operating a "fake" fetal tissue company were inequitable when the "real" fetal tissue companies that Plaintiffs (*e.g.*, PPOSBC) were supplying were admittedly criminal (*e.g.*, DaVinci).

manifestly in the public interest. 10-ER-2764-65 (proffering Exs. 5496, 5220, 5091, 5126, 5128-3, 5130, 5121, 5241, 5242, 5168, 5196, 5191, 5269, 5840, and 5760 (videos)). Enforcement of any contract provision to bar such investigation and publication contravenes public policy. *See Leonard*, 12 F.3d at 890.

For example, Defendants recorded PPGC Research Director Melissa Farrell stating that researchers connected to Planned Parenthood have targeted specific fetal tissue in the past and that Planned Parenthood is willing to alter the abortion procedures to obtain specific tissue for those researchers, which violates federal law. *Kauffman*, 981 F.3d at 380 (Elrod, J., concurring) (citing 42 U.S.C. § 289g-1(b)(2)(A)(ii)). The video evidence also suggested that Planned Parenthood received valuable consideration in exchange for fetal tissue, a crime under 42 U.S.C. § 289g-2(a), (d). *Id.* at 380-81 (Elrod, J., concurring).

Planned Parenthood receives hundreds of millions of dollars in taxpayer funds annually and provides health care services and abortions to thousands of people. 9-ER-2273-4. The public therefore has an obvious interest in the legality of Planned Parenthood's practices. Tellingly,

Planned Parenthood changed its own fetal-tissue policies in response to the videos. 18-ER-5003-07. Yet, in conclusory fashion, the district court broadly stated that "none" of the recordings shows that Planned Parenthood engaged in any illegal activity. 1-ER-70 n.12; *see also* 2-ER-197. The district court did not address any specific portions of any of the recordings, including those the Fifth Circuit specifically cited as strong evidence of violations of law. 1-ER-70 n.12; 2-ER-197. Nor did it consider them in light of federal statutes and regulations. 1-ER-70 n.12; 2-ER-197. If it had, it would have concluded, as did a majority of the en banc Fifth Circuit, that the PPGC video alone includes significant enough evidence of legal violations to support the decision of Texas to debar Planned Parenthood from Medicaid. *Kauffman*, 981 F.3d at 379-383 (Elrod, J., concurring); *id.* at 386 (Higginson, J., concurring in part).

Public policy is a complete defense to Planned Parenthood's contract claims, and the district court erred in rejecting it without so much as considering and analyzing the specific content of the videos.

B. Plaintiffs did not prove breach-of-contract claims.

i. PPFA exhibitor agreements

In 2014 and 2015, BioMax—through Daleiden—entered into three PPFA exhibitor agreements for exhibit space at: (1) the PPFA North American Forum on Family Planning; (2) the PPFA MeDC Conference; and (3) the PPFA National Conference. 10-ER-2640-41, 2646-47, 2651-52; 25-ER-6903, 6908, 6911. These agreements straightforwardly set out the terms and conditions governing BioMax's exhibit at each conference. 25-ER-6903, 6908, 6911; 11-ER-2953-54.

All three agreements establish exhibitor staffing and badging requirements and prohibit behaviors like smoking, damaging property, and using flammable materials. *See* 25-ER-6903, 6908, 6911. In each, PPFA reserves the right to "prohibit or evict without refund any exhibit (or parts of exhibits) or person[]" that "detracts from the general character of the exhibition." 25-ER-6903, 6908, 6911.

The Forum and MeDC agreements identically require that exhibits be "of an educational character, . . . not . . . primarily to attract or amuse. . . ." 25-ER-6903 ¶12, 6908 ¶11. The National Conference agreement includes no such educational requirement, but provides that

"[e]xhibitors must show only products manufactured or represented by their company in the regular course of business." 25-ER-6911 ¶12. The contracts also require exhibitors to comply with certain laws and regulations "in performance" of their "obligations pursuant to this Agreement. 25-ER-6906 ¶3, 6909 ¶3, 6912 ¶16. The district court granted PPFA summary judgment as to breach of the "educational" and "products" clauses and failed to grant Defendants judgment as a matter of law as to the "obligations" clause. 2-ER-176. These were errors.

In fact, BioMax performed its obligations under the agreements. It paid its exhibitor fee in exchange for the opportunity to exhibit at each conference, then exhibited successfully three times without violating any provisions of the agreements or "detract[ing] from the general character of the exhibition[s]." *See, e.g.*, 11-ER-2953-58 (Daleiden describing Forum conference); 25-ER-6903, 6908, 6911.

Moreover, although BioMax was investigating, rather than engaging in, fetal tissue procurement, there is no evidence that BioMax's exhibits were not "educational" in nature, particularly where that phrase

is elaborated as "not . . . primarily to attract or amuse."[9] 25-ER-6903 ¶12, 6908 ¶11; 11-ER-2956-57. Certainly, BioMax's exhibits, which outlined a proposed business model for harvesting and selling parts of human fetuses, were designed neither to "attract [n]or amuse." 11-ER-2956. Moreover, conference attendees commented with appreciation on what they learned from the BioMax materials about stem cells. 11-ER-2956-57.

The district court also erred in determining that Defendants breached the National Conference agreement by failing to offer "products." 2-ER-174. The agreement merely limits exhibitors to displaying "only products manufactured or represented by their companies. . . ." 25-ER-6911 ¶12. It does not require all exhibitors to have products; the very first paragraph of the agreement refers to the "products *or* services" of exhibitors. *Id.* ¶1 (emphasis added). Moreover, a former PPFA conference manager testified that an exhibitor could provide "either products or services." 12-ER-3238.

[9] If this Court finds the agreements were in any way ambiguous, they must be construed against the drafter, Planned Parenthood. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995).

In sum, BioMax, though not what it appeared to be, peaceably complied with every provision of the PPFA exhibitor agreements, so the district court erred in granting summary judgment in Plaintiffs' favor on the "educational" and "products" clauses *and* in denying Defendants judgment as a matter of law on the "obligations" clauses.

Moreover, even if Planned Parenthood could show that Defendants breached the exhibitor agreements, there would be no cognizable claim. Once each conference concluded, its exhibitor agreement became moot. If Planned Parenthood later became aware that an exhibitor had not complied with all the rules, it would be too late for it to exercise its contractual remedy and evict the exhibitor without a refund. If, for example, months after a conference concluded without incident, Planned Parenthood discovered that an exhibitor had in fact used flammable materials, a breach-of-contract claim for damages would be completely implausible. Defendants caused the same damages as that exhibitor: none. *See also* Rhomberg Brief, Section I.

ii. PPGC non-disclosure agreement

In April 2015, Daleiden and Merritt visited a Planned Parenthood facility in Texas (PPGC). 11-ER-3019. A few days before, BioMax—

through Daleiden—signed a non-disclosure agreement with PPGC (PPGC NDA). 25-ER-6848; 11-ER-3016. Daleiden recorded the visit with PPGC's Research Director Melissa Farrell at the facility and lunch with her at a nearby seafood restaurant. 11-ER-3025-32. When Daleiden arrived at the PPGC facility, Farrell left her office door open, saying "I don't think we're going over anything extremely confidential yet." 10-ER-2687, 11-ER-3024-26; Ex. 5302-3 (video). During the PPGC facility tour and lunch, PPGC staff members and Daleiden discussed the facility, the facility's work, and several personal topics. PPGC personnel never told Daleiden that any information was confidential or proprietary under the PPGC NDA. 11-ER-3023-3032.

PPGC's claim for breach of contract fails as a matter of law because a reasonable jury could not have found that Defendants breached its agreement with PPGC. *See, e.g.*, *PennWell Corp. v. Ken Assocs.*, 123 S.W.3d 756, 767 (Tex. App. 2003). The PPGC NDA prohibited defendants from disclosing "Confidential Information," which the contract defined as "(i) all *written* information of the Disclosing Party [i.e. PPGC], and (ii) all oral information of the Disclosing Party, which in either case is *identified at the time of disclosure* as being of a confidential or proprietary nature

or is reasonably understood by the Recipient [*i.e.* BioMax] to be confidential under the circumstances of the disclosure." 25-ER-6848 ¶1 (emphasis added).

PPGC alleged that Defendants violated the NDA when they "posted a video recording they had secretly recorded at their meeting at PPGC." 24-ER-6658. Yet PPGC did not show that the recorded discussion was "identified at the time of disclosure as being of a confidential or proprietary nature" or was "reasonably understood by [Defendants] to be confidential under the circumstances of the disclosure," as required for confidentiality obligations to apply. 25-ER-6848. On the contrary, Daleiden testified that the information discussed was not confidential. *See* 11-ER-3016-17 (explaining that he, not PPGC, filled in the subject matter of the NDA); *see also* 11-ER-3022-24.

Furthermore, the recordings that Plaintiffs claim to be "confidential" include conversations recorded with Farrell during lunch at a busy restaurant. 11-ER-3028-32. Clinic matters were discussed at lunch within earshot of servers and other restaurant guests, thus waiving any claim for confidentiality. *Id.*; *see, e.g.*, *Goold v. Kishan Singh*, 88 Cal. App. 339, 343 (1928); *cf. Medical Lab*, 306 F.3d at 817-18

("Because the [recordees] . . . 'discussed business matters on the open patio of a public restaurant with four strangers,' '[t]here was no intrusion into a private place, conversation or matter'" and no reasonable expectation of privacy) (citation omitted)).

Since PPGC staff identified no content as confidential and peppered allegedly "confidential" conversations with non-confidential subject matter throughout BioMax's visit, there is no evidence that any part of the video recording was "reasonably understood" by BioMax to be confidential, as required for confidentiality obligations to apply. The Court should reverse given the insufficient evidence supporting the jury's verdict.

iii. NAF agreements

In both 2014 and 2015, BioMax entered into exhibitor agreements for the annual NAF Tradeshow. 25-ER-6837; 25-ER-6844. Like the PPFA exhibitor agreements, the NAF exhibitor agreements are short form contracts that established "Exhibit Rules and Regulations" governing the orderliness of the booth space, set-up times, fire safety, and use of hotel property. 25-ER-6837; 25-ER-6844. These agreements also purported to require exhibitors to maintain the confidentiality of unspecified

"confidential information" that "NAF may furnish" and to exhibit accurately according to their applications. 25-ER-6844; 25-ER-6839. As NAF required a new Exhibitor Agreement at each tradeshow, like the PPFA agreements, once the tradeshow concluded, the agreement became moot. Once present at each tradeshow, NAF asked some Defendants to sign separate non-disclosure agreements (NDAs), purporting to bar recording, for no additional consideration. 10-ER-2633-34, 6-ER-1305; 25-ER-6900. The district court erred in granting PPFA partial summary judgment and in denying Defendants judgment as a matter of law on PPFA's claims related to the four NAF agreements, because PPFA lacks standing to enforce any of them, and because the NDAs are unenforceable for lack of consideration.

a. PPFA lacks standing to enforce any agreements between NAF and individual Defendants. PPFA claims to have third-party standing to enforce NAF's agreements with Defendants because it employs some fellow conference attendees. But this in actuality is a claim for fourth-party standing, a step even further removed than third parties to a

contract. California law does not grant distant parties standing to enforce contracts.[10]

Generally, a non-party to a contract lacks standing to enforce the contract or to recover damages for its breach. *Windham at Carmel Mountain Ranch Assn. v. Super. Ct.*, 109 Cal. App. 4th 1162, 1173 (2003). In limited instances, a third-party may enforce a contract if the contract was "made expressly for the benefit of a third person." Cal. Civ. Code § 1559. The intent to benefit another party must be expressly manifested, so that the promisor understands the benefit is intended for the beneficiary. *Schauer v. Mandarin Gems of Cal.*, 125 Cal. App. 4th 949, 957 (2005). "[E]xpressly" as used in the statute and case law means "in direct or unmistakable terms; explicitly; definitely; directly." *Id.*

Thus, a third-party beneficiary may only enforce a contract if it unmistakably indicates shows that at least one of the contracting parties specifically intended for the third party to benefit from and enforce the

[10] The NAF agreements do not include a choice of law provision, so the governing law depends on where the contract was to be performed. Cal. Civ. Code § 1646. The agreements were all executed and performed in California or Maryland. California law and Maryland law are substantially similar as to relevant non-party beneficiary law. *See*, *e.g.*, *Goonewardene v. ADP*, 6 Cal. 5th 817, 829-30 (2019) (applying California's non-party beneficiary law); *Dickerson v. Longoria*, 995 A.2d 721, 741 (2010) (applying Maryland's).

contract. There is no evidence of such intent here. The NAF agreements do not refer or imply any benefit to anyone other than NAF. 25-ER-6837, 25-ER-6844, 25-ER-6900. There is no indication from the contract language (clear or otherwise) that by signing the agreements with BioMax, NAF intended to protect even conference participants, let alone those participants' employers. 25-ER-6837, 25-ER-6844, 25-ER-6900.

Moreover, Plaintiffs admitted no evidence at trial that any party to NAF's agreements with Defendants intended the other conference attendees' corporate employers to benefit from those contracts. All evidence, in fact, was to the contrary. *See* 6-ER-1364 ("Q. And NAF would not allow a single representative of an entity to sign on behalf of all—of other staff members or whatever of that entity, is that correct? A. That's correct. Q. Okay. And, because NAF viewed this as an agreement between the individual and NAF. Is that correct? A. Yes. That's correct.").

Plaintiffs have also identified no legal theory supporting standing to sue as essentially fourth-party beneficiaries. *Accord* 1-ER-25 (district court resolving question of Plaintiffs' standing in their favor without referencing any law or specific evidence). Defendants were thus entitled

to judgment as a matter of law on Planned Parenthood's contract claims predicated on agreements with NAF.[11]

b. Even if PPFA had standing to pursue claims under the NAF NDAs, those claims still fail because "[p]ast consideration cannot support a contract." *Passante v. McWilliam*, 53 Cal. App. 4th 1240, 1247 (1997). NAF's NDAs, presented at conference registration, rested solely on the past consideration exchanged when BioMax entered into the NAF exhibitor agreements. 10-ER-2633-34.

To attend the NAF conferences, BioMax completed registration forms a few weeks before each conference. 11-ER-2922-26; 25-ER-6844, 6837. Each registration form included the same language: "Return the completed application with credit card information or check payable to NAF for the full cost of exhibiting and registration for educational sessions. . . . When countersigned by NAF, this serves as a contract for exhibit space and the following [Exhibitor Agreement] are expressly incorporated herein." 25-ER-6844, 6837. Neither the instructions nor

[11] The National Abortion Federation is currently proceeding in its own right against Defendants, alleging, inter alia, breach of these same agreements. *Nat'l Abortion Fed. v. Ctr. for Med. Progress, et al.*, No. 3:15-cv-3522-WHO (N.D. Cal.).

exhibitor agreements referenced additional conditions to exhibit and register for the educational sessions at the NAF conference. 25-ER-6844, 6837. In 2014, Defendants paid the $3,235.00 exhibitor fee and was accepted, on those terms alone, for admission into the NAF conference. 11-ER-2921-22, 2896.

At the conference, Defendants were told signing a NAF NDA was an additional condition for exhibiting.[12] 10-ER-2633-34; 6-ER-1305; 25-ER-6900. By that time, the fee securing their exhibit at the conference under the exhibitor agreement was non-refundable. 11-ER-2921-22. Defendants did not receive any new consideration for signing the NAF NDAs. *Id.* Past consideration cannot support a contract. *Passante*, 53 Cal. App. 4th at 1247.

Because there was no new consideration for the NAF NDAs, Defendants were entitled to judgment as a matter of law on the breach claims based on the NAF NDAs—namely, breach of the non-recording provision. This Court should reverse the district court's judgment.

[12] However, NAF's representative at trial acknowledged that besides Defendants, not all attendees at their tradeshows signed the NDAs. 6-ER-1334-35 & 1355-56 & 1381.

C. The district court erroneously instructed the jury that the court had ruled Defendants breached the NAF contracts by disclosing confidential information.

Erroneously and over Defendants' objection, the district court instructed the jury that it had already ruled that Defendants had breached the NAF agreements by "disclosing confidential information," 16-ER-4282, even though the court had not so ruled and there was no evidence of any such breach. 1-ER-110. The jury awarded Planned Parenthood $49,360, as "security" damages relating to PPFA's Dr. Nucatola, as a result of Defendants' supposed breach of the NAF agreements, including by "disclosing confidential information." 18-ER-4884.

The instruction was erroneous, misleading, and prejudicial. The court had ruled (erroneously, Defendants maintain, because the contract terms are ambiguous) *only* that Defendants breached the NAF agreements by misrepresenting their identities and recording private conversations. 1-ER-110. The court *never ruled* (erroneously or not) that Defendants breached the NAF agreements by disclosing confidential information. *Id.* The instruction thus falsely represented to the jurors that they must accept as true that Defendants had disclosed private

information. This prejudiced Defendants and tainted the jury's deliberations on breach of the NAF agreements as well as other claims, and in assessing damages. It also gave the false and prejudicial impression that Defendants injured Plaintiffs by publishing recordings they made of Nucatola at a NAF conference, which was not even alleged, much less proven. 20-ER-5315. *See also* Section I.B-C above (court's pervasive errors).

III. The District Court Erred in Entering Judgment Against Lopez On Any Claims Given His Limited Role.

All of Planned Parenthood's claims fail as to all Defendants. *See* Merritt Brief, Rhomberg Brief, Newman Brief. But the trespass, breach, fraud, conspiracy, and RICO claims are uniquely deficient as to Defendant Lopez.

Lopez had a limited role in the investigation. Originally hired to transcribe footage part-time for CMP, Lopez uniquely described himself among Defendants as not holding pro-life views.[13] 5-ER-1035-45. Lopez

[13] At trial, Plaintiffs attacked the other Defendants for their pro-life beliefs, including strong opposition to Planned Parenthood, but they conceded Lopez was different in closing argument and in their declining to seek punitive damages from him (and later, in declining to seek injunctive relief against him). 16-ER-4421. As noted *supra*, those other Defendants were severely hamstrung in demonstrating the reasonableness of their positions, having

became a contract investigator only after learning about abuse in the fetal tissue procurement industry through his transcriptions and further research, concerned about monetary incentives in fetal harvesting vitiating patient autonomy. 5-ER-1035-45. Lopez was not involved in the management of the project. 10-ER-2495, 11-ER-2878. He was never on CMP's board. 10-ER-2508.

As an investigator, Lopez used his own name and ID, and was by any articulated standard indistinguishable from any other exhibitor at a Planned Parenthood tradeshow. 5-ER-1060. He was unaware of anyone else using a fake ID. 5-ER-1061. He never met and did not know supposed co-conspirators Newman and Rhomberg until this lawsuit was filed. 5-ER-1075. He received no personal advantage over and above the fees he was paid as a contractor for CMP for actions he took on behalf of CMP. 5-ER-1044-45. *See Applied Equip. Corp. v. Litton*, 7 Cal. 4th 503, 512 n.4 (1994) ("Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities

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been barred from putting on their videos and other evidence supporting their allegations against Plaintiffs.

on behalf of the corporation and not as individuals for their individual advantage.").

Because of his limited involvement in the Human Capital Project, Planned Parenthood is not entitled to any relief against Lopez on any claims.

IV. The District Judge Should Have Been Disqualified.

In 2017, Defendants timely moved to disqualify the district judge under 28 U.S.C. §§ 144 and 455. The motion and supporting affidavit presented evidence of actual bias and asserted that the evidence would lead a reasonable person to question his impartiality. 24-ER-6437 (affidavit).[14] The district court's denial of this motion was erroneous.

Section 144 permits litigants to move to disqualify a judge based on bias: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein,

[14] Defendants previously sought a discretionary writ of mandamus for the district court's denial of the motion to recuse. No. 17-73313. The Court, without addressing the merits, summarily denied the "extraordinary remedy of mandamus," 24-ER-6434, which deferred the recusal issue until appeal of the final judgment. *See* 28 U.S.C. § 1291; *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1078-79 (9th Cir. 1988).

but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. Section 455 requires the judge to "disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*." 28 U.S.C. § 455(a) (emphasis added). Section 455's broader scope requires the judge to "avoid *even the appearance* of partiality." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (emphasis added) (internal quotation omitted). "If it is a close case, the balance tips in favor of recusal." *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008).

In high profile cases like this one, it is even more critical to avoid the appearance of partiality. *In re Bernard*, 31 F.3d 842, 845 (9th Cir. 1994); *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996). "No Court should tolerate even the slightest chance that its continued participation in a high profile lawsuit could taint the public's perception of the fairness of the outcome." *Melendres v. Arpaio*, 2009 WL 2132693, *15 (D. Ariz. July 15, 2009).

A. The district judge's impartiality is questionable based on the evidence submitted by defendants.

The facts, which were undisputed by the district judge, would lead a reasonable person to question the district judge's impartiality.

First, the district judge had a professional connection to Planned Parenthood. *See* 24-ER-6438, 6443-50. He was Board Secretary of Good Samaritan Family Resource Center ("GSFRC") when that organization entered into a "key partnership" with Plaintiff Planned Parenthood Northern California (PPNorCal), at that time d/b/a Planned Parenthood Shasta Pacific (PPSP). 24-ER-6438. That partnership established a Planned Parenthood facility providing abortion referrals inside GSFRC's premises. *Id.* In his Senate Judiciary Questionnaire, the district judge stated that for over a decade, he "assisted the [GSFRC] on many legal issues." *Id.*; 24-ER-6451-83. The district judge was still associated with GSFRC, and thus, with Planned Parenthood, as a board member until at least 2015. 24-ER-6439, 6535-37. The district judge's professional work for GSFRC while it partnered with Planned Parenthood to establish and operate a Planned Parenthood facility creates the appearance of bias, if not actual bias. Indeed, the district judge's Planned Parenthood clinic referred pregnant patients to the very PPNorCal/PPSP surgical centers that sold fetal tissue and were exposed by Defendants' reporting.

Further, on multiple occasions, the Facebook account for the district judge's wife, using a photo of herself with the judge as her profile

picture, publicly supported social media posts that applauded since dismissed criminal charges against Mr. Daleiden in Texas and described Defendants' work as "domestic terrorism" and their published videos as "heavily edited videos by a sham organization run by extremists who will stop at nothing to deny women legal abortion services." 24-ER-6440, 6595-6603. The account also expressed support for Planned Parenthood as part of a social media campaign designed to garner support amid the public scandal caused by the release of the videos. 24-ER-6440; 24-ER-6584-94. To be clear, this is not a situation in which a judge's immediate family member simply expressed views on a political issue related to a case. Here, the district judge's wife publicly expressed views directly related to the merits of the case before him, using the judge's image in her statements. That creates an unacceptable appearance of bias. *See Melendres*, 2009 WL 2132693, at *15.

Even if these facts did not prove actual bias, they show that the district judge's impartiality might reasonably be questioned, which requires disqualification. The fact that this is a high-profile case justifies even more concern, and in other cases—based on less evidence—courts have found disqualification warranted. *See Tucker*, 78 F.3d at 1323-25

(disqualifying district judge from presiding over the trial of the Governor based on news articles questioning partiality); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (disqualifying district judge when defendant was charged with bombing that damaged judge's chambers because his impartiality might reasonably be questioned); *Melendres*, 2009 WL 2132693, at *15 (Judge Murguia recusing herself because of her sister's public positions "highly disparaging of specific Defendants" and taking "a strong stand on disputed factual matters lying at the heart of the litigation").

This case is not a close call, but even if it were, disqualification is required. *Holland*, 519 F.3d at 912; *Melendres*, 2009 WL 2132693, at *15. The Court need not question the district judge's integrity and professionalism to recognize that his disqualification was necessary to preserve the appearance of impartiality. *Tucker*, 78 F.3d at 1325; *Nichols*, 71 F.3d at 352; *Melendres*, 2009 WL 2132693, at *15.

B. The lower court's denial of the recusal motion was an abuse of discretion.

Despite several legitimate grounds for questioning the district judge's impartiality in the case, the district judge did not respond to the factual allegations and merely brushed them off, which amounts to an

abuse of discretion. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (per curiam) (because of the district court's cursory analysis, "the District Court's discretion 'was barely exercised here,' [and] its order provides no meaningful basis for even deferential review" (citation omitted)). The district judge has firsthand knowledge of the facts of his association with Planned Parenthood and his wife's use of his image in support for one of the parties before him. But unlike his detailed explanation in another case, he merely stated here that he did not find the allegations "legally sufficient," 2-ER-347.[15] *Compare Morris v. Petersen*, 2015 WL 78769 (N.D. Cal. Jan. 5, 2015) (Orrick, J.) (explaining in detail why recusal was not appropriate by responding to each specific allegation).

Though the district judge found the allegations legally insufficient, he referred the matter to another district judge. The second district judge suggested that Defendants' affidavit in support of recusal was speculative. 2-ER-344. But the second district judge relied on cases in

[15] Aside from being cursory, that conclusion is also clearly erroneous because the affidavit is legally sufficient under the requisite standard: it (1) alleges material facts with particularity; (2) taken as true, the facts would indicate to a reasonable person that a bias exists; and (3) the facts show that the bias is personal. *Reiffen v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1022 (N.D. Cal. 2001).

which litigants offered no factual basis for recusal at all. *See Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993); *Clemens v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 428 F.3d 1175, 1180 (9th Cir. 2005). Here, Defendants did not speculate; Defendants alleged particular facts about the district judge's relationship with Planned Parenthood in a lengthy affidavit supported by evidence. 24-ER-6437. Moreover, the district court was required to "take[] as true" these well pleaded and substantiated facts absent any repudiation by the district judge. *Ronwin v. State Bar of Ariz.*, 686 F.2d 692, 701 (9th Cir. 1981), *rev'd on other grounds sub nom. Hoover v. Ronwin*, 466 U.S. 558 (1984); *see also Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976) ("Neither the truth of the allegations nor the good faith of the pleader may be questioned."). The district court did not do so, resulting in clear error.

Any of the facts alleged in the affidavit would suffice to show partiality; cumulatively, they are more than enough to show it. The district court abused its discretion in denying Defendants' recusal motion. Thus, even if this Court does not recognize grounds for outright reversal or direct entry of judgment for Defendants on all claims, it

should vacate the judgment as to any remaining claims and reassign this case to a different district judge on remand.

CONCLUSION

For these reasons and the reasons presented in co-Defendants' opening briefs, the Court should reverse the district court's judgment on all claims and direct entry of judgment for Defendants. To the extent any claims remain, this Court should vacate the entire remaining judgment and remand for a new trial, ordering that the case be reassigned to a different district court judge.

Respectfully submitted

February 26, 2021,

/s/ Charles S. LiMandri

Charles S. LiMandri (CA Bar No. 110841)
Paul M. Jonna (CA Bar No. 265389)
Jeffrey M. Trissell (CA Bar No. 292480)
Milan L. Brandon (CA Bar No. 326953)
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
Tel: (858) 759-9948
Fax: (858) 759-9938
cslimandri@limandri.com
pjonna@limandri.com
jtrissell@limandri.com
mbrandon@limandri.com

Attorneys for Defendants the Center for Medical Progress, BioMax Procurement Services, LLC, David Daleiden, and Gerardo Adrian Lopez

Thomas Brejcha, *pro hac vice*
Peter Breen, *pro hac vice*
Matthew F. Heffron, *pro hac vice*
THOMAS MORE SOCIETY
309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
tbrejcha@thomasmoresociety.org
pbreen@thomasmorsociety.org
mheffron@thomasmoresociety.org

Attorneys for Defendant David Daleiden

Harmeet K. Dhillon (CA Bar No. 207873)
Mark P. Meuser (CA Bar No. 231335)
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, CA 94108
415-433-1700
415-520-6593 (fax)
harmeet@dhillonlaw.com
mmeuser@dhillonlaw.com

Attorneys for Defendants the Center for Medical Progress, BioMax Procurement Services, LLC, and David Daleiden

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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- The three other Defendants-Appellants' principal appeals, consolidated with this appeal (No. 20-16070): Planned Parenthood Fed'n of Am., et al. v. Ctr. for Med. Progress, et al., Nos. 20-16068, 20-16773, and 20-16820.

- Defendants-Appellants' joint appeal concerning the award of attorneys' fees and costs in favor of Plaintiffs-Appellees: Planned Parenthood Fed'n of Am., et al. v. Ctr. for Med. Progress, et al., No. 21-15124.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

A. U.S. Constitution, amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. 42 U.S.C. § 289g

(a) Conduct or support by Secretary; restrictions

The Secretary may not conduct or support any research or experimentation, in the United States or in any other country, on a nonviable living human fetus ex utero or a living human fetus ex utero for whom viability has not been ascertained unless the research or experimentation--

(1) may enhance the well-being or meet the health needs of the fetus or enhance the probability of its survival to viability; or

(2) will pose no added risk of suffering, injury, or death to the fetus and the purpose of the research or experimentation is the development of important biomedical knowledge which cannot be obtained by other means.

(b) Risk standard for fetuses intended to be aborted and fetuses intended to be carried to term to be same

In administering the regulations for the protection of human research subjects which--

(1) apply to research conducted or supported by the Secretary;

(2) involve living human fetuses in utero; and

(3) are published in section 46.208 of part 46 of title 45 of the Code of Federal Regulations;

or any successor to such regulations, the Secretary shall require that the risk standard (published in section 46.102(g) of such part 46 or any successor to such regulations) be the same for fetuses which are intended to be aborted and fetuses which are intended to be carried to term.

C. 42 U.S.C. § 289g-1

(a) Establishment of program

(1) In general

The Secretary may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes.

(2) Source of tissue

Human fetal tissue may be used in research carried out under paragraph (1) regardless of whether the tissue is obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth.

(b) Informed consent of donor

(1) In general

In research carried out under subsection (a), human fetal tissue may be used only if the woman providing the tissue makes a statement, made in writing and signed by the woman, declaring that—

(A) the woman donates the fetal tissue for use in research described in subsection (a);

(B) the donation is made without any restriction regarding the identity of individuals who may be the recipients of transplantations of the tissue; and

(C) the woman has not been informed of the identity of any such individuals.

(2) Additional statement

In research carried out under subsection (a), human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that—

(A) in the case of tissue obtained pursuant to an induced abortion—

(i) the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research;

(ii) no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue; and

(iii) the abortion was performed in accordance with applicable State law;

(B) the tissue has been donated by the woman in accordance with paragraph (1); and

(C) full disclosure has been provided to the woman with regard to—

(i) such physician's interest, if any, in the research to be conducted with the tissue; and

(ii) any known medical risks to the woman or risks to her privacy that might be associated with the donation of the tissue and that are in addition to risks of such type that are associated with the woman's medical care.

(c) Informed consent of researcher and donee

In research carried out under subsection (a), human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual—

(1) is aware that—

(A) the tissue is human fetal tissue;

(B) the tissue may have been obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth; and

(C) the tissue was donated for research purposes;

(2) has provided such information to other individuals with responsibilities regarding the research;

(3) will require, prior to obtaining the consent of an individual to be a recipient of a transplantation of the tissue, written acknowledgment of receipt of such information by such recipient; and

(4) has had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research.

(d) Availability of statements for audit

(1) In general

In research carried out under subsection (a), human fetal tissue may be used only if the head of the agency or other entity conducting the research involved certifies to the Secretary that the statements required under subsections (b)(2) and (c) will be available for audit by the Secretary.

(2) Confidentiality of audit

Any audit conducted by the Secretary pursuant to paragraph (1) shall be conducted in a confidential manner to protect the privacy rights of the individuals and entities involved in such research, including such individuals and entities involved in the donation, transfer, receipt, or transplantation of human fetal tissue. With respect to any material or information obtained pursuant to such audit, the Secretary shall—

(A) use such material or information only for the purposes of verifying compliance with the requirements of this section;

(B) not disclose or publish such material or information, except where required by Federal law, in which case such material or information shall be coded in a manner such that the identities of such individuals and entities are protected; and

(C) not maintain such material or information after completion of such audit, except where necessary for the purposes of such audit.

(e) Applicability of State and local law

(1) Research conducted by recipients of assistance

The Secretary may not provide support for research under subsection (a) unless the applicant for the financial assistance involved agrees to conduct the research in accordance with applicable State law.

(2) Research conducted by Secretary

The Secretary may conduct research under subsection (a) only in accordance with applicable State and local law.

(f) Report

The Secretary shall annually submit to the Committee on Energy and Commerce of the House of Representatives, and to the Committee on Labor and Human Resources of the Senate, a report describing the activities carried out under this section during the preceding fiscal year, including a description of whether and to what extent research under subsection (a) has been conducted in accordance with this section.

(g) "Human fetal tissue" defined

For purposes of this section, the term "human fetal tissue" means tissue or cells obtained from a dead human embryo or fetus after a spontaneous or induced abortion, or after a stillbirth.

D. 42 U.S.C. § 289g-2

(a) Purchase of tissue

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.

(b) Solicitation or acceptance of tissue as directed donation for use in transplantation

It shall be unlawful for any person to solicit or knowingly acquire, receive, or accept a donation of human fetal tissue for the purpose of transplantation of such tissue into another person if the donation affects interstate commerce, the tissue will be or is obtained pursuant to an induced abortion, and—

(1) the donation will be or is made pursuant to a promise to the donating individual that the donated tissue will be transplanted into a recipient specified by such individual;

(2) the donated tissue will be transplanted into a relative of the donating individual; or

(3) the person who solicits or knowingly acquires, receives, or accepts the donation has provided valuable consideration for the costs associated with such abortion.

(c) Solicitation or acceptance of tissue from fetuses gestated for research purposes

It shall be unlawful for any person or entity involved or engaged in interstate commerce to—

(1) solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue; or

(2) knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal.

(d) Criminal penalties for violations

(1) In general

Any person who violates subsection (a), (b), or (c) shall be fined in accordance with title 18, subject to paragraph (2), or imprisoned for not more than 10 years, or both.

(2) Penalties applicable to persons receiving consideration

With respect to the imposition of a fine under paragraph (1), if the person involved violates subsection (a) or (b)(3), a fine shall be imposed in an amount not less than twice the amount of the valuable consideration received.

(e) Definitions

For purposes of this section:

(1) The term "human fetal tissue" has the meaning given such term in section 289g–1(g) of this title.

(2) The term "interstate commerce" has the meaning given such term in section 321(b) of title 21.

(3) The term "valuable consideration" does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.

E. 42 U.S.C. § 274e

(a) Prohibition

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. The preceding sentence does not apply with respect to human organ paired donation.

(b) Penalties

Any person who violates subsection (a) shall be fined not more than $50,000 or imprisoned not more than five years, or both.

(c) Definitions

For purposes of subsection (a):

(1) The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human

organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term "interstate commerce" has the meaning prescribed for it by section 321(b) of title 21.

(4) The term "human organ paired donation" means the donation and receipt of human organs under the following circumstances:

(A) An individual (referred to in this paragraph as the "first donor") desires to make a living donation of a human organ specifically to a particular patient (referred to in this paragraph as the "first patient"), but such donor is biologically incompatible as a donor for such patient.

(B) A second individual (referred to in this paragraph as the "second donor") desires to make a living donation of a human organ specifically to a second particular patient (referred to in this paragraph as the "second patient"), but such donor is biologically incompatible as a donor for such patient.

(C) Subject to subparagraph (D), the first donor is biologically compatible as a donor of a human organ for the second patient, and the second donor is biologically compatible as a donor of a human organ for the first patient.

(D) If there is any additional donor-patient pair as described in subparagraph (A) or (B), each donor in the group of donor-patient pairs is biologically compatible as a donor of a human organ for a patient in such group.

(E) All donors and patients in the group of donor-patient pairs (whether 2 pairs or more than 2 pairs) enter into a single agreement to donate and receive such human organs, respectively, according to such biological compatibility in the group.

(F) Other than as described in subparagraph (E), no valuable consideration is knowingly acquired, received, or otherwise transferred with respect to the human organs referred to in such subparagraph.

F. 42 U.S.C. § 289g

(a) Conduct or support by Secretary; restrictions

The Secretary may not conduct or support any research or experimentation, in the United States or in any other country, on a nonviable living human fetus ex utero or a living human fetus ex utero for whom viability has not been ascertained unless the research or experimentation—

(1) may enhance the well-being or meet the health needs of the fetus or enhance the probability of its survival to viability; or

(2) will pose no added risk of suffering, injury, or death to the fetus and the purpose of the research or experimentation is the development of important biomedical knowledge which cannot be obtained by other means.

(b) Risk standard for fetuses intended to be aborted and fetuses intended to be carried to term to be same

In administering the regulations for the protection of human research subjects which—

(1) apply to research conducted or supported by the Secretary;

(2) involve living human fetuses in utero; and

(3) are published in section 46.208 of part 46 of title 45 of the Code of Federal Regulations;

or any successor to such regulations, the Secretary shall require that the risk standard (published in section 46.102(g) of such part 46 or any successor to such regulations) be the same for fetuses which are intended to be aborted and fetuses which are intended to be carried to term.

G. 18 U.S.C. § 1958

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate or foreign commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

H. 18 U.S.C. § 1531

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

(b) As used in this section—

(1) the term "partial-birth abortion" means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term "physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform

abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(c)

(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include—

(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

(B) statutory damages equal to three times the cost of the partial-birth abortion.

(d)

(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

I. 1 U.S.C. § 8

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section.

J. 45 C.F.R. § 46.204

Pregnant women or fetuses may be involved in research if all of the following conditions are met:

(a) Where scientifically appropriate, preclinical studies, including studies on pregnant animals, and clinical studies, including studies on nonpregnant women, have been conducted and provide data for assessing potential risks to pregnant women and fetuses;

(b) The risk to the fetus is caused solely by interventions or procedures that hold out the prospect of direct benefit for the woman or the fetus; or, if there is no such prospect of benefit, the risk to the fetus is not greater than minimal and the purpose of the research is the development of important biomedical knowledge which cannot be obtained by any other means;

(c) Any risk is the least possible for achieving the objectives of the research;

(d) If the research holds out the prospect of direct benefit to the pregnant woman, the prospect of a direct benefit both to the pregnant woman and the fetus, or no prospect of benefit for the woman nor the fetus when risk to the fetus is not greater than minimal and the purpose of the research is the development of important biomedical knowledge that cannot be obtained by any other means, her consent is obtained in accord with the informed consent provisions of subpart A of this part;

(e) If the research holds out the prospect of direct benefit solely to the fetus then the consent of the pregnant woman and the father is obtained in accord with the informed consent provisions of subpart A of this part, except that the father's consent need not be obtained if he is unable to consent because of unavailability, incompetence, or temporary incapacity or the pregnancy resulted from rape or incest.

(f) Each individual providing consent under paragraph (d) or (e) of this section is fully informed regarding the reasonably foreseeable impact of the research on the fetus or neonate;

(g) For children as defined in § 46.402(a) who are pregnant, assent and permission are obtained in accord with the provisions of subpart D of this part;

(h) No inducements, monetary or otherwise, will be offered to terminate a pregnancy;

(i) Individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy; and

(j) Individuals engaged in the research will have no part in determining the viability of a neonate.

K. 28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

L. 28 U.S.C. § 455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, 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