No. 17-202

In The

Supreme Court of the United States

DAVID DALEIDEN, CENTER FOR MEDICAL PROGRESS, AND BIOMAX PROCUREMENT SERVICES, LLC,
Petitioners,

v.

NATIONAL ABORTION FEDERATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Erroneously using the abuse-of-discretion standard, the Ninth Circuit upheld a prior restraint specifically intended to suppress information of significant public concern, on the grounds that the public interest is served by industry-wide secrecy. This Court should grant the petition.

I. THE NINTH CIRCUIT'S REJECTION OF HEIGHTENED REVIEW WHERE FIRST AMENDMENT RIGHTS ARE THREATENED WARRANTS REVIEW BY THIS COURT.

NAF asserts that the Ninth Circuit correctly applied an abuse of discretion standard in reviewing this preliminary injunction—a prior restraint on speech of great public interest. NAF focuses on the general rule of abuse-of-discretion appellate review of factual findings underlying decisions to grant or deny preliminary injunctions. Brief in Opposition ("Opp.") at 36–37.

In so doing, NAF ignores the rationale of this Court's repeated enunciation of a reviewing court's duty to conduct an "independent examination of the record as a whole, without deference to the trial court" when First Amendment freedoms are threatened. The rationale is, quite simply, that the usual standards of review, applied mechanistically as they were in the instant case, are not sufficiently rigorous for assurance that the lower court's ruling "does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers' Union of U.S., Inc.*, 466 U.S. 485, 498–99 (1984) (reconciling Fed. R. Civ. P. 52(a) standard of review

with heightened First Amendment review). Thus, the obligation to conduct an independent review

> rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 567–68 (1995). "The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501.

Appellate courts have recognized the force of the constitutional duty to conduct an independent review, including in reviewing preliminary injunctions. *See*, *e.g.*, *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (in reviewing preliminary injunction, court has "a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim") (Alito, J.); *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1994) (reviewing temporary restraining order, citing *Bose*); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("[S]ince appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court.").

Indeed, this Court, reviewing the issuance of a temporary injunction against leafleting, did not defer to the lower courts, but placed the burden of justifying the restraint squarely on the party seeking to suppress speech: "Any prior restraint on expression *comes to this Court* with a 'heavy presumption' against its constitutional validity. Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint." *Org. for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971) (citations omitted; emphasis added).

NAF cites cases where the lower court *granted* a preliminary injunction enjoining enforcement of a statute or government action on the grounds that the *statute or action itself impinged* on First Amendment rights. Opp. at 37. In such cases, the lower courts' *judgments* did not "intrude on the field of free expression" or threaten a loss of First Amendment freedoms. *E.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004) (reviewing preliminary injunction against enforcement of Child Online Protection Act); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (reviewing preliminary injunction against enforcement of topless dancing ban); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (reviewing injunction against display of Ten Commandments on government property as violation of Establishment Clause).

Finally, NAF attempts to create a distinction where none exists, arguing that the duty of independent review arises only in determining whether the restricted expression is the "type of speech" entitled to First Amendment protection.

Opp. at 37–38. However, this Court has independently reviewed "constitutional facts" underlying restrictions on speech beyond the bare question of whether the speech is a form of protected speech. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (whether facts supported finding of actual malice); *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 304 n.5 (2007) (challenge to sanction for violating recruiting rule); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003) (fraud conviction). The ultimate question whether speech is protected under the First Amendment necessarily includes relevant questions of constitutional fact about context, justification, and so forth.

Here, the Ninth Circuit gave complete deference to all of the district court's findings supporting a ruling infringing on First Amendment rights, including findings that in and of themselves were an affront to the First Amendment: that signing (or not) form contracts containing nondisclosure provisions constitutes a knowing and intelligent waiver of First Amendment rights, Pet. at 27–28; that public policy favors the suppression of information about abortion providers, Pet. at 28; that the contents of videos on a controversial matter of significant public interest were, in the court's view, "misleading," Pet. at 24;[1]

[1] NAF cites the brief *amici curiae* on behalf of journalism scholars criticizing Petitioners' actions. Opp. at 6. But the scholars formed their conclusions by relying on the district court's conclusions, rather than independently examining the videos. Doc. 87, at 7 n.4. By contrast, the Brief of Amici Susan B. Anthony List et al. relies on a detailed comparison of the highlight and full videos. Doc. 27, at 16–31.

and that third parties' speech activities such as picketing and commenting on the Internet constituted irreparable harm. Pet. at 25–26.[2] These are exactly the types of findings that require a reviewing court to "search the record" to ensure that constitutional freedoms are "not defeated by insubstantial findings of fact screening reality." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982).

This Court should either grant plenary review, or, in the alternative, grant review, summarily reverse, and remand for the Ninth Circuit to comply with its duty to conduct an independent examination of the record.

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[2] The Ninth Circuit deferred to these findings, based solely on a written record, even when the District Court's conclusions went farther than the hearsay on which it relied. *See* App. 39a: "Following release of the videos . . . the subjects of those videos . . . have received a large amount [of] harassing communications (including death threats)." The district court cited a series of Internet articles and accompanying comments, uncovered by NAF staff "mining" through thousands of comments on the Internet. There was no evidence that the subject of any video *received* any harassing communications. But NAF said it, the district court adopted it, and the Ninth Circuit deferred to it.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

A. The Injunction at Issue Is an Unconstitutional Prior Restraint.

NAF contends vigorously with the straw man that, even as journalists, CMP and Daleiden have no First Amendment right of access to private meetings, nor a First Amendment right to "break and enter an office or dwelling" to gather information. Opp. at 19. But Daleiden was *invited* to the NAF meetings; CMP *paid for* the right to attend, converse with other attendees, and gather information. The issue presented here is whether, having sold access to its "private" meetings, NAF can enlist judicial contempt power to muzzle meeting attendees because of nondisclosure provisions in form agreements.

Petitioners have not argued that their status as investigative journalists immunizes them from generally applicable laws. But their purpose of engaging in investigative journalism does mean that their use of misrepresentation (including assumed identities) to gain access to the NAF meetings was not fraud or breach of contract but a form of protected speech. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018) (misrepresentation to gain access to private property is protected speech and cannot on its face be characterized as fraud).

NAF also asserts that the prior restraint doctrine only applies "where the government attempts to

preclude speech," Opp. at 20, presumably meaning when the government is the instigator of the restriction on speech. This is manifestly incorrect. The prior restraint doctrine applies whether or not the government is the party seeking the injunction. *Keefe,* 402 U.S. at 419.

B. NAF's Reliance on Protective Orders Is Misplaced.

Searching for precedent for the prior restraint at issue, NAF relies *exclusively* on cases involving protective orders, including this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). NAF claims that "courts routinely issue protective orders barring litigants from publicly disclosing information that the parties have agreed to keep confidential." Opp. at 21, 23.

NAF is incorrect. The salient point in these cases is not that the parties may have *agreed* to a protective order, but that courts are authorized under federal or state law to issue such orders because the orders further a narrow and significant purpose related to fair administration of a judicial system that can compel unwilling parties to disclose information. *Rhinehart,* 467 U.S. at 32 ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)").

Agreement of the parties is irrelevant to protective orders, and indeed courts have been specifically instructed not to let parties dictate terms of protective orders to serve their own interests. *Procter & Gamble*, 78 F.3d at 227 ("[T]he District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties").

NAF's exclusive reliance on cases involving protective orders is tantamount to an admission that it, too, has failed to find any federal case (and only one state case) in which a court order restraining speech has been based on an agreement between private parties.

C. Case-by-Case Approval of Prior Restraints to Enforce Confidentiality Agreements Enables Viewpoint Discrimination.

Citing *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), NAF claims that what it had in mind all along was that a waiver of constitutional rights could only result in an injunction against speech if, considered on a case-by-case basis, the balancing of competing public policy interests favored enforcement of the waiver.[3] Opp. at 24–25.

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[3] NAF claims, as it did below, that the petitioners did not raise on appeal the district court's finding of a waiver. The Ninth Circuit did not agree and instead held that the district court "did not clearly err" in finding a waiver. App. 5a.

Leonard, however, did not deal with waiver of the First Amendment right to speak publicly, nor with the remedy of an injunction suppressing information from the public. Pet. at 17–18. Thus, the Ninth Circuit had no occasion to consider the heavy weight of the constitutional presumption against the validity of prior restraints on speech.

More importantly, NAF's and the lower courts' endorsement of a case-by-case consideration of a mélange of public policies, such as resulted in the injunction issued below, is a recipe for viewpoint discrimination in suppressing information from the public. As this Court has recognized, "Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994). Courts should not be allowed to pick and choose, on the basis of amorphous and debatable public policies, which professions, trade groups, and industries have a particular need to associate in privacy and which don't (abortion providers vs. gun manufacturers and cigarette retailers); which speakers can be trusted to disclose information to the public with "journalistic integrity," *cf.* App. 75a, and which cannot; and which topics deserve further airing and which do not.[4] Rather, as set forth in the Petition at 14–17, any exception to the near-universal prohibition on prior restraints could only be based on significant, limited, clearly articulable, and neutral public policy interests, such as the national security interest in

[4] *See* App. 75a ("Weighing against the public's general interest in disclosure . . . is the fact that there is a constitutional right to abortions); App. 62a ("[T]his sort of information is already part of the public debate over abortion.")

protecting classified information, *Snepp v. United States*, 444 U.S. 507 (1980), the commercial interest in protecting trade secrets as a form of valuable property, *DVD Copy Control Ass'n., Inc. v. Bunner*, 31 Cal. 4th 864 (2003), and the interest in fair and efficient administration of the judicial process. *Rhinehart,* 467 U.S. 20.[5]

NAF contends that there is no reason why statutorily protected trade secrets are more deserving of protection than its "associational right to keep its annual meetings private," which right is "protected by the Constitution." Opp. at 22; *see also* Opp. at 25, 32. Leaving aside the fact that NAF itself invited strangers to its meetings, NAF also misconstrues one of the fundamental principles of the right of association: it is a right against *government* compulsion.

First Amendment rights are a shield against government action, not private action. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (only Thirteenth Amendment right to travel and to be free of involuntary servitude have been recognized as rights against private encroachment; "[a] burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth"); *Hurley*, 515 U.S. at 566 ("guarantees of free speech and equal protection guard only against encroachment by the

[5] Whether prior restraints are permissible to prohibit libelous publications or copyright violations is a matter of ongoing scholarly debate, but in such instances an injunction would not have the express purpose of preventing the public from receiving true information, as does the injunction here.

government and 'erect no shield against merely private conduct'") (quoting *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948)).

Daleiden and CMP did not violate or threaten NAF's members' associational privacy rights; as a matter of constitutional law, they *could not* violate those rights. The NAF exhibitor and confidentiality agreements are not bulwarks against constitutional violations,[6] but contracts of adhesion designed to prevent the secret practices of an entire trade group from being revealed to the public, lest the public demand reform, as it has in the past.

The national debate over partial birth abortion, which led to the federal government and dozens of states enacting legislation to ban the procedure, began when the public learned of a presentation at a NAF meeting. *Stenberg v. Carhart*, 530 U.S. 914, 987 (2000) ("Use of the partial birth abortion procedure achieved prominence as a national issue after it was publicly described by Dr. Martin Haskell . . . at the National Abortion Federation's September 1992 Risk Management Seminar"); *Gonzales v. Carhart*, 550 U.S. 124, 140 (2007) ("After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on 'partial birth abortion' proliferated.")

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[6] *Cf.* Opp. at 32: "The confidentiality agreements were put into place to secure NAF's constitutionally protected freedom. Refusing to enforce the confidentiality agreements would vitiate NAF's constitutional rights."

Determined not to be responsible for another public relations disaster, NAF began requiring meeting attendees, including members, to sign form confidentiality agreements. [7] NAF here tautologically declares that adherence to these secrecy agreements is critical to its privacy, and, even more dubiously, that its mission of providing medical and ethical guidance to its members and thereby advancing public safety would be compromised if outsiders were to learn any information from its meetings, including who attended. Opp. at 3.

The assertion that industry-wide secrecy promotes public safety runs counter to experience, common sense, and many statutory presumptions about the disinfectant effects of sunlight. However, the lower courts here were persuaded that that NAF's desire that its members be free to "gather at NAF meetings and share their confidences," App. 72a–73a, was sufficient to overcome the heavy presumption against the constitutionality of prior restraints—amply illustrating the dangers in allowing courts to roam through thickets of potential "public" interests, deciding which ones will justify suppressing speech.

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[7] NAF asserts that "an activist group offered bounties to infiltrate NAF meetings in the 1990's," Opp. at 2–3, implying that the bounties were rewards for violent acts against abortion providers. The president of NAF stated that the "bounties" were "monetary rewards for material from NAF meetings, including audio recordings of our Annual Meeting sessions." ER220.

Any party seeking injunctive relief to enforce a form non-disclosure provision will by definition be able to point to some privacy interest the agreement was created to protect. Just as NAF can see no reason why its privacy interests are not entitled to as much protection as trade secrets, litigants representing other controversial industries undoubtedly believe that their "confidences" are entitled to as much protection from public scrutiny as NAF's.

The Second and Fourth Circuits recognized that the use of injunctions and contempt to enforce private agreements to keep information from the public is impermissible judicial censorship. Pet. at 15–16. The Ninth Circuit has now staked out a contrary position, one highly susceptible to viewpoint-based application. This Court should grant review.

CONCLUSION

This Court should grant certiorari and either set the case for plenary review or summarily reverse and remand for consideration using the correct standard of review.

Respectfully submitted,

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