No. _____

In the Supreme Court of the United States

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

v.

NATIONAL ABORTION FEDERATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 17, 2023

QUESTION PRESENTED

Petitioners sparked national debate in the summer of 2015 with the release of videos, recorded during an undercover investigation, which raised legal and ethical concerns about conduct in the abortion industry. Public discussion of Petitioners' videos prompted investigations and legal changes across the country at the federal, state, and local levels. *See, e.g.*, *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 351 (5th Cir. 2020) (en banc). But on the motion of an abortion-industry trade organization opposed to Petitioners' message, the district court entered (and the Ninth Circuit affirmed) a sweeping permanent injunction against the release of over 500 hours of further recordings, without applying *any* level of First Amendment scrutiny.

Is the district court's suppression of speech about a high-profile and highly charged issue of public debate an unconstitutional prior restraint?

PARTIES TO THE PROCEEDING

Petitioners are Center for Medical Progress, BioMax Procurement Services, LLC, and David Daleiden. Petitioners were the defendants below.

Respondent is National Abortion Federation. Respondent was the plaintiff below.

RULE 29.6 STATEMENT

Petitioner Center for Medical Progress has no parent company or publicly held company with a 10% or greater ownership interest in it. BioMax Procurement Services, LLC is wholly owned by Center for Medical Progress.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

National Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-3522-WHO (Feb. 5, 2016) (order granting preliminary injunction)

National Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-3522-WHO (July 17, 2017) (order of civil contempt)

National Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-3522-WHO (Apr. 7, 2021) (order granting summary judgment and permanent injunction)

National Abortion Federation v. Center for Medical Progress, et al., No. 15-cv-3522-WHO (May 4, 2021) (judgment and permanent injunction)

United States Court of Appeals (9th Cir.):

National Abortion Federation v. Center for Medical Progress, et al., No. 16-15460 (Mar. 29, 2017) (memorandum opinion)

National Abortion Federation v. Center for Medical Progress, et al., No. 17-6622 (June 5, 2019) (opinion)

National Abortion Federation v. Center for Medical Progress, et al., No. 18-17195 (Nov. 15, 2019) (memorandum opinion)

National Abortion Federation v. Center for Medical Progress, et al., No. 21-15953 (Aug. 19, 2022) (memorandum opinion)

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INTRODUCTION

"[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). Because a "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment," it "comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968). Yet the district court issued—and the Ninth Circuit affirmed—a sweeping anti-publication injunction without applying *any* level of First Amendment scrutiny, much less strict scrutiny.

David Daleiden and the Center for Medical Progress conducted a multi-year undercover journalism campaign to expose suspected criminal activity by some of the country's largest abortion providers. Their initial reports sparked widespread public debate and led to congressional investigations and successful criminal prosecutions. Multiple states stopped funding abortion providers implicated in the reports, and others banned the sale or distribution of human tissue obtained in an abortion. The National Institute of Health also updated its guidance on the handling of fetal tissue. Yet before Petitioners could publish all their recordings, the district court stepped in to protect the abortion industry from further embarrassment. It issued a temporary restraining order, then a preliminary injunction, and then a permanent injunction prohibiting Daleiden and his colleagues from continuing to publish footage from the investigation.

Incredibly, the lower courts held that no First Amendment analysis was necessary to justify this draconian prior restraint because Daleiden had signed a one-page exhibit-space agreement with a vague confidentiality clause two years prior. The only prior-restraint analysis conducted over the past seven years of litigation was the district court's conclusory opinion that Petitioners' reports were not "pieces of journalistic integrity" and its incorrect statement that "this sort of information [was] already fully part of the public debate about abortion" in any event. App.101, 114. But that is simply not how the First Amendment works. Federal courts do not have free rein to decide which speech the public has an interest in hearing.

This case is precisely the kind of important individual rights dispute this Court has not hesitated to hear. To this day, Daleiden and CMP remain prohibited from sharing their recordings with law enforcement agencies (even though they believe those recordings depict criminal activity); publishing their footage for public consumption and debate; or even describing their findings. The injunction even prohibits Daleiden from using the footage to defend himself—both in public and in court—against state criminal charges filed against him at the plaintiff's urging.

In short, the lower court decisions muzzle Daleiden's speech in perpetuity and in all circumstances. As a journalist, he is prohibited from publishing his conclusions about a grave matter of public debate; as a criminal defendant, he is restricted from introducing critical evidence that proves his innocence; and as a private citizen, he is forbidden from defending himself

in the court of public opinion. These decisions represent a grave threat to free expression and uninhibited public discourse and should be reviewed and reversed by this Court.

OPINIONS BELOW

The district court's order issuing a permanent injunction is available at App.8. The Ninth Circuit panel opinion affirming the injunction is unpublished but reproduced at App.1. The Ninth Circuit order denying rehearing en banc is reproduced at App.50.

JURISDICTION

The Ninth Circuit's opinion was issued on August 19, 2022, and a timely petition for rehearing en banc was denied on December 19, 2022. On March 9, 2023, Justice Kagan extended the time for filing this petition until May 18, 2023. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution states:

> 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.

STATEMENT OF THE CASE

A. CMP Discovers Evidence of Criminal and Unethical Activity in the Abortion Industry.

In 2000, ABC's *20/20* conducted an undercover investigation into the fetal trafficking industry. Using a fictitious name and fake credentials, journalists met with fetal tissue salesmen and filmed their interactions. Staff of S. Comm. on the Judiciary, 114th Cong., *Human Fetal Tissue Research: Context and Controversy* 22 (Comm. Print 2016), https://perma.cc/3V6D-9R8N. The *20/20* investigation revealed a host of unethical and illegal practices related to the harvesting and sale of tissue from aborted babies. It led to congressional hearings but no industry-wide changes or accountability. *Id.* at 26-28.

In 2010, David Daleiden learned about the *20/20* investigation and was troubled by the lack of meaningful safeguards in the fetal-tissue industry. *PPFA*-11-ER-2785-86.[1] After additional research, he came to believe that abortion providers, including Planned Parenthood affiliates, were harvesting and selling fetal tissue in violation of state and federal law. *PPFA*-11-ER-2828.

Daleiden founded the Center for Medical Progress ("CMP") to investigate the sale of fetal tissue procured

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[1] "*PPFA*" cites refer to the Excerpts of Record on appeal in *Planned Parenthood Federation of America v. Newman*, 51 F.4th 1125 (9th Cir. 2022). That case was tried before the same district court judge as this one, and the court relied on the *PPFA* record at summary judgment here. *See* App.19-21, 24-25. All other record citations refer to the Excerpts of Record in the appeal below.

from abortions. CMP sought to educate the public and catalyze reform of unethical and inhumane medical and research practices, including the buying and selling of fetal tissue from aborted fetuses. To investigate the abortion industry, CMP created BioMax Procurement Services, LLC, as a start-up tissue procurement company.

Daleiden and his colleagues investigated abortion providers using standard undercover journalism techniques. Posing as BioMax representatives, they attended the 2014 and 2015 annual trade show of the National Abortion Federation, the leading trade organization in the abortion industry. App.10. Daleiden and other CMP associates (under assumed names) represented BioMax on the floor of the trade show, hosting an exhibit booth in a hotel ballroom alongside hundreds of other for-profit vendors. They surreptitiously recorded their own conversations at their booth with attendees.

These investigative tactics are time-honored methods of informing the public about critical issues. "For more than a century, undercover investigations have relied on lies to uncover politically important information otherwise unavailable to forthright journalists." A. Chen & J. Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1457 (2015). History abounds with examples of impactful journalism using such techniques.[2] The

[2] *See, e.g.*, B. Kroeger, *Undercover Reporting: The Truth About Deception*, 15-30 (2012) (detailing abolitionists' undercover journalism in the 1850s); Chen & Marceau, 68 Vand. L. Rev. at

same methods have also been used to great effect in the civil rights context, by "testers" posing as potential purchasers to investigate and expose discriminatory conduct. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

During their recorded interactions with abortion industry executives, Daleiden and his colleagues discovered evidence of illegal practices, including the sale of organs obtained from aborted fetuses, the alteration of abortion procedures to preserve and obtain fetal tissue, partial-birth abortions, and even the killing of babies born alive during and after abortion procedures. *Human Fetal Tissue Research*, *supra*, at 28.

B. Petitioners' Reporting Spurs Public Debate and Policy Reforms.

CMP began publishing the fruits of its investigation in summer 2015. One video showed, for example, a Planned Parenthood executive discussing how much abortion providers could charge "per specimen," and how abortion procedures could be changed to "increase your success" at harvesting tissue for research.[3] K. Scanlon, *In Undercover Video, Planned Parenthood Executive Describes Selling Fetal Body Parts*, Daily

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1457 & n.129 (collecting examples from "muckraker" era); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018); *Med. Lab'y Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 810 (9th Cir. 2002).

[3] Due to the injunction, and district the court's zealous enforcement of its parameters—*e.g.*, fining Daleiden and his criminal defense counsel for contempt for using material from the enjoined videos, *see* App.12—Petitioners' ability to describe the enjoined material is severely limited.

Signal (July 14, 2015), https://perma.cc/6RVT-88H6. In another, an executive began negotiations for the sale of fetal tissue by asking, "well, why don't you start by telling me what you're used to paying?" 161 Cong. Rec. 14591 (2015) (statement of Rep. Rothfus).

From the first release, the recordings sparked nationwide controversy and debate. *See, e.g.*, S. Almasy & E. McLaughlin, *Planned Parenthood Exec, Fetal Body Parts Subject of Controversial Video*, CNN (July 15, 2015), https://perma.cc/AM54-8DUT; S. Armour, *State Lawmakers Target Fetal-Tissue Research*, Wall Street Journal (Aug. 19, 2015), https://perma.cc/57WL-Y5NN.

CMP's exposure of illegal and unethical activity by the nation's largest abortion providers soon prompted policy responses at the federal, state, and local levels. In Congress, both the House and Senate opened investigations. The Senate Judiciary Committee's final report stated that "[t]he CMP videos were the impetus for the Committee's investigation." *Human Fetal Tissue Research*, *supra*, at 28. The report called on the Department of Justice to investigate potential violations of federal law by Planned Parenthood Federation of America and four of its affiliates, along with three other companies which had obtained fetal tissue from these affiliates. *Id.* at 29-30, 55.

Meanwhile, the House formed a Select Investigative Panel, whose final report found that CMP's reporting had raised "[s]erious [i]ssues" about fetal tissue procurement in the abortion industry. U.S. House

of Representatives, Select Investigative Panel of the Energy & Commerce Committee, *Final Report* 3 (Dec. 30, 2016), https://perma.cc/HR9E-DRBP. The report described Petitioners' videos as "a series of serious claims made by a citizen advocacy group." *Id.* at 3. "Multiple clips," the report noted, "show[ed] abortion clinic doctors and executives admitting that their fetal tissue procurement agreements are profitable for clinics and help keep their bottom line healthy," and "that they sometimes changed the abortion procedure in order to obtain a more intact specimen, including relying on the illegal partial-birth abortion procedure." *Id.* at 1. The panel ultimately made fifteen criminal and regulatory referrals to federal and state law-enforcement agencies, *id.* at 33-135, and delivered eighteen legislative recommendations to Congress, *id.* at 406-13.

The published recordings also led several states to open investigations. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of certiorari). Five states terminated the implicated abortion providers' participation in Medicaid.[4] Several other states banned the

[4] *See, e.g.*, *Kauffman*, 981 F.3d at 352 (Texas terminating Planned Parenthood affiliates from Medicaid program "based ... on the CMP videos, evidence provided by the United States House of Representatives' Select Investigative Panel, and the OIG's consultation with its Chief Medical Officer"); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1213-14 (10th Cir. 2018) (Kansas); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 451-52 (5th Cir. 2017) (Louisiana); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1212 (M.D. Ala. 2015) (Alabama).

sale or distribution of aborted human tissue altogether. *See, e.g.*, Ind. Code §35-46-5-1.5; Ariz. Rev. Stat. §36-2302(D).

Prosecutions and enforcement actions followed as well. Arizona prosecuted an abortion clinic and affiliated doctor for providing fetal tissue to StemExpress, LLC, a NAF member and commercial sponsor of its annual meetings, which had featured prominently in both the Senate and House reports. In California, the Orange County District Attorney acted on a referral from the House Select Investigative Panel and sued two companies that sold fetal tissue obtained from Planned Parenthood. The companies settled the cases, admitted they had "unlawfully sold fetal tissue for valuable consideration," paid $7.8 million in fines, and permanently ceased all operations in California. 4-ER-883-85.

Federal agencies also responded. The National Institute of Health published new research guidelines on complying with the law against sale of fetal tissue. 2-ER-365-68. And the FDA terminated its contract with Advanced Bioscience Resources, a NAF member, because it could not determine whether the company was complying with the law. 2-ER-359-364.

C. Lower Courts Block Further Publication.

1. The district court issues a preliminary injunction forbidding Petitioners' speech.

NAF sued Petitioners on July 31, 2015, and sought a temporary restraining order prohibiting

CMP from publishing any recordings made at NAF annual meetings or even discussing the contents of those recordings. The district court granted NAF a TRO, and NAF promptly moved for a preliminary injunction on the same grounds. Several state attorneys general urged the district court to deny the motion because there was "no proper basis for restraining" CMP's speech, "*especially* … because the videos and audio recordings at issue have generated controversy on an issue of immense public concern." Memorandum of Law by Amici Curiae State Attorneys General, Doc. 285, at 1, *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016) (No. 3:15-cv-3522). The court nevertheless issued a preliminary injunction against publication. App.118.

The district court did not apply any level of First Amendment scrutiny—much less strict scrutiny—before enjoining Petitioners from publishing or speaking about their footage. Instead, the court held that CMP had waived the First Amendment's protections altogether by signing one-page exhibitor agreements ("EAs") and confidentiality agreements ("CAs") before attending NAF meetings. The EAs were form documents in fine print presented to exhibitors for their signatures. The relevant provisions covered only "information NAF may furnish," "written information provided by NAF," and "*confidential* information received in the course of exhibiting." App.60. But the court held that these terms extended to *all* written, oral, and visual information received while exhibiting at the meeting, no matter who furnished it and whether it was confidential.

The court then held that because the EAs (but not the CAs, *see* 7-ER-1633) contained a provision stating "monetary damages would not be a sufficient remedy for any breach" and authorizing "specific performance or injunctive relief," 7-ER-1627 ¶18, Petitioners had waived all First Amendment rights to publish information gained from the NAF meetings, including all protection against prior restraints. The court ignored that the agreement said nothing about injunctions *against speech*, and that its provision for "specific performance and injunctive relief" applied to all of the EAs' rules and regulations, not just those governing disclosures. *Id.*; App.134. The mere fact that Daleiden and his co-defendants had read and signed the agreement sufficed as a blanket waiver of First Amendment rights according to the district court.

Finally, the district court considered whether the public's interest in "enforcement" of the waiver "outweighed" any other "public policy" concerns. App.98. The court found that the public interest in allowing CMP to publish its findings was low because the recordings purportedly did not contain evidence of "criminal wrongdoing," App.99-100; because any light shed on the abortion industry was "information ... already fully part of the public debate," App.101; and because the information, if released, could be "taken out of context" and result in "disparagement, intimidation, and harassment" of NAF members," App.102. Tellingly, the district court omitted any mention of the most important public interest: "access to discussion, debate, and the dissemination of information" about issues of political significance. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

The district court's merits analysis likewise ignored any public policy considerations disfavoring judicial restraints on political speech. The court's only mention of prior restraints came when it weighed the "public interest" for and against an injunction. Even then, the district court's analysis was perfunctory. For example, the court suggested that the public interest in CMP's speech was low based on "how defendants came into possession of the NAF materials" and CMP's published material's supposed lack of "journalistic integrity," with "misleadingly edited videos and unfounded assertions." App.113-14.

2. The Ninth Circuit affirms the preliminary injunction.

Petitioners appealed, arguing that the preliminary injunction was an unconstitutional prior restraint. A panel of the Ninth Circuit affirmed in a brief, unpublished opinion that devoted only a single paragraph to the First Amendment. The panel upheld the district court's conclusion that Petitioners had forever waived their First Amendment rights to speak about NAF's activities, regardless of whether "the matters recorded [were] of public interest." App.124. The panel held that "knowingly signing" the form contracts sufficed to support the blanket waiver found by the district court. *Id.* It further held that the district court had discretion to find that the public interest favored an injunction. *Id.* The panel did not address the district court's assessment of the value and newsworthiness of the Petitioners' message in issuing the injunction.

Judge Callahan "strongly" dissented from "the application of the preliminary injunction to law enforcement agencies" on three grounds. App.126. First, there was "no justification" for prohibiting CMP from sharing its footage "with any law enforcement agency that is interested." App.127. Second, "the District Court's determination that the tapes contain no evidence of crimes, even if true, is of little moment as the duties of Attorneys General and other officers to protect the interests of the general public extend well beyond actual evidence of a crime." *Id.* Finally, the district court's procedures for Petitioners to notify NAF of any law-enforcement request "inherently interfere[d] with legitimate investigations." App.128-29. This Court denied certiorari. *Daleiden v. Nat'l Abortion Fed.*, 138 S. Ct. 1438 (2018).

3. The district court issues a permanent injunction, and the Ninth Circuit again affirms.

The district court entered summary judgment for NAF and issued a permanent injunction on April 7, 2021. App.8. The court invoked the Ninth Circuit's summary affirmance of the preliminary injunction to justify granting permanent relief, App.29, even though the prior Ninth Circuit panel held only that "the district court did not clearly err" or "abuse its discretion in concluding that a balancing of the competing public interests favored *preliminary* enforcement of the confidentiality agreements." App.124 (emphasis added). The district court saw "no *new* evidence" to undermine CMP's purported waiver and affirmed its prior holding that the signed agreements alone sufficed to waive Petitioners' constitutional rights.

App.30. The district court also awarded NAF $6.3 million in attorneys' fees. *Nat'l Abortion Fed. v. Ctr. for Med. Progress*, 2021 WL 6091742, at *9 (N.D. Cal. Dec. 23, 2021).[5]

The permanent injunction is an astonishingly broad restraint on publication. The injunction prevents CMP from publishing or otherwise disclosing any recordings taken or information learned from any NAF annual meetings. App.48-49. Notably, the district court made no effort to tailor the scope of the materials under injunction—it simply enjoined the release of several hundred hours of recordings, regardless of whether they purportedly contained private information. *Id.* The court's injunction even covered disclosures to law enforcement: no investigation could obtain the recordings without a subpoena and pre-disclosure notice to NAF. App.115-16.

Worse yet, the district court also banned Daleiden from using the recordings to defend himself against felony charges filed by the California Attorney

[5] The same district court judge also allowed non-parties to the Exhibit Agreements/Confidentiality Agreements to sue CMP and obtain a judgment over $2 million and attorneys' fees and costs over $13.7 million in a separate case. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 613 F. Supp. 3d 1190, 1195 (N.D. Cal. 2020), *aff'd in part*, 51 F.4th 1125; 2020 WL 7626410 (N.D. Cal. Dec. 22, 2020) (fee award). CMP's petition for certiorari in that case is forthcoming.

General's office.[6] App.176-78; *see also* 5-ER-1090-95. Under California law, defendants charged with unlawful recording enjoy a complete defense from conviction if the recordings were created to provide evidence of certain unlawful activity. *See* Cal. Penal Code §633.5. Petitioners' recordings meet this standard. *See supra*, 6-9. Yet the injunction cripples this defense. Moreover, California law does not prohibit recording conversations in public places where the subject has no reasonable expectation of privacy. *See* Cal. Penal Code §632(c). Nevertheless, Daleiden can use the recordings in his defense only by seeking leave from the state trial court or applying to the federal district court for a modification of the injunction. App.13-14, 176-78. And he is completely barred from using the recordings to publicly maintain his innocence.

The Ninth Circuit again affirmed in a short, unpublished opinion and rejected Petitioners' First Amendment defense in a single paragraph. The panel held that Petitioners had waived all constitutional rights and asserted in conclusory fashion that this "waiver of First Amendment rights was demonstrated by clear and convincing evidence" because "Daleiden voluntarily signed the agreements." App.4. The panel bypassed any First Amendment scrutiny, expressed no concern about the injunction's prior restraint of speech, and never discussed whether, even *assuming*

[6] Through extensive email exchanges and face-to-face meetings, NAF executives lobbied the California Attorney General to bring these charges at the same time NAF sought an injunction from the district court that would prevent Daleiden from using the videos in his defense. 5-ER-1047.

Petitioners had executed a waiver of their rights, that waiver was enforceable.

REASONS FOR GRANTING THE PETITION

Because the proper application of the First Amendment is manifestly an "important federal question," this Court has routinely granted certiorari to address lower court decisions that fail to adequately protect the right to free speech. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

This is precisely such a case. The Ninth Circuit affirmed a breathtakingly broad injunction that (1) forbids Daleiden and CMP from publishing more than 500 hours of footage about matters of profound public interest; (2) prohibits them from otherwise describing their findings; (3) bans them from providing evidence of criminal activity to law enforcement agencies; and (4) impedes Daleiden's defense to state criminal charges by restricting his ability to introduce the videos as evidence of his innocence. In doing so, the panel unquestionably "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

I. The Ninth Circuit badly erred on a constitutional question of the highest importance.

A. First Amendment protections are strongest against prior restraints.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). While other state actions can infringe on the freedom of speech, a prior restraint is necessarily more severe because of its "immediate and irreversible sanction." *Id.* "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* This distinction is "deeply etched in our law": prior restraints are set apart for special scrutiny because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *see also Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting) ("At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished." Rather, any "injuries" from publication could be remedied "in tort."). For this reason, the Court has long recognized prior restraints on speech as "the essence of censorship." *Near*, 283 U.S. at 713.

Consequently, this Court has "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent

punishments." *Alexander v. United States*, 509 U.S. 544, 554 (1993); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). This protection extends even to injunctions which purport to redress a violation of law. In such cases, "the First Amendment requires" a claimant to "remedy its harms through a damages proceeding rather than through suppression of protected speech." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). For a prior restraint to pass muster, "publication must threaten an interest more fundamental than the First Amendment itself." *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996). This Court has *never* found a countervailing interest strong enough to justify a prior restraint—not even in cases implicating national security or the right to a jury trial. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n*, 427 U.S. at 570.

Court injunctions that "forbid speech activities," like the injunction here, are "classic examples of prior restraints." *Alexander*, 509 U.S. at 550. Indeed, because injunctions are not generally applicable, they "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). For this reason, injunctions "require a somewhat more stringent application of general First Amendment principles" than general ordinances. *Id.* at 765; *see also id.* at 793 (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]he injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards.").

The injunction here merits exacting scrutiny under the First Amendment for another reason: it targets speech about issues of great public importance. Expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *Id.*

Here, the lower courts should have given NAF's request for an anti-publication injunction the most exacting scrutiny under the First Amendment. They should have confronted it with "a 'heavy presumption' against [its] constitutional validity," *Nebraska Press Ass'n*, 427 U.S. at 558, and demanded both "compelling public need and surgical precision of restraint." *Madsen*, 512 U.S. at 798 (Scalia, J.); *Carroll*, 393 U.S. at 183 (Anti-publication injunctions violate First Amendment unless "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.").

More importantly, the lower courts should have held that NAF's requested injunction could not possibly meet this demanding standard. As this Court recognized five decades ago:

> No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an

> invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of information[] ….

Org. for a Better Austin 402 U.S. at 419-20.

B. The Ninth Circuit's justifications for bypassing strict scrutiny flout bedrock First Amendment principles.

The lower courts did not even purport to apply strict scrutiny, holding instead that CMP waived all First Amendment rights before ever attending a NAF trade conference. That holding contravenes a multitude of this Court's precedents, as well as the application of those cases by other courts of appeals.

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). The standard for a waiver of First Amendment rights is high. Courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). And they must be especially hesitant to find a waiver of First Amendment rights. Because the freedom of speech "is the 'matrix, the indispensable condition, of nearly every other form of freedom,'" this Court has refused to "sustain[] a claim of waiver [which] might be an imposition on that valued freedom," outside of "clear and compelling" circumstances. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967); *see also Janus*, 138 S. Ct. at 2486.

1. The form agreements signed here cannot support a waiver of constitutional rights. This Court has never held that a generic form contract like those here can do so. *See D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174 (1972). In *Overmyer*, the Court addressed an agreement with a waiver of due process rights, but the Court did not rest on the mere existence of a contractual provision. Instead, the Court found waiver based on several additional facts: that Overmyer was a sophisticated corporation; that there was no "unequal bargaining power or overreaching"; that the "agreement ... was not a contract of adhesion"; and that "Overmyer [did] not contend ... that it or its counsel was not aware of the significance of the ... provision." *Id.* at 782-83.

In *Fuentes v. Shevin*, the Court again emphasized the importance of "bargaining over contractual terms," the parties' "equal ... bargaining power," whether the waiver was a "necessary condition" of the agreement, and whether the waiving party was "actually aware ... of the significance of the fine print now relied upon as a waiver of constitutional rights." 407 U.S. 67, 95 (1972). "Taken together," *Fuentes* and *Overmyer* allow waiver of constitutional rights "where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988). A waiver can be implied under the right circumstances—especially "bargaining equality" and negotiation of the contract terms—but not from a signature

alone. *Id.*; *see also Gonzalez v. Hidalgo County*, 489 F.2d 1043, 1046-47 (5th Cir. 1973).

The district court's analysis—twice adopted by the court of appeals without elaboration—flouts these well-established principles. The court held that Petitioners had categorically waived all First Amendment rights simply by signing the form agreements, full stop. App.24-25, 96-97. In doing so, the court did not even inquire whether Petitioners acted "with full understanding of the consequences of [their] waiver," *Erie Telecomms.*, 853 F.3d at 1096, much less require NAF to show as much by "clear and compelling" evidence.

The lower courts also ignored important evidence against waiver. *See Brookhart*, 384 U.S. at 4 n.4 ("When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record."). First, they ruled that Petitioners' testimony of their own understanding of the agreements' effect was irrelevant. App.96-97. But Petitioners' understanding should have been central to whether there was knowing waiver. Second, the lower courts omitted all mention of the exhibitor agreements' provisions which expressly *permitted* "[p]hotography of exhibits" by an exhibitor in its own designated space—exactly where Petitioners recorded most of their footage. 7-ER-1627, ¶13. Finally, the courts disregarded evidence that NAF employees told Petitioners that the confidentiality agreements had nothing to with publication, but only with keeping word of the meetings from reaching other hotel guests. 9-ER-1929 ¶56. These facts are

irreconcilable with a purported agreement to waive First Amendment rights.

The lower courts tried to salvage their finding of waiver based on *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993). That case also involved a written agreement, but the similarities end there. In *Leonard*, the Ninth Circuit sustained a union's waiver of First Amendment rights in a clause of a collective bargaining agreement. But the union itself had drafted and proposed the disputed clause, had negotiated it with advice of counsel, and ratified it several times, in different agreements across nearly a decade. *Id.* at 889-90. Based on these factors, the court held that the waiver was a "contractual term that resulted from the give-and-take of negotiations between parties of relatively equal bargaining strength," *id.* at 890, and enforced it accordingly.

This Court anticipated these distinguishing factors in *Fuentes*. There the Court noted that "[t]here was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power." 407 U.S. at 95. The Court further noted that the supposed waiver was "a printed part of a form sales contract and a necessary condition of the sale." *Id.* So too here.

2. Even assuming NAF's form contracts could support a waiver of First Amendment rights, any purported waiver should have been found unenforceable. The district court correctly acknowledged that a waiver "is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public

policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); App.98. Nevertheless, it held that the public interest favored enforcement. The court of appeals then ignored these enforceability questions in both of its brief opinions. The district court's analysis—the only word on the issue in the case—flew in the face of settled First Amendment doctrine.

One overriding constitutional interest should have foreclosed an anti-speech injunction: the public's interest in hearing Petitioners' speech. "The constitutional guarantee of free speech 'serves significant societal interests,'" namely, "the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 8 (1986). "[B]eyond protection of the press and the self-expression of individuals," the First Amendment also "prohibit[s] government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 783. The public interest is pronounced here, where the speech under injunction is "expression on public issues," which "'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Claiborne Hardware*, 458 U.S. at 913. Invoking a form contract to suppress Petitioners' core political speech undercuts the "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Yet the district court ignored the strong public interest in free speech on matters of profound national

debate. Instead, the court improperly substituted its *own* estimation of the *value* of Petitioners' speech. Notwithstanding the interest of many law-enforcement agencies and the *amicus* brief from several state attorneys general, the court stated that it had "reviewed the recordings ... and [found] no evidence of criminal wrongdoing." App.99-100. The district court grudgingly conceded "some public interest" in Petitioners' recordings, but downplayed that interest based on a conclusory assertion that "this sort of information is already fully part of the public debate about abortion." App.101-02; *but see Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."). The district court expressed concern that Petitioners' recordings, "if released," could be "taken out of ... context" and result in "disparagement" of NAF affiliates and employees by members of the public. App.102. On these grounds, the district court decided that "[t]he public interest in additional information on this issue" could not "outweigh the competing interests" of NAF in an injunction. *Id.* In other words, the court's primary concern was not with the public interest, but with NAF's interests.

Worse yet, the district court cited its own disapproval of Petitioners' speech—both their investigative methods and the substance of their reporting—as a justification for censoring it. The district court highlighted supposed "exceptional facts," including Petitioners' purported "fraudulent conduct" and "misleading characterizations about the information procured

by misrepresentation." App.112 & n.43. It registered its disapproval of "how [Petitioners] came into possession of the NAF materials," and suggested that Petitioners lacked "journalistic integrity" and published "misleadingly edited videos and unfounded assertions ... of criminal misconduct." App.113-14; *but see Nebraska Press Ass'n*, 427 U.S. at 573 (Brennan, J., concurring) ("discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors"). Notably, the district court did not reconcile these statements with its subsequent acknowledgement that "NAF [did] not assert[] a defamation claim." App.143.[7]

Thus, the court concluded this was "not a typical freedom of speech case." App.112. And even though the court "recognize[d] that this case impinges on [Petitioners'] rights to speech and the public's equally important interest in hearing that speech," *id.*, it determined the usual strictures on prior restraints did not apply. That holding not only contradicts "[s]ettled case law concerning the impropriety and constitutional invalidity of prior restraints," which applies with full force "no matter how shabby the means by which the information is obtained." *Nebraska Press Ass'n*, 427

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[7] *But see, e.g.*, *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc v. Smith*, 913 F.3d 551, 559 n.6 (5th Cir. 2019) (noting that "a forensic firm conclude[ed] that the video was authentic and not deceptively edited," and that "plaintiffs did not identify any particular omission or addition in the video footage"), *on reh'g en banc sub nom. Kauffman*, 981 F.3d 347. None of the cases against Petitioners arising from CMP's recordings—this case, *PPFA*, or the criminal charges—have alleged the falsity of any of Petitioners' publications.

U.S. at 588 (Brennan, J., concurring). It is also precisely the kind of "discriminatory application" that makes anti-publication injunctions such a dangerous form of prior restraint. *Madsen*, 512 U.S. at 764.

In other words, the court censored Petitioners because it disagreed with their methods of collecting and reporting the information they had obtained. *But see CBS, Inc.*, 510 U.S. at 1318 (Blackmun, J., in chambers) ("Nor is the prior restraint doctrine inapplicable because the videotape was obtained through the 'calculated misdeeds' of CBS.").

Other courts of appeals have considered similar waivers and found them broadly unenforceable, precisely because of the First Amendment's protections against prior restraint of speech. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224-25 (4th Cir. 2019) (non-disparagement clause of settlement agreement with public official unenforceable as "contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public discourse"); *In re Halkin*, 598 F.2d 176, 189-90 (D.C. Cir. 1979) ("Even where individuals have entered into express agreements not to disclose certain information … the courts have held that judicial orders enforcing such agreements are prior restraints implicating First Amendment rights"), *overruled in part on other grounds, Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (voiding anti-publication injunction because "[t]he court was without power to make such an order; that the parties may have agreed to is immaterial");

United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972) ("We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights."). These cases are in direct tension with the lower courts' unflinching imposition of a sweeping anti-publication injunction here.

* * *

In short, despite multiple rounds of review, the prior restraint of Petitioners' speech has never been subjected to any meaningful First Amendment scrutiny. Instead, the lower courts seized on an indefensible finding of waiver, brushed aside the overriding public interest in the free flow of ideas, cited their disapproval of Petitioners' message as a reason to suppress it, and approved millions of dollars in attorney's fees to boot. Courts must not set aside "the 'matrix, the indispensable condition, of nearly every other form of freedom,'" on such shaky grounds. *Curtis Pub. Co.*, 388 U.S. at 145.

II. The lower courts' prior restraint on CMP's core political speech will continue to have drastic consequences unless reversed.

The district court's sweeping prior restraint inflicts tangible harm on Petitioners and the broader public on several levels, but three are particularly significant. If allowed to stand, the Ninth Circuit's decision to affirm this prior restraint will continue to: (1) suppress open discourse on a matter of heated public

debate; (2) hinder law enforcement investigations and public policy responses to unethical conduct; and (3) interfere with Daleiden's defense against criminal charges in state court.

This Court "has *never* upheld a prior restraint" on speech about matters of public concern, "even [when] faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co.*, 78 F.3d at 226-27 (emphasis added); *cf. N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (A prior restraint on publication can be upheld only if publication will "result in direct, immediate, and irreparable damage to our Nation or its people."). It certainly has never upheld an injunction forbidding public citizens from sharing information with state and federal law enforcement. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").

Furthermore, if prior restraints are disfavored even when they protect the right to a fair trial, then, *a fortiori*, they are even more objectionable when they actively *impair* a citizen's right to defend himself. *Cf. Nebraska Press Ass'n,* 427 U.S. at 572 (Brennan, J., concurring in the judgment) ("The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights," but "resort to prior restraints on the

freedom of the press is a constitutionally impermissible method for enforcing that right.").

The lower courts disregarded all of this. If allowed to stand, the decision below will have grave and far-reaching repercussions for the rule of law and the paramount constitutional protections for uninhibited expression and debate.

A. The injunction prevents Petitioners from publishing investigative reporting and opinions about one of the most hotly contested issues in American politics.

"[A] major purpose of the First Amendment" is "to prevent prior restraints upon publication." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *see also Carroll*, 393 U.S. at 181 n.5 ("The elimination of prior restraints was a 'leading purpose' in the adoption of the First Amendment."). "The damage" inflicted by a prior restraint is "particularly great" when the "restraint falls upon the communication of news and commentary on current events." *Nebraska Press Ass'n*, 427 U.S. at 559; *see also Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (the freedom to report on matters of public concern "lies near the core of the First Amendment").

It is no secret that "Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). CMP wants to contribute to public debate by highlighting legal and ethical concerns about the

activities of prominent players in the abortion industry. This debate has only intensified now that "the authority to regulate abortion [has been] returned to the people and their elected representatives." *Id.* at 2279. Daleiden and CMP achieved that goal in part—their reports generated substantial media coverage and led to congressional inquiries and state law enforcement investigations—but the district court ordered them to stop speaking. The district court unilaterally decided that CMP's recordings at NAF conferences did not meet its own, unspecified criteria for "journalistic integrity" and thus were not sufficiently newsworthy. App.114. Yet CMP's footage continues to stir public debate and was raised in congressional hearings just yesterday. *See Revisiting the Implications of the FACE Act, Hearing Before the Subcomm. on the Const. and Limited Gov't of the H. Comm. on the Judiciary*, 118th Cong. (May 16, 2023), https://perma.cc/J5SV-79DS, at 1:58:22-2:00:38.

The Constitution does not allow courts to act as self-appointed curators of public news consumption. *See, e.g.*, *Cmty. Commc'ns Co. v. City of Boulder,* 455 U.S. 40, 67-68 (1982) (nothing in the Constitution "authorizes federal courts to invalidate" lawful actions "simply upon opining that [an individual] has acted unwisely"). Freedom of the press "is 'a fundamental personal right'" that "comprehends every sort of publication that affords a vehicle of information and opinion." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). First Amendment rights are not a privilege afforded only to those who satisfy amorphous judicial standards of "journalistic integrity." *See* 4 Blackstone, *Commentaries* at 151-52 ("Every freeman has an

undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." (emphasis added)); *see also id.* at 152 ("The liberty of the press … consists in laying no previous restraints upon publications."). Moreover, the right to speak is not extinguished simply because a court believes that a speaker's message has been adequately communicated by someone else. *See Bellotti*, 435 U.S. at 801 (Burger, C.J., concurring) ("frequency or fervor of expression" is irrelevant).

B. The injunction will continue to interfere with state law enforcement investigations and public policy decisions unless this Court intervenes.

The injunction forbids CMP from sharing the results of its investigation with law enforcement agencies unless an agency subpoenas CMP for specific records. *See* Brief of Amici Curiae Attorneys General, at 18-24, *Nat'l Abortion Fed. v. Ctr. for Med. Progress*, 685 F. Appx. 623 (9th Cir. 2017) (No. 16-15360) ("Attys.Gen.Br."). Thus, law enforcement agencies that are investigating illegal fetal tissue trafficking and seek access to CMP's evidence must guess what the unreleased videos might contain and then try to tailor their subpoenas to those guesses. Even then, CMP cannot disclose any footage unless NAF receives prior notice of the subpoena and is given an opportunity to object to it in state court. *Cf. Jerry T. O'Brien, Inc.*, 467 U.S. at 743 (rejecting argument "that notice of subpoenas issued to third parties is necessary" to protect the rights of subpoena subjects). That forces law enforcement agencies to discuss active investigations with the parent organization of

potential defendants before they can enforce subpoenas for material that CMP would voluntarily provide in ordinary circumstances.

The district court's order also effectively grants NAF oversight and veto power over the content of state criminal investigations into its own conduct. NAF has already leveraged the injunction to resist a congressional subpoena and multiple subpoenas issued by state attorneys general. In Arizona, for example, although Petitioners would have handed over all their material, authorities had to guess at what materials existed and issue a subpoena—which NAF promptly resisted. CMP identified 47 hours of video and 100 hours of audio recording responsive to the state's subpoena, but NAF sought to block all but about an hour of the recordings. Attys.Gen.Br. at 15, 21. Yet NAF did not object to the California Department of Justice possessing the same material when California authorities confiscated it from Daleiden's residence to pursue criminal charges against him. *Id.* at 14-15, 22.

And because the district court justified the injunction with its own conclusion that CMP's recordings do not contain evidence of criminal activity, the court also intruded on state investigations with its own view of the value of the disputed material. *But see United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that

corporate behavior is consistent with the law and the public interest.").

Yet at summary judgment, the court concluded that its preliminary injunction "d[id] not hinder the ability of states or other governmental entities from conducting investigations." App.116. The district court noted that law enforcement agencies in Arizona and Louisiana were engaged in "ongoing" negotiations with NAF, and that process was "work[ing] well." *Id.* By that, the district court appeared to mean simply that the injunction was having the intended outcome of giving NAF input and oversight into communications between law enforcement and a third-party. *See Jerry T. O'Brien, Inc.*, 467 U.S. at 750 (notice requirement "would substantially increase the ability of persons who have something to hide to impede legitimate investigations.").

The injunction also inhibits the public policy process. It is critical for state and federal lawmakers to access information relevant to their legislative responsibilities. *See, e.g.*, *DeGregory v. Att'y Gen. of N.H.*, 383 U.S. 825, 829 (1966) ("Lawmaking at the investigatory stage may properly probe historic events for any light that may be thrown on present conditions and problems."). Elected representatives thus have a profound interest in accessing and assessing the information suppressed by the permanent injunction.

C. The injunction unconstitutionally restricts Daleiden's defense against state criminal charges.

The injunction also sabotages Daleiden's defense against criminal charges in state court and destroys his ability to maintain his innocence in the court of public opinion.

Federal courts cannot interfere with state criminal prosecutions, absent "extraordinary circumstances." *Younger v. Harris*, 401 U.S. 37, 45 (1971). Tellingly, none of the Court's precedents address a federal injunction limiting the evidence a defendant may introduce in state criminal proceedings, as the injunction does here. But "the principles of *Younger* and *Huffman* are not confined solely to the types of state actions [challenged] in those cases." *Juidice v. Vail*, 430 U.S. 327, 334 (1977).

Yet Daleiden is forced to prepare his criminal defense in the shadow of a federal-court injunction. The district court expressly ordered that its injunction must persist through the state criminal proceedings. App.176-78. To introduce evidence in the state court—or even to "comment on" material that has already entered the public domain through these proceedings—Daleiden must work around the federal injunction. App.178-79. The district court has required that Daleiden must convince a state court judge to enter an order modifying the federal court injunction, or directly petition the federal court for such a modification. App.179. And although the district court represented that the state court could authorize use of the injunction materials "without [the district court's]

interference," it refused to modify its injunction in response to the state court's protective order allowing more liberal use of the materials.[8] App.178. Moreover, the state court informed Daleiden and the prosecution that it would comply with the district court's injunction. App.179. As this Court has long recognized, "such federal interference with a state prosecution is improper," because "the admissibility of evidence in state criminal prosecutions [is] ordinarily ... to be resolved by state tribunals." *Perez v. Ledesma*, 401 U.S. 82, 84 (1971).

"The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). In other words, the guarantee of a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *Id.* Yet the injunction prevents Daleiden from disclosing any footage from his investigation, and it requires him to ask the district court for permission before disclosing evidence critical to his state criminal

[8] The state court's protective order explicitly covered "all ... digital evidence seized" by law enforcement "from David Daleiden," which includes the injunction materials. 4-ER-928. It allowed these materials to "be used ... in preparation of the defense," including "in a judicial proceeding or as may be directly necessary in the preparation of the defense."4-ER-929. Yet in the federal district court's view, this order "did not "discuss[] or otherwise allow[] defendants to use ... any of the Preliminary Injunction materials," and therefore did not warrant modification of the injunction. App.178.

defense. *None of the lower court opinions addressed this issue.*

The injunction also strips Daleiden of any chance to use his footage to publicly maintain his innocence, even though "circumstances will virtually never occur in which the right to freedom of speech could be of more importance to an individual than in the course of criminal proceedings." M. Freedman & J. Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys*, 29 Stan. L. Rev. 607, 613 (1977).

Again, the real-world consequences of the injunction are not hypothetical. The district court held Daleiden and his attorneys in contempt for including footage from the NAF conferences in a state court filing in support of his affirmative defense and uploading that filing to the attorneys' website. App.12. *Cf. Wood v. Georgia*, 370 U.S. 375, 387-88 (1962) (reversing because it would be "indeed novel" to punish a defendant "because he had made public his defense to the charges made against him"); Freedman & Starwood, 29 Stan. L. Rev. at 613 (The First Amendment is "severely impaired" when "those who are most knowledgeable about injustices are silenced at the very moment at which they have the greatest incentive to protest.").

That is precisely the outcome that this Court's First Amendment jurisprudence is designed to prevent:

> The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law. Once such a basis has been found, later speech may be quashed, or not quashed, in the discretion of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction; the injunction is enforceable through civil contempt, a summary process without the constitutional protection of a jury trial; and the only defense available to the enjoined party is factual compliance with the injunction, *not* unconstitutionality.

Lawson v. Murray, 515 U.S. 1110, 1114 (1995) (Scalia, J., dissenting).

Even if Daleiden is eventually acquitted of the state charges—as he should be, if he's allowed to introduce his footage—the injunction will have already inflicted irreparable harm by forbidding him from proving his innocence to the public. *See* V. Royster, *The Free Press and a Fair Trial*, 43 N.C.L. Rev. 364, 369 (1965) (one should "shudder at the prospect of being charged with some crime" and "being condemned to suffer silence until some distant day when even an acquittal would not be recompense").

CONCLUSION

This Court should grant certiorari.

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May 17, 2023