No. 22-1135

In The

Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, ET AL., PETITIONERS

v.

NATIONAL ABORTION FEDERATION, RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

David Daleiden and other members of his anti-abortion advocacy group, the Center for Medical Progress ("CMP"), infiltrated the National Abortion Federation's ("NAF") private conferences with the express purpose of collecting video footage of attendees. To gain entry, they signed contracts prohibiting them from making any recordings at the meetings and from disclosing any information obtained. The contracts provided that any breach could be remedied by injunction. The district court granted NAF summary judgment on its breach-of-contract claim and a permanent injunction preventing petitioners from publishing or disclosing the recordings they had made. The Ninth Circuit affirmed that ruling. Both courts rejected petitioners' First Amendment challenges to the injunction, explaining that petitioners had waived any First Amendment rights by knowingly and voluntarily entering into contracts that restricted their speech.

The question presented is whether the district court abused its discretion in permanently enjoining petitioners from disclosing materials that they contractually agreed not to disclose.

CORPORATE DISCLOSURE STATEMENT

Counsel for respondent states that no corporation is a parent corporation of National Abortion Federation, and no publicly held corporation owns ten percent or more of the stock of National Abortion Federation.

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INTRODUCTION

Petitioner David Daleiden and his organizations—petitioners CMP and BioMax Procurement Services, LLC—fraudulently gained entry to NAF's annual meetings, secretly recorded over 500 hours of video footage, then sought to release misleadingly edited versions of those recordings. But in doing so, petitioners violated the contracts they signed to gain entry, which prohibited recording the meetings and disclosing any information obtained there. Facing an unprecedented flood of threats and violence, NAF secured first a preliminary and then a permanent injunction enforcing petitioners' promises not to disclose the stolen information—a remedy the contracts expressly permitted. Applying this Court's precedents, the Ninth Circuit affirmed the permanent injunction in an unpublished opinion. Because "Daleiden voluntarily signed the agreements," which "unambiguously prohibited him from making records, disclosing recordings, and from disclosing any information he received from NAF," petitioners' "waiver of First Amendment rights was demonstrated by clear and convincing evidence." App. 4.

Petitioners offer no reason for this Court to review that fact-specific waiver ruling. Indeed, this Court previously declined to address petitioners' misguided First Amendment arguments the last time they raised them, denying petitioners' request for certiorari from the Ninth Circuit's decision affirming the preliminary injunction. Nothing has changed that would warrant granting review now.

Once again, petitioners attempt to manufacture a constitutional violation by characterizing the injunction as an impermissible prior restraint. Once again, this argument quickly falls apart upon examination. As the courts below repeatedly concluded, petitioners waived any First Amendment rights by knowingly, voluntarily, and intelligently signing the governing contracts with NAF, making prior-restraint doctrine inapplicable. Petitioners cannot show that the lower courts' fact-bound waiver determinations were erroneous. Indeed, petitioners forfeited the vast majority of the arguments they now press in their petition by failing to raise them before the Ninth Circuit. And even if preserved, petitioners' arguments would fail. The record evidence—along with facts definitively established in a preclusive prior judgment—belie any contention that petitioners did not understand and willingly enter the contracts they signed, and no public interest precludes holding petitioners to their promises.

The petition should be denied.

STATEMENT

I. FACTUAL BACKGROUND

A. NAF Strives To Ensure The Security And Safety Of Its Members

NAF is a non-profit professional association of abortion providers. App. 121. It holds annual meetings where it provides continuing education and

training related to abortion. 7-ER-1572-73.[1] Because of a long and well-documented history of harassment, threats, violence, and intimidation against its members, NAF's annual meetings are subject to strict privacy and security measures. 7-ER-1553-54.

After an extreme anti-abortion group offered bounties to infiltrate NAF's meetings, NAF began requiring all attendees and exhibitors to sign a confidentiality agreement as a condition of entry. 7-ER-1576. Among other things, all attendees agree not to disclose any information obtained at the meeting "without first obtaining NAF's express written consent." App. 63, 134-35. All exhibitors also sign an exhibitor agreement agreeing to keep all information learned at the meetings in confidence and not disclose that information to third parties without NAF's consent. App. 19. Exhibitors agree that any breach of this contract may be remedied by "injunctive relief." App. 24, 28.

B. Petitioners Waive Their Speech Rights In Order To Infiltrate NAF's Private Meetings

Petitioner David Daleiden and members of his anti-abortion advocacy organization—petitioner CMP—infiltrated NAF's 2014 and 2015 private meetings to obtain footage of attendees. App. 57. Daleiden first set up a fake company, petitioner BioMax Procurement Services, LLC. App. 58-59. Daleiden—posing as

[1] Unless otherwise indicated, "ER" citations refer to the Excerpts of Record in the Ninth Circuit appeal, No. 21-15953.

BioMax employee "Brianna Allen," "assistant" to fake BioMax CEO "Susan Tennenbaum"—then sent NAF emails inquiring about exhibitor space at NAF's 2014 meeting. App. 59. NAF's staff provided "Allen" an exhibitor application packet, including an exhibitor agreement. App. 59. Daleiden signed the exhibitor agreement under a fake name. App. 59-60.

In the exhibitor agreement, Daleiden expressly agreed that all written, oral, or visual information disclosed at the meetings "is confidential and should not be disclosed to any other individual or third parties." App. 60. Daleiden additionally agreed "to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree[d] not to reproduce or disclose confidential information without express permission from NAF." App. 60 (emphasis omitted). Finally, Daleiden expressly agreed that a breach of the exhibitor agreement could be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. App. 61.

Daleiden then came to NAF's 2014 meeting posing as "Robert Sarkis," supposedly BioMax's Vice President of Operations. App. 61-62. Daleiden brought two associates who pretended to be Tennenbaum and Allen. App. 62. To gain entry, they presented fake driver's licenses and signed confidentiality agreements. App. 61-62.

In these confidentiality agreements, Daleiden and his associates expressly agreed they were "prohibited

from making video, audio, photographic, or other recordings of the meetings or discussions at this conference." App. 63. They agreed not to use any "'information distributed or otherwise made available at this conference by NAF or any conference participants *** in any manner inconsistent with' the purpose of enhancing 'the quality and safety of services provided by' meeting participants." App. 122. And they agreed not to disclose any such information "to third parties without first obtaining NAF's express written consent." App. 122.

In advance of NAF's 2015 meeting, Daleiden again submitted an exhibitor agreement for BioMax, agreeing to the same strict requirements. App. 59. One of Daleiden's associates signed the confidentiality agreement. App. 62. Daleiden (as "Sarkis"), "Tennenbaum," and "Allen" gained entry by falsely representing to NAF staff that they had signed confidentiality agreements too. App. 62-63.

C. Petitioners Launch A Smear Campaign Against NAF's Members

At both NAF meetings, "Daleiden and his associates wore and carried a variety of recording devices that they did not disclose to NAF or any of the meeting attendees." App. 63. On camera, Daleiden and his associates tried to talk attendees into potentially illegal fetal tissue sales. They were rebuffed at every turn. After an extensive review of the materials, the district court found that "no NAF attendee admitted to engaging in, agreed to engage in,

or expressed interest in engaging in potentially illegal sale of fetal tissue for profit." App. 71. To the contrary, "[t]he recordings tend to show an express rejection of Daleiden's and his associates' proposals." App. 71.

Petitioners did not provide the recordings to law enforcement after either annual meeting (despite their unsupported claims that the tapes show evidence of illegal practices). App. 54, 100. Instead, petitioners began publicly releasing "misleadingly edited videos" of follow-up meetings with abortion providers that Daleiden secretly recorded after NAF's annual conferences. App. 114, 174. These videos manipulated dialogue to falsely portray the abortion providers as sellers of fetal tissue. *E.g.*, App. 73-74. For example, petitioners edited a video to make it appear as though one doctor was discussing selling fetal tissue, but the doctor actually told Daleiden: "[N]obody should be selling tissue. That's just not the goal here." App. 74.

The released videos caused an unprecedented spike in harassment, death threats, and violence against NAF members. App. 78. The FBI reported seeing an increase in attacks on reproductive-healthcare facilities, including four incidents of arson at abortion-care facilities. App. 78-79. And the Colorado clinic where one of the videos' subjects worked was attacked by a gunman, resulting in three deaths. App. 79.

Following the release of these videos, seven states opened and closed investigations into Planned Parenthood, finding no evidence of wrongdoing. Eight

other states publicly refused to pursue any investigations based on petitioners' false accusations. D.Ct. Dkt. Nos. 227-21 to 227-34, 227-39.

II. PROCEDURAL HISTORY

A. NAF Obtains A Preliminary Injunction

NAF sued petitioners, alleging they breached the exhibitor and confidentiality agreements. The parties stipulated to a protective order, which required petitioners to notify NAF of any subpoena they received for the stolen information so that NAF would have the opportunity to object. App. 82.

The district court then granted a preliminary injunction prohibiting petitioners from publishing or disclosing the stolen information. The court concluded that NAF had shown a strong likelihood of success on its breach-of-contract claim, and it rejected petitioners' argument that an injunction violated the First Amendment. App. 86.

In doing so, the court followed the Ninth Circuit's decision in *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993). *Leonard* had held that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." App. 96 (quoting *Leonard*, 12 F.3d at 890). Here, the district court found, by "voluntarily and knowingly sign[ing]" the agreements, petitioners had waived any relevant First Amendment rights. App. 95-97. *Leonard* had further held that such a waiver should not be enforced "if the interest in its

enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." App. 98 (quoting *Leonard*, 12 F.3d at 890). The district court found the balance of interests favored enforcement here, emphasizing that "the recordings do not show criminal wrongdoing" and that any information in them "is already fully part of the public debate over abortion." App. 101.

B. The Ninth Circuit Affirms And This Court Denies Review

The Ninth Circuit affirmed in an unpublished opinion. App. 123. The court rejected petitioners' argument that the injunction was an unconstitutional prior restraint, explaining that even if there was any public interest in the recordings, petitioners had "waived any First Amendment rights to disclose [the] information publicly by knowingly signing the agreements." App. 124 (citing *Leonard*, 12 F.3d at 889). The court also held that the district court did not "abuse its discretion in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality agreements." App. 124. And the court rejected the assertion that the preliminary injunction should not have prevented petitioners from voluntarily producing the enjoined materials to law enforcement, upholding "the district court's finding that [petitioners] uncovered no violations of the law." App. 125. Moreover, the court emphasized, the preliminary injunction "in no way prevent[ed] law enforcement from conducting lawful

investigations" because it did not preclude compliance with a lawful subpoena. App. 125.

Petitioners sought this Court's review of the Ninth Circuit's decision. Their petition argued that the court of appeals had approved an unconstitutional prior restraint by "uphold[ing] an injunction against the publication of information of legitimate public interest." Petition for Writ of Certiorari, *Daleiden v. Nat'l Abortion Fed'n*, No. 17-202, 2017 WL 3393651, at *11 (U.S. Aug. 3, 2017). Petitioners claimed that this supposedly unprecedented "exception to the doctrine of prior restraints" conflicted with decisions of the Second, Fourth, and D.C. Circuits in *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir. 1963), *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), and *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). 2017 WL 3393651, at *2, *15-16. This Court denied the petition. *Daleiden v. Nat'l Abortion Fed'n*, 138 S. Ct. 1438 (2018).

C. Petitioners Attempt To Evade The Preliminary Injunction

In 2017, the California Attorney General's Office filed a criminal complaint against Daleiden for illegally recording people during NAF's 2014 meeting in California. 1-ER-39-40. Daleiden and his criminal counsel responded by posting enjoined footage on YouTube and promoting it on counsel's website—conduct that prompted another wave of threats and harassment against NAF members. 1-ER-41-44; App. 5-6. The district court held Daleiden and his

counsel in contempt for violating the preliminary injunction. 1-ER-48-58.

Petitioners then moved to modify the preliminary injunction, arguing it interfered with Daleiden's right to use the enjoined material in defending against his criminal prosecution. The district court denied the motion, explaining that the judge in Daleiden's criminal case had full authority to allow Daleiden to use any enjoined materials in his defense. App. 177-78. The Ninth Circuit affirmed, agreeing that "the preliminary injunction d[id] not impede the state's ability to bring criminal charges or Daleiden's ability to mount a defense." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 793 F. App'x 482, 484-85 (9th Cir. 2019).

D. Petitioners Are Found Liable In A Related Action

Petitioners were also defendants in a separate action involving the same confidentiality and exhibitor agreements at issue here—*Planned Parenthood Federation of America v. Center for Medical Progress*, No. 16-cv-236 (N.D. Cal.) ("*PPFA*"). The district court in that action concluded that petitioners voluntarily entered into and breached these contracts. The Ninth Circuit affirmed. *Planned Parenthood Fed'n of Am., Inc. v. Newman*, No. 20-16068, 2022 WL 13613963, at *1-2 (9th Cir. Oct. 21, 2022).

E. The District Court Grants NAF Summary Judgment And A Permanent Injunction

Following the *PPFA* judgment, the district court here granted NAF's motion for summary judgment on its breach-of-contract claim and a permanent injunction. App. 9. The court concluded that issue preclusion barred petitioners from relitigating the issues "actually litigated and determined against" them in *PPFA*. App. 19.

The district court again rejected petitioners' argument that an injunction would burden their First Amendment rights, reiterating that petitioners had knowingly waived any such rights. App. 29. The court relied in part on the findings in the *PPFA* case, which "demonstrated Daleiden's intimate familiarity with and his own frequent use of NDAs" and that Daleiden "*knew* what he was signing." App. 25, 30 (emphasis by court).

The district court also again found that no public-interest concerns prevented it from holding petitioners to this waiver of any First Amendment rights. The court emphasized that "there [wa]s no evidence that the Preliminary Injunction *** ever stood in the way of law enforcement or governmental investigations or that it has hindered any part of the criminal prosecution of Daleiden." App. 30. Nor could petitioners demonstrate a public interest in releasing the enjoined materials by pointing to investigations that were supposedly triggered by their doctored

videos, because petitioners did not "identify any NAF materials" that "led directly to any of the prosecutions or regulatory actions" petitioners cited. App. 32-33.

The district court acknowledged, however, that petitioners' "First Amendment rights *** require a significant narrowing of the scope of relief" NAF requested. App. 39-40. Accordingly, the court tailored the permanent injunction to prohibit only the disclosure of materials petitioners had recorded in violation of their contractual obligations. App. 39-40. Like the preliminary injunction, the permanent injunction does not prevent the judge presiding over Daleiden's criminal case from deciding how the enjoined materials should be treated in those proceedings. App. 30, 49.

F. The Ninth Circuit Affirms In An Unpublished Decision

Petitioners again appealed, advancing a scattershot array of arguments (the bulk of which are not at issue here). Their challenge to the district court's determination that they had waived their First Amendment rights was limited to the single sentence that "there was no evidence" in *PPFA* or this action that petitioners "knowingly and voluntarily waived their constitutional right[s]." Dkt. 22 at 33.

The Ninth Circuit again affirmed in an unpublished opinion. The court reiterated that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent." App. 4 (citing *Leonard*,

12 F.3d at 889-90; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2486 (2018)). Because "Daleiden voluntarily signed the agreements, and testified that he was familiar with the[ir] contents," the court affirmed that "[h]is waiver of First Amendment rights was demonstrated by clear and convincing evidence." App. 4. Moreover, the court explained, the injunction did not violate the Sixth Amendment, as the district court had "repeatedly stated that the federal court would not interfere with the state court's determinations regarding what information will become publicly available or disclosed in connection with the criminal proceedings." App. 5.

The Ninth Circuit also made clear that petitioners had not challenged certain aspects of the district court's ruling. The court held that "[b]y failing to specifically and distinctly argue that the district court incorrectly applied issue preclusion, [petitioners] forfeited this argument." App. 3 n.2. And, the court held, "[petitioners] forfeited any argument that the district court abused its discretion in entering an unjustified permanent injunction in favor of NAF." App. 4 n.3.

The Ninth Circuit subsequently denied petitioners' request for rehearing. App. 50-51.

REASONS FOR DENYING THE PETITION

Whether the district court abused its discretion in enjoining petitioners from disclosing materials they agreed not to disclose is not a question that warrants this Court's review. This Court previously reached

that conclusion when it denied petitioners' prior petition for certiorari, which raised this same question in challenging the district court's preliminary injunction. No intervening factual or legal developments warrant granting review now that the district court has entered a permanent injunction.

To the contrary, petitioners once again identify no disagreement among the courts of appeals or any conflict with the relevant decisions of this Court. Instead, they simply ask this Court to review the fact-bound determination that they waived any First Amendment right to disclose the enjoined materials. This Court rarely grants such requests for error correction. S. Ct. Rule 10. This case should be no exception. That is particularly true given that petitioners' arguments against waiver were not presented below. Petitioners are also wrong regardless: the evidence shows they knowingly, voluntarily, and intelligently waived any First Amendment rights by signing contracts in which they agreed not to disclose information gathered at NAF's meetings, and no public-policy interests counsel against enforcing that waiver.

I. THERE IS NO RELEVANT CONFLICT ON THE QUESTION PRESENTED

There is no conflict among any courts on any question presented by the petition. Petitioners do not meaningfully contend otherwise.

1. While petitioners attempt to frame the injunction as an impermissible prior restraint under

the First Amendment (Pet. i, 18), they identify no court that would treat it as such. That is because prior-restraint doctrine has no application here, where petitioners *waived* any First Amendment rights. As the courts below concluded, petitioners voluntarily executed agreements in which they agreed (1) not to make recordings at NAF's meetings, (2) not to disclose such recordings, (3) and that injunctive relief would be an appropriate remedy for any breach of their agreements. App. 4, 29, 95-97, 123-24. When a party waives First Amendment rights by "voluntarily assum[ing] a duty of confidentiality," those "restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *United States v. Aguilar*, 515 U.S. 593, 606 (1995).

Accordingly—and unsurprisingly—none of this Court's cases that petitioners cite as supposedly striking down impermissible prior restraints (Pet. 17-18, 30) involve waiver of First Amendment rights.[2] Instead,

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[2] *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 n.2 (1994) ("declin[ing] to adopt [a] prior restraint analysis" when reviewing an injunction that prohibited anti-abortion demonstrations because "petitioners are not prevented from expressing their message in any one of several different ways"); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (holding that government's requested injunction of newspaper's publication of classified study on Vietnam policy violated First Amendment); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding that a court order prohibiting press from publishing criminal defendant's confessions violated First Amendment); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419

this Court has enforced such waivers, rejecting the argument that a "voluntarily signed *** agreement that expressly obligated" an individual to restrict his speech by "submit[ting] any proposed publication for prior review" is "unenforceable as a prior restraint." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *accord Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (enforcing newspaper's promise of confidentiality and explaining that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law").

Likewise, none of the court of appeals decisions petitioners invoke have, as petitioners claim, deemed contractual waivers unenforceable "because of the First Amendment's protections against prior restraint

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(1971) (holding that injunction prohibiting distribution of leaflets critical of a broker's practices violated First Amendment); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-85 (1968) (holding that injunction restraining members of political party from holding rallies violated First Amendment); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-62 (1975) (holding that city board's denial of application to use city auditorium to perform musical "Hair" violated First Amendment); *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 722-23 (1931) (holding that state law providing for enjoining individuals from publishing malicious, scandalous, or defamatory articles violated First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (holding that state law authorizing education department to examine films and issue licenses for them unless film was "sacrilegious" violated First Amendment); *see also CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (granting stay of preliminary injunctions that enjoined CBS from broadcasting videos of unsanitary practices at meatpacking company).

of speech." Pet. 27. Like other litigants seeking to evade contractual obligations—and just like in their prior petition for a writ of certiorari—petitioners identify not "a single case in which a court has held that a judicial restraining order that enforces an agreement restricting speech between private parties constitutes a *** prior restraint[] on speech." *Perricone v. Perricone*, 972 A.D.2d 666, 679 (Conn. 2009).

Instead, two of the decisions petitioners cite involve no contractual waiver at all. *In re Halkin* held that a protective order enjoining disclosure of discovery materials violated the First Amendment because the plaintiffs never agreed to waive their First Amendment rights. 598 F.2d 176, 189 (D.C. Cir. 1979); *but see Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (overruling *Halkin* and holding that protective orders do not offend the First Amendment). *Crosby v. Bradstreet Co.* likewise did not involve a contractual agreement not to collect or disseminate specific information; rather, it concerned an order in a libel action "restrain[ing] the defendant from publishing any report, past, present or future, about certain named persons," including some who had not even been parties to the case. 312 F.2d 483, 485 (2d Cir. 1963); *see SEC v. Romeril*, 15 F.4th 166, 173-74 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022) (distinguishing *Crosby* and upholding SEC consent

agreement against challenge that it constituted prior restraint in violation of the First Amendment).[3]

The remaining two cases petitioners invoke, both from the Fourth Circuit, involve speech-restrictive agreements with the *government*, not the enforcement of a contract between private parties. In *United States v. Marchetti*, the Fourth Circuit actually enforced the agreement, holding that confidentiality agreements are appropriate under some circumstances in light of the government's "need for secrecy." 466 F.2d 1309, 1316 (4th Cir. 1972). And in *Overbey v. Mayor of Baltimore*, the court declined to enforce non-disparagement provisions in a settlement agreement after applying the same public-policy balancing test the Ninth Circuit applies. 930 F.3d 215 (4th Cir. 2019). *Overbey* emphasized that the "non-disparagement clause is a government-defined and government-enforced restriction on government-critical speech" because the agreement gave the City the unilateral right to declare a breach. 930 F.3d at 224-26. No similar concern is present here.

2. As petitioners are ultimately forced to admit (*see* Pet. 20), the only question here is whether petitioners waived any First Amendment rights they might have otherwise had to disclose the enjoined materials. Petitioners identify no relevant conflict of

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[3] Petitioners also cite *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), but rightly refrain from similarly mischaracterizing it as a waiver-enforcement case. *See id.* at 225 (holding that district court erred in enjoining magazine from publishing materials because those materials had been sealed by other parties in litigation).

authority on that question. That is because the courts of appeals are in agreement that a party may waive First Amendment rights as long as that waiver is voluntary, knowing, and intelligent. *E.g.*, *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) ("[I]t is well settled that such [First Amendment] waivers must be voluntary, knowing, and intelligent, and must be established by clear and compelling evidence.") (citations and quotation marks omitted); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cnty.*, 149 F.3d 277, 280 (4th Cir. 1998) ("The contractual waiver of a [First Amendment] constitutional right must be a knowing waiver, [and] must be voluntarily given."); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586 (7th Cir. 2023), *cert. denied*, No. 22-1096, 2023 WL 3937633 (U.S. June 12, 2023) ("The voluntary signing of a union membership contract is clear and compelling evidence that an employee has waived her right not to join a union."); *United States v. Loc. 1804-1, Int'l Longshoremen's Ass'n*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995) (acknowledging "the principle that an individual may waive constitutional rights in a consent decree, provided that the waiver is voluntary, knowing, and intelligent").[4]

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[4] A First Amendment waiver may arguably be valid even on a lesser showing. In *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972), the Court assumed without deciding that the standard for constitutional waiver in the civil context was governed by the "voluntary, knowing, and intelligent[ ]" standard used in the criminal context. *Id.* at 185. It has not revisited that question since.

If anything, in considering the public interest in determining whether to enforce such a waiver (*e.g.*, App. 30), the courts below applied a standard more favorable to petitioners than other courts would apply. Some courts have held that "where a court acts to enforce the right of a private party which is permitted but not compelled by law, there is no state action for constitutional purposes," so no First Amendment concerns are implicated at all. *See United Egg Producers v. Standard Brands, Inc*., 44 F.3d 940, 942-43 (11th Cir. 1995) (enforcement of settlement agreement containing non-disparagement clauses); *In re Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017) (enforcement of settlement agreements that "compelled funding of speech" was not state action). Others have held that in enforcing a waiver of constitutional rights, no balancing of the public interests is required: while "public policy must be considered as a factor in determining whether to give effect to a waiver of constitutional rights, *** the 'knowing, voluntary and intelligent' standard established by [this Court] for the waiver of constitutional rights, subsumes consideration of the public's interests." *Erie*, 853 F.2d at 1099.

The Ninth Circuit, however, has adopted a standard that is more forgiving of those seeking to evade their contractual obligations: "even if a party is found to have validly waived a constitutional right," the court "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*, 12 F.3d at 890 (quotation marks omitted); *see* App. 4 (citing *Leonard*). Petitioners identify no court that would apply a still-more-forgiving standard. To the contrary, petitioners ultimately embrace this standard, quibbling only with the lower courts' application of it to the particular facts of this case. Pet. 23-24. Such fact-bound arguments, even if valid, would not warrant this Court's attention.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT

Regardless, petitioners' fact-bound arguments also lack merit: the Ninth Circuit's decision affirming the district court's permanent injunction is correct.

A. Petitioners Waived Any First Amendment Rights

1. Petitioners plainly waived any First Amendment rights to release the enjoined materials. First Amendment rights are deemed waived if there is clear and convincing evidence the waiver is knowing, voluntary, and intelligent. App. 4; *see Janus*, 138 S. Ct. at 2486; *Overmyer*, 405 at 185, 187. That is not a close question here.

As the Ninth Circuit concluded, petitioners' knowing, voluntary, and intelligent "waiver of First Amendment rights was demonstrated by clear and convincing evidence." App. 4. Petitioners signed contracts in which they expressly agreed not to record or disclose information, and they expressly agreed those obligations were enforceable by

injunction. App. 59-63. They did so voluntarily: it is undisputed that "Daleiden and his associates *chose* to attend the NAF Annual Meetings" and "sign[] the EAs and CAs." App. 97 (emphasis by court). Indeed, "[t]he record *** demonstrates that" petitioners "infiltrated the NAF meetings with the intent to disregard the confidentiality provisions." App. 106; *see* App. 59. In deeming that waiver knowing and intelligent, the district court highlighted Daleiden's written testimony from the preliminary injunction phase that he understood the NAF contracts imposed a "nondisclosure agreement." App. 97. It also relied on the finding in the *PPFA* action that Daleiden had "intimate familiarity with" and "frequent[ly] use[d]" NDAs, and that "Daleiden *knew* what he was signing" here. App. 25, 30 (emphasis by court); *contra* Pet. 22 (asserting the district court did not consider whether petitioners understood the consequences of their waiver).

2. Petitioners' arguments that they nevertheless did not waive their rights to disclose any information obtained at NAF's meetings fail. Petitioners contend the courts below did not properly consider the "circumstances" surrounding their waiver. Pet. 21. They emphasize the form nature of the contracts. Pet. 21-22. They also highlight other "important evidence against waiver" the courts below supposedly ignored, including Daleiden's statements about the waiver's enforceability, the contracts' prohibitions on photography, and statements by NAF employees. Pet. 22.

All of petitioners' arguments about these "circumstances" are forfeited. Beyond a cursory statement that there was "no evidence" they "knowingly and voluntarily waived their constitutional right[s]" (Dkt. 22 at 33), petitioners never argued their waiver was invalid, whether on account of these factors or otherwise, in the court of appeals.[5] Issues that are "not examined by the" court of appeals are "not properly pursued in this Court." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012); *accord Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *but see*, *e.g.*, Pet. 37 ("None of the lower court opinions addressed this issue.") (emphasis omitted). Petitioners cannot now complain that the court of appeals failed to consider a "circumstance" that was not properly raised below.

Compounding the problems stemming from petitioners' failure to properly raise these arguments in the Ninth Circuit is petitioners' failure to address—

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[5] In appealing the preliminary injunction, petitioners contended the contracts should be construed narrowly because they were "standard-form contracts of adhesion." *NAF v. CMP*, 9th Cir. No. 16-15360, Dkt. 19, at 46. But petitioners did not make that argument in the underlying appeal, and in any event this statement was made in support of petitioners' argument that the contracts were ambiguous under state-law contract interpretation principles: petitioners never argued a "form contract" exception to the constitutional waiver rule. While petitioners mentioned form contracts, bargaining inequality, and assistance of counsel in their reply brief on appeal of the permanent injunction, arguments first raised in reply briefs are properly deemed forfeited. *Barnes v. FAA*, 865 F.3d 1266, 1271 n.3 (9th Cir. 2017).

even in *this* Court—the district court's conclusion that Daleiden's knowledge and understanding of the relevant contracts was established in the *PPFA* litigation. App. 25, 30. As the Ninth Circuit determined, petitioners forfeited any argument that the district court erred in treating these findings as preclusive. App. 3 n.2. That alone is dispositive.

3. In any event, petitioners' factual challenges to the waiver finding are meritless. Petitioners first contend that they could not have waived their First Amendment rights in a "form" contract. Pet. 21-22. Yet such a blanket exception would contradict the principle that waiver "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the" waiving party. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quotation marks omitted). *Overmyer*, on which petitioners rely, is not to the contrary. 405 U.S. at 186 (emphasizing case-specific nature of waiver inquiry).[6] And lower courts have consistently found valid waiver, including of First Amendment rights, in standardized contracts. *E.g.*, *Edgar v. Haines*, 2 F.4th 298, 308, 312 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 2737 (2022) ("[B]y voluntarily

[6] *Fuentes v. Shevin*, 407 U.S. 67 (1972), on which petitioners also rely (Pet. 21), has no application here. While *Fuentes* reiterated the "knowing, voluntary, and intelligent" standard that *Overmyer* assumed applied to civil constitutional waivers, it declined to consider "the involuntariness or unintelligence of" the purported waiver, because "the contractual language relied upon d[id] not, on its face, even amount to a waiver." *Fuentes*, 407 U.S. at 95.

signing" CIA "standard secrecy agreements," "plaintiffs knowingly waived their First Amendment rights to challenge the requirement that they submit materials for prepublication review."); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (waiver of jury-trial right in "standardized, fine print contract" knowing and voluntary); *United States v. Sanchez*, 354 F.3d 70, 81-83 (1st Cir. 2004) (defendant knowingly and voluntarily waived right to counsel through "boilerplate" form); *United States v. Brown*, 569 F.2d 236, 237 (5th Cir. 1978) (same). To be sure, the boilerplate nature of a waiver agreement may be relevant where there are no other indicia of knowledge or voluntariness. *Overmyer*, 405 U.S. at 186. Here, however, there is abundant evidence that Daleiden was "aware of the significance of" the waiver provisions (*ibid.*) and willingly chose to sign the contracts. *Supra* 21-22.

4. Petitioners' three pieces of "important evidence against waiver" (Pet. 22) are no more compelling.

First, petitioners complain the district court "ruled that Petitioners' testimony of their own understanding of the agreements' effect was irrelevant." Pet. 22. That misstates the record. The district court, in the preliminary injunction order, rejected petitioners' argument that the waiver was unenforceable simply because petitioners purportedly believed they might have defenses to its enforcement. App. 97. That Daleiden thought his waiver might be unenforceable "does not make" his "execution of the

agreement any less voluntary." *Leonard*, 12 F.3d at 890. In fact, petitioners' statements that they, for example, believed the nondisclosure provisions were "too broad, vague, and contradictory to be enforced" (App. 97) actually prove knowledge: parties cannot contemplate defenses to a nondisclosure agreement without understanding they made such an agreement.

Second, petitioners assert the lower courts ignored "provisions which expressly permitted photography of exhibits by an exhibitor in its own designated space." Pet. 22. Yet the agreements also provided that "[a]ttendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions." App. 60-61, 63 (district court quoting agreements). Under no interpretation of this language could audio and video recordings such as those made by petitioners have been permitted. Nor, in any event, would any allowance for "photography" supersede the agreements' separate prohibitions on *disclosing* any information obtained at the meetings. *E.g.*, App. 19.[7]

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[7] Petitioners also appear to suggest in passing that the exhibitor agreements preclude disclosure only of "information NAF may furnish" or of "confidential information." Pet. 10 (emphasis omitted). Again, they failed to raise these arguments to the court of appeals, forfeiting them. And in any event, as the district court correctly recognized, this contention fails to give effect to the contracts as a whole, which plainly cover "all written, oral, and visual information." App. 92; *see*, *e.g.*, App. 60 (quoting exhibitor agreement provisions providing that "[u]nless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties").

Finally, petitioners claim the "courts disregarded evidence that NAF employees told Petitioners that the confidentiality agreements had nothing to [do] with publication, but only with keeping word of the meetings from reaching other hotel guests." Pet. 22. But these purported statements were made after Daleiden signed the 2014 exhibitor agreement. 9-ER-1926. And in any event, petitioners again distort the record: the NAF employees stated that the agreements required secrecy in general, without any limitation to hotel guests. 9-ER-1929.

B. Petitioners' Waiver Is Enforceable

1. No public policy prevents enforcement of petitioners' knowing, voluntary, and intelligent waiver. *Contra* Pet. 24-28. Petitioners argue that the public's interest in the recordings necessarily requires releasing petitioners from their contractual obligations. Pet. 24. But as the Ninth Circuit determined, petitioners "forfeited any argument that the district court abused its discretion in entering an unjustified permanent injunction." App. 4 n.3. Thus, the court of appeals properly declined to consider petitioners' undeveloped assertion that "public-policy considerations," including "public interest in the recordings," "weighed against enforcement" of the agreements. Dkt. 22 at 34-35. Petitioners do not even attempt to address this forfeiture ruling.

Regardless, even if petitioners had properly preserved the argument that the district court abused its discretion in finding the interest in enforcing their

waiver was not "outweighed in the circumstances by a public policy harmed by enforcement" (*Leonard*, 12 F.3d at 890), that argument would lack merit. As the district court correctly concluded, "[t]he public interest will be served by enforcing the NAF Agreements, including [the] EA provision allowing for injunctive relief." App. 34. Public policy strongly favors the freedom of contract. *E.g.*, *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 528 (1928). Here, petitioners "voluntarily entered" into the exhibitor and confidentiality agreements with NAF, exercising their freedom to bind themselves to their promises. *Town of Newton v. Rumery*, 480 U.S. 386, 398 (1987). And NAF had "legitimate reason[s]" for making these agreements with petitioners. *Rumery*, 480 U.S. at 398. NAF's agreements enable it to provide continuing medical education while protecting the privacy and safety of its employees and members, many of whom have been relentlessly stalked, threatened, and intimidated in the past. 7-ER-1553-54; 7-ER-1576; 7-ER-1572-73. The public has strong interests in the freedom of association that NAF's contracts were designed to protect. *See*, *e.g.*, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). Allowing petitioners to release the enjoined materials would severely harm that public interest by "creat[ing] a significant risk of future threats and harassment with *** irreparable and unredressable consequences." App. 34.

Petitioners' contrary arguments fail for three primary reasons. *First*, petitioners are wrong to suggest that First Amendment waivers are always unenforceable whenever the public may have an interest in the relevant issue. Pet. 24. To the contrary, this Court has enforced promises not to disclose information even when that information may have interested the public. *See*, *e.g.*, *Snepp*, 444 U.S. at 509 & n.3 (upholding injunction enforcing CIA agent's promise to submit certain writings for agency's prepublication review). Other courts broadly agree that parties' nondisclosure agreements are enforceable even when they cover matters that could spark the public's interest. *E.g.*, *Youngblood-West v. Aflac, Inc.*, 796 F. App'x 985, 992-93 (11th Cir. 2019), cert. denied, 141 S. Ct. 267 (2020) (enforcing agreement not to disclose doctor's alleged assault of patients). All petitioners muster in response are the unremarkable (and undisputed) propositions that the First Amendment protects speech on issues of public importance and the right to receive information. Pet. 24, 30 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978)). None of the cases petitioners cite concerned waiver of First Amendment rights, much less the enforceability of that waiver.

Second, and in any event, no public interest would be served by allowing petitioners to disseminate the

materials covered by the injunction. Contrary to petitioners' suggestion, they have not been enjoined from engaging in the "profound national debate" surrounding abortion. Pet. 24-25. Petitioners remain free to participate in that debate, including by criticizing NAF, its members, and their policies. All they are enjoined from doing is releasing recordings they obtained in violation of their contracts at NAF conferences in 2014 and 2015. The release of those materials would serve no marginal public interest. As the district court reiterated in its permanent injunction order, the videos "disclosed no criminal activity." App. 33. And "the majority of the recordings lack any sort of public interest" at all—"consist[ing] of communications that are tangential" to the issues in which petitioners profess an interest. App. 64. The remainder merely depict "abortion providers comment[ing] candidly about how emotionally and professionally difficult their work can be." App. 101. "[T]his sort of information is already fully part of the public debate over abortion." App. 101.

Third, any public interest is further diminished by the deceptiveness of petitioners' speech. As the district court found in its permanent injunction ruling, "the steps [petitioners] took to effectuate their fraudulent scheme of misrepresentation and surreptitious recordings" favored injunctive relief. App. 31; *see* App. 114 (similar in preliminary injunction ruling). For example, petitioners released a "highlight" video of a conversation with a Planned Parenthood doctor with a press release claiming the video showed that

Planned Parenthood "sell[s] baby parts." App. 74 (capitalization omitted). The video omitted the doctor's comments that "'nobody should be selling tissue. That's just not the goal here' and her repeated comments that Planned Parenthood would not sell tissue or profit in any way from tissue donations." App. 74. Petitioners also released a "highlight" video of a conversation with a Planned Parenthood staff member with a press release claiming the staff member "haggle[d] over baby parts prices." App. 74 (capitalization omitted). The video omitted the staff member's comments "that tissue donation was not about profit, but 'about people wanting to see something good come out' of their situations, 'they want to see a silver lining ***.'" App. 74. Contrary to petitioners' suggestion (Pet. 25-26), it was entirely appropriate for the district court to consider petitioners' deceptive conduct in determining whether the public interest supported enforcing petitioners' waiver: "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

2. Petitioners are also wrong to insist that any interests of law enforcement required the district court to refuse to enforce petitioners' waiver. *Contra* Pet. 32-34. As an initial matter, petitioners did not challenge the permanent injunction in either the district court or the Ninth Circuit on the ground that it interferes with law enforcement or government

investigations. This contention is therefore forfeited. *Ark. Game & Fish Comm'n*, 568 U.S. at 38.

In any event, as petitioners concede, petitioners have been permitted to produce the enjoined materials in response to lawful government-issued subpoenas. Pet. 32. And there is no evidence that the injunction, which has been in place since 2015, "has ever stood in the way of law enforcement or governmental investigations." App. 30. To the contrary, in the wake of petitioners' campaign, at least seven states opened and closed investigations, finding no evidence of wrongdoing, while eight other states publicly refused to pursue any investigations based on petitioners' false accusations. D.Ct. Dkt. Nos. 227-21 to 227-34, 227-39. Likewise, "Congress has completed its investigations into fetal tissue donation, uncovering no wrongdoing." *NAF v. CMP*, 9th Cir. No. 18-17195, Dkt. No. 69-1 at 2. "[B]oth houses of Congress have expressly disclaimed reliance on CMP's recordings in their investigations and referrals." *Id.* at 4. And meanwhile, the district court has "repeatedly offered to make and made [itself] available on an expedited basis to hear the defendants' or investigatory requests for access to the NAF materials." App. 30.

NAF's right to receive notice of the government subpoenas likewise does not counsel against enforcement of petitioners' waiver. *Contra* Pet. 32-33. Petitioners *stipulated* to this right in a protective order, which they have never appealed. D.Ct. Dkt. No. 92. They also agreed to such notice in the very NAF confidentiality agreements they knowingly and

voluntarily signed. D.Ct. Dkt. No. 225-8 (¶4). No state has sought to intervene to challenge the notice provision. And regardless, contrary to petitioners' contention, the notice provision gives NAF no "veto power over the content of state criminal investigations." Pet. 33. It merely gives NAF notice of the subpoenas so that NAF can timely challenge such subpoenas in the appropriate forum under governing law. App. 82.

Petitioners' reliance on *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984) is misplaced. In *O'Brien*, this Court held that the SEC need not notify the target of an investigation before issuing a third-party subpoena. "*O'Brien* involves investigations in which a target is unaware of an ongoing investigation and still possesses" responsive materials, and thus might destroy the materials if alerted. App. 125-26. Here, "NAF already knows that some law enforcement authorities seek this information." App. 126. And, significantly, petitioners' lawyers possess copies of the recordings and "are hardly likely to destroy" them. App. 126.

3. Nothing about Daleiden's state-court criminal prosecution weighs against enforcing petitioners' waiver, either. Contrary to petitioners' argument (Pet. 35), the injunction does not interfere with Daleiden's defense. As the district court repeatedly made clear, if Daleiden wishes to use the enjoined materials "to support his defense," he can "seek leave from" the state court to do so. App. 13. And if the state court orders that any enjoined materials "may be

released in some public manner to allow Daleiden to fully contest the criminal charges," the state court "may do so without [the federal district court's] interference." App. 13-14.

Because nothing in the district court's order enjoins the state's prosecution of Daleiden, "*Younger* abstention is not applicable to this case," as the Ninth Circuit correctly recognized. App. 6; *see Younger v. Harris*, 401 U.S. 37, 45 (1971) (federal courts must abstain from taking actions that have the actual or practical effect of enjoining state criminal prosecutions in limited circumstances). *Contra* Pet. 35 (invoking *Younger*). Nor does the injunction interfere with the state prosecution by controlling "the admissibility of evidence" there. *Contra* Pet. 36. As the district court explained, the state court "will determine what is relevant, admissible, and accessible to the public in the criminal proceedings." D.Ct. Dkt. No. 482 at 20-21 n.25.

III. THE PETITION RAISES NO IMPORTANT QUESTION AND IS A POOR VEHICLE IN ANY EVENT

The petition does not properly present any question of importance. This Court already declined to address these issues when petitioners sought review of the Ninth Circuit's affirmance of the district court's preliminary injunction. *Daleiden v. Nat'l Abortion Fed'n*, 138 S. Ct. at 1438. There, petitioners argued that the preliminary injunction—which was identical in substance to the permanent injunction—was an impermissible prior restraint. *Daleiden v. Nat'l*

Abortion Fed'n, 2017 WL 3393651, at *11. And petitioners argued that the Ninth Circuit's decision conflicted with those of other circuits, including *Crosby*, *Halkin*, and *Marchetti*. *Id.* at *15-16.

This successive petition presents the very same arguments, and it should be denied for the same reasons. Indeed, even if the petition presented an important question, this case would be a poor vehicle to resolve it—worse, even, than it was five years ago. Most of petitioners' arguments against waiver were never raised below, meaning this Court does not have the benefit of a fully developed record. And petitioners further obscure the proceedings below by ignoring important aspects of the waiver ruling, including the impact of issue preclusion.

This case did not warrant review five years ago. It is even less worthy of review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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