No. 22-1135

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

REPLY BRIEF FOR PETITIONERS

Thomas Brejcha
Peter Breen
THOMAS MORE SOCIETY
309 W. Washington
Suite 1250
Chicago, IL 60606
(312) 782-1680

Jeffrey M. Harris
Counsel of Record
James F. Hasson
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Rd.
South Suite 250
Austin, TX 78746
(512) 399-3022

Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9938

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Attorneys for Petitioners

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REPLY BRIEF

NAF concedes that Petitioners engaged in public speech when they published the first half of their video footage. It concedes that Petitioners' speech sparked intense nationwide debate and directly led to state and federal investigations, criminal referrals, convictions, new state laws, and terminations of federal contracts. It likewise concedes that the district court injunction permanently bans Petitioners from sharing, or even describing, their remaining 500 hours of footage with anyone, for any reason. Daleiden cannot use it to publicly defend himself from criminal charges. Petitioners cannot provide it to law enforcement, even though they believe it contains evidence of criminal activity. And they cannot publish it to inform the ongoing debate about the use of organs from aborted babies in medical research or the fetal tissue industry more broadly.

NAF suggests this is all business as usual and that this case is simply a factual dispute with no constitutional implications. But the First Amendment implications of the district court's permanent gag order are staggering. Thus, NAF retreats to a handful of inapposite cases about waiver, argues that "no First Amendment concerns are implicated at all," BIO.20, and asserts that Petitioners have forfeited arguments that were explicitly raised below.

Contrary to NAF's suggestion, the question before the Court is a straightforward and highly consequential matter of constitutional law: can a district court enter a permanent injunction that completely bans speech on a specific matter without

applying any level of First Amendment scrutiny? This Court's intervention and reversal of the decision below are imperative.

I. The question presented is a matter of profound public importance, and the lower courts' decisions flout the First Amendment.

NAF dedicates most of its brief to characterizing this appeal as a routine factual dispute unworthy of this Court's attention. *E.g.*, BIO.14. Tellingly, it spares only a few pages addressing the public importance of the constitutional issue at stake. BIO.34-35. On the merits, NAF largely quotes the district court and Ninth Circuit opinions, and argues that this Court's prior restraint jurisprudence is entirely inapposite to a permanent gag order against further speech.

A. As *amici* underscore, this case raises issues of profound national importance.[1] Petitioners' speech prompted debate and substantive changes at every level of government and across a vast array of public and private institutions. *See* Pet.6-9; Br. for Judicial Watch at 8-23.

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[1] NAF repeatedly notes that the Ninth Circuit's opinion was unpublished, BIO.1, 8, 12, but that "carries no weight" in this Court's certiorari analysis, *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); *see also Ricci v. DeStefano*, 557 U.S 557, 576 (2009). Given the seven-year procedural history and enormous stakes of this case, that "the decision below is unpublished … is yet another disturbing aspect of the [Ninth] Circuit's decision, and yet another reason to grant review." *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari).

Those debates are still ongoing. *See, e.g.*, Rep. Daniel Webster, *Rep. Webster Demands DOJ Investigate Illegal Fetal Tissue Research*, (Sept. 23, 2021), https://perma.cc/F4LR-TW5Z (letter from 44 congressmen and 22 senators requesting investigation into University of Pittsburgh's use of organs from aborted fetuses in research experiments); Sen. Bill Cassidy, *Cassidy, Colleagues Urge DOJ, FBI to Investigate Planned Parenthood for Illegal Trafficking and Sale of Fetal Tissue*, (Aug. 10, 2020), https://perma.cc/M3RG-PEBC (letter from 27 senators requesting investigation based on testimony from related case involving CMP). The injunction deprives the public of "the complete picture" about these issues. Br. for Judicial Watch at 24; *cf. N.Y. Times Co. v. United States*, 403 U.S. 713, 723-34 (1971) (Douglas, J., concurring) ("[S]erious impact" of publication is "no basis for sanctioning a previous restraint on the press," because "[o]pen debate and discussion of public issues are vital to our national health.").

If the Ninth Circuit were right, then speech that "lies at the heart of the First Amendment" could be extinguished by fine print in form contracts signed years or decades before. *Lane v. Franks*, 573 U.S. 228, 325 (2014). The decisions below "open[] the door to a wide range of prior restraints," enforced by federal courts under pain of sanctions. Br. for Missouri, et al. at 13. Speech on any topic could be censored without any level of First Amendment scrutiny if a plaintiff could contrive some argument that that a defendant waived its right to speak.

The public also has "a strong interest in ensuring that [citizens] can freely communicate with law enforcement." Br. for Missouri, at 1. The Ninth Circuit, however, has announced a de facto rule that a private party can use a purported "contractual waiver as a sword to prevent another party from sharing information with law enforcement." *Id.* NAF offers no defense of this new legal principle. Instead, it suggests that the injunction "'has [n]ever stood in the way of law enforcement or governmental investigations," because "seven states opened and closed investigations" without charges. BIO.32.

That argument is circular, as Petitioners have been enjoined from sharing any evidence for the past six years. It also fails on its own terms because multiple companies—including one of NAF's members—were prosecuted for selling or transferring fetal tissue due to video evidence released by CMP before the injunction was entered. *See* Pet.App.32 n.19; Br. of Amici Curiae Attorneys General at 5-9, *Planned Parenthood Fed'n of Am. v. Center for Med. Progress*, No. 20-16068 (9th Cir. 2021) ("Defendants' videos aided state and local investigations and enforcement actions."). Notably, the NAF member subject to prosecution was accused of illegally transferring fetal tissue to a second NAF member. *Id.* There can be no serious dispute about the importance of the enjoined speech.

B. The Ninth Circuit's decision affirmed an unprecedented prior restraint and must be reversed. Petitioners had released only half of their investigation before the district court ordered them to

stop speaking. By essentially silencing Petitioners mid-sentence, the district court departed from centuries of jurisprudence stretching back to the sixteenth-century common law. *See* Br. for American Constitution Rights Union at 5-16.

NAF cannot identify a single case that parallels the prior restraint entered by the district court. For good reason: this Court has never held that a "permanent injunction" against "all future speech" is constitutionally permissible, even in cases of repeated defamation. *Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., dissenting). NAF's only retort is to claim that Petitioners cannot produce supporting precedent, either. *See* BIO.14-16. That is incorrect. *See* Pet.17-18, 30. To the extent that none of those cases "expressly consider[ed]" a gag order of infinite duration and unlimited scope, that only highlights the extreme nature of the district court's injunction. *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977). "But unless [this Court] close[s] [its] eyes to the basic reasons why" it has rejected every prior restraint it has reviewed, it "cannot avoid applying the force and rationale of [those] precedents" to the injunction here. *Id.* at 501.

II. NAF's defense of the lower courts' finding of waiver is unavailing.

A. NAF fails to cite any precedent finding a waiver of core constitutional protections in remotely comparable circumstances. Its lead attempt is *Snepp v. United States*, 444 U.S. 507 (1980), in which this Court enforced a former CIA employee's agreement "not to divulge *classified* information and not to

publish *any* information without prepublication review." *Id.* at 508 (emphases original). But the agreements there, unlike those here, "expressly obligated [the employee] to submit any proposed publication for prior review," which obligation he had "voluntarily reaffirmed … when he left the Agency." *Id.* at 509 n.3. Unlike NAF's form exhibit-space agreements, which alluded generally to undefined "injunctive relief," the *Snepp* agreements spelled out—and obtained the defendant's consent to—the exact process of prepublication review.

Moreover, the burden on speech in *Snepp* rested on the highest justification: that publication would jeopardize "both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id.* No such interests are at stake here. *Cf.* BIO.28 (invoking only alleged interests in freedom of contract and association). And yet the burden on speech in *Snepp* was also much lighter: a prepublication review process, as "a reasonable means for protecting [the Government's] vital interest," 444 U.S. at 509 n.3, not a permanent injunction against all publication.

NAF fares no better with its other cases. *Edgar v. Haines* also involved CIA prepublication review, and the court straightforwardly applied *Snepp* to circumstances implicating national security. 2 F.4th 298, 312 (4th Cir. 2021); *see* BIO.24-25. *Cohen v. Cowles Media Co.* never mentioned waiver at all and concerned only a damages award, not a prior restraint of speech. 501 U.S. 663 (1991); *see* BIO.16. And for the

proposition that courts "broadly agree" that waivers are enforceable even against speech that "spark[s] the public's interest," BIO.29, NAF cites only an unpublished decision enforcing a settlement agreement—negotiated with advice of counsel—in which parties "covenant[ed] that neither they nor their counsel shall reveal to anyone the alleged acts or omissions giving rise to their claims," *Youngblood-West v. Aflac Inc.*, 796 F. App'x 985, 988 (11th Cir. 2019). None of these cases supports the dramatic waiver of rights the lower courts seized on here to bypass the First Amendment altogether.

NAF also relies on *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993); *see* BIO.25-26, 28, but that case only highlights the lower courts' erroneous approach to waiver. *Leonard* concerned financial penalties indirectly related to a union's speech—far less severe a restriction than a prior restraint. 12 F.3d at 886. This distinction was crucial to the court's decision to enforce the waiver: "Were [the challenged provision] a complete ban on all Union political speech," the court wrote, "we might well hold that the public interest in allowing and hearing such speech outweighs the public interests in enforcing the waiver." *Id.* at 891. But because the agreement served important public interests and imposed only a "relatively narrow limitation" on the union's political speech—an *ex post* disincentive to speak on a narrow category of legislation—the Ninth Circuit held its waiver was enforceable. *Id.* at 892.

B. NAF also fails to rebut Petitioners' arguments that the lower courts erred by finding and enforcing a

blanket waiver of core First Amendment rights. NAF does not even try to argue that the lower courts fulfilled their duty to "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Nor does it contend with *Overymyer*, in which this Court did not enforce a signed waiver agreement until satisfied that parties were "aware of the significance of" the agreement, and that it was "not a case of unequal bargaining power or overreaching," nor "a contract of adhesion." *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 186 (1972); *see* Pet.21-22.

NAF's remaining attempts to bolster the finding of waiver fail.[2] It omits altogether the fact that the disputed exhibit-space agreement, with only a general reference to "injunctive relief" covering nearly twenty paragraphs of terms, does not reference injunctions *against publication*. *See* Pet.11. But a party cannot "clearly and affirmatively consent" to the waiver of its constitutional right against prior restraint, *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), by signing an agreement that makes no mention of any injunction against speech. Indeed, NAF's primary argument on waiver is to reiterate the lower courts' conclusion that as long as Petitioners consciously signed these form agreements, courts have nothing else to consider. BIO.21-22. That argument contradicts this Court's precedent and falls well short of a "clear and

[2] NAF does not dispute that whether a party waived a constitutional right is a question of federal law. *See* Pet.20.

compelling" showing. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967).

As to the enforceability of a waiver, NAF largely retreats to defending the lower courts' assessment of the accuracy and newsworthiness of Petitioners' speech, particularly their conclusion that Petitioners had published "misleadingly edited videos," leveled "unfounded assertions … of criminal misconduct," and lacked "journalistic integrity." App.113-14. NAF defends this overreach as a judicious weighing of the public interest. BIO.30-31; *but see* Pet.31-32. It also observes that Petitioners "have not been enjoined from engaging in the 'profound national debate' surrounding abortion." BIO.30 (citing Pet. 24-25). But the First Amendment does not tolerate government dictation of the tools or sources with which citizens may enter public debate—least of all through targeted acts of censorship. None of NAF's arguments excuses the lower courts' erroneous waiver of core constitutional guarantees. Pet.20-28.[3]

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[3] NAF repeatedly mischaracterizes the content of Petitioners' speech and other facts relevant to Petitioners' legal arguments. For example, NAF contends that Petitioners' video footage was "misleadingly edited" and portrayed "manipulated dialogue." BIO.1, 6. Curiously, though, NAF never brought a defamation claim, and neither did the plaintiffs in the related case cited in NAF's opposition. *See* BIO.10; *cf. Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 380 (5th Cir. 2020) (en banc) (rejecting charges that related CMP videos were "deceptively edited or otherwise unreliable"). NAF also portrays the events Petitioners attended as secret, tightly controlled

III. No other obstacles impede the Court's review.

Finally, NAF offers baseless claims of forfeiture and a distorted picture of the facts to paint this case as a "poor vehicle" for the Court's review. BIO.35. To the contrary, there are no obstacles to review of the lower courts' evisceration of the First Amendment's fundamental protections: the freedom to speak on matters of profound public importance in "'an uninhibited marketplace of ideas'" without "government … interfere[nce]." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2303 (2023) (quoting *McCullen v. Coakley*, 573 U. S. 464, 476 (2014)).

A. NAF's reflexive answer to nearly all of Petitioners' arguments is to suggest they are forfeited, *e.g.*, BIO.2, 23, 24, 27, but even a cursory review of the record shows otherwise. All of Petitioners' arguments were briefed extensively in the Ninth Circuit. *See, e.g.*, Dkt. 22 (Opening Brief of Defendants-Appellants) at 27-35 ("The injunction is a prior restraint on protected speech in violation of the First Amendment."); *id.* at 30-34 ("Defendants did not waive their First Amendment rights by signing the exhibit-space agreement."); *id.* at 34-35 ("[P]ublic-policy considerations weigh against enforcement" of any waiver). Petitioners likewise pressed these same

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meetings, when in reality they were garden-variety trade shows with exhibitors and other attendees mingling in a hotel ballroom in large numbers. *Cf.* Br. for Missouri, at 14 ("Communications at trade conferences (which are necessarily industry-wide affairs) are hardly the type of information that is generally recognized as the most private.").

arguments throughout this case, including at the summary-judgment phase.[4]

NAF is particularly wrong to suggest that Petitioners forfeited their argument that any putative waiver is unenforceable as a matter of law. NAF re-packages Petitioners' argument as one that the district court "abused its discretion," and then points to the Ninth Circuit's observation in a footnote that Petitioners had not challenged the injunction under a fact-bound, abuse-of-discretion standard. BIO.27; *see* App.4 n.3. But the errors of law Petitioners identify would necessarily constitute abuse of discretion. *See McLane Co. v. E.E.O.C.*, 581 U.S. 72, 81 (2017). And, in all events, Petitioners plainly raised the same argument below, discussing the Ninth Circuit's precedent on the issue. Dkt. 22, at 34-35 (citing *Leonard*, 12 F.3d at 890-92; *Davies v. Grossmont Union H.S. Dist.*, 930 F.2d 1390, 1396-99 (9th Cir. 1991)).

NAF further asserts that Petitioners "never argued their waiver was invalid" in the court of appeals, beyond "a cursory statement that there was 'no evidence' they 'knowingly and voluntarily waived their constitutional right[s].'" BIO.23. That is incorrect. Petitioners argued at length that they "did

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[4] *See, e.g.*, D. Ct. Dkt. 688 (Defendants' Opposition to Plaintiff's Motion for Summary Judgment), at 13-14 (arguing against waiver and enforceability of any waiver); Dkt. 19, at 17-19, *NAF v. Daleiden*, No. 16-15360 (9th Cir. April 18, 2016) (similar, on appeal of preliminary injunction); Petition for Writ of Certiorari, *Daleiden v. Nat'l Abortion Fed'n*, No. 17-202, at 17-19, 2017 WL 3393651 (U.S. Aug. 3, 2017) (similar).

not waive their First Amendment rights by signing the exhibit-space agreement." Dkt. 22 at 30-34.

NAF also argues that because Petitioners did not seek certiorari on the lower courts' rulings on issue preclusion, based on the same district court's factual findings in *PPFA*, "that alone" is "dispositive" of the case. BIO.24. Not so. Without reviewing the lower courts' analysis of issue preclusion, the Court can and should review whether these facts overcome the high "presumption against waiver." *Johnson*, 304 U.S. at 464.[5]

Finally, NAF repeatedly emphasizes that this Court declined to review the district court's preliminary injunction. *See* BIO.1, 14, 34-35. But that is no barrier to review of the case now that it has reached final judgment. Indeed, the Court routinely allows a case to reach a final disposition before granting review. *Cf. Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 952 (2022) (Alito, J., respecting the denial of certiorari) (concurring in denial "because the preliminary posture of the litigation would complicate [the Court's] review"). Now that the lower court proceedings are completed, the Court can review the

[5] Petitioners have also sought certiorari in the parallel *PPFA* case, which involves another group's claim for money damages arising out of the same speech at issue here. *See Center for Medical Progress v. Planned Parenthood Federation of Am.*, No. 22-1168 (U.S. filed May 30, 2023). Given the substantial overlap between the facts and certain issues in the cases, the Court may wish to consider the two petitions simultaneously.

weighty constitutional issues implicated by this case on a full record from a final judgment.

CONCLUSION

This Court should grant certiorari.

Thomas Brejcha
Peter Breen
THOMAS MORE SOCIETY
309 W. Washington
Suite 1250
Chicago, IL 60606
(312) 782-1680

Jeffrey M. Harris
Counsel of Record
James F. Hasson
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Rd.
South Suite 250
Austin, TX 78746
(512) 399-3022

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LIMANDRI & JONNA LLP
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