

No. _____

In the Supreme Court of the United States

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

Applicants,

v.

NATIONAL ABORTION FEDERATION,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Applicants Center for Medical Progress and BioMax Procurement Services, LLC, state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stocks.

TO THE HONORABLE ELENA KAGAN, AS CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to Supreme Court Rule 13.5, Applicants Center for Medical Progress, BioMax Procurement Services, LLC, and David Daleiden respectfully request a 60-day extension of time to file a petition for a writ of certiorari, to and including May 19, 2023.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Ninth Circuit issued its opinion on August 19, 2022 (Exhibit 1), and denied Applicants' timely petition for rehearing on December 19, 2022 (Exhibit 2). Unless an extension is granted, the deadline for filing the petition for certiorari will be March 20, 2023. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

2. This case implicates core First Amendment principles. The district court issued, and the court of appeals affirmed, an anti-publication injunction against Applicants' core political speech. Such prior restraints "are the most serious and the least tolerable infringement on First Amendments rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Court has long recognized them as "the essence of censorship," *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), and subjects "[a]ny prior restraint on expression" to "a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

3. Applicants are undercover journalism organizations and their principal. They attended the 2014 and 2015 annual meetings of the National Abortion

Federation (“NAF”) and recorded their discussions with members of the abortion industry about the sale of fetal tissue obtained in abortions. Applicants released the first of their recordings in July 2015, with seismic nationwide effect. The videos prompted investigations, prosecutions, and legal and regulatory changes at all levels of government. *See, e.g., Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of certiorari) (noting “several” states’ investigations); Committee on the Judiciary, United States Senate, *Human Fetal Tissue Research: Context and Controversy* (Dec. 2016).

4. To stem this tide of unfavorable attention, NAF sued Applicants and sought a preliminary injunction against release of any further materials recorded at its conferences. The district court granted a TRO, and then a preliminary injunction. *Nat’l Abortion Fed’n v. Ctr. for Med. Progress*, No. 3:15-cv-03522, 2016 WL 454082, *12, *26 (N.D. Cal. Feb. 5). It concluded Applicants had waived all protections of the First Amendment in the fine print of exhibitor agreements they had signed before NAF’s meetings, which stated that attendees must not share any “information NAF may furnish” and authorized unspecified “injunctive relief” as a remedy for breach. *Id.* at *4-5.

5. This Court has emphasized that any waiver of constitutional rights must be “freely given and shown by ‘clear and compelling’ evidence,” *Janus v. AF-SCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), but the district court held that Applicants waived all constitutional protections the moment they signed these contracts of adhesion. *See* 2016 WL 454082, at *17-18; *but see, e.g., Fuentes v. Shevin*, 407 U.S.

67, 94-95 (1972). The district court then granted a preliminary injunction, and later a permanent injunction, restraining Applicants from publishing more than 500 hours of remaining footage or *even discussing* any information they obtained during their investigation. It did all this without applying any level of First Amendment scrutiny.

6. Despite the grave constitutional questions raised by prior restraints on the press, the Ninth Circuit affirmed the preliminary and permanent injunctions in two unpublished opinions. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 685 F. App'x 623 (9th Cir. 2017); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 2022 WL 3572943 (9th Cir. Aug. 19) (Exhibit 1). Both times, the appellate court dispensed with the case's First Amendment issues in a single paragraph and did not engage in any substantive analysis of Applicants' free speech rights. Accordingly, no court has yet tested whether the district court's anti-publication injunction against Applicants can surmount the "heavy presumption' against its constitutional validity." *Org. for a Better Austin*, 402 U.S. at 419. Nor has any court required NAF to produce "clear and compelling" evidence of Applicants' purported waiver of rights.

7. The injunction has already caused serious harm to Applicants and the public. It has prevented Applicants from contributing their reporting to one of the most hotly contested issues in American politics. It has interfered with law enforcement investigations of multiple states. And it has crippled Applicant Daleiden's defense against criminal charges in California state court predicated on these recordings. Incredibly, the permanent injunction forces Daleiden to seek court permission before introducing as evidence or even describing the recordings at issue for his

defense against the state charges. *But see Kugler v. Helfant*, 421 U.S. 117, 130 (1975). If allowed to stand, the injunction's effects will be felt beyond this case, too: the lower courts' ruling will serve as a blueprint for powerful organizations to suppress unfavorable investigative journalism with the aid of the judiciary.

8. On March 1, 2023, the Ninth Circuit denied Applicants' petition for rehearing en banc in *Planned Parenthood Federation of America v. Center for Medical Progress* ("*PPFA*"), No. 20-16068 (9th Cir. 2023), which involves an appeal in a parallel case arising from the same set of facts. In *PPFA*, unrelated abortion providers who were never parties to the agreements with Applicants nevertheless sued Applicants for damages for Applicants' purported breach of the NAF form contracts. None of the claims filed by the *PPFA* plaintiff alleged that Applicants' footage was false or deceptive, but the district court nevertheless awarded the plaintiff several million dollars in publication damages. Once again, the Ninth Circuit affirmed the district court judgment without engaging in any meaningful First Amendment analysis.

9. Applicants plan to petition the Court for a writ of certiorari in *PPFA*, in addition to the certiorari petition in this case. Applicants believe that submitting the two petitions in close proximity would serve the Court's interest in judicial economy and provide the Court with a more complete explanation of the crucial legal issues at stake.

10. Applicants respectfully request an extension to prepare a petition that fully addresses the important and far-reaching issues raised by the decisions below and frames those issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicants respectfully request that an extension of time to and including May 19, 2023, be granted.

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March 6, 2023

Respectfully submitted,



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