Nos. 17-202, 17-482

In The Supreme Court of the United States

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

v.

NATIONAL ABORTION FEDERATION.

TROY NEWMAN, PETITIONER

v.

NATIONAL ABORTION FEDERATION.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In granting respondent's motion for a preliminary injunction, the district court made extensive factual findings, including that: (1) petitioners engaged in repeated instances of fraud in creating a fake company, making false statements, and entering into contractual obligations they had no intent to honor; (2) petitioners did so to infiltrate respondent's annual meetings, which are closed to the public to protect respondent's members' safety and security; (3) petitioners waived their First Amendment rights by knowingly and voluntarily entering into contractual obligations restricting their speech rights; (4) petitioners breached those contractual obligations by secretly recording respondent's meetings and obtaining confidential information from the meetings; (5) despite their professed goal of uncovering criminal wrongdoing by abortion providers, petitioners obtained no evidence of any wrongdoing; and (6) disclosing the recordings and other materials would irreparably harm respondent's constitutional rights to associate in privacy and would likely lead to harassment, threats, and violence against respondent and its members.

The question presented is:

Whether the district court properly exercised its discretion by preliminarily enjoining petitioners from disclosing the materials that petitioners recorded or obtained at respondent's private annual meetings.

CORPORATE DISCLOSURE STATEMENT

Respondent National Abortion Federation is a not-for-profit corporation organized under the General Not For Profit Corporation Law of the State of Missouri. It does not have any parent corporation, and no publicly held entity owns ten percent or more of its stock.

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STATEMENT

A. Factual Background

1. NAF and its closed-to-the-public annual meetings

Respondent National Abortion Federation ("NAF") is a private, not-for-profit professional association of abortion providers. App. 38a.[1] NAF's members include individuals, private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. *Ibid.* NAF's mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women. App. 2a. To that end, NAF sets the standards for quality abortion care and educates abortion providers and medical professionals. App. 38a.

Since 1977, NAF has hosted annual meetings where it provides essential accredited continuing medical education and training related to abortion care. NAF's annual meetings are one of the only remaining places where abortion providers can meet to learn about the latest medical research and network with other professionals. CA ER219, SER248-66.

NAF also assists its members in preventing and dealing with harassment, intimidation, and violence against abortion providers. NAF has documented more than 60,000 such incidents in the last 30 years, including murders, shootings, arsons, bombings, chemical and acid attacks, bioterrorism threats, kid-

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[1] All citations to "App." are to the petition appendix in No. 17-202.

nappings, and death threats. App. 38a-39a. NAF's own office was bombed in 1984, along with several member clinics. CA ER218. NAF assists its members by tracking security threats and providing technical assistance, onsite security training, and security assessments at its members' facilities and homes, as well as around-the-clock emergency support. App. 38a.

Understandably, many NAF members strive to preserve their privacy and identity. CA ER220-21. Some member clinics have security protocols to protect the identities of their staff, such as driving a different way to the clinic each day, not wearing scrubs when entering the building, or wearing disguises or bulletproof vests. *Ibid.* Other providers try to remain under the radar and do not speak publicly about their work out of fear for their own safety and that of their families. *Ibid.*; CA SER192-94.

NAF has therefore adopted extensive security measures to ensure the safety and security of its annual meetings. Each year, NAF's full-time security staff helps select a venue that meets strict guidelines. Security staff meet with hotel staff, local police officials, FBI and/or ATF agents, and fire-and-rescue personnel to review security issues and potential threats. Security officers stand posted at strategic locations throughout the meeting areas. Bomb-sniffing dogs patrol the venue. Attendees and staff must wear security badges to enter meeting spaces and are advised to remove them when leaving. CA ER219-21, SER1100-02.

After an activist group offered bounties to infiltrate NAF's meetings in the 1990s, NAF began

requiring all attendees and exhibitors to sign confidentiality agreements before gaining entry to its meetings. CA ER220. Adherence to the confidentiality agreements is critical for NAF as a private organization. App. 63a-64a. NAF's mission of providing medical and ethical guidance to its members—and thereby advancing public safety—would be substantially undermined if NAF could not hold private meetings without concern that they would be infiltrated, videotaped, and displayed to activists who are diametrically opposed to NAF's mission.

2. Petitioners' waiver of their speech rights in order to gain entry to NAF's private annual meetings

Petitioner David Daleiden founded the Center for Medical Progress ("CMP") in 2013. CMP is incorporated as a California nonprofit, public-benefit corporation and is tax exempt. App. 15a-17a.

Petitioner Troy Newman was, until January 2016, a board member and the secretary of CMP and a key advisor of Daleiden's. App. 17a. Newman is also the president of Operation Rescue, an anti-abortion group that lists on its websites the names and addresses of all known U.S. abortion providers and abortion facilities. App. 18a. Newman has written that it is the "responsibility" of the United States to "execut[e] * * * abortionists[] for their crimes in order to expunge bloodguilt from the land and people." CA SER758.

To infiltrate NAF's 2014 private annual meeting, Daleiden set up a fake front company called "BioMax Procurement Services," which supposedly supplied researchers with human biological specimens.

App. 17a. Daleiden—posing as 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. 19a. NAF's staff provided "Allen" an exhibitor application packet, including an Exhibitor Agreement. *Ibid.*

Daleiden filled out the exhibitor application for the fake company BioMax and signed the Exhibitor Agreement with the fake name "Susan Tennenbaum." *Ibid.* In signing 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. 3a, 20a. Daleiden also fraudulently represented that all information contained in BioMax's application and other correspondence with NAF was "truthful, accurate, complete, and not misleading." App. 3a n.1, 21a. 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. 20a-21a (emphasis omitted). Finally, Daleiden expressly agreed that a breach of the Exhibitor Agreement can be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. App. 21a.

Daleiden came to NAF's 2014 private meeting fraudulently posing as "Robert Sarkis," supposedly BioMax's Vice President of Operations. App. 20a n.5, 21a-22a. Daleiden brought two associates who pretended to be Tennenbaum and Allen. App. 21a-22a.

To gain entry, Daleiden (as "Sarkis") and "Tennenbaum" presented fake California driver's licenses. App. 21a n.6.

"Sarkis," "Tennenbaum," and "Allen" all signed Confidentiality Agreements—a prerequisite for entry. App. 21a-22a. By signing the Confidentiality Agreements, they expressly agreed they were "prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference." App. 23a. 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. 3a. And they explicitly agreed not to disclose any such information "to third parties without first obtaining NAF's express written consent." *Ibid.*

For NAF's 2015 closed-door meeting, Daleiden again submitted a fraudulent Exhibitor Agreement for BioMax. App. 19a-20a. One of Daleiden's associates—a person posing as "Adrian Lopez"—signed the Confidentiality Agreement. App. 22a. Daleiden (as "Sarkis"), "Tennenbaum," and "Allen" gained entry by falsely representing to NAF staff that they had signed Confidentiality Agreements. App. 22a-23a.

3. Petitioners' secret recordings of NAF's private annual meetings, in breach of their contractual obligations

Despite their contractual obligations, at both of NAF's private annual meetings the BioMax agents wore and carried hidden recording devices in purses, water bottles, ties, glasses, and shirt buttons.

App. 24a. Each day, they turned on their recording devices before entering the meetings and turned them off only at the end of the day. *Ibid.* They taped their conversations with attendees at the BioMax exhibitor booths, the meeting sessions they attended, and their interactions with other attendees. *Ibid.*

In total, they recorded nearly 504 hours at the meetings. *Ibid.* Yet the vast majority of the material recorded had nothing to do with CMP's professed interest in fetal-tissue donation. App. 24a-25a.

Contrary to petitioners' claim that they were acting "in the tradition of countless undercover journalists," Daleiden Pet. i, their methods diverged sharply from accepted investigatory-journalism practices. App. 75a-77a & n.44. According to journalism scholars and experts, petitioners' actions amounted to "a breathtaking departure from ethical journalism." Br. of Amici Curiae Journalism Scholars and Journalists at 21, CA ECF No. 87.

4. Petitioners' release of surreptitiously recorded videos

Despite their unsupported claims that the tapes show evidence of unlawfulness, petitioners did not immediately provide any of the recordings to law enforcement after either annual meeting. App. 61a. Instead, petitioners began releasing to the general public misleadingly edited videos of follow-up meetings with abortion providers that Daleiden secretly recorded after NAF's annual conferences. App. 34a. According to Daleiden, he was able to secure these follow-up meetings with abortion providers because of BioMax's fraudulent exhibition at NAF's annual conferences. App. 33a-34a.

The videos manipulated dialogue to falsely portray the abortion providers as "sellers" of fetal tissue. App. 34a-35a. 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." *Ibid.*

5. The ensuing harassment, threats, and murders following petitioners' release of their videos

Immediately after the videos' release, incidents of harassment, threats, and violence against abortion providers skyrocketed. App. 39a. The FBI reported seeing an increase in attacks on reproductive-health-care facilities. *Ibid.* Indeed, there have been four incidents of arson at abortion-care facilities since the videos' release. *Ibid.*

Most gravely, the Colorado clinic where one of the videos' subjects worked was targeted by a gunman, resulting in three deaths. App. 39a-40a. Newman's organization had posted on its website the surreptitiously recorded videos of this physician alongside a map and address for her clinic. *Ibid.*; CA SER196.

NAF has had to significantly boost its security staff, at increased cost, and NAF members have had to take steps to ensure their safety and that of their families. NAF has also had to increase the security measures for its private annual meetings and has cut back on its communications with members. App. 40a-41a.

Meanwhile, petitioners have threatened to release videos from NAF's private annual meetings.

Daleiden told the district court that he is continuing "the work of curating available raw investigative materials * * * for release of videos to the public." CA SER792. Newman stated that "this is just the beginning" and that "at a time of our choosing, we will release more damning evidence of illegal, ghastly and repugnant butchery." CA SER238.

Prompted by the release, nine States opened and closed investigations into Planned Parenthood, finding no evidence of wrongdoing. Eleven other States publicly refused to pursue any investigations based on petitioners' false accusations. CA SER326-78, 406-08.

B. Proceedings Below

1. Proceedings in the district court

NAF sued petitioners, alleging among other things that petitioners breached the Exhibitor Agreements and Confidentiality Agreements. NAF sought, and the district court issued, a temporary restraining order enjoining petitioners from publishing recordings and other materials taken at NAF's private annual meetings. App. 12a-13a.

The parties engaged in limited discovery, in the course of which petitioners stipulated to a protective order in which they agreed to notify NAF if they receive a subpoena, so that NAF would have an opportunity to challenge the subpoena if necessary. App. 6a. Such notice is also required as a term of the Confidentiality Agreements. CA ER127.

NAF moved for a preliminary injunction. In a 42-page opinion, the district court carefully considered

each of the four factors for injunctive relief and held that they weigh strongly in NAF's favor.

(i) Likelihood of success on the merits.

The district court construed the Exhibitor Agreements and Confidentiality Agreements and concluded that "NAF has demonstrated a strong likelihood of success on its breach of contract claims." App. 53a. The district court rejected petitioners' arguments that the agreements were not supported by consideration and did not prohibit petitioners' actions. App. 45a-54a.

Having found the contracts breached, the district court also held them to be enforceable. First, the court addressed petitioners' argument that enforcing the contracts would be an unjustified prior restraint under the First Amendment. The court found that Daleiden and his associates knowingly and voluntarily waived their rights to publish the recordings. App. 56a-58a. As the court observed, "where parties to a contract agree to restrictions on speech, those restrictions are generally upheld." App. 56a. Here, "Daleiden and his associates *chose* to attend the NAF Annual Meetings and voluntarily and knowingly signed" the contracts. App. 58a (emphasis by district court). Accordingly, petitioners' "prior restraint" arguments were misplaced. *See also* App. 73a-74a n.43 (distinguishing petitioners' cited "prior restraint" decisions).

Next, the district court weighed the public-policy interests and held that "enforcement of the confidentiality agreements against defendants is not contrary to public policy." App. 64a. Indeed, public policy "supports NAF's position." App. 63a. As the court

observed, "NAF members have the right to associate in privacy and safety to discuss their profession at the NAF Meetings, and need that privacy and safety in order to safely practice their profession." App. 75a. Thus, "in order to fulfill [NAF's] mission and allow candid discussions of the challenges its members face—both professional and personal—confidentiality agreements for NAF Meeting attendees are absolutely necessary." App. 63a. Moreover, releasing the recordings would be "contrary to California's recognition of the dangers faced by providers of abortion, as well as California's efforts to keep information regarding the same shielded from public disclosure." App. 64a (citing California statutes).

The district court considered petitioners' arguments about their asserted interest in disclosing criminal wrongdoing. But the court concluded that, on the specific facts of this case, that interest is weak; having carefully "reviewed the recordings relied on by defendants," the court found "no evidence of criminal wrongdoing." App. 60a. The court found that in context, "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. 32a. The recordings actually "tend to show an express *rejection* of Daleiden's and his associates' proposals or, at most, discussions of interest in being paid to recoup the costs incurred by clinics to facilitate collection of fetal tissue for scientific research." App. 32a (emphasis added). Recouping such costs is lawful. 42 U.S.C. § 289g-2(a), (e)(3) (permitting "reasonable payments").

The court also found that the recordings contain no evidence of violations of any other laws. App. 28a,

31a n.13. For example, in context, one of the clips on which petitioners relied as evidence of a purported violation of the Partial Birth Abortion Act, 18 U.S.C. § 1531, actually discusses "the techniques that [providers] employ to ensure that they do *not*" violate the Act. App. 28a (emphasis added).

Additionally, the district court observed that "while defendants[] repeatedly assert that their primary interest in infiltrating NAF was to uncover evidence of criminal wrongdoing, and that the NAF recordings show such wrongdoing, defendants *did not* provide any of the NAF recordings to law enforcement following" either of the annual meetings that they infiltrated. App. 61a. "Instead, defendants decided it was more important to 'curate' and release the Project videos starting in July 2015," more than a year after NAF's 2014 meeting. *Ibid.*

(ii) Irreparable harm.

The district court found that absent preliminary injunctive relief, NAF and its members would suffer four types of irreparable harm.

First, the court found that releasing the recordings would cause irreparable injury to NAF's members' constitutionally protected rights to "freedom of association (to gather at NAF meetings and share their confidences)." App. 72a-73a.

Second, the court found it likely that "the NAF attendees shown in [the] recordings would * * * face an increase in harassment, threats, or incidents of violence." App. 70a. As the court observed, petitioners' prior release of recordings "led to a significant increase in harassment, threats, and violence directed

not only at the 'targets' of CMP's videos but also at NAF and its members more generally." App. 69a. This violence included three murders at an "attack in Colorado Springs," in which "the gunman was apparently motivated by the CMP's characterization of the sale of 'baby parts.'" App. 69a, 72a n.42.

Third, the court found that due to the potential of violence and of future infiltrations at its meetings, NAF and its members would "need to take additional security measures." App. 71a.

And fourth, the court found that releasing the recordings would result in "reputational harms" to NAF's members. *Ibid.* Uncontroverted evidence established that many of the recordings previously released by CMP were highly edited to be misleading. App. 70a. Absent an injunction, petitioners were likely to release edited, misleading recordings again, thus causing reputational harms. App. 71a.

(iii) Balance of equities.

The district court found that "the balance of equities favors NAF." App. 73a. Although petitioners would be unable to release their recordings during the pendency of the preliminary injunction, "the hardships suffered by NAF and its members are far more immediate, significant, and irreparable." *Ibid.*

(iv) Public interest.

The court found that the "public interest weighs in favor of granting the preliminary injunction." App. 74a. The court explained that NAF's members have a constitutional "right to associate in privacy and safety to discuss their profession at the NAF Meetings" and that they "need that privacy and safety in

order to safely practice their profession." App. 75a. "[T]he release of the materials will irreparably impinge on those rights." *Ibid.*

(v) Scope of the preliminary injunction vis-à-vis law enforcement.

Finally, the district court carefully tailored the scope of the preliminary injunction to ensure it would protect NAF's rights but would not "hinder the ability of states or other governmental entities from conducting investigations." App. 77a; *see* App. 67a. The court made clear that the stipulated protective order and the preliminary injunction do not bar petitioners "from disclosing materials in response to subpoenas from law enforcement or other government entities." *Ibid.* Instead, those orders "simply create an orderly procedure," requiring petitioners to notify NAF before producing the materials, "so that NAF may (if necessary) challenge the subpoenas in the state court at issue." App. 77a-78a.

The court also explained that any conflict between enforcing the confidentiality agreements and the interests of law enforcement has not yet actually arisen. App. 66a (explaining that this question "has not been placed directly in issue"). Law-enforcement agencies from only two States—Arizona and Louisiana—have issued subpoenas seeking access to the materials. App. 67a n.37, 78a. Neither State has sought "enforcement of their subpoenas in the courts of their own states." App. 67a. Instead, "negotiations are ongoing between NAF, defendants, and the two states" over the scope of the materials to be produced. App. 78a. And petitioners "have repeatedly stipulated to extend the timeframe for NAF to file a

challenge to the state subpoenas in state court" under the district court's procedures. App. 67a n.37. Moreover, although Attorneys General of seven States filed an amicus brief in the district court, they did "not directly [seek] relief from the confidentiality agreements, the TRO, or the requested preliminary injunction by intervening and moving for declaratory relief." App. 66a-67a & n.36.

Accordingly, the district court enjoined petitioners from publishing or disclosing (1) "any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings"; (2) "the dates or locations of any future NAF meetings"; and (3) "the names or addresses of any NAF members learned at any NAF annual meetings." App. 80a.

2. Proceedings in the court of appeals

The court of appeals affirmed in a non-precedential memorandum decision. App. 1a-7a. Reviewing for abuse of discretion, *see Brown v. Chote*, 411 U.S. 452, 457 (1973), the court of appeals explained that the "district court carefully identified the correct legal standard and its factual determinations were supported by the evidence." App. 4a.

The court rejected petitioners' argument that the preliminary injunction is an unconstitutional prior restraint, reasoning that "the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose [the] information publicly by knowingly signing the agreements with NAF." App. 5a. Indeed, on appeal, petitioners never even challenged the district court's finding that they waived their First Amendment rights. The court of

appeals also explained 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, because one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest." *Ibid.*

The court of appeals further held that petitioners are not released from their contractual obligations because they claim to have obtained evidence of criminal wrongdoing. The district court "concluded as a matter of fact that they had not" obtained evidence of criminal wrongdoing, and "[t]hat determination is amply supported by the record." *Ibid.*

Finally, the court of appeals rejected the assertion that the preliminary injunction should not have precluded petitioners from voluntarily producing the enjoined materials to law enforcement. The court reasoned: "even assuming the dubious proposition that the defendants were entitled to root out what they considered to be illegal activities through fraud and breach of contract, the district court's finding that they uncovered no violations of the law is a sufficient answer to any right claimed by the defendants." App. 6a. Additionally, the preliminary injunction "in no way prevents law enforcement from conducting lawful investigations" because it does not preclude compliance with a lawful subpoena. *Ibid.* Rather, "the preliminary injunction carefully balances the interests of NAF and law enforcement." App. 7a.

Judge Callahan concurred in part and dissented in part. She agreed that petitioners "have generally failed to carry their burden of showing that the District Court's grant of a preliminary injunction is an abuse of discretion." App. 8a. But she would have "vacate[d] the preliminary injunction insofar as it purports to limit Defendants from disclosing the materials to law enforcement agencies and requires that Defendants notify NAF of any request they receive for the materials from law enforcement agencies." App. 10a-11a.

3. Ongoing proceedings in the district court and court of appeals

Proceedings in the district court are stayed pending appeal, including disposition of petitioners' certiorari petitions.

After the court of appeals' ruling, Daleiden and one of his associates were charged with fifteen felony counts for recording confidential communications without the consent of the parties to the communications, violating Section 632(a) of the California Penal Code. Criminal Complaint, *California v. Daleiden*, No. 2502505 (Cal. Sup. Ct. Mar. 28, 2017).

On May 25, 2017, Daleiden, CMP, and Daleiden's criminal-defense lawyers published hundreds of hours of enjoined materials on the lawyers' website and on CMP's YouTube channel. In an emergency hearing the same day, the district court ordered the immediate removal of all enjoined material and ordered petitioners and their lawyers to show cause why they should not be held in contempt. D. Ct. ECF No. 409.

Petitioners responded by moving to disqualify the district judge for purported bias. The district judge referred the motion for random assignment to a different district judge, who then denied the motion, finding no "credible arguments for disqualification." D. Ct. ECF No. 452 at 6. Nearly six months later, petitioners sought review of that denial by filing a petition for a writ of mandamus. *In re Center for Medical Progress*, No. 17-73313 (9th Cir., pet. filed Dec. 13, 2017). That petition remains pending.

The district court held Daleiden, CMP, and Daleiden's criminal-defense lawyers in civil contempt, finding "clear and convincing direct and circumstantial evidence" that they knowingly and willfully violated the preliminary injunction. D. Ct. ECF No. 482 at 11. Daleiden, CMP, and Daleiden's lawyers have appealed the contempt order. *National Abortion Federation v. Cooley*, No. 17-16622 (9th Cir.). That appeal is in the process of being briefed.

REASONS THE PETITIONS SHOULD BE DENIED

Review of the court of appeals' interlocutory, nonprecedential memorandum decision is unwarranted. The district court made well-supported factual findings and applied settled law, and the court of appeals found no abuse of discretion. The facts of this case are unique, and this Court's review would provide lower courts vanishingly little guidance. And no such guidance is needed because the lower courts agree on the legal principles.

Moreover, the two sets of petitioners cannot even agree on what questions this Court should decide. In No. 17-202, the Daleiden petitioners present the

primary issue as whether the injunction violates their First Amendment rights. Daleiden Pet. i. But they expressly waived their speech rights by knowingly and voluntarily entering into contractual confidentiality obligations. In No. 17-482, petitioner Newman implicitly recognizes that the First Amendment is not the proper lens through which to view this case; he presents the primary issue as whether the confidentiality agreements are unenforceable as against public policy. Newman Pet. 22-38. But that is a state-law question of contract law, not a question of federal law for this Court.

Both sets of petitioners ultimately agree that the courts below were required to weigh competing public-policy interests to determine whether to enforce the confidentiality agreements. But that is exactly what the lower courts did. Petitioners are unhappy with the result, but their petitions here amount to fact-bound requests for error correction. The petitions should be denied.

I. REVIEW OF THE FIRST AMENDMENT-BASED QUESTION PRESENTED IN THE DALEIDEN PETITION IS UNWARRANTED

A. Petitioners Do Not Have A First Amendment Right To Commit Fraud And Breach Of Contract

Whether a party has a First Amendment right to commit fraud and breach of contract, trample on a private organization's constitutionally protected associational rights, and disclose to the public the fruits of their fraud is not a question warranting this Court's review. That is particularly so where the answer provided below was in an interlocutory, non-

precedential, memorandum decision that was unanimous as to this question.

In any event, the answer is plainly no. The "First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Nor does it confer any "'special immunity from the application of general laws'" or any "'special privilege to invade the rights and liberties of others.'" *Id.* at 670 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). The First Amendment is therefore no obstacle to the enforcement of petitioners' contractual restrictions on their speech rights, which prohibit them from broadcasting NAF's private annual meetings to the public. As the district court explained, the First Amendment does not give petitioners "an automatic license to disregard the confidentiality provisions." App. 60a.

Even if petitioners were acting as journalists (they were not, as the district court found, App. 75a-77a & n.44), they had no First Amendment right to violate their contracts in order to access NAF's annual meetings. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Thus, journalists are "regularly excluded" from "the meetings of private organizations" without offense to the First Amendment. *Ibid.*; *see Cohen*, 501 U.S. at 669 (First Amendment confers no right to, "with impunity[,] break and enter an office or dwelling to gather" information to be released to the public.).

Nor is enforcing petitioners' own agreed-to contracts a prior restraint. *See Perricone v. Perricone*, 292 Conn. 187, 204 (2009) (noting absence of "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"). A prior restraint is found where the *government* attempts to preclude speech. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965) (striking down motion-picture-censorship law). Here, petitioners entered into private contracts in which they agreed to restrict their own speech. Where, as here, "[t]he parties themselves * * * determine the scope of their legal obligations, * * * any restrictions that may be placed on the publication" are "self-imposed," not imposed by the government. *Cohen*, 501 U.S. at 671.

B. The Daleiden Petitioners Have No Coherent Legal Rule And Ultimately Are Seeking Error Correction

1. The Daleiden petitioners frame the primary question presented in such a way that, if answered yes, would essentially preclude all courts from enjoining disclosure of any confidential, sensitive, or classified information. Petitioners assert that the First Amendment forbids "issuance of an injunction restraining the release of information of undisputed and legitimate public interest." Daleiden Pet. i. If that were the law, it would mean no confidentiality agreement could ever be enforced through an injunction, no sensitive information could be kept private through a protective order, and no court could preclude disclosure of government-classified information—so long as the public has some "interest" in

the information. But the public nearly always has an interest in confidential information. Indeed, confidentiality agreements, protective orders, and classified designations are put into place *because* the public would be interested in information that parties or courts need to keep confidential. *See, e.g.*, Fed. R. Civ. P. 26(c)(1) (Protective orders "forbidding the disclosure of discovery" may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.").

Petitioners' rule would be contrary to this Court's decision in *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984). There, this Court upheld an order barring disclosure of information produced in discovery, even though "there certainly is a public interest" in the information. *Id.* at 31. The Court explained that it "does not necessarily follow" that there is an "unrestrained right to disseminate" information to the public. *Ibid.* "[E]ven though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that '[f]reedom of speech * * * does not comprehend the right to speak on any subject at any time.'" *Ibid.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 394-95 (1950)). Thus, courts may, "on a showing of good cause," issue orders prohibiting the disclosure of information even though the public has an interest in the information. *Id.* at 37. Such an order "does not offend the First Amendment." *Ibid.*

Under the Daleiden petitioners' view, however, individuals have a First Amendment right to disclose *any* information, including information subject to a protective order, if the public would have an "interest" in it. Daleiden Pet. i. According to petitioners,

courts are powerless to issue an "injunction restraining the release" of such information. *Ibid.* There is no support for that unrestrained view of the First Amendment.

2. Perhaps recognizing the indefensible nature of the position taken in their question presented, the Daldeiden petitioners seem to advance narrower theories in other parts of their petition.

To start, petitioners allow that disclosure of "government-classified information and trade secrets" may be enjoined because those categories of information "enjoy specific statutory protection" and because "there are recognized overriding societal interests in protecting the confidentiality" of this information. Daleiden Pet. 14, 16.

But this limitation readily falters. There is no sound reason why trade secrets would be more deserving of protection than NAF's associational right to keep its annual meetings private. Even if NAF's associational rights do not have "specific statutory protection," Daleiden Pet. 14, they are protected by the Constitution. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (private organization has constitutional right to exclude if it engages in expressive activity that could be impaired by inclusion); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 580-81 (1995) (private organization can exclude members "whose manifest views [are] at odds" with the organization's existing members); *Brown v. Socialist Workers '74 Campaign Cmte. (Ohio)*, 459 U.S. 87, 91 (1982) ("'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom

of association, particularly where a group espouses dissident beliefs.'" (citation omitted)); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing "freedom to associate and privacy in one's associations"). And in any event, California statutes specifically protect confidential communications, prohibiting their recording without the consent of all parties to the communication. Cal. Penal Code § 632(a).

3. Next, the Daleiden petitioners try a different tack, asserting that a "private party" cannot obtain an injunction through "the device of a nondisclosure agreement." Daleiden Pet. 12. According to petitioners, they could not find a single "case in which federal courts have imposed or upheld an injunction prohibiting the disclosure of information to the public, based on an agreement between private parties." Pet. 17.

But courts routinely issue protective orders barring litigants from publicly disclosing information that parties have agreed to keep confidential. For example, "courts have granted protective orders to protect confidential settlement agreements." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). A protective order "act[s] as an injunction," *Public Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988), and is enforceable through contempt, *Doe v. Maywood Housing Authority*, 71 F.3d 1294 (7th Cir. 1995).

4. So the Daleiden petitioners change their legal theory yet again. They argue that courts cannot blindly enforce confidentiality agreements through an injunction but must "consider public policy" in deciding whether to do so. Daleiden Pet. 18. But that

is *exactly* what the courts below did. Contrary to the Daleiden petitioners' representation, the lower courts did not "assume[] Daleiden's putative waiver of First Amendment rights through confidentiality agreements was the beginning and end of the balancing of public interest." Daleiden Pet. 19.

Rather, the lower courts followed precedent requiring case-by-case consideration of public-policy interests to determine whether to enforce a waiver of speech rights. *See* Daleiden Pet. 17 (acknowledging that both courts relied on *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993)). Under *Leonard*, "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." 12 F.3d at 890 (quotation marks and citation omitted). Courts "balance the public policies favoring enforcement" of the waiver "against those favoring non-enforcement." *Id.* at 891; *see* Restatement (Second) of the Law of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if * * * the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

Here, the district court expressly "[w]eigh[ed] the public policy interests on the record before" the court and determined that "enforcement of the confidentiality agreements is not contrary to public policy." App. 64a; *see* App. 68a. As part of that weighing, the court carefully considered the interests of the public and law enforcement. App. 62a-65a & n.34. The court also considered NAF's constitutionally pro-

tected associational rights, as well as California's interest in protecting reproductive-health-care workers from harassment, threats, and violence, App. 63a-64a. Those are compelling public-policy interests that petitioners completely ignore. The court concluded that the public's interest in the information does not "outweigh the competing interests of NAF and its members' expectations of privacy, their ability to perform their professions, and their personal security." App. 63a. The court of appeals reviewed that determination and concluded that on this particular record, 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. 5a.

Thus, the court of appeals' non-precedential decision here in no way suggests that all confidentiality agreements will be enforced through an injunction in all circumstances. Every case involves an inquiry into whether, on the specific facts presented, enforcement of the confidentiality agreement violates public policy. *Leonard*, 12 F.3d at 890.

At bottom, the Daleiden petitioners are unhappy with how the lower courts performed this fact-intensive weighing of the public-policy interests, and they ask this Court to engage in error correction. *See* Daleiden Pet. 17-18 (disagreeing with how the court of appeals applied *Leonard*). But this Court rarely grants review when the asserted error consists of "the misapplication of a properly stated rule of law." S. Ct. R. 10.

5. Finally, stuck in error-correction mode, the Daleiden petitioners quibble with the district court's

irreparable-harm findings. They claim the court could not consider threats, harassment, and violence perpetrated by others in response to petitioners' release of recordings. Daleiden Pet. 20-21. But as the court rightly recognized (App. 69a), the correct inquiry was whether NAF and its members are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The court found that releasing the recordings "would likely lead to * * * further harassment and incidents of violence." App. 71a. The court thus applied the correct legal test. Indeed, none of the decisions cited by petitioners holds that harassment and violence perpetrated by third parties cannot be considered in the irreparable-harm analysis.

In any event, petitioners completely ignore the district court's other irreparable-harm findings that independently support the preliminary injunction. The court found that releasing the recordings would require NAF and its members to take additional security measures, and it would immediately and irreparably destroy NAF's "members' freedom of association (to gather at NAF meetings and share their confidences)." App. 71-73a.

C. The Decision Below Does Not Conflict With That Of Any Other Court Of Appeals

Review is further unwarranted because the unpublished decision below does not conflict with any other court-of-appeals decision. Nor could it do so, as it is not precedential. The Daleiden petitioners have contrived a supposed 2-1 conflict that, even if it existed, would be stale and shallow and would not war-

rant this Court's intervention. But the asserted conflict is non-existent.

1. The Second Circuit's decision in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), is readily distinguishable. There, the parties to a libel case entered into a stipulation that Dun & Bradstreet, a business-credit-report publisher, would refrain from publishing "any report, comment, or statement" about Crosby for all time. *Id.* at 484. The district court entered the stipulation as an order. *Ibid.* Thirty years later, the Second Circuit held that the order was overly broad: it "was not directed solely to defamatory reports, comments or statements, but to 'any' statements," including statements that were "not libelous." *Id.* at 485. The court was "concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information." *Ibid.*

The preliminary injunction here is completely different. It does not preclude petitioners from making "any" statements about NAF. Rather, it is tailored to the recordings and materials that petitioners fraudulently obtained through breach of contract.

2. Petitioners' reliance on *United States v. Marchetti* is puzzling, as there the Fourth Circuit *affirmed* an injunction that *enforced* a confidentiality agreement. 466 F.2d 1309, 1311-12 (4th Cir. 1972). Marchetti was a former CIA employee who, as a condition of his employment, had signed a secrecy agreement promising not to disclose classified information without authorization. *Id.* at 1312. When Marchetti sought to publish an article containing

classified information, the district court issued an injunction enforcing the secrecy agreement. *Id.* at 1312-13.

The Fourth Circuit held that the injunction comported with the First Amendment. *Ibid.* As the court explained, the right to speak is not absolute. *Id.* at 1313-15. The government has a need to keep confidential information secret, and nothing in the Constitution requires the government to divulge such information. *Id.* at 1315-16. So it is "entirely appropriate" for the government to require CIA employees to sign secrecy agreements. *Id.* at 1316. Marchetti remained free to disclose unclassified information, which would not violate the secrecy agreement. *See id.* at 1312 n.1, 1317. But the court affirmed the injunction against disclosing classified information as prohibited by the secrecy agreement. *Id.* at 1317.

Marchetti cannot conflict with the decision below because *Marchetti* does not address whether private parties' confidentiality agreements may be enforced through an injunction. To the extent *Marchetti* is apposite, it *supports* the ruling below. The Fourth Circuit explained that "[c]onfidentiality inheres in the situation and relationship of the parties." *Id.* at 1316. Where one party has a legitimate need for confidentiality and another party voluntarily agrees to keep the information secret, enforcing the agreement does not violate the First Amendment. Like the government in *Marchetti*, it was entirely appropriate for NAF to secure its privacy by requiring exhibitors and attendees at its annual meetings to sign confidentiality agreements as a condition of their attendance.

Enforcing the agreements through an injunction comports with the First Amendment.

What is more, *Marchetti* suggests that courts *can* enjoin the disclosure of "information of undisputed and legitimate public interest." Daleiden Pet. i. The enjoined CIA-classified information in *Marchetti* was surely of immense public interest. *See* 466 F.2d at 1313 (Marchetti's article had been submitted to Esquire magazine and other publishers, and he had appeared on television and radio shows).

II. REVIEW OF THE PUBLIC-POLICY-BASED QUESTION PRESENTED IN NEWMAN'S PETITION IS UNWARRANTED

A. The Public-Policy Question Here Is Not A Federal Question

Petitioner Newman focuses on a different question: whether the confidentiality agreements are unenforceable as contrary to public policy. In particular, Newman argues that public policy prohibits enforcement of the agreements to the extent they preclude petitioners from submitting the recordings and materials to law-enforcement agencies without a subpoena.

This is not a First Amendment question, and Newman does not appear to treat it as one. Rather, whether public policy precludes enforcement of a contract is a question of contract law. *See* Restatement (Second) of the Law of Contracts § 178(1). And contracts between private parties are ordinarily governed by *state law*. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). This Court does not review state-law questions.

The district court implicitly recognized that the public-policy issue is a state-law question. It concluded that public policy supports enforcing the confidentiality agreements for several reasons, including that releasing the recordings would be "contrary to California's recognition of the dangers faced by providers of abortion, as well as California's efforts to keep information regarding the same shielded from public disclosure and protect them from threats and harassment." App. 64a (citing Cal. Govt. Code §§ 6215(a), 6218, 6254.28; Cal. Civ. Code § 3427 *et seq.*; Cal. Penal Code § 423).

Additionally, petitioners *conceded* that the public-policy inquiry is a state-law question. They expressly argued below that enforcing the confidentiality agreements would "violate[] the strong public policy of California and every other state." Petrs'. CA Br. 19. Moreover, both parties and the district court treated the contracts as governed by California state contract law, not federal law. Petrs.' CA Br. 40-47; Resp's. CA Br. 28-36; App. 45a, 52a n.29.

The state-law nature of the public-policy inquiry is confirmed by decisions on which Newman relies. In *Lachman v. Sperry-Sun Well Surveying Co.*, the Tenth Circuit held that public policy barred enforcement of a confidentiality agreement that would have precluded a surveying company from informing its customer's neighbor that the customer's oil-and-gas well ran under the neighbor's property. 457 F.2d 850, 852-54 (10th Cir. 1972). That case was decided as a matter of Oklahoma contract law. The court cited Oklahoma statutes to show that the neighbor was legally entitled to natural gas below the land's surface, and it cited Oklahoma decisions as showing

that Oklahoma courts prioritize enforcement of state law over enforcement of private contracts when those interests collide. *See id.* at 852-53.

Likewise, in *Bowman v. Parma Board of Education*, an Ohio appellate court held that a confidentiality agreement between a school board and a fired teacher was unenforceable to the extent it prevented school-board members from warning the teacher's new employers that he had been fired for molesting students. 542 N.E.2d 663, 666-67 (Ohio Ct. App. 1988). Among the court's considerations was that state law required the reporting of felonious conduct. *Id.* at 667 & n.5; *see also Cosby v. American Media, Inc.*, 197 F. Supp. 3d 735, 740-43 (E.D. Pa. 2016) (applying common-law contract principles in holding that a confidentiality agreement did not bar voluntary cooperation with law enforcement).

Other decisions cited by Newman demonstrate only that federal law may be implicated where, for example, the federal government is a party to the confidentiality agreement or where enforcing the contract would violate the U.S. Constitution or federal law. *See Hurd v. Hodge*, 334 U.S. 24, 34-36 (1948) (enforcing restrictive covenant would violate Fifth and Fourteenth Amendments and federal civil-rights statute); *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1369, 1373-74 (Fed. Cir. 2001) (applying federal common law to federal government contract); *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) (concluding that agreements barring employees from assisting the EEOC were void as against public policy because they would impair EEOC's ability to enforce federal anti-discrimination laws). Those circumstances are not present here.

In any event, to the extent federal public policy is implicated here, it *supports* enforcing the confidentiality agreements. The Constitution guarantees NAF's associational right to meet privately and to exclude those opposed to its core mission. *Supra* pp. 22-23. The confidentiality agreements were put into place to secure NAF's constitutionally protected freedom. Refusing to enforce the confidentiality agreements would vitiate NAF's constitutional rights.

B. The Decision Below Does Not Conflict With Decisions Of Any Other Circuits

There is no conflict among the courts of appeals over whether and when a contract may be deemed unenforceable as against public policy in the circumstances present here. Here, the district court found that, on the present, preliminary record, petitioners uncovered no evidence of criminal wrongdoing to be reported to law enforcement. As the court of appeals explained, "the district court's finding that [petitioners] uncovered no violations of the law is a sufficient answer to any right" claimed by petitioners to report such violations. App. 6a. Yet the lower courts "carefully balance[d] the interests of NAF and law enforcement" and tailored the preliminary injunction so that it "in no way prevents law enforcement from conducting lawful investigations." App. 6a-7a.

This case is nothing like the decisions discussed in Newman's petition concerning reporting to law enforcement. In none of those cases was there a factual finding of a complete absence of any criminal wrongdoing to be reported. Nor did those cases involve situations like here, where holding the contracts

unenforceable would vitiate NAF's constitutionally protected associational rights.

Lachman and *Bowman* involved clear violations of the law. *Lachman*, 457 F.2d at 852-53; *Bowman*, 542 N.E.2d at 666. Neither *Astra USA* nor *Fomby-Denson* involved a court's finding that there was no evidence of criminality. In both cases, unlike here, the confidentiality agreements impeded government investigations into alleged wrongdoing. *Astra USA*, 94 F.3d at 742, 744; *Fomby-Denson*, 247 F.3d at 1377-78. Newman also cites a handful of district-court and state-court decisions, but none involves a finding of no wrongdoing, and even if they did, a conflict with those decisions would not warrant review.

The absence of any conflict is confirmed by the district court's opinion here. Discussing some of the very same decisions cited by Newman, the district court recognized that some "courts have refused to enforce, or excused compliance with, otherwise applicable confidentiality agreements for the limited purpose of allowing cooperation with a specified law enforcement investigation." App. 65a (citing *Lachman*); *see id.* at 66a n.35 (citing *Fomby-Denson*). The district court did "not disagree with the analysis and results in those cases," but it explained that "[t]hose cases are inapposite" and that "the posture of this case is different." App. 66a & n.35.

Thus, far from a conflict, the courts below *agreed* with the legal principles in Newman's cited decisions. Newman's complaint is with how the lower courts applied those principles to the particular facts of this case. That complaint does not warrant review. *See* S. Ct. R. 10.

C. The Decision Below Does Not Conflict With This Court's Decisions

The ruling below also accords with this Court's decisions. Newman cites various decisions to show a general policy favoring reporting to law enforcement. Newman Pet. 23-25. But as discussed, the courts below recognized and carefully considered that policy. None of Newman's cited decisions establishes an absolute right to report information that a court has already found does not show wrongdoing—and certainly none suggests such a right when there additionally are compelling countervailing public-policy interests favoring non-disclosure.

Nor does the ruling below conflict with *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984). That decision holds—based in part on the statutes specifically governing SEC investigations—that the SEC need not notify the target of an investigation before issuing a third-party subpoena. *Id.* at 741-42. Although the protective order here requires petitioners to notify NAF of any subpoena, that order is consistent with *O'Brien*. As the court of appeals explained, "*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. 6a-7a. Here, "NAF already knows that some law enforcement authorities seek this information." App. 7a. And, significantly, petitioners' lawyers possess copies of the recordings and "are hardly likely to destroy" them. *Ibid.*

Even further afield are Newman's citations to *New York Times v. United States*, 403 U.S. 713

(1971), and *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers). Neither case involved a claim of a right to provide information to law enforcement. More significantly, those decisions are inapposite because, unlike petitioners here, neither *The New York Times* nor CBS entered into a confidentiality agreement agreeing not to publish the information.

D. This Case Would Be A Poor Vehicle To Decide The Public-Policy Question

Were this Court inclined to consider whether law-enforcement interests always trump confidentiality agreements, it should do so in a future case that is not an exceptionally poor vehicle.

First, as discussed, whether the contracts here are unenforceable as against public policy is a question of state contract law. *Supra*, pp. 29-31. At the very least, were review granted, this Court would have to decide at the threshold whether state or federal law governs. A better vehicle would be a case in which federal law clearly governs.

Second, the district court made extensive findings that petitioners uncovered no evidence of criminal wrongdoing, and the court of appeals held those findings adequately supported. App. 5a, 26a-32a, 60a-62a. That makes this fact pattern exceedingly rare, and therefore the Court's weighing of the public-policy interests in this case would provide little guidance for future cases.

Third, as the district court explained, any conflict between the confidentiality agreements and law enforcement's interests "has not been placed directly at

issue." App. 66a. The preliminary injunction here does not hamper law enforcement. App. 6a. Law-enforcement agencies throughout the Nation are already well aware of the presence of the recordings and can subpoena them; so petitioners' claimed need to unilaterally disclose the recordings to law enforcement without a subpoena is sharply diminished. Nine States have already opened and closed investigations, while eleven other States publicly refused to pursue any investigations. CA SER326-77, 406-08. Only two States have issued subpoenas for the materials, but they have not tried to enforce them. App. 66a-67a. Petitioners have repeatedly stipulated to extend the schedule for NAF to challenge the subpoenas. App. 67a n.37. Thus, a superior vehicle would be a case in which a State's attempt to enforce a subpoena were thwarted by an injunction, or a case in which the injunction precluded voluntary disclosure of materials to law enforcement and law enforcement was not already aware of the materials.

And fourth, this case would be an exceptionally poor vehicle to review the requirement that petitioners notify NAF of any subpoena. No party appealed from the protective order that includes that requirement. Moreover, petitioners expressly *agreed* to that requirement. App. 6a; CA ER127.

III. THE COURT OF APPEALS CORRECTLY REVIEWED THE PRELIMINARY INJUNCTION FOR ABUSE OF DISCRETION

Contrary to arguments advanced by both sets of petitioners, the court of appeals correctly applied an abuse-of-discretion standard in reviewing the preliminary injunction. Petitioners do not allege any

conflict among the circuits over the standard-of-review question, nor do they cite any court-of-appeals case that has applied de novo review in circumstances like those here. Petitioners' argument that de novo review should have applied is wrong.

This Court has repeatedly instructed that preliminary injunctions are reviewed for abuse of discretion—including in First Amendment cases. *E.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction."); *see also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). None of the cases relied on by petitioners involved review of a preliminary injunction. Rather, each case involved judgment following a trial. *Hurley*, 515 U.S. at 561-562; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 890-893 (1982); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 268-69 (1974).

Where the Court has undertaken an independent examination of facts in First Amendment cases, it has done so to determine whether the activity at issue is "in the nature of protected speech." *Hurley*, 515 U.S. at 567; *see Old Dominion*, 418 U.S. at 282 (discussing the Court's obligation to review facts to determine whether "the expression involved was entitled to First Amendment protection"). For example, in *Hurley*, the Court reexamined the state courts' characterization of a parade as "lacking the element

of expression for purposes of the First Amendment." *Ibid.* 515 U.S. at 567.

Here, however, the district court made no finding that publishing the recordings is not the type of speech ordinarily entitled to First Amendment protection. Instead, the key findings were that petitioners waived their First Amendment rights and that the recordings do not show any criminal wrongdoing. App. 5a-6a. None of petitioners' cited decisions suggests those factual findings must be reviewed de novo—and particularly not in the context of a preliminary injunction.

Additionally, petitioners have no support for the notion that the district court's findings of irreparable harm or its weighing of the public interests should have been reviewed de novo. *Contra* Daleiden Pet. 25-28.

Petitioners' claims of error on the standard-of-review question are unfounded.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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