No. 17-202

In The Supreme Court of the United States

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

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 OF *AMICUS CURIAE* AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE* AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.[1]

The American Catholic Lawyers Association, Inc. (ACLA) is a non-profit religious organization dedicated to promoting and defending the teaching of the Catholic Church and the constitutional and civil rights of Catholics in America. ACLA's activities include *pro bono* federal and state court litigation on behalf of Catholic plaintiffs and defendants in the sphere of pro-life advocacy.

As an organization that provides legal assistance to pro-life advocates, ACLA is gravely concerned about the unprecedented preliminary injunction the Ninth Circuit has upheld. The district court imposed an unheard-of prior restraint on publication of videos concerning Respondent National Abortion Federation (NAF), which the court itself conceded involved matters of public interest and importance. The censored videos contribute to a national debate over the very issues Petitioners had already brought to the public's attention with their prior, uncensored videos concerning NAF-related activities.

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[1] The parties were timely notified of *amicus curiae's* intent to file this brief. Counsel for the Respondent, National Abortion Federation, has consented to the filing of this brief. Counsel for the Petitioner has filed a blanket consent for the filing of briefs by *amici curiae* and counsel. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

The district court's novel concept of "irreparable harm" in the form of "fraudulent," "misleadingly edited" videos that allegedly "cause" or "increase" public hostility toward the subjects – often the very purpose of provocative but protected speech – poses a serious threat to the vigorous, First Amendment-protected pro-life advocacy ACLA is dedicated to defending.

SUMMARY OF ARGUMENT

A preliminary injunction must be supported by a finding of *actual* "irreparable harm." Especially given the First Amendment context of this case, irreparable harm cannot be notionally stipulated into being by a boilerplate confidentiality provision in the NAF conference attendance forms on which the Ninth Circuit placed sole reliance in "becoming the first federal appeals court ever to uphold a preliminary injunction on speech. . . ." Pet. at 2, 4.

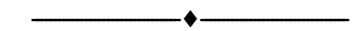
Given the district court's own recognition that members of the public have an interest in the remaining videos of conversations between representatives of Petitioner Center for Medical Progress (CMP) and abortion doctors, as a matter of law there could be no "irreparable harm" from their release. No court – until this case – has ever found that publication of speech on matters of public interest constitutes irreparable harm warranting a prior injunctive restraint as opposed to the economic or commercial harm that would arise from the disclosure of such matters as trade secrets.

Nor has any court – until this case – ever found that a boilerplate contractual confidentiality provision constitutes a waiver of First Amendment rights concerning matters of public interest.

The Ninth Circuit has flouted this Court's longstanding First Amendment jurisprudence by endorsing the district court's creation of a purely *ad hoc* category of unprotected speech: allegedly "confidential information" obtained during the NAF conferences, which the court broadly construed to include any conversation with any NAF member anywhere at the NAF conference site, even if the conversation was not part of the conference proceedings.

In order to buttress its imposition of the injunction, the district court, with the Ninth Circuit's rubberstamped approval on appeal, created three additional *ad hoc* categories of enjoinable speech: (1) videos clandestinely recorded by one participant using an alias; (2) videos that could "increase" public hostility toward abortion providers and might inspire someone to commit violence; and (3) videos that are "misleadingly edited."

There being no legally cognizable basis for a finding of "irreparable harm," respect for this Court's First Amendment precedents mandates reversal of the Ninth Circuit's anomalous endorsement of a prior restraint on speech.



ARGUMENT

I. RELEASE OF PETITIONER CMP's REMAINING VIDEOS CANNOT, AS A MATTER OF LAW, CONSTITUTE "IRREPARABLE HARM" WARRANTING AN UNPRECEDENTED PRIOR RESTRAINT ON SPEECH THAT ADMITTEDLY CONCERNS MATTERS OF PUBLIC INTEREST.

A. "Irreparable harm" cannot be created by contract; the district court was required independently to determine its existence based on *commercial or economic* harm, not the feared adverse effects of speech concerning matters of public interest.

As Petitioners note, the Ninth Circuit's cursory memorandum affirmance "completely omitted any discussion of the essential element of a threat of irreparable harm. . . ." Pet. at 20. Small wonder, for there is none.

Preliminary injunctions are an "extraordinary remedy *never* awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L.Ed.2d 249 (2008).[2] Accordingly, the *sine qua non* of "irreparable harm" in the absence of injunctive relief cannot be created by boilerplate recitations in standard forms, with federal courts to act as merely rote enforcers of contractual rights. Rather:

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[2] All emphasis in this brief is added.

> While courts have given weight to parties' contractual statements regarding the nature of harm and attendant remedies that will arise as a result of a breach of a contract, they nonetheless characteristically hold that *such statements alone are insufficient to support a finding of irreparable harm and an award of injunctive relief*. . . . Instead, the courts also identify *other factors* which establish that the harm is indeed irreparable."

Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1266 (10th Cir. 2004).

The "other factors" required beyond a boilerplate recitation of irreparable harm are uniformly found to be intangible *commercial or economic* consequences of a breach of contract for which money damages would be difficult or impossible to calculate, *not* the undesired effects of pure speech as such. *Dominion*, 356 F.3d at 126 (collecting cases). *See*, *e.g.*, *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 602 F. App'x 669, 672 (9th Cir. 2015) (loss of trade secrets); *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (same); and *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68-69 (2d Cir. 1999) (non-compete clause, where New York law had already established breach as irreparable harm).

If, even in the lesser-protected commercial context, a mere contractual stipulation cannot create irreparable harm absent "other factors which establish that the harm is indeed irreparable," *Dominion*, 356 F.3d at

1266, all the more inadequate is a boilerplate recitation of irreparable harm in the First Amendment context presented here.

Moreover, even an explicit waiver of speech rights via a non-disparagement agreement cannot support a prior restraint of speech concerning matters of public interest. The outlier domestic relations case on which both NAF and the district court placed heavy reliance – for lack of any other authority – (Pet. App. B, 57a, 59a) explicitly recognized that conclusion. *Perricone v. Perricone*, 292 Conn. 187, 220-22 (2009).

In *Perricone*, the court held that a non-disclosure/non-disparagement agreement in a matrimonial proceeding was enforceable by injunction only for the *commercial* "purpose of protecting the value of the plaintiff's business," whereas the agreement did "*not* prohibit the disclosure of information concerning . . . matters of great public importance" and thus "did not violate *the public policy favoring free speech*." *Id.* at 221.

Tellingly for this case, even when protectable commercial interests are present, the injunctive relief granted has been strictly limited to avoid overbreadth. Thus in *OTR Wheel Eng'g, Inc.*, for example, even the Ninth Circuit struck from the district court's injunction not only a restraint against trademark infringement, which was not the subject of the trade secrets clause at issue, but also a restraint on "making any *false description* or representation of origin concerning

any goods or services offered for sale by Defendants. . . ." *Id.* at 602 F. App'x at 672-73.

As the district court here explicitly acknowledged: "There is *no doubt* that members of the public have *a serious and passionate interest* in the debate over abortion rights and the right to life, and *thus in the contents of defendants' recordings*." Pet. App. B, 15a. Thus, "there is no doubt" that the court intruded into the realm of protected speech – with the Ninth Circuit's blessing.

B. Alleged past "harassment" cannot constitute "irreparable harm" warranting a preliminary injunction against Petitioners' future speech.

By affirming the district court's unprecedented prior restraint on speech, the Ninth Circuit ignored the fundamental principle the district courts in its own jurisdiction have recognized: "The purpose of a preliminary injunction is to prevent *future* irreparable harm, not to remedy *past* harm. . . . Plaintiff must identify a risk of future harm that is more specific than *a general fear of future harassment* based on alleged *past* incidents of harassment." *United Fabricare Supply, Inc. v. 3Hanger Supply Co., Inc.*, No. CV 12-03755-MWF FFMX, 2012 WL 2449916 at *6 (C.D. Cal. June 27, 2012) (citation and internal quotation omitted). *See also Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 969 (N.D. Cal. 2009) ("an injunction may deter future harm, but *it may not punish*"), citing

Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1549 (Fed. Cir. 1988).

In *United Fabricare*, the court refused to issue a preliminary injunction against defendant's republication of false claims that plaintiff supported tariffs on the wire hanger industry, even though the court found plaintiff was likely to succeed on its Lanham Act claim that the false statements had harmed plaintiff's business. *Id.* at 5. The court rejected the argument that plaintiff was likely to suffer future disparagement by defendant at an upcoming trade show, where both parties would be exhibitors, noting that "The Court also is mindful of [defendant's] *First Amendment freedom to comment on matters of public concern*, including the tariff proposal." *Id.* at 6-7.

In this case, the alleged future "disparagement, intimidation, and harassment of which NAF members . . . are afraid," (Pet. App. B, 63a) would consist of nothing more than adverse *third-party* reaction to CMP's remaining videos, predicted on the basis of the public's mere adverse reaction to the past videos. Thus the alleged future "harm" would not even involve conduct by CMP or the other defendants as opposed to members of the public reacting in the First Amendment arena wherein the censored videos are fully protected. *See* Pet. at 21.

That aside, it is curious that so much of the district court's opinion is taken up with a catalogue of past acts respecting the details of CMP's "sting" operation, as if

this had anything to do with whether the resulting videos could be subjected to a prior restraint under the First Amendment due to alleged *future* irreparable harm from the content of the videos. The court is at pains to recite a litany of prior deeds that have no bearing on the First Amendment issue: *e.g.*, "repeated instances of fraud," the use of "fake documents," a "fake company," and "fake business cards," and "repeated false statements" made in order to "infiltrate NAF. . . ." Pet. App. B, 15a-26a; 21a, n. 6; 75a.

Citing no authority, the district court illogically concluded, and the Ninth Circuit (without any real analysis) agreed that "The context of how defendants came into possession of the NAF materials cannot be ignored and directly supports preliminarily preventing the disclosure of these materials." Pet. App. B, 75a.

In response to Petitioners' obvious objection that journalists traditionally employ aliases and other techniques of deception to break an "undercover" news story, the district court caviled in a footnote that "those cases do not show the *level* of fraud and misrepresentation defendants engaged in here." Pet. App. B, 75a, n. 44. Acknowledging that in one case Petitioners cited below "reporters posed *as employees of fictitious labs*," the court "distinguishes" that case by noting "[t]here is no evidence the reporters did anything other than *verbally misrepresent themselves* to the lab owner." *Id.* In other words, in the district court's view, rubberstamped by the Ninth Circuit under the inapplicable "abuse of discretion" standard, *see* Pet. at 10, a little bit of journalistic "fraud" is acceptable under the First

Amendment, but too much somehow supports a prior restraint on publication of what the journalist "fraudulently" obtains.

The prior restraint at issue flouts the principle that an injunction "may not punish" past acts, *Hynix*, 609 F. Supp. at 969, but only prevent future irreparable harm. The net impression is that the district court's injunction, which the Ninth Circuit upheld without serious judicial inquiry, is precisely a punishment meted out for CMP's "sting" operation consisting entirely of the past conduct involved in obtaining the videos. This judicial punishment forbids future publication of the videos on the theory – unsupported by any legal authority – that they are the fruit of a poisonous tree, rooted in past acts the court viewed as reprehensible. Neither the law of injunctions nor the First Amendment permits what amounts to granting a civil "motion to suppress evidence" in the form of otherwise protected speech.

C. The *admitted* public importance of Petitioners' speech cannot be negated by judicial attempts to minimize its importance.

The Ninth Circuit's analysis should have begun and ended with the district court's own recognition that "members of the public have *a serious and passionate interest . . . in the contents of defendants' recordings*." Pet. App. B, 15a.

Instead, however, the Ninth Circuit has evidently endorsed the district court's caviling that "the *majority* of the recordings lack *much* public interest, and despite the misleading contentions of defendants, *there is little that is new* in the remainder of the recordings." Pet. App. B, 15a.[3] The district court's own words are fatal to the Ninth Circuit's uncritical affirmance of its decision for two reasons:

First, courts have no power to impose prior restraints on public interest speech as constituting "irreparable harm" based on their view of *how much* public interest the speech involves or *what quantity* of the same sort of speech suffices to supply "the public debate over abortion." That is for the public to decide.

Second, the district court's recognition that "there is little that is new" in the censored videos extinguishes the Ninth Circuit's affirmance of the rationale – such as it is – for censoring them as threats of irreparable harm.

As the district court itself noted, "the [prior] videos [already] released by CMP . . . to date *do not contain*

[3] Adding to the utterly anomalous outcome here is the district court's order placing under seal the very videos it now characterizes as not having "much" public interest or as presenting "little that is new." Given this veil of secrecy, neither this *amicus* nor any member of the public can challenge that claim in detail, and even Petitioners in the related case have been reduced to the absurd measure of having to redact from their publicly filed Petition for *Certiorari* all discussion of the forbidden sounds and images.

information recorded during the NAF Annual Meetings" and thus are not even arguably subject to the confidentiality provisions or to the court's putative authority to enforce by injunction. Pet. App. B, 36a, 55a. These videos, now a part of American history, recorded conversations between CMP's representative, Petitioner David Daleiden (acting under an alias) and Drs. Nucatola, Gatter and Ginde. Pet. App. B, 34a, 35a. *Yet the record is devoid of any evidence of judicially cognizable harm, much less enjoinable irreparable harm, to any of these three doctors from release of the prior videos.* And it does not appear that any of these doctors ever sought any form of judicial relief.

If the censored videos of conversations with abortion doctors recorded during (but outside the official proceedings) of NAF meetings contain "little that is new" by comparison with the videos already released to the public, there can be no *irreparable* harm in releasing to the public *more of the same public interest speech*.

Undaunted by the lack of legally cognizable harm to Drs. Nucatola, Gatter and Ginde, who continue to conduct their business of providing abortions, the district court nonetheless purported to find irreparable harm as to the doctors whose names it has shrouded in secrecy. The court, summarily affirmed by the Ninth Circuit, did so by creating several entirely new categories of unprotected speech.

D. The Ninth Circuit erred by affirming a finding of "irreparable harm" based on novel *ad hoc* categories of unprotected speech invented merely to justify the censorship of Petitioners' videos.

Whether or not Petitioners "waived" their First Amendment rights, the district court and the Ninth Circuit were still bound to observe First Amendment limitations in the extraordinary exercise of injunctive powers. The First Amendment controls even injunctions statutorily authorized to prevent future violations of federal law. *United States v. Benson*, 561 F.3d 718, 724-25 (7th Cir. 2009) ("Of course, even though the injunction was properly granted under 26 U.S.C. § 7408, it still must meet the standards of the First Amendment.").

Under American law, only a few "historically unprotected categories of speech" fall outside the First Amendment's broad protections. *United States v. Stevens*, 559 U.S. 460, 470 (2010). Accordingly, federal district courts have no "freewheeling authority to declare *new* categories of speech outside the scope of the First Amendment. . . ." *United States v. Alvarez*, 132 S. Ct. 2537, 2547, 183 L. Ed. 2d 574 (2012) (internal citation and quotation omitted).

Moreover, while the burden of proving irreparable harm is formidable enough outside the First Amendment context, "[i]n the case of a prior restraint on pure speech, the hurdle is substantially higher: publication must threaten an interest more fundamental than the

First Amendment itself." *Procter & Gamble Co. v. Bankers Trust Co*., 78 F.3d 219, 226-27 (6th Cir. 1996), opinion clarified (May 8, 1996). The court in *Procter* was not stating a mere truism but a hard judicial reality: "in the case of a prior restraint on pure speech, the Supreme Court *has never upheld a prior restraint*, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Id.*

Confronted with these high hurdles, the district court indulged in a constitutionally impermissible workaround, blithely endorsed by the Ninth Circuit. Under the rubric of "extraordinary circumstances," the court devised no fewer than three "new categories of speech outside the scope of the First Amendment." *Alvarez*, 132 S. Ct. at 2547.

First, the court characterized the videos as "fraudulently obtained" because CMP and its representatives elaborately posed as buyers of fetal tissue acting under aliases. Pet. App. B, 36a, 69a-72a; 77a-78a. But the label "fraud" is merely the court's pejorative characterization of an admittedly sensational "undercover" investigation.

The district court had even less authority to forbid publication of "fraudulently" obtained videos of conversations with abortion doctors, *in which CMP's own representative participated*, than the Second Circuit had to forbid publication of the Pentagon Papers, contained in the 43 classified, top-secret volumes Daniel Ellsberg purloined, photocopied and provided to the New York Times. *New York Times Co. v. United States*, 403 U.S.

713, 714 (1971). As Justice Black observed: "These disclosures may have a serious impact. But that is *no basis* for sanctioning a previous restraint on the press." *Id.* at 722-23. Yet the Espionage Act and the top-secret designation of the government documents Ellsberg released to the world were vastly weightier considerations than the boilerplate "confidentiality" provision in NAF's conference attendance forms.

Second, the Ninth Circuit affirmed the district court's imaginary "causal" link between CMP's previously published videos and hostility from unrelated members of the general public, finding that "harassment, threats and violent acts will *continue to rise* if defendants were to release NAF materials in a similar way." Pet. App. B, 64a. Like the district court, the Ninth Circuit apparently presumes some sort of linear causal relation between the amount of video CMP publishes and the level of general public hostility against "abortion providers."

The district court indulged in what amounts to sociological speculation about the widespread effects of CMP videos on the behavior of parties unrelated to the speaker. Even the Ninth Circuit has previously recognized that injunctive relief cannot be predicated upon such speculations. *See*, *e.g.*, *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988) (reversing preliminary injunction against women observers of environmental compliance on tuna boats based on predicted effects of female presence among male crew and prior incident of assault on female observer).

Even if the district court's *post hoc ergo propter hoc* fallacy were accepted for purposes of argument, such "but for" causation would not warrant a prior restraint or indeed any restriction whatsoever on release of the videos. Only speech that is "*directed* to inciting or producing *imminent* lawless action and is likely to incite or produce such action" can be punished – and then only *after* the fact, not by prior restraint. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This would be true even if the videos were not mere conversations with abortion doctors, but rather openly advocated violence to stop abortion without threatening anyone in particular. *Id.* at 449.

It is elementary First Amendment jurisprudence that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). The possibility of disorder on the part of others is no grounds for restriction of First Amendment freedom. *Wright v. State of Ga.*, 373 U.S. 284, 292 (1963) ("the possibility of disorder by others . . . could not justify exclusion of the petitioners from the park.") Nor can "the ordinary murmurings and objections of a hostile audience," *Feiner v. New York*, 340 U.S. 315, 320 (1951), warrant *any* restraint, much less a prior restraint, on speech.

At any rate, even if the district court's novel speech causation theory were viable, as already noted there is no record evidence that the subjects of the already released videos – Drs. Nucatola, Gatter and Ginde – have ever received a direct threat or even a

direct hostile communication from members of the public following the release of CMP's famous videos involving them. The record shows only "the ordinary murmurings and objections of a hostile audience," *Feiner*, 340 U.S. at 320, to news and editorials *about* the three doctors based on the videos. Pet. App. B, 39a-40a. *See* Ninth Circuit record excerpts at ER 82, 93, 95. There is no affidavit or deposition testimony from Nucatola, Gatter or Ginde, nor anything else in the record, to show that they – or indeed anyone on the face of the earth – suffered any form of *actionable* harm from release of the videos, much less irreparable harm that would have warranted the extreme rarity of a prior restraint.[4]

Even a deranged individual's violent attack on an NAF-affiliated abortion clinic in Colorado, of which Dr. Ginde happened to be medical director, Pet. App. B, 39a, is not actionable harm that can be attributed to CMP's videos under the First Amendment. The fanciful claim of a causal relation between CMP's prior videos and the violence of a lone actor in Colorado, months after the videos appeared, is belied by the clinic's own defense of a lawsuit brought against it on grounds that it failed to provide sufficient security. The Court may

[4] The district court found, erroneously, that "the subjects of those videos (*including Doctors Nucatola, Gatter, and Ginde*), have *received* a large amount of harassing communications. . . ." ER 17. In fact, the three doctors were merely mentioned or condemned in published articles or comments thereon. None of them offered a declaration to the contrary. Pet. App. B, 39a.

take judicial notice of the clinic's public record brief opposing amendment of the complaint in that suit:

> [T]his crime was *unforeseeable*; this crime was *unpreventable*; and fault for this crime was *entirely with the shooter*, Robert Dear. . . . [A]cts of the type committed by criminals like Mr. Dear . . . are *not foreseeable and preventable*, most particularly by an entity . . . that *had never before been the target of a crime*.

See, *Wagner v. Planned Parenthood Federation of America, et al.*, Case No. 16-CV-31798, Colo. Dist. Ct. (Denver) (2017), DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT at 2-3.

Third, the district court found the videos "misleading" because they were allegedly "heavily edited" – as if video highlights would not be – and because "there is evidence" that the raw footage was "edited." Pet. App. B, 36a. Even if this were true, what of it? Here, with the Ninth Circuit's approval, the district court assumed authority it did not have under the First Amendment, because "allegations of falsity are insufficient to warrant prior restraint." *New. Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1083 (C.D. Cal. 2003), citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971) (invaliding ban on distribution of pamphlets despite claims of falsity).

The Ninth Circuit's cursory affirmance ignores the crucial distinction between commercial speech and pure speech. As to the latter, alleged falsity does not

justify prior restraints even where it constitutes outright libel, which is not even alleged here.[5] In *Benson*, for example, the court held that although the author of a book on avoiding the federal income tax had been guilty of demonstrably false advertising claims, the injunction against future false claims could not prohibit expression of his *false opinion* that the Sixteenth Amendment was never ratified or even continued sales of his book presenting the same false opinion. *Benson*, 561 F.3d at 725.

Commercial speech, unlike the videos whose censorship the Ninth Circuit approves, involves "an advertisement . . . a specific product; and . . . an economic motivation for the speech." *Benson*, 561 F.3d at 724-25 (discussing Supreme Court authority). Commercial speech "does *no more* than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation and citation omitted). Where speech on matters of public interest is involved, however, "the courts do not concern themselves with the *truth or validity* of the publication." *Org. for a Better Austin*, 402 U.S. at 418. Here, however, the district

[5] "The majority American rule [is that] . . . that *a court of equity will not enjoin the publication of a libel*." *New. Net, Inc.*, 356 F. Supp. at 1088. Further, "the operation of the rule is not affected by the fact that the false statements *may injure the plaintiff in his business or as to his property*, in the absence of acts of conspiracy, intimidation, or coercion." *Id.*

court did so concern itself, and the result the Ninth Circuit has uncritically endorsed was an impermissible prior restraint on non-commercial speech.

In striking down the federal "Stolen Valor" statute that criminalized false statements about having received military honors, this Court observed: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. *See* G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out." *Alvarez*, 132 S. Ct. at 2547 (plurality opinion).

In this case, the "list of subjects" was unconstitutionally extended to videos whose censorship the Ninth Circuit approves because, based on the claims of CMP's political opposition, the district court deemed them "misleadingly edited." Pet. App. B, 75a. This is simply unheard of in American law.

The Ninth Circuit's trampling on the First Amendment is all the more indefensible in view of the record evidence controverting NAF's claim of deceptive editing. Defendant Daleiden filed a declaration that the complete raw footage of the conversations with Nucatola, Gatter and Ginde was released to the public along with the edited highlights. Daleiden Dec., ¶¶ 25-27. Pet. App. B, 34a-36a. Even where the falsity of a statement is relevant for *commercial* purposes under the Lanham Act, a court cannot preliminarily enjoin allegedly false statements "where the declarations

from the parties are of equal weight and directly contradictory" and there has not yet been a hearing on the merits of the claim of falsity. *J.K. Harris & Co., LLC v. Kassel*, 253 F. Supp. 2d 1120, 1129 (N.D. Cal. 2003).

Further, it is undisputed that there was no evidence or claim of any fraudulent tampering with the audio or video tracks of the videos now under seal, as opposed to allegedly omitting statements providing "context." Pet. App. B, 25a-32a; 35a-36a. None of this is to suggest that the debate over whether, or how extensively, the videos were edited is at all relevant to their First Amendment immunity from prior restraint.

In sum, despite a putative "waiver" of First Amendment rights by way of a generic confidentiality clause and a boilerplate recitation of "irreparable harm":

(1) Courts have no power under the First Amendment to enjoin public release of public interest videos because someone employed an alias while participating in them, and clandestinely recorded them.

(2) Courts have no power to censor videos that provoke anger and might inspire violence in the unbalanced.

(3) Courts have no power to keep the public from seeing public interest videos deemed "misleadingly edited."

Just as a series of singles is not a homerun, the district court's concatenation of criticisms of Petitioners' journalistic techniques was not grounds for an unprecedented prior restraint on speech in which the court itself acknowledged the public has an interest.

The Ninth Circuit should have recognized that the only parties irreparably harmed in this case are the Petitioners, for "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

CONCLUSION

This *amicus* requests that the Petition for *Certiorari* be granted and that the decision below be reversed.

Respectfully submitted,

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