NO. 16-15360

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California
Civil Case No. 3:15-CV-3522-WHO, Hon. William H. Orrick

BRIEF OF AMICUS CURIAE SUSAN B. ANTHONY LIST EDUCATION FUND IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), Susan B. Anthony List Education Fund states that it is a trust fund of Susan B. Anthony List, a nonprofit 501(c)(4) corporations, and that it does not issue stock.

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INTEREST OF AMICUS

Susan B. Anthony List Education Fund is a 501(c)(3) non-profit organization that supports the Free Speech Project, which promotes freedom of speech on pro-life issues. Beginning in 2011, the organization began making grants that fund legal action against state laws that unconstitutionally restrict the freedom of speech of pro-life groups and other organizations in the public square. Because this case raises important free speech issues, the proper resolution of this case is of great concern to Susan B. Anthony List Education Fund.[1]

BACKGROUND

Appellant David Daleiden is an investigative journalist. He founded Appellant Center for Medical Progress ("CMP") to "monitor and report on medical issues and advances, including the use of fetal tissue for research." Appellants' Br. at 3. "CMP seeks to educate and inform the public, and to serve as a catalyst for reform of unethical and inhumane medical and research practices, including the buying and selling of fetal tissue." *Id*. In pursuit of these goals, Daleiden and others working under his direction attended National Abortion Federation's ("NAF") annual

[1] Counsel for both parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or its counsel contributed money intended to fund preparing or submitting the brief.

conference in 2014 and 2015, while posing as representatives from a tissue procurement company called BioMax Procurement Services, LCC ("BioMax"). *Id*. at 4.

In registering for the conferences, Daleiden, representing BioMax, signed a document entitled "Exhibit Rules and Regulations." *See* Appellants' Br. at 4. Upon arriving at the conferences, representatives for BioMax signed an additional document entitled "Confidentiality Agreement for NAF Annual Meeting." *Id*. at 4. During the course of these conferences, Appellants collected a great deal of information relating to the procurement of fetal tissue, and believed that some was evidence of possible illegal activity. *Id*. at 4–5. In addition to the NAF conferences, CMP collected recordings in other conferences and meetings that involved fetal tissue procurement. *Id*. at 6.

Beginning in July of 2015, CMP began releasing a series of videos discussing practices such as profiting from the sale of fetal organs and altering abortion methods to procure intact fetal specimens. Appellants' Br. at 6. The release of the videos sparked enormous public interest, dominating headlines for months, and served as the catalyst for various federal and state investigations. *Id.* at 7.

On July 31, 2015, NAF filed the instant case and obtained a temporary restraining order and, later, a preliminary injunction prohibiting the publishing of any recordings or other information obtained at the NAF conferences. Appellants'

Br. at 8. In granting the preliminary injunction order, the District Court held that Appellants had waived their First Amendment rights when they signed the Agreements. *Nat'l. Abortion Fed'n. v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2016 WL 454082 at *17–*21 (N.D. Cal. Feb 5, 2016). This Court affirmed. Amicus curiae Susan B. Anthony List Education Fund urges the Court to rehear that affirmance en banc.

ARGUMENT

First Amendment rights may only be waived if the purported waiver was made knowingly, voluntarily, and intelligently. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see also Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458 (1938), 464 (internal citations and quotations omitted). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel," for instance "must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* "A waiver of First Amendment rights may only be made by a 'clear and compelling' relinquishment of them." *Nat'l. Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981).

Even where a party has been found to have waived their constitutional rights in a private agreement, public policy interests ordinarily mandate that a waiver of fundamental rights not be enforced. *See Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396–99 (9th Cir. 1991).

The agreements provided by the National Abortion Federation and signed by Defendants, including the Exhibitor Agreement and Confidentiality Agreements (hereinafter the "Agreements"), do not constitute a waiver of First Amendment rights. Interpreting the Agreements to be a valid waiver of First Amendment rights is contrary to public policy. Furthermore, the purported waiver of rights was not made knowingly, intelligently, or voluntarily, and therefore is not valid.

The Panel found that the "district court did not clearly err in finding that the defendants had waived any First Amendment rights to disclose . . . information publicly by knowingly signing the agreements with NAF." Opinion at 9. Rather than deferring to the trial court, as the Panel did here, other circuits have held that "[w]henever constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent factual examination of the evidence in the record." *See e.g. Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 666, 690 (6th Cir. 1981). This independent examination of the record in First Amendment cases is affirmatively required by Supreme Court precedent. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

Indeed, while abuse of discretion is generally the proper standard in reviewing the grant of a preliminary injunction by a trial court, "when a case involves free expression, 'we must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *San Antonio Cmty. Hosp., v.* So. Cal. Council of Carpenters, 125 F.3d 1230, 1233–34 (9th Cir. 1997) (quoting *Old Dominion Branch No. 496, Nat'l. Ass'n. of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974)).

I. ENFORCING THE AGREEMENTS TO DENY FIRST AMENDMENT RIGHTS WOULD VIOLATE PUBLIC POLICY.

The Supreme Court has held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Town of Newton v. Rumery*, 408 U.S. 386, 392 (1987) (involving an issue of whether a party had waived their individual rights). This Court has previously articulated the standard required where a party has purportedly waived their constitutional rights in a private agreement: whether the party attempting to enforce the contract or agreement has "demonstrated that the public interest is better served by the enforcement of the . . . agreement than by non-enforcement." *Davies*, 930 F.2d at 1397.

The fundamental right to free speech and its component rights are of such great public interest that it would violate public policy to allow for a waiver of constitutional rights in this circumstance. "[F]ree speech 'serves significant societal

interests'. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n. of Cal.*, 475 U.S. 1, 8 (1986). The right which NAF seeks to declare waived "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g. Co.*, 388 U.S. 130, 145 (1967) (citing *Palko v. Conn.*, 302 U.S. 319, 327 (1937)). Indeed, the "rights to free speech and a free press are arguably so fundamental to the functioning of a democratic society that they ought not to be subjected to unregulated market ordering backed by the state power of contract enforcement." Shell, Richard G., *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 431, 516 (1993).

The First Amendment right to freedom of speech necessarily contains a companion right of the public to receive such speech. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." In this context, "'[i]t is the right of the [public], not the right of the [media], which is paramount." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991) (Souter, J., dissenting) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)).

The National Abortion Federation cannot demonstrate that the public interest is better served by enforcement than non-enforcement. *See Davies*, 930 F.2d at 1397.

In *Davies,* this Court found that the parties had knowingly waived their constitutional rights by signing a settlement agreement agreeing not to run for certain political offices, but nonetheless found that the waiver of such rights violated public policy, and was therefore invalid. 930 F.2d at 1395–96. There was "no question" that the fundamental rights involved in *Davies* were public interests of the "highest order." *Id*. at 1397. While the enforcement of private agreements is of public interest, the enforcement of fundamental rights such as the freedom embodied by the First Amendment significantly outweigh such private interests. *See id*. at 1398. The public interest therefore favors non-enforcement of any alleged waiver of First Amendment rights.

The public interests served by freedom of speech warrant the invalidation of any alleged waiver of such rights, especially where a party did not clearly and convincingly intend to waive such rights. As shown below, that is true in this case and warrants the invalidation of any alleged waiver. Here, Defendants have sought to expose relevant and critical information concerning possible illegal activity in the context of the divisive abortion debate. The public interest in law enforcement and general public access to this information greatly outweighs any interest in the enforcement of a private agreement. As the dissent noted, the preliminary injunction granted by the District Court is contrary to the public policy favoring the allowance of "citizens to report matters to law enforcement agencies." Op. at 3 (Callahan, J.,

dissenting) (citing *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984)). "It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." *S.E.C.*, 467 U.S. at 743. Public policy mandates that any alleged waiver of constitutional rights in this circumstance be invalidated.

II. DEFENDANTS DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THEIR FIRST AMENDMENT RIGHTS.

The Defendants did not waive their First Amendment rights when they signed the Agreements. A waiver of constitutional rights is only valid if it was made knowingly, voluntarily, and intelligently. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. at 185; *Leonard v. Clark*, 12 F.3d at 889.

Courts are reluctant to find a waiver First Amendment rights and "indulge every reasonable presumption against" such a waiver. *Johnson*, 304 U.S. at 464 (internal citations and quotations omitted). "A waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege." *Id*. (emphasis added). First Amendment rights can only be waived contractually "where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988). Importantly, the Supreme Court has noted that "[w]here the ultimate effect of

sustaining a claim of waiver might be an imposition on th[e] valued freedom [of the First Amendment], we are unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publ'g Co.*, 388 U.S. at 145 (internal citations omitted).

Defendants did not intentionally relinquish their right to free speech, as the Agreements are not clear that signatories would be prohibited from exercising their First Amendment rights. Instead, the confidentiality agreement merely stated that recording of the presentations at the NAF conferences was prohibited. *See* Pet. for Reh'g En Banc at 10. Defendants had no way of knowing that such agreement would be used to prohibit their exercise of First Amendment rights, especially where Defendants sought to expose potentially illegal activity to both law enforcement and the public at large. The alleged waiver was not "clear and compelling," and therefore cannot be sustained. *See Curtis Publ'g. Co.*, 388 U.S. at 145; *see also Nat'l. Polymer*, 641 F.2d at 424 (court found that because an alleged waiver of constitutional rights was "not unambiguous," it was not a clear waiver of First Amendment rights, and therefore remanded to trial court for further determination of validity of waiver.).

Moreover, Defendants did not sign the Agreements upon advice of counsel, and were therefore likely unaware of the possibility of waiver of constitutional rights, especially where the documents did not refer to the right of free speech at all. *See, e.g. Leonard,* 12 F.3d at 890 (found a waiver of First Amendment rights

knowing, voluntary, and intelligent where the party "was advised by competent counsel during the negotiations" and had "originally proposed the language of the agreement."). Defendants did not therefore knowingly and intelligently relinquish their First Amendment rights.

III. THE AGREEMENTS WERE CONTRACTS OF ADHESION AND THEREFORE NOT MADE VOLUNTARILY.

The Agreements are contracts of adhesion, and therefore should be unenforceable as a waiver of First Amendment rights. Such contracts are defined as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Perdue v. Crocker Nat'l. Bank*, 38 Cal.3d 913, 925 (1985).

The Confidentiality Agreement, which prohibited recordings of the meetings at the NAF conference, was only presented to Defendants after they had arrived at the conference, after they had paid several thousand dollars in non-refundable fees to attend. *See* Pet. for Reh'g. at 10. Additionally, the parties had clearly unequal bargaining power when entering into the Agreements. *See Erie Telecomms. v. Erie*, 853 F.2d at 1096 (waiver can occur where "parties to the contract have bargaining equality and have negotiated the terms of the contract."). NAF required, as a condition of attending at its conferences, that all parties sign the Confidentiality Agreement, and the record does not indicate that NAF permitted negotiation on such

terms. Nor is there any indication that negotiation was permitted in the Exhibitor Agreement. Moreover, it is a canon of contract law that any ambiguity in a contract is ordinarily construed against the drafter. *See* Restatement (Second) of Contracts § 206. The Agreements did not clearly and unambiguously state that adopting the agreement would result in the waiver of First Amendment or other fundamental rights. Defendants did not therefore voluntarily relinquish their First Amendment rights, and the finding of waiver by the District Court was therefore improper.

CONCLUSION

For all of these reasons, the Court should grant the petition for rehearing en banc and reverse the decision of the District Court.

Respectfully submitted,

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April 21, 2017

STATEMENT OF RELATED CASES

Amicus curiae Susan B. Anthony List Education Fund is not aware of any related cases pending in the Court.

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

S/Kevin H. Theriot

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Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: s/Kevin H. Theriot

Date: April 21, 2017

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