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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* LEGAL CENTER FOR DEFENSE OF LIFE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment right against prior restraints may be infringed upon to censor speech that is embarrassing to one side in the abortion debate.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, *amicus curiae* Legal Center for Defense of Life ("Legal Center") is a nonprofit New Jersey corporation dedicated to defending constitutional rights of those who advocate on behalf of unborn children. The Legal Center includes a network of attorneys who together have volunteered

[1] *Amicus* files this brief after the requisite ten days' prior written notice, based on the filed blanket consent by Petitioners and the written consent by Respondent accompanying this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

thousands of hours of *pro bono* services in defense of pro-life advocates. The work of the Legal Center has included protecting the free speech rights of sidewalk counselors against infringement on their First Amendment rights. The Legal Center has a direct and vital interest in clarifying that First Amendment rights apply in a uniform manner, which is at issue in this case.

SUMMARY OF ARGUMENT

The First Amendment applies to the federal judiciary, which should never allow itself to become a tool of censorship. U.S. CONST., Amend. I. Court-ordered prior restraints on speech concerning matters of immense public interest are inherently unconstitutional. A prior restraint on speech that interferes with access to politically relevant information, as here, is contrary to the foundation of our free society. There is national importance to ensuring that lower federal courts do not engage in censorship of such information, and the Petition for *certiorari* should be granted.

The First Amendment was ratified to prevent federal suppression of free speech, yet that is what the prior restraint below has imposed. Had a court restrained speech in a non-abortion context in which there is a strong public interest, then it would surely be reversed. Here, the lower federal courts imposed a prior restraint that is breathtakingly broad in scope, preventing communication even with state and local law enforcement. The effect of this unprecedented prior restraint is to shield a controversial business activity against criticism, which no federal court should ever do. There is no constitutional right to

suppress criticism, which the First Amendment protects. The prior restraint below is untenable.

This Court has repeatedly held that the better approach to unpleasant political disagreement is more speech, not less. This should be as true in the abortion context as any other. The Ninth Circuit took the wrong turn by embracing censorship rather than discourse. Allowing the prior restraint in this case to remain would undermine a half-century of rulings by this Court which stand for the right to robust free speech. The First Amendment would mean little if federal courts are permitted to censor politically related speech in unpublished opinions, as done below, and then dodge full review by this Court. Instead, the Petition should be granted to ensure that the First Amendment safeguards all politically related speech regardless of whether some disagree with it.

ARGUMENT

I. REVIEW IS NECESSARY TO ENSURE COMPLIANCE BY THE JUDICIARY WITH THE FIRST AMENDMENT CONCERNING PRIOR RESTRAINTS ON A CONTROVERSIAL TOPIC.

The strong public interest in the recordings at issue is acknowledged by the trial court and cannot be seriously disputed. (Pet. 15a, 73a) Petitioners' work has been the basis for decisions by government officials across the country, as recognized by multiple federal trial and appellate judges. *See Planned Parenthood Ass'n v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting from a denial of rehearing *en banc*) (action taken by Utah officials based on similar videos); *see also Does v. Gillespie*, Nos.

15-3271, 16-4068, 2017 U.S. App. LEXIS 15453, at *2 (8th Cir. Aug. 16, 2017) (action taken by Arkansas officials based on similar videos); *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 236 F. Supp. 3d 974 (W.D. Tex. 2017) (action taken by Texas officials based on similar videos).

Well-established First Amendment principles prohibit the prior restraint below, in light of the concededly strong public interest in the recordings. The widely followed decision of this Court in *New York Times Co. v. United States* and its progeny make clear that the prior restraint below is unconstitutional. 403 U.S. 713 (1971). "The chief purpose of the First Amendment's guaranty is to prevent previous restraints upon publication." *Id.* at 726 (Brennan, J., concurring, inner quotations and brackets omitted). As to the possibility of a disclosure inciting violence – a theory relied upon below (Pet. 72a n.42) – the *New York Times* decision expressly rejected potential violence as a valid basis for a prior restraint:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion …."

403 U.S. at 719-20 (Black and Douglas, JJ., concurring, quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

Additional decisions by this Court both before and after the seminal *New York Times* decision likewise ruled strongly against prior restraints on speech. *See,*

e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (reaffirming that "the barriers to prior restraint remain high and the presumption against its use continues intact" and "to the extent that this order restrained publication of such material, it is clearly invalid"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

The district court below cited *New York Times v. United States*, but then failed to follow or distinguish it, or mention any of the other controlling precedents against prior restraints. (Pet. 13a) Instead, the district court below declared that:

> freedom of speech must be balanced against and give way to the protection of other compelling Constitutional rights, such as the First Amendment's right to freedom of association, the Fifth and Fourteenth Amendments' protection of liberty interests, and the right to privacy.

(*Id.*) But neither the district court nor the Court of Appeals below identified any established constitutional right that would justify infringing on the First Amendment rights here.

At most the district court made a passing reference to supposedly countervailing rights as follows:

> a constitutional right to abortions and … NAF members also 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.

(Pet. 75a) Yet there is obviously no constitutional right to be free from embarrassing recordings, whether

about abortion or any other political topic. The trial court implied the existence of a constitutional right where there is none, and simply refused to apply *New York Times v. United States* and its controlling progeny against prior restraints.

On appeal the Ninth Circuit did not reach for non-existent constitutional rights, and instead relied entirely on a routine confidentiality form to gag Petitioners and prevent them from publishing the recordings. But that basis pales in comparison to the statutory requirements and national security interests rejected by this Court as justification for a prior restraint in *New York Times v. United States*. *See New York Times*, 403 U.S. at 731 (White and Stewart, JJ., concurring) ("Nor … can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result.").

The Ninth Circuit failed even to cite the controlling *New York Times* precedent, let alone attempt to distinguish it. Instead, its meager authority for its ruling was a decision about a collective bargaining agreement that had been extensively negotiated and which conferred bargained-for benefits to the parties. *See Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (cited by Pet 5a). No such negotiation or bargained-for benefits occurred here, and it is silly to argue that Petitioners had "knowingly, voluntarily, and intelligently waived his constitutional right" to free speech when the very purpose of their attending the NAF conferences was to expose to the public what was happening there. *Leonard*, 12 F.3d at 890. Moreover, not even the *Leonard* decision allowed a prior restraint

to censor information in which there was a public interest, as there is here.

The trial judge disparaged the significance of the recordings in his decision (Pet. 60a-63a), and his prior restraint on disclosure prevents the public from evaluating the recordings and disagreeing with him. Censorship is bad enough, but when accompanied by a substitute characterization by government of the contents of the suppressed information, this is directly at odds with the First Amendment. In effect the trial judge substituted his own negative view of the evidence for the evidence itself, which would never be allowed at a jury trial and should not be condoned for a prior restraint. Under the approach below a court could have announced that the *Pentagon Papers* contained nothing of interest, or even assert that they provide compelling evidence in support of the Vietnam War, and then improperly censor their publication.

Such an approach undermines public confidence in the judiciary, as a prior restraint should never be imposed after a court has disparaged evidence while denying the public access to the same evidence. The public has a right to form their own opinions about both the recordings and a judge's view of them. The First Amendment stands against compelling the public to accept a court's characterization of speech, without granting access by the public to the speech itself.

Moreover, the rulings below are incoherent in both insisting that the recordings do not disclose wrongdoing (Pet. 5a, 72a n.42) and in asserting that there might be violence if the recordings are released. (Pet. 13a, 38a-39a, 51a, 63a-64a, 69a-72a) Such findings are self-contradictory, and reinforce the

impression that the prior restraint below is to protect NAF and its members from embarrassment and avert political fallout from disclosure. Such a basis for a prior restraint, easily inferred from the contradictory findings below, is plainly unconstitutional.

The stakes are high in the abortion debate. But the higher the stakes, the greater the need to strike down censorship of speech concerning the matter. Leading up to the Civil War Congress imposed on itself a gag order against any bills relating to slavery, and a central tenet of the newly formed Republican Party was to reject such suppression of speech. *See* Michael Kent Curtis, "The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37," 89 Nw. U.L. Rev. 785, 859 (1995) ("By 1859, a broad defense of free expression on the subject of slavery was a central part of the ideology of the Republican Party. In the eyes of many, free expression became a right of American citizens.").

The approach taken below of limiting speech never succeeds in defusing a national political issue, and only heightens the emotions on both sides. Vigilance in favor of free speech and against censorship is the far better approach, and the one that the First Amendment requires. This Court has emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. The Petition raises an issue of national importance, and *certiorari* should be granted.

II. WHERE, AS HERE, THE PRIOR RESTRAINT AFFECTS A DOMINANT POLITICAL ISSUE, REVIEW BY THIS COURT IS ESSENTIAL.

The prior restraint below was on an issue of heightened political significance, which reinforces the necessity of review by this Court. Nearly a quarter of all abortion costs are paid for by taxpayers, which increases the legitimate public interest in conduct and statements by abortion providers. *See* Chris Conover, "Are American Taxpayers Paying for Abortion?" Forbes (Oct. 2, 2015) ("taxpayers subsidize roughly 24% of all abortion costs in the U.S. with 6.6% borne by federal taxpayers and the remaining 17.4% picked up by state taxpayers").[2] The recordings at the NAF meetings concern an activity for which the public is being compelled to subsidize, often in violation of their own consciences.

Without recognizing this taxpayer interest, the trial court judge did expressly acknowledge the "strong public interest":

> I fully recognize that there is strong public interest on the issue of abortion on both sides of that debate, and that members of the public therefore have an interest in accessing the NAF materials. I also recognize that this case impinges on defendants'

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[2] https://www.forbes.com/sites/theapothecary/2015/10/02/are-american-taxpayers-paying-for-abortion/#624d88b46a4b (viewed Sept. 3, 2017).

> rights to speech and the public's equally important interest in hearing that speech.

(Pet. App. 73a)

Indeed, judicial notice can be taken of how much abortion is an issue in contemporary elections, which makes the prior restraint below even more infirm from a constitutional perspective. *See, e.g.*, Jennifer Haberkorn, "Abortion Returns to Election Spotlight," Politico.com (Sept. 9, 2015).[3] The prior restraint below did not suppress merely private speech, but it suppressed politically related speech that is highly relevant to elections.

Prior restraints that favor one side of a political dispute are particularly improper, because "civic discourse belongs to the people and the Government may not prescribe the means used to conduct it." *McConnell v. FEC*, 540 U.S. 93, 341 (2003) (opinion of Kennedy, J.). Yet the Ninth Circuit has allowed the federal judiciary to become a tool of censorship for one side in the abortion debate to use against the other. This is directly contrary to the teachings of this Court on speech relating to political issues, as abortion is. By limiting speech, the courts below took a wrong turn that this Court has emphatically rejected.

"[I]t is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. FEC*, 558 U.S. 310, 361 (2010). The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *F.E.C. v. Wisconsin Right to Life, Inc.,* 551 U.S. 449,

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[3] http://www.politico.com/story/2015/09/planned-parenthood-abortion-2016-spotlight-213478 (viewed Sept. 3, 2017).

469 (2007) (interior quotations omitted). "To safeguard this liberty," reviewing courts should be "focusing on the substance of the communication," and not on "amorphous considerations of intent and effect." *Id.* Courts "must give the benefit of any doubt to protecting rather than stifling speech." *Id.*

It is no justification for the trial court to downplay the significance of the recordings, such as saying that "this sort of information is already fully part of the public debate over abortion." (Pet. 62a) It is not for a federal court to base its decision on a request for a prior restraint on its opinions about the impact or relevance of the speech. As Justice Alito explained in his concurrence in *McCullen v. Coakley*, a law that is "content neutral on its face" may not be "content neutral in fact" as required by the First Amendment:

> The Court treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral.

McCullen v. Coakley, 134 S. Ct. 2518, 2549-50 (2014) (Alito, J., concurring) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645-646 (1994)). The prior restraint below is not "content neutral in fact" because it suppresses speech about abortion. Such censorship is particularly repugnant to the First Amendment.

Denial of a petition for *certiorari*, which seeks review of an infringement on First Amendment rights by a lower federal court, can itself chill free speech. Lower federal courts need to comply with the First Amendment, and be reversed when they fail to. The strong precedents of this Court in favor of the First Amendment will have diminished significance if lower courts can rule otherwise with impunity and without full review by this Court. The Petition for *certiorari* should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be granted, either to order summary reversal of the decision below or to set this case for argument.

Respectfully submitted,

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