Consolidated Appeal Nos. 20-16068, 20-16070, 20-16773, 20-16820

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FED. OF AM., ET AL.,
PLAINTIFFS-APPELLEES,
V.
TROY NEWMAN,
DEFENDANT-APPELLANT.
_____/

NO. 20-16068
APPEAL FROM THE U.S. DISTRICT COURT FOR THE N.D. OF CALIFORNIA CASE NO. 3:16-CV-236-WHO HON. WILLIAM H. ORRICK, PRESIDING

PLANNED PARENTHOOD FED. OF AM., ET AL.,
PLAINTIFFS-APPELLEES,
V.
THE CTR. FOR MED. PROGRESS, ET AL.,
DEFENDANTS-APPELLANTS.
_____/

NO. 20-16070
APPEAL FROM THE U.S. DISTRICT COURT FOR THE N.D. OF CALIFORNIA CASE NO. 3:16-CV-236-WHO HON. WILLIAM H. ORRICK, PRESIDING

PLANNED PARENTHOOD FED. OF AM., ET AL.,
PLAINTIFFS-APPELLEES,
V.
ALBIN RHOMBERG,
DEFENDANT-APPELLANT.
_____/

NO. 20-16773
APPEAL FROM THE U.S. DISTRICT COURT FOR THE N.D. OF CALIFORNIA CASE NO. 3:16-CV-236-WHO HON. WILLIAM H. ORRICK, PRESIDING

PLANNED PARENTHOOD FED. OF AM., ET AL.,
PLAINTIFFS-APPELLEES,
V.
SANDRA SUSAN MERRITT,
DEFENDANT-APPELLANT.
_____/

NO. 20-16820
APPEAL FROM THE U.S. DISTRICT COURT FOR THE N.D. OF CALIFORNIA CASE NO. 3:16-CV-236-WHO HON. WILLIAM H. ORRICK, PRESIDING

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Americans United for Life (AUL) is the nation's first and most active pro-life non-profit legal organization dedicated to advocating for comprehensive protections for human life from conception to natural death. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has nearly 50 years of experience relating to abortion jurisprudence. AUL attorneys are highly regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country.

All parties consented to the timely filing of this *Amicus* Brief.

ARGUMENT

I. DEFENDANTS' UNDERCOVER JOURNALISM EFFORTS REFLECTED AND CONTRIBUTED TO AN ONGOING AND INTENSE PUBLIC POLICY DEBATE OVER ALLEGED UNLAWFUL AND UNETHICAL PRACTICES BY PLAINTIFF PLANNED PARENTHOOD AFFILIATES.

It is no exaggeration to say that the undercover journalism Defendants engaged in was among the most consequential *sub rosa*

[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* and its counsel contributed any money intended to fund the preparation or submission of this brief.

journalism campaigns in American history. The Center for Medical Progress undercover videos have had as much impact on their intended issue as Upton Sinclair's had on the food packing industry,[2] or the FBI "Abscam" sting operation had on government corruption.[3]

Well before the CMP videos made their debut, the issue of public funding of elective abortion generally, and Planned Parenthood—as the nation's largest abortion chain—specifically, was the subject of a long train of state lawmaking and court challenges by Planned Parenthood affiliates. State efforts sometimes centered on excluding Planned Parenthood and other elective abortion providers from Title X federal family planning programs.[4] Other State actions and Planned Parenthood

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[2] *See* Upton Sinclair, THE JUNGLE (1906).

[3] *See ABSCAM*, Federal Bureau of Investigations, https://www.fbi.gov/history/famous-cases/abscam (last visited Mar. 4, 2021).

[4] *See*, *e.g.*, *Planned Parenthood Ass'n of Utah v. Schweiker*, 700 F.2d 710, 723–24 (D.C. Cir. 1983) (upholding Utah's decision to bypass Planned Parenthood for Title X family planning funding); *Planned Parenthood of Mid-Missouri and E. Kansas v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999) (upholding Missouri statute excluding elective abortion providers from eligibility for family planning funds in order to prevent abortion service providers from receiving state family-planning funds against Planned Parenthood's challenge); *Planned Parenthood of Houston & S.E. Texas v. Sanchez,* 403 F.3d 324 (5th Cir. 2005) (upholding Texas' restricted distribution of federal Title X and Title IX family planning

legal challenges focused on Medicaid family planning qualifications.[5] Further, the purported link between the "partial-birth abortion" procedure and aborted fetal tissue trafficking helped motivate Congressional approval of the federal Partial Birth Abortion Ban Act in 2003, 18 U.S.C. § 1531. One senator, Bob Smith of New Hampshire,

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funds to non-abortion performing recipients against Planned Parenthood's challenge). New Jersey Governor Chris Christie vetoed funding for Planned Parenthood and other elective abortion providers in 2010. Katie Sanders, *Chris Christie Vetoed Planned Parenthood Funding 5 Times, Hilary Rosen Claims*, POLITIFACT (Nov. 10, 2013) https://www.politifact.com/factchecks/2013/nov/10/hilary-rosen/chris-christie-vetoed-planned-parenthood-funding-5/ ("Christie has used his executive power several times to deny funding for family planning clinics, including but not exclusively limited to Planned Parenthood. As a result of the cuts at least six clinics have closed, including two affiliated with Planned Parenthood. . . ."). *See generally* Guttmacher Institute, *State Family Planning Restrictions*, https://www.guttmacher.org/state-policy/explore/state-family-planning-funding-restrictions (last visited Mar. 4, 2021).

[5] *See*, *e.g.*, *Planned Parenthood Ass'n of Hidalgo County Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (upholding Texas' exclusion from state Medicaid waiver program prohibition of elective abortion providers and entities associated with them against Planned Parenthood's challenge); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (affirming injunction against Indiana's prohibition on state contracts with abortion providers); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013) (same with respect to Arizona's prohibition); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D.N.C. 2012) (holding unconstitutional a state budget provision that excluded Planned Parenthood from funding).

explained on the Senate floor the pecuniary motivations abortionists had to employ the procedure over other late-gestation abortion procedures.[6]

In this contextual milieu, it comes as no surprise that Defendant Daleiden testified at trial that his interest in conducting the CMP investigation started with seeing congressional testimony and an ABC News *20/20* report that discussed abuses, fetal tissue trafficking and whistleblowers.[7] The House record of the subcommittee hearing regarding fetal tissue trafficking in violation of federal law, held in March

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[6] Sen. Bob Smith (R-N.H.), Speech to U.S. Senate debating an early version of the Partial-Birth Abortion Ban Act of 1999 (Oct. 20, 1999); Cf. *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding constitutionality of the federal act).

[7] Docket No. 941, Tr. of Jury Trial Proceedings at 2301:1–2303:3 (Oct. 22, 2019). *See Fetal Tissue: Is It Being Sold in Violation of Federal Law?: Hearing Before the Subcomm. on Health and Environment of the House Comm. on Commerce*, 106th Cong., 2d Sess. (March 9, 2000) [hereinafter March 2000 House Hearing]. Although federal funding for research utilizing fetal tissue was historically prohibited, it was permitted under certain conditions beginning in 1993. *See* 42 U.S.C. § 289g-1(c)(4) (requiring researchers to certify that they "had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research"); 45 C.F.R. § 46.204(i) (requiring that "[i]ndividuals engaged in the research [involving pregnant women or fetuses] will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy"); 42 U.S.C. § 289g-1(b)(2)(A)(ii) (requiring researchers to certify that "no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue").

2000, included the transcript of a telephonic "sting" interview with an abortion clinic employee who detailed fetal tissue orders and testified that abortion procedures were altered routinely for the sake of obtaining better cadaver specimens.[8] Just before the hearing, on March 8, 2000, the ABC News show *20/20* broadcast a hidden-camera investigation into alleged trafficking in aborted fetal tissue entitled, "Parts for Sale; People Make Thousands of Dollars Off the Sale of Fetal Body Parts." The *20/20* hidden camera investigation included an *M.O.* that bore remarkable similarity to CMP's later investigative methods. "One '20/20' producer went undercover as a potential investor to meet Dr. Miles Jones, a Missouri pathologist whose company, Opening Lines, obtains fetal tissue from clinics and ships it to research labs."[9] The report raised similar questions to those raised by the congressional partial-birth abortion debate and the CMP videos at issue in this case, including exorbitant and illegal profiting on fetal tissue, altering the abortion technique to gain

[8] March 2000 House Hearing, at 159–174.

[9] Press Release, Nat'l Right to Life, *ABC News "20/20" Investigation Into Alleged Trafficking in Fetal Tissue Finds Companies that Appear to be Profiting from Selling Human Tissue for Medical Research* (Mar. 6, 2000) http://www.nrlc.org/abortion/babyparts/20_20_press_release/.

more preferable specimens, and lack of patient consent for donation.[10] According to ABC, "The issue has outraged both pro-life and pro-choice advocates," and, quoting Gloria Feldt, president of Planned Parenthood Federation of America, "Where there is wrongdoing, it should be prosecuted and the people who are doing that kind of thing should be brought to justice."[11] The *20/20* broadcast was mentioned repeatedly by various congressmen throughout the course of the March 2000 House Hearing.[12]

It was completely predictable, then, that the advent of the CMP videos in July 2015 would fan into flame again the smoldering controversy over the apparent designs of abortion industry personnel to evade federal law against fetal tissue trafficking, and spur on the state push to ensure that public funding was not used to subsidize elective abortion. The pro-abortion Guttmacher Institute, at one time the research arm of Planned Parenthood, observes:

> The latest wave of policy threats to family planning funding emerged in the summer of 2015 with the public release of a series of deceptive videos seeking to discredit Planned Parenthood. Since then, several states have attempted to

[10] *Id.*
[11] *Id.*
[12] *Id.* at 220–226.

> prohibit abortion providers generally, or Planned Parenthood affiliates specifically, from receiving any public funds that pass through the state treasury, including federal grants such as Title X funding.[13]

In the immediate aftermath of the CMP videos, at least half a dozen states took executive or legislative action to deny Planned Parenthood public funding. Most of these funding decisions were a direct result of the CMP videos. *See, e.g., Planned Parenthood Southeast, Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1212 (M.D. Ala. 2015) ("The Governor states in his briefing in this court that his decision to terminate was based on his viewing one of the videos released by the Center for Medical Progress."); *Planned Parenthood Ark. & E. Okla. v. Gillespie*, 2018 U.S. Dist. LEXIS 237265, *14–15 (E.D. Ark. 2018) ("Governor Hutchinson states that he directed ADHS to terminate the agreements because '[i]t is apparent that after the recent revelations on the actions of Planned Parenthood, that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them'"); *id.* at 15 ("After the [termination] letter was issued, the Governor directed DHS to review the videos released by the

[13] "State Family Planning Restrictions," *supra* note 4.

Center for Medical Progress."); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1212–1213 (10th Cir. 2018), cert den., 139 S. Ct. 638 (2018) ("In July 2015, the anti-abortion group Center for Medical Progress . . . released on YouTube a series of edited videos purportedly depicting PPFA executives negotiating with undercover journalists for the sale of fetal tissue and body parts. Kansas alleges that the videos demonstrate that 'Planned Parenthood manipulates abortions to harvest organs with the highest market demand' and that PPFA executives are willing to negotiate fetal-tissue prices to obtain profits. . . Based on CMP's videos of the PPFA executives, Kansas began investigating the Providers."); *id.* at 1212–13 (listing three additional state investigations spawned by CMP); *Planned Parenthood of the Gulf Coast v. Gee*, 862 F.3d 445, 451–52 (5th Cir. 2017), reh. en banc den., 876 F.3d 699 (5th Cir. 2017), cert. den., 139 S. Ct. 408 (2018) ("In July 2015, the anti-abortion Center for Medical Progress, released a series of undercover videos and allegations purporting to show that Planned Parenthood and its affiliates were contracting to sell aborted human fetal tissue and body parts."); *Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs. v. Smith*, 913 F.3d 551, 555–56 (5th Cir. 2019), reh. en

banc, vacated, *Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) ("In 2015, [CMP], a pro-life organization, released more than eight hours of undercover videos disclosing conversations held at the [Planned Parenthood Gulf Coast] headquarters. . . The release of these graphic videos prompted federal and state investigations into numerous Planned Parenthood affiliates."); *id.* at 556 (listing six Texas criminal investigations spawned by CMP); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1250 (10th Cir. 2016) ("In the summer of 2015, an entity known as [CMP] released 'selectively edited videos of Planned Parenthood staff members discussing the health care provider's fetal tissue donation program.' The videos resulted in '[a]nti-abortion advocates . . . accusing Planned Parenthood of profiting off the sale of fetal tissue, which would be illegal.' In turn, "[m]ultiple investigations were launched in Congress and in the states.") (internal citations omitted). Notably, three Justices of the U.S. Supreme Court referred to the CMP investigation and the strong state response in dissenting from the Court's denial of certiorari in *Gee*. "It is true that these particular cases arose after several States alleged that Planned Parenthood

affiliates had, among other things, engaged in 'the illegal sale of fetal organs' and 'fraudulent billing practices,' and thus removed Planned Parenthood as a state Medicaid provider." *Gee*, 139 S. Ct. at 410 (Thomas, J., and Alito and Gorsuch, JJ., dissenting), quoting *Andersen*, 882 F.3d at 1239, n. 2 (Bacharach, J., concurring in part and dissenting in part).[14]

This controversy over funding abortion-providing organizations continued into the realm of eligibility for Title X federal family planning funds. The Trump administration's Health & Human Services agency promulgated the "Protect Life Rule," requiring federal family planning recipients to demonstrate bifurcation between their family planning and abortion facilities. 42 C.F.R. § 59.14(e)(5)[15] This federal funding rule

[14] For other states, the CMP investigation was a likely subtext of de-funding efforts. *See*, *e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir. 2019) (en banc) (holding that Ohio's budgetary exclusion of elective abortion providers, enacted in 2016, was not unconstitutional); *Planned Parenthood Southeast, Inc. v. Dzielak*, 2016 U.S. Dist. LEXIS 148015 (S.D. Miss. 2016); *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019), cert. den., 141 S. Ct. 550 (2020).

[15] The U.S. Supreme Court recently accepted review this term of decisions involving the "Protect Life Policy." *Am. Med. Ass'n. v. Cochran*, No. 20-429 (petition for cert. filed Oct. 1, 2020), consolidated with *Cochran v. Mayor & City of Baltimore*, No. 20-454 (petition for cert. filed Oct. 7, 2020) and *Oregon v. Cochran*, No. 20-539 (petition for cert. filed Oct. 5, 2020) (petitions granted Feb. 22, 2021).

resulted in Planned Parenthood withdrawing its affiliates from the federal family planning program.[16]

The CMP videos directly launched multiple congressional investigations into whether Planned Parenthood was, in fact, engaged in fetal tissue research in violation of federal and state law.[17] Many, including House leadership, believed it was. Upon release of the first video, July 15, 2015, three House Committees—Energy and Commerce, Judiciary, and Oversight—quickly opened investigations into the videos.[18] House leadership charged, "In 2015, videos were uncovered featuring senior level Planned Parenthood officials admitting unethical and potentially illegal procedures. . . The practices described in these videos are despicable, and Planned Parenthood should be forced to defend

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[16] *See* Press Release, Planned Parenthood, *Trump Administration Gag Rule Forces Planned Parenthood Out of Title X National Program for Birth Control*, (Aug. 19, 2019) https://www.plannedparenthood.org/about-us/newsroom/press-releases/trump-administration-gag-rule-forces-planned-parenthood-out-of-title-x-national-program-for-birth-control-2.

[17] *See* House of Representatives Republican Leadership, *House Investigation Into Planned Parenthood*, [hereinafter *House Investigation*] https://www.gop.gov/solution_content/plannedparenthood/ (last visited Mar. 4, 2021).

[18] *Id.*

their content."[19] Among the issues the committees investigated were whether the Plaintiff organizations were profiting from the sale of fetal tissue or changing abortion procedures to maximize revenue from such sales in violation of federal law, and whether they were obtaining proper informed consent from patients.[20]

In the immediate aftermath of the release of the CMP videos, the House heard multiple bills relating to the provision of abortion in the United States, and specifically Planned Parenthood's role in it. As a result, the House passed several pieces of legislation aimed at limiting federal funding for Planned Parenthood and elective abortion providers.[21]

On July 17, 2015, the House Judiciary Committee asked the U.S. Attorney General to investigate potential violations of the federal Partial-Birth Abortion Ban Act by Planned Parenthood.[22] A month later, on August 19, 2015, the Judiciary Committee sent letters to fifty-eight

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[19] *Id.*

[20] *Id.*

[21] *See*, *e.g.*, Defund Planned Parenthood Act of 2015, H.R. 3134, 114th Cong. (passed Sep. 18, 2015, by a vote of 241-187); Born Alive Abortion Survivors Protection Act, H.R. 3504, 114th Cong. (2015) (passed Sep. 18, 2015, by a vote of 248-177); Women's Public Health and Safety Act, H.R. 3495, 114th Cong., (2015) (passed September 29, 2015, by a vote of 236-193).

[22] *House Investigation*, *supra* note 17.

Planned Parenthood affiliated organizations requesting information on their clinical procedures and standards when performing abortion services.[23]

The House held multiple fact-finding hearings in response to the revelations in the CMP videos. On September 9, 2015, the House Judiciary Committee held a hearing entitled, "Planned Parenthood Exposed: Examining the Horrific Abortion Practices at the Nation's Largest Abortion Provider." A House Subcommittee on Health hearing held September 17, 2015, was entitled, "Protecting Infants: Ending Taxpayer Funding for Abortion Providers Who Violate the Law." And on September 29, 2015, the House Oversight and Government Reform Committee held a hearing on the use of taxpayer funding by Planned Parenthood, entitled "Planned Parenthood's Taxpayer Funding." Cecile Richards, president of the Planned Parenthood Federation of America, testified.[24] The following day, Energy and Commerce Committee leaders

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[23] *Id.*

[24] *Id. See also* Stephanie Armour & Louise Radnofsky, *Planned Parenthood Head Testifies on Capitol Hill*, THE WALL ST. JOURNAL, (updated Sept. 29, 2015) https://www.wsj.com/articles/planned-parenthood-head-testifies-on-capitol-hill-1443544274. ("The oversight committee is one of several congressional panels investigating Planned

sent letters to Richards and the heads of seven Planned Parenthood affiliates seeking further assurances that they were not in violation of federal law.[25] "[D]espite PPFA's assertions that it complies with all applicable laws and ascribes to the highest ethical standards with regard to these programs, its guidance does not appear to be fully consistent with the requirements of the 1993 law," the committee stated.[26]

Ultimately, on October 7, 2015, the House of Representatives voted to create a select panel within the Energy and Commerce Committee for the purpose of continuing to investigate abortion practices and the handling of and policies regarding fetal tissue, its cost, and how it is obtained. Energy and Commerce Committee Vice Chairman Marsha Blackburn stated, "there are still many questions yet to be answered

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Parenthood, amid a push by some Republicans to halt any federal funds from going to the organization. . . .").

[25] Letter from House Energy and Commerce Committee to Planned Parenthood (Sept. 30, 2015) https://republicans-energycommerce.house.gov/news/press-release/demanding-answers-and-continuing-hold-plannedparenthood-accountable/.

[26] *Id*. The House Oversight and Government Reform Committee also sought to review the entirety of the CMP videos, issuing a subpoena on September 15, 2015 to the Center for Medical Progress (CMP) for all the unedited video footage in the Human Capital Project, but CMP was enjoined from releasing the footage in a lawsuit filed against it by the National Abortion Federation (NAF). *House Investigation, supra*, note 17.

surrounding Planned Parenthood's business practices and relationships with the procurement organizations. This is exactly why the House is investigating abortion practices and how we can better protect life."[27]

On October 23, 2015, Speaker of the House John Boehner issued a statement announcing appointments to the House Energy and Commerce Committee's Select Investigative Panel. Referencing the CMP videos, Speaker Boehner stated:

> Recent videos exposing the abortion-for-baby parts business have shocked the nation, and demanded action. At my request, three House committees have been investigating the abortion business, but we still don't have the full truth. Chairman Blackburn and our members will have the resources and the subpoena power to get to the bottom of these horrific practices, and build on our work to protect the sanctity of all human life.[28]

Thus, in point of fact, Defendants' "Human Capital Project" *actually accomplished at least two key purposes of its investigation*—forcing Planned Parenthood to forego any alleged illegal trafficking in fetal tissue, and (partially) ending taxpayer funding of Planned Parenthood. Planned Parenthood Federation of America responded to the CMP videos and the popular pressure they created by committing not to receive

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[27] *House Investigation*, *supra* note 17.
[28] *Id.*

compensation for fetal tissue donations, claiming to remove any doubt over whether their affiliates violated federal law in their tissue procurement policies.[29] Numerous states made legislative or executive efforts to de-fund Planned Parenthood as a result of CMP's work, and in at least two of those states, Texas and Arkansas, Planned Parenthood legal challenges were turned back.

The House Select Committee on Infant Lives conducted a thirteen-month-long investigation into allegedly unlawful tissue procurement practices, and on January 4, 2017, issued a 413-page report. The Committee made thirteen referrals for criminal prosecutions or regulatory investigations for matters arising out of its investigation.[30]

The Senate Judiciary Committee conducted its own investigation into the alleged fetal tissue trafficking shown on the CMP videos,

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[29] *See* Press Release, Planned Parenthood, *Taking Away Basis for Discredited Smear Campaign, Planned Parenthood Declines Any Reimbursement for Fetal Tissue Donation* (Oct. 13, 2015) https://www.plannedparenthood.org/about-us/newsroom/press-releases/taking-away-basis-for-discredited-smear-campaign-planned-parenthood-declines-any-reimbursement-for-fetal-tissue-donation.

[30] Select Investigative Panel of the House Energy & Com. Comm., *Final Report*, 33–135 (Dec. 30, 2016) https://republicans-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf.

resulting in multiple criminal referrals to the Department of Justice and the FBI.[31] The Judiciary Committee report concluded that three companies had paid Planned Parenthood affiliates to acquire aborted fetuses, and those companies had sold the fetal tissue to their respective customers at substantially higher prices than their documented costs.[32] Chairman Grassley noted that Planned Parenthood Federation of America "initially had a policy in place to ensure its affiliates were complying with the law, but the affiliates failed to follow its fetal tissue reimbursement policy."[33] When PPFA learned of this situation in 2011, it cancelled the policy rather than exercise oversight over the affiliates.[34] "Thus, PPFA not only turned a blind eye to the affiliates' violations of its

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[31] *See* Press Release, Senate Judiciary Committee Chairman Charles Grassley, *Grassley Refers Planned Parenthood, Fetal Tissue Procurement Organizations To FBI, Justice Dept. For Investigation* (Dec. 13, 2016) https://www.grassley.senate.gov/news/news-releases/grassley-refers-planned-parenthood-fetal-tissue-procurement-organizations-fbi ("[T]he impetus for the investigation was the release of a series of videos regarding transfers of fetal tissue by the Center for Medical Progress. . . .").

[32] *Id.*

[33] *Id.*

[34] *Id.*

fetal tissue policy, but also altered its own oversight procedures enabling those affiliates' practices to continue unimpeded," Grassley concluded.[35]

Regardless of what Planned Parenthood would have the jury believe, the CMP investigations were no schoolboy romp, no sophomoric prank. Defendants engaged in a highly sophisticated fact-gathering operation modeled in part on a reputable news operation and propelled by years of controversy over the role of elective abortion in the fetal tissue procurement industry, and specifically Planned Parenthood's leading part in it. The CMP videos directly resulted in de-funding efforts against Planned Parenthood by the House of Representatives and over a half dozen states, and numerous federal and state criminal and regulatory investigations into Planned Parenthood affiliates. Although the comparative effectiveness of undercover journalism efforts should have little or no role to play in gauging their constitutionally protected status, it is worth noting in passing that Defendants' campaign undoubtedly had far more national impact than the slaughterhouse investigations held protected in *Animal Legal Defense Fund v. Wasden,* 878 F.3d 1184, 1189 (9th Cir. 2018), the investigation into allegedly sloppy lab procedures in

[35] *Id.*

Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc., 306 F.3d 806, 821 (9th Cir. 2002), ABC's food safety investigation in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), or ABC's allegations of Medicare fraud against the elderly in *J.H. Desnick v. American Broadcasting Cos.*, 44 F.3d 1345 (7th Cir. 1995).

II. APPELLANTS' AUDIOVISUAL RECORDINGS WERE THE FRUIT OF PROTECTED FIRST AMENDMENT ACTIVITY.

"Investigative journalism has long been a fixture in the American press." *Animal Legal Def. Fund*, 878 F.3d at 1189. Although undercover journalists may engage in deception, their "[h]igh value lies . . . affirmatively further the three most commonly invoked theoretical goals of free speech—enhancing political discourse, revealing truth, and promoting individual autonomy." Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1438 (2015). In turn, "[f]rom prisons, to mental hospitals, to schools, to the meatpacking industry, lies have facilitated award-winning journalism, prompted changes in public behavior, and led to major legislative reforms." *Id.* at 1455–56.

The Supreme Court likewise "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)). There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

Although news gathering "has no special immunity from the application of general laws [or] special privilege to invade the rights and liberties of others," *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (internal quotation marks omitted), "[w]hen such conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Claiborne Hardware*, 458 U.S. at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). As such, constitutionally protected activity "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916–17.

Here, the district court distinguished between the "contents of the videos" and "the direct acts of defendants—their intrusions, their misrepresentations, and their targeting and surreptitious recording of plaintiffs' staff." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F.Supp.3d 615, 644 (N.D. Cal. 2019) (order on pending motions) (emphasis omitted). Although the district court determined the First Amendment barred damages arising out of the video content, it allowed damages arising out of appellants' newsgathering methods. *Id.* Yet the district court overlooked the fact that both video content and videotaping activity is protected under the First Amendment.

The Ninth Circuit "ha[s] recognized that there is a 'First Amendment right to film matters of public interest.'" *Animal Legal Def. Fund*, 878 F.3d at 1203 (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)). Likewise, "[a]udiovisual recordings are protected by the First Amendment as recognized 'organ[s] of public opinion' and as a 'significant medium for the communication of ideas.'" *Id.* (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)). Even in undercover journalism, "[i]t defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself

an inherently expressive activity." *Id*. Consequently, "[b]ecause the recording process is itself expressive and is 'inextricably intertwined' with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity." *Id*. at 1204 (referencing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)).

Failing to recognize the act of videotaping as constitutionally protected activity deserving of "precision of regulation," the district court then imposed a crippling judgment of $1,555,084 in compensatory damages and $870,000 in punitive damages.[36] *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO, 2020 U.S. Dist. LEXIS 76374, at *73–83 (N.D. Cal. Apr. 29, 2020) (order resolving unfair competition claim and entering judgment). Yet, without a

[36] Punitive damages against First Amendment activity are suspect as "the state interest in awarding presumed and punitive damages [is] not 'substantial' in view of their effect on speech at the core of First Amendment concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)). Often, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz*, 418 U.S. at 350.

"precision of regulation" in its analysis, the district erred in holding appellants violated federal wiretapping and civil RICO laws.

III. In Light of the Tenuousness of Liability Under the Federal Claims and the Countervailing First Amendment Interests in the CMP Investigation, the Lower Court Should Have Eschewed Federal Question Jurisdiction and Dismissed the Case.

Plaintiffs' chain of federal and state claims is a Rube Goldberg machine of highly tenuous liability, forged together with poorly-articulated theories of "criminal conduct," "criminal enterprise" and "fraud". Docket No. 998, Defs.' Mot. for Judgment on the Pleadings at 8 (Plaintiff offered "no coherent theory of what the 'enterprise' is"). The district court held all defendants were jointly and severally liable for federal wiretapping under 18 U.S.C. § 2511, *Planned Parenthood*, 2020 U.S. Dist. LEXIS 76374, at *70–71, in spite of the court's instruction to the jury that "a party to an intercepted communication who consents to the interception does not violate this statute unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." Docket No. 1006, Final Jury Instrs. at 82; 18 U.S.C. § 2511(2)(d). As this court has held, "[u]nder section 2511, 'the focus is not upon

whether the interception itself violated another law; it is upon whether the *purpose* for the interception—its intended use—was criminal or tortious.'" *Sussman v. Am. Broad. Cos.*, 186 F.3d 1200, 1202 (9th Cir. 1999) (emphasis added) (internal citation omitted). In this case, it was well recognized below that the *purpose* for which Appellants made the audiovisual recordings was to "investigate, document, and report on the procurement, transfer, and sale of aborted fetal tissue" through "undercover journalism tools." *Planned Parenthood*, 402 F.Supp.3d at 635–36. All that the false identification enabled Daleiden to do was to cross the threshold of public spaces that Plaintiffs had sought to reserve access for. Once on the grounds of the hotel, conference center or clinic, Defendants committed no violence or destructive acts. All that the access gained them was the ability to talk to individuals associated with Plaintiffs about their plans and desires to break federal law—a subject on which they were all too willing to converse.[37] Again, newsgathering

[37] For its part, once the videos were broadcast, Planned Parenthood sought to evade blame by falsely claiming Defendants had "doctored" or "altered" the videos, since it could not argue that its employees' statements, if they were made, were not in furtherance of a scheme to evade federal fetal trafficking laws. *See*, *e.g.*, Letter from Planned Parenthood Federation of America to National Institutes of Health

and making audiovisual recordings are protected First Amendment activity. The First Amendment has "many safeguards designed to protect a vigorous market in ideas and opinions." *J.H. Desnick*, 44 F.3d at 1355. As the Seventh Circuit describes, undercover journalism, including,

> [t]oday's 'tabloid' style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort and, we add, *regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast*.

Id. (emphasis added) (internal citations omitted). As such, it is beyond peradventure that Appellants intended to engage in protected First Amendment activity.

Director Francis Collins, stating "Planned Parenthood has been attacked through a series of doctored videos." (July 29, 2015) https://www.plannedparenthood.org/uploads/filer_public/0c/db/0cdb6389-cc14-4fd0-a811-4602f9ba11b5/nih_letter.pdf. That charge was never true; a forensic report by an independent third-party entity concluded that the "video recordings are authentic and show no evidence of manipulation or editing." *Digital Forensic Analysis Report*, Coalfire Systems, Inc., (Sept. 28, 2015) https://www.scribd.com/document/283100242/Planned-Parenthood-Forensic-Analysis-Report# (last visited Mar. 5, 2021).

The court indulged Plaintiffs' inarticulate theory of federal liability by instructing the jury that "plaintiffs claim Defendants used the recordings to violate civil RICO." RICO imposes liability for a "criminal enterprise" involving two or more "criminal acts," in this case the "preparation" and "presentation" of false governmental identification, and a "conspiracy" to violate that section. Docket No. 850, Final Prelim. Jury Instrs. at 6–7; Docket No. 1006, Final Jury Instrs. at 64–65. Under Respondents' argument,

> Defendants set out to damage Planned Parenthood with a scheme that involved creating a phony corporation and false identities, infiltrating conferences and facilities, ignoring confidentiality agreements, and trading on relationships established under false pretenses *for the purpose of* secretly videotaping individuals without their consent in the hopes of getting them to make damaging statements.

Planned Parenthood, 402 F.Supp.3d at 633 (emphasis added). By this reasoning, to violate the wiretapping statute, Appellants must have videotaped individuals for the purpose of violating civil RICO, namely, (1) conducting the affairs of an enterprise through a pattern of racketeering activity or (2) conspiring to do so. Final Prelim. Jury Instrs. at 8. In other words, under this logic, Appellants violated RICO for the purpose of creating damaging videos while also creating damaging videos

for the purpose of violating RICO—a textbook example of circular reasoning.[38] Respondents' tautology is illogical and fails to meet a "precision of regulation" standard in imposing liability on Appellants' constitutionally protected newsgathering.

Liability under RICO is also highly tenuous. The alleged predicate statute, 18 U.S.C § 1028(a)(1) and § 1028(a)(2), is the False Identification Crime Control Act of 1982, Pub. L. No. 97-398. That law was designed to address professional forging and trafficking in false government identification documents, not garden-variety one-off use of a false identification. In fact, for that reason, the House rejected a proposed amendment to the law that would have expanded liability to use by a minor of a false I.D. for the purpose of obtaining alcohol.[39]

In sum, Appellants engaged in undercover journalism, and videorecording, for the purpose of engaging in protected First

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[38] *See* Docket No. 1080, Defs.' Joint Post-Judgment Motions at 26:15–18 ("[I]n terms of both logic and chronology, the purported RICO predicate acts were not an end in themselves, but an early step in the investigatory process that eventually culminated with recordings and publications. For this reason, Plaintiffs' tautological Federal Recording [c]laim fails for lack of evidence.").

[39] H.R. Rep. No. 97-802 at 6 (1982).

Amendment activity. Thus, Appellants did not commit federal wiretapping under 18 U.S.C. § 2511 or violate the RICO act.

Since the state law claims predominate over the tenuous federal question issues, this court should reverse and remand with directions to dismiss the supplemental state law claims. Appellants' protected First Amendment conduct, as discussed above, significantly dilutes the federal question issues, if it does not vitiate them altogether. Consequently, the state law claims dominate the case. Lacking a substantial federal question, this Court should reverse with instructions to dismiss the supplemental state law claims.

The lower court had supplemental jurisdiction over the state law claims, if at all, under 28 U.S.C. § 1367(a), which reads,

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

However, "not every claim within the same 'case or controversy' as the claim within the federal courts' original jurisdiction will be decided by the federal court." *Jinks v. Richland Cnty.,* 538 U.S. 456, 459 (2003). Under Section 1367(c),

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> > (1) the claim raises a novel or complex issue of State law,
> >
> > (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> >
> > (3) the district court has dismissed all claims over which it has original jurisdiction, or
> >
> > (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Consequently, district courts may dismiss state law claims filed under supplemental jurisdiction and, if these claims are to be pursued, the plaintiff must refile them in state court. *Jinks*, 538 U.S. at 459.

Federal subject matter jurisdiction is essential for a court to exert supplemental jurisdiction under Section 1367(a). As the Supreme Court describes in *United Mine Workers of America v. Gibbs*, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . assuming substantiality of the federal issues, there is power in federal courts to hear the whole." 383 U.S. 715, 725 (1966). However, "[i]t has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Id.* at 726. In turn, when analyzing whether to exert supplemental jurisdiction, "a federal

court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). "When the balance of these factors indicates that a case properly belongs in state court, as when . . . only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Id.* Ultimately, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726.

Here, Appellants' constitutionally protected activity has diluted the federal questions beyond substance. As such, the "[state law] claim[s] substantially predominate[] over the . . . claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). In turn, the district court should dismiss the state law claims and "procur[e] for [the parties] a surer-footed reading of applicable law" by the state courts. *Gibbs*, 383 U.S. at 726.

CONCLUSION

The Court should vacate the judgment below and reverse the appeals with instructions to dismiss Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A) AND NINTH CIRCUIT RULE 32-1

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains 6,203 words, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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