No. 17-202

IN THE

# Supreme Court of the United States

DAVID DALEIDEN, aka ROBERT DAOUD SARKIS, *ET AL.*,

*Petitioners*,

—v.—

NATIONAL ABORTION FEDERATION, *ET AL.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF *AMICI CURIAE* THE MISSISSIPPI JUSTICE INSTITUTE, THE MISSISSIPPI CENTER FOR PUBLIC POLICY, THE SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONERS


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## INTERESTS OF THE *AMICI*[1]

The *amici* are the Mississippi Justice Institute ("MJI"), its affiliated policy organization the Mississippi Center for Public Policy ("MCPP"), the Southeastern Legal Foundation ("SLF"), and the Beacon Center of Tennessee.

MCPP is an independent, nonprofit, public policy organization based in Jackson, Mississippi that was founded in 1991 by a small group of concerned citizens who wanted to take action steps to protect the families of Mississippi. Over time the organization has grown to become a leading voice in Mississippi policy formation by informing the media and equipping the public with information and perspective to help them understand and defend their liberty. The vision of MCPP is to make Mississippi a place "where entrepreneurs are free to pursue their dreams, parents are free to direct the education and upbringing of their children, government functions according to the principles that enhance freedom, and all Mississippians are free from dependence on government for their daily needs."

MJI is the legal arm of MCPP, with the aim of representing Mississippians whose state or federal

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief, and all parties included in the caption of this brief have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici* and their counsel made any such monetary contribution.

constitutional rights have been threatened or violated. Furthermore, MJI works to defend the principles and ideals of MCPP within and throughout the courts, with a particular aim toward protecting liberty and honoring constitutional rights. This work takes many forms, including direct litigation on behalf of individuals, intervention in cases of importance to public policy, participation in regulatory and rule making proceedings, and filing *amicus* briefs to give voice to the perspective of Mississippi families and individuals in significant legal matters pending in Mississippi and Federal courts.

Founded in 1976, SLF is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Minority TV Project v. FCC*, 134 S. Ct. 2874 (2014); *Ctr. For Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446 (2000).

The Beacon Center of Tennessee is a nonprofit organization based in Tennessee that advocates for limited government and the vigorous protection of constitutionally protected rights. The Beacon Center operates a public-interest law firm and a

policy center that jointly advocate for those goals. The Beacon Center litigates on behalf of First Amendment rights in both federal and state courts in Tennessee. The Beacon Center successfully represented plaintiffs in a First Amendment challenge to Nashville's content-based restrictions on homesharing signs in the case *Anderson v. Metro. Nashville,* 15-c-3212, in Chancery Court of Davidson County. The Beacon Center also filed an *amicus* brief in a case that resulted in the declaration of unconstitutionality for Tennessee's Billboards Act in the United States District Court for the Western District of Tennessee, *Thomas v. Schroer, et al*, 127 F.Supp.3d 864 (W.D. Tenn. 2015).

The decisions of the District Court and the Ninth Circuit conflict not only with the First Amendment's protections afforded to the Petitioners' right to communicate to the public and law enforcement information concerning potential criminal, illegal, or unethical conduct, but also conflict with the protections afforded to hearers to receive that information. These petitions present the Court with an opportunity to not only reinforce the protections afforded by the First Amendment to the speakers of publicly-important information, but also to confirm and clarify those protections to the hearers of such information as well.

## SUMMARY OF THE ARGUMENT

The District Court's decision to restrain Petitioners' speech rested on the belief that "this is not a typical freedom of speech case." *See*, Pet. App. 73a. The basis for this belief was three-fold: (1) a non-disclosure agreement was in place; (2) the

information at issue was obtained by deceit; and, (3) those who hear the speech are likely to respond violently. *See*, Pet. App. 73a, FN43. But, in restraining Petitioners' speech, the District Court discounted the right of hearers to receive that speech.

This Court has long recognized that the First Amendment right to speak is inseparable from the right to hear speech. In the present case, the public has a strong interest in hearing Petitioners' speech. There has been no dispute that the issue of abortion is a topic of significant concern to the public and information regarding the calloused and potentially criminal activity within the abortion industry is vital to robust public debate and formulation of public opinion.

The District Court's concern that the hearing public would respond to the information with violence illustrates the value of this information to public discourse. Instead, the District Court engaged in paternalistic censorship, assuming the worst of the potential hearers and barring release of the information.

This overreach by the District Court—which was validated by the Ninth Circuit—has potentially profound implications for speech and the formation of an informed public discourse on controversial and sensitive subjects. Can another party waive a hearer's First Amendment rights by signing a non-disclosure agreement? Can a court block the release of information vitally important to public discourse simply because it was obtained through unconventional means? Can a court shield the public

from receiving information of significant public interest simply because the court believes some small subset of hearers may respond violently to that information?

The District Court and the Ninth Circuit say yes, but the implications of such a view are significant. The First Amendment rights of hearers are at risk anytime a court censors information. We, therefore, urge this Court to grant review and resolve these complex questions so as to protect the rights of hearers. This information must be released.

## ARGUMENT

### I. The District Court's ruling hinged on a paternalistic fear that violence would ensue

The District Court's opinion—which was effectively affirmed in its entirety by the Ninth Circuit—rested on three core findings: (1) the non-disclosure agreements constituted waivers of Petitioners' First Amendment rights; (2) the fraudulent conduct of Petitioners' in obtaining the information at issue undercuts their interest in publishing that information; and, (3) the potential violent actions of hearers of Petitioners' speech created a risk of irreparable harm. All are insufficient to support the District Court's ruling and raise serious First Amendment concerns, but the most troublesome is the District Court's concern with the violent actions of the hearing public.

Absent a showing of likely "irreparable injury," there is no legally valid basis for issuing an injunction or temporary restraining order like that

issued here. *See, e.g., Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21, 129 S. Ct. 365 (2008). Oftentimes in the context of injunctions and restraining orders relating to non-disclosure agreements, the primary concern is the release of trade secrets and other proprietary information which would lose its value if disseminated publicly. But, here, the concern is not that trade secrets of the abortion industry will be released thereby irreparably injuring some sort of market advantage it rightfully possesses. The concern is that the inner workings of the abortion industry will so inflame the passions of the listening public that violence is sure to ensue.

The District Court devoted several pages of its opinion to a discussion of the essential element of irreparable harm. This discussion focused almost exclusively on the "significant increase in harassment, threats, and violence directed not only at the 'targets' of CMP's videos but also at NAF and its members more generally." *See*, Pet. App. 69a-70a. Ultimately, the District Court concluded "[t]he NAF members and attendees in the recordings have a justifiable expectation that release of the materials—in direct contravention of the NAF confidentiality agreements—will result not only in harassment and violence but in reputational harms as well." *See*, Pet. App. 71a.

The threat of violence and harassment that the District Court (and the Ninth Circuit) believed would likely follow publication of the videos is an essential piece of the District Court's reasoning in this case. But, as the primary basis for issuing a prior restraint on speech, this reasoning is constitutionally invalid.

As discussed below, this reasoning imposes censorship upon the potential hearers of Petitioners' speech in a paternalistic attempt to maintain the peace. And, that peace comes at the expense of the free flow of information that is critical to our democracy.

## II. The District Court discounts the First Amendment rights of hearers

This Court has stated it is "well established that the constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct 1243 (1969). Furthermore, "[t]his right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Id.* (internal citations omitted).

Though the potential hearers of Petitioners' speech feature prominently in the district court's analysis, it is primarily as agents of imminent irreparable harm. The District Court minimized the vital First Amendment right of hearers to receive the information at issue, and the Ninth Circuit disregarded this interest altogether. But, the right to hear is a vital right that cannot be separated from the right to speak.

"The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 339, 130 S. Ct. 876 (2010). For reasoned discourse to flourish in the public sphere there must be protection for both the speaker and the hearer of that speech. Any

analysis that focuses exclusively on the speaker—as the Ninth Circuit and the District Court did here—runs a grave risk. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Id.* Absent the free flow of information on issues of significant public interest, governmental bodies (and organizations subject to those governmental bodies) would be permitted to operate without any check from the populace despite the fact that these bodies derive their very power from that populace.

This transparent flow of information requires both a deliverer and a receiver. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *Lamont v. Postmaster General of U.S*, 381 U.S. 301, 308, 85 S. Ct. 1493 (1965) (Brennan, J. concurring). The result would be "a barren marketplace of ideas that had only sellers and no buyers." *Id.* This is why this Court has stated: "Freedom of speech presupposes a willing speaker [b]ut where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S. Ct. 1817 (1976); *see also,* Dana R. Wagner, *The First Amendment and the Right to Hear*, 108 Yale L.J. 669, 673 (1998). "Th[e] freedom of speech and press necessarily protects the right to receive." *Stanley*, 394 U.S. at 564.

"The right to receive speech, while constitutionally derivative of the right to produce it, is distinct and possesses independent legal force." Wagner, at 673. This right to receive or hear speech

is anchored in the same general principles for protecting the right to speak: (1) the interest in "shaping and defining the hearer's self;" (2) the interest in obtaining information to aid the hearer in decision making relating to "economic, social, aesthetic, or political" matters; and, (3) the fear of governmental abuse of its power to "cut the hearer off" from vital information. *See,* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 Wm. & Mary Bill Rts. J. 897, 906-07 (2017). Even in its derivative nature, the right to receive speech is fundamentally inseparable from the right to speak. There cannot be one without the other. Therefore, any analysis of a free speech issue must carry with it an analysis of the rights of hearers.

## III. Censorship due to fear of violent reaction violates the First Amendment rights of hearers

When a government restricts the flow of information it "uses censorship to control thought." *Citizens United*, 558 U.S. at 356. This is particularly true when the restriction is based on concern for the reaction of the hearers. To justify censorship of a publication, a court must be convinced "the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317, 114 S. Ct. 912 (1994).

Here, "the evil" contemplated by the District Court to justify censorship was concern for the potentially violent reaction of the hearers. But, "[f]ear that people [will] make bad decisions if given truthful information" cannot justify burdening

dissemination of that information. *Id.* "[W]e do not discard a useful tool because it may be misused." *Dennis v. United States*, 341 U.S. 494, 546, 71 S. Ct. 857 (1951). This Court has recognized that "[t]hose who seek to censor or burden free expression often assert that disfavored speech has adverse effects." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577, 131 S. Ct. 2653 (2011).

There is no debate as to whether the hearers have a strong interest in this speech. As the District Court stated:

> 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' right to speech and the public's equally important interest in hearing that speech. But this is not a typical freedom of speech case.

*See*, Pet. App. 73a-74a. The District Court, instead, concluded that the threat of violence outweighed these vital interests.[2] *See*, Pet. App. 74a-75a

[2] Another prominent feature of the District Court's opinion was Petitioners' purported waiver of free speech rights by signing the non-disclosure agreement. *See*, Pet. App. 57a-60a, 72a. There is no basis whatsoever for concluding that the *hearers* have waived *their* right to receive the information here, and no allegation of such waiver has been made. Therefore, the violence-based reasoning of the District Court must be considered the dominant feature of its analysis despite the ways in which the District Court's opinion blurs the lines of its rationale.

("Weighing against the public's general interest . . . [is the NAF members'] need [for] privacy and safety in order to safely practice their profession."). And the Ninth Circuit failed to acknowledge the hearers' interest at all.

There is a limited set of circumstances that justify restraining speech for fear that violence will ensue if that speech is heard. Generally, speech that advocates for or incites violence has not been protected. *See, Dennis*, 341 U.S. at 544-45; *see also Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790-91, 131 S. Ct. 2729 (2011). The same is true for "fighting words" based on the same rationale—it "tends to incite an immediate breach of the peace." *Dennis*, 341 U.S. at 544-45.

Here, there is no allegation that Petitioners' speech constitutes "fighting words" or "incitement." There is a distinction "between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." *Dennis*, 341 U.S. at 545. Neither the Ninth Circuit nor the District Court so much as mentioned "fighting words" or "incitement." Instead, the District Court simply assumed that violence would follow based on a perceived causal relationship between the publication of the first video and violent attacks on abortion providers.[3]

[3] The District Court cites these past violent reactions as evidence for some new, irreparable harm. Yet, it also points to the fact that the first videos have already placed the relevant information in the public domain as evidence that the public's interest in this information is minimal. As the District Court said, this information "is neither new or (sic) unique." *See*, Pet.

The District Court's view is similar to those that this Court has called "an undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression." *Cohen v. California*, 403 U.S. 15, 91 S. Ct 1780 (1971) (quoting *Thinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508, 89 S. Ct. 733 (1969)). Though there may be "some persons about with such lawless and violent proclivities," there is hardly proof "that substantial numbers of citizens are standing ready to strike out physically" at members of NAF if this information is published. *Id*. Therefore, this violent potential "is an insufficient base upon which to erect" a limitation on the First Amendment rights of Petitioners' and their potential hearers that is "consistent[] with constitutional values." *Id*.

Blocking a hearer from receiving speech that is of clear public interest in the context of a major political debate within our county is a violation of the hearer's First Amendment rights absent some constitutionally-valid justification. Fear that some small subset of hearers will take unlawful action in response to speech is simply not a constitutionally-valid justification; this rationale is textbook censorship with the paternalistic aim of keeping the flood of emotions to a minimum. And, as this Court has suggested, such censorship is a mere step away

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App. 72a-73a. But, if the information is not "new" or "unique," then it seems unlikely that its release would prompt any new threat of irreparable harm to NAF members. Therefore, the District Court's reasoning falls apart. Members of this Court have recognized the contradiction in the District Court's rationale in previous "prior restraint" cases. *See, New York Times Co. v. United States*, 403 U.S. 713, 733, 91 S. Ct. 2140 (1971) (White, J. concurrence).

from attempts at thought control. *See Citizens United*, 558 U.S. at 356.

Perhaps the clearest articulation of the issue presented here is found in *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S. Ct. 894 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

*Id.*, at 896. No such "clear and present danger of a serious substantive evil" exists here.

"Punishing provocative, but otherwise fully protected speech, solely because of the reaction it engenders . . . imposes speech restrictions purely for extrinsic reasons rather than in response to the value of the speech itself." Daniel Ortner, *The*

*Terrorist's Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad*, 12 NW J. L. & Soc. Pol'y 1, 4 (2016). Once a court has departed from analyzing the speech itself and starts looking to extrinsic factors like the reaction of hearers, a dangerous precedent is set.

Though the viewpoint of Petitioners and the violent actors is alleged to be the same here, the District Court's rationale could just as easily be applied in the inverse context—where the violent hearers were those offended by and opposed to the speech. Allowing speech to be barred because of the violent reaction of hearers "would allow those offended to shut down speech with which they disagree through the threat of violence." *Id*. This approach would effectively create a "terrorist's veto," whereby the public's First Amendment right to receive speech of public interest can be held hostage by the violent whims of a few. *Id*.

As discussed below, there are profound implications for a First Amendment regime structured in line with the District Court's and the Ninth Circuit's rationales. To protect the First Amendment rights of the hearing public and to insure an informed, robust, and diverse public discourse, this Court must accept review and address these critical problems with the opinions below.

## IV. The implications for this ruling touch many spheres of public interest

The District Court failed to adequately take into account the rights afforded by the First Amendment to hearers of speech, and this is manifest when other

factual contexts are considered. The application of the District Court's reasoning in factually analogous contexts is troubling. Consider the following alternative fact patterns:

- At a conference of the major international oil and gas companies, activists for an environmental extremist group gain entrance under false pretenses and record industry representatives appearing to discuss plans for expanding the controversial drilling technique known as hydraulic fracturing (*i.e.* fracking) "to the absolute border of federal regulations and probably beyond" despite admitted knowledge of risks it creates for the public. Conference organizers seek to restrain the environmental group from sharing the recording with the public and law enforcement, citing a conference registration form signed by activists containing a non-disclosure provision. In addition, the companies at issue claim an imminent threat that extremist groups will sabotage the companies' property.

- At a gathering of American white nationalists, a reporter trespasses in order to cover the meeting. In the meeting, the reporter captures an audio recording of several white nationalists discussing their intent to "strike back" at the destruction of monuments honoring Confederate soldiers through a national defacing campaign "aimed at civil rights monuments or statutes." Fearing that disclosure of this conversation would hinder their overall efforts, organizers of the meeting seek to enjoin the reporter from

publishing the recording or the names of individuals involved, relying on the fact that the reporter gained access to the information only by trespassing. The individual members also claim concern that groups such as Antifa would preemptively harm them and other white nationalists if the recording is made public.

- At a convention for farming corporations, an anti-animal cruelty group is granted permission by convention organizers to set up a booth under strict rules about protesting and confidentiality. Unbeknownst to convention organizers, the group places recording devices throughout the convention center and captures corporate executives for cattle and poultry companies discussing best practices for circumventing state and federal anti-animal cruelty laws. Convention organizers seek to enjoin the group from giving the recording to a documentary filmmaker, pointing to the exhibitor's contract that prohibits disclosure of information and the corporate executives' fear for their personal safety.

Under the District Court's rationale in this case, the public would be prevented from hearing the information obtained in the above examples irrespective of its obvious importance to the public interest. Such a result would be wildly inconsistent with the strong public policy in the United States favoring the free and decentralized flow of information and the concomitant preference for the

public to sort out in open debate the difficult issues of our society.[4]

The free flow of information and deference to the American public is a strong public policy preference of the United States. This was made abundantly clear in the Presidential election of 2016. Between the hacking of various campaign officials' electronic accounts, recordings and covert dossiers concerning Presidential candidates, governmental leaks, and fake news, to name just a few, the national dialogue never focused on a desire to prevent or stifle the flow of the information regardless of how that information was obtained or even whether the information was true. This was the case despite the obvious and significant harm caused by the disclosure of that information.

Our public discourse has always accommodated the free flow of ideas and information, irrespective of the passions those ideas and information arouse, so long as that discourse does not cross the line into advocacy for lawlessness and violence. The free flow of information and discussion has given our country much that is good and true, but it has also in equal parts given us much that is abhorrent. In a nation of over three-hundred million people—all with varying political, religious, economic, and social concerns held with varying degrees of intensity—it is impossible to predict the ripple effects of speech.

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[4] This would include the longstanding American preference for members of the public deciding whether criminal activity occurred, as evidenced in the use of the grand jury and trial by jury. *Contra*, Pet. App. 60a ("I have reviewed the recordings relied on by defendants and find no evidence of criminal wrongdoing.").

In this same vein, it is impossible to prevent violent responses to *any* disclosure of information. One man's frivolity may well be the basis for another man's crusade. If our courts were to set upon the task of controlling speech so as to prevent any hearers from hearing anything so upsetting that they may take violent action, our judicial resources would be exhausted and our public discourse would be destroyed. As such, this Court must accept review and reverse the untenable rulings of the District Court and the Ninth Circuit.

## CONCLUSION

The Court should grant certiorari to afford this case full consideration on the merits.

Respectfully submitted,

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