No. 22-1135

In the Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; and DAVID DALEIDEN,
Petitioners,

v.

NATIONAL ABORTION FEDERATION,
Respondent.

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

BRIEF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and applying the Judeo-Christian moral tradition to critical issues of public policy. EPPC has a strong interest in this case because the ruling below illustrates the manner in which abortion, even after the Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), continues to inflict damage on the integrity of our national culture, our political institutions, and the rule of law.[1]

[1] Counsel of record received timely notice of EPPC's intent to file this amicus brief under Supreme Court Rule 37.2. No counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Nearly four decades ago, Justice Sandra Day O'Connor decried that "[t]his Court's abortion decisions ha[d] already worked a major distortion in the Court's constitutional jurisprudence." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). As she remarked, it was "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Id.* On no other matter had the Court shown itself incapable of "even-handedly applying uncontroversial legal doctrines to cases that come before it." *Id.*

This "ad hoc nullification machine," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part), has kicked into gear time and again in the years since Justice O'Connor denounced it. As this Court observed last year in *Dobbs*, the "Court's abortion cases have diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standing doctrine," "disregarded standard res judicata principles," and "flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality." 142 S. Ct. at 2275.

Most relevant here, the Court's abortion rulings have also "distorted First Amendment doctrines." *Id.* Indeed, Justice Antonin Scalia identified the First Amendment as the "greatest and most surprising victim" of the abortion distortion that has plagued

judicial decision-making. *Madsen*, 512 U.S. at 785 (Scalia, J., concurring in the judgment in part and dissenting in part).

This abortion distortion "is back at full throttle" in this case. *Stenberg v. Carhart*, 530 U.S. 914, 1020 (2000) (Thomas, J., dissenting). The Ninth Circuit refused to subject the district court's injunction on petitioners' speech—a classic prior restraint that represents the greatest threat to First Amendment freedoms—to *any* level of constitutional scrutiny, much less the highest level of scrutiny a prior restraint would receive in any other context. Instead, the court bypassed this demanding standard on the grounds that petitioners waived their First Amendment rights. And even that conclusion rests on departures from the demanding standards courts are to employ when assessing whether a party has waived its constitutional rights and the enforceability of such waivers. The Ninth Circuit's decision is abortion distortion piled on abortion distortion.

This case gives the Court a chance to remedy this longstanding problem. Even more squarely than *Dobbs*, it presents the Court an opportunity to condemn the judicial malpractice of abortion distortion. The Court should grant certiorari to take advantage of this opportunity.

ARGUMENT

I. Abortion-Rights Litigants Have Long Received Favored Treatment.

Abortion distortion is not new. It dates to *Roe v. Wade* itself. *See* 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228. The Court in *Roe* "made little effort" to follow settled rules of constitutional interpretation. *Dobbs*, 142 S. Ct. at 2266–67. Instead, it offered a "remarkably loose … treatment of the constitutional text," and, in sharp departure from the usual method for recognizing unenumerated constitutional rights, failed "to show that history, precedent, or any other cited source supported its scheme." *Id.*

After *Roe*, the abortion distortion metastasized, as it spread beyond bans on abortion to anything that touched on this controversial subject. *See Dobbs*, 142 S. Ct. at 2275–76.

This practice is particularly troubling in First Amendment cases. The Court's "practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents" has generated "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring).

In its 1994 ruling in *Madsen*, for example, the Court upheld an injunction that barred protesters from entering public streets or sidewalks in the vicinity of an abortion clinic's property line. 512 U.S. 753, 757 (1994). In doing so, as Justice Scalia explained, the Court "depart[ed] so far from the established course of

[First Amendment] jurisprudence that, in any other context, [the case] would have been regarded as a candidate for summary reversal." *Id.* (opinion of Scalia, J.). Eschewing the strict- and even intermediate-scrutiny standards that normally apply to speech restrictions, the Court "create[d] [a] brand new … additional standard" that was "not as rigorous as strict scrutiny." *Id.* at 791 (cleaned up). "An injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797. But rather than requiring a showing of "compelling public need and surgical precision of restraint," the Court simply asked whether the injunction "burden[ed] no more speech than necessary to serve a significant government interest." *Id.* at 791, 798.

The *Madsen* decision also generated substantial scholarly criticism. "By giving its imprimatur to the [injunction's] bubble zone," one scholar observed, *Madsen* "legitimized viewpoint discrimination against anti-abortionists exercising their free speech rights." Charles Lugosi, *The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand*, 79 DENV. U. L. REV. 91, 126 (2001). "[T]he Court employed the wrong standard to determine the constitutionality of the permanent injunction at issue in *Madsen*," argued another, and "the entire injunction should have been struck down as violative of the First Amendment." Keli N. Osaki, Madsen v. Women's Health Center, Inc.*: Striking an Unequal Balance Between the Right of Women to Obtain an Abortion and the Right of Pro-Life Groups to Freedom of Expression*, 24 PEPP. L. REV. 203, 204–05 (1996).

The Court's 2000 ruling in *Hill v. Colorado* aggravated *Madsen*'s differential treatment of First Amendment rights. 530 U.S. 703. The Court there upheld a statute that regulated speech within 100 feet of the entrance to any health care facility, including abortion clinics, making it unlawful within those zones to approach within eight feet of another person to distribute literature, protest, or educate or counsel that person without their consent. *Id.* at 707–08. The Court again declined to subject the speech restraint to "the exacting scrutiny [applicable] to content-based suppression of speech in the public forum," this time by holding that a restriction expressly "directed to only certain categories of speech (protest, education, and counseling) [was] *not* content-based." *Id.* at 741 (Scalia, J., dissenting) (emphasis added). It also found that the restriction was "narrowly tailored to serve a government interest" that had never before justified *any* speech regulation—"protection of citizens' right to be let alone." *Id.* Both holdings were "patently incompatible with the guarantees of the First Amendment." *Id.*

Hill earned immediate criticism from scholars across the ideological spectrum. In remarks at a constitutional law symposium shortly after *Hill* was decided, Professor Michael McConnell said it was "inexplicable on standard free-speech grounds" and called the "reasoning that [this Court] gave" to support its holding "shameful." *Constitutional Law Symposium, Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747 (2001). "[O]n so many doctrinal points," Professor McConnell continued, "those who voted to uphold that statute did so when, in another context not involving abortion protest, there is not a chance that legislation of this sort would be upheld."

Id. Professor Laurence Tribe weighed in with his own condemnation of the ruling in *Hill*: "I think [*Hill*] was slam-dunk simple and slam-dunk wrong." *Id* at 750.[2]

In 2014, the abortion distortion appears to have affected the Court's conclusion in *McCullen v. Coakley* that a restriction on speech around abortion clinics was content-neutral. 573 U.S. 464, 485–86 (2014). The state law in question established a 35-foot buffer zone around abortion clinics that only clinic employees and three other categories of individuals could enter. *Id.* at 471–72. In any context except abortion, Justice Scalia charged, the Court never would have held "that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur … is not content based." *Id.* at 501 (Scalia, J., concurring in the judgment). It would never, for instance, "exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention," "those used annually to commemorate the 1965 Selma–to–Montgomery civil rights marches," or "those outside the Internal Revenue Service." *Id.* Yet that is what it did in *McCullen* where the regulated area consisted of abortion clinics, "giving abortion-rights

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[2] *See also* Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 199 (2001) (arguing that *Hill* "suppressed essential free speech principles" on reasoning that "fails to stand on its own terms"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("The *Hill* dissenters also raised serious questions whether the Court here had selectively departed from speech-protective principles out of cultural affinity for abortion seekers over abortion protestors.").

advocates [another] pass when it comes to suppressing the free-speech rights of their opponents." *Id.* at 497. *McCullen* illustrated once again that the Court's "abortion jurisprudence … is in stark contradiction of the constitutional principles [that] apply in all other contexts." *Hill*, 530 U.S. at 742 (Scalia, J., dissenting); *see also* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in* Mccullen v Coakley, 2014 Sup. Ct. Rev. 215, 242 (2014) (*McCullen* illustrates the Court's past willingness "to jettison rule-like frameworks and rely upon [its] own sense of what the [state] legislature did or what effects it had" in conducting content-neutrality analysis in the abortion context).

II. As This Case Illustrates, the Abortion Distortion Has Survived *Dobbs*.

Despite this Court's unequivocal condemnation of the practice in *Dobbs*, 142 S. Ct. at 2275–76, abortion distortion persists in the lower courts. Although the Eleventh Circuit has correctly acknowledged that *Dobbs* requires courts to "treat parties in cases concerning abortion the same as parties in any other context," *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1328 (11th Cir. 2022) (Pryor, J.), this case and a closely related one (on which certiorari is also pending) demonstrate that at least one other circuit court is less willing to "take [*Dobbs*] at its word." *Id.*

This case provides the first example. The district court broadly enjoined the defendants from "disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned at the 2014 and 2015 NAF Annual Meetings." Pet. App. 42 – 43. "[P]ermanent injunctions

… that actually forbid speech activities" like this one "are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). And "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Indeed, "the gagging of publication has been considered acceptable only in exceptional cases," and this Court has refused to sanction this remedy "[e]ven where questions of allegedly urgent national security or competing constitutional interests are concerned." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994). Accordingly, when reviewing the district court's injunction here, the Ninth Circuit was required to apply "a heavy presumption against its constitutional validity" and to put respondent to "a heavy burden of showing justification for the imposition of such a restraint," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971),[3] as it has done for prior restraints outside the abortion context.[4]

Instead, the court relied exclusively on the rule that a party can waive its First Amendment rights, and it wrongly concluded that petitioners had done so by signing NAF's form non-disclosure agreements. Pet. App. 4, 123–24. That conclusion departs from the normal rules regarding waivers of constitutional rights. Although the Ninth Circuit nominally

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[3] *Accord, e.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980); *Nebraska Press*, 427 U.S. at 558; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

[4] *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 746–47 (9th Cir. 2015) (en banc); *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for Cent. Dist. of California*, 729 F.2d 1174, 1183–84 (9th Cir. 1984); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247–50 (9th Cir. 1981).

acknowledged the requirement that a First Amendment "waiver must be freely given and shown by *clear and compelling evidence*," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (emphasis added); Pet. App. 4, 123–24, it made no real effort to apply that rule, as it undoubtedly would have in any context other than abortion. The court did not "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It also failed to consider the defendants' countervailing evidence regarding their own understanding of the enforceability of the agreements or the assurances they received from NAF employees that the agreements did not prevent publication. These are critical factors in determining whether petitioners truly made "an intentional relinquishment or abandonment of a known right or privilege." *Id.* In short, the Ninth Circuit considered only one side of the equation to decide whether the alleged waiver was established by "clear and compelling evidence." *Janus*, 138 S. Ct. at 2486. This approach "is inconsistent with this Court's pronouncements on waiver of constitutional rights." *Barker v. Wingo*, 407 U.S. 514, 525 (1972).

Worse, the Ninth Circuit also refused to consider the defendants' public policy challenge to the enforceability of the NAF agreements. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."); Pet. App. 4, 123–24. The closest the court came to addressing this argument was its cursory holding that the "balancing of competing public interests favored …

enforcement of the confidentiality agreements," supported by a citation to circuit precedent for the inapposite proposition that "[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." Pet. App. 124. This curt treatment of the defendants' central public policy argument contrasts sharply with the approach the Ninth Circuit has taken to similar arguments challenging the enforceability of similar contracts outside the abortion context. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 890–92 (9th Cir. 1993) (carefully considering policies for and against enforceability of speech-restricting contract); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (same for contract that waived right to run for office); *United States v. Northrop Corp.*, 59 F.3d 953, 963–69 (9th Cir. 1995) (same for release of statutory right to bring *qui tam* claim).

This case is not the only example of the Ninth Circuit distorting First Amendment doctrine in a post-*Dobbs* abortion-related case. In a closely related matter on which certiorari is also pending, *Planned Parenthood Federation of America, Inc. v. Newman* ("*PPFA*"), the Ninth Circuit departed from the rules regarding publication damages and general tort liability for protected speech in affirming the district court's damages award. *See* 51 F.4th 1125, 1133–35 (9th Cir. 2022). The Court's ruling in *Hustler Magazine, Inc. v. Falwell* is the controlling authority on these issues. 485 U.S. 46, 49–52 (1988). There, this Court reversed a jury verdict on an intentional infliction of emotional distress claim that awarded damages arising from the defendant's publication of speech offensive to the plaintiff. The Court ruled that such an award must

meet the heightened standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Id. Hustler* confirms that "[t]he Free Speech Clause of the First Amendment … can serve as a defense in state tort suits," *Snyder v. Phelps*, 562 U.S. 443, 451 (2011), particularly where the plaintiff's damages are "caused by the publication" of protected speech, *Hustler*, 485 U.S. at 50.[5]

The Ninth Circuit has applied these rules outside the abortion context to facts materially identical to this case. In *Medical Laboratory Management Consultant v. American Broadcasting Companies, Inc.* ("*ABC*"), a laboratory sought relief for business torts, including "tortious interference with contractual relations and prospective economic relations," allegedly caused by undercover journalists who exposed the laboratory's negligent testing through the same reporting tactics as petitioners. 306 F.3d 806, 810–11, 821–26 (9th Cir. 2002). Consistent with *Hustler*, the court subjected those torts to "the same [F]irst [A]mendment requirements that govern actions for defamation" and "require[d] [the lab] to demonstrate the falsity of the statements made in the television segment, as well as [d]efendants' fault in broadcasting them, before recovering damages." *Id.* at 821 (quoting *Unelko*

[5] *See also Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 523 (4th Cir. 1999) ("*Hustler* confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*."). Long before *Hustler*, the Court had recognized that First Amendment defenses are available against general tort claims. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990)). Because the plaintiff did "not raise any triable issues of fact regarding [the publication's] falsity," the Ninth Circuit "affirm[ed] the district court's grant of summary judgment in [d]efendants' favor." *Id.* at 826.

But that case did not involve abortion. *PPFA* does. As such, the Ninth Circuit deviated from the commands of *Hustler* and found a way to uphold the jury's verdict in *PPFA*, even though Planned Parenthood's damages were "caused by the publication" of the results of an undercover investigation just as much as in *ABC*. *Hustler*, 485 U.S. at 50. To reach this result, the court interpreted *Hustler* more narrowly than it did in *ABC*, claiming that *Hustler* applied only to "emotional distress or reputational loss" damages. *PPFA*, 51 F.4th at 1134. Likewise, the court adopted an overly broad reading of *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), as foreclosing *any* First Amendment protection for undercover investigations that include allegedly illegal conduct. *PPFA*, 51 F.4th at 1133–35.

III. This Case Affords the Court a Chance to Clarify that Abortion-Rights Litigants Should Not Receive Favored Treatment.

Given the Ninth Circuit's inconsistent application of the standard rules for prior restraints and waivers of First Amendment rights in abortion and non-abortion contexts, this case presents an ideal vehicle for this Court to clarify that abortion-related cases are not entitled to special treatment and put an end to the "ad hoc nullification machine" that has operated in so many cases since *Roe*. By starting with a "heavy presumption" that the district court's injunction is invalid, putting NAF to "a heavy burden of showing

justification for the imposition of such a restraint," *Keefe*, 402 U.S. at 419, fully considering *all* the evidence on both sides of the waiver issue, *see Janus* 138 S. Ct. at 2486, and addressing petitioners' public policy challenge to the enforceability of the NAF contracts, *Rumery*, 480 U.S. at 392, the Court can make clear that the abortion distortion does not survive *Dobbs*. While *Dobbs* implicitly condemned this practice by citing it as an additional reason for overturning *Roe* and *Casey*, this case would allow the Court to make explicit what was implicit in *Dobbs*: courts are no longer to "engineer exceptions to longstanding background rules" to benefit abortion-rights litigants. *Dobbs*, 142 S. Ct. at 2276; *see also SisterSong*, 40 F.4th at 1328 ("[W]e can no longer engage in … abortion distortions in the light of a Supreme Court decision instructing us to cease doing so."). Certiorari should be granted to clarify this point.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 6, 2023