

No. 16-15360

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION, NAF,

Plaintiff - Appellee,

v.

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID
DALEIDEN, AKA ROBERT DAUD SARKIS; TROY NEWMAN,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA

No. 3:15-cv-03522-WHO

(Hon. William H. Orrick, United States District Judge)

**BRIEF OF *AMICUS CURIAE* CHARLOTTE LOZIER INSTITUTE IN SUPPORT OF
DEFENDANTS-APPELLANTS CENTER FOR MEDICAL PROGRESS, ET AL. AND
URGING REVERSAL**

Denise Burke
AMERICANS UNITED FOR LIFE
655 15th St NW
Suite 410
Washington, DC 20005
202-289-1478
denise.burke@aul.org

David R. Langdon
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069
513-577-7380
dlangdon@langdonlaw.com

Counsel for Amicus Curiae Charlotte Lozier Institute

CORPORATE DISCLOSURE STATEMENT

Charlotte Lozier Institute is the education and research arm of Susan B. Anthony List, Inc., its parent corporation. No publicly held corporation owns 10% or more of its stock.

Dated: April 25, 2016

s/ David R. Langdon
David R. Langdon

Counsel for Amicus Curiae
Charlotte Lozier Institute

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	2
I. Legislative and Executive Branch Actions Demonstrate the Public Policy Interest in Information Disclosed by Defendants-Appellants’ Speech.....	2
II. Judicial Balancing of Public Policy Interests Favors Disclosure of Information	14
A. Information Concerning the Enforcement of Laws Protecting Important Rights.....	15
B. Information Concerning Criminal Behavior	22
C. Information Concerning Behavior that Is Not Criminal but Is Unlawful or Should Be.....	24
D. Information Concerning Public Health and Safety	28
E. Information Concerning Legal or Ethical Abuses by Publicly Funded Organizations or in Publicly Funded Programs	29
F. Information Concerning Matters of Great Public Importance	31
III. The District Court Unduly Minimizes the Public Policy Interest in the Information It Has Restricted	32
CONCLUSION.....	34
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Leonard v. Clark</i> , 12 F.3d 885 (9th Cir. 1993)	14
<i>National Meat Assoc. v. Harris</i> , 132 S. Ct. 965 (2012).....	16, 33
<i>Perricone v. Perricone</i> , 972 A.2d 666 (2009).....	15

Statutes

18 U.S.C. § 1531 (2012)	22, 24
18 U.S.C. § 1531(a)	24
42 U.S.C. § 289g-1 (2012).....	<i>passim</i>
42 U.S.C. § 289g-1(a)(1)	16
42 U.S.C. § 289g-1(a)(2)	16
42 U.S.C. § 289g-1(b).....	16
42 U.S.C. § 289g-1(b)(1)	17, 20
42 U.S.C. § 289g-1(b)(1)(A).....	17, 28
42 U.S.C. § 289g-1(b)(1)(B).....	20, 29
42 U.S.C. § 289g-1(b)(1)(C).....	20, 29
42 U.S.C. § 289g-1(b)(2) (2012)	<i>passim</i>
42 U.S.C. § 289g-1(b)(2)(A).....	<i>passim</i>
42 U.S.C. § 289g-1(b)(2)(A)(i).....	17, 21, 25, 28

42 U.S.C. § 289g-1(b)(2)(A)(ii).....	18, 26, 28
42 U.S.C. § 289g-1(b)(2)(B).....	29
42 U.S.C. § 289g-1(b)(2)(C).....	17, 26
42 U.S.C. § 289g-1(b)(2)(C)(i).....	17, 26, 28
42 U.S.C. § 289g-1(b)(2)(C)(ii).....	17, 27, 28
42 U.S.C. § 289g-1(c).....	18, 21
42 U.S.C. § 289g-1(c)(1).....	21
42 U.S.C. § 289g-1(c)(1)(A).....	21
42 U.S.C. § 289g-1(c)(1)(B).....	21
42 U.S.C. § 289g-1(c)(1)(C).....	21
42 U.S.C. § 289g-1(c)(3).....	21
42 U.S.C. § 289g-1(c)(4).....	18, 28
42 U.S.C. § 289g-1(d)(1).....	28
42 U.S.C. § 289g-1(d)(2).....	28
42 U.S.C. § 289g-2.....	19, 22, 23, 24
42 U.S.C. § 289g-2(a) (2012).....	20, 22, 24
42 U.S.C. § 289g-2(b).....	19, 23, 29
42 U.S.C. § 289g-2(b)(1).....	19, 23
42 U.S.C. § 289g-2(b)(2).....	19, 23
42 U.S.C. § 289g-2(b)(3).....	19, 23

42 U.S.C. § 289g-2(c) 19, 24, 27

42 U.S.C. § 289g-2(c)(1) 19, 24, 27

42 U.S.C. § 289g-2(c)(1)(A).....27

42 U.S.C. § 289g-2(c)(1)(B)27

42 U.S.C. § 289g-2(c)(1)(C)27

42 U.S.C. § 289g-2(c)(2)24

42 U.S.C. § 289g-2(c)(3)28

42 U.S.C. § 289g-2(c)(4)27

42 U.S.C. § 289g-2(d)..... *passim*

42 U.S.C. § 289g-2(e)(3) 22, 23

Rules

Federal Rule of Appellate Procedure 29(c)(5).....1

Other Authorities

2013 Top Management & Performance Challenges, U.S. Dep’t of Health & Human Servs., Office of Inspector General, *available at* <http://oig.hhs.gov/reports-and-publications/top-challenges/2013/> 30, 31

Actions Overview: H.R.3134 — 114th Congress (2015-2016), Library of Congress, <https://www.congress.gov/bill/114th-congress/house-bill/3134/actions?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=41> 11

Actions Overview: H.R.3762 — 114th Congress (2015-2016), Library of Congress, <https://www.congress.gov/bill/114th-congress/house-bill/3762/actions>.....11

Chairman Issues Subpoena For Unedited Planned Parenthood Videos, House Oversight and Government Reform Committee (Sept. 15, 2015), <https://oversight.house.gov/release/chairman-issues-subpoena-unedited-planned-parenthood-videos/>.....3

End Trafficking of the Terminated Unborn Act of 2015, H.R.3215, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3215?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=36>11

Kristin Finklea et al., Cong. Research Serv., R44129, *Fetal Tissue Research: Frequently Asked Questions 1* (2015), available at <http://fas.org/sgp/crs/misc/R44129.pdf>.....30

Handling Misconduct – Whistleblowers, U.S. Dep’t of Health & Human Servs., Office of Research Integrity (Nov. 20, 1995), <http://ori.hhs.gov/guidelines-whistleblowers>29

H.R.3134 - Defund Planned Parenthood Act of 201511

H.R. Res. 461, 114th Cong. (2015), <https://www.congress.gov/114/bills/hres461/BILLS-114hres461eh.pdf>7, 8

Letter from Cecile Richards, President, Planned Parenthood Federation of America, to Francis Collins, Director, National Institutes of Health, 2 (July 29, 2015), https://www.plannedparenthood.org/files/1014/4709/5503/NIH_Letter.pdf..... 15

Letter from Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Catherine Short, Lawyer, Life Legal Defense Foundation (July 31, 2015), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Life%202007-31-15%20letter%20to%20Center%20for%20Medical%20Progress%20information%20on%20fetal%20tissue%20provision.pdf> 10

Letter from Daniel R. Levinson, Inspector General, Department of Health and Human Services, Office of Inspector General, to Sen. Rand Paul (stamped Dec. 4, 2015), <https://www.paul.senate.gov/imo/media/doc/OIG%20HHS%20Letter%20Respons.pdf>12

Letter from Ron Johnson, Chairman, Comm. on Homeland Security & Governmental Affairs, Charles E. Grassley, Chairman, Comm. on the Judiciary, and Joni K. Ernst, Senator, U.S. Senate to Sylvia Burwell, Secretary, Dep’t of Health and Human Services (Sept. 28, 2015), http://www.ronjohnson.senate.gov/public/_cache/files/67b6d6e8-5ce8-4f22-a069-250e415a920c/johnson-grassley-ernstletter-to-hhs-on-planned-parenthood.pdf9

Letter from the House Energy and Commerce Committee to Cecile Richards, President, Planned Parenthood Federation of America (Aug. 7, 2015), <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150807PlannedParenthood.pdf>6

Management Challenge 9: Protecting HHS Grants and Contract Funds from Fraud, Waste, and Abuse, U.S. Dep’t of Health & Human Servs., Office of Inspector General, *available at* <http://oig.hhs.gov/reports-and-publications/top-challenges/2013/challenge09.asp>..... 30, 31

Memorandum from Jason Chaffetz, Chairman, Comm. on Oversight and Gov’t Reform to Members of the House Comm. on Oversight and Gov’t Reform (Sept. 29, 2015), <https://oversight.house.gov/wp-content/uploads/2015/09/Committee-Findings-Planned-Parenthood-Investigation.pdf>3, 4

Memorandum from Panel Majority Staff to the Select Investigative Panel Members (Feb. 29, 2016), <http://docs.house.gov/meetings/IF/IF04/20160302/104605/HHRG-114-IF04-20160302-SD002.pdf>.....7, 8

Memorandum from the Committee Majority Staff to the Subcommittee on Health Members (Sept. 5, 2015), <http://docs.house.gov/meetings/IF/IF14/20150917/103957/HHRG-114-IF14-20150917-SD12321.pdf>.....7

Elizabeth Nash et al., *Trends in the States: First Quarter 2016* (April 13, 2016), <https://www.guttmacher.org/article/2016/04/trends-states-first-quarter-2016>..... 13, 16

Alisa Nelson, *Missouri Senate considers Planned Parenthood summonses*,
Missourinet (Apr. 13, 2016),
<http://www.missourinet.com/2016/04/13/missouri-senate-considers-planned-parenthood-summonses/>13

NIH Grants Policy Statement, U.S. Dep’t of Health & Human Servs., National
Institutes of Health (Nov. 2015), § 4.1.14, available at
https://grants.nih.gov/grants/policy/nihgps/HTML5/section_4/4.1_public_policy_requirements_and_objectives.htm#Human229

Order Granting Motion for Preliminary Injunction, No. 3:15-cv-03522 (N.D. Cal.
Feb. 5, 2016), ECF No. 354..... *passim*

Order re Congressional Subpoena, No. 3:15-cv-03522 (N.D. Cal. Oct. 6, 2015),
ECF No. 155, <https://www.thomasmoresociety.org/wp-content/uploads/2015/10/151006-Daleiden-NAF-Ord-re-Cong-subpoena-dkt-155.pdf>3

*Planned Parenthood Exposed: Examining the Horrific Abortion Practices At The
Nation’s Largest Abortion Provider: Hearing Before the H. Comm. on the
Judiciary*, 114th Cong. 1 (2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-41_96052.pdf5

Planned Parenthood Exposed, House Judiciary Committee, <https://judiciary.house.gov/issue/investigation-into-planned-parenthood/>5

Planned Parenthood Investigation, House Oversight and Government Reform
Committee, <https://oversight.house.gov/interactivepage/plannedparenthood/>3

Press Release, Grassley Pursues Inquiry into Planned Parenthood Fetal Tissue
Transfers (Aug. 4, 2015), <http://www.grassley.senate.gov/news/news-releases/grassley-pursues-inquiry-planned-parenthood-fetal-tissue-transfers>10

Press Release, House Judiciary Comm., House Judiciary Committee to Hold
First Hearing on Planned Parenthood Investigation (Sept. 2, 2015),
<https://judiciary.house.gov/press-release/house-judiciary-committee-to-hold-first-hearing-on-planned-parenthood-investigation/>4, 5

Protecting Infants: Ending Taxpayer Funding For Abortion Providers Who Violate The Law: Hearing Before the Subcomm. on Health, H. Comm. on Energy and Commerce, 114th Cong. 1 (2015),
<https://energycommerce.house.gov/hearings-and-votes/hearings/protecting-infants-ending-taxpayer-funding-abortion-providers-who>6

Protecting Infants: Ending Taxpayer Funding For Abortion Providers Who Violate The Law: Hearing Before the Subcomm. on Health, H. Comm. on Energy and Commerce, 114th Cong. 17 (2015) (statement of Rep. Cathy McMorris Rodgers),
<http://docs.house.gov/meetings/IF/IF14/20150917/103957/HHRG-114-IF1420150917-SD1000.pdf>7

S.1877, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1877?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=35>12

Safe RESEARCH Act, H.R. 3729, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3729/text?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=9>11

Select Investigative Panel, Energy and Commerce Committee,
<https://energycommerce.house.gov/select-investigative-panel>9

State Policies in Brief: Bans on “Partial-Birth” Abortion, Guttmacher Institute (Mar. 1, 2016), https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_BPBA.pdf22

Peter Sullivan, *HHS watchdog launches fetal tissue investigation*, Politico.com (Dec. 22, 2015), <http://thehill.com/policy/healthcare/264030-inspector-general-launches-fetal-tissue-investigation>12

The Pricing of Fetal Tissue, Energy and Commerce Committee,
<https://energycommerce.house.gov/hearings-and-votes/hearings/pricing-fetal-tissue>8

The State Assault on Planned Parenthood, N.Y. Times (Mar. 28, 2016),
http://www.nytimes.com/2016/03/28/opinion/the-state-assault-on-planned-parenthood.html?_r=114

U.S. Food & Drug Admin., FDA Staff Manual Guides, Volume IV – Agency
Program Directives, General or Multidiscipline, Research Involving Human
Fetal Tissue (Feb. 11, 2016),
[http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManual
Guides/UCM485870.pdf](http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManualGuides/UCM485870.pdf)12

INTEREST OF *AMICUS CURIAE*

Charlotte Lozier Institute (CLI) is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Institute studies federal and state policies and their impact on women's health and on child and family well-being.

Since the release of videos produced by Defendant-Appellant Center for Medical Progress (CMP), CLI has provided scientific information on fetal research and related bioethical issues to members of Congress and their staff, state legislators, and media entities. CLI commentary on law and public policy in this area has appeared in national publications, and CLI statements are widely quoted in the national press and public debate.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amicus* states that no party's counsel authored this brief in whole or in part, no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amicus Curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

ARGUMENT

This brief aims to assist the Court in three ways. First, in Section I, the brief documents an extensive collection of legislative and executive branch actions that objectively demonstrate the public policy interest in the information disclosed by Defendant-Appellants' speech. Second, for the Court to consider as it reviews the information subject to the District Court's injunction, Section II of the brief discusses several public policy interests favoring disclosure of information. Third, in Section III, the brief argues that, even judging only from the opinion published by the District Court, the District Court clearly fails to credit the public policy interest in certain types of information disclosed by the Defendant-Appellants' speech.

I. Legislative and Executive Branch Actions Demonstrate the Public Policy Interest in Information Disclosed by Defendants-Appellants' Speech

Official government actions at both the federal and state levels provide objective evidence that Defendant-Appellants' investigative project involves information concerning matters of great public concern.

At the federal congressional level multiple hearings and investigations have been conducted.

House Oversight and Government Reform Committee

- According to the House Oversight and Government Reform Committee, “In light of disturbing videos that emerged in July detailing fetal tissue procurement among Planned Parenthood facilities and affiliates, the . . . Committee launched an investigation into the use of federal funds surrounding transactions involving fetal tissue.”¹
- On September 15, 2015, “Chairman Chaffetz issued a subpoena to CMP for all unedited video footage in their possession relating to the acquisition, preparation, and sale of fetal tissue.”²
- On September 29, 2015, “the Committee held a hearing on Planned Parenthood’s taxpayer funding and published a memo of its findings on the Planned Parenthood Investigation.”³

¹ *Planned Parenthood Investigation*, House Oversight and Government Reform Committee, <https://oversight.house.gov/interactivepage/plannedparenthood/> (last visited Apr. 22, 2016).

² *Planned Parenthood Investigation*, *supra*; see also Order re Congressional Subpoena, No. 3:15-cv-03522 (N.D. Cal. Oct. 6, 2015), ECF No. 155, <https://www.thomasmoresociety.org/wp-content/uploads/2015/10/151006-Daleiden-NAF-Ord-re-Cong-subpoena-dkt-155.pdf>; *Chairman Issues Subpoena For Unedited Planned Parenthood Videos*, House Oversight and Government Reform Committee (Sept. 15, 2015), <https://oversight.house.gov/release/chairman-issues-subpoena-unedited-planned-parenthood-videos/>.

³ *Planned Parenthood Investigation*, *supra*; see also Memorandum from Jason Chaffetz, Chairman, Comm. on Oversight and Gov’t Reform to Members of the House Comm. on Oversight and Gov’t Reform (Sept. 29, 2015),

House Judiciary Committee

- According to a September 2, 2015 press release, “Since the release of numerous videos by the Center for Medical Progress,” the House Judiciary Committee “has been conducting an in-depth investigation to determine whether the federal law that prohibits partial-birth abortions and the killing of infants born alive were violated, the history of enforcement of those laws, and the sufficiency of those laws.”⁴
- “The Committee’s investigation . . . has involved letters to the Department of Justice and Planned Parenthood affiliates in order to gather the facts surrounding the horrific allegations brought to light in the Center for Medical Progress’ videos.”⁵
- On July 17, 2015, “The House Judiciary Committee sent a letter to Attorney General Loretta Lynch demanding further investigation by the Department

<https://oversight.house.gov/wp-content/uploads/2015/09/Committee-Findings-Planned-Parenthood-Investigation.pdf>.

⁴ Press Release, House Judiciary Comm., House Judiciary Committee to Hold First Hearing on Planned Parenthood Investigation (Sept. 2, 2015), <https://judiciary.house.gov/press-release/house-judiciary-committee-to-hold-first-hearing-on-planned-parenthood-investigation/>.

⁵ *Id.*

of Justice into potential violations of the Partial-Birth Abortion Ban Act by Planned Parenthood.”⁶

- On August 17, 2015, “The House Judiciary Committee sent a letter to the Department of Justice requesting information on the department’s prior investigations into the trafficking of fetal body parts.”⁷
- On August 19, 2015, “The House Judiciary Committee sent a letter to 58 Planned Parenthood Affiliates across the country requesting information on their clinical procedures and standards when performing abortion services.”⁸
- The House Judiciary Committee has also held two hearings. A hearing on September 9, 2015, was titled “Planned Parenthood Exposed: Examining the Horrific Abortion Practices at the Nation’s Largest Abortion Provider.”⁹ A hearing on October 8, 2015, was titled “Planned Parenthood Exposed:

⁶ *Planned Parenthood Exposed*, House Judiciary Committee, <https://judiciary.house.gov/issue/investigation-into-planned-parenthood/> (last visited Apr. 22, 2016).

⁷ *Planned Parenthood Exposed*, *supra*.

⁸ *Id.*

⁹ *Planned Parenthood Exposed: Examining the Horrific Abortion Practices At The Nation’s Largest Abortion Provider: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 1 (2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-41_96052.pdf; *see also* House Judiciary Committee to Hold First Hearing on Planned Parenthood Investigation, *supra*.

Examining Abortion Procedures and Medical Ethics at the Nation’s Largest Abortion Provider.”¹⁰

House Energy and Commerce Committee

- On August 7, 2015, the House Energy and Commerce Committee sent a letter to Cecile Richards, the President of the Planned Parenthood Federation of America, to ask her assistance in obtaining informal interviews with three individuals who, “in several recent videotapes made public . . . [,] [had] made statements concerning the manner in which fetal tissue is procured.”¹¹
- On September 17, 2015 the Subcommittee on Health of the House Energy and Commerce Committee held a hearing titled “Protecting Infants: Ending Taxpayer Funding for Abortion Providers Who Violate the Law.”¹² The

¹⁰ *Planned Parenthood Exposed: Examining Abortion Procedures and Medical Ethics At The Nation’s Largest Abortion Provider: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 1 (2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-41_96052.pdf.

¹¹ Letter from the House Energy and Commerce Committee to Cecile Richards, President, Planned Parenthood Federation of America (Aug. 7, 2015), <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150807PlannedP Parenthood.pdf>.

¹² *Protecting Infants: Ending Taxpayer Funding For Abortion Providers Who Violate The Law: Hearing Before the Subcomm. on Health, H. Comm. on Energy and Commerce*, 114th Cong. 1 (2015), <https://energycommerce.house.gov/hearings-and-votes/hearings/protecting-infants-ending-taxpayer-funding-abortion-providers-who>.

hearing considered two bills.¹³ At the hearing a lawmaker stated, “It has now been 2 months since the first undercover video surfaced, and the public concern has not subsided.”¹⁴

Select Investigative Panel of the House Energy and Commerce Committee

- “On October 7, 2015, the U. S. House of Representatives passed H. Res. 461, which created the Select Investigative Panel and empowered it to conduct a full and complete investigation regarding the medical practices of abortion service providers and the business practices of the procurement organizations who sell fetal tissue.”¹⁵ The Panel is part of the Energy and Commerce Committee and “centralized the investigations that were already being conducted by the Committees on Energy and Commerce, Judiciary,

¹³ Memorandum from the Committee Majority Staff to the Subcommittee on Health Members (Sept. 5, 2015), <http://docs.house.gov/meetings/IF/IF14/20150917/103957/HHRG-114-IF14-20150917-SD12321.pdf>.

¹⁴ *Protecting Infants: Ending Taxpayer Funding For Abortion Providers Who Violate The Law: Hearing Before the Subcomm. on Health, H. Comm. on Energy and Commerce*, 114th Cong. 17 (2015) (statement of Rep. Cathy McMorris Rodgers), <http://docs.house.gov/meetings/IF/IF14/20150917/103957/HHRG-114-IF1420150917-SD1000.pdf>.

¹⁵ Memorandum from Panel Majority Staff to the Select Investigative Panel Members (Feb. 29, 2016), <http://docs.house.gov/meetings/IF/IF04/20160302/104605/HHRG-114-IF04-20160302-SD002.pdf>; *see* H.R. Res. 461, 114th Cong. (2015), <https://www.congress.gov/114/bills/hres461/BILLS-114hres461eh.pdf>.

and Oversight and Government Reform by bringing them primarily under one umbrella.”¹⁶

- On March 2, 2016, the Select Investigative Panel held a hearing titled “Bioethics and Fetal Tissue.”¹⁷ As described in a background memo, “The hearing will focus upon ethical issues raised as a result of information recently made public about fetal tissue donations, transfer of fetal tissue, and use of fetal tissue by research institutions.”¹⁸
- The Selective Investigative Panel of the House Energy and Commerce Committee also held a hearing on April 20, 2016, titled “The Pricing of Fetal Tissue.”¹⁹
- The webpage for the Select Investigative Panel includes a form titled “Blow the Whistle.” The webpage states, “If you are an individual working for an abortion clinic, in the fetal tissue industry, doing biotech research, or have

¹⁶ Memorandum from Panel Majority Staff to the Select Investigative Panel Members (Feb. 29, 2016), <http://docs.house.gov/meetings/IF/IF04/20160302/104605/HHRG-114-IF04-20160302-SD002.pdf>; *see* H.R. Res. 461, 114th Cong. (2015), <https://www.congress.gov/114/bills/hres461/BILLS-114hres461eh.pdf>.

¹⁷ Memorandum from Panel Majority Staff to the Select Investigative Panel Members (Feb. 29, 2016).

¹⁸ *Id.*

¹⁹ *The Pricing of Fetal Tissue*, Energy and Commerce Committee, <https://energycommerce.house.gov/hearings-and-votes/hearings/pricing-fetal-tissue> (last visited Apr. 22, 2016).

information you believe would be pertinent to our investigation, please submit it using the form below.”²⁰

Senator Ron Johnson, Chairman, Senate Committee on Homeland Security and Government Affairs

- On September 15, 2015, Senator Ron Johnson, Chairman, Committee on Homeland Security and Government Affairs, along with Senator Charles E. Grassley, Chairman, Committee on the Judiciary, and Senator Joni K. Ernst, sent a letter under the letterhead of the United States Senate Committee on Homeland Security and Governmental Affairs to Sylvia Matthews Burwell, the Secretary of the U.S. Department of Health and Human Services. The letter states, “We write to reiterate our request for information and documents from the Department of Health and Human Services (HHS) relating to HHS enforcement and oversight policies and procedures governing the research, transfer, and sale of human fetal tissue.”²¹

²⁰ *Select Investigative Panel*, Energy and Commerce Committee, <https://energycommerce.house.gov/select-investigative-panel> (last visited Apr. 22, 2016).

²¹ Letter from Ron Johnson, Chairman, Comm. on Homeland Security & Governmental Affairs, Charles E. Grassley, Chairman, Comm. on the Judiciary, and Joni K. Ernst, Senator, U.S. Senate to Sylvia Burwell, Secretary, Dep’t of Health and Human Services (Sept. 28, 2015), http://www.ronjohnson.senate.gov/public/_cache/files/67b6d6e8-5ce8-4f22-a069-250e415a920c/johnson-grassley-ernstletter-to-hhs-on-planned-parenthood.pdf.

Senator Chuck Grassley, Chairman, Senate Judiciary Committee

- An August 4, 2015 news release states, “Since media reports of videos describing in detail Planned Parenthood’s role in the harvesting of fetal tissue, Senator Chuck Grassley, Chairman of the Senate Judiciary, has opened an inquiry into the organization’s facilitation of activities described in the videos.”²²
- Senator Grassley “has requested information from each of the Planned Parenthood affiliates regarding each affiliate’s fetal tissue policies as well as copies of documents such as policies, presentations, guidance, and communications related to its facilitation of the procurement and distribution of fetal tissue.”²³
- “Grassley requested from the Center for Medical Progress all videos and documents related to its fetal tissue investigation that may lawfully be provided to the committee.”²⁴

²² Press Release, Grassley Pursues Inquiry into Planned Parenthood Fetal Tissue Transfers (Aug. 4, 2015), <http://www.grassley.senate.gov/news/news-releases/grassley-pursues-inquiry-planned-parenthood-fetal-tissue-transfers> [hereinafter Grassley August 4th Press Release].

²³ *Id.*

²⁴ Grassley August 4th Press Release, *supra*; see also Letter from Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Catherine Short, Lawyer, Life Legal Defense Foundation (July 31, 2015), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Life%202007-31-15%20letter%20to%20Center%20for%20Medical%20Progress%20information%20on%20fetal%20tissue%20provision.pdf>.

Federal Legislation

- Federal legislation that would have effectively blocked federal funds from going to Planned Parenthood was passed by the House on a 240 – 189 vote on October 23, 2015, passed by the Senate on a 52 – 47 vote on December 3, 2015, and presented on January 7, 2016 to the President, who promptly vetoed the legislation the very next day.²⁵
- Another bill, H.R.3134 - Defund Planned Parenthood Act of 2015, passed the House on a 241 – 187 vote on September 18, 2015.²⁶
- Other abortion or fetal tissue related legislation that has been introduced since the release of the first video includes H.R.3215 - End Trafficking of the Terminated Unborn Act of 2015,²⁷ H.R.3729 - Safe RESEARCH Act,²⁸

²⁵ *Actions Overview: H.R.3762 — 114th Congress (2015-2016)*, Library of Congress, <https://www.congress.gov/bill/114th-congress/house-bill/3762/actions> (last visited Apr. 22, 2016).

²⁶ *Actions Overview: H.R.3134 — 114th Congress (2015-2016)*, Library of Congress, <https://www.congress.gov/bill/114th-congress/house-bill/3134/actions?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=41> (last visited Apr. 22, 2016).

²⁷ End Trafficking of the Terminated Unborn Act of 2015, H.R.3215, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3215?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=36>.

²⁸ Safe RESEARCH Act, H.R. 3729, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3729/text?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=9>.

and S.1877 - A bill to require the Attorney General to appoint a special prosecutor to investigate Planned Parenthood, and for other purposes.²⁹

Other actions have been taken at the federal executive level.

- A December 22, 2015 news report states, “The Department of Health and Human Services (HHS) Office of Inspector General (IG) will investigate federal oversight of fetal tissue research in the wake of controversial undercover videos targeting Planned Parenthood.”³⁰
- In addition, the federal Food and Drug Administration, an agency within the Department of Health and Human Services, issued a Staff Manual Guide, with an effective date of February 11, 2016, “to provide policies, requirements, and procedures for FDA-funded or conducted research involving human fetal tissue.”³¹

²⁹ S.1877, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1877?q=%7B%22search%22%3A%5B%22abortion%22%5D%7D&resultIndex=35>.

³⁰ Peter Sullivan, *HHS watchdog launches fetal tissue investigation*, Politico.com (Dec. 22, 2015), <http://thehill.com/policy/healthcare/264030-inspector-general-launches-fetal-tissue-investigation>. See Letter from Daniel R. Levinson, Inspector General, Department of Health and Human Services, Office of Inspector General, to Sen. Rand Paul (stamped Dec. 4, 2015), <https://www.paul.senate.gov/imo/media/doc/OIG%20HHS%20Letter%20Respons.pdf>.

³¹ U.S. Food & Drug Admin., FDA Staff Manual Guides, Volume IV – Agency Program Directives, General or Multidiscipline, Research Involving Human Fetal Tissue (Feb. 11, 2016), <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManualGuides/UCM485870.pdf>.

Many state governments have also taken action by launching investigations or by introducing or enacting legislation.

- According to one news source, “Eleven states . . . launched investigations into Planned Parenthood following the release last summer of several videos alleging the organization illegally profited from the sale of fetal tissue.”³²
- At least two states, Arizona and Louisiana, have issued subpoenas to Defendant-Appellant Center for Medical Progress.³³
- According to an April 13, 2016 report published by the Guttmacher Institute, “The Planned Parenthood videos have also led to legislation in 28 states aimed at research involving fetal tissue.”³⁴ The report states, “Measures have passed one legislative chamber in four states (AL, IA, ID and KY), and new laws have been enacted in four states (AZ, FL, IN and SD) in the first quarter alone. All four laws ban the donation of fetal tissue for purposes of research.”³⁵

³² Alisa Nelson, *Missouri Senate considers Planned Parenthood summonses*, MissouriNet (Apr. 13, 2016), <http://www.missourinet.com/2016/04/13/missouri-senate-considers-planned-parenthood-summonses/>.

³³ Order Granting Motion for Preliminary Injunction at 41, No. 3:15-cv-03522 (N.D. Cal. Feb. 5, 2016), ECF No. 354 (identifying Arizona and Louisiana as two states that “have issued subpoenas to CMP”).

³⁴ Elizabeth Nash et al., *Trends in the States: First Quarter 2016* (April 13, 2016), <https://www.guttmacher.org/article/2016/04/trends-states-first-quarter-2016>.

³⁵ *Id.*

- In addition, some states have taken steps to defund the prominent abortion provider Planned Parenthood. “Since last July,” a March 28, 2016 publication states, “23 states have tried various ways of cutting money for the organization [Planned Parenthood]. So far 11 have succeeded”³⁶

II. **Judicial Balancing of Public Policy Interests Favors Disclosure of Information**

The District Court openly admitted that “[t]he Ninth Circuit has recognized that courts should balance the competing public interests in determining whether to enforce confidentiality agreements that restrict First Amendment rights.” Order Granting Motion for Preliminary Injunction at 29, No. 3:15-cv-03522 (N.D. Cal. Feb. 5, 2016), ECF No. 354. The District Court quoted from this Court’s opinion in *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993), *as amended* (Mar. 8, 1994), which explains that “even if a party is found to have validly waived a constitutional right, we will not enforce the waiver if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement,” *id.* (internal quotations omitted).

Case law cited by the District Court suggests several public policy interests relating to non-enforcement of confidentiality agreements including “disclosure of information concerning” (1) “the enforcement of laws protecting important rights,”

³⁶ *The State Assault on Planned Parenthood*, N.Y. Times (Mar. 28, 2016), http://www.nytimes.com/2016/03/28/opinion/the-state-assault-on-planned-parenthood.html?_r=1.

(2) “criminal behavior,” (3) “the public health and safety,” and (4) “matters of great public importance.” *Id.* at 29 (*quoting Perricone v. Perricone*, 972 A.2d 666, 688–89 (2009)) (internal quotations omitted).

In addition to the above public policy interests, there are two additional public policy interests favoring disclosure of information concerning behavior that, while not criminal, is unlawful or should be and legal or ethical abuses by publicly funded organizations or in publicly funded programs.

Each of the public policy interests is discussed below.

A. Information Concerning the Enforcement of Laws Protecting Important Rights

An investigative project involving the transfer of human fetal tissue and abortion industry practices has the potential to disclose information concerning the enforcement of important rights for mothers, children, and donee-recipients of transplanted human fetal tissue as well as where those rights might need to be strengthened or expanded.³⁷

³⁷ Many of the rights, standards, and interests discussed in Section II of this brief derive from or are reflected by Section 289g-1 of title 42 of the U.S. Code. Planned Parenthood has argued that the Section 289g-1 regulations of certain federally funded research apply only to research on the transplantation of human fetal tissue for therapeutic purposes and states that NIH no longer funds this type of research. *See* Letter from Cecile Richards, President, Planned Parenthood Federation of America, to Francis Collins, Director, National Institutes of Health, 2 (July 29, 2015), https://www.plannedparenthood.org/files/1014/4709/5503/NIH_Letter.pdf. If this argument holds it only strengthens the public policy interest in information concerning conduct that would otherwise violate Section 289g-1 because instead of

The right of the mother to informed consent to donation of fetal tissue

Section 289g-1 of title 42 of the U.S. Code provides for “[r]esearch on transplantation of fetal tissue.” 42 U.S.C. § 289g-1 (2012). Paragraph (1) of subsection (a) of Section 289g-1 provides that the Secretary of the U.S. Department of Health and Human Services “may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes.” *Id.* § 289g-1(a)(1). Paragraph (2) of subsection (a) provides that “[h]uman fetal tissue may be used in research carried out under paragraph (1) [of subsection (a)] regardless of whether the tissue is obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth.” *Id.* § 289g-1(a)(2).

Subsection (b) of Section 289g-1 provides for the “[i]nformed consent of donor.” *Id.* § 289g-1(b). Under paragraph (1) of subsection (b), “In research carried out under subsection (a) of [Section 289g-1], human fetal tissue may be used only if the woman providing the tissue makes a statement, made in writing and signed

a mere enforcement problem the public would have an even stronger and more urgent interest in strengthening preexisting laws or passing new laws as needed to close loopholes and protect important rights. *Compare National Meat Assoc. v. Harris*, 132 S. Ct. 965, 969 (2012) (stating that “undercover video” released by Humane Society of the United States “prompted the California legislature to strengthen a pre-existing statute”), *with, e.g., Elizabeth Nash et al., Trends in the States: First Quarter 2016* (April 13, 2016), <https://www.gutmacher.org/article/2016/04/trends-states-first-quarter-2016> (stating that “[t]he Planned Parenthood videos have also led to legislation in 28 states aimed at research involving fetal tissue” and “new laws have been enacted in four states (AZ, FL, IN and SD) in the first quarter alone”).

by the woman, declaring that,” *id.* § 289g-1(b)(1), among other things, “the woman donates the fetal tissue for use in research described in subsection (a) of [Section 289g-1],” *id.* § 289g-1(b)(1)(A).

Paragraph (2) of subsection (b) then provides for an “[a]dditional statement” by the attending physician. *Id.* § 289g-1(b)(2). “In research carried out under subsection (a) of this section, human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-1(b)(2), among other things, “in the case of tissue obtained pursuant to an induced abortion,” *id.* § 289g-1(b)(2)(A), among other things, “the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research,” *id.* § 289g-1(b)(2)(A)(i).

The statement required of the attending physician by § 289g-1(b)(2) also must declare that, among one other thing, “full disclosure has been provided to the woman with regard to,” *id.* § 289g-1(b)(2)(C), “such physician’s interest, if any, in the research to be conducted with the tissue,” *id.* § 289g-1(b)(2)(C)(i), and “any known medical risks to the woman or risks to her privacy that might be associated with the donation of the tissue and that are in addition to risks of such type that are associated with the woman’s medical care,” *id.* § 289g-1(b)(2)(C)(ii).

The right of the mother donating human fetal tissue to receive unaltered abortion procedures

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-1(b)(2), among other things, “in the case of tissue obtained pursuant to an induced abortion,” *id.* § 289g-1(b)(2)(A), among other things, “no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue,” *id.* § 289g-1(b)(2)(A)(ii).

Furthermore, “[i]n research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual,” *id.* § 289g-1(c), among other things, “has 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,” *id.* § 289g-1(c)(4).

The rights of unborn children whose tissues are harvested for research

Federal law provides at least five protections for unborn children in relation to the harvesting of their body parts.

The first protection concerns purposefully gestating a human fetus for research purposes. “It shall be unlawful for any person or entity involved or engaged in interstate commerce to,” 42 U.S.C. § 289g-2(c), “solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue,” *id.*, § 289g-2(c)(1). “Any person who violates” this provision is subject to penalties including up to 10 years of imprisonment. *Id.* § 289g-2(d).

The second protection concerns the directed donation of fetal tissue for transplantation. Under Section 289g-2 it is unlawful “for any person to solicit or knowingly acquire, receive, or accept a donation of human fetal tissue for the purpose of transplantation of such tissue into another person if the donation affects interstate commerce, the tissue will be or is obtained pursuant to an induced abortion,” *id.* § 289g-2(b), and either “the donation will be or is made pursuant to a promise to the donating individual that the donated tissue will be transplanted into a recipient specified by such individual,” *id.* § 289g-2(b)(1), “the donated tissue will be transplanted into a relative of the donating individual,” *id.* § 289g-2(b)(2), or “the person who solicits or knowingly acquires, receives, or accepts the donation has provided valuable consideration for the costs associated with such abortion,” *id.* § 289g-2(b)(3). “Any person who violates” this provision is subject to penalties including up to 10 years of imprisonment. *Id.* § 289g-2(d).

The third protection concerns the purchase of fetal tissue for profit. “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.” *Id.* § 289g-2(a). “Any person who violates” this provision is subject to penalties including up to 10 years of imprisonment. *Id.* § 289g-2(d).

The fourth protection concerns motives that can cause a conflict of interest leading to abortion. This protection applies to research carried out under subsection (a) of Section 289g-1 of title 42 of the U.S. Code. In research carried out under that subsection, “human fetal tissue may be used only if the woman providing the tissue makes a statement, made in writing and signed by the woman, declaring that,” *id.* § 289g-1(b)(1), among one other thing, “the donation is made without any restriction regarding the identity of individuals who may be the recipients of transplantations of the tissue,” *id.* § 289g-1(b)(1)(B), and “the woman has not been informed of the identity of any such individuals,” *id.* § 289g-1(b)(1)(C).

The fifth protection, likewise, concerns the motives at play in choosing whether to abort a child and applies to research carried out under subsection (a) of Section 289g-1 of title 42 of the U.S. Code. “In research carried out under subsection (a) of this section, human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-

1(b)(2), among other things, “in the case of tissue obtained pursuant to an induced abortion,” *id.* § 289g-1(b)(2)(A), among other things, “the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research,” *id.* § 289g-1(b)(2)(A)(i).

The right of donee-recipients to informed consent

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual,” *id.* § 289g-1(c), among other things, “is aware that,” *id.* § 289g-1(c)(1), “the tissue is human fetal tissue,” *id.* § 289g-1(c)(1)(A), “the tissue may have been obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth,” *id.* § 289g-1(c)(1)(B), and “the tissue was donated for research purposes,” *id.* § 289g-1(c)(1)(C). The statement made in writing and signed by this individual must also declare that, among other things, the individual “will require, prior to obtaining the consent of an individual to be a recipient of a transplantation of the tissue, written acknowledgment of receipt of such information by such recipient.” *Id.* § 289g-1(c)(3).

The right of the partially born child not to be killed

Federal law prohibits the practice of partial-birth abortion. 18 U.S.C. § 1531 (2012). More than half of the states have enacted bans on partial-birth abortion, with nearly 20 of those laws in effect.³⁸

B. Information Concerning Criminal Behavior

Federal law establishes criminal liability for various acts involving abortion and the transfer of fetal tissue.

The crime of transferring fetal tissue for valuable consideration

Subsection (a) of Section 289g-2 of title 42 of the U.S. Code provides, “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.” 42 U.S.C. § 289g-2(a) (2012). As used in this provision, “[t]he term ‘valuable consideration’ does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” *Id.* § 289g-2(e)(3). Subsection (d) of Section 289g-2 provides for “[c]riminal penalties for violations.” *Id.* § 289g-2(d).

³⁸ See *State Policies in Brief: Bans on “Partial-Birth” Abortion*, Guttmacher Institute (Mar. 1, 2016), https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_BPBA.pdf.

The crime of soliciting or accepting fetal tissue as a directed donation for transplantation

Subsection (b) of Section 289g-2 of title 42 of the U.S. Code provides that it shall be unlawful “for any person to solicit or knowingly acquire, receive, or accept a donation of human fetal tissue for the purpose of transplantation of such tissue into another person if the donation affects interstate commerce, the tissue will be or is obtained pursuant to an induced abortion, and,” *id.* § 289g-2(b), either “the donation will be or is made pursuant to a promise to the donating individual that the donated tissue will be transplanted into a recipient specified by such individual,” *id.* § 289g-2(b)(1), “the donated tissue will be transplanted into a relative of the donating individual,” *id.* § 289g-2(b)(2), or “the person who solicits or knowingly acquires, receives, or accepts the donation has provided valuable consideration for the costs associated with such abortion,” *id.* § 289g-2(b)(3). As used in this provision, “[t]he term ‘valuable consideration’ does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” *Id.* § 289g-2(e)(3). Subsection (d) of Section 289g-2 provides for “[c]riminal penalties for violations.” *Id.* § 289g-2(d).

The crime of soliciting or accepting tissue from fetuses gestated for research purposes

Subsection (c) of Section 289g-2 of title 42 of the U.S. Code provides, “[i]t shall be unlawful for any person or entity involved or engaged in interstate commerce to,” *id.* § 289g-2(c), “solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue,” *id.* § 289g-2(c)(1), or “knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal,” *id.* § 289g-2(c)(2). Subsection (d) of Section 289g-2 provides for “[c]riminal penalties for violations.” *Id.* § 289g-2(d).

The crime of partial-birth abortion

Federal law prohibits the practice known as partial-birth abortion. 18 U.S.C. § 1531 (2012). Subject to the exceptions set forth in the statute, *id.* § 1531(a), “[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both,” *id.*

C. Information Concerning Behavior that Is Not Criminal but Is Unlawful or Should Be

The District Court acknowledges that recordings showing “criminal wrongdoing” by abortion providers would be “a matter that is indisputably of significant public interest.” Order Granting Motion for Preliminary Injunction at

30, No. 3:15-cv-03522 (N.D. Cal. Feb. 5, 2016), ECF No. 354. However, there is also a public policy interest in information concerning behavior that, while not criminal, is unlawful or should be. *See* p. 15 n. 37, *supra*.

Consent to abortion obtained before requesting consent to tissue donations

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” 42 U.S.C. § 289g-1(b)(2), among other things, “in the case of tissue obtained pursuant to an induced abortion,” *id.* § 289g-1(b)(2)(A), among other things, “the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research,” *id.* § 289g-1(b)(2)(A)(i).

Alteration of timing, method, or procedures used for abortion

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-1(b)(2), among other things, “in the case of tissue obtained pursuant to an induced abortion,” *id.* § 289g-1(b)(2)(A), among other things, “no alteration of the timing, method, or

procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue,” *id.* § 289g-1(b)(2)(A)(ii).

Disclosures of aborting physician’s interest, if any, in the research

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-1(b)(2), among at least one other thing, “full disclosure has been provided to the woman with regard to,” *id.* § 289g-1(b)(2)(C), among one other thing, “such physician’s interest, if any, in the research to be conducted with the tissue,” *id.* § 289g-1(b)(2)(C)(i).

Disclosures to mother of medical risks and risks to her privacy

“In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that,” *id.* § 289g-1(b)(2), among at least one other thing, “full disclosure has been provided to the woman with regard to,” *id.* § 289g-1(b)(2)(C), among one other thing, “any known medical risks to the woman or risks to her privacy that might be associated with the

donation of the tissue and that are in addition to risks of such type that are associated with the woman's medical care," *id.* § 289g-1(b)(2)(C)(ii).

Restrictions on researchers influencing abortion timing, method, or procedures

"In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual," *id.* § 289g-2(c), among other things, "has 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," *id.* § 289g-2(c)(4).

Informed consent for individuals receiving transplanted human fetal tissue

"In research carried out under subsection (a) of [Section 289g-1 of title 42 of the U.S. Code], human fetal tissue may be used only if the individual with the principal responsibility for conducting the research involved makes a statement, made in writing and signed by the individual, declaring that the individual," *id.* § 289g-2(c), among other things, "is aware that," *id.* § 289g-2(c)(1), "the tissue is human fetal tissue," *id.* § 289g-2(c)(1)(A), "the tissue may have been obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth," *id.* § 289g-2(c)(1)(B), and "the tissue was donated for research purposes," *id.* § 289g-2(c)(1)(C). The statement made in writing and signed by this individual must also

declare that, among other things, the individual “will require, prior to obtaining the consent of an individual to be a recipient of a transplantation of the tissue, written acknowledgment of receipt of such information by such recipient.” *Id.* § 289g-2(c)(3).

D. Information Concerning Public Health and Safety

An investigative project involving the transfer of human fetal tissue and abortion industry practices has the potential to disclose information concerning several public health and safety concerns including

- the public health and safety interest in mothers receiving informed consent, *see id.* § 289g-1(b)(1)(A), (b)(2)(A)(i), (b)(2)(C)(i)–(ii);
- the public health and safety interest in protecting the confidentiality of women who donate, *see id.* § 289g-1(b)(2)(C)(ii), (d)(2); *cf. id.* § 289g-1(d)(1) (requiring certification of availability for audit of statements but not including in this requirement statements made by women making donations);
- the public health and safety interest in mothers receiving care not unduly biased by desire to harvest human fetal tissue, *see id.* § 289g-1(b)(2)(A)(ii), (c)(4); and

- the public health and safety interest in protecting mothers from undue pressure or duress in choosing to donate human fetal tissue, *see id.* §§ 289g-1(b)(1)(B) & (C), (b)(2)(B), § 289g-2(b).

E. Information Concerning Legal or Ethical Abuses by Publicly Funded Organizations or in Publicly Funded Programs

The public has a strong interest in information concerning legal, ethical, or financial abuses by publicly funded organizations or in publicly funded programs. *See, e.g., Handling Misconduct – Whistleblowers*, U.S. Dep’t of Health & Human Servs., Office of Research Integrity (Nov. 20, 1995), <http://ori.hhs.gov/guidelines-whistleblowers> (last updated June 13, 2014). For at least three reasons, this interest applies with special force to the publicly funded organizations and programs involved in human fetal tissue research.

First, “[t]he scientific and ethical challenges associated with research utilizing human fetal tissue make it imperative that researchers and their organizations be fully aware of and in compliance with the Federal requirements.” *NIH Grants Policy Statement*, U.S. Dep’t of Health & Human Servs., National Institutes of Health (Nov. 2015), § 4.1.14.³⁹

Second, the U.S. Department of Health and Human Services, which is the federal agency that funds human fetal tissue research, “is the largest grant-making

³⁹ Available at https://grants.nih.gov/grants/policy/nihgps/HTML5/section_4/4.1_public_policy_requirements_and_objectives.htm#Human2.

organization in the Federal Government.” *Management Challenge 9: Protecting HHS Grants and Contract Funds from Fraud, Waste, and Abuse*, U.S. Dep’t of Health & Human Servs., Office of Inspector General [*hereinafter HHS Management Challenge 9*].⁴⁰ A study by the Congressional Research Institute found that the National Institutes of Health (NIH), a part of the Department of Health and Human Services, had “spent \$76 million on human fetal tissue research in FY2014, and will spend an estimated \$76 million in FY2015 and \$77 million in FY2016,” Kristin Finklea et al., Cong. Research Serv., R44129, *Fetal Tissue Research: Frequently Asked Questions 1* (2015).⁴¹ “In FY 2012, the Department [of Health and Human Services] awarded over 81,000 grants totaling approximately \$347 billion. Of these, approximately 80,000 grants totaling approximately \$90 billion were for programs other than Medicare or Medicaid.” *HHS Management Challenge 9*.

Third, as recently as 2013, “Protecting HHS Grants and Contract Funds from Fraud, Waste, and Abuse,” *id.*, was identified by the HHS Office of Inspector General as one of “the most significant management and performance challenges facing the Department of Health and Human Services.” *2013 Top Management & Performance Challenges*, U.S. Dep’t of Health & Human Servs., Office of

⁴⁰ Available at <http://oig.hhs.gov/reports-and-publications/top-challenges/2013/challenge09.asp> (last visited Apr. 25, 2016).

⁴¹ Available at <http://fas.org/sgp/crs/misc/R44129.pdf>.

Inspector General.⁴² This is no surprise given the volume and scale of HHS grantmaking. *See HHS Management Challenge 9.*

An investigative project involving the transfer of human fetal tissue and abortion industry practices has the potential to disclose information concerning legal and ethical abuses by private entities that receive public funds and in private research programs that receive public funds, as well as the need for legal or ethical reform where current norms and standards do not prohibit or regulate the disclosed conduct but should.

F. Information Concerning Matters of Great Public Importance

An investigative project involving the transfer of human fetal tissue and abortion industry practices has the potential to disclose information concerning several matters of great public importance including

- enforcing legal rights that protect the health, safety, and interests of mothers during an especially vulnerable time in their pregnancy;
- protecting the legal rights extended to unborn children;
- creating public awareness of research that is conducted using the physical remains of unborn human beings who died as a result of abortion;
- applying ethical standards in research programs that use the physical remains of unborn human beings who died as a result of abortion;

⁴² Available at <http://oig.hhs.gov/reports-and-publications/top-challenges/2013/> (last visited Apr. 25, 2016).

- exposing legal and ethical violations in taxpayer-funded programs;
- fortifying the ethics and integrity of the medical and scientific research professions;
- heightening awareness of practices that undermine respect for human life in contradiction of established legal and ethical norms; and
- identifying and then closing legal loopholes by strengthening preexisting laws or passing new ones.

III. The District Court Unduly Minimizes the Public Policy Interest in the Information It Has Restricted

Even judging only from the opinion published by the District Court and without the ability to review the same information reviewed by the District Court in issuing its injunction, it is clear that the District Court utterly fails to properly credit the public policy interest in disclosing information showing, as the Defendants put it, “a remarkable de-sensitization in the attitudes of industry participants.” Order Granting Motion for Preliminary Injunction at 31, No. 3:15-cv-03522 (N.D. Cal. Feb. 5, 2016), ECF No. 354 (*quoting* Oppo. Br. at 14).

The District Court explains that defendants highlight portions of recordings including certain comments and states, “I have reviewed defendants’ transcripts of these portions of the recordings.” *Id.* The District Court acknowledges that “there is some [sic] public interest in these comments” but, “unlike defendants’ purported

uncovering of criminal activity, this sort of information is already fully part of the public debate over abortion.” *Id.*

In support of this “already fully part of the public debate” assertion, the District Courts refers to two pages from two Supreme Court opinions as cited, apparently, in a brief by the Defendants, as well as to two pages from the Congressional Record. *Id.* at 31–32.

It is simply not credible to dismiss the public policy interest in information disclosed in the videos on the ground that the information is “neither new or [sic] unique.” *Id.* at 38. As documented in Section I of this brief, the public policy interest in the information revealed to date by the Defendant-Appellants’ investigative project—to say nothing of the public interest more generally—has been and continues to be overwhelming and significant. *Compare* Section I, *infra* (documenting governmental actions at state and federal levels following release of videos by Defendant-Appellant CMP), *with National Meat Assoc. v. Harris*, 132 S. Ct. 965, 969 (2012) (stating that “undercover video” released by the Humane Society of the United States “led the Federal Government to institute the largest beef recall in U. S. history” and “prompted the California legislature to strengthen a pre-existing statute”). That interest should be accorded the proper weight consistent with the First Amendment to the U.S. Constitution and precedents of the U.S. Supreme Court and this present Court.

CONCLUSION

Amicus Curiae respectfully urges reversal.

Dated: April 25, 2016

Respectfully submitted,

s/David R. Langdon
David R. Langdon

David R. Langdon
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069
513-577-7380
dlangdon@langdonlaw.com

Denise Burke
AMERICANS UNITED FOR LIFE
655 15th St NW
Suite 410
Washington, DC 20005
202-289-1478
denise.burke@aul.org

Counsel for Amicus Curiae
Charlotte Lozier Institute

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 28.1(e).

This brief contains 6,895 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word 2010 was used to calculate the word count; and

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: April 25, 2016

s/ David R. Langdon
David R. Langdon

Counsel for Amicus Curiae
Charlotte Lozier Institute

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2016. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished via the CM/ECF system.

Dated: April 25, 2016

s/ David R. Langdon
David R. Langdon

*Counsel for Amicus Curiae Charlotte
Lozier Institute*