

No. 16-36038

In the United States Court of Appeals for the Ninth Circuit

**Jane Does 1-10 and John Does 1-10,
*Plaintiffs-Appellees,***

v.

**David Daleiden,
*Defendant-Appellant,***

**Zachary Freeman, et al.,
*Defendants-Appellees.***

**On Appeal from the United States District Court
for the Western District of Washington,
Hon. James L. Robart, United States District Judge
Civil Action No. 2:16-cv-01212-JLR**

**Brief Amici Curiae of Southern Poverty Law Center
and Feminist Majority Foundation in Support of
Appellees and Affirmance**

David S. Cohen
Professor of Law
Thomas R. Kline School of Law
Drexel University
3320 Market St.
Philadelphia, PA 19104

Susan J. Frietsche
Women's Law Project
401 Wood Street, Suite 1020
Pittsburgh, PA 15222

Thomas E. Zemaitis
Krysten L. Connon*
Pepper Hamilton LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
connonk@pepperlaw.com
215-981-4853

* Counsel of Record for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Southern Poverty Law Center and Feminist Majority Foundation make the following disclosures:

- 1) For non-governmental corporate parties please list all parent corporations: None.
- 2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 16, 2017

/s/ Krysten L. Connon
Krysten L. Connon

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Because of the decades of extremist tactics against abortion providers, the district court properly recognized that abortion providers are at serious risk of threats and harassment. 5

II. Extremist actions against abortion providers have severe consequences for providers, including substantially restricting their ability to provide constitutionally-protected reproductive healthcare and forcing them to live their lives in constant fear. 15

CONCLUSION 26

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bering v. Share</i> , 106 Wn. 2d 212, 721 P.2d 918 (1986).....	22
<i>Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists</i> , 290 F.3d 1058 (9th Cir. 2002).....	13, 21, 23
<i>Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists</i> , 41 F.Supp.2d 1130 (D. Ore. 1999).....	12
<i>Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists</i> , 422 F.3d 949 (9th Cir. 2005).....	21
<i>Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists</i> , 518 F.3d 1013 (9th Cir. 2008).....	21
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	3, 5, 6
<i>State v. Noah</i> , 103 Wn. App. 29, 9 P.3d 858 (2000).....	22
<i>State v. Stockett</i> , 565 P.2d 739 (Ore. 1977).....	7
<i>Tompkins v. Cyr</i> , 202 F.3d 770 (5th Cir. 2000).....	21, 22
STATUTES	
<i>Freedom of Access to Clinic Entrances Act</i> , 18 U.S.C. § 248.....	13
OTHER AUTHORITIES	
Alesha E. Doan, <i>Opposition & Intimidation: The Abortion Wars and Strategies of Political Harassment</i> (2007).....	24
David S. Cohen & Krysten Connon, <i>Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism</i> (2015).....	13, 14
Jennifer Jefferis, <i>Armed for Life: The Army of God and Anti-Abortion Terror in the United States</i> (2011).....	6
Feminist Majority Foundation, <i>2016 National Clinic Violence Survey</i>	24
Feminist Majority Foundation, <i>Who is Troy Newman? What is AbortionDocs.org?</i> , available at http://www.feminist.org/anti-abortion-violence/troy-newman-operation-rescue.html	13
James Risen & Judy L. Thomas, <i>Wrath of Angels: The American Abortion War</i> (1998).....	6

Joseph M. Scheidler, <i>Closed: 99 Ways to Stop Abortion</i> (1985).....	9
Joyce Arthur, <i>Anti-Choice Terrorism: Murders and Attempted Murders</i> (May 2016), available at http://www.arcc-cdac.ca/anti-choice-terrorism-murders-attempted-murders.pdf	11
Lori Freedman, <i>Willing and Unable: Doctors' Constraints in Abortion Care</i> (2010).....	23
Mary Ziegler, <i>After Roe: The Lost History of the Abortion Debate</i> (2015)	6
National Abortion Federation, <i>2015 Violence and Disruption Statistics 3</i> (2016), available at http://prochoice.org/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf	6
Patricia Baird-Windle & Eleanor J. Bader, <i>Targets of Hatred: Anti-Abortion Terrorism</i> (2001).....	7
Paul Anderson, <i>Deluded Pro-Life Crusader Peter James Knight Kills Guard, but Wanted More Dead After He Brought His Gun and Hatred to an Abortion Clinic in Melbourne, Herald Sun, Mar. 11, 2014</i>	10
Wesley Lowery et al., <i>'No More Baby Parts,' Suspect in Attack at Colo. Planned Parenthood Clinic Told Official, Wash. Post, Nov. 28, 2015</i>	15

INTEREST OF AMICI CURIAE

Amici Curiae submit this brief¹ pursuant to Fed. R. App. P. 29(a) to assist this Court in understanding the context of anti-abortion extremism in this country and its effect on abortion providers.² The district court properly considered these elements in its decision preliminarily enjoining the release of certain identifying information to Defendant David Daleiden under Washington State's Public Records Act (PRA).

Amici Curiae are two non-profit organizations dedicated to fighting extremism in this country, both generally and as it relates to abortion. Founded in 1971, the Southern Poverty Law Center (SPLC) is one of the nation's leading civil rights organizations and is dedicated to fighting hate and bigotry and to seeking justice for vulnerable members of our society. SPLC is internationally known for its work tracking the activities of hate groups and other domestic extremists throughout the United States and for exposing their activities to the public, the media, and law enforcement. The Feminist Majority Foundation (FMF), which was founded in 1987, is a cutting-edge organization dedicated to promoting women's equality, protecting and advancing reproductive freedom, and embracing

¹ No counsel for any party authored this brief in whole or in part. No party or any person other than counsel for *Amici Curiae* contributed money to fund the preparation or submission of this brief.

² Throughout the brief, the term "abortion provider" refers to anyone working in the provision of abortion, not just doctors.

non-violence. In all spheres, FMF utilizes research and action to empower women economically, socially, and politically.

Both *Amici* have long studied anti-abortion extremism as part of their work. SPLC has produced reports as part of Hate Watch and the Intelligence Report about anti-abortion extremism and has litigated cases against associates of anti-abortion assassins. FMF spearheads the National Clinic Access Project to reduce anti-abortion violence, keep providers safe and clinics open, and bring anti-abortion extremists to justice. Since 1993, FMF has conducted periodic National Clinic Violence Surveys, which measure anti-abortion violence and harassment. The most recent survey was conducted in 2016 and released last month.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Harassment, intimidation, targeting, threats, and violence became a regular part of anti-abortion activity in the United States almost immediately following *Roe v. Wade*, and they continue to this day. Defendant David Daleiden's actions that form the basis of this case have already had profound and deadly consequences, and the release of the un-redacted information that is the subject of this case will certainly lead to an increased level of fear among the plaintiff abortion providers and could possibly lead to even more violence. This Court is no stranger to actions like those at issue in this case, as it has previously ruled -- in a case involving an ominous and extensive online hit list of abortion providers -- that anti-abortion threats and intimidation are not protected under the First Amendment. Daleiden's previous actions fit within the same pattern of activity intended to threaten abortion providers and make them feel that they are not safe while working in their lawful professions providing constitutionally-protected medical care.

As a result of anti-abortion extremism, abortion providers suffer greatly. Many live their lives in fear that they will be targeted, that their families will be harassed, or that their colleagues will be harmed. To deal with this harassment, they alter their lives in significant ways, such as wearing disguises, taking different routes to work, concealing their identities, and living in protected locations. Some

leave the profession, while others choose not to take the risk and never enter the field, even after extensive training in professional school.

In the sections of the district court's opinion considering whether disclosure here would lead to threats or harassment, the district court properly considered these issues. *Amici* submit this brief to assist this Court in further understanding the context in which this case arises and to demonstrate exactly why the district court's preliminary injunction is essential to protecting the safety of healthcare professionals providing lawful medical care throughout this country.

ARGUMENT

I. Because of the decades of extremist tactics against abortion providers, the district court properly recognized that abortion providers are at serious risk of threats and harassment.

At the heart of this case is whether the plaintiffs reasonably fear that the release of identifying information would subject them to threats and harassment. Based on the long history of anti-abortion extremism dating to the years immediately following *Roe v. Wade*, 410 U.S. 113 (1973), and continuing to the present day, the district court was undeniably correct in recognizing plaintiffs' concerns as legitimate and ordering the redaction of personally identifying information as a result.

According to the most recent statistics from the National Abortion Federation (NAF),³ the leading source of data about anti-abortion violence,⁴ since 1977 there have been 11 murders, 26 attempted murders, 42 bombings, 185 arsons, 98 attempted bombings or arsons, 404 clinic invasions, 100 butyric acid attacks, 203 physical attacks or batteries, 4 acts of kidnapping, and 189 burglaries. There have also been 663 anthrax or bioterrorism threats, 634 bomb threats, 516 death

³ This data is through the end of 2015. NAF is currently compiling 2016 data, but at the time of filing this brief, that data is not yet publicly available.

⁴ NAF's data is the best in the field, but it is based on clinics reporting to NAF. Accordingly, the real numbers are most likely "significantly higher, because not all providers report to NAF and not all incidents are reported." *Brief of National Abortion Federation et al. as Amici Curiae in Support of Respondents and Affirmance in McCullen v. Coakley*, 134 S. Ct. 2518 (2014), at 8 n.3.

threats or threats of harm, 561 acts of stalking, over 15,000 incidents of hate mail or harassing phone calls, and over 26,000 incidents of hate email or internet harassment. National Abortion Federation, *2015 Violence and Disruption Statistics* 3 (2016), available at <http://prochoice.org/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf>.

The first acts of anti-abortion violence and extremism date from the mid-1970s. In the two years immediately following *Roe*, those opposed to abortion took a peaceful political approach to reform. *See generally* Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* 27-91 (2015) (detailing the anti-abortion movement's tactics in the years following *Roe*). This commitment to peaceful political responses ended in 1975, when a small group of abortion opponents staged the first reported clinic invasion. On August 2, 1975, six women entered the Sigma Reproductive Health Services clinic in Rockville, Maryland, sat down in front of the doors that led from the waiting room to the procedure room, and refused to move. They were arrested after a several-hour stand-off with the police. James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War* 61-62 (1998).

More extreme acts of anti-abortion terrorism followed later in the decade. The first known violent anti-abortion act occurred in March 1976 when Joseph Stockett set fire to a Planned Parenthood clinic in Eugene, Oregon. Jennifer

Jefferis, *Armed for Life: The Army of God and Anti-Abortion Terror in the United States* 22-23 (2011). Just before he set fire to the building, Stockett spoke with his friends not only about his opposition to abortion but also about burning down the Planned Parenthood building. *State v. Stockett*, 565 P.2d 739, 740 (Ore. 1977) (reinstating the jury verdict against Stockett).

Not long after Stockett's attack, others followed. In February 1977, someone set fire to the Planned Parenthood clinic in St. Paul, Minnesota, and caused a quarter million dollars in damage. Risen & Thomas, *supra*, at 74. A year later, on February 18, 1978, a man entered the Concerned Women's Clinic in Cleveland, Ohio, and threw a bag of flammable liquid in the receptionist's face, blinding her. He then set fire to the clinic, which was filled with patients at the time; fortunately, none of them was injured. Patricia Baird-Windle & Eleanor J. Bader, *Targets of Hatred: Anti-Abortion Terrorism* 54 (2001); Jefferis, *supra* at 23. The violence escalated even further on February 15, 1979, when Peter Burkin bombed a clinic in Hempstead, New York, by throwing a flaming torch and a can of gasoline into a room where a doctor was performing an abortion at the time. Fifty people were in the clinic, but luckily the staff evacuated them all safely. Baird-Windle & Bader, *supra* at 57; Jefferis, *supra* at 23.

While the arsons and firebombings continued in the late 1970s and early 1980s, anti-abortion extremism took an even more disturbing turn in 1982, when a

doctor and his wife were kidnapped for over a week by people who identified with a shadowy new group called the Army of God. Hector Zevallos, who owned and was the doctor at the Hope Clinic for Women in Granite City, Illinois, was kidnapped from his home on August 12 along with his wife, Rosalee Jean. The three kidnapers held the couple for eight days in an abandoned munitions bunker where they forced Dr. Zevallos at gunpoint to make an anti-abortion video to send to President Ronald Reagan. The kidnapers made clear in their discussions with the Zevallozes as well as in several written screeds that they believed that they were on a mission from God to “kill the baby killers.” Baird-Windle & Bader, *supra* at 64-66; Jefferis, *supra* at 23-25.

While kidnapping did not become a common tactic of anti-abortion extremists, arsons, firebombs, and other direct attacks on clinics continued through the 1980s as the loose-knit Army of God expanded its reach. Another group, Operation Rescue, also became active in the late 1980s, employing its tactic of blockading clinic entrances through massive numbers of its followers who refused to move. Baird-Windle & Bader, *supra* at 88-89. Also in the 1980s, several books or pamphlets were written advocating extreme actions against abortion providers, some, like the *Army of God Manual*, going so far as to advocate murder.

One such book that stopped short of advocating murder but did advocate other extreme measures, *Closed: 99 Ways to Stop Abortion*, was written by Joseph

Scheidler, the founder of the Pro-Life Action Network. Several of the tactics Scheidler advocated that abortion opponents use are related to the issue in this case, as Scheidler suggested that anti-abortion extremists harass abortion providers by first finding out their personal information and then picketing their homes, repeatedly contacting them via mail and phone, digging deeper into their personal lives with private detectives, and discovering information from their public records. Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* (1985). These and other tactics are precisely what the Plaintiffs in this case fear if their personal information is released.

The world of anti-abortion violence changed on December 28, 1991, when abortion providers became victims of gun violence for the first time. That day, Don Catron and Claudia Gilmore, two administrators at the Central Health Center, an abortion clinic in Springfield, Missouri, were shot by a man in a ski mask who entered the clinic asking to see a doctor but instead shot them with a sawed-off shotgun. Both survived, though Gilmore was left paralyzed. Less than a month later, Dr. Douglas Karpen was shot at the Women's Pavilion, an abortion clinic in Houston, Texas. He survived. Neither gunman was ever caught, though the Army of God subsequently took credit for the attacks. Jefferis, *supra* at 30.

On March 10, 1993, anti-abortion extremism turned deadly. Dr. David Gunn was shot and killed while walking from his car to the entrance of the

Pensacola Women's Medical Services clinic in Pensacola, Florida. Since Dr. Gunn's murder, there have been ten other anti-abortion murders in this country:⁵

July 29, 1994: Dr. John Britton and James Barrett, a clinic volunteer, were shot and killed at The Ladies Center in Pensacola, Florida.

December 30, 1994: Clinic receptionists Shannon Lowney and Leanne Nichols were shot and killed in Brookline, Massachusetts. Lowney was working at the Planned Parenthood clinic; Nichols was working at Preterm Health Services.

January 29, 1998: Security officer Robert Sanderson was killed when a bomb exploded at the New Woman, All Woman Health Care Clinic in Birmingham, Alabama.

October 23, 1998: Dr. Barnett Slepian was murdered by a sniper when he was standing at his kitchen window making dinner on a Friday night in Amherst, New York, just outside Buffalo.

May 31, 2009: Dr. George Tiller was murdered while he was performing his usher duties at his church on a Sunday morning in Wichita, Kansas.

November 27, 2015: Police officer Garret Swasey and patient companions Ke'Arre Stewart and Jennifer Markovsky were murdered at the Planned Parenthood clinic in Colorado Springs, Colorado.

⁵ Dr. George Wayne Patterson was murdered in Mobile, Alabama, on August 21, 1993; however, even though abortion rights advocates suspect the murder was abortion-related, the authorities have never solved the case. Remarkably, in stark contrast to the experience in the United States, only *one* abortion-related murder has been recorded anywhere else in the entire world. On July 16, 2001, Steven Rogers, a clinic security guard, was murdered by an anti-abortion extremist in Melbourne, Australia. Paul Anderson, *Deluded Pro-Life Crusader Peter James Knight Kills Guard, but Wanted More Dead After He Brought His Gun and Hatred to an Abortion Clinic in Melbourne*, Herald Sun, Mar. 11, 2014.

During this time-frame, there have also been twenty-nine attempts at anti-abortion murder via gunshots or bombings. Most recently, during the same attack that killed three individuals in Colorado Springs in 2015, nine others (five police officers and four civilians) were also shot but survived. See Joyce Arthur, *Anti-Choice Terrorism: Murders and Attempted Murders* (May 2016), available at <http://www.arcc-cdac.ca/anti-choice-terrorism-murders-attempted-murders.pdf> (comprehensively setting forth all anti-abortion murders and attempted murders).

Anti-abortion extremism since the 1990s has encompassed tactics other than murder and attempted murder. Indeed, while the tactics of the 1980s -- arson, bombings, blockades -- have continued, the massive clinic protests of previous decades have for the most part been replaced with newer tactics.⁶ The internet has become the newest battleground for anti-abortion threats and harassment. As NAF has chronicled, death threats and other threats of harm have skyrocketed in the past decade, particularly those online and particularly since Defendant Daleiden released misleadingly-edited videos about Planned Parenthood in the summer of 2015. National Abortion Federation, *supra*.

⁶ Anti-abortion harassment and threats on the whole appear to be increasing, however, NAF members reported that “[t]he number of clinic blockades nearly doubled from 2014 to 2015. Incidents of picketing at facilities, which had been decreasing in previous years, increased from 5,402 in 2014 to 21,715 reported incidents in 2015—a number larger than numbers reported for any other year.” National Abortion Federation, *supra*.

The progenitor of almost all internet-related harassment of abortion providers, including Defendant Daleiden's online videos, is the Nuremberg Files website. The site was first unveiled at the White Rose Banquet in 1996, a banquet that honored individuals convicted of anti-abortion violence. Neil Horsley created the website which included photos, addresses, telephone numbers, and other detailed personal information -- *identifying information very similar to the information that the plaintiffs in this case are fighting to redact from public records* -- for over 200 abortion providers. The site functioned as a hit list of sorts, indicating those who had been murdered with a strike-through font and those who had been injured by anti-abortion violence shaded in gray. Along with the website, the American Coalition of Life Activists (ACLA), an extremist group associated with the Army of God, launched its campaign of "WANTED" posters, featuring the pictures and names of doctors who provide abortion care. ACLA offered a reward to anyone who stopped these physicians from providing abortions.⁷ ACLA also previously published a "Deadly Dozen" poster with thirteen abortion providers labeled as "GUILTY OF CRIMES AGAINST HUMANITY." Jefferis, *supra* at 34-36. In 2002, an *en banc* panel of this Court found that, taken together, the Nuremberg Files website, the WANTED posters, and the Deadly Dozen poster

⁷ Posters like these appeared before the murders of Dr. Gunn and Dr. Britton and before the first attempt on Dr. Tiller's life. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (D. Ore. 1999).

were “true threats,” a violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and not protected by the First Amendment. *See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). Although the defendants were ordered to remove the Nuremberg Files website from the internet, fragments of it still exist online to this day.

Online harassment of abortion providers reminiscent of the chilling Nuremberg Files has now become commonplace. Websites such as AbortionDocs.org⁸ compile personal information about providers of abortion care nationwide for anyone to use. Local anti-abortion extremists have created webpages with clinic workers’ photos and personal information and have used Facebook and Twitter to harass and threaten providers. David S. Cohen & Krysten Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 72-74 (2015). These online threats, both past and current, rely on discovering abortion providers’ personally identifying information -- like the information at the heart of this case -- and disseminating it online for anti-abortion extremists to use as they see fit.

⁸ AbortionDocs.org is a project of Pro-Life Nation, whose president is Troy Newman. Newman was a founding board member of the Center for Medical Progress with Defendant Daleiden. *See* Feminist Majority Foundation, *Who is Troy Newman? What is AbortionDocs.org?*, available at <http://www.feminist.org/anti-abortion-violence/troy-newman-operation-rescue.html>.

Beyond online threats, abortion providers also must live with other forms of non-violent but targeted harassment. This kind of harassment, distinct from attacks on and protests at clinics, is focused on specific individuals who work in the field, rather than on the issue of abortion in general or a collective entity like a clinic. For some abortion providers, this kind of targeted harassment is an everyday part of their lives. Providers are harassed at home and at other jobs, followed to and from work, and stalked. They receive hate mail, middle-of-the-night phone calls, abusive emails, and death threats. Their personal information is discovered -- like the issue in this case -- and then disseminated widely for other anti-abortion extremists to use; they are victims of slurs based on their race, religion, or sexuality; and their property is trespassed upon. Their loved ones can also become targets, as anti-abortion extremists also harass abortion providers' partners, parents, children, neighbors, and colleagues in order to intimidate and indirectly target the provider. This type of targeting, almost completely foreign to the experience of other medical professionals, may never lead to violence, but it conveys the very clear message that providers have to be constantly vigilant about their personal safety and privacy. *Id.*

The release of the information at issue in this case could lead to even more anti-abortion extremism. When similar information has been released in the past, such as the information about the abortion providers in the videos Defendant

Daleiden disseminated in 2015, it has led to death threats and has appeared to inspire murder. *See, e.g.*, National Abortion Federation, *supra*; Wesley Lowery et al., ‘No More Baby Parts,’ *Suspect in Attack at Colo. Planned Parenthood Clinic Told Official*, Wash. Post, Nov. 28, 2015. Abortion providers legitimately fear for their safety and lives because of the history of these threatening tactics of the anti-abortion extremist movement. The district court properly recognized this serious risk in reaching its conclusion that private information should be redacted from Defendant Daleiden’s PRA request.

II. Extremist actions against abortion providers have severe consequences for providers, including substantially restricting their ability to provide constitutionally-protected reproductive healthcare and forcing them to live their lives in constant fear.

Anti-abortion extremism can have devastating effects on abortion providers’ lives. The district court took note of this when it found that, if Plaintiffs’ personally identifiable information were to be released, it would have a “chilling effect . . . upon Plaintiffs’ exercise of their constitutional rights,” because of the “threat of such harassment or violence from others.” Order Granting Motion for Preliminary Injunction and Denying Motion to File a Supplemental Pleading at 17. Consequences of anti-abortion extremism are not limited to this chilling effect but rather are widely-varied and well-documented not only in the literature that has studied the issue but also in case law.

In their 2015 book about anti-abortion extremism, Professor David S. Cohen and attorney Krysten Connon (two of the authors of this brief) undertook an in-depth study of the many ways that targeted harassment affects abortion providers. Cohen & Connon, *supra*. Cohen and Connon interviewed 87 abortion providers around the United States about their experiences being targeted by anti-abortion extremists, how this targeting impacted their lives, and the ways that law and society could better address the problem. The chapters in the book explaining how providers react to targeted harassment and how they change their lives in order to avoid being targeted and to protect themselves confirm that the two declarations relied upon by the district court relate activity that is as commonplace among the provider community as is anti-abortion harassment. *See id.* at 123-171.

For instance, Cohen and Connon detail the various emotional reactions abortion providers experience because of targeted harassment. Because of anti-abortion extremism and the concern that it could impact them at any time, many providers live their lives in a constant state of fear. As one doctor emphatically stated, after explaining all the ways that anti-abortion extremists have targeted him, including gathering his personal information and disseminating it online, “Let them know, let them know I am frightened. I feel physically threatened.” *Id.* at 124. Another clinic worker who had experienced decades of harassment, including violence against people she worked with as well as having her and her family’s

personal information broadcast throughout her city, revealed how deeply it affected her. She said, “I suppose if I wanted to be really honest, I’d have to say I was scared sometimes, not knowing what I was going to find at home or at the clinic.” *Id.* at 126-27.

Other providers stopped short of saying that they were fearful, but instead described their emotional state as a result of the targeting they have faced as angry, anxious, frustrated, paranoid, insecure, and/or vulnerable. One provider in particular explained that she felt this sense of vulnerability, especially after detailed personal information about her was included in hate mail she received at home. She said that this kind of invasion of privacy concerned her because her phone number and home address, neither of which was public, had been discovered and used to threaten her. *Id.* at 131.

The strong emotional reactions reach far beyond just the individual abortion provider. Many providers expressed a stronger sense of concern for others in their lives -- including patients, co-workers, neighbors, and family members -- than they did about themselves. One doctor explained the impact of a recently-uncovered plot to assassinate people who worked at her clinic by talking about her family more than about herself:

I have three young children at home, and I never know what someone is going to do, especially with the recent incident. I was on maternity leave when the person who was planning to attack our clinic [was caught], and so that kind of concerns me to the point where I had

thought do I need to keep doing this? Do I need to keep coming to this clinic as a provider? Everyone has their reason, but I have two infants at home now.

Id. at 132. Providers' family members can also have similar reactions. When anti-abortion extremists disseminated one doctor's personal information throughout the state, the doctor's husband had a difficult time dealing with the situation and the resulting safety concerns. She explained that her husband "hadn't really gotten his mind around that fear of being in our home. He hadn't thought about if you stand at the sink, there are nine windows." *Id.* at 140.

Providers employ many different strategies that help most of them continue with their work despite the extremists' efforts. For many providers, this means living their lives in a constant state of vigilance. One clinic administrator explained just how much this kind of harassment changed her life, particularly after the extremists targeting her revealed that they knew her home town, similar information to what would be disclosed if the documents at issue here were released without redaction. She said, "I feel like now I really just watch my back. I pay a lot more attention to my surroundings. Like when I leave, I'll look at my car for anything." She added that she is "very uncomfortable" when she goes to her home town. When she is there, her mother closes the blinds and demands that, when she leaves, she call her mother when she reaches her destination. *Id.* at 149.

This increased vigilance, foreign to most people, changes the most minute aspects of abortion providers' lives. For instance, many providers regularly check their cars before they get into them for any sign of tampering. They look around at who may be following them when they leave the clinic where they work. They keep detailed records about people who may be targeting them. They alter their daily routines so as not to be predictable. They park in different locations, drive different routes to work, vary their modes of transportation, go outside for breaks in groups, and close the window shades wherever they are. *Id.* at 148-55.

Some of the most extraordinary actions providers take are to prevent their identities from being discovered, reflecting just how important it is for the information at issue in this case to be redacted. Some providers hide their home address by using a post office box, registering their property under a relative's name, or relying on government programs that allow certain people to protect their personal information. To prevent anti-abortion extremists from knowing what they look like, some providers wear disguises to and from work, such as Halloween masks or baseball hats and dark sunglasses, or they pose as a patient or patient supporter. *Id.* at 155-61.

Providers take these actions not because they are ashamed of their work, but rather because they fear the harassment, threats, and violence that anti-abortion extremists have been engaging in for decades, which have increased since

Defendant Daleiden's release of the videos starting in July 2015. Hiding their identities can have an unfortunate consequence for abortion providers: they are silenced from speaking out about a topic about which they have strong feelings. One doctor said that she was proud of her work, but because she has to protect her "ability to live a free life, I have to act like someone who has done something wrong or criminal." *Id.* at 160. Another doctor lamented that because of the targeting he and others have faced, he had to reduce his public advocacy around abortion. *Id.* at 159.

Publicly disclosing information about providers, as would be the result if this Court were to reverse the district court's preliminary injunction, can be very costly for the affected individuals. Abortion providers modify their homes and offices to protect themselves, including installing extensive security systems. Some even move to more secure locations that are more difficult to discover or threaten. *Id.* at 161-66. And almost all of the providers that Cohen and Connon interviewed seriously considered the question of whether to purchase a gun and a bulletproof vest in response to the threats to their safety. Providers had very different answers to this question, but because of the threats to those in their profession, they were forced to consider it. *Id.* at 167-71. One doctor expressed incredulity about his circumstances by saying, "If anybody told me when I was in medical school that I would go to work armed and with a bulletproof vest, I would

have thought they were nuts. But I do have a bulletproof vest, and I do go to clinics armed these days.” *Id.* at 147.

This Court is familiar with the ways that abortion providers are affected by the release of abortion providers’ personally identifying information. In the Nuremberg Files/ACLA case described above, the plaintiffs described being terrified and altering their lives and medical practices as a result. *Planned Parenthood*, 290 F.3d at 1065-66. Because of the extent of the injury to the plaintiffs and the extremism directed at them, a federal jury awarded over \$100 million in compensatory and punitive damages (eventually reduced to just over \$5 million on appeal). *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 518 F.3d 1013 (9th Cir. 2008). In its 2005 decision considering the appropriateness of punitive damages in the case, this Court described the reprehensibility of the defendants’ conduct and the effect it had on the abortion providers. “Physicians were terrified and took the threat seriously. FBI and other law enforcement officials regarded the posters and files as sufficiently dangerous that they warned physicians to purchase bullet proof vests, obtain protection, and take other protective measures.” *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005).

The Fifth Circuit has also considered the ways abortion providers are affected by anti-abortion extremism. In *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000), a Texas doctor and his wife sued a group of anti-abortion protesters for various state torts, including invasion of privacy, infliction of emotional distress, and tortious interference. *Id.* at 777. The torts stemmed from the group incessantly picketing, harassing, threatening, and surveilling the plaintiffs. *Id.* at 775-77. As a result of these actions, Dr. Tompkins and his wife suffered. They hired security, wore bullet-proof vests, altered their routines, warned family members, lost business at Dr. Tompkins's medical practice, and suffered mentally. *Id.* at 776-77. After hearing the evidence, a jury awarded the Tompkinses a total of \$8 million in damages, *id.* at 777, which the Fifth Circuit largely affirmed on appeal (only partially reducing the verdict for a duplicative award). *Id.* at 788.

In a similar vein, Washington courts have recognized that the State has a compelling interest in protecting individuals against harassing or threatening actions, particularly those that compromise an individual's right to privacy. *Bering v. Share*, 106 Wn. 2d 212, 230, 721 P.2d 918, 929 (1986) (upholding a permanent injunction against anti-abortion protesters, observing that "continued harassment of physicians as they enter their lawful place of business may cause them to refuse to perform legal abortions for women" and finding that the State has a "compelling interest" in protecting a woman's right to privacy and her "ability to effectuate her

constitutional right to obtain an abortion”); *State v. Noah*, 103 Wn. App. 29, 41, 9 P.3d 858 (2000) (protecting citizens from harassment is a compelling state interest).

The concern that otherwise-willing medical professionals will not enter the field of abortion provision or will leave the field after entering it because of the harassment is real. Many of Cohen and Connon’s research subjects told of colleagues who refused to become an abortion provider as a result of the harassment, and one of the plaintiffs in the Nuremberg Files case stopped practicing medicine entirely for a time because of the threat. *Planned Parenthood*, 290 F.3d at 1066. Sociologist Lori Freedman’s work shows the same. She studied doctors who were trained to be abortion providers and were committed to the cause but who decided that they could not follow through on that commitment. Although doctors expressed several other reasons for not becoming abortion providers, harassment or extremism was one reason for some, especially doctors practicing in rural areas. One of the doctors Freedman interviewed explained her decision not to provide abortions by citing “the violence of the anti-abortion movement, which she felt could put her family at risk.” Lori Freedman, *Willing and Unable: Doctors’ Constraints in Abortion Care* 48-49 (2010).

Other studies of abortion providers bear this out. Political scientist Alesha Doan quantitatively assessed the correlation between anti-abortion harassment and

the number of abortion providers throughout the country. Her study concluded that “anti-abortion harassment is not the most powerful factor influencing the number of abortion providers, but it certainly plays a role.” Alesha E. Doan, *Opposition & Intimidation: The Abortion Wars and Strategies of Political Harassment* 151 (2007). She found that one of the harassing tactics that had the greatest impact on the number of abortion providers was intruding upon providers’ privacy by picketing at their homes after extremists found out where the provider lived. *Id.* at 145.

A 2016 study from *Amicus* Feminist Majority Foundation confirms that abortion providers generally persevere despite the harassment, but that it causes some providers to leave the field. Out of a total of 318 abortion clinics surveyed for the study, FMF found that the percentage of staff who resigned because of anti-abortion extremism was 5.6% (up from 2.2% in 2014 and 4.0% in 2008, but down from 10% in 1999, and 23% in 1993). For clinics that experienced high levels of violence, 17.6% reported staff resignations (up from 10% in 2010). The report’s conclusion on this point mirrored that of Doan -- that there is a “strong correlation between the incidence of violence and harassment and staff resignation.” Feminist Majority Foundation, *2016 National Clinic Violence Survey* 7.

As these studies show, if the information at the heart of this case were to be released without redaction, the harm to the abortion provider plaintiffs would be

real and substantial. Fearing harassment and violence, some might leave the field. For those who persevered, their lives would change in an instant as their privacy would be invaded and they and their loved ones would be forced to live with the increased possibility of extremist violence and threats, as has already happened to several who have been affected by Defendant Daleiden's actions.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Court affirm the Order of the district court dated November 15, 2016, granting plaintiffs preliminary injunctive relief.

DATED: March 16, 2017

Respectfully submitted,

David S. Cohen
Professor of Law
Thomas R. Kline School of Law
Drexel University
3320 Market St.
Philadelphia, PA 19104

Susan J. Frietsche
Women's Law Project
Western Pennsylvania Office
401 Wood Street, Suite 1020
Pittsburgh, PA 15222

Thomas E. Zemaitis
Krysten L. Connon*
Pepper Hamilton LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
connonk@pepperlaw.com
215-981-4853

* Counsel of Record for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

The text of the attached Brief Amici Curiae (excluding the signature in the Conclusion) contains 5,652 words. I used the word count function of Microsoft Word to count these words.

I used Times New Roman 14 point font.

Dated: March 16, 2017

/s/ Krysten L. Connon
Krysten L. Connon

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 March 16, 2017. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 16, 2017

/s/ Krysten L. Connon
Krysten L. Connon

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-36038

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief*.
I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) separately represented parties; (2) a party or parties filing a single brief in response to multiple briefs; or (3) a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or
Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)