

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

In the United States Court of Appeals for the Ninth Circuit

Planned Parenthood Federation of America, Inc., et al.
Plaintiffs-Appellees,

v.

Troy Newman, et al.
Defendants-Appellants

**On Appeal from the United States District Court
for the Northern District of California,
Hon. William H. Orrick, United States District Judge
Case No. 3:16-cv-00236-WHO**

**Brief *Amici Curiae* of Feminist Majority Foundation,
Physicians for Reproductive Health, and Abortion
Care Network in Support of Appellees and
Affirmance**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Feminist Majority Foundation, Physicians for Reproductive Health, and Abortion Care Network 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: July 26, 2021

/s/ Krysten L. Connon
Krysten L. Connon

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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, its effect on abortion providers,² the clinics where they work and the staff at these clinics, and the special importance California has placed on fighting this extremism. These considerations support the award of money damages to compensate Plaintiff Planned Parenthood Federation of America and its affiliates (Planned Parenthood) for security enhancements that Defendants' conduct made necessary.

Founded in 1987, the Feminist Majority Foundation (FMF) is dedicated to promoting women's equality, protecting and advancing reproductive freedom, and embracing non-violence. FMF uses research and action to empower women and girls economically, socially, and politically. FMF has long studied anti-abortion extremism as part of their work. FMF leads 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

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.

Clinic Violence Surveys, which measure anti-abortion violence and harassment.

The most recent survey was released in early 2019.

Physicians for Reproductive Health (PRH) is a doctor-led national organization that uses evidence-based medicine to promote access to comprehensive reproductive health care, including abortion. The PRH network includes physicians who practice in a wide range of fields: obstetrics and gynecology, family medicine, pediatrics, emergency medicine, internal medicine, psychiatry, and more. The abortion providers in PRH's network provide care in the face of harassment and a history of intimidation and violence because they believe in the autonomy and dignity of their patients and know that abortion is essential health care.

Abortion Care Network (ACN) is the national membership association for community-based independent abortion care clinics, which collectively provide the majority of abortion care in the United States, serving three out of every five people who has an abortion. By supporting independent clinics, ACN works to ensure that every person can access dignified, expert abortion care.

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. The actions of the Center for Medical Progress (CMP) and the other defendants that form the basis of this case have had profound and deadly consequences and have forced Planned Parenthood to implement effective security measures to protect against future 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 extensive online hit list of abortion providers – that anti-abortion threats and intimidation are not protected under the First Amendment. CMP’s actions are consistent with activities intended to threaten abortion providers and make them fear for their safety while working in their lawful professions providing constitutionally protected medical care.

As a result of anti-abortion violence and intimidation, abortion providers suffer greatly. While abortion providers are resilient with a steadfast commitment to providing their patients and communities with the care they need, many live in fear that they will be targeted, their families will be harassed, or their colleagues will be harmed. To deal with this harassment, they alter their lives in significant ways, including wearing disguises, taking different routes to work, concealing their

identities, and living in protected locations. Some leave the profession, while others choose never to enter the field, even after professional training.

To its immense credit, California's long-standing public policy against anti-abortion violence and in favor of protecting abortion providers and their privacy is a model for the rest of the country. Through various laws – civil and criminal, statewide and local – California has proclaimed that it is contrary to the public policy of the state to target and harass abortion providers and in particular, to use the disclosure of private information to put abortion providers in danger. *Amici* submit this brief to assist this Court in further understanding the context in which this case arises and to demonstrate why the district court's jury verdict and judgment are essential to protecting the safety of healthcare professionals and should be affirmed.

ARGUMENT

I. CMP's infiltration and illegal recordings of Planned Parenthood are consistent with decades of extremist tactics against abortion providers.

The infiltration of Planned Parenthood health centers and Planned Parenthood and National Abortion Federation (NAF) meetings, and the illegal recordings of Planned Parenthood staff, are part of a long history of anti-abortion violence, harassment, and intimidation dating to the years immediately following *Roe v. Wade*. Between 1977 and 2019, anti-abortion extremists murdered 11 individuals and attempted to murder 26 others, committed 4 acts of kidnapping, assaulted scores of health care workers, patients, and law enforcement personnel, and caused millions of dollars of damage to clinic property and equipment. See National Abortion Federation, *2019 Violence and Disruption Statistics* 11 (2019), available at <https://bit.ly/3ybQTRX>.

Abortion providers are also subjected to frequent harassment. Between 1977 and 2019, there have been 756 death threats or threats of harm, 620 acts of stalking, over 21,646 incidents of hate mail or harassing phone calls, and over 128,582 incidents of hate email or Internet harassment. *2019 Violence and Disruption Statistics, supra*. Targeted harassment, distinct from attacks and protests at clinics, is focused on 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 targeted harassment is part of their daily 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 and disseminated; they are victims of slurs based on their race, religion, or sexuality; and their property is trespassed upon. Providers of color endure identity-based harassment by “protesters [who] commonly comment on the provider’s race and the protester’s perception of a link between race and abortion.” David S. Cohen & Krysten Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 97 (2015).³ Their loved ones can also become targets, as anti-abortion extremists harass abortion providers’ partners, parents, children, neighbors, and colleagues to intimidate and indirectly target the provider. *Id.* at 110-118. This type of targeting, foreign to the experience of other medical professionals, conveys the clear message that providers must be constantly vigilant about their personal safety and privacy.

The first acts of anti-abortion violence and extremism began in the mid-1970s immediately following *Roe*. In 1975, a group of abortion opponents staged the first reported clinic invasion. James Risen & Judy L. Thomas, *Wrath of Angels:*

³ David Cohen testified at trial as an expert. 12-ER-3314-13-ER-3373. U.S. District Judge William Orrick ruled Cohen was not permitted to testify about the Defendants’ intent, the causation of the Plaintiffs’ damages, or the foreseeability of the violence following the release of the CMP videos. 2-ER-159 n.17; 2-ER-264.

The American Abortion War 61-62 (1998). The first known act of anti-abortion violence occurred in 1976 when extremist 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). In 1977, the Planned Parenthood clinic in St. Paul, Minnesota was set ablaze, causing a quarter million dollars' worth of damage. Risen & Thomas, *supra*, at 74. In 1978, a man threw a bag of flammable liquid in the receptionist's face at a Cleveland clinic, blinding her, and then set fire to the clinic. Patricia Baird-Windle & Eleanor J. Bader, *Targets of Hatred: Anti-Abortion Terrorism 54* (2001); Jefferis, *supra*, at 23. In 1979, 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 in the middle of surgery. Baird-Windle & Bader, *supra*, at 57; Jefferis, *supra*, at 23.

In the 1980s, new extremist groups, the Army of God and Operation Rescue, introduced new tactics, including kidnapping and massive clinic blockades. Jefferis, *supra*, at 23-25. In 1982, the Army of God kidnapped Hector Zevallos, who owned and directed the medical practice at the Hope Clinic for Women in Granite City, Illinois, and his wife. The couple was held captive for eight days. Baird-Windle & Bader, *supra*, at 64-66; Jefferis, *supra*, at 23-25. Arsons, firebombs, and other direct attacks on clinics continued through the 1980s as the Army of God expanded its reach. Operation Rescue, of which Defendant Troy

Newman has been president since 1999, also became active in the late 1980s, employing the tactic of blockading clinic entrances with massive numbers of its followers who refused to move. Baird-Windle & Bader, *supra*, at 88-89.

Also in the 1980s, several books and pamphlets were written advocating extreme actions against abortion providers, some advocating murder. The Army of God published a manual with instructions on using violence and intimidation against abortion providers, writing that killing abortion providers is “morally acceptable and justified as doing ‘God’s work.’” Daryl Johnson, *Hate in God’s Name*, Southern Poverty L. Ctr. (Sept. 25, 2017), <https://bit.ly/3qok4hd>; *see Army of God Manual*, https://www.armyofgod.com/AOGsel4_5_6.html (hard copy on file with *amicus* Feminist Majority Foundation). Another book, *Closed: 99 Ways to Stop Abortion*, written by Joseph Scheidler, former leader of the Pro-Life Action League, stopped short of advocating murder but did advocate other extreme measures, such as disrupting NAF annual meetings before they were closed to the public. At one meeting in the mid-1980s, Scheidler threatened then-NAF president Glenna Halverson-Boyd, pinning her against a wall and saying, “I’m gonna see the death of you and the likes of you.” Baird-Windle & Bader, *supra*, at 116. Among the many reasons NAF and Planned Parenthood meetings are now closed to the public is to prevent threats and invasions from anti-abortion extremists.

In the 1990s, anti-abortion violence turned deadly for the first time. On March 10, 1993, Dr. David Gunn was the first doctor to be murdered by anti-abortion extremists when he was shot while walking into the Pensacola Women's Medical Services clinic. Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015), <https://nyti.ms/2On6LMH>. Since Dr. Gunn's murder, there have been at least ten other anti-abortion murders in this country:⁴

July 29, 1994: Dr. John Britton and a clinic volunteer were murdered in the parking lot of a clinic in Pensacola. *Id.*

December 30, 1994: Two clinic receptionists in Massachusetts were shot and killed. John Kifner, *Anti-Abortion Killings: The Overview; Gunman Kills 2 at Abortion Clinics in Boston Suburb*, N.Y. Times (Dec. 31, 1994), <https://nyti.ms/2qEEdFG>.

January 30, 1998: An extremist detonated multiple bombs at a Birmingham clinic, killing a police officer. Stack, *supra*.

⁴ 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 world. In 2001, 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, <https://bit.ly/3hmMP9X>.

October 23, 1998: A sniper murdered Dr. Barnett Slepian in his home in New York. *Id.*

May 31, 2009: Dr. George Tiller, the sole abortion provider in Wichita, Kansas, was shot and killed in his church. Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. Times (May 31, 2009), <https://nyti.ms/2KWu9P7>. Dr. Tiller survived a prior shooting in 1993. *Id.*

November 27, 2015: An extremist murdered a police officer and two patient companions at a clinic in Colorado Springs. Trevor Hughes, *Planned Parenthood Shooter ‘Happy’ with His Attack*, USA Today (Apr. 11, 2016), <https://bit.ly/3xPRYhy>.

Since 1991, there have also been 29 attempted murders of abortion providers or their associates via gunshots or bombings. Most recently, in the 2015 Colorado Springs shooting that killed three, nine others were shot but survived. *See* Joyce Arthur, *Anti-Choice Terrorism: Murders and Attempted Murders* (May 2016), *available at* <https://bit.ly/3zUWInV> (comprehensively setting forth all anti-abortion murders and attempted murders). Chillingly, anti-abortion extremists began signing and circulating “justifiable homicide” petitions endorsing and justifying deadly attacks against physicians who provide abortion care. National

Abortion Federation, *South Dakota Must Not Legalize Murder of Abortion Providers*, <https://bit.ly/3gT6WgX>.

Violent anti-abortion extremists since the 1990s have employed newer tactics, including using the Internet to amplify anti-abortion threats and harassment. As early as 1996, the Nuremberg Files website published photos, addresses, telephone numbers, and other personal information for over 200 abortion providers. The website ominously identified injured providers by shading their names gray and crossed out murdered providers' names, essentially functioning as a hit list. Extremists published WANTED-style posters with the photos and names of abortion providers and offered monetary rewards to anyone who stopped those physicians from providing abortions.⁵ The American Coalition of Life Activists (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 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

⁵ 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, 1134 (D. Ore. 1999).

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 remain online to this day. Cohen & Connon, *supra*, at 72.

Online harassment of abortion providers reminiscent of the Nuremberg Files has become commonplace. Websites such as AbortionDocs.org⁶ compile personal information about providers of abortion care nationwide that anyone can access. 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. Cohen & Connon, *supra*, at 72-74.

NAF has chronicled that death threats and other threats of harm have skyrocketed in the past decade, particularly online and during the months following the Defendants' campaign. NAF's 2015 statistics reflect a dramatic increase in hate speech and Internet harassment, death threats, attempted murder, and murder, which coincided with the Defendants' release of heavily-edited, misleading, and inflammatory videos beginning in July 2015. Three of the eleven reported murders happened in November 2015 when Robert Dear opened fire at a clinic affiliated with Planned Parenthood of the Rocky Mountains, which had been

⁶ AbortionDocs.org is a project of Operation Rescue, whose president is Defendant Troy Newman. 14-ER-3891:12-17.

targeted in the CMP videos.⁷ When police arrested Dear, he made a reference to part of the CMP videos. After each video was released, social media, blogs, and news websites were filled with incendiary comments about the doctors who were misrepresented in the videos, including that they were “evil,” “vile,” “inhuman,” “murderers,” and that abortion providers “deserve everything they have coming” to them. National Abortion Federation, *2015 Violence and Disruption Statistics I* (2015), available at <https://bit.ly/3dbLiCq>.

Reported death threats increased dramatically from one threat in 2014 to 94 in 2015. An individual wrote death threats online to a CEO of a tissue procurement organization after she was featured in one of CMP’s videos, stating that she “should be hung by the neck using piano wire and propped up on the lawn in front of the building. . .” The person identified where the CEO lived and stated, “I’m going there . . . I’ll pay ten grand to whomever beats me to [CEO] . . . [CEO] must die . . .” The same person offered a reward online for the murder of a doctor, posting, “I’ll pay ten large to whomever kills [Doctor]. Anyone. Go for it.” Following the videos, one NAF member received a voicemail that said someone planned to “pull a Columbine and wipe everyone out,” and an unknown male called a hospital switchboard in North Carolina saying, “We will kill all [hospital]

⁷ At trial, testimony related to the foreseeability of the Colorado murders was excluded. 2-ER-159 n.17; 2-ER-264.

abortion doctors...” Further, anti-abortion extremists began picketing in front of a provider’s personal residence and harassed her neighbors after she was featured in one of the videos. The alarming rise in threats and violence in 2015 directly correlates with the Defendants’ campaign of demonizing providers. *2015 Violence and Disruption Statistics, supra*, at 1-2.

Abortion providers continue to experience alarming levels of violence. In 2019, abortion providers reported an increase in targeted violence and disruption. *See 2019 Violence and Disruption Statistics*. Clinic invasions more than doubled in 2019 from the previous year. *Id.* at 2. Abortion providers reported an increase in death threats and threats of harm, from 57 in 2018 to 92 in 2019, as well as a rise in incidents of targeted hate mail and harassing phone calls, from 1,388 in 2018 to 3,123 in 2019. *Id.* There was an increase in bomb threats, from 3 in 2018 to 8 in 2019. *Id.* Additionally, extremists staged arson attacks at clinics in Texas, Missouri, and Pennsylvania in 2019. *Columbia Man Charged with Arson at Planned Parenthood Clinic*, Dep’t of Justice, U.S. Att’y Office W.D. Mo. (Mar. 4, 2019), <https://bit.ly/35Qt6dG>; Amanda Michelle Gomez, *Arson attempt, trespassing, and harassment: The consequences of extreme anti-abortion rhetoric*, THINKPROGRESS <https://bit.ly/3hiknX5> (May 6, 2019); Andy Palumbo & Chelsea Strub, *Planned Parenthood in Wilkes-Barre Vandalized, Security*

Camera Image Released, WNEP Newswatch 16 (Aug. 12, 2019),

<https://bit.ly/2T2Kedh>.

Earlier this year, on the anniversary of *Roe v. Wade*, an unidentified individual fired a shotgun at the doors of an unoccupied Planned Parenthood in Knoxville, Tennessee. Melissa Greene, *Police investigating after shots fired at Knoxville's Planned Parenthood clinic on anniversary of Roe v. Wade*, WATE 6 (Jan. 22, 2021), <https://bit.ly/3qoeb3C>. In February 2021, the New York Attorney General filed a lawsuit against two anti-choice protesters, one of whom was caught on camera “slam[ming] a [Planned Parenthood] health center staff member’s hand in a door, causing her to need x-rays; repeatedly shov[ing] a volunteer patient escort attempting to enter the facility; slapp[ing] a different volunteer in the face; and threaten[ing] to knock an escort unconscious.” Complaint at 3, *People v. Beaty*, No. 21-CV-1159 (S.D.N.Y. Feb. 9, 2021).

CMP’s infiltration and illegal recordings conform with this long history of anti-abortion extremism. CMP infiltrated confidential meetings and illegally filmed people with the intent to expose the identities of Planned Parenthood staff, blurring out all faces of non-providers while purposefully leaving providers’ faces unblurred and identifiable.⁸ These tactics are similar to the public exposure of

⁸ Defendant David Daleiden testified at trial that he sent various emails to Ryan Gonzales instructing him to blur out CMP staff and clinic patients, but not Planned Parenthood providers and staff. 10-ER-2700-06.

abortion providers by plastering their photos on WANTED-style posters and on sites like the Nuremberg Files. In any of these methods, the goal is to expose identities of abortion providers and staff in order to invite anti-abortion extremists to target them, with the knowledge that someone will undoubtedly accept the invitation. The disclosure of a doctor's identity and other personal information can be tantamount to a death sentence, and here CMP provided this information knowing anyone could pull the trigger. Further, CMP's infiltration is reminiscent of early instances of clinic invasions, where the goal is to enter private premises with malicious intent. CMP clearly drew upon some of the most threatening tactics of the anti-abortion extremist movement. It is precisely the extensive history and continuing practice of violent tactics by the anti-abortion extremist movement that rendered CMP's conduct so powerfully threatening.

II. Extremist actions against abortion providers have severe consequences for providers, including forcing them to live in fear under heavy security

Anti-abortion extremism can have devastating effects on abortion providers' lives that necessitate effective security measures to protect their safety.

Immediately following the release of one of CMP's illegal recordings of a Planned Parenthood abortion provider, this provider began to receive threatening emails, social media messages, phone calls, and voicemails, and even had her parents contacted by extremists. 8-ER-1929-33. Due to concerns for her safety and the

safety of the Planned Parenthood affiliate staff, she was unable to work and did not leave her house “for the first few weeks” following the release of the recordings. 8-ER-1932. Following CMP’s release of a video of a different provider, the provider received death threats on social media, extremists protested at her home, and her neighbors became targets when extremists put “very graphic postcards in the mailboxes of [her] neighbors” that read “[d]id you know that your neighbor is a baby killer?” 7-ER-1662-65. This provider had to leave the house she lived in for nearly 20 years because she was unable to adequately fortify her home against extremists fueled by CMP’s actions. 7-ER-1666.

These impacts on abortion providers are not unique. In fact, a Planned Parenthood provider who was illegally recorded by CMP testified that “two of the clinics [she] worked at were firebombed,” and that she had to wear a flak jacket to work at a Cincinnati clinic to protect herself from extremist violence. 6-ER-1495. The security measures Planned Parenthood was forced to implement are commensurate with the targeted harassment of its providers, and indeed essential given the tactics of their tormentors. The jury recognized the devastating impact CMP’s actions had on Planned Parenthood staff and providers and thus found that the security expenses Planned Parenthood incurred in order to protect its staff and providers were reasonable.

In their 2015 book about anti-abortion extremism, Professor David S. Cohen and attorney Krysten Connon, an author of this brief, undertook an in-depth study of the many ways targeted harassment affects abortion providers. Cohen & Connon, *supra*. Cohen and Connon interviewed 87 abortion providers around the country 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 explaining how providers react to targeted harassment and how they change their lives to protect themselves confirm that the testimony relied upon by the jury reflects experiences that are as commonplace among providers as is anti-abortion harassment. *See id.* at 123-171.

While abortion providers are proud of the care they provide in their communities, because they are truly “in the crosshairs,” 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 explained that she felt a 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. This provider understandably felt vulnerable, not knowing who else had her personal information and knowing only that it was being funneled to extremists.

The terror tactics reach far beyond the individual abortion provider. Many providers expressed a stronger sense of concern for others in their lives – including patients, co-workers, neighbors, and family – than they did for 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 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. The doctor 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 and clinic staff, this means maintaining constant vigilance. One clinic administrator explained how much this kind of harassment changed her life, particularly after the extremists targeting her revealed that they knew her hometown. 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 hometown. When she is there, her mother closes the blinds and demands that, when she leaves, she calls her mother when she reaches her destination. *Id.* at 149.

This increased vigilance, foreign to most, 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. Clinics likewise take extensive precautions to protect their providers and staff. *See, e.g.,* Cohen & Connon, *supra*, at 148 (discussing clinics in two states that arrange for armed guard to escort doctor to and from airport).

Some of the most extraordinary actions providers are forced to take are to prevent disclosure of their personally identifying information. 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 people subject to stalking to protect their personal information on government databases. To prevent anti-abortion extremists from identifying them, 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. One abortion provider illegally recorded by CMP testified that while working at a Cincinnati clinic she “ended up having a dual identity” – using her maiden name for work and married name in her children's school directory to prevent extremists from identifying her children. 7-ER-1495-96.

Providers and the clinics where they work take these actions not because they are ashamed of their work, but because they fear the harassment, threats, and violence that anti-abortion extremists have engaged in for decades. Hiding their identities can have an unfortunate consequence for abortion providers, however: they are silenced from speaking out on a topic they care about. 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.” Cohen & Connon, *supra* at 160.

Publicly disclosing information about staff and providers, as the CMP videos do, can be costly for the affected individuals. Abortion providers modify their homes and offices to protect themselves, including installing advanced security systems. One Planned Parenthood provider testified that she had to update her alarm system after the release of the videos to include “cameras and a safe room.” 8 -ER-1932. Some move to more secure locations that are more difficult to discover or break into. Cohen & Connon, *supra*, at 161-66. And almost all of the providers interviewed by Cohen and Connon considered whether to purchase a gun and bulletproof vest in response to the threats to their safety. One doctor commented, “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 anti-abortion extremism. In the Nuremberg Files/ACLA case, the plaintiffs described being terrified and altering their lives and medical practices as a result. *Planned Parenthood of the Columbia/Willamette, Inc.*, 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 (punitive damages reduced to just over \$5 million on appeal to comport with due process). *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 high 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 anti-abortion group incessantly picketing, harassing, threatening, and surveilling the plaintiffs. *Id.* at 775-77. In response, Dr. Tompkins and his wife 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. A jury awarded the Tompkinses a total of \$8,000,000 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.

The concern that otherwise-willing medical professionals will not enter the field of abortion care or will leave the field after entering it because of harassment is real. Many of Cohen's and Connon's research subjects told of colleagues who refused to become abortion providers as a result of the harassment they or their colleagues experienced; indeed, 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 produced similar findings. She studied doctors who trained to be abortion providers and were committed to the cause but who decided they could not follow through on that commitment. Although doctors expressed various reasons for not becoming abortion providers, harassment or extremism was a commonly cited reason,

especially among 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. *Id.* at 145.

A 2016 study from *Amicus* FMF confirms that abortion providers and clinic staff generally persevere despite the harassment, but that it causes some providers to leave the field. Directly following the Defendants’ campaign in 2015, a total of 6.9% of clinics reported at least one staff member quit because of anti-abortion violence or harassment, up from 5.5% in 2014. Moreover, out of the clinics reporting high levels of severe violence and harassment, 17.6% experienced staff

resignations in 2016 following this anti-abortion activity. This rate is significantly higher than in both 2008 and 2010, when 4% and 2.2% of clinics reported staff resignations after experiencing anti-abortion violence and harassment, respectively. Feminist Majority Foundation, *2016 National Clinic Violence Survey* 11 (2016), <https://bit.ly/3xT5Nvt>.

As these studies and the extensive factual record in this case show, CMP's illegal recording and infiltration led to some of the most threatening tactics of the anti-abortion extremist movement and caused substantial harm to abortion providers. History shows a pattern of violence flowing from anti-abortion extremist tactics like those utilized by CMP. As such, it is clear why Planned Parenthood took seriously the death threats and harassment its providers experienced due to CMP's illegal actions and implemented reasonable security measures to protect its providers. The jury's determination that Planned Parenthood's security expenses were reasonably incurred should be upheld.

III. California law reflects a deep-seated public policy against actions that threaten, intimidate, and terrorize abortion providers, particularly those actions that compromise their privacy.

California law contains a strong public policy that condemns anti-abortion violence generally and invasions of abortion provider privacy specifically. The state also has adopted several measures that not only condemn these violations but also give abortion providers powerful ways to protect themselves before the

occurrence of any violence or invasion of privacy and to have recourse in the courts and administrative agencies if such actions do occur.

Perhaps the aspect of California law most directly on point is its expansion of the Safe at Home program in 2002. The program was created in 1988 as a way to assist victims of domestic violence. The basic protection the program offers is to allow those who register to use a substitute address in all public databases so no one can search through public records to find out where that person lives. In 2002, the program was expanded to include any “reproductive health care service provider, employee, or volunteer who is fearful for his or her safety or the safety of his or her family because of his or her affiliation with a reproductive health care services facility.” Cal. Gov’t Code § 6215.2(a)(1). The extension of the Safe at Home program to providers of reproductive health care manifests California’s understanding of the importance of abortion providers’ privacy and its intention to protect them from anti-abortion harassment.

California’s legislators did not leave the purpose of the law to guesswork, as they included detailed findings as part of the law that prove the high importance the State puts on protecting abortion providers from anti-abortion harassment through invasions of privacy. The legislature found and declared that “persons working in . . . the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups.” Cal. Gov’t Code §

6215. The legislature cited statistics of violence and harassment against providers, outlined some of the tactics of anti-abortion groups, and noted that “the threat of violence toward reproductive health care service providers and those who assist them has clearly extended beyond the clinic and into the home.” *Id.* Citing statistics demonstrating lack of availability of abortion providers, the legislature noted that “there exists a fear on the part of physicians to enter the reproductive health care field and to provide reproductive health care services,” and concluded:

Reproductive health care services are legal medical procedures. In order to prevent potential acts of violence from being committed against providers, employees, and volunteers who assist in the provision of reproductive health care services and the patients seeking those services, it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential.

Id.

Separately, California law explicitly protects providers’ home addresses, home telephone numbers, and images from being posted online in certain situations. California Government Code §§ 6218-6218.05 prohibits anyone from posting this information with intent to incite a third person to threaten or cause harm to the provider. Cal. Gov’t Code §§ 6218(a)(1)(A) & (B). An aggrieved provider can sue for injunctive, declaratory, or monetary relief and has a statutory right to demand that the information be removed from the Internet. This law further evidences California’s commitment to protecting providers from extremism and the unauthorized use of their personal information.

Beyond the protection of personal information from public disclosure, California strongly protects against acts that injure, intimidate, or interfere with abortion providers. The California Freedom of Access to Clinic and Church Entrances Act, Cal. Penal Code §§ 423-423.6, is modeled after the federal Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and applies similar protections under California law. The lead sponsor of the law recognized the importance of supplementing the federal law in her cover letter introducing the bill: “[T]he federal government cannot take the place of local police in protecting abortion clients and providers on a day-to-day basis. California must give its police the laws, training, tools, and backup they need to do that job.” Letter from Deborah V. Ortiz to Senate Colleagues Introducing SB 780 (May 2001), *available at* <https://bit.ly/3qm4tiq>. This law, which took effect January 1, 2002, addressed the “need to develop a plan to protect women’s reproductive rights in California,” a need “clearly demonstrated by national trends in both anti-choice legislation and anti-reproductive-rights crimes.” Robert Richard Springborn, *Special Report to the Legislature on Senate Bill 780: California Freedom of Access to Clinic and Church Entrances Act and Reproductive Rights Law Enforcement Act 8* (2003), *available at* <https://bit.ly/3w5ws7n>. The Attorney General further noted that the “incidence of anti-reproductive-rights crimes across our nation is also increasing” which “clearly show[s] the necessity to protect women’s reproductive rights in

California by developing a plan to prevent, apprehend, prosecute, and report anti-reproductive-rights crimes in California.” *Id.*

This law recognizes the importance of protecting both the safety and privacy of abortion providers. As the legislative counsel’s digest indicates in the preamble to the Senate bill that became Sections 423-423.6, the law requires:

a court . . . to take all actions reasonably required to protect the safety and privacy of the parties, witnesses, and persons who are victims, or at risk of becoming victims, of the prohibited activities. This bill would allow specific persons to use pseudonyms in civil actions related to prohibited acts.

Sen. Bill 780, Ch. 899 1-2 (preamble); *see also* Cal. Civ. Code § 3427.3 (allowing courts to safeguard privacy in civil actions by health care facilities suing for the tort of “commercial blockade” and those bringing such suits to use pseudonyms “to protect their privacy”).

Ten California municipalities have also taken steps to protect abortion providers from invasions of privacy by prohibiting or limiting picketing at their homes.⁹ San Jose’s law was challenged, and the California Court of Appeals found it constitutional in 1995. *City of San Jose v. Superior Court*, 32 Cal. App. 4th 330

⁹ Davis, Cal., Mun. Code § 35.06; Glendale, Cal., Mun. Code § 9.20.080; Huntington Beach, Cal., Mun. Code § 9.20.030; Irvine, Cal., Mun. Code §§ 4-14.104, 4-14.107; Los Angeles, Cal., Mun. Code ch. 5, art. 6.1, § 56.45(e); Riverside, Cal., Mun. Code §§ 8.54.010, 9.54.030-9.54.050; San Jose, Cal., Mun. Code § 10.09.010; Santa Ana, Cal., Mun. Code § 10-110; Solana Beach, Cal., Mun. Code §§ 7.38.010-7.38.020; Tustin, Cal., Mun. Code §§ 6510-6520.

(Cal. Ct. App. 1995). In that decision, the court noted the importance of protecting abortion providers' privacy, both as a matter of California law and United States Supreme Court precedent. *Id.* at 341.

Taken together, these laws bespeak a strong California public policy to protect abortion providers from anti-abortion extremism generally and invasions of privacy specifically. Despite these protections, providers and clinic staff still reasonably fear for their safety and often need to take additional protective measures. The district court jury verdict and judgment awarding Planned Parenthood damages corresponding to enhanced security measures to protect against anti-abortion extremism is in harmony with and is supported by this emphatically articulated public policy.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Court affirm the judgment of the district court in favor of the Plaintiffs.

DATED: July 26, 2021

Respectfully submitted,

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