

No. 16-36038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOES 1-10, and JOHN DOES 1-10,
individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

DAVID DALEIDEN, an individual,

Defendant-Appellant,

ZACHARY FREEMAN, UNIVERSITY OF WASHINGTON, and
PERRY TAPPER, in his official capacity,

Defendants.

On Appeal from the U.S. District Court for the Western District of
Washington, the Honorable James L. Robart Presiding

**BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF
OBSTETRICIANS AND GYNECOLOGISTS, NATIONAL
ABORTION FEDERATION, AND PHYSICIANS FOR
REPRODUCTIVE HEALTH IN SUPPORT OF APPELLEES**

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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amici all have an interest in ensuring that reproductive healthcare providers and researchers may perform their jobs safely. The personally identifying information that Defendant David Daleiden wants disclosed will put providers and researchers in danger. Amici have an interest in ensuring that this information is not disclosed. They can also offer a knowledge of reproductive healthcare—and the circumstances in which it is provided—that is not only unique but also relevant to the Court’s legal analysis.

I. American College of Obstetricians and Gynecologists

The American College of Obstetricians and Gynecologists (ACOG) is a non-profit educational and professional organization founded in 1951. With more than 58,000 members, including 1,033 in Washington, the College is a leading professional association of physicians who specialize in women’s health care. ACOG’s membership includes

¹ All parties to this appeal have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). In accordance with Federal Rule of Appellate Procedure 29(a)(4), Amici state that they and their counsel authored this brief in whole; that no counsel for a party authored any part of this brief; and that no person and no party to this case—other than Amici, their members, and their counsel—made a monetary contribution to the preparation or submission of this brief.

physicians who provide the full spectrum of women's healthcare, including abortion care, and ACOG has a direct interest in protecting its members from violence and harassment.

II. National Abortion Federation

The National Abortion Federation (NAF), a nonprofit organization founded in 1977, is the professional association of abortion providers. NAF's members include nearly 400 nonprofit and private facilities, women's health centers, hospitals, and private physicians' offices. NAF acts as an advocate for provider protection with all levels of law enforcement, tracks and informs its members about anti-abortion violence, and conducts on-site security assessments and training for facility staff to assist with safety concerns. NAF therefore has a keen interest in ensuring that reproductive healthcare providers will not be put in danger.

III. Physicians for Reproductive Health

Physicians for Reproductive Health ("Physicians") is a doctor-led nonprofit that seeks to assure meaningful access to comprehensive reproductive health services, including contraception and abortion, as part of mainstream medical care. Founded in 1992, the organization currently has over 6,000 members across the country, including over

3,000 physicians who practice in a range of fields: obstetrics and gynecology, pediatrics, family medicine, emergency medicine, cardiology, public health, neurology, radiology, and more. These members, many of whom provide abortion care, include faculty and department heads at academic medical centers and top hospitals.

SUMMARY

Amici submit this brief for two purposes. First, they wish to show that the consequences that Plaintiffs fear from the release of identifying information about them—the chilling effects of which they warn—are entirely real. Providers of abortions have been subjected to decades of threats and violence. What is more, after a period of declining violence, Daleiden’s release of identifying information about other people involved in fetal tissue donation caused a surge in harassment, assault, and murder.

Second, Amici want to emphasize that there are no *legitimate* considerations favoring the release of personally identifying information about Plaintiffs. The connection between abortion and fetal tissue donation is tenuous to begin with, since there is not the slightest evidence that fetal tissue donation encourages abortions. The public

interest is further lessened by the existing ethical guidelines governing tissue donation. Worse, information identifying specific people does not promote the goal that Daleiden trumpets to support his request for identifying information: the public's interest in government expenditures, contracting, and research. That interest can be fully satisfied by redacted documents, the production of which the district court has already allowed. In the end, this Court is left with a puzzle: The goals that Daleiden claims he is pursuing do not match the means with which he pursues them. Whatever the solution to that puzzle, it is not the release of unredacted documents.

ARGUMENT

I. Publicizing the identities of reproductive healthcare providers will put them in danger—as evidenced by the decades of terrorism and harassment they have suffered, including the recent surge triggered by Defendant David Daleiden.

The Plaintiffs—who include reproductive healthcare providers—engage in association and expression protected under the First Amendment. *See* Response Br. of Pls.-Appellees 19–20. The dispositive question is thus whether there is a “reasonable probability” that the disclosure of their identities “will subject them to threats, harassment, or reprisals from either Government officials or private parties” due to

their constitutionally protected activity. *Doe v. Reed*, 561 U.S. 186, 200 (2010) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).²

Sadly, the answer to this question is emphatically yes. This can be seen from the evidence that Plaintiffs have marshaled and put in the record. In addition, from enduring decades of violence against and harassment of reproductive healthcare providers, Amici are deeply aware of their own vulnerability.

The United States has a long history of violent attacks against reproductive healthcare providers and facilities. Amicus NAF's statistical surveys indicate that from 1977 to 1989, reproductive healthcare facilities suffered 64 recorded arsons, 25 bombings, and 37 attempted arsons and bombings.³ *See infra* p. 7, Figure 1.

² This question also bears on the likelihood of irreparable injury, and hence the propriety of the district court's preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

³ NAF's data derives from law enforcement sources and a monthly member survey for the United States, Canada, and Colombia. The vast majority of incidents reported occurred in the United States. The Court should also be aware that the actual number of incidents is likely to be significantly higher than the survey indicates. This is true for several reasons. First, not all incidents are reported to law enforcement. Second, NAF surveyed only its members, and not all

The 1990s saw an escalation of violence against clinics—in both frequency and gravity. In that decade, seven abortion providers and facility workers were murdered. *Id.* There were also 16 attempted murders, 96 arsons, and a whopping 100 attacks with butyric acid, a noxious chemical that induces nausea, leads to the evacuation of whole buildings, and requires an expensive clean-up. *Id.*

Threats of violence increased along with violence itself. The 1990s witnessed at least 245 bomb threats and 247 death threats against reproductive healthcare providers, as well as thousands of pieces of hate mail or harassing calls. *Id.*

reproductive healthcare providers are members of NAF. Third, not all NAF members responded to the survey.

Figure 1. Incidents of violence and disruption by decade.

Violence	NAF VIOLENCE AND DISRUPTION STATISTICS (Summary by Decade)					Totals
	1977 to 89	1990 to 99	2000 to 09	2010 to 15		
Murder ¹	0	7	1	3	11	
Attempted Murder	0	16	1	9	26	
Bombing	25	15	1	1	42	
Arson ¹	64	96	14	11	185	
Attempted Bombing/Arson ¹	37	39	20	2	98	
Invasion	247	117	25	15	404	
Vandalism	244	575	570	145	1,534	
Trespassing ²	0	193	1,864	621	2,678	
Biolyric Acid Attacks	0	100	0	0	100	
Anthrax/Bioterrorism Threats	0	47	614	2	663	
Assault & Battery	58	53	71	21	203	
Death Threats/Threats of Harm ¹	70	247	88	111	516	
Kidnapping	2	1	1	0	4	
Burglary	20	35	98	36	189	
Stalking ⁴	20	404	110	45	561	
Totals	767	1,945	3,478	1,024	7,214	
Disruption						
Hate Mail/Harassing Calls	192	6,327	6,210	2,381	15,110	
Hate Email/Internet Harassment ⁵			345	26,120	26,465	
Hoax Devices/Suspicious Packages ⁶			160	63	223	
Bomb Threats	237	245	129	22	634	
Picketing ⁷	847	29,937	110,600	49,524	190,908	
Obstruction ⁸				968	968	
Totals	1,276	36,509	117,444	79,079	234,308	
Clinic Blockades						
Number of Incidents	385	289	87	83	844	
Number of Arrests ⁹	24,380	9,447	4	5	33,836	

All numbers represent incidents reported to or obtained by NAF. Actual incidents are likely much higher.

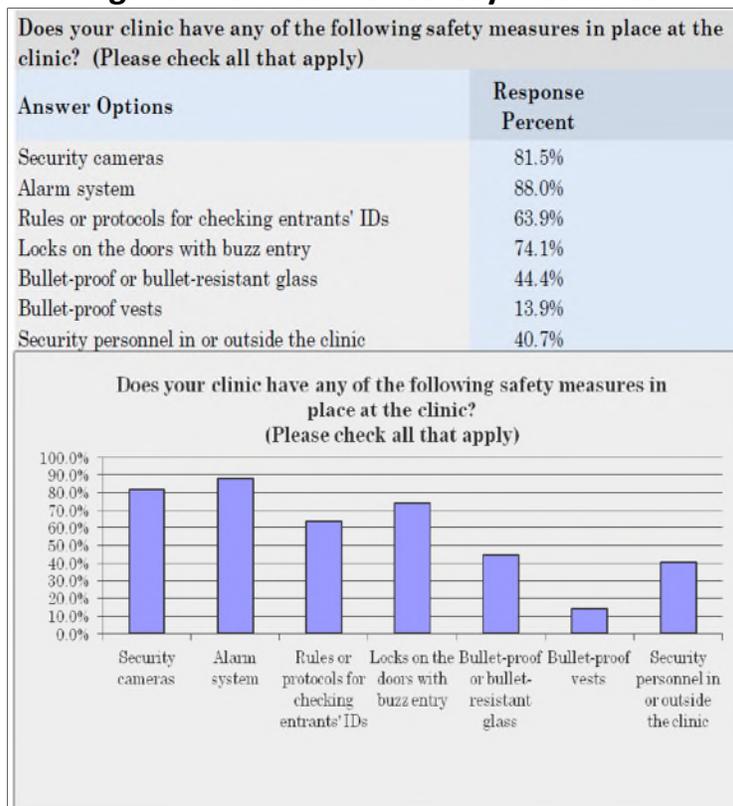
Numbers prior to 2013 represent the U.S. and Canada only. Numbers from 2013-2015 represent the U.S., Canada, and Colombia.

¹ Incidents recorded are those classified as such by the appropriate law enforcement agency. Incidents that were ruled inconclusive or accidental are not included.
² Tabulation of trespassing began in 1999.
³ Death Threats, as of 2015, include any reported or discovered "Threats of Harm."
⁴ Stalking is defined as the persistent following, threatening, and harassing of an abortion provider, staff member, or patient away from the clinic. Tabulation of stalking incidents began in 1993.
⁵ Tabulation of email harassment began in 2002. As of mid-November 2015, enhanced technology allowed for an increased ability to uncover Hate Email/Internet Harassment.
⁶ Tabulation of hoax devices began in 2002.
⁷ NAF changed its method of collecting picketing data in 2012. Obstruction was separated into its own category.
⁸ Tabulation of Obstruction began in 2012. Obstruction is defined as the act of causing a delay or an attempt to cause a delay in the conduct of business or prevent persons from entering or exiting an area. This would apply to violations of the FACE Act.
⁹ The "number of arrests" represents the total number of arrests, not the total number of persons arrested. Many blockaders are arrested multiple times.

Source: 2015 National Abortion Federation Anti-Abortion Violence and Disruption Statistics (Apr. 2016).

This history of violence and threats explains why—unlike any other healthcare providers—abortion providers must spend a great deal of time and energy on security precautions. About four out of five recently surveyed reproductive healthcare facilities have security cameras, nearly 90% have alarm systems, and almost half have bulletproof glass:

Figure 2. Clinics with safety measures.



Source: National Abortion Federation Anti-Abortion Violence and Disruption Survey Results (September 2013).

Terrorism against reproductive clinics has not subsided. To be sure, some kinds of violence and harassment against clinics decreased

in the first decade of this century (e.g., arson), although others did not (e.g., bioterrorism threats). *See supra* p. 7, Figure 1. But NAF's most recent survey—completed in April 2016—disclosed an alarming rise in threats and violence in the preceding year. *See infra* p. 10, Figure 3.

In 2015, three people were murdered and nine wounded at a clinic in Colorado Springs. *See id*; *see also* Julie Turkewitz & Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, N.Y. Times, Nov. 27, 2015, at A1. Incidents of arson rose fourfold from the previous year. *See infra* p. 10, Figure 3. And death threats or threats of harm totaled 94, *id.*—more than occurred during the entirety of the preceding decade, *see supra* p. 7, Figure 1.

Figure 3. Violence and disruption statistics (2010-2015).

Violence	NAF VIOLENCE AND DISRUPTION STATISTICS (2010 - 2015)						Totals 2010-15
	2010	2011	2012	2013	2014	2015	
Murder ¹	0	0	0	0	0	0	3
Attempted Murder	0	0	0	0	0	0	9
Bombing	0	1	0	0	0	0	1
Arson ¹	0	1	5	0	1	4	11
Attempted Bombing/Arson ¹	1	1	0	0	0	0	2
Invasion	0	0	0	8	1	6	15
Vandalism	22	27	12	5	12	67	145
Trespassing ²	45	69	47	264	78	118	621
Biohazard Acid Attacks	0	0	0	0	0	0	0
Anthrax/Bioterrorism Threats	1	1	0	0	0	0	2
Assault & Battery	4	3	7	0	1	6	21
Death Threats/Threats of Harm ³	2	2	6	2	1	94	111
Kidnapping	0	0	0	0	0	0	0
Burglary	13	8	5	0	1	9	36
Stalking ⁴	7	1	6	20	4	9	47
Totals	95	114	88	299	99	325	1,024
Disruption							
Hate Mail/Harassing Calls	404	365	452	420	367	373	2,381
Hate Email/Internet Harassment ⁵	44	17	41	88	91	25,839	26,120
Hoax Devices/Suspicious Packages ⁶	8	2	7	2	9	35	63
Bomb Threats	12	1	1	4	1	4	23
Picketing ⁷	6,347	4,780	5,706	5,574	5,402	21,715	49,524
Obstruction ⁸			79	396	251	242	968
Totals	6,815	5,165	6,286	6,484	6,121	48,208	79,079
Clinic Blockades							
Number of Incidents	1	5	6	3	23	45	83
Number of Arrests ⁹	0	0	4	1	0	0	5

Numbers prior to 2013 represent the U.S. and Canada only. Numbers from 2013-2015 represent the U.S., Canada, and Colombia.

¹ Incidents recorded are those classified as such by the appropriate law enforcement agency. Incidents that were ruled inconclusive or accidental are not included.
² Tabulation of trespassing began in 1999.
³ Death Threats, as of 2015, include any reported or discovered "Threats of Harm."
⁴ Stalking is defined as the persistent following, threatening, and harassing of an abortion provider, staff member, or patient away from the clinic. Tabulation of stalking incidents began in 1993.
⁵ Tabulation of email harassment began in 2002. As of mid-November 2015, enhanced technology allowed for an increased ability to uncover Hate Email/Internet Harassment.
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⁷ NAF changed its method of collecting picketing data in 2012. Obstruction was separated into its own category.
⁸ Tabulation of Obstruction began in 2012. Obstruction is defined as the act of causing a delay or an attempt to cause a delay in the conduct of business or prevent persons from entering or exiting an area. This would apply to violations of the FACE Act.
⁹ The "number of arrests" represents the total number of arrests, not the total number of persons arrested. Many blockades are arrested multiple times.

Source: 2015 National Abortion Federation Anti-Abortion Violence and Disruption Statistics (Apr. 2016).

This surge of violence and harassment in 2015 was no inexplicable bolt from the blue. Beginning in July 2015, Daleiden released surreptitiously recorded videos featuring healthcare providers and others discussing fetal tissue donation. In the publicly released versions of these videos, it appeared as if abortion providers were unlawfully profiting from the sale of fetal tissue—which, if true, is a criminal offense. This was a trick of editing, however. As a district court judge concluded last year after reviewing the unedited recordings, he was unable to find any “evidence of actual criminal wrongdoing.”

Nat’l Abortion Fed’n v. Ctr. for Med. Progress, No. 15-cv-03522, 2016 WL 454082, at *21 (N.D. Cal. Feb. 5, 2016). He also suggested that Daleiden himself did not believe his “claim that [he had] uncovered criminal wrongdoing,” since he “did not promptly turn over [the] recordings to law enforcement.” *Id.* This, in turn, suggested that the goal was “to falsely portray” abortion providers and others through the release of deceptively edited videos. *Id.*

But the videos’ deceptiveness did not diminish their power to provoke. It was those videos that motivated the November 2015 massacre in Colorado Springs. *See* Kevin Conlon et al., *Source: Suspect*

Spoke of “Baby Parts” After Planned Parenthood Shooting, CNN, Nov. 29, 2015, <http://www.cnn.com/2015/11/28/us/colorado-planned-parenthood-shooting>. They also prompted a man to threaten the CEO of an organization featured in one of Daleiden’s videos, offering to “pay ten grand” to anyone who would kill her. Denny Walsh, *Man Who Admits Threatening Placerville Biotech Executives Released by Sacramento Judge*, Sacramento Bee, Jan. 4, 2016, 2016 WLNR 245662. The man later pleaded guilty to making threats in violation of 18 U.S.C. § 875(c). Plea Agreement, *United States v. Orton*, No. 2:15-cr-00233, ECF No. 27 (E.D. Cal. Apr. 19, 2016).

The effects of Daleiden’s videos have been felt beyond abortion clinics or firms that provide fetal tissue to researchers. Even researchers themselves have suffered. One researcher—who uses fetal tissue to develop treatments for infants with congenital disorders or with HIV—has said that, in the wake of the videos, he fears an attack on himself or his children. Amy Maxmen, *Fetal Tissue Probe Unsettles Scientific Community*, 34 Nature Biotechnology 447, 447 (2016). And a cancer researcher has reported “receiv[ing] hate mail” after a website linked his name to fetal tissue research. *Id.* What followed this hate

mail was precisely the kind of chilling effect that the First Amendment is designed to prevent: “In response, the floors of some [of the] researcher’s laboratories are now permanently locked and de-identified, constraining the scholarly exchange of students, visitors, and ideas.” *Id.*

In sum, we do not have to speculate about how Daleiden’s publication of Plaintiffs’ identities will harm them. Recent history already shows that when Daleiden identifies someone linked to the donation of fetal tissue, threats and violence will follow. If there is any case in which parties have shown a reasonable probability that disclosure of their identities will subject them to threats, harassment, or reprisals, it is this one.

II. There is no legitimate public interest in disclosing the personal identities of reproductive healthcare providers.

To support the release of personally identifying information, Daleiden has invoked the public’s interest in “governmental transparency,” and the fact that “the government activities and expenditures relate to matters that have been the subject of extensive public discussion and debate.” Br. of Appellant 24, 25. But Daleiden *will* be receiving documents on government activities and expenditures related to fetal tissue. The district court’s injunction merely prevents

him from airing the personal identities of individual people. The real question, therefore, is what legitimate public interest could be served by disclosing individual healthcare providers' personal identities. Daleiden does not answer this question—likely because, as Amici will explain, there *is* no legitimate public interest in that kind of disclosure.

As an initial matter, the opening brief's account of fetal tissue donation—and his role in the public discourse about it—is radically incomplete. It fails to account for the many public interests that weigh *against* the release of personal information about Plaintiffs.

Daleiden, for example, wants to connect this case to the larger public debate about abortion, but that connection is highly tenuous. Three decades ago, President Reagan's Fetal Tissue Transplantation Panel—which included a chair and several members who were opposed to abortion—concluded that public support of research using fetal tissue was ethical. *See* R. Alta Charo, *Fetal Tissue Fallout*, 373 *New Eng. J. Med.* 890, 891 (2015). There was “no evidence that the possibility of deriving some good from fetal remains had ever persuaded women to have abortions they otherwise would not have chosen.” *Id.* at 890. Just in case, however, the panel recommended certain safeguards—for

example, it recommended that “the question of donation not be addressed until after a woman had decided she was going to end a pregnancy.” *Id.* 890–91. This recommendation and others, *see id.*, were later enacted into law. *See* 42 U.S.C. §§ 289g-1, 289g-2.⁴

Daleiden’s public-interest argument faces an even larger problem than the tenuous link between abortion and fetal tissue donation: Disclosing Plaintiffs’ personal identities does not further the public’s interest in learning about government-conducted research, or about the parties with whom the government is contracting, or about government expenditures. *Cf.* Br. of Appellant 24–25 (invoking these interests). Identifying researchers personally does not elucidate the subjects of their research or how much the government is spending on that research. Similarly, identifying healthcare providers personally does not help to identify the *facility* from which the University of Washington is acquiring tissue, or how much the government is spending to acquire it.

⁴ While 42 U.S.C. § 289g-2 prohibits profiting from the acquisition or transfer of fetal tissue, this behavior had already been unlawful. *See* National Organ Transplant Act, Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346 (1984) (codified at 42 U.S.C. § 274e).

Even if Daleiden is interested in tracing the University of Washington’s “personnel who also work at the abortion clinics that supply the laboratory with fetal tissue,” Br. of Appellant 8, the solution is to identify these persons by number, as did the U.S. House of Representatives Select Investigative Panel.⁵ Identifying those employees personally is unnecessary.

In this respect, *Planned Parenthood of the Great Northwest v. Bloedow*, 187 Wn. App. 606, 350 P.3d 660 (2015), a case decided under the Washington Public Records Act, provides helpful guidance. There, a public-records requester sought to compel the production of records of abortions performed at certain clinics around the Puget Sound area. These records identified each abortion with certain data points—date, method, estimated gestation in weeks, the age and race of the patient, and so on—but did not otherwise identify the patient. *Id.* at 615. The records did, however, identify the provider. *Id.* at 623. In concluding that the public interest favored enjoining production, the Washington

⁵ See H. Select Investigative Panel of the H. Energy & Commerce Comm., *Final Report* at l–li (Comm. Print 2016), *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf.

Court of Appeals reasoned that, while the public's interest "in the quality, cost, and accessibility of health care" allowed the release of "statistical data about abortions," it did not "extend to information that identifies patients or health care providers." *Id.* at 628.

Here, likewise, the public may have an interest in what the University of Washington's researches, in how much money is spent on that research, and in which organizations provide materials for that research. This interest, however, does not "extend to information that identifies patients or health care providers," *id.*, because that information does not actually satisfy the public's needs.

CONCLUSION

For the reasons given here, as well as in Plaintiffs' brief, the district court's preliminary injunction should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of March, 2017.

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CERTIFICATE OF COMPLIANCE

I, Benjamin Gould, certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 2,640 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced, plain serif type, with the exception of certain headings and captions.

Dated this March 16, 2017.

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CERTIFICATE OF SERVICE

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

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