No. 17-202

In the Supreme Court of the United States

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

v.

NATIONAL ABORTION FEDERATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ATTORNEYS GENERAL OF ALABAMA, ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici Attorneys General are twenty states' chief law enforcement or chief legal officers.[1] *Amici* investigate and prosecute not just criminal offenses but also a wide variety of civil actions, ranging across civil rights, consumer fraud, the environment, and antitrust. Attorneys General have brought some of our nation's most significant, industry-affecting lawsuits, including multi-billion dollar actions against the tobacco and mortgage industries.

As Judge Callahan recognized in dissent below, *Amici* Attorneys General (and the justice system) will be harmed if the Ninth Circuit's decision in this matter stands. The decision sets a precedent that hampers law enforcement's ability to effectively receive information and investigate possible civil or criminal wrongdoing. The Attorneys General routinely receive confidential tips and complaints from whistleblowers, victims, and others. *Amici* also regularly rely on subpoenas and requests for voluntary provision of information to carry out investigations. By opening a variety of contract-based prior restraints on communications with law enforcement, the decision below will at a minimum throw sand in the gears of investigations (wasting precious resources) and at worst foil law enforcement's ability to efficiently gather information and protect the public.

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief, and no person or party other than named amici's offices made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

SUMMARY OF ARGUMENT

Certiorari is warranted because the petitions encompass a question relating to the public's engagement with law enforcement in connection with a broad category of civil and criminal cases: may a private party use a boilerplate nondisclosure agreement to block the free exchange of information to law enforcement and obtain a prior-notice guarantee regarding contacts with law enforcement.[2]

The Attorneys General support the First Amendment points raised by Petitioners (and believe certiorari is warranted on those bases). Within those broader issues, the Ninth Circuit's decision specifically hampers law enforcement's ability to effectively receive information and conduct initial investigatory steps into possible wrongdoing. The decision empowers would-be wrongdoers, especially those engaged in collusion, conspiracy, or other multi-party enterprises, to shroud their actions and hamper investigations. The effect of this is real—the earliest investigatory stages can be the most productive, when law enforcement is best situated to determine the truth and obtain evidence without the potential target taking evasive action (*e.g.*, destroying records, hiding assets, and influencing witnesses).

The panel split on precisely this law-enforcement issue. The majority reached its damaging decision by failing to adhere to established Supreme Court case law, and indeed turned on its head the existing Supreme Court standard for enjoining communications to law enforcement. It also created tension with the Fifth and Tenth Circuits. It is no surprise

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2 Troy Newman has sought leave to file a separate petition in No. 17M22, and this amicus brief supports that petition as well.

then that Judge Callahan quoted this Court for the proposition that "'when a person communicates information to a third party ***even on the understanding that the communication is confidential***, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.'" Pet. App. 8a (quoting *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984)) (emphasis added).[3]

As Judge Callahan explained:

> [O]ur system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement. This case is no exception and the district court erred in preventing Defendants from showing the tapes to law enforcement agencies.
>
> Similarly, the injunction violates this strong public policy by requiring that if a law enforcement agency contacts Defendants and seeks materials covered by the injunction, Defendants must notify NAF of the request and allow NAF time to respond. These conditions inherently interfere with legitimate investigations.

Id. at 10a.

Judge Callahan had it right. Law enforcement must be able to receive information freely from the public in order to investigate potential wrongdoing. And as Judge Callahan recognized, this interest

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[3] Law enforcement was not involved in collection here; this case solely involves those who wish to communicate to law enforcement information they independently obtained.

includes not just investigations into criminal activity but any matter in which law enforcement has an interest. *Id.* at 9a.

The panel majority's unprecedented decision opens even the most ordinary law enforcement investigation to being held hostage by a tangle of contractual disclosure restrictions. The use of non-disclosure agreements is already part-and-parcel with daily operations in many industries; indeed, in some areas (*e.g.*, Silicon Valley) many offices ask visitors to sign non-disclosure agreements upon entry. According to the decision below, each of these agreements represents a potential resource-wasting bar to free and open communication between a signatory and law enforcement. And this says nothing about these agreements' sudden utility to those who wish to shut down whistleblowers and shield information from law enforcement—all that is required is ensuring that anyone privy to such information enter into confidentiality agreements and then enforcing (or threatening to enforce) those agreements through injunctive relief and large attorneys' fees awards.

Put simply, the decision below contravenes this Court's guidance, creates tension with other circuits, and in doing so sets a dangerous precedent that applies to innumerable law enforcement efforts under a broad range of state and federal statutes. The Court should correct this glaring error of law and ensure the just and efficient functioning of law enforcement in ongoing and future cases across the country.

ARGUMENT

I. WHETHER A COURT MAY ENJOIN THE FREE FLOW OF INFORMATION TO LAW ENFORCEMENT BASED ON A THIRD-PARTY CONTRACT IS AN IMPORTANT QUESTION BEARING ON INNUMERABLE SITUATIONS AND ON WHICH THE COURT'S GUIDANCE IS NOW NEEDED

A. The Panel Majority Contravened *SEC v. O'Brien*, In Which This Court Protected Both The Public's Ability To Communicate Freely With Law Enforcement And Law Enforcement's Ability to Receive Information

This Court has recognized that outside parties should not be able to interfere with disclosures to law enforcement. In *O'Brien*, the Court described it as "established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." 467 U.S. at 743. The Court also noted that it is "[e]specially debatable" that a person "may obtain a restraining order preventing voluntary compliance by a third party with an administrative subpoena" and noted that the Court has "never before expressly so held." *Id.* at 749. And the Court squarely rejected the notion that prior notice to those other than the investigative subpoena recipient is workable, as this would permit investigative targets to impede investigations. *Id.* at 749-51.

In direct contravention of *O'Brien*, the injunction here imposes material restrictions on petitioners' ability to disclose information to law enforcement; it

limits such disclosures to instances where a subpoena has been issued and NAF receives prior notice and an opportunity to challenge the subpoena or the scope of the information to be produced. Pet. App. 6a. This doubly impinges on law enforcement. It gives a potential investigative target (or persons closely aligned with a potential target) influence over an investigation and precludes law enforcement from receiving and evaluating the full slate of information a knowledgeable person would otherwise freely disclose.

The panel majority's decision failed to acknowledge the *O'Brien*-recognized broad policy against court orders restraining voluntary information sharing with law enforcement. *Id.* at 8a & n.1 (Callahan dissent noting policy and citing *O'Brien* as well as cases from Fifth and Tenth Circuits). In contexts involving whistleblowers or confidential informants, injunctive relief empowering a party to inhibit information sharing with law enforcement would severely harm law enforcement's ability to investigate effectively.[4]

Indeed, the restrictions placed on petitioners have detrimentally affected the flow of information to

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[4] Although subpoenas have been issued here, whether a subpoena has been issued is ultimately secondary to the policy interest of ensuring persons can share information about potential wrongdoing with law enforcement. Subpoena requests are limited to what law enforcement thought to specifically request and may not encompass the full scope of relevant information in an informant's possession. If a third party is permitted to affect whether a willing informant can share all the information the informant possesses (with or without being subpoenaed), law enforcement may not be able to obtain possible evidence of wrongdoing.

multiple state investigations. There are hundreds of hours of material petitioners may wish to disclose to law enforcement. And in response to subpoenas from Arizona and Louisiana, petitioners have identified at least 47 hours of video and 100 hours of audio as being responsive, including contextual information necessary for the material to be sufficiently meaningful. Yet NAF has embargoed almost all of this material, refusing to consent to petitioners' disclosure of responsive materials except for snippets of materials.

NAF is thus blocking state investigatory efforts by imposing its own relevance and responsiveness standard on law-enforcement subpoenas issued to a third party. This is especially inappropriate for two reasons. *First*, NAF does not know—nor should it know—the persons, entities, or conduct being confidentially investigated. *Second*, law enforcement is not necessarily in a position to know what other information it would learn (or could seek) if it had access to the full, responsive audio and video files.

As long as the injunction is in place, NAF can continue screening information and wielding influence over government investigations. There is no evidence that NAF sought any restrictions regarding information provided to or obtained by the FBI or the California Department of Justice, yet NAF has objected to disclosures pursuant to subpoenas from Arizona and Louisiana (as well as a congressional subpoena). Allowing NAF to choose which agencies can access petitioners' information (and what information they can get) directly conflicts with the Supreme Court's reasoning in *O'Brien*, 467 U.S. at

749-51, and imperils the effectiveness of law enforcement's investigative processes.[5]

B. The Panel Majority Actually Applied The Opposite Of The *O'Brien* Standard—Allowing Contractual Limits To Serve As Per Se Bars To Communications With Law Enforcement

Rather than applying the *O'Brien*-recognized broad policy against court orders restraining voluntary information sharing with law enforcement, the panel blessed an injunction in the absence of even the usually required showings of likelihood of irreparable harm and alignment with the public interest. In *Winter v. Nat. Res. Def. Council, Inc.*, this Court held that to obtain a preliminary injunction a party must show a likelihood of suffering irreparable harm in the absence of an injunction, and it specifically reversed the grant of an injunction where "any [likelihood of irreparable] injury is outweighed by the public interest." 555 U.S. 7, 22-23 (2008). It also stated the party seeking the injunction bears the burden on each element. *See id.* at 20.

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[5] The panel majority's efforts to distinguish *O'Brien* solely on the grounds that NAF is aware of the states' investigations and the recordings cannot be destroyed because they are in the possession of the District Court is not persuasive. Pet. App. 6a-7a. As Judge Callahan recognized, *O'Brien* is on point. And, *O'Brien* recognized broader policies—observing that allowing a potential investigatory target to affect third-party information sharing with law enforcement would result in a "substantial[] increase [in] the ability of persons who have something to hide to impede legitimate investigations" by "discourag[ing] the recipients from complying" and then "further delay[ing] disclosure . . . by seeking intervention." 467 U.S. at 749-50. This concern is embodied in this case.

NAF did not show the required likelihood of irreparable harm to justify enjoining disclosure to law enforcement. In addition, NAF proved no causal connection between its supposed irreparable injury and free communication with law enforcement. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (content-based injunction must burden "no more speech than necessary to serve a significant government interest"); *see also State of Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (recognizing that "'[a]n injunction must be narrowly tailored to remedy the specific harm shown'" and collecting cases); *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (injunction "must be narrowly tailored 'to affect only those persons over which [the Court] has power,' . . . and to remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of the law.'").

Any argument that NAF was likely to suffer irreparable harm from disclosure to law enforcement fails on this record both legally and factually. Legally, *O'Brien* forecloses a party from claiming irreparable injury from a government agency issuing subpoenas for information. *See In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013) (citing *O'Brien*, 467 U.S. at 743); *Blinder, Robinson & Co. v. S.E.C.*, 748 F.2d 1415, 1419 (10th Cir. 1984) (same); *cf. Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016) (challenge to law enforcement civil investigative demand (similar to subpoena) was unripe). The decision below thus created tension with the Fifth and Tenth Circuits. Indeed, the injunction is unprecedented. None of the panel majority, the District Court, or NAF has cited a single case that

supports a finding of irreparable injury in these circumstances or supports enjoining disclosure of information to law enforcement under similar facts.[6]

Moreover, as Judge Callahan observed in dissent, "disclosure to a law enforcement agency is not a disclosure to the public." Pet. App. 10a. Law enforcement regularly handles highly sensitive materials, such as the identity of informants, information regarding gangs and organized crime, and the location of domestic violence victims. If law enforcement cannot be trusted to handle information that risks bodily harm or even death if it falls into the wrong hands, then it simply cannot do its job.

Factually, NAF did not show, or even suggest, that "harassment and death threats" are likely to result from disclosure to law enforcement in this case. Nor did the District Court ever find a likelihood of harm from such disclosure. *See* Pet. App. 71a-74a.[7] The panel majority thus created a per se bar to communications to law enforcement based on contractual

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[6] The sole case cited by NAF was *Vringo, Inc. v. ZTE Corp.*, No. 14-4988, 2015 WL 3498634 (S.D.N.Y. June 3, 2015), which involved private litigation and did not specifically analyze the law enforcement issue. NAF did not re-urge that case on appeal. It is therefore unsurprising that neither the District Court nor panel decision cited it.

[7] Outside the law enforcement context, NAF identified "harassment and death threats" from the public directed at individuals appearing in publicly released videos, and predicted that its employees and members would continue to suffer such harm if petitioners released video and audio recorded at NAF's conferences. *See* Pet. App. 72a. The District Court accepted that showing in granting the injunction. *Id.* But this showing bears no connection to the law enforcement component of this case, and the District Court did not find otherwise.

provisions alone—requiring no actual showing of a likelihood of irreparable harm as required by *Winter*.

Restricting communications and disclosure to law enforcement agencies is also contrary to the public interest—a separate *Winter* fact that was similarly disregarded here. Public policy strongly favors the unimpeded flow of communication and information between the public and law enforcement. Law enforcement's ability to effectively investigate potential wrongdoing is in no small part dependent on the public's willingness and ability to freely communicate and share information. While the District Court correctly recognized here that "public policy may well support the release" of records to law enforcement, Pet. App. 67a; *see also Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) ("It is public policy . . . everywhere to encourage the disclosure of criminal activity . . . ."), that court as well as the panel majority erred in adopting a too-narrow construction of that public policy—recognizing only the need to ensure disclosure of information that may "show criminal wrongdoing." Pet. App. 67a; *id.* at 6a-7a.

The policy interest here goes beyond criminal activity and includes any matter—civil or criminal—in which a government agency has a legitimate investigatory interest. Indeed, *O'Brien* itself involved an administrative investigation by the S.E.C. *See* 467 U.S. at 737-38 (discussing procedural history of investigation). Given this strong public policy, it is again unsurprising that none of the panel majority, the District Court, or NAF has cited a single case that supports enjoining disclosure to law enforcement under similar facts. *See supra* 10 & n.6.

As Judge Callahan's dissent noted, whether the information at issue here contains evidence of crimes "is of little moment as the duties of Attorneys General and other officers to protect the interests of the general public extend well beyond actual evidence of a crime." Pet. App. 9a. This Court should likewise recognize the important public policy contravened by restricting free communication with law enforcement and that the public policy extends beyond information regarding definite criminal wrongdoing.

C. The Panel Majority's Decision Opens A Wide Range Of Prior Restraints On Disclosure To Law Enforcement That Could Harm Investigations Nationwide

The panel majority decision creates a harmful precedent on a topic of great importance because it not only affirmed an unprecedented injunction, but in doing so also placed practically no limitations on the ability to enjoin disclosure to law enforcement based on contractual provisions, opening the door to a wide range of prior restraints on such disclosure by whistleblowers and others.

The panel majority articulated hardly any limitations on its ruling, and the District Court's stated limitations do not limit the harmful future effects of its analysis. Indeed, if anything, the facts of this case—a trade association obtaining injunctive relief restricting disclosure to law enforcement of communications occurring at its trade conferences—shows the breadth of this injunction. Communications at trade conferences (which are necessarily industry-wide affairs) are hardly the type of information that is generally recognized as the most private (in contrast to trade secrets and classified information), and

the panel decision therefore opened a wide variety of prior restraints on disclosure to law enforcement. For example, even beyond the bargained for NDAs that often came with contracts or employment, it is a common practice to ask visitors to sign an NDA simply to gain entry into office buildings in places like Silicon Valley. *See* Dan Frommer, *That Time Apple Marketing Boss Phil Schiller Refused To Sign The NDA At Google*, BUSINESS INSIDER, Sept. 22, 2010, http://www.businessinsider.com/phil-schiller-apple-google-2010-9.

The decision thus opens even the most mundane law enforcement investigation to being held hostage by a tangle of contractual disclosure restrictions that are commonly used in industry. And for those with more sinister motives, it empowers would-be wrong-doers, especially those engaged in collusion, conspiracy, or other multi-party enterprises, to shroud their actions and block initial investigatory steps by contractually barring free communication with law enforcement (under threat of court-enforced injunction and costly legal proceedings for a would-be whistleblower).

Following the reasoning in the decisions below, any group desiring to shield its communications from law enforcement need only (1) enter into confidentiality agreements and (2) use the courts to enforce the agreements and thereby short circuit or otherwise delay government investigations. A price-fixing cartel, for example, could make its members sign confidentiality agreements and then seek to enforce those agreements if a member sought to share information with law enforcement.

* * *

The decision below contravenes this Court's guidance and creates tension with other circuits. It also sets a dangerous precedent that imperils the efficient functioning of law enforcement and affirms an injunction that is against the public interest. The Court should correct this glaring error of law and properly identify the injunction as conflicting with an important public interest.

CONCLUSION

The petitions for certiorari should be granted.

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