

No. 22-1168

IN THE
Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, et al.,
Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,
Respondents.

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

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS*
CURIAE AND BRIEF OF *AMICUS CURIAE*
FOUNDATION FOR MORAL LAW IN SUPPORT
OF PETITIONERS**

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Counsel for *Amicus Curiae*

**MOTION FOR LEAVE TO FILE BRIEF OF
*AMICUS CURIAE***

COMES NOW *Amicus Curiae*, Foundation for Moral Law, and moves for leave to file the attached brief in support of Petitioners.

The Foundation for Moral Law is an Alabama-based legal organization dedicated to religious liberty, freedom of speech and the press, and the strict interpretation of the Constitution as intended by its Framers. The Foundation believes freedom of speech and freedom of the press are God-given rights, enshrined with religious liberty as a first priority in the Bill of Rights, not only to protect the God-given rights of individual persons but also to check the power of government and others who might abuse their powers.

Believing that human life is a sacred gift from God and that life begins at fertilization, the Foundation has filed *amicus* briefs in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and other cases involving the sanctity of life.

The Foundation for Moral Law submits this Motion because, regretfully, its counsel failed to provide 10-day notice to Respondents of its intent to file this brief. This error occurred when, reviewing its list of attorneys in this case and their contact information, counsel for the Foundation mistook the contact information for the counsel in the lower court proceedings as the contact

information for the current counsel of record for Respondents. As a result, Petitioners and Intervenors were provided with 10-day notice, but counsel did not realize its mistake as to Respondents until four days prior to the deadline for filing this brief.

WHEREFORE, the Foundation for Moral Law respectfully requests that this Court grants this Motion to file the attached brief in support of Petitioners.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT	3
I. Equity will not allow a wrongdoer to profit by a wrong	6
II. He who sues in equity must proceed with clean hands	10
III. The decision below will chill and intimidate undercover journalism	15
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases	Page
<i>Adler v. Federal Republic of Nigeria</i> , 219 F.3d 869 (9th Cir. 2000)	10, 13
<i>Arkansas Writers’ Project, Inc., v. Ragland</i> , 481 U.S. 221 (1987).....	2
<i>Bein v. Heath</i> , 47 U.S. 228 (1848).....	12
<i>Deweese v. Reinhard</i> , 165 U.S. 386 (1897).....	12
<i>Holy Family Catholic School v. Boley</i> , 847 So. 2d 371 (2002).....	10-11
<i>Kendall-Jackson Winery, Ltd. v. Super Ct.</i> , 76 Cal. App. 4th 970 (Cal. App. 5th Dist. 1999).....	14
<i>Liu v. Securities and Exchange Commission</i> , 591 U.S. ____ (2020)	7
<i>Loughran v. Loughran</i> , 292 U.S. 216 (1934).....	13
<i>Precision Instrument Mfg. Co. v. Auto Maintenance Machine Co.</i> , 324 U.S. 806 (1945).....	13
<i>Root v. Railway Company</i> , 105 U.S. 189 (1881).....	6, 8
<i>Tilghman v. Proctor</i> , 125 U.S. 136 (1888).....	8-9

<i>Time Warner Cable, Inc. v. Hudson</i> , 667 F.3d 630 (5th Cir. 2012)	2
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952).....	17

Other Authorities

ABC News 20/20, Press Release (Mar. 6, 2000), https://perma.cc/XX3Y-8BWB	9
Alexandra DeSanctis, Big Abortion v. David Daleiden, ETHICS AND PUBLIC POLICY CENTER, May 21, 2021, https://eppc.org/publication/big-abortion- v-david-daleiden/	5
Elizabeth Jane Cochran, <i>Ten Days in a Mad House</i> (1887).....	15
Encyclopedia Britannica <i>Nellie Bly</i> : <i>American Journalist</i> , https://www.britan nica.com/biography/Nellie-Bly	15-16
<i>Fact Sheet: Planned Parenthood’s 2019-20 Annual Report</i> , CHARLOTTE LOZIER INSTITUTE, Feb. 23, 2021, lozierinstitute.org/fact-sheet-planned- parenthoods-2019-20-annual-report/	10
Gloria Steinem Publishes Part One of “A Bunny’s Tale” in SHOW Magazine, HISTORY.COM, Nov. 20, 2021, https://www.history.com/this-day-in- history/gloria-steinem-publishes-a- bunnys-tale-show-magazine	16
Hunter S. Thompson, <i>Hell’s Angels: The</i>	

<i>Strange and Terrible Saga of the Outlaw Motorcycle Gangs</i> (1996).....	16
John Milton, <i>Areopagitica</i> (Jebb ed.) (1644)	2
John Norton Pomeroy, <i>Equity Jurisprudence and Equitable Remedies</i> (1918).....	11
Joseph Story, <i>Commentaries on Equity Jurisprudence</i> (14th ed., 1918).....	11
Lauren Gambino, <i>Second Planned Parenthood video shows official discussing fetal tissue</i> , THE GUARDIAN, Jul. 21, 2015, https://www.theguardian. com/us-news/2015/jul/21/second-planned- parenthood-video-abortion	5
S. Flannagan, <i>The truth About Hunter S. Thompson's Time with the Hells Angels</i> , Grunge.com, Dec. 9, 2021, https://www.grunge.com/702003/the- truth-about-hunter-s-thompsons-time- with-the-hells-angels/	16

INTEREST OF *AMICUS CURIAE*¹

The Foundation for Moral Law is an Alabama-based legal organization dedicated to religious liberty, freedom of speech and the press, and the strict interpretation of the Constitution as intended by its Framers. The Foundation believes freedom of speech and freedom of the press are God-given rights, enshrined with religious liberty as a first priority in the Bill of Rights, not only to protect the God-given rights of individual persons but also to check the power of government and others who might abuse their powers.

Believing that human life is a sacred gift from God and that life begins at fertilization, the Foundation has filed *amicus* briefs in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and other cases involving the sanctity of life.

SUMMARY OF THE ARGUMENT

[T]o distrust the judgement and the honesty

¹ The Foundation for Moral Law provided timely notice to Petitioners and Intervenor but failed to provide the 10-day notice to Respondents. Accordingly, this brief is accompanied by a motion for leave to file despite this error. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

of one who hath but a common repute in learning, and never yet offended, as not to count him fit to print his mind without a tutor or examiner, lest he should drop a schism or something of corruption, is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.

— John Milton²

Freedom of speech and freedom of the press are God-given rights that protect all persons. All persons, not just licensed journalists, have the right to disseminate their messages, not just narrowly under the Free Speech Clause but also broadly under the Free Press Clause.³

The First Amendment not only guarantees to the individual a God-given right; it also checks government power and checks the power of those who, because of their wealth or influence or connections, are able to misuse their power to suppress the truth. That is another reason the Free Press Clause protects the right of all persons to disseminate their messages, not just the

² John Milton, *Areopagitica* (Jebb ed.) (1644).630,

³ See *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638-39 (5th Cir. 2012), holding that “[l]aws singling out a small number of speakers for onerous treatment are inherently suspect.” See also, *Ark. Writers’ Project, Inc., v. Ragland*, 481 U.S. 221 (1987), invalidating a statute exempting some publications from a sales tax but denying the exemption to others).

established media.

And when one person's right to speak or publish is suppressed, the entire public discourse is impoverished.

That is the reason this case is before this Court, and that is the reason this Court should grant certiorari in this case. This case involves a lone independent journalist who exposed the corrupt and outrageous practices of a powerful organization: Planned Parenthood. Planned Parenthood in response is trying to silence that journalist in a way that makes sure neither he nor anyone else will ever challenge them again.

Planned Parenthood comes to this Court with hands that are not only unclean; they are dripping with the blood of unborn babies whose organs they have harvested and sold. They should not be allowed to profit from their own wrongdoing

ARGUMENT

What is this case all about – really? Why is this Petition before the Supreme Court?

Beneath the very important issues of circuit splits, economic vs. reputational damages, and RICO violations, the basic reason this case has drawn national attention and is now before this Court is this:

Planned Parenthood and some of its affiliates (hereinafter “Planned Parenthood”) have engaged

in the illegal and outrageous business of harvesting the organs of aborted babies and selling them at great profit.

Their actions were discovered and disclosed to the public.

And Planned Parenthood's response is: Shoot the messenger!

The "messenger" is David Daleiden and those who work with him (hereinafter "Daleiden"), pro-life activists whose views about abortion are anathema to Planned Parenthood and many of its allies in California media and government. When Daleiden became aware that Planned Parenthood may be harvesting organs and selling them, and that law enforcement and the media seemed uninterested, he formed the Center for Medical Progress and through undercover means, documented Planned Parenthood's activities. He revealed conversations with Planned Parenthood officials in which they casually explained which organs are most in demand, how they modify abortion procedures to better obtain intact and therefore more valuable organ and tissue samples from aborted babies, how they cut through babies' faces to harvest the brain or cut through other parts of the body to harvest other organs, how they work through procurement agencies to sell the organs, and much more. In one of the Center for Medical Progress videos, Planned Parenthood senior executive Dr. Mary Gatter says concerning

an abortion to obtain babies' organs, "The money is not the important thing for me. But it has to be big enough that it makes it worthwhile for me. . . . I want a Lamborghini."⁴ In response to charges that the videos were edited and misleading, Daleiden has released the entire unedited videos.⁵

When their deeds were made public, Planned Parenthood and its co-plaintiffs launched a campaign of vilification, criminal prosecutions, and civil lawsuits to teach Daleiden a lesson. In a California civil trial in which jurors were not allowed to hear First Amendment defenses, Daleiden was found liable for \$2 million in economic damages and nearly \$14 million in attorney fees—all for discovering and publishing the truth.

Planned Parenthood has never claimed, much less proven, that anything Daleiden published was untrue, with one exception: They deny that they actually made great profit selling harvested organs, although they do not deny that their personnel made that claim.

⁴Lauren Gambino, *Second Planned Parenthood video shows official discussing fetal tissue*, THE GUARDIAN, Jul. 21, 2015, <https://www.theguardian.com/us-news/2015/jul/21/second-planned-parenthood-video-abortion>.

⁵ Alexandra DeSanctis, *Big Abortion v. David Daleiden*, ETHICS AND PUBLIC POLICY CENTER, May 21, 2021, <https://eppc.org/publication/big-abortion-v-david-daleiden/>.

They have never denied that they harvested the organs of unborn babies and sold them. Instead, they seek to teach a lesson to Daleiden and anyone who shares his views: Don't mess with an organization as powerful and wealthy as Planned Parenthood, or you will be forever ruined.

If this verdict and judgment are allowed to stand, Planned Parenthood will have achieved its objective. Investigative reporting, free speech, and freedom of the press will be chilled, and few, if any, will dare publish the truth.

The Foundation will not duplicate Petitioners' well-drafted arguments that the decisions below constitute a split with other circuits and violate the free speech and free press guarantees of the First Amendment.

Rather, the Foundation will argue that allowing the Ninth Circuit decision to stand violates two respected legal maxims: that one should not be allowed to profit from one's wrongful actions and that one who sues in equity must do so with "clean hands."

I. Equity will not allow a wrongdoer to profit by a wrong.

This Court recognized this maxim as early as 1881 in *Root v. Railway Company*, 105 U.S. 189 (1881), a case involving a party that had allegedly infringed upon the patent rights of another relating to a machine and profited from the infringement. The lower court instructed the jury that the

plaintiff was entitled to actual damages for the profits the plaintiff would have made from the machine if the defendant had not interfered with his patent rights. This Court, however, concluded that the proper measure of damages was the profit the defendant had wrongfully gained from the misuse of the patented machine. The Court also recognized that the principle could be affected by statute and that, in some cases, expenditures and reimbursements might be deducted from the wrongful profits.

And in *Liu v. Securities and Exchange Commission*, 591 U.S. ___, *6-7 (2020), this Court ordered “disgorgement” of Liu’s profits from his illegal scheme to defraud foreign nationals. The Court noted that disgorgement is authorized by “works on equity jurisprudence” and stated that

[t]hese works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer’s net profits to be awarded for victims.

A

Equity courts have routinely deprived wrongdoers of their net profits from unlawful

activity, even though that remedy may have gone by different names. Compare, e.g., 1 D. Dobbs, *Law of Remedies* §4.3(5), p. 611 (1993) (“Accounting holds the defendant liable for his profits”), with *id.*, §4.1(1), at 555 (referring to “restitution” as the relief that “measures the remedy by the defendant’s gain and seeks to force disgorgement of that gain”); see also Restatement (Third) of Restitution and Unjust Enrichment §51, Comment a, p. 204 (2010) (Restatement (Third)) (“Restitution measured by the defendant’s wrongful gain is frequently called ‘disgorgement.’ Other cases refer to an ‘accounting’ or an ‘accounting for profits’ “); 1 J. Pomeroy, *Equity Jurisprudence* §101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy for the violation of strictly legal primary rights).

No matter the label, this “profit-based measure of unjust enrichment,” Restatement (Third) §51, Comment a, at 204, reflected a foundational principle: “[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong,” *Root v. Railway Co.*, 105 U.S. 189, 207 (1882). At the same time courts recognized that the wrongdoer should not profit “by his own wrong,” they also recognized the countervailing equitable principle that the

wrongdoer should not be punished by “pay[ing] more than a fair compensation to the person wronged.” *Tilghman v. Proctor*, 125 U.S. 136, 145-146 (1888).

Let us apply this “foundational principle” to the case at hand. Planned Parenthood wrongly harvested body parts from unborn babies and sold them at great profit. *Even Planned Parenthood acknowledges that this action is wrong*. When Chris Wallace conducted a hidden-camera investigation and discovered similar acts by another abortion provider, then-president of Planned Parenthood Gloria Feldt stated concerning those actions, “Where there is wrongdoing, it should be prosecuted and the people who are doing that kind of thing should be brought to justice.” ABC News 20/20, Press Release (Mar. 6, 2000), <https://perma.cc/XX3Y-8BWB>.

Daleiden and the Center for Medical Progress caught and exposed Planned Parenthood for doing precisely what Ms. Feldt had publicly condemned. And now, Planned Parenthood seeks to profit from its wrongdoing. Planned Parenthood sought, and the District Court awarded, \$366,873 in “infiltration damages,” \$101,048 in “security damages,” nearly \$2,000,000 in punitive damages, and more than \$13,700,000 in attorney fees and costs. The “infiltration” and “security” damages are to provide Planned Parenthood a better security system than it has at present, making Planned

Parenthood more secure than before.⁶ The nearly \$2,000,000 in punitive damages enhances Planned Parenthood’s already-enlarged coffers.⁷

If this award is allowed to stand, Planned Parenthood will profit from its own wrongdoing, which is an abomination under common law.

II. He who sues in equity must proceed with clean hands.

As the Ninth Circuit recognized in *Adler v. Federal Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000), in California, the “clean hands” doctrine applies in suits at law as well as in equity.

The clean hands doctrine is similar to the doctrine that one may not profit from one’s own wrongdoing, but it refers to one who has asked the court to right a wrong but is complicit in the wrong he seeks to right. For example, in *Holy Family Catholic School v. Boley*, 847 So. 2d 371 (2002), an employee of Holy Family Catholic School named Charles W. Boley suffered an on-the-job injury. As

⁶ One might ask why Planned Parenthood needs an enhanced security system if it has no intention of engaging in future unethical or illegal operations.

⁷ According to the Lozier Institute, in its 2019-2020 annual report, Planned Parenthood listed \$1.6 billion in income and over \$2.0 billion in net assets. *Fact Sheet: Planned Parenthood’s 2019-20 Annual Report*, CHARLOTTE LOZIER INSTITUTE, Feb. 23, 2021, lozierinstitute.org/fact-sheet-planned-parenthoods-2019-20-annual-report/.

part of the settlement, the School was to maintain an account at Medicine Shoppe through which Boley could obtain his injury-related medications. Boley charged unrelated medications to the account, so the School closed the account. Boley sued, but the Alabama Court of Civil Appeals ruled that Boley's acts of charging unrelated medications to the account constituted "unclean hands" and refused to entertain his lawsuit.

As Justice Joseph Story wrote in *Commentaries on Equity Jurisprudence* (14th ed., 1918) at section 98:

It is one of the fundamental principles upon which equity jurisprudence is founded that, before a complainant can have a standing in court, he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.

John Norton Pomeroy wrote in *Equity Jurisprudence and Equitable Remedies* (1918) sec. 397:

whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy has violated conscience or good

faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

This Court held in *Bein v. Heath*, 47 U.S. 228 (1848) at 247,

It is a principle in chancery that he who asks relief must have acted in good faith. The equitable powers of this Court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this Court the a better of iniquity.

And this Court also stated in *Deweese v. Reinhard*, 165 U.S. 386 (1897) at 390:

A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

In the District Court below, Daleiden raised the unclean hands defense, arguing that because Planned Parenthood had engaged in the unethical and illegal harvesting and sale for profit of the

organs of unborn babies, their hands were unclean and therefore they could not bring this lawsuit.

The District Court granted summary judgment to Planned Parenthood on Daleiden's clean hands defense, noting that the Planned Parenthood's "unclean" conduct does not directly relate to its lawsuit against Daleiden.

It is true that equity "does not demand that its suitors shall have led blameless lives." *Loughran v. Loughran*, 292 U.S. 216, 239 (1934). There must be a nexus between the plaintiff's wrongful acts and the remedy he seeks in court. If a plaintiff sues a defendant for wrongful conversion of stocks, and the plaintiff had committed an act of shoplifting many years earlier, that would not give rise to the unclean hands defense because the acts are not related to one another. But they do not need to be as directly related as the District Court indicated.

The District Court cited *Adler v. Federal Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000), in which Adler advanced \$5 million for an illegal contract with Nigeria. Adler performed on the contract, Nigeria did not. Adler sued, and Nigeria claimed Adler had unclean hands because the contract was illegal. The Ninth Circuit held that the parties were equally at fault, and therefore they applied the clean hands doctrine as a bar to recovery. This case actually supports Daleiden's clean hands defense.

The District Court also cited *Precision*

Instrument Mfg Co. v. Auto Maintenance Machine Co., 324 U.S. 806 (1945), in which this Court held that the plaintiff's misconduct must relate directly to the cause at issue. Even though both parties' misconduct were of many kinds, from perjury to patent infringements, this Court concluded at 819 that the District Court had been correct because the "inequitable conduct impregnated Automotive's entire cause of action, and justified dismissal by resort to the unclean hands doctrine." The Court also noted at 815 that "one's misconduct need necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the [unclean hands] maxim by the chancellor." Again, this case supports Daleiden's position more than that of Planned Parenthood.

The final case cited by the District Court is *Kendall-Jackson Winery, Ltd. v. Super. Ct.*, 76 Cal. App. 4th 970 (Cal. App. 5th Dist. 1999). In *Kendall*, the California Appellate Court said the issue in a malicious prosecution claim is whether the relevant misconduct was limited to that which affected the other party's decision to file and pursue the prior lawsuit. There is no prior lawsuit here, but clearly the misconduct of Planned Parenthood in harvesting and selling the organs of unborn babies is directly related to Daleiden's decision to do his

undercover investigation. It is the only reason he conducted the investigation. The results of his investigation, which demonstrated that Planned Parenthood is engaged in these practices on a wide scale, is the only reason Planned Parenthood brought this lawsuit. Like the other two cases cited by the District court, this case supports Daleiden's position more than that of Planned Parenthood.

Planned Parenthood's unethical and illegal activities are what this lawsuit is all about. Clearly they are related, even directly related. One cannot separate the harvesting of unborn babies from this lawsuit.

The unclean hands doctrine therefore applies. Planned Parenthood should not be allowed to bring a lawsuit in which their hands are not only unclean, but dripping with blood.

III. The decision below will chill and intimidate undercover journalism.

Undercover journalism has a long and important history in the discovery and exposure of truth.

Consider Elizabeth Jane Cochran, better known by her pseudonym Nellie Bly, who in 1887 at the behest of the *New York World* checked herself in as a patient into the Women's Lunatic Asylum on Blackwell's Island, feigning insanity, to report on cruelty and neglect. Her reporting in the *New York World*, followed by her book, *Ten Days in a Mad House* (1887), led to a grand jury indictment of the

asylum. She engaged in similar undercover journalism in sweatshops, jails, and the legislature.⁸

Or consider Gloria Steinem, who in order to expose exploitative working conditions in New York's Playboy Club applied for and obtained a job as a Playboy Bunny, worked at the job for eleven days, and wrote "A Bunny's Tale" which was published in *Show Magazine* in 1963.⁹

And consider Hunter S. Thompson, who in 1965 was hired by *The Nation* editor Carey McWilliams to go undercover as a member of the Hell's Angels motorcycle club in California. His book *Hell's Angels: The Strange and Terrible Saga of the Outlaw Motorcycle Gangs* was published by Random House in 1966 and was widely praised for the information and insights it revealed.¹⁰

Had these undercover journalists, and many

⁸ Encyclopedia Britannica *Nellie Bly: American Journalist*, <https://www.britannica.com/biography/Nellie-Bly>.

⁹ *Gloria Steinem Publishes Part One of "A Bunny's Tale" in SHOW Magazine*, [History.com](https://www.history.com/this-day-in-history/gloria-steinem-publishes-a-bunnys-tale-show-magazine), Nov. 20, 2021, <https://www.history.com/this-day-in-history/gloria-steinem-publishes-a-bunnys-tale-show-magazine>.

¹⁰ Hunter S. Thompson, *Hell's Angels: The Strange and Terrible Saga of the Outlaw Motorcycle Gangs*, (1996); S. Flannagan, *The truth About Hunter S. Thompson's Time with the Hells Angels*, [Grunge.com](https://www.grunge.com/702003/the-truth-about-hunter-s-thompsons-time-with-the-hells-angels/), Dec. 9, 2021, <https://www.grunge.com/702003/the-truth-about-hunter-s-thompsons-time-with-the-hells-angels/>.

like them, faced the massive retaliation Planned Parenthood has launched against Daleiden, no one would have followed in their footsteps. If this decision stands, would-be investigative journalists will know not to take on the rich, powerful, and well-connected, or they will face financial ruin. Much information and evidence about illegal and immoral activities will remain hidden from public view, and the public will not be able to act to correct these injustices.

This is a classic example of a “chilling effect” on free speech as described in *Wieman v. Updegraff*, 344 U.S. 183 (1952).

If the lower court decision is allowed to stand, not only will Daleiden be deprived of his God-given rights to freedom of speech and freedom of the press as guaranteed by the United States Constitution, the American people will be deprived of much important information that can be helpful in public discourse.

CONCLUSION

Rich, powerful, and well-connected organizations are harvesting the organs of unborn babies, selling them, and privately bragging about it. The public and those who make our laws would know nothing of this, were it not for one man of courage and integrity who went undercover to learn and expose the truth.

The Foundation urges the Court to grant Daleiden’s Petition for a Writ of Certiorari, not only

to resolve a circuit split and correct a grave injustice, but also to ensure that the rich, powerful, and well-connected are not able to misuse their power and suppress information that is vital to public discourse.

Respectfully submitted,

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