No. 16-36038

In the
United States Court of Appeals
for the Ninth Circuit

JANE DOES 1-10, individually and on behalf of others similarly situated; 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; PERRY TAPPER, Public Records Compliance Officer at the University of Washington, in his official capacity,

Defendants.

Appeal from the United States District Court for the
Western District of Washington, Seattle, Case No. 2:16-cv-01212-JLR.
The Honorable **James L. Robart**, Judge Presiding.

OPENING BRIEF OF DEFENDANT-APPELLANT DAVID DALEIDEN

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INTRODUCTION

The preliminary injunction on appeal is an assault on the Washington Public Records Act ("PRA"). Appellant David Daleiden ("Daleiden") made a routine request under the PRA to see documents relating to a publicly-funded fetal tissue research laboratory at the University of Washington ("UW"). No one disputes that Daleiden is legally entitled to inspect the requested documents. Nevertheless, a collection of government employees and contractors, united only by the fact that they are named in UW's disclosures, filed this lawsuit objecting to the release of a broad array of alleged "personal identifying information" to Daleiden.

Appellees claim to be defending a putative right to conceal their involvement in publicly-funded research, but the requested disclosures would reveal the identity of no one who is not already publicly known to be involved in such research. This lawsuit is plainly meant to serve another purpose: obstructionism. Appellees disagree with Daleiden's investigative agenda, and they filed this spurious lawsuit to impede his access to information that will further that agenda.

This lawsuit is, at best, an illegal attempt by government employees and contractors to evade public scrutiny and, at worst, a cynical tactic to stall an ideological adversary. The preliminary injunction granted by the district court thus

flouts the PRA and the principles of transparency and accountability that gave rise to it.

The preliminary injunction enables Appellees to conceal information about the activities of a government agency, in direct contravention of the PRA. It must not stand.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees have asserted claims arising under 42 U.S.C. § 1983 and the United States Constitution, giving this Court federal question jurisdiction pursuant to 28 U.S.C. § 1331. The district court exercised supplemental jurisdiction over the state-law claims at issue in this appeal under 28 U.S.C. § 1367. This appeal challenges an order granting a preliminary injunction, over which the Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered its Order Granting Motion for a Preliminary Injunction ("PI Order") on November 15, 2016. On December 15, 2016, Appellant Daleiden filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the district court's preliminary injunction violates the State of Washington PRA by authorizing a government agency to withhold information that is responsive to a legitimate PRA request and is not exempt from disclosure by any statute.

2. Whether the district court applied the wrong legal standard to Appellees' Motion for a Preliminary Injunction by failing to require a *clear showing* of *likelihood* of success on the merits.

3. Whether the district court abused its discretion in concluding that the federal Constitution grants Appellees a right to conceal from the public their involvement with a state agency that is subject to an open records law.

4. Whether the PRA permits the concealment of government activities that are the subject of widespread public concern, or rather forbids such concealment.

ADDENDUM

Pertinent statutes are included in the Addendum to this Brief.

STATEMENT OF THE CASE

Appellant David Daleiden is an investigative journalist who has conducted extensive research concerning the sale, procurement, and transfer of aborted human fetal organs and tissue for experimental purposes.[1] ER A136, ¶¶ 2-3. From 2013 to 2015, the Center for Medical Progress ("CMP"), which he heads, conducted an undercover investigation to document Planned Parenthood and other abortion facilities' involvement in the harvesting and sale of aborted fetal tissue.

[1] "Tissue" in this context refers to any fetal parts, typically organs such as liver, brain, thymus, lungs, kidneys, and limbs.

ER A136, ¶ 4. On July 14, 2015, CMP began releasing the findings of this 30-month-long investigation as "The Human Capital Project," a series of videos revealing, among other things, Planned Parenthood's participation in the harvesting and sale of fetal parts. *Id.*

From its first video release, the Human Capital Project generated tremendous public interest. CMP's video releases dominated national headlines for months. Videos released as part of the project have received over 12.1 million views on YouTube alone, and the project's revelations have been covered by CNN, FOX News, MSNBC, ABC, CBS, NBC, The New York Times, The Washington Post, The Los Angeles Times, The Associated Press, Reuters, and countless other print, radio, television, and new media. *Id.* The project also sparked multiple state and federal investigations. At the state level, in the wake of the videos, "more than a dozen states have sought to halt or reduce public funding for Planned Parenthood." David Crary, *State-by-State Strategy Wielded to Defund Planned Parenthood*, Associated Press (Apr. 3, 2016), http://salinapost.com/2016/04/03/state-by-state-strategy-wielded-to-defund-planned-parenthood. And at least one district attorney has sued fetal tissue procurement companies for illegally profiting from the sale of fetal tissue. *See, e.g.*, Christopher Goffard & Soumya Karlamangla, *Orange County Prosecutors File Suit Against Biological Suppliers, Alleging Unlawful Pricing of Fetal Tissue*, L.A. TIMES (Oct. 13, 2016),

http://www.latimes.com/local/lanow/la-me-ln-fetal-tissue-charges-orange-county-20161012-snap-story.html.

Meanwhile, the videos incited a congressional debate that nearly shut down the federal government—resolved only by the House of Representatives impaneling a Select Panel to investigate the revelations in the videos. *See* ER A066-67, A136, ¶ 5; *see also* Wesley Lowery & Mike DeBonis, *Boehner: There Will Be No Government Shutdown; Select Committee Will Probe Planned Parenthood*, Washington Post (Sept. 27, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/09/27/boehner-there-will-be-no-government-shutdown-select-committee-will-probe-planned-parenthood/?utm_term=.ec9036dd5152. The Senate Judiciary Committee also launched an investigation. MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY, S. DOC. NO. 114-27, at 28-29 (2d Sess. 2016), *available at* http://www.grassley.senate.gov/sites/default/files/judiciary/upload/22920%20-%20FTR.pdf ("SENATE JUDICIARY REPORT"). The findings of those investigations were damning, revealing that many actors in the fetal tissue market—including Planned Parenthood Federation of America and several of its affiliates—had likely broken federal or state laws. *See, e.g.*, Letter from Charles E. Grassley, Chairman, Senate Committee on the Judiciary, to Attorney General Loretta Lynch and FBI Director James Comey (December 13,

2016), *available at* https://www.judiciary.senate.gov/imo/media/doc/2016-12-13%20CEG%20to%20DOJ%20FBI%20-%20Fetal%20Tissue%20Investigation%20referrals.pdf; SELECT INVESTIGATIVE PANEL OF THE ENERGY & COMMERCE COMMITTEE, FINAL REPORT 33 (Dec. 30, 2016), *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf ("SELECT PANEL FINAL REPORT"). Together, the two congressional investigations yielded more than a dozen referrals to law enforcement agencies, plus another half dozen to regulatory agencies, for further investigation and possible prosecution. *See* SELECT PANEL FINAL REPORT at 33-34; SENATE JUDICIARY REPORT at 55 ("[T]he Department of Justice should investigate the fetal tissue practices of the Planned Parenthood Federation of America; all the Planned Parenthood affiliates that have engaged in paid fetal tissue transfers within the statute of limitations; Advanced Bioscience Resources, Inc.; Novogenix Laboratories, LLC; and StemExpress, LLC.").

Appellant Daleiden first learned of the University of Washington's Birth Defects Research Laboratory ("BDRL") and its supply of aborted fetal tissue and organs in a 2001 newspaper article. ER A138, ¶ 14; *see also* Scott Sunde, *UW Lab in Eye of Fetal-Research Storm*, SEATTLE POST-INTELLIGENCER (Aug. 19, 2001), http://www.seattlepi.com/local/article/UW-lab-in-eye-offetal-research-storm-

1063186.php. Later, in the context of CMP's 2013-2015 investigation, Planned Parenthood Federation of America's Senior Director of Medical Services, Dr. Deborah Nucatola, referenced the BDRL as the "group at the University of Washington that reached out directly to" Planned Parenthood affiliates. ER A138, ¶ 16; *see also* Video: FULL FOOTAGE: Planned Parenthood Uses Partial-Birth Abortions to Sell Baby Parts (The Center for Medical Progress 2015), https://youtu.be/H4UjIM9B9KQ?t=46m08s. For these and other reasons, Daleiden "believe[s] that the BDRL is an important case study to understand the fetal trafficking phenomenon," and that "the protocols of the BDRL relating to the procurement and transfer of aborted fetal tissue are a critical benchmark to use to compare to the business practices of other private-sector fetal tissue procurement entities and partners." ER A138-39, ¶¶ 14-20.

Daleiden is not alone in that conviction. The House Select Investigative Panel also trained significant attention on the BDRL, noting in its July 2016 Interim Update:

> The University of Washington School of Medicine manages and operates the Birth Defects Research Laboratory (UW BDRL), which contains the largest fetal tissue bank in the nation. . . . ***In this and other cases involving similar entities, a full investigation includes asking broader questions as to whether other value was received from, or personnel shared with, the University of Washington***.

ER A076-77 (emphasis added). The Select Panel also noted at that time that the University of Washington had not responded to its requests for information about

the BRDL. ER A79, A190.[2] Six months later, the same Select Investigative Panel's Final Report dedicated an entire section to the activities of the BDRL, as a Case Study of "The University/Clinic Model" in the Fetal Tissue Industry. SELECT PANEL FINAL REPORT at 253-60. Among other findings, the Panel noted that:

- UW refused to produce information about BDRL personnel who also work at the abortion clinics that supply the laboratory with fetal tissue, but the Panel found from other sources that "UW BDRL deploys doctors to outside abortion clinics and that numerous physicians on the staffs of those clinics hold faculty positions at UW BDRL." *Id.* at xxxiii, 256.

- At least one of the laboratory's providers of fetal tissue had "grossly misrepresent[ed] the state of scientific research and available treatment" in its efforts to induce women into donating their fetal tissue. *Id*. at 256

- One of the fetal tissue researchers at the BDRL had authored "a paper on optimal abortion techniques." *Id.* at 258.

- UW made only a "partial production" and redacted its documents so heavily that they were not informative. *See id.* at 258-59 ("In addition to names, UW redacted identities of departments at the university involved in various transactions, shipment dates, and even (in many but not all cases) descriptions of the tissue involved. . . . ***The invoices either do not specify what clinic services are involved or, when they apparently elaborate on the nature of such services, those elaborations are redacted—rendering it impossible for the Panel to conduct a forensic analysis of UW's financial arrangements with clinics***.") (emphasis added).

[2] The Attorney General of Washington had been publicly critical of the work of the Select Panel. *See, e.g.*, Cong. Suzan DelBene, *GOP's Select Panel Threatens Women's Safety, Privacy* (Mar. 9, 2016), https://delbene.house.gov/media-center/press-releases/delbene-gop-s-select-panel-threatens-women-s-safety-privacy. The Attorney General, on behalf of the State of Washington, has throughout this lawsuit supported Appellees' attempts to suppress the information Daleiden has requested about government involvement in fetal tissue research.

- The Washington attorney general's inquiry into the laboratory had been halfhearted and insufficient. *Id.* at 259.

The Select Investigative Panel's ultimate conclusion about the BDRL was that "UW's incomplete production raises more questions than it answers and demonstrates the need for further investigation." *Id.*[3]

In the midst of this robust public discussion of fetal tissue procurement in general and the BDRL in particular, on February 10, 2016, Appellant Daleiden sent the University of Washington a public records request under the Washington State Public Records Act, RCW Chapter 42.56, seeking "all documents that relate to the purchase, transfer, or procurement of human fetal tissues, human fetal organs, and/or human fetal cell products at the University of Washington Birth Defects Research Laboratory from 2010 to present." ER A140, ¶ 21; ER A203-05. Nearly six months later, in late July 2016, the University of Washington declared its intent to produce responsive documents on August 5, 2016, unless enjoined by a court before then. *See* ER A096. In response to UW's declaration, a handful of government employees and contractors, united only by the fact that they were named in UW's disclosures, filed this lawsuit objecting to the release of their personal information to Daleiden. *See* ER A500-09. They immediately sought

[3] At one point, BDRL invoked the district court's excessively overbroad TRO to stall production to the Select Panel, causing the Chair of that Panel to write to the district court, urging it to clarify to UW that the TRO did not excuse UW from responding to a congressional subpoena. ER A038-41; *see infra* pp. 10-11.

both a temporary restraining order and a preliminary injunction "to prevent disclosure of their identities and related personal identifying information" in the requested disclosures. ER A479-95.

Seeking to spare all parties the time and expense of an unnecessary lawsuit, Daleiden responded to Appellees' Complaint by clarifying that his request did not even reach names or personal contact information, and noting that he would be happy to accept the documents with Appellees' identities and personal contact information redacted.[4] *See* ER A044-057, A277-300. Instead of accepting Daleiden's concession, Appellees continued to litigate. On the same day that Plaintiffs-Appellees filed their Complaint, the district court granted them a TRO that went much farther than Appellees had even requested, enjoining UW not only from "disclosing the personal identifying information," but also "from releasing, altering, or disposing of the requested documents . . . pending further order of [the] court." ER A317-23. After briefing the issues, the district court issued a preliminary injunction that corresponded more closely with what Plaintiffs-

[4] In the e-mail communications clarifying his request, Daleiden defined personal contact information as "including direct work phone numbers, work e-mails, personal addresses, and personal cell phone numbers" but not including "names of entities." ER A287-88. Daleiden's sole qualification on names was that UW should not redact the names of eight individuals he had already named in the public records request—none of whom was a party to the lawsuit, and all of whom were already publicly associated with fetal tissue research. ER A140-45, ¶¶ 26-45; ER A203-43.

Appellees had actually sought, "prohibit[ing] the disclosure of Plaintiffs' personally identifying information in response to Defendants' PRA requests." ER A021. But the district court also adopted Appellees' overbroad interpretation of "personal identifying information" as including at least "a broad range of information that (a) identifies or provides the location of specific individuals, (b) would allow individuals to be identified or located, and (c) would allow individuals to be contacted." ER A023. And the district court even granted Appellees' request to redact the names of the eight individuals who were already named in Daleiden's records request. ER A025. Facing a document production so heavily scrubbed of information as to be practically worthless for investigative purposes, Daleiden now seeks relief from this Court of Appeals, to overturn the preliminary injunction and allow these public documents to be released as required by the PRA.

SUMMARY OF ARGUMENT

The preliminary injunction at issue in this appeal is a subversion of the State of Washington's Public Records Act ("PRA"), RCW Chapter 42.56. The PRA was enacted decades ago to ensure government transparency and accountability in the Evergreen State. However, relying in part on the exceptional public interest in the activities at issue here, the district court determined that there should be no such transparency and accountability in this case. By the district court's reasoning, the public should *not* have access to information about official conduct precisely when

access to such information is *most* critical—i.e., when citizens are gravely concerned about that conduct. The preliminary injunction stands logic on its head and leaves the PRA toothless and without purpose.

In order to justify withholding public records under the PRA, a party has to demonstrate that either a provision of the Act itself or some other statute "exempts or prohibits disclosure." *See* RCW § 42.56.070(1); RCW § 42.56.540. Therefore, in order to obtain a preliminary injunction restraining the government from disclosing public records, a party has to make a "clear showing" of "likelihood of success" at demonstrating that such a statute exempts the records from disclosure. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Munaf v. Green*, 553 U.S. 674, 689 (2008). Appellees did not—and cannot—make that showing.

To begin with, Appellees did not even attempt to make a "clear showing" of "likelihood of success" at the district court, and instead aimed at the substantially lower standard of showing "serious questions as to the merits." ER A485. That standard is not consistent with Supreme Court and Ninth Circuit precedent, and the district court abused its discretion in applying it at Appellees' suggestion.

Moreover, Appellees' claims fail as a matter of law, regardless of the standard. Appellees proposed three legal theories for exempting their personal information from disclosure, but none of them supports a right to conceal their involvement in government activities that are subject to an open records law.

The constitutional rights to privacy and association simply do not apply to Appellees' predicament. *See NASA v. Nelson*, 562 U.S. 134, 146-47 (2011) (noting that the Court had not hinted at the existence of a constitutional right to informational privacy since "the waning days of October Term 1976"); *Doe v. Reed*, 823 F. Supp.2d 1195, 1203 (W.D. Wash. 2011) (requiring a party invoking the right to association to show that it "constitute[d] a fringe organization with unpopular or unorthodox beliefs"). Even if they did, Appellees' claims would still fail, because both privacy-based and association-based objections to disclosure in this context require balancing the burdens of disclosure on the individual against the public interest. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2009); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999). In this case, there is no question that the public's vital interests in government transparency and accountability outweigh any privacy or associational interests of individuals who willingly chose to communicate and transact business with a government agency that was subject to an open records law. *See, e.g.*, *Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1091 (9th Cir. 2016) (because of open records law, state employee had no right to privacy in emails concerning official state business, even when sent from his personal email account).

Appellees also claim that their personal identifying information falls under the PRA's exemption for "[p]ersonal information in files maintained for employees

. . . of any public agency to the extent that disclosure would violate their right to privacy." RCW § 42.56.230(3) (emphasis added). That argument fails for at least two reasons. First, the exemption applies only to "employees" of a "public agency," which is only a small subset of Appellees. Second, the "right to privacy" under the PRA applies only to deeply personal or embarrassing facts, and not to matters that "arise[] exclusively from the employee's *public* employment." *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wash.2d 896, 904-05 (2015) (explaining that examples of such highly personal facts would be those relating to "[s]exual relations," "family quarrels, many unpleasant or disgraceful or humiliating illnesses"). Nothing in the requested disclosures resembles anything that might be exempt under RCW § 42.56.230(3).

In sum, Appellees identified *no* colorable legal basis for concealing their interactions with a government agency, and therefore they did not come close to the "clear showing" of "likelihood of success" that is necessary for a preliminary injunction. *Mazurek*, 520 U.S. at 972; *Munaf*, 553 U.S. at 689. That is hardly surprising, considering that the purpose of the PRA is to *prevent* such concealment. The Supreme Court has called open records laws like the PRA "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The preliminary injunction permits Appellees to circumvent

that "structural necessity" without adequate justification; therefore, the district court abused its discretion in granting it.

ARGUMENT

Standard of Review. This Court generally reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *PlayMakers LLC v. ESPN, Inc.*, 376 F.3d 894, 896 (9th Cir. 2004) (internal quotations marks and citation omitted). Appellant contends that the district court applied the wrong legal standard to Appellees' Motion for a Preliminary Injunction. "When the district court is alleged to have relied on an erroneous legal premise, [the Ninth Circuit] review[s] the underlying issues of law de novo." *Id.* at 896-97.

I. Appellees Did Not, and Cannot, Satisfy the Standard for a Preliminary Injunction.

A. The District Court Did Not Require a *Clear Showing* of *Likelihood* of Success on the Merits.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*,

555 U.S. 7, 20 (2008) (holding that "likelihood" is a higher standard than mere "possibility"). The Supreme Court and the Ninth Circuit have both held that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek*, 520 U.S. at 972 (citation omitted); *see also Winter*, 555 U.S. at 20; *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). The Ninth Circuit has called the "clear showing" requirement a "heavy burden" for a party seeking preliminary injunctive relief. *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1322 (9th Cir. 2015). The district court did not require Appellees to make a "clear showing" that they are entitled to a preliminary injunction. *See* ER A008.

Instead, the district court cited a standard proposed by Appellees that required them to show only "serious questions going to the merits" of the lawsuit, rather than *likelihood* of success on those merits. ER A008 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). That comparatively low bar cannot be reconciled with the decisions of the Supreme Court, which have unequivocally held that *every* litigant who seeks a preliminary injunction must demonstrate that he is *likely* to succeed on the merits. *See Munaf*, 553 U.S. at 689 ("[A] party seeking a preliminary injunction *must demonstrate*, among other things, a likelihood of success on the merits." (citations omitted)

(emphasis added)); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) ("[T]he party seeking pretrial relief bears the burden of demonstrating a likelihood of success on the merits."); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) ("The proper legal standard for preliminary injunctive relief requires a party to demonstrate that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." (quotation marks and citation omitted)).

Other district courts in the Ninth Circuit have recognized the tension between the "serious questions" test and the "likelihood" standard established in *Winter*, *Munaf*, and *Stormans*, and have made clear that a preliminary injunction requires *actual* likelihood. *See, e.g.*, *US Bank, N.A. v. SFR Invs. Pool 1, LLC*, 124 F. Supp. 3d 1063, 1070-71 (D. Nev. 2015) ("The Court must reconcile the cases by interpreting the *Cottrell* 'serious questions' requirement to be in harmony with the *Winter/Selecky* 'likelihood' standard, not as being in competition with it. 'Serious questions going to the merits' must therefore mean that there is at least a reasonable probability of success on the merits."); *SEC v. Banc de Binary, Ltd.*, 964 F. Supp. 2d 1229, 1233 (D. Nev. 2013) ("The *Cottrell* court must have meant something like 'reasonable probability,' which appears to be the most lenient position on the sliding scale that can satisfy the requirement that success on the

merits be 'likely.' If success on the merits is merely possible, but not at least reasonably probable, no set of circumstances with respect to the other prongs will justify preliminary relief."); *Campbell v. Feld Entm't, Inc.*, 2013 U.S. Dist. LEXIS 120432, at *14-15 (N.D. Cal. Aug. 22, 2013) ("[T]his 'serious questions' standard is in tension with *Winter* and prior Ninth Circuit case law rejecting any earlier standards that are lower than the standard in *Winter*. . . . The Court therefore addresses only the *Winter* factors." (citation omitted)).

Although the district court did use the term "likelihood" in its Order, it nowhere acknowledged that "likelihood" is a more demanding standard than the "serious questions" standard that it purportedly set out to apply, at Appellees' suggestion. ER A008-19; *see Munaf*, 553 U.S. at 689; *Gonzales*, 546 U.S. at 428; *Stormans*, 586 F.3d at 1127. In addition, the district court never even paid lip service to the requirement of a "clear showing" of likelihood of success. *See Winter*, 555 U.S. at 20; *Mazurek*, 520 U.S. at 972; *Center for Competitive Politics*, 784 F.3d at 1322; *Lopez*, 680 F.3d at 1072. And the district court granted the preliminary injunction on the basis of a showing that fell woefully short of "likelihood," never mind a "clear showing" thereof. *See infra* Section I.B. The district court's failure to apply the correct legal standard, notwithstanding clear Supreme Court and Ninth Circuit precedent, is an abuse of discretion warranting reversal. *See PlayMakers LLC*, 376 F.3d at 896.

B. Appellees Cannot Make a Clear Showing That They Are Likely to Succeed on the Merits of Their Claims.

The Washington Public Records Act ("PRA") is a strongly-worded mandate for open government . . . ." *City of Federal Way v. Koenig*, 167 Wash.2d 341, 344 (2009) (quotation omitted). "The primary purpose of the Public Records Act is to provide broad access to public records to ensure government accountability." *Livingston v. Cedeno*, 164 Wash.2d 46, 52 (2008). "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW § 42.56.030. To that end, the PRA requires UW to "make available for public inspection and copying all public records," unless a provision of the Act or some other statute prohibits the disclosure. *See* RCW § 42.56.070(1).

Section 42.56.230 explicitly enumerates categories of "personal information" that are exempt from disclosure under the Act, including credit card numbers, Social Security numbers, license plate numbers, and driver's licenses. *See* RCW §§ 42.56.230(5); 42.56.230(7)(c). Neither Appellees nor the district court has identified any specific statutory provision that precludes the disclosure of the identities or "identifying information" of government employees or contractors. *See, e.g.*, *Predisik*, 182 Wash.2d at 905 (for purposes of what is private under the

Washington PRA, distinguishing between facts related to a public employee's profession, which is necessarily "freely exposed to the public," and those related to an employee's family and home life). Appellees chose to conduct their affairs in the public domain, and they cannot now shield those affairs from public scrutiny. The PRA was enacted to prevent precisely the sort of secrecy that Appellees seek.

1. The Constitutional Right to Privacy Does Not Bar the Requested Disclosures.

Appellees contend that the requested disclosures would violate their constitutional right to privacy.[5] That claim is meritless. Even assuming that there is a constitutional right to informational privacy[6], the Court would have to "engage

[5] "[T]he Washington Constitution provides no more protection than the federal constitution in the context of the interest in confidentiality, or the nondisclosure of personal information . . . ." *In re Meyer*, 142 Wash.2d 608, 619 (2001). Therefore, Appellees' state constitutional privacy claim fails along with their federal constitutional privacy claim.

[6] Appellant submits that there is not. The Supreme Court has called the very existence of such a right into question. *See NASA v. Nelson*, 562 U.S. 134, 146-47 (2011) (declining to decide whether such a right exists, but noting that the Court had not hinted at the existence of such a right since "the waning days of October Term 1976"); *id.* at 162 (Scalia, J., concurring in the judgment) ("[T]here is no constitutional right to informational privacy"); *see also, e.g.*, *Am. Fed'n of Gov't Employees v. Dep't of Housing & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information"). The Ninth Circuit has not revisited the existence of this right since *Nelson*. *But see Nelson v. NASA*, 568 F.3d 1028, 1052 (9th Cir. 2009) (Kozinski, C.J., dissenting from the denial of rehearing en banc) (encouraging the Ninth Circuit to revisit its informational-privacy doctrine, and asking "[i]s there a constitutional right to informational privacy?"). But even if such a right did exist, it would not provide any protection to Appellees in this case.

in the delicate task of weighing competing interests to determine whether the government may properly disclose private information." *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999). Here, that balancing would rule out Appellees' privacy claim as a matter of law.

On one side of the balance, the requested disclosures will have minimal, if any, impact on Appellees' legitimate privacy interests. Appellees claim that the names and identifying information of individuals who have communicated with a government agency is "not the type [of information] that would ordinarily be publicly available," s*ee* ER A487, but that claim is plainly false. Names of public employees are regularly released under the Washington PRA, even when the employees assert fear of harassment or violence. *See King County v. Sheehan*, 114 Wn. App. 325, 345-46 (Wash. Ct. App. 2002) (though "public identification could lead to harassment and danger in their personal lives," holding no right of privacy in disclosure of police officers' names, despite that, "[i]t is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure of the names of police officers under the act.").

Indeed, the Ninth Circuit has held that the public's interest in access to governmental records outweighs considerably more concrete privacy concerns than those proffered by Appellees. In *In re Crawford*, a person challenged a federal law

requiring public disclosure of the social security numbers of bankruptcy petition preparers. 194 F.3d at 956-57. The court expressly recognized that "the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous." *Id.* at 958 (quotation omitted). The court also acknowledged the challenger's argument that "the disclosure of his SSN makes him vulnerable to being a victim of certain crimes." *Id.* at 959. Nevertheless, the court concluded that "the right of public access to judicial proceedings" outweighed even the weighty privacy concerns on which the challenger relied. *Id.* at 960. Appellant here has already agreed to redactions of information much more innocuous than the social security numbers required to be disclosed to the public in *Crawford*, dooming Appellees' constitutional privacy claim.

It is also well-established that a person lacks a reasonable expectation of privacy in information that he or she voluntarily discloses to a third party, especially when that third party is a governmental entity. *See United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. Forrester*, 512 F.3d 500, 509 (9th Cir. 2007) ("[A] person has no legitimate expectation of privacy in

information he voluntarily turns over to third parties." (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979))).[7]

Furthermore, Appellees chose to communicate and transact business with a state agency that is, and has at all times relevant to this case, been subject to a broad open records law. Washington's open records law puts everyone on notice that their communications and business dealings with the State are open to public review. *See City of Ontario v. Quon*, 560 U.S. 746, 758 (2010) (whether a communication is subject to review under an open records law "bear[s] on the legitimacy of an employee's privacy expectations"); *Kitzhaber*, 828 F.3d at 1091 (because of open records law, state employee had no right to privacy in emails concerning official state business, even when sent from his personal email account); *see also, e.g.*, *Painting Indus. of Haw. Mkt. Recovery Fund v. United States Dep't of the Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) (noting that "Hawaii's freedom of information statute makes certified payroll records for public works projects available for public inspection"). After knowingly choosing to communicate in a forum that is wide open to public scrutiny, Appellees' cannot claim that those communications are "not the type [of information] that would

[7] Appellees have tried to discredit these cases on the grounds that they involve the Fourth Amendment, but the Supreme Court itself has looked to Fourth Amendment cases in analyzing information privacy under the Constitution. *See, e.g.*, *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 459 (1977) (citing *Miller*, 425 U.S. 435).

ordinarily be publicly available." ER A487. If Appellees expected that their communications with—or as—government employees in the State of Washington would remain "private," those expectations were neither reasonable nor legitimate. *Kitzhaber*, 828 F.3d at 1091. Therefore, the disclosure of such communications could have no effect on cognizable privacy interests.

And finally, Daleiden has requested that UW redact names[8] and personal contact information. *See* ER A044-057, A277-300. Thus, Daleiden has taken pains to ensure that the requested disclosures do not implicate *any* privacy interests at all, much less those of constitutional significance.

Against Appellees' non-existent privacy interests, the Court has to weigh the critical interest in governmental transparency that gave rise to the Washington Public Records Act. As described above, "[t]he primary purpose of the Public Records Act is to provide broad access to public records to ensure government accountability." *Livingston*, 164 Wash.2d at 52. Governmental open records laws like the PRA provide an essential "check against corruption." *Prison Legal News v. Dep't of Homeland Security*, 113 F. Supp.3d 1077, 1081 (W.D. Wash. 2015) (quotation omitted). The people of the State of Washington have a *vital* interest in—and, under the PRA, a legal right to—information about the research in which

[8] Save the eight names of the well-known individuals specifically identified in Appellant's PRA request. *See supra* note 4; ER A140-45, ¶¶ 26-45; ER A203-43.

state entities are engaged, the parties with whom state entities have entered into business transactions, and the ways in which public funds are spent. The Supreme Court has called open records laws like the PRA "a structural necessity in a real democracy." *Favish*, 541 U.S. at 172.

Moreover, the public's interest in transparency is at its peak when, as here, the government activities and expenditures relate to matters that have been the subject of extensive public discussion and debate. Indeed, a Select Investigative Panel of the United States Congress has already documented suspect fetal procurement practices at the BDRL and has called for further investigation into the precise subject matter of Daleiden's PRA request. *See supra* pp. 5-9; ER A076-77; *see also* SELECT PANEL FINAL REPORT at 259. It is hard to imagine a more compelling case of public interest in the disputed government records.

Yet, Appellees have argued that the public debate over fetal tissue research should militate *against* disclosing information about their activities. That extraordinary theory would turn the purpose of the PRA on its head, ensuring open government *except* when that openness might lead to public criticism. The controversial nature of Appellees' activities is a factor strongly supporting public disclosure, not suppression, of information. Naturally, Appellees would *prefer* to conduct their business with the State without the potential for public oversight and critique, but the PRA exists precisely to prevent government from operating in the

shadows. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)). Thus, even if Appellees could demonstrate some legally cognizable privacy interest in communications with a public agency, the public's interest in sunlight—that is, its strong interest in open and accountable government—would dramatically outweigh them. Therefore, Appellees' constitutional privacy claim fails as a matter of law. Appellees have by no means made a clear showing that they are likely to prevail on the merits of that claim.

2. The Constitutional Right to Association Does Not Bar the Requested Disclosures.

Appellees' claim that the requested disclosures would violate their constitutional right to association[9] also fails as a matter of law. As a threshold matter, Appellees are not the sort of "group" that can invoke the constitutional right to association to defend against disclosure of its members. Disclosure of a group's members implicates the right to association *only if* the "group[] seek[s] to further ideas historically and pervasively rejected and vilified by both this

[9] The scope of the right to association under the Washington Constitution is co-extensive with the right to association under the United States Constitution. *See State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 156 Wash.2d 543, 559 n.4 (2006), *rev'd on other grounds sub nom. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

country's government and its citizens." *Reed*, 823 F. Supp.2d at 1203 (quotation omitted); *see also id.* (requiring a party invoking the right to association to show that it "constitute[d] a fringe organization with unpopular or unorthodox beliefs"). The few and extraordinary cases in which courts have found compelled disclosures to violate the right to association have involved controversial or dissident political groups, often those whose members have traditionally faced severe and unjust targeting by the government. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 452 (1958) (considering state-court order compelling the disclosure of the identities of members of the NAACP to the State of Alabama, in a lawsuit "to enjoin the Association from conducting further activities within, and to oust it from, the State"); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 88-90 (1982) (considering statute requiring small, anti-capitalist political party to disclose donors). In addition, those cases have involved targeted attempts to obtain a dissident organization's membership lists, not more general requests that indirectly disclose the fact that certain persons are members of an organization. *See, e.g.*, *Anderson v. Hale*, Case No. 00-C-2021, 2001 WL 503045, at *7 (N.D. Ill. May 10, 2001) ("There is a difference between disclosure of the fact of communicating with [a particular person in an organization] and disclosure of the fact of belonging to [an organization]. The latter strikes at the heart of the [organization's]

associational activities, while the former does not; the nexus of disclosure and injury differs.").

The requested disclosures here are a far cry from those in *NAACP* and *Brown*. Even if Appellees could be considered members of an "association," they certainly have not been "historically and pervasively rejected and vilified by both this country's government and its citizens." *Reed*, 823 F. Supp.2d at 1203 (quotation omitted). Indeed, they have powerful allies in state and federal government, as evidenced by their close cooperation with the State's Attorney General in this very case. What's more, they have the economic and political clout of the healthcare industry behind them, and they are supported by powerful, well-financed organizations. The fact that some subset of the population may disapprove of Appellees' conduct (or perceived conduct) does not make Appellees "a fringe organization." *Id.* This flaw is especially glaring as to the Appellees who are government employees. Appellees have not cited—and *cannot* cite—a single case suggesting that state action can violate a right to associate *with the State*.

Appellees' association claim also suffers from another fundamental flaw. The courts review association-based objections to disclosure of a group's members by "balanc[ing] the burdens imposed on individuals and associations against the significance of the interest in disclosure, to determine whether the interest in disclosure outweighs the harm." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161

(9th Cir. 2009) (quotations, alterations, and internal citations omitted). In another dispute over disclosures under Washington's PRA, Justice Stevens explained that, where there is a "nondiscriminatory policy of disclosing information already in the State's possession," there simply is no infringement on association, and thus the balance necessarily tips in favor of disclosure. *Reed*, 561 U.S. at 215 (Stevens, J., concurring). Indeed, Justice Stevens wrote, it is "not a hard case." *Id.* This case also involves a "nondiscriminatory policy of disclosing information already in the State's possession." *Id.* Indeed, Appellees *voluntarily* provided the information to a state agency—and one that was subject to an open records law, at that. To Appellant's knowledge, no court has ever held that the disclosure of information created in the course of government employment or voluntarily disclosed to the government could possibly violate the right to associational privacy.

Moreover, Appellees have not produced anything like the showing that would be necessary to prevail under *Perry*'s balancing test. Specifically, they have not alleged any *facts* showing that they are engaged in any protected form of expression, or that the disclosures would have a cognizable chilling effect on such expression—such as that Appellees would cease to associate with their organizations if the disclosures occurred, or that their organizations would cease to engage in expressive conduct if the disclosures occurred. Most likely, those omissions are due to the fact that any expressive conduct of Appellees and their

organizations would remain entirely unchanged if the requested disclosures were to occur. Meanwhile, on the other side of the scale, the PRA's disclosure mandate serves compelling public interests in government transparency, public accountability, and the prevention of government corruption. *See Livingston*, 164 Wash.2d at 52; *City of Federal Way*, 167 Wash.2d at 344; RCW § 42.56.030. Advancing these critical governmental interests would outweigh any associational burdens that the requested disclosures might cause.

The district court's reliance on *Roe v. Anderson*, 2015 U.S. Dist. LEXIS 104737 (W.D. Wash. Aug. 10, 2015), and *Planned Parenthood Association of Utah v. Herbert*, 828 F.3d 1245, 1258-59 (10th Cir. 2016), was misplaced. Plaintiffs in both of those cases were discrete *groups* that were *actually engaged in* constitutionally protected forms of expression: the plaintiffs in *Roe* were forced to provide their personal information to the state in exchange for licenses to exercise their First Amendment right to exotic dancing, and the Court in *Herbert* held that the plaintiffs there were denied a government right by the State of Utah because of their First Amendment-protected expression and association.

Here, Appellees are (or were) employed by at least seven different organizations and have not alleged facts supporting their expressive association claim. Neither have they produced any evidence or a *single* precedent that would support treating the contents of communications relating to "the purchase, transfer

or procurement of human fetal tissues" as constitutionally protected expression. *See* ER A203. The PRA does not treat them differently because of any alleged expressive conduct, nor did the government compel them to provide the information to be disclosed in exchange for the right to exercise their First Amendment freedoms.

It may be true that some of Appellees are employed by organizations that engage in advocacy, *see* ER A012, but it is not relevant. Procuring, invoicing, and transferring fetal tissue is not First Amendment expression and does not enjoy its constitutional protection. The First Amendment cannot be so elastic as to reach every action performed by anyone who is in any way associated with any group that also engages in advocacy. There would be very little human activity left that is *not* constitutionally protected expression.

The district court also "conclude[d] that 'research activity' is a form of expression protected within the ambit of the First Amendment." ER A013. The district court based that conclusion on a 1982 Seventh Circuit case, about the enforcement of an administrative subpoena, where the Court held that "scholarly research . . . comes within the First Amendment's protection of academic freedom." *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274 (7th Cir. 1982). Even if that principle can also be found in case law that is authoritative over this Court, it still does not help Appellees. The status of "research" under the First Amendment

is not in question here. Appellees are hardly "scholar[s] in the laboratory," and the instant case is far afield of *Dow Chemical Company*. *Id.* at 1275.

In that case, Dow attempted to force university researchers "to turn over to Dow virtually every scrap of paper and every mechanical or electronic recording made during the extended period that those studies have been in progress at the university. The ALJ's decision would have further obliged the researchers to continually update Dow on 'additional useful data' which became available during the course of the proceedings." *Id.* at 1275-76. The undisputed evidence in *Dow Chem Co.* was:

> that public access to the research data would make the studies an unacceptable basis for scientific papers or other research; that peer review and publication of the studies was crucial to the researchers' credibility and careers and would be precluded by whole or partial public disclosure of the information; that loss of the opportunity to publish would severely decrease the researchers' professional opportunities in the future; and that even inadvertent disclosure of the information would risk total destruction of months or years of research.

Id. at 1273. The PRA requests at issue here are not for internal research notes or private work product. The requests seek invoices, communications, and purchase orders between the government entities procuring and distributing fetal tissue (*e.g.*, UW and its BDRL) and the various abortion providers (*e.g.*, Planned Parenthood of Greater Washington and Idaho and Planned Parenthood Federation of America) and tissue procurement companies (*e.g.*, Advanced Bioscience Resources, Inc.; Da Vinci Biosciences, LLC; StemExpress, LLC; Novogenix Laboratories, LLC) that

the BDRL receives fetal tissue from and transfers fetal tissue to. These communications are not inherently First Amendment-protected expressive activity, nor have Appellees made any attempt to prove the communications are such.

The activities that Appellees engaged in relating to the "purchase, transfer, or procurement of human fetal tissues" *see* ER A203, do not qualify as "research" any more than they qualify as "advocacy." They are, at best, tangentially related to either. Neither Appellees nor the district court was able to produce a single case stretching the First Amendment so far as to reach every communication or transaction between individuals affiliated with groups that also engage in advocacy or research. Appellees' constitutional rights to association are simply not at stake in this lawsuit.

For all of these reasons, Daleiden's public records request does not, and cannot, implicate Appellees' right to association, and Appellees came nowhere near a clear showing that they are likely to prevail on the merits of that claim.

3. RCW § 42.56.230(3) Does Not Bar the Requested Disclosures.

In addition to their constitutional claims, Appellees also argued below that RCW § 42.56.230(3) exempts their personal identifying information from disclosure. As a threshold matter, because Appellees have failed to state a plausible federal claim, *see supra* Subsections I.B.1 and I.B.2, there is no basis for the federal courts to exercise jurisdiction over Appellees' state-law claim. This

Court's jurisdiction over Appellees' state-law claim is based on 28 U.S.C. § 1367. "When all federal claims are eliminated before trial, the balance of convenience, fairness, and comity generally 'will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Fratus v. Cnty. of Contra Costa*, 2016 U.S. Dist. LEXIS 136225, at *42 (N.D. Cal. Sept. 29, 2016) (quoting *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997)). Here, no considerations support the Court continuing to exercise jurisdiction over Appellees' state-law claim if the Court dismisses the federal-law claims.

If this Court nevertheless exercises jurisdiction over Appellees' state-law claim, that claim fails. RCW § 42.56.230(3) exempts from disclosure "[p]ersonal information in files maintained for employees . . . of any public agency *to the extent that disclosure would violate their right to privacy*." RCW § 42.56.230(3) (emphasis added). RCW § 42.56.230(3) fails to support Appellees' claims for several reasons. As an initial matter, the exemption in § 42.56.230(3) applies only to information about *government employees*, and thus it provides no basis for relief to any Appellees who are not government employees. *See* RCW § 42.56.230(3). In this case, however, it does not even provide relief for government employees, because none of the requested disclosures "would violate [the employees'] right to privacy" under the PRA. *Id.*

"It is well settled that a reviewing court interprets the disclosure provisions of the PRA liberally and exemptions narrowly." *Koenig v. Thurston Cnty.*, 175 Wash.2d 837, 842 (2012). Accordingly, Washington courts have narrowly interpreted an employee's "right to privacy" under the PRA: "[A] person has a right to privacy under the PRA only in matters concerning the private life." *Predisik*, 182 Wash.2d at 904. The PRA permits the withholding only of deeply personal facts of the sort that one "keeps entirely to himself or at most reveals only to his family or to close personal friends." *Id.* at 905 (quotation omitted) (explaining that examples of such highly personal facts would be those relating to "[s]exual relations," "family quarrels, many unpleasant or disgraceful or humiliating illnesses"); *see also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 413 & 413 n.10 (2011) (holding that a police officer "has a right to privacy in his identity in connection with . . . unsubstantiated allegation of sexual misconduct . . . because the unsubstantiated allegations are matters concerning the officer's private life and are not specific incidents of misconduct during the course of employment" (alterations and quotation marks omitted) (emphasis added) (quoting *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 215-16 (Wash. 2008)). The narrow right to privacy under the PRA ***does not*** apply to matters that "arise[] exclusively from the employee's *public* employment." *Predisik*, 182 Wash.2d at 905.

Appellees have cited no case to the contrary. In fact, every case they cited in the district court supports Daleiden's position that the PRA's "right to privacy" does *not* extend to the identities of public employees. *See, e.g.*, *id.* (holding that "[a] public employer's investigation is certainly not a private matter: it arises exclusively from the employee's public employment. The investigation is simply an administrative process. It is not akin to a family quarrel or a humiliating illness, nor does it touch on the employee's life at home." (internal quotation marks, citations, and alterations omitted)); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 221-22 (Wash. Ct. App. 1998) (finding that "employee names, salaries, publicly funded fringe benefits, and vacation and sick leave pay" are not exempt from disclosure); *see also Sheehan*, 114 Wn. App. at 343 ("No Washington case has held that public employees' names are private . . . [A]bsent such a statute so providing, lists of names and addresses are not private." (citations omitted)). Indeed, under *all* of the precedent cited by *both* parties, the PRA requires disclosure of public employees' identities, as well as other sensitive information, as long as it relates to their public employment. *Woessner*, 90 Wn. App. at 218 ("[R]elease of employee names would not be similarly offensive or lead to such invasions of privacy; rather disclosure of employee names would 'allow public scrutiny of *government*.'" (quoting *Cowles Pub. Co. v. State Patrol*, 44 Wn. App. 882, 898 (Wash. Ct. App. 1986)) (emphasis in *Cowles Pub. Co.*)).

Here, each of the requested documents "arises exclusively from the employee's *public* employment," and thus the PRA's limited exemption does not apply. *Predisik*, 182 Wash.2d at 905 (holding that RCW § 42.56.230(3) did not prevent disclosure of information about an investigation of a public employee). Appellees have not alleged that any of the requested disclosures would involve the narrow class of highly personal facts that fall within the highly limited "right to privacy" recognized under the PRA. Rather, they have argued that information about their *professional* activities *as public officials* should be concealed precisely because those activities have sparked public concern. Appellees have produced no case supporting the application of the PRA's privacy right to shield public officials from controversy about their *professional* conduct *as public officials*. The closest they have come is a single case concealing the name of a police officer in documents relating to unfounded charges relating to his private life. *See Bainbridge Island Police Guild*, 172 Wn.2d at 413. The concerns expressed by the public in this case are neither unfounded nor related to Appellees' private lives.

The PRA counsels "that free and open examination of public records is in the public interest, *even though such examination may cause inconvenience or embarrassment to public officials or others*." RCW § 42.56.550(3) (emphasis added). Appellees seek to hide information about their execution of public business, not their private lives. Section 42.56.230(3) simply does not permit the

withholding of such information, *Predisik*, 182 Wash.2d at 904-05, and Appellees have not made a clear showing that they are likely to prevail on the merits of their statutory claim.

Because they *cannot* prevail on the merits of *any* of their claims, Appellees also cannot satisfy the exacting standard for a preliminary injunction, which requires a "clear showing" of "likelihood of success." *Winter*, 555 U.S. at 20; *Mazurek*, 520 U.S. at 972. Therefore, the district court's grant of a preliminary injunction was an abuse of discretion.

II. The Preliminary Injunction is Impermissibly Overbroad.

A. The District Court Erred in Ordering Redaction of Names of Eight Individuals Named in Daleiden's PRA Request.

As explained in Part I above, Appellees have provided no valid legal basis for redacting any information from the requested disclosures. Accordingly, there is no legal basis for redacting the eight names that appear in Daleiden's PRA request, and the district court abused its discretion in authorizing their redaction.[10]

Moreover, even if Appellees' constitutional claims had merit—*i.e.*, assuming that Appellees do have constitutionally-protected interests in concealing

[10] As explained above, Daleiden's PRA request excludes all names and personal contact information, such as direct telephone numbers, emails, and personal addresses, with the single exception of the names of eight well-known individuals he had already identified in his request. *See supra* note 4 and accompanying text; ER A044-057, A277-300; A140-45, ¶¶ 26-45; ER A203-43.

their involvement with government activities—those privacy interests would be significantly diminished for those who are already publicly associated with those activities. *See Uphaus v. Wyman*, 360 U.S. 72, 80 (1959) (finding that "individual rights in an associational privacy . . . , however real in other circumstances," were "tenuous at best," where the information was already in the public domain); *Block v. Meese*, 793 F.2d 1303, 1317-18 (D.C. Cir. 1986) (finding that the impairment of "appellants' [First Amendment] interest in anonymity" was "insubstantial," where appellants "d[id] not want already extant public knowledge . . . to be any more widespread than necessary"). These eight named individuals have already, by their own conduct, become well-known for their involvement in the activities covered by Daleiden's PRA request. *See supra* note 4; ER A140-45, ¶¶ 26-45; ER A203-43. Their constitutional privacy interests are "insubstantial" and "tenuous at best," and are therefore readily outweighed by the public's interests in government transparency and accountability under the balancing tests described in *In re Crawford* and *Perry*. *See In re Crawford*, 194 F.3d at 959; *Perry*, 591 F.3d at 1161. Therefore, the names of the eight individuals named in Daleiden's PRA request need not—and should not—be redacted.

The district court reached the opposite conclusion by applying the wrong legal standard. *See* ER A023-24 (quoting *Bainbridge Island Police Guild*, 259 P.3d at 192, 196-97). *Bainbridge Island Police Guild* involved the "right to

privacy, as interpreted *under the PRA*," 259 P.3d at 196-97 (emphasis added), which, as explained above, applies to information relating to someone's private life. Whether someone has a right to privacy under the PRA in a particular piece of information is a straightforward, binary determination based solely on "the contents of the document." *Id.* at 197. Therefore, the *Bainbridge* court recognized, whether some third parties already know the private information is irrelevant to the existence of such a right.

On the other hand, the constitutionally protected rights to privacy and association—the supposed bases for the redactions in this case—are not binary. As described above, both require a court to assess the magnitude of the individual's protected interest and weigh it against the countervailing societal interest. Under Supreme Court case law, the magnitude of someone's constitutionally protected privacy interest is most certainly diminished by the fact that the information they seek to conceal is already publicly known. *See Uphaus*, 360 U.S. at 80. The district court's failure to apply the correct legal standard is, by definition, an abuse of discretion. *See PlayMakers LLC*, 376 F.3d at 896. Thus, even if other aspects of the preliminary injunction survive this appeal, this Court should reverse the district court's mandate to redact the names of the eight individuals named in Daleiden's PRA request.

B. The District Court Erred in Ordering Redaction of Information Other than Names and Contact Information.

Again, as argued in Part I above, Appellees have provided no valid legal basis for redacting any information from the requested disclosures, even Appellees' personal identifying information. Daleiden's agreement to the redaction of nearly all names and all contact information was gratuitous, and the PRA mandates disclosure of all other information in the public records.

Even if Appellees' constitutional rights to privacy and association did require the redaction of names and contact information, though, there would still be no legal basis for redacting anything beyond their identities and contact information. Appellant is aware of no instance in which records disclosed under the Washington PRA (or any other public records statute, for that matter) have been redacted to conceal not just the identities of individuals, but also "a broad range of information that (a) identifies or provides the location of specific individuals, (b) would allow individuals to be identified or located, or (c) would allow individuals to be contacted." ER A104. Appellees produced no case supporting the request. Tellingly, they cited *three other* privacy statutes—the Family Educational Rights and Privacy Act, the Children's Online Privacy Protection Act, and the Health Insurance Portability and Accountability Act—but they were unable to produce a shred of textual or case support relating to an open records law. *Id.* Likewise, the district court cited no rule, regulation, or precedent

in granting Appellees' extraordinary request.[11] ER A023. Infringing on Daleiden's rights under the PRA without legal authority or precedent was an abuse of discretion.

CONCLUSION

For the reasons stated, this Court should reverse the district court's Order Granting Motion for a Preliminary Injunction.

Dated: January 26, 2017

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[11] The district court similarly failed to require any precedent or justification before approving a proposal to grant Appellees extraordinary authority—which they had not sought or argued for in preliminary injunction briefing—to review and preapprove the University's documents before their disclosure to Daleiden. *See* ER A027-35. Neither the PRA nor the PI Order gave UW authority to further delay the release of public records to Daleiden, particularly at the behest, and for the benefit, of Appellees. And no party produced any legal precedent for it. Granting Appellees *still more* control over the government's disclosure of public records, without any legal rationale, was an abuse of the district court's discretion.

STATEMENT REGARDING RELATED CASES

Appellant is not aware of any related cases pending in the Court.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellant Daleiden requests that the Court hear oral argument in this case. This case presents issues of great importance to the public, such as whether the United States Constitution requires a state to redact the names and all personal identifying information of public employees and contractors from government documents prior to disclosure to the public, despite the contrary mandate of the state's open records law. Oral argument will assist this Court in considering the issues presented and the underlying facts.

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

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Peter C. Breen

Date: 1/26/2017

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Opening Brief of Defendant-Appellant David Daleiden with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 26, 2017.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: January 26, 2017

By: s/ Peter C. Breen

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ADDENDUM

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A. Revised Code of Washington 42.56.030

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

B. Revised Code of Washington 42.56.070(1)

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

C. Revised Code of Washington 42.56.230

The following personal information is exempt from public inspection and copying under this chapter:

(1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients;

(2) (a) Personal information:

(i) For a child enrolled in licensed child care in any files maintained by the department of early learning;

(ii) For a child enrolled in a public or nonprofit program serving or pertaining to children, adolescents, or students, including but not limited to early learning or child care services, parks and recreation programs, youth development programs, and after-school programs; or

(iii) For the family members or guardians of a child who is subject to the exemption under this subsection (2) if the family member or guardian has the same last name of [as] the child or if the family member or guardian resides at the same address of [as] the child and disclosure of the family member's or guardian's information would result in disclosure of the personal information exempted under (a)(i) and (ii) of this subsection.

(b) Emergency contact information under this subsection (2) may be provided to appropriate authorities and medical personnel for the purpose of treating the individual during an emergency situation;

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

(4) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would: (a) Be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, 84.40.340, or any ordinance authorized under RCW 35.102.145; or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer;

(5) Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial information as defined in RCW 9.35.005 including social security numbers, except when disclosure is expressly required by or governed by other law;

(6) Personal and financial information related to a small loan or any system of authorizing a small loan in RCW 31.45.093;

(7) (a) Any record used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard.

(b) Information provided under RCW 46.20.111 that indicates that an applicant declined to register with the selective service system.

(c) Any record pertaining to a vehicle license plate, driver's license, or identicard issued under RCW 46.08.066 that, alone or in combination with any other records, may reveal the identity of an individual, or reveal that an individual is or was, performing an undercover or covert law enforcement, confidential public health work, public assistance fraud, or child support investigative activity. This exemption does not prevent the release of the total number of vehicle license plates, drivers' licenses, or identicards that, under RCW 46.08.066, an agency or department has applied for, been issued, denied, returned, destroyed, lost, and reported for misuse.

(d) Any record pertaining to a vessel registration issued under RCW 88.02.330 that, alone or in combination with any other records, may reveal the identity of an individual, or reveal that an individual is or was, performing an undercover or covert law enforcement activity. This exemption does not prevent the release of the total number of vessel registrations that, under RCW 88.02.330, an agency or department has applied for, been issued, denied, returned, destroyed, lost, and reported for misuse; and

(8) All information related to individual claims resolution structured settlement agreements submitted to the board of industrial insurance appeals under RCW 51.04.063, other than final orders from the board of industrial insurance appeals. Upon request by the legislature, the department of licensing shall provide a report to the legislature containing all of the information in subsection (7)(c) and (d) of this section that is subject to public disclosure.

(9) Voluntarily submitted information contained in a database that is part of or associated with enhanced 911 emergency communications systems, or information contained or used in emergency notification systems as provided under RCW 38.52.575 and 38.52.577.

D. Revised Code of Washington 42.56.540

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such

examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

E. Revised Code of Washington 42.56.550(3)

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.