No. 16-36038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOES 1-10 and JOHN DOES 1-10,
Plaintiffs-Appellees,

v.

DAVID DALEIDEN,
Defendant-Appellant,

ZACHARY FREEMAN; UNIVERSITY OF WASHINGTON;
PERRY TAPPER, in his official capacity,
Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington, Case No. 16-cv-1212-JLR
Honorable James L. Robart

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INTRODUCTION

The underpinning of our nation's laws is the U.S. Constitution. While public disclosure laws undoubtedly serve an important purpose – to further the public interest in transparency and accountability by our governments – this interest has never been unfettered. Rather, the public interest in disclosure must be balanced with equally important interests in the protection of sensitive information. And when disclosure would violate a right protected by the U.S. Constitution, the ability of a member of the public to obtain information through a public records request must give way to the Constitution. That is the case here. Notably, there is no dispute that the substance of the records at issue are subject to disclosure. This Court should affirm the district court's sound exercise of discretion to require redactions that protect against disclosures that would threaten constitutionally-protected rights, particularly when there is little if any public interest in such disclosure.

This case involves documents sought by Defendant-Appellant David Daleiden ("Daleiden") through a public records request to the University of Washington's Birth Defects Research Laboratory ("BDRL"), pursuant to Washington's Public Records Act, RCW 42.56 (the "PRA"). Daleiden, an anti-abortion activist, and the "Center for Medical Progress," which he leads, infamously released deceptively-edited videos that falsely suggest that abortion providers and others "profit" from the sale of fetal tissue. In February 2016, Daleiden, a self-styled "investigative journalist," submitted a request to the BRDL for "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." ER140, ¶ 21; ER203-05.

The Plaintiffs-Appellees in this case, Jane and John Does 1-10 ("the Doe Plaintiffs"), are health care providers, clinic and hospital staff, researchers, and other people whose work is to improve the health of patients and to advance medical research, day in and day out. They include employees and former employees of the BDRL, Cedar River Clinics, Seattle Children's Hospital, Evergreen Hospital Medical Center, the University of Washington, and Planned Parenthood Federation of America and Planned Parenthood of Greater Washington and North Idaho (collectively, "Planned Parenthood"). What unites this group of medical and scientific personnel is that their work involves fetal tissue. Some of the Doe Plaintiffs are clinical staff who provide care, including to patients who choose to donate fetal tissue; some are hospital staff involved in processing and analysis of fetal tissue for diagnostic purposes; others are researchers who use fetal tissue to conduct life-saving research; some work at the BDRL to facilitate tissue donation and to provide tissue to researchers. ER383-87; ER379-82; ER362-66; ER352-55; 345-47; ER338-39; ER331-33; ER324-25.

As a result of Daleiden's deceptively edited videos, anyone connected with fetal tissue research now joins the already at-risk groups targeted for harassment, threats, and violence by anti-abortion activists. The marked increase in violence experienced by abortion providers and fetal tissue researchers after the video release is well-documented.[1] Based on fear for their safety, the Doe Plaintiffs and

[1] *Id. See also* ER394-452 at 422-29, 434-36; *see generally Setting the Record Straight: The Unjustifiable Attack on Women's Health Care and Life-Saving Research*, SELECT INVESTIGATIVE PANEL OF THE ENERGY & COMMERCE

(continued . . .)

other similarly situated individuals[2] sought protection from the release of their identities and any personally identifying information in response to the requests, because such disclosure would violate their constitutional rights.

The district court agreed with the Doe Plaintiffs and preliminarily enjoined the release of constitutionally protected information – the Doe Plaintiffs' identities and personally identifying information. The district court recognized that the First Amendment to the Constitution protects the right to association and expressive activity, including advocacy and research, and it also recognized that protection from public disclosure of information is appropriate when disclosure would have a chilling effect on the exercise of those rights. ER016-17; ER021. Courts have recognized both that there is a constitutional right to privacy, and that when the release of information would violate that right, the information should be protected from disclosure.

Importantly, the court did not rule – nor have the Doe Plaintiffs ever argued – that the requested records should be withheld in their entirety. Rather, the district court properly limited the injunction to certain information in the records that was protected by the Constitution. The district court struck the right balance in ruling that while there may be an interest in public disclosure of BDRL records,

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COMMITTEE, REPORT OF DEMOCRATIC MEMBERS, (Dec. 28, 2016), *available at* https://selectpaneldems-energycommerce.house.gov/sites/default/files/20161228%20Full%20Report.pdf (the "Minority Report").

[2] The Doe Plaintiffs filed a Motion for Class Certification but the district court has not ruled on that motion, and further proceedings in the district court are stayed pending the proceedings before this Court. *See* ER515 at Dkt. #16; ER523 at Dkt. 109.

that interest simply does not extend to the Doe Plaintiffs' identities, nor to information that could lead to the discovery of their identities. The interest in protecting the Doe Plaintiffs from the very real threat to their personal safety outweighs any public interest in disclosure of the redacted information.

This Court should affirm the district court's order granting a preliminary injunction from the release of the Doe Plaintiffs' identities and personally identifying information.

STATEMENT OF JURISDICTION

The Doe Plaintiffs do not object to Daleiden's Statement of Jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether this Court should review the district court's decision for an abuse of discretion when the district court properly stated, and applied, the standard for a preliminary injunction and held that the Doe Plaintiffs established a clear showing of a likelihood of success on the merits.

2. Whether the district court properly issued a preliminary injunction allowing the release of records under the Washington Public Records Act, but requiring redaction of information protected by the U.S. Constitution. Specifically:

   a. Whether the district court properly exercised its discretion in holding that the federal Constitution protects against disclosure of information that would chill the exercise of First Amendment rights and would threaten the Doe Plaintiffs' privacy and safety; and

   b. Whether the district court properly held that when there is little to no public interest in the information being sought

(individuals' identities and personally identifying information), and disclosure would violate the federal Constitution and threaten the Doe Plaintiffs' safety, the balance of equities tips in favor of protecting that information from disclosure.

STATEMENT OF THE CASE

During the summer of 2015, Daleiden published a series of secretly-recorded videos showing Planned Parenthood employees discussing fetal tissue donation. *See* ER394-52 at 399-402. Though the authenticity of those videos was called into question, they incited a media firestorm. *See id.* Since then, the staffs of Planned Parenthood, other abortion providers, and entities involved in fetal tissue research or donations have been subjected to markedly increased levels of hate speech, harassment, death threats, and violence. *See id.*; ER463-78 ¶¶ 4-14; ER453-62 ¶¶ 4.

After the Seattle Times published an article in October 2015 regarding the controversy and its implications for the BDRL, Daleiden sent the UW a PRA request (PR-2016-00109). *See* ER394-452 at 403-8. Daleiden requested, among other things, "[a]ll communications between the [UW], the [BDRL], … and Cedar River Clinics, Planned Parenthood of Greater Washington and North Idaho, Connie Cantrell, Karl Eastlund, Andrew Triplett, Denise Bayuszik, or Erica Garza ... regarding the collection of fetal or placental tissues" and "[a]ll communications with [Planned Parenthood] and affiliates, … regarding procurement or disposition of fetal or placental tissue, from 2010 to present."[3]

[3] The individuals named are the Executive Director of Cedar River Clinics, members of the leadership team of Planned Parenthood of Greater Washington and (continued . . .)

The UW's Birth Defects Research Laboratory (BDRL) is a lab and repository that collects, identifies, processes, and distributes fetal tissue for research purposes to non-profit research and academic facilities across the country. ER379-82 ¶ 5. The BDRL collaborates with clinics and hospitals in Washington to collect fetal tissue for research purposes. *Id.* ¶ 6.

The Doe Plaintiffs and putative class members work or worked for the UW and/or private entities that are involved in fetal tissue research or donation in a variety of capacities. *See*, *e.g.*, ER383-93; ER379-82; ER362-78; ER352-61; ER345-51; ER338-44; ER331-37; ER324-30. For example, John Doe 1 is employed by Seattle Children's Hospital, which receives fetal tissue from the BDRL for research purposes. *See* ER383-93 ¶¶ 1, 5, 11. Jane Does 3, 4, and 5 are employed by Planned Parenthood and Cedar River Clinics, with which the BDRL collaborates to collect fetal tissue donated by patients who have provided informed consent. *See* ER362-78; ER352-61; ER345-51. Certain Doe Plaintiffs communicated with the BDRL to, among other things, arrange for the collection and transfer of fetal tissue donations in compliance with federal requirements. *See* ER379-82 ¶¶ 6, 7, 11; ER338-44 ¶ 4; ER337-37 ¶ 5; ER324-30 ¶ 4.

In conjunction with those communications and to ensure the coordination needed in tissue research, the Doe Plaintiffs regularly included information that would facilitate that coordination, including their direct work phone numbers, work emails, and even personal cell phone numbers. *See*, *e.g.*, ER383-93 ¶ 13; ER362-78 ¶ 8; 345-51 ¶ 5. The Doe Plaintiffs provided such information with the

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North Idaho, and BDRL employees and an employee of Planned Parenthood Federation of America.

belief and knowledge that their individual identities and/or personal contact information would be treated confidentially. *Id*. For example, in recognition of the sensitivity of the information, at the close of every email that a Planned Parenthood-affiliated Doe Plaintiff sent to the BDRL was a confidentiality notification providing:

> The information contained in this transmission is intended for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, [or] distribution . . . of this information is strictly prohibited and illegal.

See ER362-78 ¶ 8. Likewise, emails from Doe Plaintiffs employed by Seattle Children's Hospital include a confidentiality notification at the close of emails stating:

> CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information protected by law. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

ER383-93 ¶ 13. Emails from Doe Plaintiffs employed by Cedar River Clinics also include a confidentiality notification meant to protect private information from disclosure. *See* ER345-51 ¶ 5.

The UW identified these types of communications between the Doe Plaintiffs and the BDRL and other documents as responsive to the Requests.[4] *See* ER383-93 at 388-93; ER379-82 and ER309-16 at 311-16; ER362-78 at 367-72; ER352-61 at 356-61; ER345-51 at 348-51; ER338-44 at 341-44; ER331-37 at 334-37; ER324-30 at 327-30. The Doe Plaintiffs expressed serious privacy concerns.

The Doe Plaintiffs' privacy concerns are well-founded. The Doe Plaintiffs presented *unrebutted* evidence explaining why release of their personal information to Daleiden raises serious privacy and safety concerns. *See* ER383-93 ¶¶ 14-16 (noting interactions with physician who was killed by someone with anti-abortion views after he performed an abortion relating to an autopsy performed by Children's Labs); ER379-82 ¶¶ 12-14 (noting that prior director of BDRL was confronted by protestors outside his home and BDRL's phone number was removed from UW directory to protect BDRL employees from harassment); ER362-78 ¶¶ 15, 16 (noting steps taken to conceal work identities to avoid physical danger and reputational harm and to safeguard wellbeing of families, friends, and neighbors); ER352-61 ¶¶ 8-10, 13 (noting prior stalking led to

[4] Zachary Freeman, named in the Complaint, is Director of Communications for the Family Policy Institute of Washington, an advocacy organization that, among other things, advocates against abortion and for defunding Planned Parenthood. ER394-452 at 409-20. Freeman sent the UW a PRA request (PR-2016-00117) similar to Daleiden's seeking, among other things, "[a]ll communications between the [BDRL] and any executives, agents, employees, representatives, or volunteers from . . . any Planned Parenthood affiliates in Washington State, beginning January 1, 2008." *Id.* at ER421. After the court issued the preliminary injunction, Freeman withdrew his request and was dismissed from the case. SER003-6.

development of severe anxiety and concerns for safeguarding privacy); ER345-51 ¶ 6-7 (noting instances that have caused her to feel personally threatened where anti-abortion extremists expressed intentions to cause physical, mental, or emotional harm to abortion providers and medical researchers); ER338-44 ¶6-7 (noting concerns for personal safety and privacy given increase in harassment, threats, and violence against people working in women's health, specifically abortion services); ER324-30 ¶¶ 5, 6 (accord); ER331-37 ¶¶ 6, 7 (noting she is a physician and abortion provider, and referencing Daleiden's videos trying to malign abortion providers and clinics have led to death threats and safety concerns for providers identified in videos, and her concern that she and anyone specifically identified could be at risk of similar threats and violence).

The Doe Plaintiffs' fears regarding disclosure of their identities is warranted. One witness before the U.S. Senate's Select Investigative Panel of the Energy & Commerce Committee ("Panel") explained that after revelation of his or her identity in a video released by Daleiden: "I was immediately subject to many death threats and had to leave my home . . . I was terrified for the safety of myself and my family. Like many of my colleagues whose faces were shown on the video, I changed my appearance to safely continue my work. I still fear for my safety when I'm out in public." *See* Minority Report at p. 35.

Violence and harassment directly targeting Planned Parenthood and other abortion providers and facilities, including incidents in Washington, have also led the Doe Plaintiffs to fear for their safety. *See* ER362-78 at ¶¶ 9-14 (noting arson at clinic in Pullman, WA, increasing intensity of protests at clinics, pipe bomb at Spokane clinic in 1996, and recent stalking and harassment of Planned Parenthood employee outside of work, at a church parking lot on Mother's Day); ER352-61 at

¶ 8 (noting conviction of anti-abortion activist for attempted first-degree intentional homicide for plotting to kill Jane Doe 4's colleague, a doctor in the community); ER331-37 at ¶ 7 (noting that gunman who killed three people at Planned Parenthood in Colorado in 2015 specifically referenced fetal tissue as a cause of his attack).

The Doe Plaintiffs fear that disclosure of their personal information will put them and their families at risk. ER383-93 at ¶¶ 15, 16; ER379-82 at ¶ 14; ER362-78 at ¶¶ 15, 16 (noting fears stemming from fact that she telecommutes, so her work address is her home address, and concern that children of clinic employees, who attend public school, could also be targeted); ER352-61 at ¶¶ 9-10, 12-13; ER345-51 at ¶¶ 6, 7 (noting concern that families can become target of violence as a tactic to have organizations stop services and stressing she does not want to be the next statistic in fight for reproductive justice due to a random public records request that does not protect her privacy, and may cause her personal harm); ER338-44 at ¶¶ 6, 7; ER331-37 at ¶¶ 6, 7; ER324-30 at ¶¶ 5, 6. Indeed, there is already significant evidence that individuals publicly identified with fetal tissue donation and research have been harassed and threatened. *See* ER463-78 ¶ 4, and ER469-72.

To that point, "[o]nly two of the six Planned Parenthood affiliates that had been facilitating donation . . . in the past five years still provide this service; three stopped because of threats and controversy caused by the deceptively-edited and discredited videos released by anti-abortion activist David Daleiden. In fact, the threats against one affiliate were so immediate and severe that it stopped its donation program . . . the day that the first [Daleiden] video was released." *See* Minority Report at p. 12.

In an attempt to see if litigation could be avoided in the first instance, through counsel, the Doe Plaintiffs asked Daleiden whether he would agree to modify his PRA request so that Doe Plaintiffs' and putative class members' personally identifying information could be redacted. ER394-52 ¶ 12 and ER437. Daleiden did not agree to the scope, and demanded disclosure of anything beyond "names and contact information" as well as full disclosure related to named individuals. *Id.* On July 21, 2016, the UW notified the Doe Plaintiffs of Daleiden's request and explained that absent a court order enjoining release, the documents would be released on August 5, 2016. *See* ER383-93 at 388-93; ER379-82 and ER309-16 at 311-16; ER362-78 at 367-72; ER352-61 at 356-61; ER345-51 at 348-51; ER338-44 at 341-44; ER331-37 at 334-37; ER324-30 at 327-30.

The Doe Plaintiffs filed a complaint and motion for temporary restraining order and preliminary injunction on August 3, 2016. ER500-9. The district court entered a temporary restraining order on the same date. ER317-23. The temporary restraining order was extended pending the district court's ruling on the preliminary injunction. ER518 at Dkt. #54. On November 15, 2016, the district court entered the preliminary injunction. ER001-26. In the preliminary injunction order, the district court directed the parties to determine and follow a protocol for redaction of "personally identifying information or information from which a person's identity could be derived with reasonable certainty." ER025-26. This calls for the UW to redact records before they are disclosed. *Id.* While the case has been stayed pending appeal, the district court's administration and enforcement of the preliminary injunction, which allows for disclosure of records consistent with the terms of the injunction, are proceeding. ER523 at Dkt. #109.

STANDARD OF REVIEW

A district court's grant of a preliminary injunction is reviewed for abuse of discretion. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009).

SUMMARY OF ARGUMENT

This Court should affirm the district court's order granting a preliminary injunction and ordering redactions to protect against disclosures of information that would threaten the Doe Plaintiffs' constitutionally-protected rights.

The proper standard for this Court's review is abuse of discretion. The court cited to the correct standard, as articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), and included a detailed analysis applying this standard, including in a section of the order entitled "Likelihood of Success on the Merits." There is no basis for this Court to review the district court's decision *de novo*, as there was no legal error.

Turning to the merits, the district court allowed disclosure of all documents requested by Daleiden and imposed only one limitation – that the Doe Plaintiffs' "personally identifying information and information from which a person's identity could be derived with reasonable certainty" should be redacted. ER025. The district court properly held that the Public Records Act does not require disclosure when the disclosure would violate the Constitution.

Here, disclosure of personally identifying information would chill the exercise of the Doe Plaintiffs' First Amendment rights to association and would infringe on their constitutionally-protected rights to privacy. The Doe Plaintiffs engage in expressive association and advocacy by providing abortion services and engaging in research involving fetal tissue. Because disclosure of personally identifying information would endanger their safety, it would chill their participation in First Amendment-protected activities, including advocacy and

research. As to the First Amendment right to association, constitutional protection from the chilling effects of information disclosure extends beyond groups engaged in electoral activity; thus, protection is not limited to group that are "minor" groups or are "vilified." Here, there was ample evidence that disclosure of personally identifying information could subject the Doe Plaintiffs to threats of violence and harassment, thus endangering their personal safety, which would certainly have a chilling effect on the exercise of their First Amendment rights.

Further, the court properly held that disclosure was likely to violate the Doe Plaintiffs' constitutional rights to privacy. The constitutional right to privacy includes the individual's interest in avoiding disclosure of personal matters. Further, privacy interests are of a constitutional dimension when they implicate a fundamental liberty interest, including preserving personal security and bodily integrity. On balance, here, there is very little, if any, public interest in the disclosure of the Doe Plaintiffs' personally identifying information. The district court properly ordered the requested records to be produced, subject only to redactions of information in which the Doe Plaintiffs' had a constitutionally-protected privacy interest.

Finally, the scope of the redactions was proper. Courts routinely order redaction so that personal information is protected, yet the remainder of the records are disclosed. This type of order satisfies both the public interest in disclosure, and the individuals' interests in protection of certain personal information. The order properly included the individuals specifically named in the records request as well. Even when private information, including a person's identity, has been disclosed in some other form, privacy is not forever lost because of media coverage or due to other disclosures. Here, the court properly included the named individuals because

they have the same privacy interests and safety concerns from disclosure or confirmation of their identities and personally identifying information in connection with fetal tissue research.

This Court should rule that the district court did not abuse its discretion in issuing the preliminary injunction. The right to seek records under the Public Records Act is subject to statutory and constitutional limits, and in this case, the Constitution supports protecting the Doe Plaintiffs' identities and personally identifying information.

ARGUMENT

I. The District Court Properly Exercised Its Discretion in Granting the Preliminary Injunction.

A district court's decision to grant a preliminary injunction is reviewed for abuse of discretion. *E.g.*, *Boardman* v. *Pac. Seafood Grp.*, 822 F.3d 1011, 1017 (9th Cir. 2016). That is the applicable standard here. This Court should reject Daleiden's efforts to manufacture grounds for *de novo* review by claiming the district court "relied on an erroneous legal premise" and "applied the wrong legal standard." Opening Br. at 15. This argument is nothing but a specious reading of both the relevant case law and the district court's opinion.

First, the district court set out the same factors identified by the Supreme Court in the case that Daleiden claims provides the correct standard, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008): a party seeking a preliminary injunction "must show: (1) a likelihood of succe[ss] on the merits; (2) that irreparable harm is likely, not just possible, if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest." ER008.

The district court then analyzed the Doe Plaintiffs' claims in a section of the opinion entitled "**Likelihood of Success on the Merits.**" ER009-19.[5] After addressing the merits of the Doe Plaintiffs' claims in detail, the district court concluded that the Doe Plaintiffs had demonstrated they are "likely to succeed on the merits" of their claims. ER018-19. The district court cited *Winter* in its conclusion, stating that "[a]ll of the *Winter* factors favor imposing a preliminary injunction." ER021.

Daleiden contends that the district court "applied the wrong legal standard" because it cited *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), in which the Court held that a preliminary injunction still may issue when a plaintiff shows that there are "'serious questions going to the merits,'" there is "a balance of hardships that tips sharply towards the plaintiff," there is "a likelihood of irreparable injury," and "the injunction is in the public interest." *Id.* at 1134-35 (citation omitted). Yet courts have rejected, multiple times, Daleiden's argument that the "serious questions" aspect of this four-factor test "cannot be reconciled" with the Supreme Court's "likelihood of success" requirement, Opening Br. at 15-18 – including this Court. *See Cottrell*, 632 F.3d at 1131-35; *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013); *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (holding that a "serious questions" version of the sliding scale

[5] In suggesting that the Doe Plaintiffs are at fault for having "proposed" the "serious questions" factor (Opening Br. at 16), Daleiden ignores the extensive argument the Doe Plaintiffs presented to the district court under the heading: "The Doe Plaintiffs Are Likely to Succeed on the Merits." ER485-93; *see also* ER105-09.

approach to preliminary injunctions survives *Winter*); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (same).[6]

The district court also properly required that the Doe Plaintiffs make a "clear showing" of likelihood of success, contrary to Daleiden's assertion otherwise. Opening Br. at 16. The "clear showing" requirement is merely a different way of stating the burden of persuasion; the party seeking the preliminary injunction must "clearly carr[y]" that burden. *See Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (clear showing means that the party seeking the injunction "'clearly carried the burden of persuasion on all four requirements'" (citation omitted)), *cert. denied*, No. 16-6903, 2017 WL 670345 (U.S. Feb. 21, 2017). And here, the district court plainly placed on the Doe Plaintiffs the burden of persuasion and concluded that the Doe Plaintiffs "had demonstrated" sufficient evidence to carry the same. ER021. The district court further detailed the "specific evidence" provided by the Doe Plaintiffs upon which it relied for its conclusion. *See* ER015-16. Daleiden's search for "magic words" notwithstanding, no more is required.

Thus, this Court should review the district court's decision for an abuse of discretion, and should reject Daleiden's strained efforts to argue for a *de novo* standard. Not only is the *Cottrell* standard not "wrong," but the district court did

[6] The Nevada district court decisions on which Daleiden attempts to rely actually make efforts to ***reconcile*** the operative language in *Cottrell* with *Winter*'s requirements. *See U.S. Bank, N.A. v. SFR Invs. Pool 1, LLC*, 124 F. Supp. 3d 1063, 1070-71 (D. Nev. 2015) (interpreting *Cottrell* to be "in harmony" with *Winter*, "not as being in competition with it"); *SEC v. Banc de Binary Ltd.*, 964 F. Supp. 2d 1229, 1233 (D. Nev. 2013) (same).

plainly apply the *Winter* "likelihood of success" standard, as evidenced by the court's multiple uses of those very words.

II. The District Court Properly Held That the Doe Plaintiffs Made a Clear Showing That They Are Likely to Succeed on the Merits of Their Claims.

While the Washington Public Records Act permits public inspection and copying of public records, *see* Wash. Rev. Code § 42.56.030, if any "other statute … exempts or prohibits disclosure of specific information or records," such information is protected from disclosure. *See* Wash. Rev. Code § 42.56.070(1). The Washington Supreme Court has held that the PRA "must give way to constitutional mandates." *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1258 (Wash. 2013); *see also Seattle Times Co. v. Serko*, 243 P.3d 919, 927 (Wash. 2010) (recognizing that even absent a specific exemption protecting constitutional rights, "courts have an independent obligation to secure such rights"). In other words, "[t]he PRA, by design, cannot violate the Constitution, and constitutional protections … are necessarily incorporated as exemptions, just like any other express exemption enumerated in the PRA." *Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL 4724739, at *3 (W.D. Wash. Aug. 10, 2015). Though Daleiden disputes the constitutional rights asserted in this case, he does not challenge this basic, yet important, premise: disclosure under the PRA is limited by the state and federal constitutions.

The district court correctly held that the Doe Plaintiffs are likely to succeed on the merits of their claim that the release of their personally identifying information would violate their constitutional rights of privacy and association, and, thus, the information was exempt from disclosure. Accordingly, this Court

should affirm the preliminary injunction requiring the redaction of the Doe Plaintiffs' personally identifying information.

A. Disclosure of Personally Identifying Information Would Violate the Doe Plaintiffs' First Amendment Rights.

Disclosing the Doe Plaintiffs' personally identifying information is unconstitutional because it would have a chilling effect on their protected First Amendment rights to expression and to association.[7] These are clearly established

[7] While Daleiden contends the right to association under the Washington Constitution is co-extensive with the right to association under the United States Constitution in this case, Opening Br. at 26, the Washington Constitution may provide a broader right of association than its federal counterpart; however, the district court did not have the opportunity to analyze this issue. In the authority relied upon by Daleiden, the Washington Supreme Court presumed, without evidence or analysis, that the state constitution grants at least an equal amount of protection as the federal provision. *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 359 n.4 (Wash. 2006) ("Neither party has provided an analysis or argument to show why, in this context, the state constitutional provision protecting the rights of free speech and association should be construed more broadly than the federal provision. Therefore, we interpret the state constitutional clause coextensively with its parallel federal counterpart."), *vacated on other grounds sub nom. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007). Accordingly, if it becomes necessary to decide this issue, it would be proper to remand the issue back to the district court so that the parties may brief the application of the *Gunwall* factors that are necessary for that analysis. *See State v. Boland*, 800 P.2d 1112, 1114 (Wash. 1990) (explaining the six, nonexclusive, neutral criteria that the Washington Supreme Court examines to determine whether a state constitutional provision provides greater protection of party's interest than its federal counterpart: "'(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern'" (quoting *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986))).

constitutional rights, and there is ample evidence to support the district court's ruling that the Doe Plaintiffs were likely to succeed on the merits of this claim. Thus, this Court should affirm.

Group members are entitled to the First Amendment's associational protection, so long as the group with which a member participates "engage[s] in some form of expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). This protection includes, but is not limited to, advocacy groups. *Id.* All of the facilities with which the Doe Plaintiffs are identified plainly satisfy this requirement of engaging in expressive association and advocacy, as they all provide abortion services or engage in research involving fetal tissue. *See, e.g.*, ER433 ("The mission of Planned Parenthood of Greater Washington and North Idaho is to provide exceptional reproductive and complementary health care services, honest education, and *fearless advocacy for all*." (emphasis added)); ER453-54 at ¶ 2 ("As a reproductive health provider since 1979, Cedar River Clinics and its employees have fought for reproductive freedom.").

Indeed, the Tenth Circuit recently had "little trouble" in concluding that the First Amendment protected precisely this same activity. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1259 (10th Cir. 2016). In *Herbert*, the plaintiffs asserted that their "advoca[cy] for access to abortion" and "association with other Planned Parenthood providers who participate in lawful programs that allow abortion patients to donate fetal tissue for scientific research" were protected by the First Amendment. *Id.* at 1258. Similarly, here, as the district court properly recognized, the Doe Plaintiffs have a constitutionally protected right to associate with organizations such as Planned Parenthood, Cedar River Clinics, and research facilities conducting research involving fetal tissue, as well as to advocate for and

to provide a full range of reproductive health care that includes abortion care. This associational activity extends beyond the mere communication with others involved in fetal tissue research. *Cf. Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045, at *7 (N.D. Ill. May 10, 2001) ("The fact that individuals may be identified in subscription information doesn't make them [organization] … members, it makes them people that [organization members] … communicated with." (first ellipsis in original)), *cited in* Opening Br. at 27.[8] Here, the Doe Plaintiffs are not merely communicating with these associations; they are substantively contributing to and participating in the fetal tissue research program. Moreover, the district court also properly held that "research activity" is a form of expression protected by the First Amendment. ER013; *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982).

A law that substantially chills participation in First Amendment-protected activities is unconstitutional. *See, e.g., Boy Scouts*, 530 U.S. at 650 (holding that a law was unconstitutional because it ultimately "affect[ed] the Boy Scouts' ability to advocate public or private viewpoints"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged

[8] While Daleiden mischaracterizes the Doe Plaintiffs' associational claims as stemming from their ability to associate with the government, this is not what the Doe Plaintiffs have argued. Rather, the Doe Plaintiffs have asserted that "[t]he threat of exposure of [Plaintiffs'] personal information would discourage their participation with organizations such as Planned Parenthood and Cedar River Clinics, and their willingness to cooperate with the BDRL and other state agencies, thereby unconstitutionally chilling their advocacy." ER479-95 at 490 (emphasis added).

sphere."). Thus, when there is a "'reasonable probability that the compelled disclosure [of information in government records] will subject [a person] to threats, harassment, or reprisals from either Government officials or private parties,'" the First Amendment prohibits such disclosure. *John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

This principle – that government-compelled disclosure of information is prohibited if it would chill First Amendment-protected activity – is well-established. *See NAACP v. Alabama*, 357 U.S. 449, 452 (1958) (protecting from disclosure the identities of NAACP members); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88-90 (1982) (prohibiting disclosure of donors to political party). Contrary to Daleiden's assertion, Opening Br. at 26, it is not only fringe groups that are "vilified"[9] that may assert First Amendment challenges to disclosure requirements. Rather, the question is whether "'those resisting disclosure can … 'show a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals.'" *Doe v. Reed*, 823 F. Supp. 2d 1195, 1200 (W.D. Wash. 2011) (citation and brackets omitted).

While the question of whether the party seeking to prevent disclosure is a "fringe" versus a mainstream group may bear on the balance of interests in the electoral context, it has no bearing on the balance of interests in the present case. *See id.* at 1199 ("In *Doe*, the Supreme Court set out the standard of scrutiny to be

[9] For example, the Boys Scouts of America can hardly be said to be the target of widespread "vilification," yet the U.S. Supreme Court has recognized, and protected, their First Amendment right to expressive association. *Boy Scouts*, 530 U.S. 640.

applied **in electoral cases** ….” (emphasis added)). In *Doe v. Reed*, the U.S. Supreme Court considered the question of whether the Washington PRA violated the First Amendment as applied to referendum petitions in general. 561 U.S. 186, 190 (2010). After rejecting that claim, the Court remanded the separate claim of whether disclosure of information in the particular petition at issue violated the First Amendment. *Id*. On remand, the district court noted that given the substantial government interest in “‘**preserving … the electoral process**,’” challenges to disclosure requirements in the electoral context “‘have been successfully raised only by minor parties[] having small constituencies and promoting historically unpopular and almost universally-rejected ideas.’” *Doe*, 823 F. Supp. 2d at 1199, 1203 (citations and ellipsis omitted; emphasis added).

In electoral cases, the rationale for treating “minor party” groups differently than larger, more “mainstream” groups is that, on one side of the balancing test, the government’s interest in disclosure is diminished when it concerns groups that are unlikely to win an election. *See Buckley*, 424 U.S. at 70. On the other hand, “minor party” groups are particularly vulnerable to being “forced to retreat from the marketplace of ideas” because of their limited membership and lack of financial wherewithal. *Doe*, 823 F. Supp. 2d at 1204.

But the assertion that only fringe groups can assert First Amendment claims – no matter the context, and no matter the interests involved – is not supported by *Reed* or any other case. The one-size-fits-all approach that Daleiden proposes, based on the nature of the party involved rather than its interests at stake, would lead to perverse results. Under this standard, the First Amendment would protect minority groups at risk of losing contributions, but turn a blind eye to the Doe Plaintiffs’ personal safety. Surely, this is not what the court in *Reed* intended.

Rather, the fundamental question in all of these cases, regardless of the context, is whether the government's interest in disclosure outweighs the chilling effect that disclosure would have on the exercise of First Amendment rights – a determination that necessarily must be made based upon the facts of each particular case. Here, unlike in cases where there is a strong government interest in maintaining the integrity of the electoral system, there is no compelling government interest in disclosure of the Doe Plaintiffs' identities or personally identifying information.

On the other side of the equation, when there is a clear potential chilling effect that would result from disclosure, courts have protected similar personally identifying information from disclosure. For example, in several cases involving the collection of personal information for adult entertainment dancers, courts have uniformly held that public disclosure of personally identifying information, including the dancers' names and aliases and their current and former addresses, would infringe on their First Amendment rights because of potentially dangerous consequences. *See, e.g.*, *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1012 (9th Cir. 2004) (enjoining disclosure of information about erotic dancers required to be submitted to city for work permit); *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 274 F.3d 377, 394-95 (6th Cir. 2001) (exempting from public disclosure certain personal information about applicants at adult entertainment establishments); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) (acknowledging First Amendment protection for information submitted by adult entertainment permit applicants, but reversing injunction because state law already protected information from disclosure). Likewise, under the Washington PRA, in *Roe*, the court held that participation in erotic dancing is protected under the First Amendment. 2015 WL 4724739, at *3. Because erotic

dancers are "uniquely vulnerable to harassment, shaming, stalking, or worse," the court held that disclosure of their personal information would unduly chill the exercise of their First Amendment rights, and the plaintiffs could "plausibly claim that they would not have engaged in their profession had they known that their erotic license information could be so easily disclosed to any member of the public"; the requested records were therefore exempt from disclosure under the PRA. *Id.*

The analysis in the foregoing adult entertainment public disclosure cases is directly on point. Like the dancers in *Roe*, the Doe Plaintiffs "are uniquely vulnerable to harassment, shaming, stalking, or worse." *Id.* Indeed, there is already significant evidence that individuals publicly identified with fetal tissue donation and research have been harassed and threatened. *See* ER463-78 at ¶ 4, 469-72; *see also* Minority Report at 1-22 (quoting Letter from Johns Hopkins University to Hon. Jan Schakowsky, Ranking Member, Select Investigative Panel (Sept. 20, 2016)) (stating that due to the "linking [of] fetal tissue research to broader concerns about abortion, faculty will be discouraged from pursuing important scientific questions due to difficulty in acquiring needed material or out of fear of personal reprisal"); *id.* at 35 (quoting Letter from the University of California, Los Angeles to Hon. Jan Schakowsky, Ranking Member, Select Investigative Panel (Sept. 19, 2016)) (describing the need for clinicians to consider that the choice to work with a fetal tissue provider might endanger their lives because of the violence and harassment directed at doctors who perform abortions, and explaining that many medical residents express fear about potential violence and have therefore elected to limit their training time at clinics).

The Doe Plaintiffs pled those threats, *see* ER080-99 at ¶ 31, and submitted evidence that supports those allegations, *see, e.g.*, ER463-78, ER453-62. As the district court noted, there is no dispute about the evidence establishing the potential danger to the Doe Plaintiffs. *See* ER016-19 & n.9. The threat of exposure of the Doe Plaintiffs' personally identifying information would discourage their participation with organizations such as Planned Parenthood and Cedar River Clinics, and their willingness to cooperate with the BDRL and other organizations involved with fetal tissue research, thereby unconstitutionally chilling their advocacy and association rights. The threat of serious harm, and the chilling effect on the Doe Plaintiffs, is echoed by others involved with fetal tissue research. The Minority Report is replete with additional examples of threats of violence and harassment specifically engendered by Daleiden's and the Center for Medical Progress' activities identifying institutions and individuals involved with fetal tissue research.[10]

The potential chilling effect on research activities also supports protecting personally identifying information for the Plaintiffs engaged in research. As the court recognized in *Dow Chemical*, 672 F.2d at 1276, when enforcement of a subpoena for information from researchers in a lab would threaten substantial intrusion "capable of chilling the exercise of academic freedom," the production of such information would therefore chill the exercise of First Amendment rights.

[10] "[P]roviders and researchers already face harassment and violence and identifying anyone in connection with this investigation [by the Select Panel] increases these risks." Minority Report at 31 (citing Letter from Ass'n of American Medical Colleges et al. to Hon. Marsha Blackburn, Chair, and Hon. Jan Schakowsky, Ranking Member, Select Investigative Panel (Mar. 31, 2016)).

Regular invocation of open records requests "'by private citizens in attempts to burden, embarrass, or otherwise hassle those professors whose research and scholarship they found objectionable … might soon amount to a real threat to academic freedom, casting a chill on speech in the academy.'" Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, at 9 (Feb. 2015) (citation omitted), http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf.

Here, it is difficult to imagine what could be more chilling to the continuation of association and research than the threat of bodily harm or death. *See, e.g.*, ER383-87 at ¶¶ 14, 15 ("I had interactions with the physician who performed the abortion relating to the autopsy that Children's Labs performed on the fetus. That physician was later killed by someone with anti-abortion views.") ("If my or my SCH colleagues' personal identifying information … is disclosed in the records to be released by the University of Washington, we have real concerns for our safety and privacy."). This chilling effect on research connected with fetal tissue is well-documented and widespread. *See, e.g.*, Amy Maxmen, *Fetal Tissue Probe Unsettles Scientific Community*, Nature Biotechnology (May 6, 2016), *available at* http://www.nature.com/nbt/journal/v34/n5/full/nbt0516-447.html, *cited in* Minority Report at 26 & n.104 (describing increased prevalence of safety concerns and threats among scientific community linked to fetal tissue, and how in response, some laboratories are locked and de-identified, constraining the scholarly exchange of students, visitors, and ideas); Halpern, *Freedom to Bully, supra,* at 3 (Harold Varmus stated, "There are pitfalls in unrestrained openness, including unwarranted violations of privacy, the potential harassment of scientific

investigators and the chilling effect that inappropriate public scrutiny could have on the free exchange of ideas and the willingness to take risks to find answers.").[11]

Thus, while there is no dispute that the type of records sought by Daleiden are subject to disclosure in general, allowing concomitant disclosure of the Doe Plaintiffs' identities and their personally identifying information would unconstitutionally hinder the Doe Plaintiffs' rights to expressive association. The First Amendment to the federal constitution and the Washington Constitution thus operates as "other statute[s]" exempting from disclosure the personal information at issue. This was the sound decision of the district court, and this Court should affirm.

B. Disclosure of the Doe Plaintiffs' Identifying Information Would Violate Their Constitutional Right to Privacy.

Disclosure of the Doe Plaintiffs' identities and personally identifying information would violate their right to privacy protected by the Fourteenth Amendment to the United States Constitution and Washington's Constitution. This right to privacy provides an independent basis for protection from disclosure

[11] *See also* Minority Report at 21-22 ("Leading institutions also told the Panel about the chilling impact on life-saving research."). UCLA told the Panel that "[a]nother laboratory has reduced their effort on studies that require fetal tissues, despite the importance of this research, due to concerns about personal safety." *Id.* at 21 & n.97. Similarly, Johns Hopkins University described the chilling effect on research: "[D]ue to the sensational nature of linking fetal tissue research to broader concerns about abortion, faculty will be discouraged from pursuing important scientific questions … out of fear of personal reprisal." *Id.* at 22 & n.103.

because the PRA "must give way to constitutional mandates." *Freedom Found.*, 310 P.3d at 1258.

Constitutional privacy protects both the individual's interest in independent decision making in important life-shaping matters and the individual's interest in avoiding disclosure of highly personal matters. *Whalen v. Roe*, 429 U.S. 589, 600 (1977); *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) ("'One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters[.]'" (citation omitted)).[12] The latter interest has been described as an interest in "information privacy." *See, e.g.*, Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1198 (2002).

This Court has likewise explicitly acknowledged that "[i]ndividuals have a constitutionally protected interest in avoiding 'disclosure of personal matters.'" *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (quoting *Whalen*, 429 U.S. at 599) (holding that a statutory and regulatory scheme that

[12] While courts have often held an individual's privacy interests do not outweigh the public interest in disclosure, they have nevertheless recognized that the U.S. Constitution does protect a right to privacy. *See, e.g., NASA v. Nelson*, 562 U.S. 134, 138 (2011) (court "assume[d], without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*"); *Doe v. Attorney Gen. of U.S.*, 941 F.2d 780, 796 (9th Cir. 1991) (interpreting *Whalen* and *Nixon* as creating a broad constitutional right to privacy, to be balanced against public's interest in the information; finding HIV status is protected information). Further, Daleiden's contention that this Court has not revisited the existence of the right since 2009, Opening Brief at 20 n.5, is incorrect. *See Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014) (recognizing the right, but finding the issue was unripe, noting that "[t]he Supreme Court has recognized a fundamental privacy right in non-disclosure of personal medical information" (citing *Whalen*, 429 U.S. at 599)).

allowed the Arizona Department of Health Services to collect unredacted medical files pertaining to patients at certain medical facilities that provided abortions violated the patients' constitutional right to informational privacy). Washington courts have likewise recognized a constitutional right to privacy. *See Bedford v. Sugarman*, 772 P.2d 486, 491 (Wash. 1989) (noting that the constitutional right of privacy encompasses two sorts of interests, including the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions (citing *Whalen*, 429 U.S. at 599-600)); *O'Hartigan v. Dep't of Pers.*, 821 P.2d 44, 47 (Wash. 1991) (right to privacy includes "the right to nondisclosure of intimate personal information, or confidentiality").

Names and other personally identifying information may constitute "personal matters" when that information is normally kept private, or when nondisclosure is necessary to ensure personal safety. *See, e.g.*, *In re Crawford*, 194 F.3d 954, 959-60 (9th Cir. 1999) (recognizing that public disclosure of social security numbers of bankruptcy petition preparers may implicate the constitutional right to informational privacy, but concluding that the government's interest in preventing "widespread fraud and unauthorized practice of law" outweighed the preparers' privacy interests); *Simpson v. Devore*, No. 2:16-cv-2981-JCM-VCF, 2017 WL 459879, at *2 (D. Nev. Jan. 13, 2017) (concluding that plaintiff had stated a claim against a police officer for violating his constitutional right to informational privacy where the officer left plaintiff's criminal file, which contained his name, date of birth, and other confidential information, in a car that

was later released to a third party).[13] No law may unreasonably, unnecessarily, or arbitrarily require the revelation of this type of private facts. *Bedford*, 772 P.2d at 491; *see also Whalen*, 429 U.S. at 596.

Privacy interests are also of a protectable, constitutional dimension when they "implicate a fundamental liberty interest, specifically [the individual's] interest in preserving their lives and the lives of … their family members, as well as preserving their personal security and bodily integrity." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998). In *Kallstrom*, plaintiffs were undercover police officers who had testified against several gang members; at issue was the disclosure of police officers' personnel files to the gang members' attorney. The court first acknowledged that the Constitution protects "the right to be free from 'unjustified intrusions on personal security' … [and] that 'no right is held more sacred, or is more carefully guarded … than the right of every individual to the possession and control of his own person.'" *Id*. (brackets and second ellipsis omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)). Further, the court recognized that protection from threats to personal security was not limited to the context of government-imposed punishment or physical restraint. *Id*. Thus, releasing the

[13] Individual names and contact information fall within the rubric of "intimate personal information" protected by the right to privacy. *See Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) (holding that the privacy protections of federal Freedom of Information Act required the redaction of names and other personally identifiable information in payroll records); *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 87 (2d Cir. 1991) (in FOIA case, holding that "individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses").

police officers' personally identifying information (including addresses, phone numbers, driver's licenses, and family members' names, addresses, and phone numbers "where disclosure of this personal information may fall into the hands of persons likely to seek revenge upon the officers, … created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Id*. at 1063.[14]

Here, as in *Kallstrom*, there is a very real threat of serious bodily harm and violence for individuals who are identified as participating at any level in fetal tissue donation and research programs – a threat that is not merely speculative, particularly given the rancor Daleiden himself has fueled. After Daleiden released his Center for Medical Progress videos critiquing the use of fetal tissue in scientific research, three people were shot and killed and nine others injured at a Planned Parenthood facility in Colorado Springs, with the shooter repeating anti-abortion and anti-fetal tissue donation rhetoric; and arson was committed against a Planned Parenthood facility in Washington. *See* ER463-78 at ¶¶ 4, 12; ER362-78 at ¶ 10; ER394-452 at 422 ("This [the intentional arson of a Washington Planned Parenthood facility] is an appalling act of violence towards Planned Parenthood, but unfortunately a predictable ripple effect from the false and incendiary attacks

[14] The *Kallstrom* court cautioned, "[W]e do not mean to imply that every governmental act which intrudes upon or threatens to intrude upon an individual's body invokes the Fourteenth Amendment. But where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the 'magnitude of the liberty deprivation … strips the very essence of personhood.'" 136 F.3d at 1064 (ellipsis in original) (quoting *Doe v. Claiborne County*, 103 F.3d 495, 506-07 (6th Cir. 1996)).

that fuel violence from extremists."); ER423-28 (noting that "the clinic where the gunman [who attacked a Planned Parenthood facility] holed up was part of the Planned Parenthood Rocky Mountain network featured in the [Daleiden] videos released this summer"); ER429-32 (noting that the head of Colorado's Planned Parenthood had been depicted on a Daleiden "sting" video just prior to a massacre at the Colorado Springs clinic).

Further, the Doe Plaintiffs and their employer organizations have made concerted efforts to maintain the confidentiality of specific, identifying information regarding employees. Put differently, their identities and personal identifying information – as associated with fetal tissue donation or research – is not information that would ordinarily be publicly available. *See* ER453-56 at ¶ 5; ER362-66 at ¶¶ 15, 16; ER345-47 at ¶¶ 5, 6; *see also* ER394-98 at 403-05 (stating that Planned Parenthood spokesperson declined to identify the Washington facility involved in tissue donation "out of fear that activists would attack the facilities, endangering patients and staff"). Because disclosure of Plaintiffs' personally identifying information would pose a threat to their personal safety and bodily integrity, this information is precisely the type of information to which the constitutional right to informational privacy should attach.[15]

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[15] The fact that the Doe Plaintiffs work for organizations that collaborate with a public research institution, and whose records are therefore public records, does not change their interest in maintaining the privacy of their employment status. "[T]he right to informational privacy 'applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public.'" *Tucson Women's Clinic*, 379 F.3d at 551 (quoting *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002)); *see also Whalen*, 429 U.S. at 599-600 (concluding that plaintiffs' constitutional right to informational (continued . . .)

Because the Doe Plaintiffs have a constitutionally protected privacy interest in their personally identifying information, disclosure is prohibited unless there is a sufficient legitimate interest in disclosure that outweighs their privacy and safety concerns. This Court has held that a "conditional right to informational privacy must be balanced against any legitimate government interest in obtaining the information." *Idaho AIDS Found., Inc. v. Idaho Hous. & Fin. Ass'n*, 422 F. Supp. 2d 1193, 1999 (D. Idaho 2006) (citing *Crawford*, 194 F.3d at 959). To the extent state action infringes upon a fundamental right, such as an individual's protected liberty interest in avoiding bodily harm, an even higher standard is required for disclosure: "such action will be upheld under the substantive due process component of the Fourteenth Amendment only where the governmental action furthers a compelling state interest." *Kallstrom*, 136 F.3d at 1064 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring)). Finally, the PRA also prohibits disclosure if information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. Wash. Rev. Code § 42.56.050.

Under any analysis, there is simply no reason that justifies disclosure of the Doe Plaintiffs' personally identifying information. To the extent there is a "public debate over fetal tissue research," as Daleiden suggests, the allegedly

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(. . . continued)
privacy was protected where, among other things, the government had in place adequate safeguards against public disclosure); *Kallstrom*, 136 F.3d at 1062 (holding that disclosure of police officers' personally identifiable information maintained in their personnel files violated their constitutional right to informational privacy). Those of the Doe Plaintiffs who work for the University of Washington are no different. *See* Section II.C.

"controversial nature of Appellees' activities," *see* Opening Br. at 25, does not support finding a legitimate public interest in the disclosure of constitutionally protected private information. Mere public attention to a topic does not equal legitimate public interest in the information; were that the measure, tabloid headlines could suffice to justify disclosure of constitutionally protected private information.

Even assuming a legitimate public interest in ensuring scientific research is appropriately conducted, here, the Doe Plaintiffs have never sought to redact the substantive information contained in the requested documents that would serve that public interest. The preliminary injunction from which Daleiden appeals reflects that openness. ER025 ("The court preliminarily enjoins UW from releasing the requested documents without first redacting all personally identifying information or information from which a person's identity could be derived with reasonable certainty for all individuals."). Rather, the remaining dispute is focused on Daleiden's continued unreasonable request for individuals' personally identifying information. As to this information – such as the identity of the Doe Plaintiffs, their phone numbers, their addresses, etc. – there is no proof of a robust public debate or public interest.

Daleiden has provided no explanation as to how the Doe Plaintiffs' personally identifying information would advance any public interest – much less how any public interest in this information outweighs the danger that disclosure would pose to Plaintiffs' personal privacy and safety. The PRA claims no such interest in the type of personally identifying information at issue in this case and in this context. Instead, the PRA's "'primary purpose … is to provide broad access to public records to ensure *government* accountability.'" *Benton County v. Zink*, 361

P.3d 801, 806 (Wash. Ct. App. 2015) (citation omitted; emphasis added), *review denied*, 369 P.3d 501 (2016) (table). Disclosure of the Doe Plaintiffs' identities and personally identifying information does little to nothing to "ensure government accountability." Indeed, beyond facilitating harassment against the Doe Plaintiffs and putting their safety at risk, it is simply not clear what interest revelation of their identities and identifying information could serve.

Moreover, "[t]he PRA was never intended to facilitate spying or stalking, or to enable a host of other nefarious goals." *Anderson*, 2015 WL 4724739, at *2. The PRA provides no absolute right to all public records; indeed, the fact that the PRA contains several exemptions demonstrates that it was never intended to provide the public with unfettered access. Daleiden's goal of stymying fetal tissue donation programs via harassment is simply not a legitimate reason to justify violating Plaintiffs' constitutional rights to privacy. *See United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014) (recognizing no constitutional right to harass); *State v. J.M.*, 28 P.3d 720, 724 (Wash. 2001) (no right to engage in threats of violence).

The fact that some courts have found *different* public interests to outweigh *different* private interests in *other* cases does not mean it is appropriate in *this* case to rule, as a matter of law, that any as-yet-unidentified public interest in personally identifying information outweighs Plaintiffs' privacy interests. Rather, even cases cited by Daleiden support the propositions that (1) there is a constitutionally protected right to privacy and (2) courts must balance the public interest in disclosure with this protected privacy right. *See, e.g.*, *Crawford*, 194 F.3d at 960 (finding governmental interests in preventing "widespread fraud and unauthorized practice of law in the [bankruptcy petition preparer] industry" and "the important purposes behind the Bankruptcy Code's 'public access' provision," that required

identifying the individuals involved to ensure the proper operation of the bankruptcy system (citation omitted)), *cited in* Opening Br. at 21. It is difficult to imagine why the balance struck by the district court in this case was improper, when it is one to which Daleiden himself agreed. *See* Opening Br. at 22.[16] Even the other original defendant, Zachary Freeman, who lodged similar requests for records relating to the BDRL's activities, agreed to accept documents with redactions of personally identifying information. SER013-16 at 16.

Nor does the mere fact that the government possesses private information that was disclosed to a third party lead to the conclusion that the information is therefore be subject to disclosure. The Ninth Circuit has acknowledged that even if individuals' personally identifying information was provided to the government, this does not itself mean that the individuals waived their privacy rights. *See Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) (protecting workers' financial information contained in government records submitted under the Davis-Bacon Act). The general applicability of a public records act to the requested information does not necessarily control whether the Doe Plaintiffs' privacy expectations were

[16] As detailed above, Daleiden's offer to accept records with certain information redacted did not entirely overlap with the redactions sought by the Doe Plaintiffs. Daleiden gave his permission to redact only a small subset of personal identifying information, not the full scope ultimately agreed to by the district court. Further, Daleiden refused to allow redaction for eight individuals specifically identified in his PRA request, though he did not provide any rational basis for his position as to why his proposed redactions were acceptable while the others requested by the Doe Plaintiffs were not. ER394-452 at ¶¶ 14, 16 and ER437, 441-51.

reasonable – "the public's interest in knowing 'what their government is up to' … does not create an avenue to acquire information about other private parties held in the government's file." *Id*. (citation omitted).[17]

Public disclosure laws recognize that there is no government or public interest in certain types of personal information, and that individuals retain privacy rights to certain information even if they have shared it with the government. The PRA itself is replete with examples of the Legislature categorically exempting the disclosure of certain "personally identifying information" for individuals who have voluntarily interacted with the State. *See, e.g.*, Wash. Rev. Code § 42.56.320 (exempting disclosure of "personally identifying information" of transit riders, driver's license holders, and toll payers); Wash. Rev. Code § 42.56.640 (exempting "sensitive personal information" of vulnerable individuals and in-home

[17] The reliance on cases like *United States v. Miller*, 425 U.S. 435 (1976), *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2007), *West v. Vermillion*, 384 P.3d 634, 196 Wash. App. 627 (Wash. App. Ct. 2016), and *Service Employees International Union Local 925 v. Freedom Foundation*, ___ P.3d ___ 2016 WL 7374228 (Wash. Ct. App. Dec. 20, 2016) by Daleiden and *amicus curiae* Washington Coalition for Open Government is equally misplaced. *Miller and Forrester* are Fourth Amendment cases that establish the proposition that a reasonable expectation of privacy protects against unreasonable government searches and seizures, but they shed no light on when, in the context of public records act cases, the right to privacy is outweighed by a public interest in disclosure. *West* instructs that public documents found on State employee's personal devices are subject to disclosure, but follows a line of cases which specifically note that the employee still has constitutional rights in "personal information comingled with those public records." *Nissen v. Pierce Ct.*, 357 P.3d 45, 56, 183 Wn.2d 863 (Wash. 2015). Finally, the court in *SEIU* did hold that the requested personal information was not protected from disclosure, but only after finding that there was no showing that release of the information would endanger those whose identities were being released.

caregivers, which is defined to include names, addresses, telephone numbers, email addresses, or "other personally identifying information"); *see also* Wash. Rev. Code § 42.56.590 (requiring notification of security breaches that reveal "personal information" held by an agency). Disclosure statutes outside Washington also buttress the conclusion that public disclosure is not at odds with the protection of personal privacy interests. *See, e.g.*, 5 U.S.C. § 552(b)(6) (FOIA exemption preventing the disclosure of information that would infringe on an individual's privacy right when the public interest in that information is minimal); Va. Code Ann. § 2.2-3705.1 (exempting disclosure of "'personal information' . . . including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body"); California Attorney General, *Summary of California Public Records Act 2004* at 2-3, available at http://ag.ca.gov/publications/summary_public_records_act.pdf (explaining that "[p]rivacy is a constitutional right and a fundamental interest recognized by the CPRA" that provides the basis for many of the exemptions from disclosure). Thus, there is nothing unusual about an individual's constitutional privacy rights barring the disclosure of their personally identifying information when any governmental or public interest is minimal at best. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Commerce*, 337 F. Supp. 2d 146, 176 (D.D.C. 2004) (government properly withheld home addresses and telephone numbers of DOC employees under the FOIA privacy exemption, because "the disclosure of this information has little to do with the public's understanding of the manner in which the DOC conducts business").

Here, the Doe Plaintiffs have a protected constitutional right to privacy that outweighs any public interest in the disclosure of their personally identifying

information. Because the PRA cannot require a disclosure that violates the Washington Constitution, this Court should affirm the district court's decision exempting from disclosure the personally identifying information at issue here.[18]

C. The District Court Correctly Held That the Remaining Factors for Injunctive Relief Were Met.

In addition to establishing a likelihood of success on the merits, as the district court properly held, the Doe Plaintiffs also established the remaining elements required for a preliminary injunction: that irreparable harm is likely, not just possible, if the injunction is not granted; that the balance of equities tips in their favor; and that an injunction is in the public interest. ER001-26; *see Winter*, 555 U.S. at 20.

The evidence establishing that the release of the Doe Plaintiffs' identities and personally identifying information would cause substantial harm was abundant and undisputed. *See* Section II.A.-.B., *supra*. The release would pose a risk to the Doe Plaintiffs' safety, as well as substantial and irreparable harm to their rights of privacy and First Amendment rights to expression and association.

As detailed in Sections II.A. and II.B. above, there is little if any public interest in releasing the documents without redactions of personally identifying information. While the documents themselves may be subject to disclosure, and the subject of Daleiden's records request may be of some public interest, that interest

[18]The district court did not reach the question of whether Wash. Rev. Code § 42.56.230(3), which exempts certain information in public employee personnel files from disclosure, applied. ER010, n.8. Therefore, that issue is not before the Court. Should the Court wish briefing on this point, Doe Plaintiffs will submit a supplemental brief.

does not extend to the identities or personally identifying information of the Doe Plaintiffs. The district court thus properly concluded that the balance of the hardships tips in favor of protecting the Constitutional rights of the Doe Plaintiffs by enjoining release of their personally identifying information. *See* ER018-19, 21.

III. The District Court Properly Exercised Its Discretion in Entering a Preliminary Injunction That Allows for Disclosure of All Documents and Is Reasonably Tailored to Address Privacy Concerns.

The district court properly exercised its discretion in requiring redactions to documents disclosed in response to Daleiden's public records request. Notably, the injunction allows for disclosure of *all documents* sought by Daleiden. This is a critical point. There is no broad, category-based exemption that precludes entire sets of documents from disclosure. In fact, the injunction does not exempt any category of documents from disclosure. Instead, the injunction imposes one limitation, providing that release of all documents may proceed but only after redaction of "personally identifying information or information from which a person's identity could be derived with reasonable certainty." ER025. Daleiden contends that the Doe Plaintiffs offer "no valid legal basis" for redaction of personally identifying information, and as a result: (a) information other than "names and contact information" should not be redacted; and (b) the names of eight individuals that Daleiden specifically identified in his public records request should not be redacted. *Id.* Daleiden's position flatly ignores the underlying tenets of constitutional First Amendment and privacy protections and should be rejected.

A. The Scope of the Injunction Appropriately Protects Individual Privacy Rights.

Daleiden's argument that there is "no legal basis" for redacting "any information," let alone personally identifying information, is unfounded. First, as laid out in detail above, the district court properly reached the legal conclusion that "[a]ll of the *Winter* factors favor imposing a preliminary injunction that prohibits the disclosure of Plaintiffs' personally identifying information." ER021.

Second, redaction is a common practice routinely directed by courts to ensure public agencies comply with PRA exemptions when producing documents subject to public disclosure. To that end, Washington courts have rejected attempts to withhold a record entirely where the record could be disclosed, subject to redaction. *Does v. King County*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (citing *Bainbridge*, 259 P.3d at 198 ("The trial court erred by exempting the entire [record], rather than producing the report with only [the officer's] identity redacted.")). Consistent with that principle, the district court here did not direct withholding of entire records, but rather, required redactions.

Morevoer, the scope of the injunction is appropriate and necessary to prevent violating the Doe Plaintiffs' constitutional rights. Daleiden wrongly suggests that the Doe Plaintiffs seek to protect more than their identities. But that is precisely what they seek to protect. To do so necessarily requires more than merely redacting their names. It also requires redacting information that could be used to derive the Doe Plaintiffs' identities.

The injunction properly defines personally identifying information and does not limit it to just "names and contact information." The district court found that limiting the definition of personally identifying information to "names and contact

information" was insufficient; if limited in this fashion, the injunction would "not be effective in protecting Plaintiffs' constitutional rights unless it includes these broader categories of information." ER023. This ruling is consistent with how personally identifying information is defined by statute or rule in numerous contexts. *See, e.g.*, 34 C.F.R. § 99.3 ("Personally identifiable information" includes "[a] list of personal characteristics that would make … identity easily traceable" and "[o]ther information that would make … identity easily traceable"); 16 C.F.R. § 312.2(7) (examples in the Children's Online Privacy Protection Act include "[a] persistent identifier that can be used to recognize a user over time and across different Web sites or online services" . . . such as "a customer number held in a cookie, an Internet Protocol (IP) address, a processor or devise serial number, or unique device identifier."); 45 C.F.R. § 164.514(a) (under federal Health Insurance Portability and Accountability Act, information is "individually identifiable health information" unless it "does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual" regulations). As one scholar explains, the term "personally identifiable information" "describes a relationship between the information and a person, namely that the information – whether sensitive or trivial – is somehow identifiable to an individual." Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1207 (1998). [19]

[19] Prof. Kang describes different ways that information can be "identifiable" to a person, including (1) authorship, *i.e.*, information that an individual creates and claims authorship over; (2) description, *i.e.*, information that "could describe the individual in some manner" including characteristics such as age and sex; and (3) instrumental mapping, or persistent identifiers such as social security numbers, usernames, Internet Protocol addresses, and unique device addresses, that can be (continued . . .)

There are ample examples of courts similarly acting to limit disclosure of information, beyond simply "names and contact information," that would lead to the disclosure of an individual's identity. In *Does v. City of Trenton Department of Public Works*, 565 F. Supp. 2d 560, 571 (D.N.J. 2008), the court granted an injunction precluding release under New Jersey's Open Public Records Act of the "names, addresses, and other personal identifying information" of the employees of a government vendor on privacy grounds, finding a "weak public interest" and noting the court's fear that "once the personal information at issue is released, there would be nothing to stop others from obtaining it to harass these employees." *Id.* Indeed, the *City of Trenton* court found that the "very real possibility of such an intrusion militates against disclosure." *Id.* Finally, the *City of Trenton* court concluded that "[d]isclosure of employees' personal information to third parties while revealing nothing about the inner workings of government, not only violates these employees' reasonable expectation of privacy under the Federal Constitution,

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(. . . continued)
used to map an individual's interactions with an institute. Kang, *supra*, at 1207-08 The Government Accountability Office has likewise adopted a broad and comprehensive definition of personally identifiable information:

> [PII is] any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, Social Security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information.

U.S. Gov't Accountability Office, *Privacy: Alternatives Exist for Enhancing Protection of Personally Identifiable Information*, at 1 n.1 (May 2008), http://www.gao.gov/new.items/d08536.pdf (evaluating federal government privacy laws).

but also does nothing to advance the purpose of OPRA, which is to promote transparency in government." *Id.* The same analysis applies here.

Likewise, in *Corbett v. Transportation Security Administration*, 568 F. App'x 690, 705 (11th Cir. 2014), the Eleventh Circuit upheld redaction of the names and faces of TSA employees in documents and videos in the context of a Freedom of Information Act request. The Eleventh Circuit did so to protect individuals' "privacy interests in avoiding disclosure of their personal identifying information." *Id.* The *Corbett* court analyzed the FOIA request and concluded that disclosure would "not add to a reader's or viewer's understanding of those documents and images," that "disclosure of their personal identities would not shed any light on the TSA's operations," and that the requestor had failed to offer a reasonable, much less compelling, explanation for a public interest in disclosure of individual identities. *Id.* at 704.

In another example, in *King County*, 366 P.3d at 939, the identities of students depicted in surveillance footage of a school shooting were deemed exempt from disclosure. Black boxes and pixilation were applied to redact the students' identifying information, including their faces, clothing, and body types. And there are many other examples of cases in which redactions beyond "names and contact information" were applied in the context of public records responses to avoid disclosure of individual identities. *See, e.g., Papraniku v. Cherry Hill Twp.*, No. A-1763-07T3, 2009 WL 1045998, at *1 (N.J. Super. Ct. App. Div. Apr. 21, 2009) (upholding redaction of "city of origin and qualifier classifications, along with the classification key" for Section 8 applicants under a state PRA request); *State ex rel. Rocker v. Guernsey Cty. Sheriff's Office*, 932 N.E.2d 327, 330 (Ohio 2010) (upholding redaction of the name of the diocese where priest accused of

sexual assault worked, along with his name, address, and telephone number, under the state's PRA); *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 865 (Tenn. 2016) (upholding redaction of any photographic or video depiction of the victim under a production pursuant to the state's PRA); *Rutland Herald v. City of Rutland*, 48 A.3d 568, 579-80 (Vt. 2012) (upholding redaction of teacher's suspension dates, along with their names, under the state's PRA).

Consistent with these cases, redaction of "personally identifying information or information from which a person's identity could be derived with reasonable certainty" is both legally and factually sound. This Court should affirm the district court's proper exercise of discretion in this regard.

B. The Preliminary Injunction Properly Protects the Privacy Rights of All Doe Plaintiffs, Including the Eight Named Individuals.

In his public records request, Daleiden identified eight individuals by name (the "named individuals"). Even assuming certain of the named individuals are known to have some involvement with fetal tissue research or donation, disclosure of their names in conjunction with the UW's records would still infringe on the rights of the named individuals. Therefore, the district court's preliminary injunction properly protected the named individuals by requiring redaction of their personally identifying information.

The district court properly relied on *Bainbridge*, 259 P.3d at 197, in concluding that Daleiden's "ability to find certain publicly available information about eight individuals that he believes will be named in the records at issue is irrelevant to the right of those individuals to claim a valid exemption under the PRA based on their constitutional rights." ER025. Indeed, "just because some members of the public may already know the identity of [a] person … it does not

mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production." *Bainbridge*, 259 P.3d at 197. In considering whether the name of an officer should be disclosed in response to a PRA request, the *Bainbridge* court was "not persuaded that a person's right to privacy, as interpreted under the PRA, should be forever lost because of media coverage," reasoning that "[a]n agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity." *Id.* at 196-97. The same analysis applies here.

While Daleiden attempts to circumvent application of the PRA principles set forth in *Bainbridge*, claiming that the district court applied the wrong legal standard, he cites no legal precedent in the context of the PRA and relies on general privacy law in contending that the proper standard here would involve an assessment of privacy rights – which would necessarily be on a person-by-person basis. *See* Opening Br. at 40 (arguing that the district court must "assess the magnitude of the individual's protected interest" and that the "magnitude" of an individual's privacy interest is diminished if the information they seek to conceal is already known). Not only is this argument incorrect, as it ignores clear precedent, *see* discussion *supra* of *Bainbridge*, 259 P.3d at 197, it is unworkable. The district court correctly concluded that it was improper to impose on the UW the burden of performing an intractable fact-specific inquiry concerning the level of media coverage each individual at issue has received.

In sum, the district court correctly applied the appropriate standard in the context of the PRA in concluding that the scope of the injunction should apply to

all Doe Plaintiffs, and that the named individuals should not be singled out and denied protection.

C. The District Court's Imposition of Procedural Safeguards Is a Reasonable Exercise of Discretion.

In conjunction with entry of the preliminary injunction, the district court ordered the parties to follow a protocol for redaction. ER027-28. The protocol calls for the following to occur within a set timeframe: (a) the UW reviews and applies redactions consistent with the terms of the injunction; (b) the UW provides the redacted records to the Doe Plaintiffs' counsel for review and an opportunity to identify additional proposed redactions; (c) the UW considers the additional proposed redactions; and (d) if the additional proposed redactions are not accepted, the Doe Plaintiffs have an opportunity to seek *in camera* review by the district court. *Id.*; ER031-32. This redaction protocol was a proper exercise of the district court's discretion and in no way infringes on Daleiden's rights, as he claims. *See* Opening Br. at 41-42.

The district court has wide discretion under its inherent powers to govern matters before it, including discovery-related matters such as imposition of a redaction protocol. *See Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (district courts have wide discretion in controlling discovery). The UW proposed the redaction protocol to assist it in ensuring compliance with the preliminary injunction. ER031-32. The parties, including Daleiden, had full opportunity to address the proposed protocol and present their arguments to the district court at a telephonic hearing. ER027-29; SER001-2. Contrary to Daleiden's claim, the redaction protocol does not offer the Doe Plaintiffs any "control" over the UW's disclosure of records. It merely allows counsel for the Doe Plaintiffs an

opportunity to review briefly, within a strict timeframe, already-redacted documents. This is grounded in the same opportunity that an individual to whom responsive records pertain to view those records before they are released under the PRA. The district court's exercise of its inherent discretion to direct discovery by ordering use of a redaction protocol was reasonable and wholly grounded in the law. This Court should affirm the preliminary injunction, including the production protocol that it approved subsequently.

CONCLUSION

Public disclosure laws are intended to further the public interest in transparency and accountability by our governments. But such laws were never intended to facilitate harassment, violence, stalking, or infringements on constitutionally-protected interests. The public interest in disclosure must be balanced with equally important interests in the protection of sensitive information. The district court properly allowed production of records relating to fetal tissue research, in which there may be some public interest – but required redaction of individuals' personally identifying information, where such disclosure would pose a very real threat to their safety and would violate the Doe Plaintiffs' constitutional rights. This Court should affirm.

DATED this 9th day of March, 2017.

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STATEMENT OF RELATED CASES

Plaintiffs-Appellees are unaware of any related cases.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 9, 2017.

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