

Nos. 20-16068, 20-16070, 20-16773, 20-16820

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*,
Plaintiffs-Appellees,

v.

CENTER FOR MEDICAL PROGRESS, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 3:16-cv-00236-WHO

**BRIEF OF AMICI CURIAE ATTORNEYS GENERAL OF
ARIZONA, ALABAMA, ARKANSAS, GEORGIA, IDAHO,
INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI,
MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA,
SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND
WEST VIRGINIA**

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Statement of Amici Curiae	1
Summary of the Argument	2
Argument	3
I. The Public Policy Defense To Liability for Disseminating Videos Is Applicable To The Claims Presented.....	3
A. Defendants’ Videos Aided State And Local Investigations And Enforcement Actions.....	5
1. Texas.....	6
2. Orange County, California.....	7
3. Arizona.....	8
Conclusion.....	9

TABLE OF AUTHORITIES

PAGE(S)

CASES

Altschul v. Sayble,
83 Cal. App. 3d 153, 147 Cal. Rptr. 716 (1978)..... 4

*Planned Parenthood of Greater Texas Family Planning and
Preventative Health Servs., Inc. v. Kauffman*,
981 F.3d 347 (5th Cir. 2020) 7

*Planned Parenthood of Greater Texas Family Planning and
Preventative Health Servs., Inc. v. Smith*,
No. 1:15-CV-1058, Dkt. 182 (W.D. Tex.) 7

*Sheppard, Mullin, Richter & Hampton, LLP v. J-M
Manufacturing Co., Inc.*,
425 P.3d 1 (Cal. 2018) 4

The People of the State of California v. DV Biologics, LLC,
No. 30-2016-00880665-CU-BT-CJC, Dkt. 128 (Cal. Super. Ct.) 7

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 2

STATUTES

42 U.S.C. § 289g-1(b)(2)(A)(ii)..... 5

42 U.S.C. § 289g-1(c)(4)..... 5

A.R.S. § 36-2302(D)..... 9

OTHER AUTHORITIES

Majority Staff Of S. Comm. On The Judiciary, 114th Cong.,
Majority Report On Human Fetal Tissue Research: Context And
Controversy (Comm. Print 2016), available at
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Select Investigative Panel Of The Energy & Commerce Comm.,
114th Cong., Final Report (2016), available at
[https://republicans-energycommerce.house.gov/sites/
republicans.energycommerce.house.gov/files/114/Analysis/20161
230Select_Panel_Final_Report.pdf](https://republicans-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Analysis/20161230Select_Panel_Final_Report.pdf)..... 6, 7, 8

STATEMENT OF AMICI CURIAE

Amici are the attorneys general and chief legal officers of the States of Arizona, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. All parties have consented to the filing of amicus briefs in this appeal. *See* Dkt. No. 33. Amici have a strong and ongoing interest in the issues presented in this appeal.

The district court wholly dismissed the applicability of the public policy defense to enforcement of the contracts at issue—the predicate by which Plaintiffs purport to impose monetary damages for Defendants’ recording and dissemination of the videos at issue (the “CMP Videos”). These videos included surreptitiously recorded statements by various Planned Parenthood employees and associates, which inspired a wide range of government action by the executive and legislative branches at the federal, state, and local levels. Amici previously submitted briefs in related matters in opposition to an injunction limiting the disclosure of the CMP Videos to law enforcement.

State Attorneys General have broad authority to investigate potential violations of state laws within their jurisdictions. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”). The district court’s categorical rejection of a public policy defense to restrictions on such recording and distribution wrongfully discounted this public interest in this case entirely. That holding should be reversed, in order to vindicate law enforcement access to evidence of wrongdoing.

SUMMARY OF THE ARGUMENT

The district court granted Plaintiffs’ motion for summary judgment against Defendants’ public policy defense in its totality. The district court relied extensively on its assertion that the CMP Videos contain “no evidence of actual criminal wrongdoing.” That not only is incorrect on its own merits but also employs the wrong test. The public policy defense is applicable to the claims presented, and its appropriate

adjudication must assess the substantial law enforcement and policy consequences of the release of the CMP Videos.

Multiple congressional bodies, as well as state and local jurisdictions, investigated Plaintiffs and other industry entities after the release of the CMP Videos. Texas terminated Planned Parenthood's participation in its Medicaid program. The Orange County District Attorney prosecuted firms for the sale of fetal tissue which exclusively acquired such tissue from Planned Parenthood. The Arizona Attorney General investigated a firm which was a case study in the congressional report for how the fetal tissue transfer industry operates, and the Arizona Legislature ultimately proscribed most fetal tissue transfers.

ARGUMENT

I. THE PUBLIC POLICY DEFENSE TO LIABILITY FOR DISSEMINATING VIDEOS IS APPLICABLE TO THE CLAIMS PRESENTED

The district court found any public policy defense to enforcement of the contracts at issue was “not applicable as a matter of law.” Dkt. No. 753 at 59. The court repeatedly anchored its holding in the assertion that CMP Videos contain “no evidence of actual criminal wrongdoing.” Dkt. No. 753 at 57, 59 (asserting Fifth Circuit opinion

“did not indicate that the [CMP] videos included evidence of any criminal wrongdoing”; noting magistrate judge “concluded” the CMP Videos “did not, in fact contain evidence of actual criminal wrongdoing regarding the sale or transfer of fetal tissue”).

The district court improperly narrowed its legal inquiry in at least three ways. First, it required evidence of “actual criminal” wrongdoing ignoring potential violations of civil law, indeed requiring a specific violation at all. *See Altschul v. Sayble*, 83 Cal. App. 3d 153, 162, 147 Cal. Rptr. 716, 720 (1978) (“There is no requirement that a contract violate an express mandate of a statute before it may be declared void as contrary to public policy.”); *cf. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, 425 P.3d 1, 9 (Cal. 2018) (contract “may be declared unenforceable for violation of [professional ethical rules]”). Second, the district court required evidence of wrongdoing by a principal contracting party, here Planned Parenthood, rather than considering evidence of wrongdoing by an associate. *See infra* at 7-8. Third, it considered only whether there was evidence of wrongdoing “regarding the sale or transfer of fetal tissue” rather than other violations. Dkt. No. 753 at 59.

Notably, even under the standard applied by the district court, Dr. Smith concluded in his expert report that CMP Videos show Planned Parenthood employees “improperly altered abortion technique and timing for the purposes of fetal tissue collection.” Dkt. No. 1158 at 4; *see* 42 U.S.C. § 289g-1(b)(2)(A)(ii) (must certify that “no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue”); 42 U.S.C. § 289g-1(c)(4) (must certify that they “had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research.”). The district court’s judgment should therefore be vacated with instructions that Defendants’ public policy defense should be properly analyzed on remand by taking into consideration the extensive effects the CMP Videos’ release had on law enforcement and policy.

A. Defendants’ Videos Aided State And Local Investigations And Enforcement Actions

Following the public dissemination of CMP Videos, various congressional bodies initiated investigations of Planned Parenthood’s practices. The Senate Judiciary Committee and a House Select Investigative Panel of the Committee on Energy and Commerce each

released reports.¹ The House Panel and Senate Committee expressly referenced CMP Videos, and State and local jurisdictions initiated their own investigations as well.

1. Texas

In October 2015, the State of Texas, through its Health and Human Services Commission, terminated Planned Parenthood’s participation in the state Medicaid program on the grounds that their services were not provided “in a professionally competent, safe, legal[,] and ethical manner under the relevant provisions of state and federal law pertaining to Medicaid providers.” *Planned Parenthood of Greater Texas Family Planning and Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 352 (5th Cir. 2020). CMP’s videos provided

¹ Majority Staff Of S. Comm. On The Judiciary, 114th Cong., Majority Report On Human Fetal Tissue Research: Context And Controversy (Comm. Print 2016), available at <https://www.govinfo.gov/content/pkg/CPRT-114SPRT22920/pdf/CPRT-114SPRT22920.pdf> (the “Senate Committee Report”); Select Investigative Panel Of The Energy & Commerce Comm., 114th Cong., Final Report (2016), available at https://republicans-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Analysis/20161230Select_Panel_Final_Report.pdf (the “House Panel Report”).

powerful evidence supporting Texas’s action. *Id* (“based this conclusion on the CMP videos...”).²

2. Orange County, California

The CMP Videos also aided enforcement actions in California against companies selling fetal tissue for profit. In October 2016, the Orange County District Attorney’s Office sued two related firms that contracted with Planned Parenthood to obtain fetal tissue. *The People of the State of California v. DV Biologics, LLC*, No. 30-2016-00880665-CU-BT-CJC, Dkt. 128 (Cal. Super. Ct., filed December 19, 2017). DaVinci Biosciences LLC and DV Biologics LLC ultimately stipulated “that they unlawfully sold fetal tissue for valuable consideration” in violation of California law, and agreed to pay \$7.8m and permanently cease all business operations in California. *Id.* at 4-6.

Planned Parenthood was the sole supplier of fetal tissue to those defendants. House Panel Report at xxviii. Soon after the Orange County complaint was filed, the House Panel revealed it formally

² Planned Parenthood contests the legal validity of its defunding, and has sought a stay in the district court pending resolution of a petition for certiorari in the U.S. Supreme Court. *See Planned Parenthood of Greater Texas Family Planning and Preventative Health Servs., Inc. v. Smith*, No. 1:15-CV-1058, Dkt. 182 (W.D. Tex. filed January 8, 2021).

referred DaVinci Biosciences LLC and DV Biologics LLC to the Orange County District Attorney for prosecution. House Panel Report at xxix.

3. Arizona

Following the release of the CMP Videos, the Arizona Attorney General's Office investigated fetal tissue transfers by Arizona clinics that perform abortions to third parties, such as StemExpress, LLC.

StemExpress, LLC was profiled in detail by the Senate Committee as an example of a fetal tissue transaction model. Senate Committee Report at 39-43. The House Panel credited the CMP Videos with “detail[ing] the relationship between fetal tissue procurement companies, such as ... StemExpress, and several abortion clinics.” House Panel Report at 1. The House Panel also expressly referred StemExpress, LLC for prosecution for potential violations of: laws against profiting from the sale of fetal tissue, HIPAA privacy rights, federal regulations governing Institutional Review Boards, and preservation orders. *Id.* at 33-34.

Ultimately, the State of Arizona through Attorney General Brnovich entered into an assurance of discontinuance with one such clinic, Camelback Family Planning and a doctor affiliated with the

clinic. *Arizona v. Camelback Family Planning*, No. CV2017-000863 (Maricopa Cty. Super. Ct. filed January 19, 2017).

The Arizona Legislature also amended A.R.S. § 36-2302(D) to make it unlawful to “knowingly sell, transfer, distribute, give away, accept, use or attempt to use any human fetus or embryo or any part, organ or fluid of the human fetus or embryo resulting from an abortion[.]”

* * *

In sum, the law enforcement utilization, and substantial policy consequences of the CMP Videos, are critical factors showing the merit of Defendants’ public policy defense to the contracts at issue in this case.

CONCLUSION

The district court’s categorical rejection of Defendants’ public policy defense was error. Its judgment should be vacated and the case remanded with instructions to properly consider Defendants’ public policy defense under the correct legal standard.

Respectfully submitted,

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9th Cir. Case Number(s) 20-16068, -16070, -16773, -16820

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