No. 91-

IN THE

Supreme Court of the United States

October Term, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,

Petitioners,

v.

VIVIANA McCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID McCALDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment permit a federal court to hold political or religious organizations and their leaders liable for damages based not on incitement to imminent lawless action, but on "threats" that consist merely of statements about a public counter-demonstration that the defendants intend to organize to protest a speech the plaintiff plans to make insisting that the Holocaust was a hoax perpetrated by Jews?

2. May the fact that statements about a planned public counter-demonstration are communicated privately rather than publicly be invoked to strip them of the First Amendment protection to which they would otherwise be entitled?

3. Does the First Amendment permit a federal court to impose damage liability on a municipality for adopting a resolution urging others to boycott a planned public presentation of these "Holocaust revisionist" notions, and for refusing to support any organization that provides a forum for those views?

4. Given the chilling effect of retaliatory litigation, does the First Amendment permit an indulgent standard of pleading for complaints seeking damages from political or religious opponents based on statements they make on matters of public importance?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the California Library Association and the Westin Hotel Company, d/b/a Westin Bonaventure Hotel, also appeared as defendants in the District Court and as defendants-appellees in the Court of Appeals.

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The initial, unamended version of the opinion of the United States Court of Appeals for the Ninth Circuit is reported at 919 F.2d 538. The amended opinion of the panel majority (Norris and D. W. Nelson, JJ.) and the opinions of the five Circuit Judges who dissented from the refusal to rehear the case en banc (Kozinski, Alarcon, Reinhardt, T. G. Nelson and Noonan, JJ.) are as yet unreported. The amended opinion is reprinted as Appendix A, and the dissents from denial of rehearing appear in Appendix F. The memorandum opinion of the United States District Court for the Central District of California is unreported and is reprinted as Appendix B.

JURISDICTION

The decision of the Court of Appeals was originally filed on November 20, 1990. (A37).[1] A timely petition for rehearing was denied (and the Court of Appeals filed its amended decision) on January 24, 1992. *See* Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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[1] Citations to the appendices printed with this petition will be styled "A__."

STATEMENT OF THE CASE

Judge Alex Kozinski, joined by Judges Alarcon, Reinhardt and T. G. Nelson, wrote in dissent below that "[t]his is a case of exceptional importance":

> What began as a political dispute among widely divergent factions has been converted into a lawsuit; thwarted in the political arena, plaintiff McCalden has chosen to continue the battle by dragging his adversaries into court. The fundamental question presented is how much — or rather how little — he need allege before the courts will entertain his case, putting the defendants to the burden, expense and risk of litigation.

(Kozinski, J., dissenting from the denial of rehearing en banc) (A39). (A total of five judges dissented: Judge Reinhardt and Judge Noonan also filed separate dissenting opinions).

Respondent McCalden, doing business as "Truth Missions," Complaint ¶ 3 (A61-62), is a self-proclaimed "Holocaust revisionist" who proselytizes the view that the historical record of Nazis murdering millions of Jews and other civilians is a hoax. Complaint ¶ 54. (A72).[2] In order to promote his notions, respondent contracted for exhibit space at the California Library Association's ("CLA") 1984 conference at the Westin Bonaventure Hotel ("Westin") and also reserved a room to present a program at the conference. (A1, A19-20). Allegedly confronted by passionate opposition from petitioners and others, the CLA canceled McCalden's contracts for participation in its conference. (A2, A20).

Respondent brought suit in federal District Court against the petitioners: the Simon Wiesenthal Center for Holocaust Studies ("Center"), an organization which operates a Holocaust museum and

[2] Since the case was appealed from the District Court's dismissal under Fed.R.Civ.P. 12(b)(6), the facts set forth here are derived from the allegations of the Complaint, which is reprinted in Appendix H. Plaintiff David McCalden died after the case was argued to the Ninth Circuit and Viviana McCalden was substituted as plaintiff by order of the court below. (A1 n.*).

is dedicated to opposing racism and anti Semitism; the Center's Dean, Rabbi Marvin Hier; the American Jewish Committee ("AJC"); and the City of Los Angeles. Also named as defendants were the Westin Hotel and the CLA. Respondent charged "that defendants participated in a deliberate and concerted effort through the application of political pressure and threats of political sanctions to force CLA to cancel its contracts with plaintiff." (A20).

Respondent alleged that a resolution urging the CLA to oust McCalden from the conference was introduced before the Los Angeles City Council by a councilman "at the specific instance and request of one of his constituents," Rabbi Hier, who was allegedly acting in concert with the Center, the AJC, Los Angeles Mayor Tom Bradley and others. Complaint ¶ 27 (A66).[3] Respondent further claimed that petitioners and public officials including the Mayor, California Assembly Speaker Willie Brown, State Senate President David Roberti and Assembly Majority Floor Leader Mike Roos engaged in "a conspiracy to pressure defendant CLA to cancel its contracts with plaintiff." Complaint ¶ 36 (A68). Mayor Bradley allegedly "instructed members of the Los Angeles Library Commission to boycott defendant CLA's Annual Conference, as an additional means of pressuring defendant CLA." *Ibid.* The City Council's unanimous resolution "officially severed City participation in [the CLA conference] in protest of the CLA's having contracted with plaintiff, and for the purpose of creating a threat of political and economic sanctions that would force defendant CLA to cancel its contracts." *Id.* at ¶ 26 (A65). Respondent charged that the City Council's resolution violated the Constitution "through public

[3] The unanimously adopted City resolution provided in pertinent part:

> [W]hile we must protect the rights of all Americans to express their views, there is no obligation to provide the forces of hatred such respected platforms. We therefore call on the California Library Association to recognize their grave error of judgment and urge them to remove these individuals from their program. Further, that whatever City participation in the California Library Association, formal or informal, be immediately severed in protest of the California Library Association action. [*Sic*].

condemnation and pressure on defendant CLA" that interfered with his rights of free speech and due process. *Id.* at ¶ 42 (A69).

The Complaint thus makes plain that McCalden was locked in a political struggle with petitioners, waged through the normal channels: "the sole purpose of defendant Hier's and/or Wiesenthal's and/or AJC's action was to induce defendant CLA by application of *political pressure* and *threats of political sanctions* to cancel its contracts with plaintiff." ¶ 37 (A68)(emphasis added). Thus the AJC allegedly "requested a meeting" with the CLA "with the purpose and intent of pressuring defendant CLA to cancel its contracts with plaintiff." ¶ 22 (A64). The Center also rented a conference room at the Westin Hotel adjacent to the room reserved for McCalden's presentation, allegedly with "the principal, if not sole purpose" of positioning "itself and defendants Hier and AJC so as to be able to disrupt plaintiff's program should it take place." *Id.* at ¶ 30 (A66). Petitioners allegedly conspired to induce the CLA to cancel respondent's contracts "by threatening and *organizing a demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence against plaintiff and members of defendant CLA." *Id.* at ¶ 32 (A67)(emphasis added). For example, petitioners allegedly "allowed information concerning plaintiff's exhibit and program to pass to members of certain militant, violence prone Jewish organizations who thereupon made plans to attend and disrupt plaintiff's program." *Id.* at ¶ 34 (A68).

Despite these allegations of protests and of plots to disrupt, the Complaint alleged that, "[h]owever, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of . . . [the] resolution of the Los Angeles City Council." *Id.* at ¶ 16 (A64). Petitioners allegedly informed the CLA that if the contracts were not canceled, "the CLA would be 'wiped out.'" *Id.* at ¶ 24 (A65).

The District Court dismissed the Complaint under Fed.R.Civ.P. 12(b)(6). (Appendix B). The Court of Appeals for the Ninth Circuit reversed in part and reinstated respondent's claims against Rabbi Hier, the Wiesenthal Center and the AJC for violation of California's Unruh Civil Rights Act, Cal.Civ.Code § 51.7 (A7-11), and the claims against all the petitioners for tortious interference with contractual relations (A6-7) and deprivation of unspecified federal rights in violation of 42 U.S.C. § 1983. (A13-14).[4] Although the Ninth Circuit acknowledged in a footnote that "none of the [petitioners] can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden" because "[t]hese activities are plainly protected by the First Amendment" (A7 n.4), the court below nevertheless held that the expression alleged in the complaint was actionable:

> Finally, some appellees raise a First Amendment defense . . . , arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(per curiam); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are alleged here.

(A10-11).[5] The Court of Appeals itself found that, even "[l]iberally construed," the Complaint contains only "one allegation of a specific

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[4] The Ninth Circuit also reinstated respondent's breach of contract claim against the CLA (A5-6), which is not at issue here. The Court of Appeals' affirmance of the District Court's dismissal of respondent's other federal claims (A11-13) is likewise not in issue. The court below held that respondent's appeal was timely under Fed.R.App.P. 4(a) because the District Court had failed to enter its judgment in compliance with Fed.R.Civ.P. 58 and 79(a), which require that the judgment be set forth in a separate document and properly entered by the clerk. (A3-4). Although Judge Fletcher dissented on this jurisdictional issue (A15), no other judge of the Ninth Circuit agreed with her or joined her dissent when the vote was taken on the suggestion for rehearing en banc. Indeed, Judge Fletcher herself voted to deny rehearing and to reject the suggestion for rehearing en banc. (A38).

[5] Although raised by petitioners in their initial appellate briefs, the First Amendment issues were not discussed by the Ninth Circuit panel majority until it amended its opinion, after petitioners had sought rehearing, to include this brief discussion. *See* Appendix F.

threat": the AJC's alleged statement to the CLA, with the supposed "knowledge and approval" of Rabbi Hier and the Wiesenthal Center, that if the contracts with McCalden were not canceled, "'[d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be "wiped out."'" (A9) (quoting Complaint ¶ 24 (A65)). This lone allegation, without more, was held sufficient to subject petitioners to a trial on liability for threatening to organize a political demonstration.

This holding produced vigorous dissents from the denial of rehearing en banc. Judge Kozinski, joined by Judges Alarcon, Reinhardt and T.G. Nelson, wrote that "[i]f plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion. One searches McCalden's 24-page complaint in vain for such allegations." (A41). "McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were 'threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence.' Complaint ¶ 32." (A39)(emphasis added by Judge Kozinski).

> By letting McCalden proceed with a lawsuit that hinges on this allegation, the panel holds that a political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg* [*v. Ohio*, 395 U.S. 444 (1969)], which held that a state may not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

(A43) (Kozinski, J., dissenting).

Judge Reinhardt likewise took issue with the panel majority's indulgent pleading standard:

> Whenever political discourse . . . is the basis for a lawsuit, the courts have a constitutional duty to ensure that the litigation does not become the instrument by which legitimate political speech or activity is stifled. . . . The content, manner, and setting of the offending speech must be pled with specificity in order to allow a court to determine whether the alleged speech is protected.

(A47-48)(Reinhardt, J., dissenting). *See also id.* at A58 (Noonan, J., dissenting)("an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant").

Both Judge Kozinski and Judge Reinhardt rejected the panel majority's belated attempt to dismiss *Brandenburg* and *Claiborne Hardware* as inapposite cases involving "public speeches advocating violence, not privately communicated threats of violence as are alleged here." (A10-11). "What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether — on the basis of what is alleged in the complaint — the speech in question can fairly be characterized as extortion." (A44)(Kozinski, J., dissenting). The issue, the dissenters reasoned, is not how the alleged threat was communicated, nor even "whether the recipient of the threat, the California Library Association, had a reasonable fear that the threat would be carried out," but whether "the alleged threat, a threat to hold a public demonstration, is the type on which liability may be founded. . . . If the content of the speech is protected, that is the end of our inquiry." (A50) (Reinhardt, J., dissenting). Nevertheless, the panel majority held that "because the [petitioners] allegedly chose to communicate with the CLA in private their otherwise protected speech is stripped of its constitutional safeguards." *Id.* at 49.

Judge Reinhardt reasoned that "[t]he threat to conduct a demonstration does not lose its constitutional protection because demonstrations generally, or this demonstration in particular, may be disruptive or likely to result in property damage." (A51). Indeed, "[t]o advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious." *Id.* at 53. The unremarkable fact that "[p]ublic demonstrations often carry with them the risk of violence" is something "we endure as part of life in a free society; it is not a sufficient reason . . . to stifle free expres-

sion." (A43) (Kozinski, J., dissenting). As Judge Kozinski explained, "While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration." *Id.* at A39. Yet this is all that the Complaint alleges: "Read in its entirety, not by plucking phrases out of context, McCalden's complaint alleges nothing more than the type of 'uninhibited, robust, and wide-open' debate on public issues the First Amendment protects." *Id.* at A45 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Judge Kozinski's dissent, joined by three other members of the Ninth Circuit, came to this conclusion (A39):

> By allowing McCalden to proceed with his lawsuit, my colleagues turn back the clock to the dark days of the not-so-distant past when the judicial process was routinely used to crush opposing viewpoints — an era I, like most observers, believed had ended with *Brandenburg v. Ohio*.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of This Court And Decisions Of Other Circuits By Holding That Individuals And Organizations May Be Held Liable For Speech That "Threatens", In The Midst Of A Heated Political Dispute, To Hold A Public Counter-Demonstration If Their Demands Are Not Met.

A. Even Liberally Construed, The Complaint Alleges Only A "Threat" To Hold A Political Demonstration.

Respondent's Complaint leaves no doubt that McCalden, the Wiesenthal Center, Rabbi Hier and the AJC were "locked in an intense political struggle, waged through the normal political channels." (A42)(Kozinski, J., dissenting). Specifically, respondent alleges that "the sole purpose of Defendant[s] [Hier, Center and AJC] was to induce Defendant CLA by application of political pressure and threats of political sanctions to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members." Complaint ¶ 37 (A68). Every allegation of any kind of "threat" is interwoven with allegations of "political pressure" or "economic and political sanctions." *Id.* at ¶ 53 (A72). *See, e.g., id.* at ¶¶ 26, 38.

The panel and dissenting opinions below were unanimous that, as the panel majority put it, even "[l]iberally construed, the complaint contains one allegation of a specific threat" (A9): the AJC's alleged statement to the CLA, supposedly "at the urging and request" of Rabbi Hier and the Center, that if the contracts with respondent were not canceled, the CLA's conference "would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" Complaint ¶ 24 (A65). The court below interpreted this threat by reference to the allegation that the petitioners "intended to disrupt his presentation by creating a *demonstration* that [they] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA.'" (A10)(emphasis added).

There is thus agreement that a "demonstration" was all that was supposedly threatened. *See* A10 (panel opinion); A42 (Kozinski, J., dissenting); A50, A53-54 (Reinhardt, J., dissenting). "There are no allegations of threats of personal violence directed at particular individuals." (A54)(Reinhardt, J., dissenting). Respondent "does not claim that defendants threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to his exhibit. . . . One searches McCalden's 24-page complaint in vain" for allegations "that, if proven, would amount to extortion." (A41)(Kozinski, J., dissenting). Since the Complaint alleges only that the threatened demonstration "would create a reasonable probability" of violence, ¶ 32 (A67), it is clear that respondent was not even *allegedly* threatened with violence at the hands of defendants or of persons acting at their direction, for threatening action of that sort would have been threatening *violence as such*, not merely threatening to create a situation bearing a "reasonable probability" of violence. During a colloquy with the District Court, respondent underscored that he was alleging "threats" to organize a potentially volatile

demonstration rather than threats of direct violence: "A threat is a situation. If you create the situation, and it is likely to cause injury or damage, you have created the threat." Tr. of Proceedings on Nov. 17, 1986 (Excerpts of Record filed with the Court of Appeals at 86). As Judges Kozinski, Alarcon, Reinhardt and Nelson stated:

> Nowhere . . . does McCalden give a single example of an actionable threat of violence. McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were 'threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence.' Complaint ¶ 32. While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration.

(A39)(Kozinski, J., dissenting)(emphasis in original).

B. Advocating Or "Threatening" A Demonstration Is Speech Protected By The First Amendment, Even If There Is A Risk That Any Such Demonstration Might Cause Some Disruption, Property Damage Or Injury.

As Judge Kozinski explained, the court below has held that:

> [A] political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg* [*v. Ohio*, 395 U.S. 444 (1969)(per curiam)], which held that a state may not prohibit 'advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' 395 U.S. at 447.

(A43)(Kozinski, J., dissenting). That standard was affirmed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where this Court unanimously held that although a state may impose liability for genuine threats of violence, a boycott organizer's vow

to "break [the] damn necks" of boycott violators was, in the context of a political dispute, politically motivated hyperbole fully protected by the First Amendment. *Id.* at 928. Since the "threat" to enforce boycott discipline was not an incitement to imminent lawless action and did not "authorize[], ratif[y] or directly threaten[] acts of violence," no civil liability could lie. *Id.* at 928-29.[6] The same is even more plainly true here, where the warning allegedly delivered to the CLA by the AJC was not a threat to break necks but merely a "threat" to hold a demonstration that could possibly damage property, cause injury and, by discouraging financial and political support from Los Angeles and other cities, "wipe out" the CLA. *See* Complaint ¶¶ 16, 24, 32.[7]

Relying on *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983), the court below nevertheless ruled that the speech alleged here was actionable to the extent that it had "a reasonable tendency to produce in the victim [the CLA] a fear that the threat will be carried out." (A11). But as *Wurtz* made clear, the only threats that can be punished or suppressed by the state are threats "to commit a criminal act," 719 F.2d at 1441 — there, a threat of rape made in an alley to a woman walking home from work alone. Rape is a crime; organizing a political demonstration is not.[8] The only

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[6] *See also Noto v. United States*, 367 U.S. 290, 296 (1961) (First Amendment protects statements that "he was the kind of guy they hoped to shoot one day," "I will see the time we can stand a person like this S.O.B. against the wall and shoot him").

[7] Even if the AJC could be held liable for making this alleged statement — which it cannot — such liability obviously could not extend to Rabbi Hier or the Wiesenthal Center, since they are not alleged to have made any such "threats" but only to have somehow "urged," "requested" or "approved of" the AJC's statements. Complaint ¶ 24 (A65).

[8] Indeed, *Wurtz* itself recognized that the First Amendment protects the "civil rights activist" who threatens a restaurant owner with a "boycott" unless he desegregates, as well as "[t]hreats of sit-ins, marches in the street, mass picketing and other such activities," even though such threats are "frequently threats to commit acts proscribed by law." 719 F.2d at 1442. *Wurtz* held that judicial punishment of "the mere communication of a threat" to commit such infractions would violate the First Amendment. *Id.*

threats that the law may constitutionally punish are "unequivocal, unconditional and specific expressions of intention immediately to inflict injury" — "only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'" *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). As Judge Kozinski observed, the alleged statements of the AJC, the Center and Rabbi Hier "were aimed at achieving a political objective, not exacting protection payments." (A45).[9]

To be sure, the First Amendment provides no license to commit extortion in the course of organizing a protest, but when "threats" are allegedly uttered in the course of protected political advocacy or activity, a different standard applies. *Claiborne Hardware*, 458 U.S. at 927-28; *Watts v. United States*, 394 U.S. 705, 708 (1969). For the very "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). *See also Houston v. Hill*, 482 U.S. 451, 461-63 (1987). As Justice Brandeis wrote long ago, "[t]he fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression." *Whitney v. California*, 274 U.S. 357, 378 (1927)(Brandeis and Holmes, JJ., concurring). After all, "[m]uch speech is dangerous. . . . [P]olitical theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake." *American*

[9] The dissent below noted that Judge Posner, writing for the Seventh Circuit en banc, interpreted *Brandenburg*, *Claiborne Hardware* and *Watts v. United States*, 394 U.S. 705 (1969), "to cover situations far more extreme than that here" (A44 n.5)(Kozinski, J., dissenting), including an announcement by a "sect of religious fanatics . . . that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply," or a "vow" by "white supremacists" to "take revenge on Chicago for electing a black mayor," or threats of "terrorist activities" by "the leaders of a newly formed organization of Puerto Rican separatists . . . if the United States does not grant Puerto Rico independence soon." *Alliance to End Repression v. Chicago*, 742 F.2d 1007, 1014 (7th Cir. 1984).

Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

Despite these dangers, this Court has unanimously adhered to the "'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'. . . 'The danger must not be remote or even probable; it must immediately imperil.'" *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). It is not enough that the speech "is 'calculated to create disturbances of the peace'" or that it includes an element of "congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby.'" *Gooding v. Wilson*, 405 U.S. 518, 527 (1972). In particular, this Court has held that *Brandenburg* forbids judicial punishment of speech that "amounted to nothing more than advocacy of illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Yet not even that much can be said of the alleged speech that the Ninth Circuit held actionable here. For the Complaint does not allege that petitioners advocated future illegal conduct, only that they threatened to hold a future demonstration that in turn carried a reasonable probability of leading, as Justice Brandeis put it, to "some violence or . . . destruction of property." *Whitney v. California*, 274 U.S. at 37 (concurring opinion). As the dissenters observed below, these are "the normal incidents of a highly emotional and volatile political protest." (A54)(Reinhardt, J., dissenting). "To advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious." *Id.* at A53. "Political demonstrations may not be banned because they are likely to be disruptive or result in property damage; and, even more so, a threat to hold such a demonstration cannot justify the imposition of civil or criminal liability." *Id.* at 54.

Indeed, "the threat of a demonstration is even further removed from unprotected activity than the act itself — because the threat of political protest is speech in its purest form." (A56)(Reinhardt, J., dissenting). If, under *Brandenburg* and its progeny, one cannot be

held liable for convening a demonstration and advocating violent crimes — so long as that advocacy is not directed to inciting and likely to incite imminent lawless action — then *a fortiori* one cannot be held liable for communicating to one's opponents a contingency plan for a future counter-demonstration which, one notes, may get out of hand. "If the propensity of large groups of angry people to harm property (and sometimes each other) is sufficient to give the target a cause of action against the organizers of the protest, we will have done much to silence the 'vehement, caustic, and sometimes unpleasantly sharp attacks' heretofore protected by the First Amendment. *See Sullivan*, 376 U.S. at 270." (A43)(Kozinski, J., dissenting).

The Ninth Circuit's dangerous departure from established First Amendment principles has produced a conflict in the circuits, as Judges Kozinski, Alarcon, Reinhardt and Nelson noted below: in light of *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984), and *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), "there is little doubt this case would have come out differently had it been brought in the Seventh Circuit." (A45 n.5). Plenary review by this Court is in order.

C. The Ninth Circuit's Attempt To Evade *Brandenburg* And *Claiborne Hardware* By Distinguishing Between Public And Private Speech Conflicts With This Court's Unanimous Decision in *Givhan v. Western Line Consolidated School District.*

The court below "brushes aside *Brandenburg* and *Claiborne Hardware* as cases 'involving public speeches advocating violence, not privately communicated threats of violence as are alleged here.'" (A44)(Kozinski, J., dissenting, quoting majority at A10-11).

> It appears from the majority opinion that . . . if defendants Rabbi Hier, the Simon Wiesenthal Center, and the American Jewish Committee had notified defendant CLA of their intentions by means of a public communication, the conduct would be protected and dismissal of the complaint would be required. However, the majority concludes that because the defendants allegedly chose to communicate with the CLA in private their otherwise protected speech is stripped of its constitutional safeguards.

(A49)(Reinhardt, J., dissenting).

This purported distinction is baseless. "What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether — on the basis of what is alleged in the complaint — the speech in question can fairly be characterized as extortion." (A44)(Kozinski, J., dissenting). "[T]he principal issue on which the majority goes astray is whether the alleged threat . . . to hold a public demonstration is the type on which liability may be founded. . . . If the content of the speech is protected, that is the end of our inquiry. *See generally Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 60 U.S.L.W. 4029, 4034-35 (U.S. Dec. 10, 1991)(Kennedy, J., concurring in the judgment)." (A50)(Reinhardt, J., dissenting).[10] "There is no persuasive reason for according greater or lesser protection on matters of public importance depending on whether" the expression is spoken to a few "neighbors across the backyard fence," published "in the local newspaper," or sent in a private letter to a single individual. *McDonald v. Smith*, 472 U.S. 479, 490 (1985)(Brennan, J., concurring).[11]

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[10] The panel majority seemed to believe that this Court had drawn a distinction in *Claiborne Hardware* between Charles Evers' threats of neck-breaking (made in public speeches and hence protected) and unspecified "threats of violence" by unnamed boycott enforcers (presumably made in private and hence actionable). (A11). That belief is in error. "The distinction is not, as the majority asserts, between public and private speech. Instead, it is between a 'threat' to conduct a boycott which the Court holds constitutionally protected even though the sponsor made it clear that violence might well play a part, and more specific, individual acts or threats of direct violent conduct which the Court states are unprotected." (A51 n.2)(Reinhardt, J., dissenting).

[11] The panel majority's only supposedly contrary authority is *Wurtz v. Risley*. (A11). Unlike the threat of rape whispered in that case to a lone woman in an alley at night, the threat alleged here — to hold a political counter-demonstration against anti-semitism and Nazi apologists —

Most importantly, the Ninth Circuit's distinction between publicly and privately communicated speech was squarely repudiated by this Court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). There the lower court likewise concluded "that because petitioner had privately expressed her complaints and opinions . . . her expression was not protected under the First Amendment." *Id.* at 413. In an opinion by Justice Rehnquist, the Court unanimously rejected "this erroneous view of the First Amendment," holding that "private expression" enjoys "constitutional protection." *Id.* Since this is the Ninth Circuit's sole basis for distinguishing *Brandenburg* and *Claiborne Hardware*, the decision below merits plenary review if not summary reversal. For as Judge Kozinski wrote for the dissenters below (A45):

> By dismissing *Brandenburg* and *Claiborne Hardware* in a few scant phrases, my colleagues deliver a body blow to the principle that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Claiborne Hardware*, 458 U.S. at 913).

II. THE NINTH CIRCUIT THREATENS FIRST AMENDMENT RIGHTS BY ALLOWING THE CITY OF LOS ANGELES TO BE HELD LIABLE FOR CRITICIZING RESPONDENT'S IDEAS AND FOR REFUSING TO SUPPORT A CONFERENCE THAT WOULD PROVIDE A FORUM FOR THOSE IDEAS.

Respondent seeks damages from Los Angeles pursuant to claims for alleged tortious interference with contractual relations and for alleged violation of his federal civil rights, on the basis of the City Council's unanimous adoption of a resolution (a) denouncing the CLA's decision to include respondent's exhibit in its conference and (b) severing Los Angeles' participation in and support of the CLA

obviously falls into the category of "expression on public issues." *NAACP v. Claiborne Hardware*, 458 U.S. at 913.

in protest of that decision. Complaint ¶¶ 26-28. By remanding these claims for trial, the Ninth Circuit panel proceeded as if Los Angeles' speech were unprotected by the First Amendment. This is a novel and disturbing proposition worthy of this Court's review.

Surely "government expression . . . would *always* seem to fall in the category of political expression, the most protected form of speech," *Block v. Meese*, 793 F.2d 1303, 1314 (D.C.Cir. 1986) (Scalia, J., joined by Wright and Bork, JJ.)(emphasis in original). "[F]reedom of speech 'does not mean that government must be ideologically neutral,' . . . or prevent government from 'add[ing] its own voice to the many that it must tolerate.'" *Block v Meese*, 793 F.2d at 1314 (citation omitted).[12]

Petitioners are aware of no prior case "suggest[ing] that 'uninhibited, robust and wide-open debate' consists of debate from which the government is excluded, or an 'uninhibited marketplace of ideas' one in which the government's wares cannot be advertised." *Id.* at 1313. Los Angeles is just as free to condemn what it perceives as anti-semitism as it is to outlaw invidious discrimination in housing or employment. As then-Judge Scalia put it in *Block v. Meese*, 793 F.2d at 1313:

> A rule excluding official . . . criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; . . . to make war on Hitler's Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things.

[12] In *Meese v. Keene*, 481 U.S. 465, 484 & n.18 (1987), this Court noted that it had "no occasion here to decide the permissible scope of Congress' 'right to speak,'" but that the "implications of judicial parsing of statutory language to determine if Congress' word choices violate the First Amendment are discussed in *Block v. Meese*, 793 F.2d at 1313-14."

Respondent bases his claim in part on the allegation that "the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of . . . [the] resolution of the Los Angeles City Council." Complaint ¶ 16 (A64). But surely Los Angeles' freedom of expression includes the right to refuse to participate in or to support the CLA's conference and other activities. The City's decision not to subsidize the CLA's involvement with respondent's exhibit and ideas does not infringe respondent's First Amendment rights, *see Regan v. Taxation with Representation*, 461 U.S. 540 (1983) — indeed, the Amendment protects the City's decision to engage in and to promote a boycott of the CLA as a political protest. *See NAACP v. Claiborne Hardware*, 458 U.S. at 915.

Although the Ninth Circuit panel noted in passing that Rabbi Hier, the Center and the AJC "can[not] be liable for petitioning the Los Angeles City Council" (A7 n.4), the panel's decision nevertheless to expose the *City itself* to liability for enacting a resolution and for allegedly communicating with citizens who opposed respondent's planned exhibit, *see* Complaint ¶¶ 36, 38 (A68-69), implicates the right to petition. It would be a Pyrrhic victory for the First Amendment to hold that although citizens generally cannot be held liable for petitioning the government to take action against others, *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the government itself may be liable if it speaks in response to the people's will.[13] Since the right

[13] Indeed, it is the First Amendment right of those who petition and implore the government, and not only the First Amendment rights of the government and those for whom it speaks, that would be abridged by any such imposition of liability upon the government as speaker. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 258-59 (1953) (just as prospective black home buyers have right not to be subjected to racially restrictive covenants, white sellers of housing may invoke this right in challenging their own damage liability for violation of such covenants); *cf. Lamont v. Postmaster General*, 381 U.S. 301 (1965) (First Amendment protects right to receive information from others); *City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (First Amendment imposes severe limits on government's power to restrict who may speak in official public meetings).

to petition is implicit in the very idea of republican government, *McDonald v. Smith*, 472 U.S. at 482, *see* U.S. Const. Art. IV, § 4, cl. 1 (Republican Form of Government); *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399, 2402 (1991), respondent's cause of action against Los Angeles, now sanctioned by the court below, threatens the central mechanism of democracy itself.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS BY REFUSING TO APPLY A HEIGHTENED STANDARD OF SCRUTINY TO A COMPLAINT SEEKING DAMAGES FOR SPEECH THAT IS *PRIMA FACIE* PROTECTED BY THE FIRST AMENDMENT.

As argued above, the Ninth Circuit panel's decision merits review because, even construed liberally in plaintiff's favor under the most relaxed standard of notice pleading, the Complaint seeks to recover damages for speech on matters of public importance that is protected by the First Amendment. As the dissenting opinions below confirm, those arguments in no way depend upon invocation of any special standard of scrutiny. (A42-46)(Kozinski, J., dissenting); (A47-48, A49-54)(Reinhardt, J., dissenting). Nevertheless, several Courts of Appeals have held, as Judge Noonan put it in his dissenting opinion, that "an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant." (A58). That issue independently warrants issuance of the writ in this case.

This Court has long recognized that although civil litigation can be a powerful First Amendment tool for vindicating important rights, *see, e.g., NAACP v. Button*, 371 U.S. 415 (1963), it can also be a threat to First Amendment values when used as a bludgeon for striking at political or religious adversaries. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The "pall of fear and timidity imposed [by the threat of litigation] upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Sullivan*, 376 U.S. at 278. "Speech may be chilled not only by an award of damages but also

by simply allowing a case to go to trial." (A48) (Reinhardt, J., dissenting). *See, e.g. Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits . . . even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'").

In order to vindicate the "principle that the freedoms of expression must be ringed about with adequate bulwarks," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), the federal courts have, as all five of the dissenting judges noted below (A41, A48, A58), developed a rule that "where a plaintiff seeks damages . . . for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).[14]

Judge Kozinski and the other dissenters concluded that respondent's Complaint "falls far short of the First Amendment's specificity requirement. He alleges nothing — nothing at all — that could arguably place defendants' speech outside the protective umbrella of the First Amendment." (A41). *See also* A54-56 (Reinhardt, J., dissenting); A58 (Noonan, J., dissenting). "If plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion. One searches McCalden's 24-page complaint in vain for such allegations." (A41)(Kozinski, J., dissenting). The

[14] *Accord Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894-95, 897 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988); *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)(Kennedy, J.); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 & n.35 (8th Cir. 1978); *Spanish Int'l Communications Corp. v. Leibowitz*, 608 F.Supp. 178, 182-84 (S.D.Fla.), *aff'd*, 778 F.2d 791 (11th Cir. 1985); *Herbert v. Lando*, 603 F.Supp. 983, 989 (S.D.N.Y. 1985), *rev'd in part on other grounds*, 781 F.2d 298 (2d Cir. 1986).

dissents also underscored the disturbing implications of the decision below:

> If these defendants — operating at the core of the First Amendment — can be subjected to a lawsuit for extortion based on a handful of conclusory allegations, one wonders and worries who else can so easily be dragged into the quagmire of litigation. . . . [For example,] I had thought it inconceivable that a complaint by a public figure claiming nothing more than that he was "libeled with malice" would survive a motion to dismiss under Rule 12(b)(6). *See, e.g., Barger v. Playboy Enterprises, Inc.*, 564 F.Supp. 1151, 1154-57 (N.D.Cal. 1983). Now I'm not so sure; if "threats of violence" is a talisman that can whisk a complaint past a motion to dismiss, why not "libel" and "malice" as well? My colleagues' utter disregard for the First Amendment's specificity requirement will bring a chill of discomfort to publishers, editors and political commentators.

(A42)(Kozinski, J., joined by Alarcon, Reinhardt and Nelson, JJ., dissenting).

Leaving the press aside, the rights of citizens and organizations with something to say about public issues are even more directly affected by the decision below. Any group that saw its public demonstrations or expressive activity met by threats of a counter-demonstration by its political opponents could sue those opponents for extortion. Flagburners could sue the American Legion if a planned flag immolation was deterred by a threatened convening of flag supporters. The Ku Klux Klan could sue the NAACP for calling out sufficient members to persuade the Klan to cancel a proposed cross-burning. Publishers of "adult magazines" could sue religiously motivated consumer groups for staging a boycott that induced retailers to refuse to market the publishers' wares.

The decision below conflicts sharply with the decisions of other circuits applying more exacting First Amendment scrutiny of complaints that seek damages for speech on public issues. Moreover, the "majority's routine treatment of the plaintiff's complaint — as if the action involved nothing more than a dispute over a bill

of lading — is at odds with the last thirty years of First Amendment jurisprudence and is reason enough to hear this case en banc." (A49) (Reinhardt, J., dissenting). Petitioners respectfully submit that it is also reason enough to warrant plenary review on certiorari.

CONCLUSION

That the petitioners here may have conveyed their reactions to plaintiff's views in impassioned terms cannot deprive them of First Amendment protection. Judge Kozinski was plainly correct when he wrote:

> No one disputes McCalden's right to say his piece, repugnant though his message be. . . . Surely, however, we may not withhold the same privilege of uninhibited, emotionally charged expression from the targets of McCalden's attack. Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald; who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to the death camps that are the shame and horror of modern times — they cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened. . . . Surely *their* anger, *their* disgust, *their* anguish also have a protected place in the wide-open arena of our public discourse. To let plaintiff use a state civil rights statute (and possibly a federal one as well) to punish these defendants for threatening to hold a demonstration voicing their righteous indignation is not only a perversion of those civil rights laws, it is also a devaluation of the precious rights granted all of us by the First Amendment.

(A46-47) (Kozinski, J., joined by Alarcon, Reinhardt and T. G. Nelson, JJ., dissenting) (emphasis in original).

In order to vindicate those First Amendment rights and to resolve important conflicts between the decision below and the decisions of this Court and of other Courts of Appeals, plenary review is in order.

Respectfully submitted,

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