No. 07-1546

In The
Supreme Court of the United States

AMERICAN COALITION OF
LIFE ACTIVISTS, et al.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., et al.,
Respondents.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents' brief creates the illusion that the Ninth Circuit's decision in this case represents a routine application of settled law and that "nothing has changed" over the 13-year course of this litigation. In fact, the decision is an unprecedented First Amendment train wreck; and only now, following multiple *vacaturs* and remands, has the trial court issued a final judgment imposing a multimillion dollar verdict on petitioners—based on nothing more than their publication of two political posters.

Judge [now Chief Judge] Kozinski, writing in dissent for himself and Judges Reinhardt, O'Scannlain, Kleinfeld, and Berzon, rightly decries the court's "vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment," and notes that the decision is "contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*..." Judge Berzon, in a separate opinion, called the decision "*very* bad law" (court's emphasis). App. 181, 182.

The Ninth Circuit has indubitably "decide[d] .... important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10 (c). That is why, in their Brief in Opposition, respondents now argue repeatedly— and falsely—that the decision below does not say what it plainly says. *See* Point 3.

ARGUMENT IN REPLY

1. Only now, after three appeals, is there a final judgment in this case.

After multiple remands on the issues of punitive damages and calculation of interest on the judgment, there is now, at last, a final judgment in this case on all issues.

When it suited their purposes in opposing a stay of the Ninth Circuit's mandate at the time of the first petition, respondents argued that "the Supreme Court is unlikely to grant certiorari at this time... because *there is no final judgment in this case*" and that "the Supreme Court's practice of denying certiorari of *non-final* judgments is not a new development..." Rep. Br. App. 1-2.

Moreover, in *this* Court respondents suggested (in 2002) that the writ be denied on grounds that "there is no final judgment in this case," because "a judgment is not final where liability has been determined and all that needs to be adjudicated is the amount of damages," and "except in extraordinary cases, the writ is not issued until final decree." Rep. Br. App. 4, n. 10.

Now, however, respondents conveniently overlook their earlier contentions and argue that "nothing has changed" since the previous denials of certiorari. Opp. 1. But something has changed: there is a final judgment. Hence, petitioners have every right to renew their request for this Court's review in this case of national importance.

2. This case is no more "factbound" than any other First Amendment case.

Respondents describe this case as "factbound," as if that were a reason to deny the writ. But every First Amendment case this Court has decided via the constitutionally mandated *de novo* review of the record has been tied to its facts, for as this Court has declared: "[T]he reaches of the First Amendment are ultimately defined *by the facts it is held to embrace*, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)(emphasis added).

The *undisputed* facts of this case demonstrate that politically unpopular pro-life speakers have been punished by their political opponents with a partisan abuse of RICO and FACE. The Ninth Circuit endorsed this "heckler's veto" by concocting a theory that two facially non-threatening posters and a facially non-threatening website, which identify and rebuke political opponents by name, can support a multi-million dollar verdict and injunctive restraint so long as it was "foreseeable" that the heckler would subjectively feel threatened by the *format* of the communications, even if the content, as the Ninth Circuit itself conceded, is *completely protected* by the First Amendment.[1]

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[1] As the Ninth Circuit opined: "our test has focused on what *a reasonable speaker* would foresee the listener's reaction to be under the circumstances, and that is where we believe it should

3. Respondents have "rewritten" the Ninth Circuit's opinion in an effort to "cure" its constitutional errors.

Implicitly recognizing that the Ninth Circuit's decision is constitutionally indefensible, respondents repeatedly argue that the court did not hold what it plainly *did* hold.

First, respondents caption a section of their opposition: "ACLA Was Not Held Liable for 'Generating Fear' of Third-Party Violence—It Was Held Liable for Its Own True Threats of Violence." Opp. 25.

That is false. The en banc opinion clearly holds ACLA liable *precisely and only* because its two posters allegedly "generated fear" of third-party violence:

> [K]nowing the *fear generated* among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster, ACLA deliberately *identified* Crist on a "GUILTY" poster and intentionally *put the names* of Hern and the Newhalls on the Deadly Dozen 'GUILTY' poster to intimidate them...

App. 135.

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remain." (court's emphasis). App. 127. As discussed *infra*, the website's list of abortion doctors was found to be a "threat" *only* when read in conjunction with the supposedly threatening (but never defined) "format" of the two posters.

In other words, mere *identification* of respondents was deemed a "threat"—without *any* discussion of what the posters actually say—because *identification alone* supposedly "generated" fear of violence from some unknown person at some unknown time in the future.[2]

In an effort to find some basis for liability besides this patently unconstitutional theory, respondents —without citing the trial record—claim that "the evidence demonstrated that petitioners, not third parties, would be the source of the threatened harm on Physicians." Opp. 26. Not only was there *no* such evidence, but the Ninth Circuit held that *it was not necessary* that "the maker of the threat personally cause physical harm to the listener" or even that he or she be "in control of those who will..." App. 127, 129.

For the Ninth Circuit, therefore, a threat is any statement—or in this case a "format"—that makes someone fearful of potential violence from anyone in the world besides the speaker, *even if the statement itself threatens nothing.*

Moreover, ACLA was found liable for non-party Horsley's "Nuremberg Files" website only because, according to the Ninth Circuit's theory, the otherwise

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[2] Respondents do not dispute that *hundreds of posters* identifying abortion doctors by name have circulated for decades without any violence to the doctors identified. Nor do respondents dispute that the "poster pattern" invented by the Ninth Circuit involves only two incidents of anti-abortion violence against "postered" doctors in the entire history of the pro-life movement. Pet. 5.

protected website became a threat in light of the two posters that "generated" fear: "[W]e cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.... *In conjunction with* the 'guilty' posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians...." App. 136, 154 (emphasis added).

In a vain attempt to find some other evidence that the website was a "threat," respondents now argue that "the Nuremberg Files contained Physicians' [i.e., respondents'] names, addresses, and family information." Opp. 4. That is false. The website contained *no* addresses or "family information" of *any* respondent, but only the business address of Dr. Hern as published to the world on his own website. Lodging, 8-24.

Respondents also argue that the website was a "threat" because it featured "dripping blood" (of aborted babies, not doctors) and spoke of a "payday someday, a day when what is sown is reaped." Opp. 5. But even the Ninth Circuit found those aspects of the website to be non-threatening, holding that apart from the listing of doctors' names "the Nuremberg Files *are protected speech* (emphasis added)." App. 154.

In a further "rewrite" of the Ninth Circuit's opinion, respondents represent that "The en banc Ninth Circuit carefully considered both the political aspects and the public distribution of petitioners' statements." Opp. 18.

That is not only false, but exactly the opposite of what the court did. The Ninth Circuit *refused* to take into account the public and political nature of the communications: "Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection..." App. 128. The court opined that the dissent by Judge Reinhart on this score "misses the point. Threats, in whatever forum, may be independently proscribed without implicating the First Amendment." *Id.*

On the contrary, it is the en banc majority that misses the point: the public and political nature of speech must be considered *precisely in order to determine whether it is a threat* as opposed to an effort to provoke public discussion and debate. That is the very lesson of this Court's teaching in *Watts v. United States*, 394 U.S. 705, 708 (1969), where this Court held that a statement made at political rally ("If they ever make me carry a rifle the first man I want in my sights is L.B.J.") was merely "political hyperbole" and not a threat against the President, and that the jury should not even have been allowed to consider the charge.

Here, *there is not even a statement* alleged to be threatening. On the contrary, the Ninth Circuit repeatedly acknowledged that the communications *contain no threatening language*. App. 97, 119, 147. Yet, by a 6-5 vote, the en banc majority affirmed the verdict and injunction by unveiling a new exception to the First Amendment: liability for a "format" of speech that "generates fear" of third-party violence because of a "pattern" in the minds of the speaker's political opposition. This utterly novel theory—on which the whole affirmance "turns," as the court admitted, App.

147—eviscerates the First Amendment's high level of protection for public forum political speech.

In sum, by insisting that the Ninth Circuit did not impose liability because the posters "generated" fear of third-party violence, respondents implicitly concede that the First Amendment forbids liability under that theory. Their entire opposition to certiorari on the First Amendment issue depends upon their running away from what the Ninth Circuit held.

4. The jury instruction was patently contrary to the First Amendment.

After vigorously opposing a specific intent jury instruction at trial, respondents now argue that there is no need for this Court to reach the First Amendment question because the jury charge on threats "required subjective intent...." Opp. 21-22.

This is not only false but nonsensical. Apart from the jury charge on "intimidation" under FACE (from which the word "intentionally" was excluded), the jury was instructed regarding threats—the foundation of all liability in this case—that "Defendants' subjective intent or motive is *not the standard* that you must apply" and that they "*must*" impose liability under a negligence standard "even if you believe that the defendant*s did not intend* the statements to be threatening." App. 416.

That is, the jury instruction states precisely the opposite of what respondents now claim. Here again respondents are attempting to rewrite the record in

order to "cure" constitutional errors they themselves insisted upon and provoked.

Respondents further argue (citing the opinion of the former Solicitor General) that this Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003) did not decide "whether the true threats standard is an objective one or a subjective one (or both)." Opp. 23.

Petitioners disagree. But even if respondents were correct, that would be all the more reason for this Court to decide the issue in a case of national importance. And, with all due respect to the former Solicitor General's opinion years ago that this case is not a "suitable vehicle" for determining the specific intent issue, Opp. 10, it is impossible to imagine a more suitable vehicle than the one presented here: The jury in a First Amendment case was instructed that specific intent was *not the standard* they must apply in deciding whether political posters are "threats," and that it must impose liability (under a negligence standard) even if it believed that the authors of the posters *had no intent to threaten*.[3]

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[3] Respondents rely heavily upon the former Solicitor General's amicus brief, filed when the first petition was pending before this Court. However, that brief did not address the adequacy of respondents' RICO claim (perhaps because the United States had argued precisely in favor of the same claim in *Scheidler* and lost); did not address the clinics' lack of Article III standing; did not address the nonexistence of a FACE "conspiracy" claim; and did not address the problem that, even if the Ninth Circuit's novel theory of First Amendment liability were sustainable, that theory was *not* the one presented to the jury and thus could *not* be the

5. The jurisdictional and RICO issues have not been "waived."

Respondents *do not dispute* the facts which establish the clinics' patent lack of Article III standing: the plaintiff clinics were not "injured" for purposes of Article III because neither they nor any of their employees or contractors were the ones allegedly threatened by petitioners' posters. The clinics were simply bystanders to this controversy whose recovery of 91% of the damages awarded is a monumental miscarriage of justice.

Lack of Article III standing cannot be waived, as respondents must concede. Pet. 8 (cases cited). Without citing any pertinent precedent of this Court, or indeed any pertinent decision at all, respondents suggest that the issue is merely one of statutory standing. Opp. 27-28. But saying does not make it so.

The same is true for petitioners' point that since FACE contains no conspiracy provisions, respondents' nonexistent claim for FACE conspiracy is not even sufficiently colorable to support subject matter jurisdiction. Pet. 9-10.

In reply, respondents offer just over a page of argument supported by nothing more than a perfunctory citation to two decisions of this Court, without analysis, and an irrelevant quotation from the legislative history of FACE. Respondents' argument

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basis for upholding its black-box verdict. Hence, the former Solicitor General's amicus brief has little utility here.

that they have "stated a claim," Opp. 30, when such a claim does not exist under federal law, is purely gratuitous. Respondents have effectively conceded the point.[4]

Regarding the failure of respondents' RICO claim given this Court's supervening decision in *Scheidler v. NOW*, 537 U.S. 393 (2003), that decision did not come down until after the Ninth Circuit's en banc decision. Petitioners can hardly be faulted for not raising an argument that had been uniformly rejected by the lower courts. In any event, the Ninth Circuit's en banc decision remanded in part for the recalculation of damages; hence, there was not yet a final judgment in place, as respondents themselves argued when it suited their purposes. (*See* Point 1. *supra*). Accordingly, there was no bar to application of this Court's supervening and controlling decision.[5] Pet. 6-7.

Indeed, the Ninth Circuit never held that this issue, or the specific intent issue, had not been preserved. Rather, the court avoided consideration of the impact of *Scheidler* and *Black* by invoking the "law

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[4] Notably, respondents themselves flag the fact that the jury verdict rested in part on a FACE conspiracy claim. Opp. 6.

[5] Respondents' theory of Hobbs Act "extortion"—the sole predicate offense for the RICO claim—suffers from the same defects as the Hobbs Act "extortion" claim this Court rejected in *Scheidler*. Namely, there was no requirement that the jury find the element of "obtaining of property," nor was any property obtained, as respondents must concede. *See* Final Jury Instructions pp. 9, 24, 30, 32-5.

of the case" doctrine, holding that it "could not go there." App. 51. However, as noted in the Petition, supervening Supreme Court decisions are a standard *exception* to law of the case. *See also* 3-30 Moore's Manual Fed. Practice and Procedure, Sec. 30.31(1)(b). The decision below is plainly erroneous on its own terms.

At any rate, even if law of the case were properly invoked below, *this Court* is not bound by the doctrine. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990) ("the earlier panel's ruling does not, of course, bind this Court"); *Christiansen v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review").

6. This Court should grant the writ and review the case, or grant, vacate and remand.

In sum, respondents have offered no substantive grounds for denial of the writ. Their argument on the merits of the petition relies upon mischaracterizations of the opinion below and the crucial jury instruction on threats.

While the meritorious issues presented warrant certiorari, this Court could also grant, vacate, and remand in light of *Scheidler* and *Black*. Respondents' RICO claim rests precisely on the theory this Court rejected in *Scheidler*. And the Ninth Circuit's "threat" standard is impossible to square with the formulation this Court embraced in *Black*.

Requiring the Ninth Circuit to apply *Scheidler* and *Black* would eliminate the need for plenary review and any decision by this Court on the First Amendment questions. The RICO judgment would fail in its entirety under *Scheidler*. The FACE claim would require, at a minimum, a retrial under *Black*. Upon retrial, the FACE claim would likely fail for the reasons already set forth in the Petition.

CONCLUSION

This Court should grant the petition and review the case. In the alternative, this Court should grant, vacate and remand for further proceedings.

Respectfully submitted,

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