No. _____

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

PETITION FOR WRIT OF CERTIORARI

DENIS V. BRENAN
Counsel for Petitioners, ACLA ALM, Dodds, Dreste, Foreman, Murch, Treshman, and Wyson

CHRISTOPHER A. FERRARA
(Admitted in the Ninth Circuit)
AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.
P.O. BOX 10092
FAIRFIELD, NJ 07004-6092

BRANDON M. BOLLING
Counsel of Record
Counsel for Petitioners Bray, Burnett, Crane, McMillan, Ramey, and Stoyer
Thomas More Law Center
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Based solely on two posters and a website alleged to constitute "threats," petitioners were punished with an aggregate $120 million verdict for compensatory, punitive, and treble damages under FACE and RICO—though later reduced to a "mere" $16 million. Despite the challenged communications being devoid of any threats, the jury was instructed that it *"must"* impose liability "even if you believe that the defendants (petitioners) *did not intend the statements to be threatening*," so long as it was *"foreseeable"* that the communications would be *"interpreted"* as threats. This matter is an injustice to petitioners and an affront to this Court's First Amendment jurisprudence.

Furthermore, ninety-one percent of the remitted damages were awarded to parties with no Article III standing—entities not even mentioned by petitioners' communications. The verdict was followed by a permanent injunction banning republication and possession of the communications. The questions presented are:

1. Whether respondent clinics' lack of Article III standing and the lack of subject matter jurisdiction over a non-existent "conspiracy to violate FACE" claim require reversal.

2. Whether the First Amendment permits punishment of public forum political speech using a "negligence" standard, on the theory that the speech might "generate fear" of violence by parties unrelated to the speaker.

3. Whether this Court's decision in *Scheidler v. NOW* requires dismissal of the RICO claim in this case.

PARTIES TO THE PROCEEDING

Petitioners, twelve pro-life advocates and two pro-life organizations, are American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), Michael Bray, Andrew Burnett, David A. Crane, Michael B. Dodds, Timothy Paul Dreste, Joseph L. Foreman, Charles Roy McMillan, Bruce Evan Murch, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong.

Respondents, four abortion doctors and two abortion clinics, are Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; and James Newhall, M.D.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations, and no publicly held company holds any stock of petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ABBREVIATIONS KEY

ACLA	Petitioner American Coalition of Life Activists and all other petitioners collectively herein.
ALM	Petitioner Advocates for Life Ministries.
App.	Appendix to the petition for certiorari.
FACE	The Freedom of Access to Clinics Entrances Act of 1994, 18 U.S.C. § 248.
L.	Petitioners "lodged" with the court below selected trial exhibits in 8 ½ x 11 format, cited herein as "L. [page number]." Reducing the size of the exhibits to include them in the appendix to the petition for certiorari would render them illegible.
RICO	The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq.
Tr.	Trial transcript in the district court.

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The latest opinion of the panel, App. 1, appears at 518 F.3d 1013. The opinion of the panel after remand, App. 3, appears at 422 F.3d 949. The opinion of the en banc panel, App. 68, appears at 290 F.3d 1058. The opinion of the original panel, App. 201, appears at 244 F.3d 1007. The district court's order after remand, App. 44, appears at 301 F.Supp.2d 1055. The district court's permanent injunction, App. 227, appears at 41 F.Supp.2d 1130. The district court's order on summary judgment, App. 302, appears at 23 F.Supp.2d 1182. The district court's order on the motions to dismiss, App. 334, appears at 945 F.Supp. 1355.

JURISDICTION

The Ninth Circuit issued its opinion on February 11, 2008, on appeal from the United States District Court for the District of Oregon, App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The appendix contains the text of FACE, App. 405, the Hobbs Act, App. 410, and excerpts of RICO, App. 411.

STATEMENT OF THE CASE

In a radical affront to this Court's precedents, the Ninth Circuit has punished political speech, which the five dissenters from the en banc majority described as "clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment." App. 154. This case raises First Amendment and federal statutory questions of national importance and the core constitutional facts are undisputed.

Respondents sued petitioners for an alleged nationwide "conspiracy" to engage in "threats" in violation of FACE and Hobbs Act "extortion" in violation of RICO. Respondents' case was based *entirely* on two posters published by petitioner ACLA and a website dubbed "The Nuremberg Files," created, published, and maintained solely by nonparty Neal Horsley, whom respondents never sued.

A. The "Deadly Dozen" Poster and "Crist Poster"

In January 1995, to mark the anniversary of *Roe v. Wade*, ACLA held a press conference and introduced a protest poster listing the names and addresses of the "Deadly Dozen," a group of abortion doctors. L.1. The poster declared them "GUILTY of crimes against humanity" and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." *Id.*

In the summer of 1995, ACLA introduced six posters during a public rally outside the old federal courthouse in St. Louis, where the *Dred Scott* decision

was handed down. L.2, 52-55. One of these posters featured respondent Crist, declaring him "GUILTY of crimes against humanity" and offered $500 to "any ACLA organization that successfully persuades Crist, through such activities as writing, picketing, and leafleting, to turn from his child killing." L.2.

B. The "Nuremberg Files"

In January 1996, ACLA publicly advocated compiling "Nuremberg Files" on abortion doctors for future trials. L.24. In January 1997 nonparty journalist Neal Horsley launched his "Nuremberg Files" website, including therein ACLA's name and a sample file regarding a nonparty doctor, provided by a nonparty journalist, from a now defunct magazine. L.24-42; App. 77. Shortly thereafter, on petitioner Crane's request, Horsley removed ACLA's name from this project. Tr. 1362-65, 2251-59, 2285-87. ACLA is not associated with any later iteration of this website. Horsley has since solely owned, operated, written, and updated the website. L.8-23; Tr. 2236-52.

The website lists hundreds of abortion doctors, politicians, judges, and celebrities and calls for Nuremberg-type trials of these people in "PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against the wanton slaughter of God's children." L.8. Using a "casualty list" published by a mainstream online news source, Horsley added to his list of abortion doctors "strikeouts" for those who had been killed and "gray-outs" for those who had been injured. L.12-14. It is undisputed that Horsley did this on his own initiative and after ACLA's association with the website ended. Tr. 2253-60, 2282-86, 2306, 2314.

C. The Trial, Verdict, and Injunction

In denying summary judgment the district judge observed that the at-issue communications did not "contain *any* expressly or *apparently* threatening language" (all emphasis added herein unless otherwise noted). App. 307-08. However, the judge allowed trial to proceed on a *negligence* theory, because "in light of their entire factual context . . . a reasonable person would have foreseen that those statements would have been . . . interpreted as statements of an intent to bodily harm or assault." App. 316-17, 324-28, 416. The jury was instructed that petitioners "*must*" be found liable for threats "even if you believe that the defendants *did not intend the statements to be threatening,*" and that petitioners' subjective intent to threaten *was not* the applicable standard. App. 416.

Over petitioners' objection, the jury heard nearly three weeks of inflammatory "context" evidence and returned an aggregate verdict of $120 million primarily to the two respondent clinics; however, these clinics were not even mentioned by petitioners' communications and it is undisputed that the clinics had no legal relationship to any of the individual respondent doctors. The jury was instructed on a statutorily non-existent theory of a civil "conspiracy to violate" FACE and their general verdict makes no distinction between substantive and conspiratorial liability, instead lumping the two concepts together. App. 429-44.

Following the verdict, the district court declared ACLA's posters "blatantly illegal" and permanently enjoined petitioners from publishing, republishing, or

even possessing the posters, the website content, or their undefined "equivalent" under pain of arrest and prosecution. App. 289-92.

D. A Three-Judge Panel Vacates the Verdict and Injunction

Correctly applying this Court's precedents, a unanimous three-judge panel determined ACLA's communications to be protected speech, vacated the verdict and the injunction, and directed entry of judgment for petitioners. App. 200.

E. An En Banc Majority Reinstates the Verdict and Injunction, but Vacates the Punitive Damage Award

On rehearing, while vacating punitive damages and remanding for reconsideration, the en banc Ninth Circuit, by a 6-to-5 vote, reinstated the liability verdict and RICO damages, but noted that the posters "contain *no* language that is a threat," and that the "*content*" of the posters was protected. App. 67, 94, 125.

The en banc court affirmed the verdict solely on the theory that ACLA's posters *could* be viewed as threats under FACE (and thus RICO) because their "*format*" resembled nonparty posters published prior to nonparty acts of violence against nonparty doctors. The Ninth Circuit opined that this merely temporal connection between nonparty posters and nonparty violence—albeit with no connection to petitioners—gave rise to a "poster pattern" that converted ACLA's

facially non-threatening posters into "threats" under FACE and "extortion" under RICO.

Undisputed facts at trial reveal the Ninth Circuit's "format" theory to be an *ad hoc* contrivance designed to salvage a patently unconstitutional verdict. The text of ACLA's posters is completely different from the nonparty posters (they do not even contain the word "Wanted") and they do not contain any pictures. L.1-2, 43-51. ACLA's posters are not "Wanted" posters—despite being nebulously labeled as such by the Ninth Circuit without definition. The Ninth Circuit's opinion stated only "differences in caption or words are immaterial," contained *no* analysis of how the posters communicated any actionable threat, and no working definition of what the published "threat" to respondents was. App 120.

Even respondents' counsel conceded that there was no evidence linking the death of a nonparty doctor named in one of the earlier nonparty posters to anti-abortion activity; he was reportedly killed during a *robbery attempt*. App. 131-32. Thus, the imaginary "poster pattern" consists of just *two* isolated acts of violence against "postered" doctors over decades of protesting. It is also undisputed that *hundreds* of posters condemning named abortion doctors have circulated throughout the country for years without violence against any of the named doctors. *Id.*

Yet, inexplicably, the en banc court did *not* even remand for retrial under its newly minted "format liability." Contrary to the Ninth Circuit's view of the matter, the jurors were allowed to parse the communications in their entirety—format *and*

content—for "threats." App. 416-19. At trial, respondents argued the *words*, not just the format, were "threatening," and respondents' counsel exhorted the jury to punish petitioners' "threatening *words*." Tr. 109, 631-35. Accordingly, the jury was instructed it could punish the *protected* aspect of the communications—the words in the posters—and not just the Ninth Circuit's unprotected "format."

Respondents also presented to the jury, as "republications" of the "Deadly Dozen" poster, editorials defending the poster in *Life Advocate* magazine and the *Salt and Light* newsletter. L.3-7. Therefore, the en banc majority upheld the punishment of *editorials* as RICO predicate acts and FACE violations without even bothering to explain how the editorials fell within the "format" theory that was the sole basis affirming liability.

Regarding the Nuremberg Files website, the majority conceded that "the Nuremberg Files *are protected speech*," but contrived a qualified exception for nonparty Horsley's list of doctors marked with "strikeouts" and "gray-outs." App. 109-10, 127. The majority concluded that the list was a jury-triable "threat," but *only when combined with ACLA's posters.* App. 110, 126-27. However, the jury was never instructed on the new theory that the Nuremberg Files content *was protected speech* apart from the "scorecard." On the contrary, just as with the posters, the jury was instructed to assess liability based on the whole of the communication, including what respondents' counsel called "threatening words" in the website's extensive text. App. 416-19; Tr. 109, 631-35.

Likewise, the injunction punishes all three communications entirely, *including those portions deemed protected by the Ninth Circuit*, and criminalizes not only republication but mere possession of the communications or their undefined "equivalent." App. 126, 289-92. Flatly contradicting the jury instruction, the injunction requires *specific intent* to threaten in order to violate its provisions. App. 289-92. Thus, the en banc majority simultaneously upheld *mutually contradictory* threat standards: negligence for the jury and specific intent for the injunction.

F. The Supervening Supreme Court Decisions

After the en banc panel's decision but before the remand, this Court altered, in petitioners' favor, the application of RICO and the Hobbs Act to political speech, the requirement of specific intent for actionable threats, and the constitutionality of punitive damages. *Scheidler v. NOW,* 537 U.S. 393 (2003) (RICO and Hobbs Act); *Virginia v. Black,* 538 U.S. 343 (2003) (threats); *State Farm v. Campbell,* 538 U.S. 408 (2003) (punitive damages).

G. The Three-Judge Panel Decision After Remand

In September 2005, a three-judge panel affirmed in part, reversed in part, vacated in part, and remanded for new trial if respondents did not accept the panel's remittitur of punitive damages from $108.5 million to $4.7 million. The panel affirmed the district court's refusal to consider any issue other than punitive damages, because, as the panel wrongly claimed, "all

these issues were finally settled" in the en banc decision. App. 32-34.

Inexplicably, the panel applied this Court's supervening decision in *State Farm* to the issue of punitive damages, but refused to apply the supervening decisions in *Black* and *Scheidler* to the liability issues. The panel concluded it could not depart from its *own mandate* following the en banc decision, even though the case was still pending and there was no final judgment due to the *vacatur* and remand. App. 32-35.

Despite the remitted punitive damages, petitioners remain saddled with an aggregate verdict of more than $16 million: $4.7 million in FACE punitive damages, $11 million in RICO treble damages, and approximately $526,000 in FACE compensatory damages.

H. Petitioners' Previous Petitions for Certiorari

This Court has previously denied petitioners' petitions for certiorari. Such denials do not preclude this latest petition, or the re-visiting of previous issues, because denial of certiorari is not an adjudication on the merits, and this Court is not bound by the "law of the case" doctrine. *See Missouri v. Jenkins,* 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964).

REASONS FOR GRANTING THE PETITION

I. THE CLINICS LACKED STANDING AND THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION

Two respondent clinics were awarded ninety-one percent of the over $16 million total verdict for "threats" that do not even mention them.

A. The Respondent Clinics Lacked Standing

Federal court standing principles derive primarily from the case and controversy requirement of Article III of the United States Constitution. Under Article III, a plaintiff must establish (1) actual or threatened injury that is (2) fairly traceable to the defendant's conduct and (3) a sufficient likelihood that the requested relief will redress this injury. *See, e.g. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Northern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Allen v. Wright*, 468 U.S. 737 (1984). The two clinic respondents have no Article III standing simply because ACLA's statements did not pertain to them.

Lack of Article III standing is not waivable. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The claimant must prove a distinct injury to himself that is concrete, actual, or imminent and not conjectural or hypothetical. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). Standing to make a threat claim means one must be threatened.

The challenged posters and website do not mention, much less threaten, the two respondent clinics. L.1-2, 8-42. The district court implicitly recognized that petitioners could not be tried for threats against respondents based on posters that did not *mention* them when it dismissed respondents' claims concerning ACLA's posters because they "do not refer to any of these plaintiffs." App. 329.

However, in denying summary judgment, the district court found standing *only* because the clinics claimed to have "working relationships with the *actual targets* of the alleged threats" such that the clinics "*felt threatened*" and took security measures. App. 330-31. At trial it was undisputed that the respondent doctors had *no legal relation to the two respondent clinics.* Tr. 1182, 1994. Accordingly, the two clinic respondents had *no connection whatsoever to the claims in this case*—yet were awarded ninety-one percent of the remitted damages.

The clinics claimed they undertook "security expenses" because they "*felt threatened*" by posters that did not mention them. This is precisely the sort of conjectural and hypothetical claim rejected in *Friends of the Earth.* Since the clinics had no Article III standing, it follows they had no statutory standing under FACE, for no "congressional enactment can lower the threshold requirements of standing under Article III." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 488 n.24 (1982).

B. The District Court Lacked Subject Matter Jurisdiction

The jury found each petitioner guilty of violating *or* conspiring to violate FACE. App. 429-43. The district court, however, had no subject matter jurisdiction to try a claim Congress did not create. Unlike RICO, FACE contains *no* civil or criminal conspiracy provision. 18 U.S.C. §§ 248, 1962(d), 1964(c). In a footnote, the en banc majority suggested that this issue was "waived." App. 112 n. 16. However, lack of subject matter jurisdiction cannot be waived. *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982).

This is not a case where an arguable claim suffices for subject matter jurisdiction. The FACE conspiracy claim is completely fictitious and conferred no jurisdiction on the district court. *Hagans v. Lavine,* 415 U.S. 528, 536-37 (1974). Such plain error is not harmless and requires a retrial. The verdict made no distinction between the substantive FACE claim and the non-existent conspiracy claim. A conspiracy theory had to have been considered to impute liability to petitioners for the website run by a nonparty. When jurors are given the option to rely on a legally inadequate theory, a court cannot presume the jurors saved themselves from error. *Griffin v. U.S.*, 502 U.S. 46 (1991).

II. The Ninth Circuit Has Punished Protected Speech

The five dissenters from the en banc decision noted that the majority could not have reinstated the

unconstitutional verdict and injunction without departing from this Court's precedents regarding protected free speech. App. 127-28, 132-75.

A. The Ninth Circuit's Refusal to Use "Extreme Care" in Punishing Public Forum Political Speech

Public forum political speech merits the highest possible protection—including alleged "threats." In *Watts v. United States*, 394 U.S. 705 (1969), this Court reversed a conviction for *threats* noting that "debate on public issues should be uninhibited, robust, and wide-open." *NAACP v. Claiborne Hardware,* 458 U.S. 886, (1982), regarding alleged threats, held that "expression on *public issues* 'has always rested on *the highest rung* of . . . First Amendment values.'"

Evading these precedents, the Ninth Circuit opined that "[*t*]*hreats*, in whatever forum, may be independently proscribed." App. 103 n.11 (original emphasis). However, a statement's public and political nature is a crucial factor in determining whether it is a threat in the first place. *Claiborne Hardware* enunciated an "extreme care" standard for review of judgments punishing public forum political speech—even though *Claiborne's* fiery political speeches were *facially threatening and resulted in gun shots fired at homes*. 458 U.S. at 904-06, 926-27.

Claiborne declared statements were protected even if they "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence.*" *Id.* at 927. Even where a fear of violence is created by speech, this Court concluded,

that "[a]n advocate . . . must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* at 928.

Yet, contrary to *Claiborne*, the Ninth Circuit held that merely creating a fear of violence constitutes a "threat" in violation of FACE and "extortion" in violation of RICO: the "fear generated" by "being singled out for identification on a 'Wanted-type' poster" was sufficient to punish ACLA's speech. However, it is undisputed that ACLA's posters were facially devoid of threats and proposed only a "peaceful, legal course of action . . . with explicit reference to great moral and political controversies of the past." App. 155. Punishment of this sort of constitutionally protected public, political speech has no precedent in this Court's jurisprudence.

B. The Ninth Circuit's Unconstitutional "Threat" Standard

FACE prohibits the use of "force [] *threat of force* or [] physical obstruction" to "intimidate" someone from "obtaining or providing reproductive health services." App. 404. FACE defines intimidation as "to place a person in reasonable apprehension of bodily harm." App. 408. FACE does not, however, prohibit intimidation standing alone, only intimidation *by means of* a threat of force. App. 404.

The Ninth Circuit itself noted that "the jury had to find a true threat *before* reaching any other FACE or RICO issues." App. 112 (emphasis added). That is, the jury had to find a true threat *before* it could find "intimidation" under FACE (or Hobbs Act extortion

under RICO). FACE does not define the term "threat" and the en banc panel acknowledged it was attempting this "for the first time." App. 72.

However, in the meantime, *Virginia v. Black*, 538 U.S. 343 (2003) settled that question. *Black* defines true threats as "those statements where the speaker *means to communicate* a serious expression of *an intent to commit* an act of *unlawful violence* to a particular individual or group of individuals." *Id.* at 359. *Black* thus distinguishes general "intimidation" from a threat of violence, holding that only a direct threat—that is, a *statement* conveying the speaker's *specific intention* to *commit* violence—is "intimidation in the constitutionally proscribable sense." *Id.* at 360.

1. An unconstitutional negligence standard of intent

Especially in the context of public forum political speech, "[w]hat is a threat must be distinguished from what is constitutionally protected speech," because only a "true threat" may be punished. *Watts,* 394 U.S. at 707-08. *Watts* expressed "grave doubts" that a political speaker could be subjected to liability under a pure objective (i.e., negligence) standard. *Id.* *Black* confirms that applying a negligence standard for threat liability is unconstitutional, at least where public forum communications in a political context are concerned.

However, the jury instructions in the instant case provided precisely the opposite: "Defendants' subjective intent or motive is *not the standard* that you must apply in this case." App. 416. Worse, the

instructions stated that the jury "must" impose liability under a negligence standard "even if you believe that the defendants *did not intend the statements to be threatening*." *Id.*

The en banc majority found no First Amendment problem with this instruction, upholding it as "an accurate statement of our law," App. 111, and affirming that "the only intent requirement for a true threat is that the defendant intentionally or knowingly communicated the threat" under circumstances in which "a reasonable person would foresee" that the statement "would be interpreted [as a threat] by those to whom the statement is communicated"—i.e., one's political opponents. App. 100, 103. That is, the Ninth Circuit upheld precisely what this Court's First Amendment precedents preclude: a *negligence standard* for threats liability based on public forum political speech.

Yet, amazingly, the Ninth Circuit blatantly contradicted its own holding by affirming the post-trial injunction, in which the district court suddenly adopted a *specific intent* standard for threats, but only *after* the trial was over. App. 289-92. The en banc panel upheld the injunction's absurd ban on republication or possession of the posters or their "equivalent" because *"[o]nly* threats . . . *with the specific intent to threaten* . . . are prohibited." App. 126.

In an effort to have it both ways, the Ninth Circuit surmised in dicta that—despite a jury instruction directly to the contrary—the jury must have found an "intent to intimidate" under FACE, and that specific

intent to threaten is "subsumed" in FACE's requirement of intentional intimidation. App. 75, 101.

This reasoning fails factually because the jury was instructed that liability *must* be imposed even if the jury believed petitioners *did not intend* to threaten; and it fails legally because when "jurors have been left the *option* of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from their error." *Griffin v. United States,* 502 U.S. 46, 59 (1991). Here, the jury was given not merely the option, but the *mandate* to impose threats liability even if it believed petitioners had *no intent* to threaten. The instruction could not have been more grossly erroneous.

Moreover, the Ninth Circuit's theory fails because it obliterates the constitutionally crucial distinction between intimidation in general and threats in particular. As *Black* makes clear, "intimidation" is a far broader concept than "threats," which is why FACE prohibits intimidation *by* threat of force, *not* mere intimidation standing alone. Political speech of all kinds may "intimidate" the target by making him or her apprehensive about unrest or even violence from some member of an outraged public. But that does not make the "intimidating" speech an actionable threat absent some expression of the *speaker's* intention to commit bodily harm upon the target. *Claiborne* also observes that political speech may intimidate without being a threat. 458 U.S. at 926-29.

Thus, even if—as surmised—the jury had found a generalized "intent to intimidate"—despite the jury instruction creating a pure negligence standard—that

would not suffice for the constitutionally required specific intent to *threaten* violence to be *committed by the speaker*. *Black*, 538 U.S. at 358-63.

The Ninth Circuit's refusal to apply *Black,* standing alone, mandates reversal because this action was still pending when *Black* was decided. An action is still pending and cannot be terminated as to any claim until all claims have been reduced to final judgment. Fed.R.Civ.P. 54. Yet, on the appeal after remand, the three-judge panel refused to follow *Black* even though there was no final judgment. App. 33-34. According to the panel, a circuit court is not bound to apply supervening Supreme Court decisions unless this Court *orders* it to do so. App. 34. This is nonsense. *United States v. Wells*, 519 U.S. 482 (1997), crystallizes the rule that a mandate "does not counsel a court to abide by its *own* prior decision in a given case, but goes rather to an appellate court's relationship to the court of trial."

Nor does the related "law of the case" doctrine prevent a circuit court from revisiting a liability issue arising from a supervening change of law after a remand on damages only, which is precisely the situation here. In *Fogel v. Chestnutt*, 668 F.2d. 100, 103, 109 (2d Cir. 1981), the Second Circuit observed that "if *before a case in a district court has proceeded to final judgment*, a decision of the Supreme Court demonstrates that a ruling on which the final judgment would depend was in error, *no principle of the 'law of the case' would warrant a failure on our part to correct the ruling*." Here the Ninth Circuit has ignored its own precedent that law of the case does not preclude application of supervening law following an

earlier panel decision. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 786-87 (9th Cir. 2000). Accordingly, the Ninth Circuit has generated an unnecessary circuit conflict for this Court to remedy.

Furthermore, application of this Court's supervening decision in *Arthur Andersen v. United States*, 125 S.Ct. 2129 (2005), requires a new trial, given the erroneous jury instruction on the threats. *Andersen* reversed a criminal conviction due to defective intent instructions that provided "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you *may* find [petitioner] guilty." *Id.* at 2136. A new trial was required because "the jury instruction at issue failed to convey the requisite consciousness of wrongdoing" for an offense requiring specific intent. *Id.*

Far worse than in *Andersen*, the jury here was instructed that it *must* find petitioners' guilty of threats even if the jury believed petitioners had *no intent* to threaten. App. 416-17. Therefore, it is beyond dispute that "the instruction at issue failed to convey the requisite consciousness of wrongdoing." 125 S.Ct. at 2136.

2. Protected Speech Punished for "Generating Fear"

Speech cannot be punished unless it "clearly falls into one of the narrow categories that [are] unprotected by the First Amendment." App. 152. The relevant categories are true threat, *Watts,* 394 U.S. at 707, and incitement, *Brandenburg v. Ohio*, 395 U.S. at

447; *see also Hess v. Indiana*, 414 U.S. 105, 108 (1973). Respondents offered no proof of incitement and the Ninth Circuit obliterated the constitutionally crucial distinction between a direct threat of unlawful violence *by the speaker*, as considered in *Watts* and *Black*, and statements aimed at inciting *others* to commit violence, as seen in *Brandenburg* and *Hess*.

The en banc court candidly conceded that petitioners were punished *solely* because they should have "foreseen" that the "format" of their posters evoked a nonexistent "pattern" *in the minds of the political opposition*. This fallacious "pattern" is nothing more than a coincidental and remote temporal connection between two isolated past acts of nonparty violence—"replicating the poster pattern" was a threat because it "generated fear" of third-party violence. App. 123, 131-37.

On remand this refrain was repeated: "ACLA made true threats . . . by *generating a fear of violence*." App. 17. However, in remitting the punitive damages the panel conceded that ACLA's posters were "*a notch removed* from a direct threat of violence." *Id.* In other words, ACLA's statements *were not direct threats*.

The Ninth Circuit, therefore, has explicitly punished speech deemed protected in *Claiborne Hardware*: speech that "might have been understood as . . . *intending to create a fear of violence* whether or not . . . specifically intended." 458 U.S. at 927. In *Claiborne,* though references to broken necks and retribution in the night might have "generated fear" of third-party violence, they did not constitute true threats under *Watts* or incitement under *Brandenburg*.

Id. It necessarily follows that ACLA's statements—which do not even *mention* violence—likewise are neither true threats nor incitement. As the five dissenters pointed out: "The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs." App. 148 (Kozinski, J., dissenting).

ACLA's protected speech cannot be converted into threats by "context" consisting of isolated *past* acts of violence by unrelated nonparties, remotely following publication of posters by still other unrelated nonparties. App. 131-47. In rejecting the notion that "context" could create "threats" where none were stated or intended, the original three-judge panel warned: "If this were a permissible inference, it could have a highly chilling effect on public debate . . . . *A party who does not intend to threaten harm...* would risk liability by speaking out in the midst of a highly charged environment." App. 217-18.

Finally, if FACE prohibits this kind of "intimidation" *sans* true threat, it would be unconstitutional as applied to these petitioners, *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), and would subject it to facial attack for overbreadth: "The Constitution gives significant protection from overbroad laws that chill speech . . . [a statute] is unconstitutional *on its face* if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002).

Prohibiting a substantial amount of protected expression is precisely what the Ninth Circuit has

done by departing from—quite literally—this Court's entire First Amendment jurisprudence on public forum political speech.

C. Punitive damages without notice or reprehensibility

Petitioners' speech was punished on the grounds that they, as legal laymen, should have "foreseen" that (a) their posters were "similar" to nonparty posters, (b) that the format of such nonparty posters was part of a "poster pattern" that "generates fear," and (c) that *one portion* of an *otherwise protected* nonparty website—which petitioners had nothing to do with—would be deemed a "threat" when read in conjunction with the posters.

However, six of the twelve Ninth Circuit judges who reviewed this case have found ACLA's statements fully protected by the First Amendment. The other six judges found the content, versus "format," to be protected. Yet, according to the Ninth Circuit, based on their public forum political speech, petitioners had notice they could be subjected to punitive damages under FACE—the first and *only* award of its kind in the nation.

The punitive damage award in this case makes a mockery of *State Farm*'s teaching that punitive damages may not be assessed absent truly reprehensible conduct and adequate notice that such a penalty was in the offing. 538 U.S. at 417, 419. According to *State Farm*: "It should be *presumed* that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded *only*

if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419. ACLA's posters can hardly be judged so reprehensible as to warrant the additional sanction of punitive damages *when all the reviewing judges have found them to be either entirely or substantially protected* by the First Amendment.

D. The national importance of the case

Unless this Court intervenes, the Ninth Circuit's errors "will haunt dissidents of all political stripes for many years to come." App. 152 (Kozinski, J., dissenting). The majority has converted *all* posters condemning named individuals into potential "true threats" and has effectively emasculated constitutional protection for the use of this time-honored mode of political speech. Moreover, there is the palpable risk that the "logic" behind the "poster pattern" theory will justify punitive damage awards based on other yet to be imagined "patterns." Today the "poster pattern," tomorrow the "picketing pattern," and so forth.

II. THE RICO CLAIM MUST BE DISMISSED

The jury awarded more than $11 million in compensatory and treble damages for "racketeering" in violation of RICO. App. 222-24, 429-44. The sole RICO predicate act at issue here was "extortion" in violation of the Hobbs Act, which defines "extortion" as "the *obtaining of property* from another, with his consent, induced by . . . threatened force." App. 409. After the en banc decision, and before the remand, this Court's decision in *Scheidler* established that political

protesters who seek nothing of value from their "victims" cannot be liable for Hobbs Act extortion because they have neither obtained nor attempted to obtain property. 537 U.S. at 403-11.

The term "property" means something of value the *protester* could exercise, transfer, or sell. *Id.* at 405-06. There is no Hobbs Act extortion, and thus no RICO liability, even when anti-abortion protesters have "achieved their ultimate goal of 'shutting down' a clinic that performed abortions," because no property has been obtained. *Id.* As with its refusal to apply *Black,* the Ninth Circuit erred in refusing to apply *Scheidler*.

The RICO claim in this case is no different from the one in *Scheidler*, and the RICO-specific jury instructions are virtually identical. App. 422-28. Respondents did not plead, never claimed, and made no effort to prove at trial that petitioners obtained or sought any of their property.

CONCLUSION

This case represents over a decade worth of constitutional error and injustice. This Court can remedy this affront to justice by granting this petition and reaching the same result the three judge panel did—vacating a preposterous verdict and injunction that defy all First Amendment precedent. It would be hard to imagine a case more fitted to this Court's rule, providing for a grant of certiorari, to review a circuit court decision "that decides an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10 (c).

Respectfully submitted,

Brandon M. Bolling
Counsel of Record
Counsel for Petitioners Bray, Burnett, Crane, McMillan, Ramey, and Stover
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001

Denis V. Brenan
Counsel for Petitioners ACLA, ALM, Dodds, Dreste, Foreman, Murch, Treshman, and Wysong

Christopher A. Ferrara
(Admitted in the Ninth Circuit)
AMERICAN CATHOLIC
LAWYERS ASSOCIATION, INC.
P.O. Box 10092
Fairfield, NJ 07004-6092
(973) 244-9895

Counsel for Petitioners