No. 91-1643

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

REPLY BRIEF

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May 11, 1992

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REPLY TO BRIEF IN OPPOSITION

The final sentence of McCalden's brief confirms that the First Amendment issues presented in the petition are ripe and warrant plenary review: McCalden forthrightly claims that the decision below entitles him to subject petitioners to litigation and a damages trial for threatening a counter-demonstration against his speech, despite "a possible chilling effect on petitioners' exercise of First Amendment rights." Brief in Opposition ("Br.Opp.") 9. Five dissenting judges of the Ninth Circuit found that proposition outrageous and fraught with peril for free expression. A writ of certiorari is in order.

I.

With respect to the first three Questions Presented, Respondent McCalden does not even try to refute the First Amendment arguments advanced by the petition and the dissents below. Instead, the brief in opposition rests entirely on the assertion that the petition disputes the facts alleged in the complaint. Br.Opp. 5-7. Contrary to McCalden's efforts at obfuscation, the petition and all of the opinions below "deem the complaint's allegations to be true." (A9)(panel majority opinion). Indeed, McCalden's belated attempt in his brief to spice up the Second Amended Complaint retroactively shows that even he now recognizes its deficiencies. *See* Br.Opp. 5 n.6.[1] The court below found no claims that petitioners authorized, directed, or ratified violence. The panel majority and all the dissenters agreed that, even "[l]iberally construed," the complaint contains only "one allegation of a specific threat." (A9). *See also*

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[1] McCalden's proffered supplement to the complaint is not only out of order, it is also the consequence of his own deliberate strategic choice. When the District Court dismissed the Second Amended Complaint, it granted McCalden leave to file a Third Amended Complaint. (A29-31). McCalden declined, choosing instead to appeal the dismissal to the Ninth Circuit. During oral argument on the Motion to Dismiss, McCalden's counsel acknowledged to the District Court that the Second Amended Complaint already contained all of the factual allegations that McCalden was able to make. Tr. of Proceedings on Nov. 17, 1986 at p. 21 (Excerpts of Record filed with the Court of Appeals at 86). The allegations that matter are those made in the Second Amended Complaint, as authoritatively and unanimously construed by the courts below, not those that McCalden irresponsibly seeks to sneak into the record now.

A42-43 (Kozinski, J., dissenting); A53 (Reinhardt, J., dissenting). Proceeding on the basis that "all reasonable inferences are to be drawn in favor of the non-moving party," the Court of Appeals found that McCalden "alleges that the appellees intended to disrupt his presentation by creating a demonstration that appellees knew and intended 'would create a reasonable probability of property damage and of violence.'" (A10).

Assuming this allegation to be true, the issue posed is clear-cut: petitioners and the dissenters below believe that threatening or organizing a demonstration against another's speech is protected expression that is not actionable in tort or under civil rights statutes. In contrast, the panel majority held that the First Amendment does not protect petitioners from being put to trial for planning "a demonstration" that carried "a reasonable probability of property damage and of violence" (A10), *solely* because petitioners allegedly communicated their plans to the CLA in private rather than through public proclamations. (A10-11). *See* Petition at 14-16. That pivotal distinction contravenes a unanimous decision of this Court, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), and warrants plenary review. McCalden has not a single word to offer in rebuttal of this crucial point.

The danger the decision below poses to free expression cannot be dispelled by the Ninth Circuit's mere incantation (in a footnote) of the truism that parties cannot be held liable for "activities plainly protected by the First Amendment." (A7 n.4). The holding below, and the remand for a trial on damages allegedly flowing from petitioners' plans to stage a counter-demonstration, reveal that the Court of Appeals' caveat was mere lip service. *See* Petition at 5, 18.

Petitioners certainly do not ask this Court to construe the First Amendment as an impenetrable shield against lawsuits alleging extortion by private or public parties or a deliberate conspiracy by public officials to withhold police protection.[2] Petitioners claim

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[2] McCalden himself describes the alleged "extortionate threats" he attributes to petitioners as nothing more than "threatening and *organizing*

only a right to be free from liability for speech that is protected by the First Amendment. McCalden concedes that the trial he seeks — the trial that the decision below expressly allows — may have a "chilling effect on petitioners' exercise of First Amendment rights." Br.Opp. at 9. Indeed, he candidly concedes that at trial he will seek damages based on petitioners' "threatening and organizing a demonstration" (Br.Opp. 2); on their "acts of political and economic sanctions"; on their petitions to government officials encouraging official condemnation of McCalden's anti-Semitism and the CLA's involvement with him; and on the Los Angeles City Council's resolution — which McCalden quotes at length as if to underscore what he deems its unprotected character — denouncing the CLA and boycotting its conference. (Br.Opp. 3).[3]

If McCalden, when he was given multiple opportunities by the District Court, had framed a complaint with specific allegations of actionable conduct that did not sweep within its grasp expression protected by the First Amendment, then he might have been entitled to proceed to trial on such claims. But he is not entitled to chill the expression of his opponents in a bitter ideological dispute by subjecting them to litigation of damage claims based on their successful opposition to him and his ideas in the political arena.

II.

With respect to the fourth Question Presented, respondent does not contest the argument for a heightened standard of review for complaints seeking damages for conduct that is *prima facie* protected by the First Amendment. McCalden largely concedes the point but asserts that it has no relevance here.

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a demonstration" which would "create a reasonable probability of property damage and violence." (Br.Opp. 2-3)(emphasis added).

[3] In his efforts to camouflage these concessions behind a smokescreen of distracting detail, McCalden leaves behind the allegations of his own amended complaint and peppers the Court with new allegations that likewise seek damages for protected expression, such as petitioners' alleged nefarious petitioning of the city government in an "escalating campaign of pressure tactics." (Br.Opp. 5 n.6).

First, McCalden admits that his tortious interference and other claims create a "chilling effect on petitioners' exercise of First Amendment rights." (Br.Opp. 9).[4] The significance and cognizability of this constitutional violation is thus undisputed.

Second, McCalden never denies that this derogation of the First Amendment is easily cured by the application of a heightened pleading standard. Following the principle announced in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), that the application of tort sanctions must "be measured by standards that satisfy the First Amendment," at least four circuits have adopted a heightened standard for complaints such as McCalden's, but the court below broke with precedent and rejected such a standard. *See* Petition at 19-21 & n. 14. As the brief *amicus curiae* of the Anti-Defamation League makes clear, vital expression on public issues will often impair the contractual relationships of others — indeed, in political boycotts, labor disputes and public awareness campaigns, such interference is frequently its purpose.

It is undisputed that the only even arguably actionable allegation the court below could find in the complaint — the threat to hold a demonstration that could turn disruptive (A9) — "occurr[ed] in the context of [petitioners'] constitutionally protected activity" of opposing McCalden's ideas. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). In this context, "precision of regulation" is mandated by the First Amendment. *Ibid.* Such precision is totally lacking in the decision below.

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[4] In the companion petition for writ of certiorari in No. 91-1699 at 15, McCalden similarly acknowledges the "chilling effect" his lawsuit will have on the defendants' First Amendment rights. McCalden offers only the strange defense that at least defendants can console themselves with the fact that they prevailed in the political arena over McCalden, who lost an audience for his pernicious views. But this only confirms, rather than compensates for, the First Amendment violation, for it is precisely that victory in the marketplace of ideas that McCalden seeks to undo by invoking the power of the federal courts to punish his opponents with an award of damages.

CONCLUSION

By ruling that parties may be held liable merely for having threatened to organize a demonstration that, according to plaintiff's speculations, might have gotten out of hand and caused some damage, the decision below makes deep inroads on the sphere of robust and passionate expression that the First Amendment was written to promote and defend. By allowing McCalden to proceed on the allegations in this complaint, the decision below — as the dissenting judges noted (Petition 19-22) — conflicts sharply with the decisions of other circuits and with the abiding principles of the First Amendment. A writ of certiorari should be granted.

Respectfully submitted,

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