

IN THE  
Supreme Court of the United States

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OCTOBER TERM, 2002

AMERICAN COALITION OF LIFE ACTIVISTS

*PETITIONER*

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLIAMETTE, INC.

*RESPONDENT*

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

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**BRIEF FOR RESPONDENT**

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## **QUESTION PRESENTED**

Considering the current climate of violence directed at abortion providers, when does antiabortion advocacy become a "true threat" and thus unprotected by the First Amendment?

## A STATEMENT OF THE CASE

Respondents include two not-for-profit corporations that operate clinics that provide abortions, among other health services, and several individual physicians, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, and Dr. Karen Sweigert, who provide abortions. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1362 (D. Or. 1996).

Petitioners are two Portland, Oregon based anti-abortion associations and several individuals who have been involved with the associations' and other anti-abortion groups' activities. *Id.* The two associations are American Coalition of Life Activists (hereinafter ACLA) and Advocates for Life Ministries (hereinafter ALM). *Id.*

At an April 1994 meeting in Chicago, there was a dispute in the pro-life movement over the use of violence. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1136 (D. Or. 1999). As a result of individual Petitioners' endorsement of the use of force, they were no longer allowed to be leaders of Operation Rescue. *Id.* They then decided to form a new organization, Petitioner ACLA. *Id.*

Petitioners openly advocate the use of force in connection with their anti-abortion activities. *Id.* at 1135-53.

The continual violence has been chronicled and endorsed by Petitioner ALM's magazine, *Life Advocate*. *Id.* at 1135-37. ALM helped form ACLA. *Id.* at 1137. ALM also edited and published Petitioner Bray's book, *A Time to Kill*. *Id.* at 1137. Petitioners issued a "Contract on the American Abortion Industry." *Id.* In addition, Petitioners have held several annual "White Rose Banquets" to honor those imprisoned for their violent anti-abortion activities. *Id.* at 1139.

On March 10, 1993, Dr. David Gunn was shot and killed outside a clinic in Florida where he performed abortions. *Id.* at 1134. Before his murder, Dr. Gunn's name, photograph, and other personal information were printed on Petitioners' WANTED posters. *Id.* These posters described Dr. Gunn as a baby killer and stated that to unborn children he was "heavily armed and very dangerous." *Planned Parenthood*, 945 F. Supp. at 1388. Michael Griffin was convicted of Dr. Gunn's murder. *Planned Parenthood*, 41 F. Supp. 2d at 1134. Several Petitioners supported the murder, stating that it was justified, and called for Griffin's acquittal. *Id.*

Similarly, on August 21, 1993, Dr. George Patterson was shot and killed in Alabama. *Id.* He was, like Dr. Gunn, an abortion provider. *Id.* Also like Dr. Gunn, prior to Dr. Patterson's murder, his name, physical description and address were printed on a WANTED poster created by Petitioners. *Id.*

On July 29, 1994, Dr. John Britton, the doctor who had replaced Dr. Gunn at the clinic where Dr. Gunn was killed, was shot and killed entering another Florida abortion clinic where he performed abortions. *Id.* at 1135. At the same time, Dr. Britton's volunteer escort, James Barrett, was also killed and James Barrett's wife was wounded. *Id.* Like Dr. Gunn and Dr. Patterson, Petitioners printed Dr. Britton's name, photograph, and physical description on "UnWANTED" posters prior to Dr. Britton's murder. *Id.* In addition, these posters contained the phrase "Crimes Against Humanity." *Id.* Paul Hill was convicted of Dr. Britton and James Barrett's murders. *Id.* Soon after the murders, Petitioners praised Paul Hill, calling him a "patriot" and a "wonderful man." *Id.*

Other violence directed at abortion providers has also occurred. For example, in August 1993, Shelley Shannon shot Dr. George Tiller in both arms. *Id.* Shelley Shannon is a friend of Petitioners. *Id.* On December 30, 1994, John Salvi



killed two clinic workers and wounded five others at two clinics in Massachusetts. *Id.* at 1135-36. He also fired shots into a clinic in Virginia before he was apprehended. *Id.* at 1136. One Petitioner was outside the Virginia clinic at the same time. *Id.* From 1994 onward, there have been several doctors who provide abortions in Canada who have been shot. *Id.* at 1135-36. It is against this backdrop of violence that Petitioners created the Deadly Dozen and the Crist posters, as well as the Nuremberg Files. *Id.* at 1131-53.

The Deadly Dozen poster says, "Guilty of Crimes Against Humanity," as did the "UnWANTED" poster describing Dr. Britton. *Id.* at 1135; *Planned Parenthood*, 945 F. Supp. at 1388. It also states "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'War Crime'." *Planned Parenthood*, 945 F. Supp. at 1388. Listed afterward are the names of thirteen physicians, including Respondents Dr. Elizabeth Newhall, Dr. James Newhall, and Dr. Warren Hern, and their home addresses. *Planned Parenthood*, 41 F. Supp. 2d at 1132. Dr. Tiller is also listed on the poster. *Id.* There is also a \$5000 reward offered "for information leading to arrest, conviction and

revocation of license to practice medicine." *Planned Parenthood*, 945 F. Supp. at 1388.

The Deadly Dozen Poster was first published in January 1995 at an ACLA event in Washington, D.C. *Planned Parenthood*, 41 F. Supp. 2d at 1131. Petitioners have republished the Deadly Dozen poster at events in August 1995 and January 1996, and have included it in Petitioner ACLA's mailings. *Id.* at 1137.

Displayed on the poster of Dr. Robert Crist is his picture and his home and business addresses. *Id.* at 1132. It also states "Guilty of Crimes Against Humanity," and describes abortion as a crime prosecuted as a war crime during the Nuremberg Trials. *Planned Parenthood*, 945 F. Supp. at 1388. The poster labels Dr. Crist as a "notorious" abortionist and offers a \$500 reward for persuading Dr. Crist to "turn from his child killing through activities within ACLA guidelines." *Id.* Petitioners first published the poster of Dr. Crist, along with those of other abortion providers, during an ACLA event in St. Louis in August 1995. *Planned Parenthood*, 41 F. Supp. 2d at 1137.

The day after the Deadly Dozen poster was first published, the Federal Bureau of Investigation advised Respondents named on the poster to take extra safety precautions and offered 24-hour protection of the U.S.

Marshal Service. *Id.* at 1132. Shortly after the release of the Crist poster, St. Louis police informed Dr. Crist that he should take additional safety precautions. *Id.* at 1133. Respondents knew of the murders of other abortion providers and the posters of these physicians that had preceded the deaths. *Id.* at 1134-35. As a result of this knowledge, Respondents followed law enforcement officers' advice. *Id.* at 1132-33.

The Nuremberg Files lists names and other personal information of abortion providers, clinic employees and owners, law enforcement officials that assist in securing access to abortion services, judges, politicians and abortion rights supporters. *Id.* at 1133. Petitioners first revealed the Files in hard copy form at an ACLA event in January 1996. *Id.* Soon after this event, the Nuremberg Files were posted on their own internet website. *Id.* at 1134. These files include Respondents Dr. Crist, Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall. *Id.* at 1133. The names of doctors and others killed during attacks on abortion clinics are listed with strikes through their names. *Id.* Those that have been wounded, like Dr. Tiller, are listed in gray type. *Id.* Law enforcement authorities informed Respondents that they were listed and advised them to take safety precautions. *Id.*

Petitioners were aware of the fear caused as a result of physicians' murders after their appearance on Petitioners' WANTED posters. *Id.* at 1138. Petitioners acknowledge that the WANTED and the GUILTY posters have the same effect. *Id.* at 1143. They know the posters pose a danger to those that provide abortions. *Id.* at 1141. One Petitioner stated, "...if I were an abortionist, I would be afraid." *Id.*

Because of the aforementioned events, in 1996, Respondents filed a lawsuit in the Federal District Court for the District of Oregon against Petitioners alleging violations of the Freedom of Access to Clinics Act of 1994 (FACE), the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962 (1988), Oregon Revised Statutes, Oregon RICO (ORICO), and Oregon state tort law. *Planned Parenthood*, 945 F. Supp. at 1361-62.

FACE, 18 U.S.C. § 248(a)(1) (2002), states that a party who "by force or threat of force...intimidates...or attempts...to intimidate...any person because that person is or has been...providing reproductive health services...shall be subject to...penalties...and...civil remedies provided in subsection (c)..." Respondents alleged that Petitioners threatened them through use of the Deadly Dozen and Crist posters. *Id.* at 1362. Respondents sought injunctive relief

to prevent Petitioners from continuing to violate FACE, ORICO, and other laws by continuing to publish those posters. *Id.* at 1365. Respondents also demanded compensatory and punitive damages. *Id.*

Petitioners moved to dismiss Respondents' complaint and moved for judgment on the pleadings. *Id.* at 1362. The court denied the Motion to Dismiss; the court could not state as a matter of law that Respondents had not stated a claim upon which relief can be granted. *Id.* at 1378. However, the court partially granted Petitioners' Motion for Judgment on the Pleadings, in that it dismissed the RICO and ORICO claims against Petitioner Bray. *Id.* at 1388.

Petitioners later filed motions for summary judgment. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1184 (D. Or. 1998). The court held that a threat does not have to be clear on its face before context may be considered. *Id.* The test for determining whether a threat was a "true threat," and thus falling outside First Amendment protection, was held to be an objective one, that of the reasonable speaker. *Id.* In addition, the court held that alleged threats should be evaluated in light of the entire factual context, including events and listeners' reactions. *Id.* The Deadly Dozen and Crist posters, as well

as the Nuremberg Files were held to be actionable under FACE. *Id.* at 1194-95. In addition, Petitioner Bray was reinstated as a defendant in the RICO and ORICO claims. *Id.* at 1195.

A jury found that Petitioners did issue true threats against Respondents and awarded Respondents compensatory and punitive damages. *Planned Parenthood*, 41 F. Supp. 2d at 1131, 1154. The court thus found that the Deadly Dozen and Crist posters, and the Nuremberg Files were true threats to harm or kill one or more of Respondents. *Id.* at 1131-33. It was also held that Petitioners, through their creation and publication of the posters and Nuremberg Files, and other actions promoting violence, unmistakably advocated violence toward abortion providers. *Id.* at 1136-53. The court rejected Petitioners' attempts to justify their actions as merely "a lawful exercise of free speech." *Id.* at 1154.

A permanent injunction was issued by the court enjoining Petitioners from committing, aiding, directing others, or conspiring with others to: threaten, with specific intent, any Respondent; publishing, republishing or redistributing directly or indirectly, the Deadly Dozen and Crist posters with specific intent to threaten Respondents; providing any additional information about

Respondents, with specific intent to threaten, to the Nuremberg Files or any "mirror web site." *Id.* at 1155-56.

Petitioners appealed the jury verdict and the injunction to the Ninth Circuit Court of Appeals. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1013 (9<sup>th</sup> Cir. 2001). They claimed that their statements were protected under the First Amendment. *Id.* at 1014.

The court stated that, according to *Brandenburg v. Ohio*, 395 U.S. 444 (1969), political speech cannot be punished just because it results in making future violence more likely by a third party. *Planned Parenthood*, 244 F.3d at 1015. Because Petitioners' statements did not specifically advocate violence, they were protected unless they demonstrated that the Petitioners themselves would be the ones to harm Respondents. *Id.* The court also held that because the context of Petitioners' statements was of a public nature, they should be given much more latitude under the First Amendment than personally communicated threats. *Id.* at 1018-19. Thus, because Petitioners did not communicate privately with Respondents, nor did they state any plans for harming Respondents, the court vacated and remanded the jury verdict. *Id.* at 1019-20. The court also gave instructions to the district court to dissolve the

permanent injunction and to enter judgment for Petitioners. *Id.* at 1020.

Respondents requested a rehearing en banc, which was granted by the Ninth Circuit. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1063 (9<sup>th</sup> Cir. 2002). Like the district court, the Ninth Circuit used the reasonable speaker standard for determining whether Petitioners' statements were "true threats" under FACE, and thus not protected by the First Amendment. *Id.* at 1074. The court also held that the alleged threats should be considered within the entire factual context. *Id.* at 1075. Moreover, the court stated that it was not necessary for the speaker to be able to, or intend to be the one carrying out the threat; the only requirement for a threat to be a "true threat" is for the speaker to have the intent to communicate the threat. *Id.* The court held that under these standards, the Deadly Dozen and Crist posters, and the Nuremberg Files were true threats, thus affirming the jury verdicts. *Id.* at 1088. However, the court vacated the punitive damage award and remanded the case for reconsideration by the district court. *Id.* at 1086.

Petitioners thereafter filed a petition for certiorari, which this Court granted.



### **A SUMMARY OF THE ARGUMENT**

The First Amendment of the United States Constitution protects political speech. This includes biting remarks, coercive language, and advocacy of the use of violence. However, all political speech is not protected.

This Court has held that First Amendment protection is not given to language that incites "imminent lawless action." *Brandenburg*, 395 U.S. at 447. Speech that may, by its content, be protected, is nevertheless proscribable when it results in an imminence of violence. Thus, "fighting words" are also not protected, neither are threats. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Because of the tendency toward violent confrontations, this Court has also found it necessary to restrict certain forms of abortion protesters' speech near abortion clinics.

To determine whether political speech is a threat, it must be analyzed in light of the entire surrounding factual context. Petitioners published WANTED posters in 1993, which resulted in the killing of three physicians who provided abortions. Other violence toward abortion providers has also occurred. Petitioners openly endorse the occurrences of violence. It was in this context that

Petitioners published the Deadly Dozen and Crist posters along with the Nuremberg Files. Petitioners were aware of the close similarity between the two sets of posters when the Deadly Dozen and Crist posters were created.

Petitioners expected Respondents would be afraid as a result of being listed on the posters and in the Files. Thus, in light of the entire factual context, Petitioners' posters and the Nuremberg Files were made in a violent context, and thus are threats to Respondents.

For political speech to be a proscribable threat, it does not have to be an express threat. It just has to result in the imminence of lawless action. Neither the WANTED posters, nor the Deadly Dozen and Crist posters and the Nuremberg Files contain express threats. However, lawless action occurred as a result of Petitioners' WANTED posters. Petitioners considered the effect those posters and the Deadly Dozen and Crist posters as analogous when the second set was published. Thus it appears that Petitioners were inciting further lawless action. By inciting lawless action, Petitioners' posters and the Files fall outside of First Amendment protection.

It is not necessary for the maker of a threat to also carry it out. It is enough that the threat has evoked fear of violence for the threat to be proscribable. Petitioners

published the Deadly Dozen and Crist posters and the Nuremberg Files in the aftermath of the murder of three physicians' who had been the subjects of Petitioners' WANTED posters. Petitioners knew the murders made abortion providers afraid. Petitioners published their second set of posters and the Files, knowing their effect would be analogous to the WANTED posters. By publishing the Deadly Dozen and Crist posters and the Nuremberg Files, Petitioners caused Respondents to fear possible violence. As such, the First Amendment should not protect the posters and the Files.

For political speech to constitute a threat, the speaker does not have to directly communicate the threat. It is enough that the political speech is likely to result in imminent lawless action. Petitioners' Deadly Dozen and Crist posters and Nuremberg Files were published after the WANTED posters likely resulted in the murders of three abortion providers. Since the content of both sets of posters was similar, imminent violence is likely to result from the dissemination of the Deadly Dozen and Crist posters, and the Nuremberg Files.

Alternatively, as long as a communication is likely to reach its target, it has been communicated. From Petitioners actions in widely publishing the posters and

posting the Nuremberg Files on the Internet, it is reasonable that Respondents received the communication. As such, a reasonable person could construe Petitioners' actions as intentionally threatening Respondents.

For the above reasons, Petitioners' Deadly Dozen and Crist posters and Nuremberg Files are true threats and are not protected by the First Amendment. As such the lower court's verdict must be affirmed.

## ARGUMENT

### I. THE FIRST AMENDMENT PROTECTS CERTAIN POLITICAL SPEECH.

The First Amendment of the United States Constitution states, "Congress shall make no law...abridging freedom of speech..." As such, political speech, even though it may contain "vehement, caustic, and sometimes unpleasantly sharp attacks," is protected. *Watts v. United States*, 394 U.S. 705, 708 (1969).

Thus, a draftee's comments condemning the draft at a public, political rally stating, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," are also protected. *Watts*, 394 U.S. at 706, 708. This Court held that because of the context, a political debate, and the reaction of the listeners, laughter, the draftee's statements were merely "political hyperbole." *Id.* at 707-08.

In addition, coercive political speech is protected. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982), this Court said, "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* at 928. In that case, a boycott leader's political speech stating that boycott violators would be "disciplined" and

their names read aloud at meetings was seen as an attempt to coerce others to join the boycott and, therefore, protected by the First Amendment. *Id.* at 909-11, 927. In addition, the leader's speech was protected because it did not incite any sort of lawless action. *Id.* at 928-29.

Similarly, advocacy of the use of force or violence is also protected political speech. *Brandenburg*, 395 U.S. at 447-48. Thus, the First Amendment protects a Ku Klux Klan leader's speech made at a Ku Klux Klan rally, advocating violence to 'reavenge' the Caucasian race. *Id.* at 445, 449. However, the First Amendment does allow the government to proscribe the advocacy of the use of force if the speech incites imminent lawless action. Therefore, freedom of speech is not absolute. *Cohen v. California*, 403 U.S. 15, 19 (1971); *Chaplinsky*, 315 U.S. at 571.

II. POLITICAL SPEECH THAT INCITES IMMINENT LAWLESS ACTION, "FIGHTING WORDS," AND THREATS ARE NOT PROTECTED BY THE FIRST AMENDMENT.

This Court has stated that the First Amendment does not protect political speech that incites or produces "imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. "Preparing a group for violent action and steeling it to such action" is different from merely advocating the use of violence. *Id.* at 448. Similarly, inciting an angry crowd to riot is also

not protected by the First Amendment. *Feiner v. New York*, 340 U.S. 315 (1951), is an example of this proposition.

Feiner was making a public political speech to a crowd of both blacks and whites. *Id.* at 316-17. His purpose was to persuade the crowd to attend a local meeting. *Id.* at 317. However, during his speech, Feiner appeared to be trying to incite the blacks in the crowd to "rise up in arms and fight for equal rights" against the whites. *Id.* The crowd started to become restless on hearing Feiner's words; some members of the crowd threatened violence. *Id.* To prevent a riot, the police had to intervene and arrest Feiner. *Id.* at 318. Though the content of Feiner's speech was not objectionable, this Court held that it was unprotected because of the resultant imminence of violence. *Id.* at 319-21.

The First Amendment also does not protect "fighting words," as stated in *Chaplinsky*, 315 U.S. at 572. Chaplinsky was distributing religious literature on public streets when a police officer warned him that the crowd was becoming agitated. *Id.* at 569-70. A different officer began to take Chaplinsky to the police station when the officer who had made the earlier warning approached and repeated it. *Id.* at 570. Chaplinsky called that officer "a damned

Fascist” and then said, “the whole government of Rochester are Fascists or agents of Fascists.” *Id.* at 569-70.

His public speech was unprotected by the First Amendment because it contained words that were commonly known as words “likely to cause a fight.” *Id.* at 573-74. “Fighting words” are unprotected because they are not an expression of ideas; they are of minimal social value such that the social interest “in order and morality” outweighs any benefit potentially derived from the speech. *Id.* at 572.

In addition, the First Amendment does not protect threats. *Madsen v. Women’s Health Center*, 512 U.S. 753, 773 (1994); *Watts*, 394 U.S. at 707. Threats of violence are unprotected to safeguard people from fear of violence, the disturbance the fear creates, and the possibility that the threatened violence will actually take place. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Similarly, because of the tendency toward vicious confrontations, this Court has restricted the political speech of abortion protesters near abortion clinics. *Hill v. Colorado*, 530 U.S. 703, 709-10 (2000); *Madsen*, 512 U.S. at 758, 772-73. This Court stated that a state’s interest in protecting “the health and safety of its citizens” “may justify a special focus on unimpeded access to health care



facilities and the avoidance of potential trauma to patients associated with confrontational protests.” *Hill*, 530 U.S. at 715.

In *Madsen*, abortion protesters picketed in front of an abortion clinic’s entrances and driveway, blocking access to the clinic. 512 U.S. at 758. The protestors also made lots of noise by “singing, chanting, whistling, shouting, yelling, use of bullhorns...or other sounds or images observable to or within earshot of the patients” in the clinic. *Id.* at 772.

This Court held that a 36-foot buffer zone around the clinic’s entrances was a constitutionally valid restriction on protestors’ speech since the protestors were only prohibited from entering, picketing, or demonstrating in the area near the clinic. *Id.* at 770. Furthermore, this Court held that noise restrictions on protestors outside the clinic during certain hours of the day were also valid restrictions on their speech, “to ensure the health and well-being of the patients.” *Id.* at 772.

Likewise, in *Hill*, this Court held valid a statute regulating protestors’ speech within 100 feet of the entrance of any clinic, and prohibiting protestors from purposely approaching within eight feet of a person without that person’s consent, in order to counsel, educate or

engage in oral protest with that person. 530 U.S. at 707. Protestors in front of the clinic had hindered access, engaged in emotional altercations, and used harsh language in face-to-face confrontations with those entering and exiting. *Id.* at 709-10.

III. IN LIGHT OF THE ENTIRE FACTUAL CONTEXT, THE DEADLY DOZEN AND CRIST POSTERS, AND THE NUREMBERG FILES ARE TRUE THREATS TO RESPONDENTS AND THUS ARE UNPROTECTED SPEECH.

As has been previously stated, threats are not protected speech under the First Amendment. *Madsen*, 512 U.S. at 773; *Watts*, 394 U.S. at 707. Thus, to determine if a political statement is a threat, it must be evaluated in light of its entire factual context. *Watts*, 394 U.S. at 708. This Court has said, "utterance in context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941). Context was used by this Court as the standard of evaluation in both *Claiborne Hardware*, 458 U.S. at 928-29, and *Watts*, 394 U.S. at 708.

As was previously stated, *Watts'* public political speech stating that if he had to carry a rifle, he would first aim it at the President, was held by this Court to be

protected speech. *Watts*, 394 U.S. at 706, 708. This court made that decision based on the entire factual context. *Id.* at 708.

Furthermore, in *Claiborne Hardware*, the boycott leader's political statements may have been harsh, but no violence toward boycott violators or others occurred as a result. 458 U.S. at 928. In addition, there was no other evidence besides his public speeches that he endorsed or threatened any sort of violent behavior. *Id.* at 929. As a result, his speech was held to be protected political speech. *Id.* The Deadly Dozen and Crist posters, and the Nuremberg Files should also be evaluated based on the entire context in which they were disseminated. *Id.* at 928-29; *Watts*, 394 U.S. at 708.

Petitioners published their first group of WANTED posters in 1993. *Planned Parenthood*, 41 F. Supp. 2d at 1134-35. These posters named, described, and posted other personal information of particular physicians who provided abortions. *Planned Parenthood*, 945 F. Supp. at 1388. As a result of these posters, three physicians named on the posters, Dr. Gunn, Dr. Patterson, and Dr. Britton, along with James Barrett, Dr. Britton's escort, were shot and killed. *Planned Parenthood*, 41 F. Supp. 2d at 1134-35. In addition, Dr. Tiller was shot in both arms. *Id.* at 1135.

Petitioners publicly praised these murderous acts. *Id.* at 1134-35, 1139. They believe violence is justified; one Petitioner has stated that he advocates "killing people in just wars, and there is a war in the womb." *Id.* at 1147. Petitioner's book, *A Time to Kill*, connects justifiable homicide to clinic destruction and the shootings of abortionists. *Id.* at 1137.

In addition, Petitioners' WANTED posters and the subsequent murders of Drs. Gunn, Patterson, and Britton, as well as other anti-abortion violence and Petitioners' advocacy in support of such violence, were well known to Respondents and other abortion providers. *Planned Parenthood*, 290 F.3d at 1066. As a result of those murders, many other abortion providers were afraid, as Petitioners hoped they would be. *Planned Parenthood*, 41 F. Supp. 2d at 1139-41. It was in this atmosphere that in 1995, Petitioners published their second installment of WANTED posters, the Deadly Dozen and Crist posters. *Id.* at 1131-32. Petitioners regarded the impact of both the WANTED and this next set of posters as the same. *Id.* at 1143. In addition, both the Deadly Dozen and Crist posters contained the phrase "Guilty of Crimes Against Humanity," as did the "UnWANTED" poster of Dr. Britton published shortly before his murder. *Id.* at 1135.

The Nuremberg Files, published shortly thereafter, also contain that phrase. *Id.* at 1134-35. The Nuremberg Files list Respondents, along with the crossed out names of the murdered physicians, and the names of the wounded in gray type. *Id.* at 1133.

Law enforcement authorities warned Respondents shortly after the Deadly Dozen and Crist posters and the Nuremberg Files were published that they were among those physicians listed and should take greater security precautions. *Id.* at 1132-33. Respondents heeded the warning. *Id.* They were afraid for their lives. *Planned Parenthood*, 244 F.3d at 1016-17. Respondent Dr. Elizabeth Newhall said, "I feel like my risk comes from being identified as a target. And...all the John Salvis in the world know who I am..." *Id.* at 1016. Dr. Warren Hern, another respondent, when he heard he was on Petitioners' list, said, "I was terrified... I felt that this was a—a list of doctors to be killed." *Id.* at 1017.

Furthermore, Petitioners' admit there is an obvious correlation between those earlier posters and the posters and Files directed toward Respondents. *Planned Parenthood*, 41 F. Supp. 2d at 1143. One petitioner, while testifying as to the danger both the WANTED posters and the Deadly Dozen and Crist posters posed to the lives of abortion providers

stated, "I mean if I was an abortionist, I would be afraid." *Id.* at 1141.

Additionally, this Court has previously held certain limitations necessary on abortion protestors' public political speech near abortion clinics. *Hill*, 530 U.S. at 735; *Madsen*, 512 U.S. at 770, 772-73. This Court acknowledged that these holdings were necessary to ensure the health of the patients, as well as access to clinics, because of the propensity for confrontations and possible abuse of those entering and exiting the clinics. *Hill*, 530 U.S. at 709-10, 715; *Madsen*, 512 U.S. at 758, 770, 772.

Based on the above facts, the Deadly Dozen and Crist posters, and the Nuremberg Files were made "in a context of violence." *Milk Wagon Drivers*, 312 U.S. at 293. Unlike in *Claiborne* where the speaker did not threaten violence outside the words of his speech, nor did any violence result, Petitioners encouraged the use of violence in many ways, and have praised its use as a direct result of their actions. 458 U.S. at 928-29; *Planned Parenthood*, 41 F. Supp. 2d at 1134-35, 1139. Likewise, in contrast to *Watts*, where the listeners' reaction was laughter, Respondents feared for their lives, taking extra safety precautions to prevent their own murders. 394 U.S. at 707; *Planned Parenthood*, 41 F. Supp. 2d at 1132-33.

Thus, the Deadly Dozen and Crist posters and the Nuremberg Files appear to have lost their "significance as an appeal to reason" and, based on the entire factual context, are threats. *Watts*, 394 U.S. at 708; *Milk Wagon Drivers*, 312 U.S. at 293; *Planned Parenthood*, 41 F. Supp. 2d at 1134-35. As such, they should be found to be unprotected speech under the First Amendment and the lower court's verdict should be affirmed.

IV. EVEN THOUGH THEY ARE NOT EXPRESS THREATS, THE DEADLY DOZEN AND CRIST POSTERS AND THE NUREMBERG FILES ARE TRUE THREATS, AND AS SUCH ARE NOT PROTECTED BY THE FIRST AMENDMENT.

According to *Brandenburg*, public, political speech that incites others to "imminent lawless action and is likely to incite or produce such action," is not protected by the First Amendment. 395 U.S. at 447. This Court does not mention that the threat must be express in this standard. *Id.* In addition, as stated above in *Feiner*, even though the content of a political statement may not be proscribable, it still can be unprotected speech because of the imminence of violence that results. 340 U.S. at 320-21.

There were no explicit threats made on any of the posters, or the Nuremberg Files. *Planned Parenthood*, 41 F. Supp. 2d at 1132-36. They only said such things as "Guilty for Crimes Against Humanity," gave descriptions of abortion

providers, including such things as "baby killer," and listed those physicians killed as crossed off names on a list. *Id.* at 1132-33, 1135; *Planned Parenthood*, 945 F. Supp. at 1388. However, the Deadly Dozen and Crist posters and the Nuremberg Files were published in the aftermath of the killing of three physicians who had, shortly before their deaths, appeared on Petitioners' WANTED posters. *Planned Parenthood*, 41 F. Supp. at 1131-35. Petitioners believed the impact of both the WANTED posters and the Deadly Dozen and Crist posters and the Nuremberg Files to be analogous. *Planned Parenthood*, 41 F. Supp. 2d at 1143.

Therefore, because the WANTED posters resulted in three physicians' murders, it appears that Petitioners published the later posters and the Nuremberg Files to incite that same lawless action. *Brandenburg*, 395 U.S. at 447; *Planned Parenthood*, 41 F. Supp. 2d at 1143.

Furthermore, based on Petitioners' and Respondents' previous experience, they believed the Deadly Dozen and Crist posters, and the Nuremberg Files were "likely to...produce such action," ending in the murders of Respondents. *Brandenburg*, 395 U.S. at 447; *Planned Parenthood*, 244 F.3d at 1016-17; *Planned Parenthood*, 41 F. Supp. 2d at 1141.



Upon learning they were listed on the new posters and in the Files, Respondents feared they would be the next victims. *Planned Parenthood*, 290 F.3d at 1066; *Planned Parenthood*, 244 F.3d at 1016-17. In addition, law enforcement officers considered the posters and the Files as threats, warning Respondents upon learning their names were listed. *Planned Parenthood*, 41 F. Supp. 2d at 1132-33.

Petitioners' use of the Deadly Dozen and Crist posters, and the Nuremberg Files is "directed to inciting or producing imminent lawless action." *Brandenburg*, 395 U.S. at 447. This is all that is necessary for Petitioners' posters and the Files not to be protected; the threats need not be explicit. *Id.* Thus, just as in *Feiner*, Petitioners' non-explicit threats will incite imminent violence and as such should not be protected under the First Amendment. 340 U.S. at 319-21; *Planned Parenthood*, 945 F. Supp. at 1372.

It is also consonant with the First Amendment to construe unprotected threats to include all those that may cause "imminent lawless action." *Brandenburg*, 395 U.S. at 447; *United States v. Fulmer*, 108 F.3d 1486, 1496 (1<sup>st</sup> Cir. 1997). This is necessary to prevent clever threateners "who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat" from avoiding accountability for their actions.

Thus, threats need not be expressly made. *Fulmer*, 108 F.3d at 1496 (quoting *United States v. Malik*, 16 F.3d 45, 50 (2d Cir. 1994)).

Petitioners, through the non-explicit threats contained in their posters and the Nuremberg Files, have instilled in Respondents' minds "an apprehension of impending injury" as can be seen through Respondents' reaction to the posters and the Files. *Id.*; *Planned Parenthood*, 244 F.3d at 1016-17. Because of the imminence of lawless action, as well as the public policy considerations, Petitioners should be held liable for their actions, and the judgment of the court of appeals should be affirmed.

V. THE DEADLY DOZEN AND CRIST POSTERS AND THE NUREMBERG FILES ARE THREATS EVEN THOUGH PETITIONERS DID NOT INTEND TO CARRY THEM OUT.

This Court has stated that the purposes of excluding threats from First Amendment protection are: "to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. Therefore, it is not necessary for the maker of a threat to have also intended to carry it out. *Watts*, 394 U.S. at 707-08. The intent to make the threat, only, must be proven. *Id.*

As was aforementioned, Petitioners' publishing of the WANTED posters resulted in the murders of three physicians whose names and personal information were published on the posters prior to their deaths. *Id.* at 1134-36. Petitioners knew Respondents, and other abortion providers, feared for their lives after those murders. *Id.* at 1138. An article in Petitioner ALM's magazine, published shortly after Dr. Gunn's death, stated that his murder "sent waves of fear through the ranks of abortion providers across the country... As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." *Id.*

Petitioners then first published the Deadly Dozen and Crist posters at various ACLA rallies from 1995-1996. *Planned Parenthood*, 41 F. Supp. 2d at 1131-34. The Deadly Dozen poster was subsequently republished at other rallies, and included in ACLA's mailings. *Id.* at 1137. The Nuremberg Files were posted on the Internet after the initial display of hard copies. *Id.* at 1133-34. Petitioners admitted that both sets of posters had the same impact on abortion providers. *Id.* at 1143.

Therefore, Petitioners' intent to threaten Respondents seems apparent through such things as Petitioner's statement, "if I were an abortionist, I would be afraid,"

the relationship between both sets of posters and the danger to the lives of those listed. *Planned Parenthood*, 41 F. Supp. 2d at 1141. Had Petitioners not intended to make any sort of a threat, why would they believe Respondents would be afraid as a result of having their names published on any of the posters? *Id.*

As previously stated, Respondents were indeed afraid after hearing they were listed on Petitioners' posters and the Nuremberg Files. *Planned Parenthood*, 244 F.3d at 1016-17. Respondents were afraid of the violence that occurred to the physicians listed on the WANTED posters. *R.A.V.*, 505 U.S. at 388; *Planned Parenthood*, 244 F.3d at 1016-17. Also, Respondents' lives were seriously disrupted as a result of this fear; they began to take extra safety precautions to prevent the possibility of their own deaths as a result of being listed in Petitioners' Files and on their posters. *R.A.V.*, 505 U.S. at 388; *Planned Parenthood*, 41 F. Supp. 2d at 1132-33.

Thus, it appears Petitioners intended to communicate threats through the publishing of Respondents' names on the Deadly Dozen and Crist posters, as well as the Nuremberg Files. *Watts*, 394 U.S. at 707-08; *Planned Parenthood*, 41 F. Supp. 2d at 1141. As such it is not relevant whether or not Petitioners intended to carry out the threat themselves.

*Watts*, 394 U.S. at 707-08. To prevent Respondents from continuing to live their lives in fear, Petitioners' threats, their posters and the Nuremberg Files, should be held to be proscribed speech under the First Amendment. *R.A.V.*, 505 U.S. at 388. The judgment of the court of appeals should be affirmed.

VI. THE DEADLY DOZEN AND CRIST POSTERS, AND THE NUREMBERG FILES ARE THREATS TO RESPONDENTS, EVEN THOUGH THEY WERE NOT DIRECTLY COMMUNICATED.

As stated above, *Feiner's* public political speech was not protected because of the threat of imminent violence that occurred as a result of his words. *Feiner*, 340 U.S. at 319-321. It was not necessary that his speech be directed at anyone. *Id.* Thus, direct communication is not necessary for political speech to be proscribable, the threat of imminent violence is. *Id.*

The publication of the WANTED posters resulted in violence, the murders of three physicians. *Planned Parenthood*, 41 F. Supp. 2d at 1134-35. Many abortion providers feared for their lives as a result. *Id.* at 1138. Since Petitioners regarded the impact of the WANTED posters and the latter set as analogous, it appears that the publishing of the Deadly Dozen and Crist posters and the Nuremberg Files would also be likely to cause imminent violence. *Feiner*, 340 U.S. at 319-321; *Planned Parenthood*,

41 F. Supp. 2d at 1143. Therefore, because the publishing of the posters and the Files alone resulted in imminent violence, they are proscribable speech. *Feiner*, 340 U.S. at 319-321.

Alternatively, a communication does not have to be specifically communicated to its target if it is foreseeable that the communication will reach the target. Leigh Noffsinger, *Wanted Posters, Bullet Proof Vests, and the First Amendment: Distinguishing True Threats From Coercive Political Advocacy*, 74 Wash. L. Rev. 1209, 1234 (1999). Petitioners' wide publication of the Posters and the posting of the Files on the Internet demonstrate that they could reasonably foresee that Respondents would become aware of their existence. *Planned Parenthood*, 41 F. Supp. 2d at 1133-34, 1138. It is also likely that Petitioners wanted their threats to reach Respondents; how else would Petitioners convince Respondents and other abortion providers to stop performing abortions? *Id.* at 1138. As stated above, Respondents in fact did become aware of the Posters and the Files. *Planned Parenthood*, 290 F.3d at 1066.

Thus, Petitioners were intentionally threatening Respondents through the wide publication of the Deadly Dozen and Crist posters, and the Nuremberg Files. *Planned*

*Parenthood*, 41 F. Supp. 2d at 1131-33. Because imminent violence could be the result of both the Deadly Dozen and Crist posters and the Nuremberg Files, it is not relevant that Respondents were not the direct recipients of Petitioners' communication. *Feiner*, 340 U.S. at 319-321. Respondents did receive the communication, however, and did feel threatened by it. *Planned Parenthood*, 290 F.3d at 1066. For these reasons, Petitioners' posters and the Nuremberg Files should not be protected under the First Amendment and the lower court's decision should be affirmed.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

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