

## **INTEREST OF AMICI CURIAE**

This brief is submitted on behalf of a broad cross section of media-related organizations including many of the largest producers and distributors of filmed entertainment, broadcast and print news organizations, publishing companies, associations of working journalists, and businesses and non-profit organizations involved in the dissemination of ideas and information.<sup>1</sup> These amici have a significant interest in this matter because they rely on First Amendment protections to preserve the broadest possible scope for creative expression. In particular, they believe that the decision below not only violates established Supreme Court precedent but impairs vital First Amendment freedoms and disrupts the uniformity of federal law in ways that will have a chilling effect on artistic expression. The amici, therefore, submit this brief in support of the petition for certiorari. While the amici agree with petitioner that plenary review is appropriate, they urge, in the alternative, that the Court consider summary reversal under Supreme Court Rule 16.1.<sup>2</sup>

## **SUMMARY OF ARGUMENT**

The decision below holding that a plaintiff may survive a motion to dismiss merely by alleging that the creators of a mass distribution motion picture had a subjective intent to incite viewers to violence severely contorts the First Amendment test

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<sup>1</sup> Written consent of both parties has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37(2)(a).

<sup>2</sup> This provision provides that “[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.”

applied in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and threatens to imperil fundamental constitutional norms. If left intact, the decision will have three pernicious effects – each of which warrants summary reversal of the decision. First, the decision will significantly broaden the narrow exception to full

First Amendment protection *Brandenburg* carved out, eroding the heightened pleading burden litigants must meet to survive a constitutional challenge and exposing expression previously protected by the First Amendment to governmental and judicial sanction. Second, by requiring plaintiffs to satisfy only a single criterion – an allegation of subjective intent – , the decision unfairly subjects defendants to costly and expensive litigation that will invite significant self-censorship by artists and entertainers and provoke illegitimate “copy cat” lawsuits that will strain judicial and litigants' resources. Finally, the decision undermines the primacy and uniformity of federal constitutional law and creates perverse incentives for litigants to “forum shop” in jurisdictions applying laxer First Amendment standards.

Even if the defendants' rights could be vindicated at summary judgment or after a full trial, this possibility – lessened by the erroneous standard the court will continue to apply – is no reason to leave the decision undisturbed. Rule 16.1 provides for the efficient correction of “palpably clear cases of constitutional error,” *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), without full briefing on the merits or oral argument in order to preserve important constitutional safeguards and the Court's inherent authority as the “supreme law of the land.” Amici thus respectfully request that the Court grant the petition for the purpose of summarily reversing the court of appeals' decision.

**I. SUMMARY DISPOSITION IS WARRANTED BECAUSE THE COURT EGREGIOUSLY MISAPPLIED SETTLED FEDERAL CONSTITUTIONAL LAW.**

The decision of the Louisiana court of appeal is patently erroneous. To survive a motion to dismiss, the court held, a complaint need only allege a single claim: that the defendants

“intended . . . [to] incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers.” (Appendix To Petition For A Writ Of Certiorari at 15a (“App.”).) Once that allegation is accepted as true, “the film ‘Natural Born Killers’ would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action.” (Id.) This holding should be summarily overturned.

In permitting the plaintiffs to proceed based only on a conclusory allegation that the media defendants had a subjective intent to incite violence without satisfying the other requirements of Brandenburg – that (1) defendants directly intended for viewers to commit such violence at once, (2) that the utterance was directed at particular and identifiable viewers and (3) that immediate violence was a foreseeable and likely consequence of defendants’ expression – the court applied a significantly weaker standard than virtually every other court in the land.

In its per curiam opinion in Brandenburg, the Supreme Court overturned the conviction of a Ku Klux Klan leader under Ohio’s criminal syndicalism statute because the statute was not limited to advocacy “directed to inciting or producing imminent lawless action and likely to produce such action.” 395 U.S. at 447. In *Hess v. Indiana*, 414 U.S. 105 (1973), a majority of the Burger Court gave content to Brandenburg’s incitement to violence exception in reversing a criminal conviction based on the defendant’s loud statement that “We’ll take the f---g street later” (or “again”) as the police tried to disperse antiwar demonstrators from a public street. The defendant’s expression did not fall within Brandenburg, the Court held, because the speech was “not directed to any person or group of persons” and thus “cannot be said that [the speaker] was advocating, in the normal sense, any action.” *Id.* at 108-09 (emphasis added). Second, the expression was “at worst . . . nothing more than advocacy of illegal action at some indefinite future time” and thus was not directed at, and was unlikely to cause, imminent lawless conduct. *Id.* at 108 (emphasis added).

In the absence of such prerequisites, the Court held, Hess' statement could not be construed as "intend[ing] to incite further lawless action on the part of the crowd in the vicinity of the appellant and was likely to produce such action." *Id.* In short, under *Brandenburg* and *Hess*, for speech to be denied full First Amendment protection, it must constitute a direct exhortation to an identifiable person or persons to commit violent illegal action at or about the time of the stated expression, with a clear likelihood that such violence will quickly occur. A complaint devoid of such allegations and facts in support thereof cannot survive First Amendment challenge.

**A. Plaintiffs' Complaint Failed To Set Forth The Necessary Allegations Required By *Brandenburg*.**

While the court of appeal purported to apply *Brandenburg*, it upheld a complaint that, on its face, did not satisfy one of its central features -- "imminent" incitement to violence. The complaint contained neither an allegation of (1) a close temporal proximity between the speech in question and the subsequent illegal act nor (2) a claim that the speech was directed at particular and identifiable viewers.

**1. The Complaint Must Allege Temporality.**

*Brandenburg*'s imminence requirement is premised on the view that advocacy only is sanctionable if the speaker effectively "participates" in the violence by directing or instigating it. As Justice Holmes' wrote in *Abrams v. United States*, 250 U.S. 616, 628 (1919), "[i]t is only the present danger of immediate evil or an intent to bring it about that can justify sanctioning advocacy." *See also Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("There must be reasonable ground to believe that the danger apprehended is imminent . . . [E]ven advocacy of violence, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon.")

The requirement of temporality has two important functions, both of which were violated here. First, it provides an important mechanism for distinguishing between assertions of values and facts that, because of their expressive nature, are part of the deliberative process and thus are entitled to full First Amendment protection, and utterances that, because of their urgent, instrumental or concrete nature, are intended to, and deliberately provoke, immediate violent response. Under the latter circumstance, the speaker's expression blends conduct and speech in such a way that both speaker and hearer participate in concerted illegal activity outside the scope of First Amendment protection, with the speaker as the "aider and abettor" of the illicit actions carried out by the hearer. Such expression -- tantamount "to an instrumental communication as part of a course of action"<sup>1</sup> -- may be "constitutionally punished only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action."<sup>2</sup> As one commentator has stated: "When words are used to join a conspiracy, to give orders, or to supply instructions in furtherance of some criminal scheme . . . the law has understood that the words are not being used to express an idea or an attitude so much as they serve as signals and actions."<sup>3</sup>

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<sup>1</sup> Charles Fried, *The Oliver Wendell Holmes Devise Lecture: Perfect Freedom, Perfect Justice*, 78 B.U.L. Rev. 717 (1998).

<sup>2</sup> Kent Greenawalt, *Speech and Crime* 751 n.388 (1979-80) (quoting Thomas Irwin Emerson, *The System of Freedom of Expression* 404 (1970)).

<sup>3</sup> Fried, *supra*, at 717. For instance, modern penal law traditionally has punished certain utterances without implicating First Amendment values such as specific inducements, threats and orders to commit crimes; agreements and conspiracies to commit crimes; offers to commit criminal acts, and specific training in criminal acts. See Greenawalt, *supra*, at 742-47. As the Iowa Supreme Court stated in response to defendants' claim that their conviction for conspiring to fix prices violated *Brandenburg*: "entering into an agreement to fix prices may hardly be said to be speech, symbolic speech or expression under the

The first function of the immediacy requirement then is to serve as an important gatekeeper of First Amendment freedoms, ensuring that advocacy that does not constitute an inducement to commit immediate illegal acts is not swept within the ambit of governmental sanction. This standard recognizes that “[t]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” *Noto v. United States*, 367 U.S. 290, 297-98 (1961). See also *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).

Second, the immediacy requirement recognizes that advocacy, even of violent action, poses no threat to public order unless such expression, by directly instigating immediate violent conduct, denies listeners the opportunity for a reasoned, deliberative response. As Justice Brandeis has stated: “If there is time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).<sup>4</sup> In other words, so long as advocacy does not by its urgent nature overwhelm rationality, it retains its fully protected expressive character.

In this case, plaintiffs’ conclusory assertion that defendants’ intended viewers to commit crime sprees “shortly after repeatedly viewing” the movie was insufficient on its face to satisfy *Brandenburg’s* imminence test. This is clear both from the case law and the facts alleged. Indeed, according to the plaintiffs own recitation of the facts, the perpetrators did not commit the crime in question until after “travelling cross-country to Louisiana” – a joy ride that necessarily involved

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ambit of Amendment 1.” Greenawalt, *supra*, at 743 & n.371 (quoting *State v. Blyth*, 226 N.W.2d 250, 265 (Iowa 1975)).

<sup>4</sup> See also E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control Of Media-Related Imitative Violence*, 38 Fed. Com. L.J. 317, 376 (1987) (“Prettyman & Hook”) (“where sufficient time exists for rebuttal and consideration, the Supreme Court has long assumed that additional speech will prevent the harm”).

considerable delay. (App. at 733a.) But, as indicated above, *see supra* at 5-7, the twin functions of the immediacy requirement mandate contemporaneous violent action. *See* Prettyman & Hook, *supra*, at 377 (“*Brandenburg* requires the advocacy to be so closely related to the harmful action that more speech could not have prevented the harm.”). For instance, in *Hess*, the Court accepted the state court’s view that the defendant’s use of the word “later” meant that the taking of the street could be performed not immediately but at some subsequent time. As one commentator has noted, “if *Hess* really did mean to urge illegal action, common sense tells us that ‘later’ must have meant later during the date of demonstration; so the opinion seems to mean that in that setting at least, illegal action some hours hence is not imminent.” Greenawalt, *supra*, at 651. “Even if ‘imminent’ contains some degree of flexibility, the term connotes and is used by the Court to suggest a very short time span between an incitement and the hoped-for action.” *Id.* Like “later,” “shortly after repeatedly viewing” does not connote the immediate, urgent inducement to violence contemplated by *Brandenburg*, as the perpetrators’ delayed response confirms.

Moreover, plaintiffs’ attempt to add a new gloss on the imminence test by focusing on the impact of repetition finds no support in the case law. In essence, the complaint advances the allegation that defendants intended viewers to repeatedly watch the movie and that this repetition provoked violent imitative crime from its viewers. On this basis, alone, the complaint should have been dismissed. Advocacy that is not direct, forceful and intentional enough *on its own* to provoke immediate response without repeated viewing simply does not constitute the kind of expression that is so concrete, conduct-based and imperative as to pose a credible, immediate threat of violent lawless action. To the contrary, the very need for repetitive viewing implies both that the expression is too weak and abstract to induce immediate violence and that there is sufficient delay between showings and between showings and deed to allow for considered response.

That plaintiffs needed to bolster their allegation with the claim that the perpetrators viewed the movie “sometimes under the influence of mind-altering drugs,” (App. 5a), only underscores the deficiency of their pleading since there was no allegation that the advocacy itself -- without the distortions caused by “mind-altering drugs” -- induced an immediate violent response. “Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct ‘incitement to imminent violence.’” *McCullum v. CBS*, 202 Cal. App. 3d 989, 1001 (1988).

Plaintiffs’ allegation that the movie “glorifi[ed] . . . violent acts” by depicting criminals as “celebrities and heroes,” (App. 33a), also could not meet *Brandenburg*’s objective requirement of a direct inducement to violence since, by definition, glorification is an indirect, non-instructive means of conveying a particular viewpoint. Indeed, the plain meaning of “glorification” is to “bestow[] honor, praise or admiration”<sup>5</sup> – hardly the kind of direct, inducement to immediate violence *Brandenburg* requires.

The court’s reliance on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), to hold otherwise was misplaced. *Paladin* should have *confirmed*, not refuted, defendants’ position that plaintiffs’ claims were barred by the First Amendment. In *Paladin*, the defendant had stipulated that “it actually intended to provide assistance to murderers and would-be murderers which would be used . . . ‘upon receipt’” of the defendant’s books “Hit Man: A Technical Manual for Independent Contractors” and “How to Make a Disposable Silencer.” *Id.* at 242. Because of the admitted instrumental nature of defendant’s “expression,” the court held that it did not involve pure speech but fell within the “speech-act doctrine [that] had long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses.” *Id.* at 244. The defendant’s books concededly “aided and abetted the murders at issue through the

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<sup>5</sup> Merriam Webster’s Collegiate Dictionary (10th Ed. 1995).

quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed . . . as if the instructor were literally present with the would-be murderer.” *Id.* at 249.

In this case, however, plaintiffs have not alleged, and indeed cannot allege, that the media defendants provided the sort of detailed assistance and counseling in how to commit violence present in *Paladin*. The fact that a film may “glamorize and thereby indirectly promote[] such conduct,” *Id.* at 266, does not bring it within the “speech-act” doctrine. As the court in *Paladin* itself noted, if there is no “basis for a permissible inference that the ‘speaker’ intended to assist and facilitate the criminal conduct described or depicted,” the expression remains constitutionally protected. *Id.*

1. **The Complaint Must Allege An Inducement To Particular And Identifiable Viewers.**

Plaintiffs’ complaint also failed to satisfy the imminence requirement because there was no allegation that the speech was directed at any particular viewers. Speech directed toward everyone in general and no one in particular is not the sort of incitement to imminent illegal action contemplated by *Brandenburg* because the speaker, by definition, has no specific hearers he or she is trying to compel to action. See, e.g., Lawrence Tribe, *American Constitutional Law* 848 n57 (1988) (the fact that the Hess defendant’s “remarks were directed at no-one in particular” suggested that they “might not have constituted an incitement sufficient to meet *Brandenburg*’s first test”). Without such a nexus between speaker and listener, it would be inappropriate to impose liability on the former for the latter’s conduct.

Because plaintiffs could not credibly claim that a major motion picture company intended to prompt any particular viewer or every single viewer to leave the theater and immediately attack everyone in sight, the best they could do was allege that “persons such as Edmonson and Darrus” were intended to commit violence. But this group is too broad and amorphous to be the intended subjects of a real and immediate

provocation to action. Since the movie was broadly released to hundreds of thousands of viewers around the world – all unknown and unidentifiable – , there is no basis to establish the necessary link between utterer and viewer necessary for the imposition of tort liability.

Numerous courts have reached the same conclusion. For instance, in *Waller v. Osborne*, 763 F. Supp. 1144, 1150 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), the court rejected a claim that a teenager committed suicide after repeated exposure to the music of Ozzy Osbourne. Despite the court's belief that it was likely "irresponsible and callous for a musician with a large teenage following . . . to portray suicide in any manner other than a tragic occurrence," the court held that "[t]here is no indication whatsoever that defendants' music was directed toward any particular person or group of persons" and that no one could "rationally infer . . . from the lyrics" an intent to incite anyone actually to commit suicide. 763 F. Supp. at 1151 (emphasis added). Likewise, in *Catholic War Veterans of the United States, Inc. v. City of New York*, 576 F. Supp. 71 (S.D.N.Y. 1983), the Southern District of New York dismissed in part on First Amendment grounds a complaint alleging in conclusory terms that the constitutional and civil rights of plaintiffs would be violated by the holding of a "Gay Pride Parade." The court found that the plaintiffs' conclusory allegations that the parade should be blocked "based on the possibility that an unidentified handful of participants may engage in unlawful conduct" could not survive First Amendment scrutiny, warranting dismissal of the complaint. *Id.* at 75. See also *People v. Mighty*, 535 N.Y.S.2d 944 (1988) (dismissing information charging defendant with inciting to riot because the activity alleged did not create a "clear and present danger of riotous conduct, or intended . . . riot"); *Davidson v. Time Warner, Inc.*, No. V-94-006, 1997 WL 405907, at \*21 (S.D. Tex. Mar. 31, 1997) (rejecting plaintiff's claims that defendant's rap music had provoked imitative violent acts "because there was no showing that the illegal conduct. would imminently occur after listening to the album.").

In sum, because plaintiffs' complaint failed to allege an inducement to immediate violent action to an identifiable set of viewers, it could not overcome, as a matter of law, the insuperable First Amendment bar to tort liability. In a virtually identical lawsuit, the State Court of Fulton County, Georgia reached this very conclusion.<sup>6</sup> The Louisiana court of appeal erroneously failed to do the same.

**A. Plaintiffs' Complaint Failed To Allege That Violence Was A Likely And Foreseeable Outcome Of Defendants' Expression.**

As if the court's failure to faithfully apply Brandenburg's imminence test was not egregious enough, it also ignored another fatal deficiency in plaintiffs' pleading: omission of any allegation that violence was the likely and foreseeable result of defendants' expression. Brandenburg's "likelihood" test, like its "incitement" test, requires an objective showing that the likely outcome of particular expression was violence; without such a likelihood, there can be no immediate threat to public order sufficient to withhold full First Amendment protection. See *Tribe*, supra, at 848 n.57 (because there was no evidence in *Hess* that the defendant's remarks "were likely to produce any imminent disorder . . . Brandenburg's second test was not met"). In this case, plaintiffs' complaint failed to include any allegation that violence was a foreseeable and likely outcome of defendants' expression.

Indeed, because the expression at issue was disseminated impersonally on a mass basis, it is doubtful that plaintiffs could have met such a standard even if they had tried. To date, virtually every reported case that has found imminent incitement under Brandenburg has involved live, direct incitement, which is more likely than inanimate expression through books, films and television programs to foment a

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<sup>6</sup> See *Miller v. Warner Bros., Inc.*, No. 96vs117599-F (Fulton Cty. Ga. Dec. 3 1996) ("the lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio* . . . , which protects statements except direct incitement to imminent unlawful action.")

crowd to violence and overcome rational deliberation. As one court has stated: “[n]either common sense nor the First Amendment . . . permit a court to equate a recorded presentation of a story with a call to arms.” *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1002 (1988).

This Court should defend the position adopted in previous cases that the fact that a few aberrant individuals may react violently to certain expression does not mean that imminent lawless action is a “likely” outcome as a matter of law. This is particularly true where, as here, the expression at issue is non-direct. For instance, in *Cohen v. California*, 403 U.S. 15 (1971), the Court recognized that “[t]here may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.” *Id.* at 22. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (finding significant the lack, with one possible exception, of violence immediately after the speech in question); *Davidson*, 1997 WL 405907, at \*20-22 (“swaying the weak-willed does not remove constitutional protection from speech”).

To adopt a weaker standard, would force the purveyors of expression to target their works at the level of the most vulnerable and unstable persons in society – an impermissible result in a society that must give the widest possible breathing space to freedom of expression. See *McCollum*, 202 Cal. App. 3d at 1002 (“[I]t is simply not acceptable to a free and democratic society to impose a duty on performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may affect emotionally troubled individuals.”); *Davidson*, 1997 WL 405907 at \*20-22 (“broadcasters . . . would be chilled into producing only the most mundane, least emotional material”).<sup>7</sup>

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<sup>7</sup> As one commentator stated:

The result of imposing upon television and movie producers the duty of avoiding any scene that could possibly

**A. The Court Of<sup>13</sup> Appeal Ignored The Heightened Pleading Burden For Claims Implicating The First Amendment.**

At bottom, the decision below ignored a central feature of First Amendment jurisprudence – that artistic expression must be treated as presumptively constitutional unless and until it is shown that it falls within a specific and narrowly drawn exception. This presumption is reflected not only in the Court’s First Amendment jurisprudence but in the rules of civil procedure. Causes of action that implicate First Amendment values require plaintiffs to meet a higher pleading burden in order to safeguard important constitutional rights. As the Ninth Circuit has noted, “the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.” *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 17, 1998) (No. 98-810).

For this reason, unlike pleadings in other contexts, no liberal construction generally is accorded complaints implicating the First Amendment. *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 1244, at 302 (1990) (“[T]he standard for successfully pleading defamation tends to be more stringent than ordinary suits because of the unfavored nature of this type of action and the desire to discourage what some believe to be basically vexatious litigation.”). For instance, in *National Bowl-O-Mat Corp. v. Brunswick Corp.*, 264 F. Supp. 221 (D.C.N.J. 1967), the court dismissed a defamation counterclaim in part because “the defendant failed to set out the alleged defamatory statements with sufficient particularity to allow the court to determine if they would support the action.” Wright & Miller, *supra*, § 1357, at 359. “If the court had applied the usual liberal

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trigger violent reaction in a few individuals would be a timidity and blandness in programming that few of us would be prepared to accept.

Prettyman & Hook, *supra*, at 379.

standard for construing a complaint, it probably would have assumed, for purposes of the motion, that the statements were defamatory . . . . “ *Id.* See also *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., with whom Kennedy, J., joins, concurring) (citing with approval a case applying a higher pleading standard for claims involving presumptively protected First Amendment expression).

In this case, the court’s failure to apply a heightened pleading burden and a narrow construction to plaintiffs’ complaint gave insufficient priority to First Amendment values. The court blithely accepted plaintiffs’ conclusory allegations and “footless conclusions of law,” *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957), when the proper disposition was dismissal. See *Jackson v. Nelson*, 405 F.2d 872 (9th Cir. 1968) (dismissing a civil rights complaint for failure to state a claim when the complaint contained conclusory statements); *Sutton v. Eastern Viavi Co.*, 138 F.2d 959, 960 (7th Cir. 1943) (“No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed . . . .”); *Davis v. City of Portsmouth*, 579 F. Supp. 1205, 1210 (E.D. Va. 1983) (“More detail often is required than the bold statement by plaintiff that he has a valid claim of some type against defendant.”), *aff’d*, 742 F.2d 1448 (4th Cir. 1984). See also *Wright & Miller, supra*, § 1357, at 318 (“[T]he court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself.”). The decision should be summarily overturned.

**I. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.**

**A. Summary Reversal Is Consistent With The Court’s Previous Application of Rule 16.1.**

Where, as here, a lower court clearly has misapplied established Supreme Court precedent, this Court frequently has granted a petition for purposes of summary disposition without full hearing on the merits. See, e.g., *Olden v. Kentucky*, 488

U.S. 227 (1988);<sup>15</sup> *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977). As Chief Justice Warren has stated: “There are many instances where the Court, without granting plenary review, has summarily reversed, remanded or taken other direct action to achieve what the Justices conceived to be essential justice.”<sup>8</sup> See also Robert L. Stern *et. al.*, *Supreme Court Practice* 247 (1993) (“This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument” is unnecessary.).

Summary disposition is particularly appropriate where a state court has derogated federal law since “the Supreme Court is the only tribunal with power to oversee compliance by state courts with the dictates of the federal Constitution and laws.”<sup>9</sup> “If the Court, by failing to correct error when it has the opportunity to do so, allows state courts to deny federal rights, the supremacy clause could easily become little more than an exhortation.”<sup>10</sup> Such a concern is most acute where fundamental rights are at stake.

This Court’s per curiam decision in *Watts v. United States*, 394 U.S. 705 (1969), is instructive. In *Watts*, during a public rally at the Washington Monument, the speaker, in protesting the draft, stated that “[i]f they ever make me carry a rifle, the

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<sup>8</sup> Warren, *The Proposed New ‘National Court of Appeals’* 28 REC. A. B. City N.Y. 627, 640-41, 645 (1973), cited in Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review* (“Hellman”), 44 U. Pitt. L. Rev. 795, 801 (1983).

<sup>9</sup> Hellman, *supra*, at 801 n.34.

<sup>10</sup> *Id.* See also *National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460 (1976) (summarily reversing a state court decision holding that the venue provision of the National Bank Act were permissive rather than exclusive in contravention to Supreme Court precedent); *Pease v. Hansen*, 404 U.S. 70 (1971) (summarily reversing a state court decision improperly applying an equal protection precedent).

first man I want to get in my sights if L.B.J.” *Id.* at 706. Agreeing with the defendant that the statement was nothing more than “a kind of crude offensive method of stating a political opposition the to President,” *id.* at 707, and not a credible threat, the Court summarily reversed the conviction. As in this case, the Court noted that “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” *Id.*

Likewise, in *Moore v. Arizona*, 414 U.S. 25 (1973), the Supreme Court summarily disposed of a decision of the Arizona Supreme Court affirming a denial of a pretrial writ of habeas corpus to a defendant alleging a speedy trial violation. The Court granted the petition and vacated the judgment on the ground that the court had improperly held that prejudice was the “sole touchstone” for proving a speedy trial violation in contravention of previous precedents. *Id.* *Moore* is perfectly analogous to this case in which the Louisiana court of appeal improperly held that an allegation of subjective intent was the “sole touchstone” for satisfying *Brandenburg*.

**A. Summary Reversal Is Necessary To Safeguard Important Constitutional Rights.**

In addition to being consistent with previous applications of Rule 16.1, summary reversal is necessary to preserve vital First Amendment rights. If left undisturbed, the decision will cause three significant constitutional harms. First, in dramatically reducing the requirements litigants must meet to fit within *Brandenburg*, the decision erodes the heightened pleading burden litigants must meet and places within the ambit of governmental sanction previously fully protected expression. In so doing, the decision creates the risk that *Brandenburg* will cease to be a narrow, rarely satisfied exception and become a general, easily invoked principle – the “exception” that swallows the rule. Such a result will significantly reduce the scope of constitutional protection for expressive content, causing a chilling effect on the free and full dissemination of ideas.

Second, by allowing<sup>17</sup> plaintiffs to subject defendants to the continued costs of litigation, with its attendant risks of self-censorship, the decision denies defendants the very protections the First Amendment is designed to provide; continued litigation is *itself* a reduction in First Amendment freedoms. Defending against an action that survives a motion to dismiss or for judgment on the pleadings is costly. The escalating expenses – financial and otherwise – of discovery and pre-trial procedures are enormous and create a significant incentive to avoid further litigation, either by settling constitutionally meritless claims, or by avoiding potentially controversial expression in the first instance. The First Amendment does not countenance either result. The Constitution requires courts to protect free and unfettered expression not only against judicial penalization of the speech but equally against legal proceedings that constrict unfettered expression by inducing self-censorship. If plaintiffs unable to meet the stringent *Brandenburg* test can nonetheless impose the costs of litigation on artists, producers and distributors, the protections guaranteed by the First Amendment are by that very fact significantly diminished.

Finally, the anomalous decision, if left intact, will undermine the uniformity of federal law and permit a state court to trample upon well-established constitutional norms. The deviation of lower courts from fundamental constitutional principles will create uncertainty as to the reach of First Amendment protection and generate perverse incentives for litigants to forum shop in jurisdictions applying less stringent standards.

Even if, as expected, defendants ultimately prevail on summary judgment or at trial, they will be unable to secure review by this Court of the state appellate court's ruling on the pleadings. That ruling will thus stand, creating a continued source of confusion about the meaning and proper application of this Court's precedents and encouraging "copy cat" suits involving protected expression. The consequences of such an uncabined intrusion on fundamental constitutional values are potentially devastating. It would be a sad day indeed if the

creators of important artistic works – such as *Amistad*, *The Deer Hunter*, *Roots*, *Apocalypse Now*, *The Godfather*, *Taxi Driver* and *Schindler's List* – were forced to spend considerable time and resources defending their works merely because a few aberrant individuals mimicked the powerful scenes depicted. It would be sadder still if, out of fear of tort liability, such works remained on the cutting room floor.

### **CONCLUSION**

For the reasons stated above, amici respectfully request that the Court grant the petition and summarily reverse the decision below.

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04/5/02

## **Amici**

- Motion Picture Association of America
- Recording Industry Association of America
- National Cable Television Association
- National Association of Broadcasters
- Directors Guild of America
- American Film Marketing Association
- Video Software Dealers Association
- Los Angeles County Bar
- Software and Information Industry Association
- Comic Book Legal Defense Fund
- Authors Guild
- American Booksellers Foundation for Free Expression
- Periodical & Book Association of America
- Independent Producers Association
- Producers Guild of America
- California Broadcasters Association