

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED FOR PEACE AND JUSTICE, :  
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 Plaintiff-Appellant, :  
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 :  
 vs. : No 03-7301  
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 The CITY OF NEW YORK; MICHAEL :  
 BLOOMBERG, Mayor of the City of New York; :  
 and RAYMOND KELLY, Commissioner of the :  
 New York City Police Department, :  
 :  
 :  
 Defendants-Appellees :  
-----X

**BRIEF OF *AMICUS CURIAE*,**  
**BRENNAN CENTER FOR JUSTICE,**  
**IN SUPPORT OF PLAINTIFF**

Laura K. Abel  
Burt Neuborne  
Craig Siegel  
David S. Udell (4762)  
BRENNAN CENTER FOR JUSTICE  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013  
(212) 998-6172

Counsel for *Amicus Curiae*

**INTEREST OF AMICUS CURIAE**

The Brennan Center for Justice at New York University School of Law ("Brennan Center") seeks leave to participate as an *amicus curiae* in this case in support of the plaintiff.

The mission of the Brennan Center is to honor the legacy of former U.S. Supreme Court Justice William J. Brennan, Jr., by promoting equality and human dignity, while safeguarding fundamental freedoms. The particular interest of the Brennan Center in this case arises out of Justice Brennan's historic role in forging First Amendment doctrine that protects our right to engage in forms of free expression and protest that are available to all, regardless of the size of one's pocketbook. In a world in which access to mass communication is priced far beyond the means of the average New Yorker, continued protection of the right to engage in protest parades and marches, the traditional low-cost speech of the poor, is crucial to the continued existence of a genuine free market in ideas.

With respect, the well-intentioned decision below permitted the blanket suppression of a classic protest march on the basis of undifferentiated fears that cannot possibly justify government censorship. A generation ago, similar fears concerning violence and security were utilized throughout the Nation to ban civil rights marches in, among other cities, Birmingham, Alabama; Selma, Georgia; and Chicago, Illinois. The

Supreme Court, often speaking through Justice Brennan, refused to permit even well-meaning authorities to elevate fear to a level where it eclipsed our First Amendment heritage.<sup>1</sup> What was true for Birmingham, Selma, and Chicago in the 1960's, is true for New York City today. Undifferentiated fears concerning security simply cannot justify a blanket ban on an anti-war protest march without profoundly eroding our First Amendment rights.

### ARGUMENT

On the first anniversary of the attacks on the World Trade Center, Mayor Bloomberg warned that a generalized fear of such threats can be as harmful as the threats themselves:

[T]he most important thing is that we not allow the terrorists' primary weapon, which is fear, to take away our confidence, to take away our freedom, to take away the strength and courage we have shown over the past year.

Janny Scott, *Threats and Responses: The Anniversary, Many*

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<sup>1</sup> The Supreme Court has unequivocally held that a mere subjective fear of a breach of the peace, which is unsupported by objective and credible evidence, can never justify the suppression of First Amendment activity. See *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing breach of peace convictions based on government's subjective and unsupported fear of violence); *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing conviction for disturbing the peace based on government's unsupported fear that violence was about to erupt because of opinions expressed); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (reversing conviction of demonstrators who "marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools").

*Observances*, N.Y. Times, Sep. 11, 2002, at A1.

Mayor Bloomberg's wise counsel was simply ignored below. Instead, both the Police Department and the District Court allowed themselves to be stampeded by fear into refusing to permit a traditional, peaceful protest march designed to express opposition to the apparently imminent war with Iraq. Echoing Mayor Bloomberg, if fear over security has so permeated this City as to erode its historic commitment to free speech, then the terrorists will indeed have won a major victory in forcing us to retreat from the values that define us as a free society.

There is, moreover, a self-fulfilling prophecy inherent in the City's action in denying a parade permit. If the City authorities are so fearful that they are forced to retreat from the preservation of First Amendment values, how can the rest of us be expected to maintain "confidence" in the difficult days to come. *Cf. Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (warning that a ban on "For Sale" signs, intended to stop panic selling by white homeowners, "actually may fuel public anxiety over sales activity by increasing homeowners' dependence on rumor and surmise"). If the highly trained New York City Police Department, which has handled countless marches and parades in the past without incident, cannot cope with the plaintiffs' march, how can it be safe for New Yorkers to go about their daily lives without giving in to

fear?

*Amici curiae* believe that when the Court carefully considers the evidence the City has put forward, and when the Court bears in mind its special duty to preserve freedom of speech for all in a time of national debate over a threatened war, the Court will find that the City has not satisfied its burden of producing powerful evidence of need, not mere undifferentiated apprehension, before suppressing First Amendment activity. Brandenburg v. Ohio, 395 U.S. 444 (1969); Cox v. Louisiana, 379 U.S. 536 (1965).

No one working or living in New York City can afford to ignore the security warnings issued by our government, or the very real attacks levied on our City in September 2001. It is, however, precisely in perilous times such as these - when there are both real and perceived threats to our security - that the government is most tempted to curtail more freedom than is necessary to ensure security. It is, consequently, precisely at these times that the role of the courts in resisting political pressures in order to preserve freedom of speech is at its most important. See Blasi, *The Checking Value of the First Amendment*, 1977 Am B. Found. Reas. J. 521.

The role of the courts in safeguarding First Amendment rights is particularly important when, as here, the speech at issue is directed against the government. See *Velazquez v.*

*Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001) ("The strongest protection of the First Amendment's free speech guarantee goes to the right to critici[ze] government or advocate change in governmental policy.")

As the district court noted, time and again, the Supreme Court has warned that the courts cannot permit the government to curtail freedom of speech based solely on undifferentiated warnings of threats to security:

When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). This is true in times of war no less than in peacetime. See, e.g., *Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 503, 508 (1969) (rejecting, as based on "undifferentiated fear or apprehension of disturbance," a ban on the right of students to wear armbands signaling opposition to war in Vietnam). See also *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (rejecting as insufficiently related to the speech at issue terrorist threats and other

threats of violent attacks).

Despite its acknowledgement of this principle, the district court held that the City had presented sufficiently concrete evidence that it was unable to sufficiently minimize the security risks resulting from a march.<sup>2</sup> The court relied on two alleged threats to the United Nations, neither of which was in any way related to a protest march. Particularly since the City has already authorized a large demonstration in the vicinity of the United Nations, there does not appear to be any evidence that the presence of a protest march would increase the level of threat to the United Nations.

The City is particularly hard-pressed to demonstrate that its blanket refusal to issue a permit for a march is necessary to avoid undue security risks because its blanket ban applies throughout New York City, without attempting to distinguish between those areas where there are valid fears as to security, and those where there are not. Moreover, in light of New York City's undisputed experience handling large parades and marches, see Pls.' Br. at 3, and its granting of a permit for a large

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<sup>2</sup> The Supreme Court has warned that appellate review in a First Amendment case such as this must include "'an independent examination of the whole record,' so as to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)); see also *Thomas v. Board of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 n.12 (2d Cir. 1979).

parade next month, *id.*, the City's assertion that it needs more time and information to plan for the logistics of the plaintiff's march rings hollow.

Amici do not quarrel with the City's right to insist that the route of a protest march be designed to minimize particularized concerns over security. But the City's insistence on imposing a blanket ban on the holding of an anti-war protest march, regardless of the route it takes, poses a threat to our constitutional values that is every bit as dangerous as the generalized security concerns expressed by the City. As Mayor Bloomberg has wisely counseled, generalized fear cannot be the fifth column that erodes our way of life.



**CONCLUSION**

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the opinion of the district court and grant a preliminary injunction to the plaintiff.

Dated:       New York, New York  
              February 11, 2003

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Laura Abel  
Burt Neuborne  
Craig Siegel  
David S. Udell (4762)

BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW  
161 Avenue of the Americas, 12<sup>th</sup> fl  
New York, New York 10013  
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