**ORAL ARGUMENT REQUESTED**

**CASE NO. 19-15148**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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KIARA ROBLES

Plaintiff-Appellant
v.

ANTIFA, et al

Defendants-Appellees.

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APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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# APPELLANT'S INITIAL BRIEF

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**Dated**: June 3, 2019

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## JURISDICTIONAL STATEMENT

The basis for the U.S. District Court for the Northern District of California ("District Court") subject-matter jurisdiction is pursuant to 28 U.S.C. § 1331 under Federal Question Jurisdiction. The basis for the U.S. Court of Appeals for the District of Columbia Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. Pursuant to the order of the Court, Appellants' Initial Brief is due June 3, 2019.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by revoking the *pro hac vice* admission of Mr. Larry Klayman ("Mr. Klayman"), leaving Plaintiff-Appellant Kiara Robles ("Ms. Robles") without counsel?

2. Did the District Court err by dismissing claims against the Individual Defendants-Appellees, Janet Napolitano and Nicholas Dirks?

3. Did the District Court err by dismissing claims against the City of Berkeley?

4. Did the District Court err by dismissing claims against the ANTIFA Defendant-Appellees, Raha Mirabdal and Ian Dabney Miller?

## STATEMENT OF THE CASE

This case is based on the Defendants-Appellees' Defendants' wrongful steadfast refusal to permit speech and other expression that they do not agree with.

Defendants-Appellees, each of whom were acting in concert, have subjected UC Berkeley students and invitees who do not subscribe to the radical, left wing philosophies sanctioned by Defendants-Appellees to severe violence and bodily harm for merely expressing a differing viewpoint and sexual preference, in clear contravention of their rights under the First Amendment to the U.S. Constitution. Ms. Robles just happened to be one of those individuals.

On February 1, 2017, Ms. Robles attended a planned speech by Milo Yiannopoulos ("Mr. Yiannopoulos"), a media personality and political commentator, hosted on the UC Berkeley campus. On the day of Mr. Yiannopoulos' speech, however, over 1,500 "protestors" gathered at UC Berkeley's Sproul Plaza and the "protestors" erupted into violence just fifteen minutes after Plaintiff's arrival onto the UC Berkeley campus. The violence was primarily orchestrated by ANTIFA and its members, in an effort to disrupt, if not kill, the event. Several people, including Ms. Robles, were intentionally and violently attacked by both masked and unmasked defendant assailants, including Defendant-Appellees Ian Dabney Miller and Raha Mirabdal, and the UC Berkeley campus incurred over $100,000 worth of damage. Ms. Robles was attacked with extremely painful pepper spray and bear mace by masked ANTIFA assailants amongst the "protestors" because she chose to exercise her right to freedom of speech and show support for Mr. Yiannopoulos.

Shockingly, while Ms. Robles and others were being violently attacked and assaulted by ANTIFA members, nearly 100 campus police and Defendant-Appellee Berkeley police officers waited in the Student Union building, within eyesight and earshot of the violence happening outside. They did nothing except watch the chaos and violence unfold outside. In contrast, in August of 2017, just months after the Yiannopoulos event, Defendant-Appellee Berkeley "provided '500 officers' for a protest against President Trump in August of 2017." This dichotomy, and thus discrimination, shows a clear custom and practice by Berkeley to withhold police protection for events spotlighting viewpoints they do not agree with, such as the Yiannopoulos event, while using their resources to ensure that events that that fall in line with their leftist viewpoints, such as an anti-Trump rally, occur without incident.

Furthermore, the Individual Regents Defendant-Appellees, Janet Napolitano and Nicholas Dirks, oversee and are responsible for the actions and inactions of UC Berkeley, as well as its police force, UCPD. It is also undisputable that those in positions of power and authority had made their ultra-leftist beliefs, which happen to oppose Plaintiff and Yiannopoulos, widely known. For instance, Defendant-Appellee Dirks, the former Chancellor of UC Berkeley, has called Mr. Yiannopoulos "a troll and provocateur who uses odious behavior in part to 'entertain,' but also to deflect any serious engagement with ideas. ECF No. 58 ¶

76. Furthermore, as set forth in the Amended Complaint "UC Berkeley regularly provides police protection for politically charged events and protests on its campus without incident." ECF No. 58 at 5. However, even though it was more than "reasonably foreseeable" – indeed it was almost certain – that violence would erupt at the Yiannopoulos event, the Individual Regents Defendants-Appellees, acting in their individual capacities, ordered the withholding of police protection and left UC Berkeley's students and invitees who happen to fall within the minority, such as Plaintiff, to be violently assaulted by ANTIFA members with no assistance. ECF No. 58 ¶ 16. The Individual Regents Defendants-Appellees, in their individual capacities, made an affirmative choice and took affirmative action to withhold police protection – instead ordering a stand-down – knowing full well that persons attending the Yiannopoulos event would be severely injured. ECF No. 58 ¶ 30.

In furtherance of this patent bias against those who do not proscribe to their own ultra-leftist, radical beliefs, the Defendant-Appellees, working together in concert, now have directly caused the serious injuries suffered by Mr. Robles and others at the Mr. Yiannopoulos event by directing and ordering the conscious withholding of police protection with the actual knowledge, if not intent, that they would be severely injured by ANTIFA rioters. ECF No. 58. ¶ 16. This behavior is not only unconstitutional, as it effectively cuts off First Amendment rights, but is

also extremely dangerous. While fortunately no one was killed by ANTIFA rioters this time, it is only a matter of time before someone is, given that their assaults are carried out with deadly weapons, such as flagpoles. It is shocking to think that the Individual Regents Defendants-Appellees and Berkeley, who are entrusted with administering to the safety of UC Berkeley students and invitees, would think so little of those that happen to hold different beliefs that they would dare risk their lives. This callous, tortious, and discriminatory behavior must be put to an end, and those who have been injured, such as Ms. Robles, must be given legal recourse.

Regrettably, however, Ms. Robles and her counsel of choice, Mr. Klayman, have encountered serious due process and the denial of other constitutional issues and rights in simply trying to prosecute her claims against the Defendants-Appellees. The Honorable Claudia Wilken ("Judge Wilken") has exhibited extra-judicial bias and animus towards Mr. Klayman and without any basis, revoked Mr. Klayman's *pro hac vice* admission. Judge Wilken did so despite the fact that Ms. Robles and her local counsel, Mr. Michael Kolodzi ("Mr. Kolodzi") – who had been retained solely to satisfy *pro hac vice* requirements – both submitted sworn affidavits that this case would not be able to proceed without Mr. Klayman serving as lead counsel. EOR 074 - 077. Ms. Robles swore under oath that:

> Should this Court revoke Mr. Klayman's *pro hac vice* status, I do not believe that I will be able to find another attorney to represent me. Since this case has been filed, I have been threatened by who I believe are members of Defendant ANTIFA. Even before the filing of this

> case, I had enormous difficulty finding an attorney who would represent me in this matter, especially given the fact that some of the Defendants are members of ANTIFA. Mr. Klayman is the only attorney that I was able to find who was ready, willing, and able to file this case and litigate it. EOR 074 - 075.

Mr. Kolodzi further swore under oath that "[s]hould this Court revoke Mr. Klayman's *pro hac vice* status, I will be unable to continue representation of Plaintiff Kiara Robles on my own, due to a lack of available time and resources." EOR 077. Judge Wilken, however, completely disregarded these sworn affidavits, and in doing so, knowingly and intentionally left Ms. Robles without counsel even when there were pending motions to dismiss to oppose. This has significantly prejudiced Ms. Robles, and left her without any possible way for her case to proceed. In effect, by revoking Mr. Klayman's *pro hac vice* admission, Judge Wilken herself decided the case on the merits in favor of Defendants-Appellees by making it impossible for Ms. Robles to proceed.

This forced Ms. Robles to move to disqualify Judge Wilken on the grounds that Judge Wilken had exhibited a pattern and practice of manifestly exhibiting through patently and intentionally false or misleading factual findings extrajudicial bias and prejudice towards Ms. Robles and her counsel of choice, Mr. Klayman and Mr. Kolodzi, that required disqualification under the express provisions of 28 U.S.C. § 144. Ms. Robles set forth that Judge Wilken's extrajudicial bias likely stems from her past connection with and affinity to U.C. Berkeley, who had been a

Defendant in the case and where Judge Wilken had attended law school and taught for many years. Unsurprisingly, however, Judge Wilken denied Ms. Robles motion, EOR 007 - 016, which, in conjunction with her order revoking Mr. Klayman's *pro hac vice* admission, effectively ended Ms. Robles' case by terminating it in favor of her alma mater, U.C. Berkeley.

## SUMMARY OF THE ARGUMENT

The District Court committed numerous egregious errors, many of which were apparently due to her extrajudicial bias an animus against Ms. Robles, her counsel of choice Mr. Klayman, and Mr. Kolodzi. This extrajudicial bias was likely due to the fact that Judge Wilken felt protective over her alma mater, U.C. Berkeley, which had been a Defendant in this case, and where Ms. Robles sustained her injuries.

As a result of this extrajudicial bias and prejudice, Judge Wilken ignored the law and the facts to revoke Mr. Klayman's *pro hac vice* admission, despite Ms. Robles and Mr. Kolodzi's submitting sworn affidavits that there was no way for the case to proceed without Mr. Klayman and Ms. Robles clearly demonstrating that the District Court's tentative ruling was based on misstatements of fact. As a result of this revocation, Ms. Robles was left unable to prosecute her claims against Defendant-Appellees Mirabdal and Miller.

Even before revoking Mr. Klayman's *pro hac vice* admission, the District Court erred by dismissing claims against Defendant-Appellees Janet Napolitano, Nicholas Dirks, City of Berkeley, and Raha Mirabdal. In doing so, the District Court failed to consider legal precedent submitted by Ms. Robles and the well-pled allegations of her Amended Complaint.

## STANDARD OF REVIEW

Whether the District Court properly granted Defendants-Appellees Motion to Dismiss and entered judgment on the pleadings in favor of Appellees is a question of law, which this Court reviews *de novo*. *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989). In doing so, this Court "must accept as true all facts alleged in the complaint and construe them in the light most favorable to plaintiffs, the non-moving party." *Snyder & Assocs. Aquisitions Ltd. Liab. Co. v. United States*, 859 F.3d 1152, 1157 (9th Cir. 2017).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In several cases, the U.S. Supreme Court addressed the standards for deciding motions to dismiss a complaint for failure to state a claim.

First, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court held that facts alleging that companies engaged in parallel business conduct, but not indicating the existence of an actual agreement, did not state a claim under the

Sherman Act. The Court stated that in an antitrust action, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*. at 556. The Court also explained, more generally, that ". . . a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," yet "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the claim is and the grounds upon which it rests. *Id*. at 555. In other words, Appellant here need only allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id*. at 570.

Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that the claim for relief must be "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. In this regard, determining whether a complaint states a plausible claim for relief is necessarily "a

context-specific task." *Id*. at 1950. Therefore, if a complaint alleges enough facts to state a claim for relief that is plausible on its face, such as here, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the *** claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY REVOKING MR. KLAYMAN'S *PRO HAC VICE* ADMISSION

As a threshold matter, the District Court committed serious error by granting Defendant-Appellee Berkeley's motion to revoke Mr. Klayman's *pro hac vice* admission in its August 31, 2018 order. EOR 040 - 041. This order was entered, essentially adopting the District Court's earlier tentative ruling, EOR 063 - 073, despite the fact that the tentative ruling relied on false statements of fact that Ms. Robles brought to the attention of the District Court and attempted to correct. Perhaps most egregiously, the District Court's order revoking Mr. Klayman's *pro hac vice* admission came after Ms. Robles had shown through sworn affidavits submitted by herself and local counsel, Mr. Kolodzi, that this case would not be able to proceed without Mr. Klayman's representation. EOR 074 - 077. These affidavits contained sworn statements from Ms. Robles that:

> Should this Court revoke Mr. Klayman's *pro hac vice* status, I do not believe that I will be able to find another attorney to represent me. Since this case has been filed, I have been threatened by who I believe are members of Defendant ANTIFA. Even before the filing of this case, I had enormous difficulty finding an attorney who would represent me in this matter, especially given the fact that some of the Defendants are members of ANTIFA. Mr. Klayman is the only attorney that I was able to find who was ready, willing, and able to file this case and litigate it. EOR 074 - 075.

Mr. Kolodzi further swore under oath that "[s]hould this Court revoke Mr. Klayman's *pro hac vice* status, I will be unable to continue representation of Plaintiff Kiara Robles on my own, due to a lack of available time and resources." EOR 077. Mr. Klayman even took it upon himself to explain the difficulties involved in finding counsel to prosecute a case against ANTIFA at the July 17, 2018 hearing:

> Well, here's -- here's the reality of it, is that because ANTIFA's a violent organization, because they have attacked not just my client but many other people, you probably won't be able to find another lawyer to represent her because of the risk factor involved. People don't want to do it. And that's one of the things that I've done in my 40 years, is that I take hard cases, including *Bundy*. That was a good example. People weren't volunteering for that case. EOR 085.

Yet, despite the clear showing made that there simply would be no counsel other than Mr. Klayman to represent Mr. Robles, the Court still revoked his *pro hac vice* admission, leaving Ms. Robles without any means to oppose the motion to dismiss filed by Defendant-Appellee Mirabdal, or proceed in litigating the case against Defendant-Appellee Miller, thus effectively terminating the proceedings.

Indeed, the Supreme Court has expressly recognized a strong presumption in favor of granting applications to appear *pro hac vice*. "We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member of the local bar. In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is a practice to be encouraged." *Leis v. Flynt*, 439 U.S. 438, 441-442 (U.S. 1979). Mr. Klayman's specialization is in highly-charged, politically motivated cases such as this one, and he has associated with a member of the local bar, Mr. Michael Kolodzi ("Mr. Kolodzi"). This is, therefore, the exact type of case that the Supreme Court in *Leis* has expressly held to justify *pro hac vice* admission. Furthermore, it is fundamentally ingrained in the Sixth Amendment to the Constitution that a criminal defendant is guaranteed the right to counsel of choice, including *pro hac vice* counsel. *See Powell v. Ala.,* 287 U.S. 45, 53 (U.S. 1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.") "A defendant's right to counsel of choice includes the right to have an out-of-state lawyer admitted *pro hac vice*." *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. Cal. 1996). This fundamental principle is so strong that the California Supreme Court has recognized this right in civil cases, such as the one at bar. "Ultimately, disqualification motions involve a conflict between the client's

right to counsel of their choice...." *City and County of San Francisco v. Cobra Solutions Inc.*, 38 Cal. 4th 839, 846 (Cal. 2006); See also *Khani v. Ford Motor Co*., 215 Cal.App.4th 916, 920 (Cal. App. 2d Dist. 2013). Federal courts have also adopted this fundamental principle. "The substantial relationship test balances the new client's right to counsel of choice and the former client's right to confidentiality." *N.L.A. v. Cty. of L.A*, 2016 U.S. Dist. LEXIS 134953, at *6 (C.D. Cal. Sep. 29, 2016).

Based on these fundamental principles, and the fact that Ms. Robles and Mr. Kolodzi submitted sworn affidavits that this case could not proceed without Mr. Klayman serving as lead counsel, the District Court should have ended its inquiry at that point and denied Defendant-Appellee Berkeley's motion. However, the District Court instead went out of its way to adopt false statements of fact – despite being corrected on the record by Ms. Robles and Mr. Klayman – to strain to find a way to remove Mr. Klayman from this case, and thus decide the case in favor of the Defendants-Appellees.

The primary issue with regard to Mr. Klayman's *pro hac vice* admission was a still pending now 13 year old D.C. Bar complaint filed by Thomas Fitton ("Mr. Fitton"), the current chairman of Judicial Watch, the public interest group that Mr. Klayman founded and conceived of, but left in 2003 to run for U.S. Senate in Florida (the "Fitton Complaint"). Since Mr. Klayman's departure, Mr. Fitton has

engaged in a vindictive pattern and practice of trying to smear and defame Mr. Klayman, which has already resulted in the award of a judgment against Judicial Watch for $181,000 for malicious defamation in the Southern District of Florida.[1] Defendant Appellee Berkeley falsely accused Mr. Klayman of having been found to have lied during the Fitton Complaint proceedings, which is simply not true. In actuality, the only reference to dishonesty was in the Hearing Committee's non-final recommendation, which the Board of Professional Responsibility reversed when it found that Mr. Klayman did not lie. This issue is currently on appeal to the D.C. Court of Appeals, but the Board's finding must stand for now. Mr. Klayman on numerous times explained this to the Court, but to no avail, as it apparently had a mind-set to revoke Mr. Klayman's pro hac vice admission no matter what the facts.

For instance, in Ms. Robles Supplement to Opposition to Motion to Revoke *Pro Hac Vice* Admission of Larry Klayman, Ms. Robles clarified that:

> *First*, the recommendation of the hearing committee in the Judicial Watch matter before the District of Columbia Bar ("DC Bar"), which is referenced in the Bundy orders, is just that – a recommendation. When the matter went up on appeal to the Board of Professional Responsibility of the DC Bar (the "Board"), the Board in its recommendation found that Mr. Klayman had not testified falsely during the prior hearing. In fact, Berkeley has also failed to tell the Court that even the Board's recommendation is not final, as the matter is on appeal to the District of Columbia Court of Appeals. Even more egregiously, when Mr. Klayman pointed this out on the court record,

[1] *See Klayman v. Judicial Watch*, 1:13-cv-20610 (S.D. Fl.).

> Berkeley failed to withdraw its misstatements and today these misrepresentations remain uncorrected, even after the recent hearing of July 17, 2018 before this Court. ECF No. 71 at 2.

Mr. Klayman himself also attempted to clarify any possible misunderstanding at the July 17, 2018 hearing on this matter, informing the Court that:

> This matter's already ten years old. It's -- California wouldn't let that happen. But it's still ten years old. There's no final finding in that. And Your Honor should have been advised of that by the City of Berkeley, and also the fact that it was the board recommendation that applied at that time, even though it's not final, and they removed any finding that I had been untruthful with the Hearing Committee. And that was the thrust of their argument. EOR 088.

As further evidence, the Honorable Ronald M. Gould expressly addressed the issue of whether Mr. Klayman had been truthful in the Fitton Complaint during an appeal of another *pro hac vice* issue in the criminal prosecution of Cliven Bundy in the Nevada District Court[2]:

> Moreover, Berkeley also failed to advise this Court that the Honorable Ronald Gould ("Judge Gould") had found in the *Bundy* matter that Mr. Klayman had been truthful with the Las Vegas federal court. Here is what he wrote in his dissenting decision, finding that Mr. Klayman truthfully answered the question presented regarding the disciplinary proceedings. "'There is a disciplinary proceeding pending before the District of Columbia Board of Professional Responsibility that was filed almost 8 years ago….' Mr. Klayman properly opines that '[t]he matter is likely to be resolved in my favor" and points out that "…there has been no disciplinary action.'" *Bundy v. United States Dist. Court (In re Bundy)*, 840 F.3d 1034, 1054 (9th Cir. Oct. 28, 2016). Judge Gould further made the clear finding that 'Klayman properly disclosed the ongoing disciplinary proceeding in his initial application for pro hac vice admission, saying that the proceeding had

[2] *See United States v. Bundy*, 2:6-cr-00046 (D. Nev.).

> not yet been resolved. **<u>This disclosure was accurate</u>**." *Id.* (emphasis added). Judge Gould further reasoned: I agree with Klayman that he was not obligated to re-litigate the D.C. proceeding before the district court and that he did not have to provide the district court with the entire record from D.C. And if his disclosures were selective, still he is an advocate, an advocate representing defendant Cliven Bundy, and after submitting a compliant response to the questions in the pro hac vice application, **<u>he had no greater duty to disclose any possible blemish on his career or reputation beyond responding to the district court's further direct requests</u>**. *Id.* at 1055 (emphasis added). ECF No. 71 at 2-3

Yet, despite being presented with these cold, hard facts, the District Court still chose to adopt the preliminary and later reversed recommendations of an inoperative hearing committee as dispositive law, despite the fact that the Board of Processional Responsibility reversed that finding and the unquestionable absence of any final ruling in order to "justify" revocation of Mr. Klayman's *pro hac vice* admission. In doing so, the Court inserted herself as the "judge, jury, and executioner" and usurped the role of the District of Columbia Court of Appeals to presume Mr. Klayman guilty until proven innocent.

Another example is the District Court's patently false finding that Ms. Robles had previously moved to disqualify her, as stated in her tentative ruling on the Motion to Revoke Pro Hac Vice, EOR 063 - 073, when in fact Ms. Robles had only previously filed a voluntary request for recusal based on an apparent perceived conflict of interest in the initial case that was subsequently voluntarily dismissed. *Robles v. The Regents of the University of California,*

*Berkeley, et al*, 4:17-cv-0325 (N.D. Ca.). Even after any possible confusion was clarified in Ms. Robles Supplement to Opposition to Motion to Revoke Pro Hac Vice Admission of Larry Klayman, ECF No. 71, the District Court intentionally still did not correct this finding, among many other false or misleading findings, in her final order. EOR 040 - 041. In fact, even when faced with the correct facts set forth in Ms. Robles Supplement, the District Court unrepentantly and defiantly still adopted her tentative ruling, holding that "the Court hereby makes its tentative ruling final…." EOR 040.

It is incredibly telling that the District Court chose not to acknowledge the correct facts presented by Ms. Robles, while also ignoring the sworn affidavits submitted by Ms. Robles and Mr. Kolodzi stating that this case could not proceed without Mr. Klayman as lead counsel. As a direct result of this egregious "error," Ms. Robles' case was prematurely terminated, as she was left without the assistance of counsel to oppose Defendant-Appellee Mirabdal's Motion to Dismiss - which was subsequently granted, EOR 005 - 006 - or to proceed against Defendant- Appellee Miller. Revocation of Mr. Klayman's *pro hac* vice admission was simply not necessary. If attorney behavior was truly a concern, the Court itself had authority to sanction misconduct. As set forth by Mr. Klayman at the July 17, 2018 hearing:

> And that is is that I will pledge to always obey your orders, your rules. I'll be respectful to you as I am today. And if I do anything wrong,

> Your Honor has the power to correct that and sanction and do whatever needs to be done. But Ms. Robles deserves the lawyer of her choice, her day in court and, as a practical matter, it's very unlikely anybody else will represent her in a case like this where there is the significant risk. EOR 087.

Thus, Ms. Robles respectfully requests that this Court reverse the District Court's error in revoking Mr. Klayman's *pro hac vice* admission.

## II. THE DISTRICT COURT ERRED IN DENYING MS. ROBLES' RECUSAL/DISQUALIFICATION MOTION

As a result of Judge Wilken's demonstrable animus and bias against Ms. Robles, Mr. Klayman, and Mr. Kolodzi, which culminated in the revocation of Mr. Klayman's *pro hac vice* admission, leaving Ms. Robles without counsel, Ms. Robles had no choice but to file a motion to recuse and/or disqualify Judge Wilken in order to retain any chance of receiving a fair chance to prosecute her claims. Judge Wilken's denial of this motion was in error. This animus and bias was likely based on her apparent desire to effectively end this case, thereby protecting U.C. Berkeley, where this Court attended law school and taught as a professor for many years

An impartial judiciary is a fundamental component of the system of justice in the United States. The right to a "neutral and detached judge" in any proceeding is protected by the U.S. Constitution and is an integral part of maintaining the public's confidence in the judicial system. *Ward v. City of Monroeville*, 409 U.S. 57, 61-62 (1972); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (The

U.S. Constitution guarantees a party an impartial and disinterested tribunal in civil cases). To ensure that this right is protected, Congress has sought to secure the impartiality of judges by requiring them to step aside, or in some circumstances, disqualify themselves, in various circumstances.

Under 28 U.S.C. § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

This statute is unambiguous – if the requirements are met, another judge must be assigned to take over the matter.

> The disqualification statute, 28 U.S.C. §144, is mandatory and automatic, requiring only a timely and sufficient affidavit alleging personal bias or prejudice of the judge. The judge is a silent defendant, unable to make findings on the truth or falsity of the affiant's allegations, and truth must be presumed. *United States v. Hanrahan*, 248 F. Supp. 471, 474 (D.D.C. 1965) (Emphasis added); and the allegations may be based upon information and belief, *Berger v. United States*, 255 U.S. 22, 34, 65 L. Ed. 481, 41 S. Ct. 230 (1920).

*Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 576 (D.C. 1967) (emphasis added). As evidence of the absolute requirement of impartiality from judicial officers, the U.S. Courts of Appeals for the Fifth, First, Sixth, Tenth, and Eleventh Circuits have said that close questions should be decided in favor of recusal. *See Republic of Pan. v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000) (citing In re Chevron, 121 F.3d

163, 165 (5th Cir. 1997)); *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995); *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). "The test for personal bias or prejudice in [S]ection 144 is identical to that in section 455(b)(1), and the decisions interpreting this language in [S]ection 144 are controlling in the interpretation of section 455(b)(1)." *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. Cal. 1980). In *Litecky v. United States*, the U.S. Supreme Court held that if the judge succumbs to extrajudicial influence, he is subject to such a motion. Even more, in the absence of an extrajudicial influence, judicial rulings coupled with the requisite "degree of favoritism or antagonism" can serve as the basis for such a motion even "when no extrajudicial source is involved." *Id.* Lastly, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" constitute a basis for such a motion if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

The main basis for disqualification is the fact that Judge Wilken knowingly and willingly adopted false statements of fact in order to try to find a way to justify her revocation of Mr. Klayman's *pro hac vice*. These include (1) the patently false finding that Ms. Robles had previously moved to disqualify her, when in fact Ms. Robles had only previously filed a voluntary request for recusal the initial case that

was subsequently voluntarily dismissed by Ms. Robles and (2) adopting the inoperative preliminary and later Board reversed recommendation of the Fitton hearing committee as dispositive law. These issues are briefed in full in the preceding section.

However, further evidence of Judge Wilken's bias and prejudice can be gleaned from the fact that she entirely disregarded the sworn affidavits of Ms. Robles and Mr. Kolodzi, EOR 074 - 077, as well as the oral arguments of Mr. Klayman that clearly set forth why this case could not proceed without Mr. Klayman as counsel. In her order revoking Mr. Klayman's *pro hac vice* admission, she simply and callously wrote, "Robles' remaining counsel, Michael Kolodzi, shall continue to represent her," EOR 040, despite a sworn affidavit on the record from Mr. Kolodzi that he would not be able to do so. Even more, in her order denying Ms. Robles' recusal and/or disqualification motion, Judge Wilken wrote, "Plaintiff's affidavits merely state that she cannot find another attorney, and that Mr. Kolodzi will be unable to represent Plaintiff by himself…. These do not speak to any purported bias or prejudice." EOR 013. In actuality, however, there can be nothing more prejudicial, or indicative of bias, than issuing an order like the revocation of Mr. Klayman's *pro hac vice* admission, while knowing full well, as shown through the affidavits, that it would end the case. This is especially true when the order is based on the knowing adoption of false facts. Indeed, nothing

could be more indicative of extrajudicial bias and prejudice. Lastly, as further evidence of bias and prejudice, Judge Wilken ordered dismissal of most of Ms. Robles claims the day after Ms. Robles filed her recusal/disqualification motion, apparently unwilling to even review it on the merits. As such, Ms. Robles respectfully requests that this Court issue an order mandating Judge Wilken's recusal/disqualification so that the may have a fair chance to litigate her claims as is required by due process of law.

## III. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST DEFENDANTS-APPELLEES MIRABDAL AND MILLER

Ms. Robles brought claims against Defendants-Appellees Mirabdal and Miller, the ANTIFA Defendants-Appellees, for directly causing her severe injuries the night of the Yiannopoulos event. The Amended Complaint pled:

> Defendants ANTIFA, Mirabdal, Miller, and Does 1-20 ("ANTIFA Defendants") organized, plotted, planned, and executed the violent shutdown of the Milo Yiannopoulos event. Members of ANTIFA, including Defendants Miller and Mirabdal rioted at the Milo Yiannopolous event and viciously attacked attendees, including Plaintiff Robles, because of their political beliefs, sex, and sexual preference, such as Plaintiff Kiara Robles….
>
> Thus, each of the ANTIFA Defendants are equally, jointly, and severally liable for each others' actions, as they were all performed in concert, and as part of their conspiracy to violently shut down the Yiannopolous event using, among other dangerous objects, pepper spray and bear mace, flag poles, signs, and flashlights.
>
> Therefore, the acts of Does 1-20, the Defendants who used pepper spray and bear mace on Plaintiff Robles must be imputed to each and every one of the other ANTIFA Defendants who planned and carried out the violent protest in concert, and as part of one concerted attack, with each of the ANTIFA Defendants having an agreed role in the attack. ECF No. 58 ¶¶ 21-22.

Accordingly, Ms. Robles brought causes of action for Battery, Assault, and violations of the Bane Act against the ANTIFA Defendants-Appellees. Defendant-Appellee Miller never filed any motion to dismiss, instead filing answers. However, once Judge Wilken left Ms. Robles without any counsel, Ms. Robles was unable to continue to prosecute her claims against Miller, which ultimately led to the Court's *sua sponte* dismissal. As such, Miller's dismissal was in error for the same reasons as the revocation of Mr. Klayman's *pro hac vice* admission.

Defendant-Appellee Mirabdal filed motions to dismiss claims against her, and the Court erred in its September 14, 2018 Order dismissing Ms. Robles claims for Battery and Assault against her. EOR 017 - 039. In that same order, Judge Wilken granted leave for Ms. Robles to file a Second Amended Complaint with regard to her Bane Act claim, which Ms. Robles did. However, she was then precipitously left without counsel by Judge Wilken, leaving her unable to oppose Mirabdal's motion to dismiss the Second Amended Complaint, which led to dismissal of the Bane Act claim as well. Thus, the District Court erred in dismissing Ms. Robles' Bane Act claim error for the same reasons as the revocation of Mr. Klayman's *pro hac vice* admission.

The District Court also erred with regard to Ms. Robles' claims for Battery because it usurped the role and function of a medical expert to determine that shining a bright light in an individual's eyes could not have caused harm. This is

clearly not a determination that a layman, even one who serves as a judge, is qualified to make. The District Court reasoned that Ms. Mirabdal's claims failed because "she does not allege that the light directed by Mirabdal itself caused her harm. She alleges only that the combination of the pepper spray, bear mace, and bright light harmed her eyes." EOR 035. The District Court's reasoning is fatally flawed in that it completely discounts the likelihood that the shining of a bright light into Ms. Robles eyes caused additional harm and/or been exacerbated, especially since her eyes were already in a damaged state due to pepper spray and bear mace also being sprayed into her eyes. Respectfully, this is not a determination that Judge Wilken, or even this Court, is medically qualified to make.

The District Court further errs by entirely discounting Ms. Robles allegations that Defendant Mirabdal acted as a joint tortfeasor to her fellow ANTIFA members, who were named as Does Defendants, in causing Ms. Robles' injuries. The Amended Complaint sets forth that ANTIFA "organized, plotted, planned, and executed the violent shutdown of the Milo Yiannopoulos event" which resulted in Plaintiff's injuries. ECF No. 58 ¶ 21. Furthermore, it alleged that Mirabdal was "shining flashlights in Yiannopoulos supporters' eyes in order to incapacitate them, so that her fellow ANTIFA members, including Defendants Miller and Does 1-20, could physically assault Yiannopoulos supporters, including

Plaintiff Robles, with pepper spray, bear mace, and flag poles." ECF No. 58 ¶ 70. Ms. Robles has further alleged that Mirabdal knew of and knowingly and willing participated in each of the injuries that Plaintiff suffered. ECF No. 58 ¶¶ 53-60.

"California law allows for joint liability of aiders and abettors to an intentional tort." *Newman v. San Joaquin Delta Cmty. Coll. Dist.*, 2010 U.S. Dist. LEXIS 95794, at *8 (E.D. Cal. Sep. 13, 2010). Under California law:

> [l]iability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Id*.

It was clearly alleged that Defendant-Appellee Mirabdal, at a minimum, knew that her fellow ANTIFA Defendants would be committing intentional torts at the Yiannopolous event, i.e., spraying attendees with pepper spray and bear mace and beating them with flagpoles, since the Amended Complaint alleges that ANTIFA carefully organized and planned the attack. Indeed, why else someone be carrying bear mace at a speaking event if not to use it for a premeditated attack? The Amended Complaint further alleges that Mirabdal gave "substantial assistance" to her joint tortfeasors by incapacitating her victims, including Ms. Robles, with light so that her fellow ANTIFA tortfeasors could step in and brutally attack them. In fact, the District Court admitted as much, holding that the allegations of the

Amended Complaint "show[ed] that Mirabdal intended to help others to cause harmful or offensive contact." EOR 037. Yet, it still refused to consider Ms. Robles' allegations of concerted action. This is clear, reversible error.

## IV. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST THE INDIVIDUAL REGENTS DEFENDANTS-APPELLEES

Ms. Robles brought claims against Defendant-Appellees Napolitano and Dirks under 42 U.S.C. § 1983, the Bane Act, and certain state law tort provisions. The District Court erred in dismissing each of of Ms. Robles Section 1983 claims, as well as her claims brought under the Bane Act.

Ms. Robles brought claims under 42 U.S.C. § 1983 for violations of her First Amendment and her Fourteenth Amendment Equal Protection Rights. Both were erroneously dismissed.

With regard to Ms. Robles' First Amendment claim, the District Court based its erroneous decision to grant dismissal solely on the grounds that Ms. Robles only alleged that the Individual Regents Defendants-Appellees "stood idly by as third parties interfered with her rights." EOR 026. From there, the District Court reasoned that "the First Amendment does not require the Individual Defendants to protect Robles against the actions of others." EOR 026. However, this is clearly not what was pled in the Amended Complaint. Instead, the Amended Complaint clearly alleges that the Individual Regents Defendants-Appellees took affirmative

steps to prevent Plaintiff from exercising her First Amendment rights.

> Thus, each and every Defendant worked in concert, jointly and severally, to organize and cultivate the riots and violent assaults that led to Plaintiff Robles injuries. The Individual Regents Defendants worked in concert with the BPD and UCPD to withhold police support to the attendees of the Milo Yiannopoulos who were brutally attacked by ANTIFA members and violent protestors, including, but not limited to, Miller and Mirabdal, and Does 1-20. ECF No. 58 ¶ 84.

The Individual Regents Defendants-Appellees did not simply sit by while Ms. Robles was deprived of her First Amendment rights. To the contrary, it is alleged that the Individual Regents Defendants-Appellees, acting in their individual capacities, and as part of a conspiracy and in concert with each and every Defendants-Appellees, took affirmative steps to actively ensure that Ms. Robles would not be able to exercise her First Amendment rights by shutting down the Yiannopoulos event. The withholding of police protection was simply the Individual Regents Defendants-Appellees' role in this conspiracy. Put another way, it is one thing to simply sit idly and watch while Ms. Robles and others were brutally assaulted. However, it is clearly alleged that the Individual Regents Defendants-Appellees took things a step further by actively ordering the withholding of police protection. The first scenario, while abhorrent, is defined by inaction. The latter, which is what was pled and alleged, is defined by affirmative action. The District Court clearly erred by failing to acknowledge this distinction.

With regard to Ms. Robles claim under the Fourteenth Amendment, the

District Court ordered dismissal solely on the grounds that Ms. Robles "has not pled any facts showing that it is plausible that the Individual Defendants knew that she was a gay woman and intentionally discriminated against her on this basis." EOR 026. This is, again false. The Amended Complaint pled that Mr. Yiannopoulos and a large number of his supporters, including Ms. Robles, are gay and female. ECF No. 58 ¶ 96. It is well-known that Mr. Yiannopoulos, a public figure, is gay, as he clearly makes no attempt to hide this fact. Thus it is disingenuous for the District Court to reason that the Individual Regent Defendants-Appellees could not have known that a large number of the individuals who chose to attend the event, including Ms. Robles, would also be gay. Thus, the District Court clearly erred in this regard.

The District Court provides no independent analysis of Ms. Robles' Bane Act claims, simply holding that "For the same reasons stated above with respect to the § 1983 claims, Robles' Bane Act claim fails as well. Because the FAC fails to state a claim for First and Fourteenth Amendment violations, it also does not state a claim for a violation of the Bane Act on the same basis." EOR 029. As set forth above, Ms. Robles Section 1983 claims were dismissed in error, and as such so was her claim under the Bane Act.

## V. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST THE CITY OF BERKELEY

Ms. Robles brought claims against Defendant-Appellee Berkeley under 42

U.S.C. § 1983 for violations of First Amendment and Fourteenth Amendment rights, as well as under the Bane Act. Each of these claims were erroneously dismissed.

As a municipality, Defendant-Appellee Berkeley's liability must be decided under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) ("*Monell*"). The District Court found no *Monell* liability on the sole grounds that "Robles has not stated sufficient factual allegations to plausibly suggest an entitlement to relief. There are simply not enough factual allegations to show that it is plausible that Berkeley has an official policy or custom of 'selectively providing police support and withholding police support to conservative events, rallies, and protests.'" EOR 031. This, however, is not true.

The Amended Complaint provides a very specific example of disparate treatment between conservative and liberal events.[3] Ms. Robles alleged that in August on 2017, just months after the events at issue here, Berkeley provided adequate and successful police protection to an event protesting President Trump. ECF No. 58 ¶ 83. Indeed, as reported by the Los Angeles Times, Berkeley

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[3] The District Court apparently asserts that Ms. Robles' use of the term "conservative" is too vague. "Robles' description of the policy itself is vague: she does not allege what 'conservative' means, nor does she allege how Berkeley determines an event is 'conservative.'" EOR 031. This assertion is disingenuous at best. Conservative clearly means politically conservative. Persons generally identify as conservative or liberal or other. Whether a political event furthers one of these ideals is common sense.

provided 500 police officers for this anti-conservative, anti-Trump rally. ECF No. 58 ¶ 83, Fn. 72. Not surprisingly, "Police… stepped in to halt the violence or escort the victims away from the area. Officers reported 14 arrests, many of them for violations of the city's emergency rules banning masks, sticks and potential weapons inside the demonstration area." ECF No. 58 ¶83, Fn. 72. "When protesters and counter-protesters arrived, they encountered a series of dump trucks lined up to form a barricade, an effort aimed at keeping a car from heading into a crowd. Marchers encountered concrete barriers at the park." ECF No. 58 ¶ 83, Fn. 72. Unsurprisingly, given the strong police presence, the Anti- Trump protest did not devolve into a violent brawl.

In stark contrast, Ms. Robles alleged that, during the Yiannopoulos event, which was pro-conservative and featured a known gay speaker, Berkeley law enforcement officers simply stood by idly inside of UC Berkeley's Student Union Building and watched as ANTIFA protestors violently assaulted and brutalized pro-conservative Yiannopoulos supporters, such as Ms. Robles. ECF No. 58 ¶ 57. Even as Plaintiff was being violently assaulted by bear mace, pepper spray, and flag poles, "there were no police officers close enough to Plaintiff Robles to protect her from her assaulter. As a result, the attackers escaped and there was no one to immediately aid Plaintiff Robles." ECF No. 58 ¶ 56. Plaintiff alleges that even though Berkeley police officers could plainly see pro-conservative, pro-gay

attendees of the Yiannopoulos event being viciously attacked, they simply "waited in the Student Union building, yet did not act to protect any of the victims…." ECF No. 58. ¶ 58. The striking discrimination between the actions (and inactions) of Berkeley when called to protect a pro-conservative and the subsequent event brings the allegations that Berkeley employs a municipal custom and policy of selectively providing police protection based on politics and its own inherent biases and prejudices.

The District Court further erred by disregarding *Rauen v. City of Miami*, 2007 U.S. Dist. LEXIS 14931 (S.D. Fla. Mar. 2, 2007). In *Rauen*, the Court encountered a similar factual circumstance where the city of Miami was alleged to have stifled protest in violation of the protestors constitutional rights. Importantly, the *Rauen* Court held that the Plaintiff did not need to identify any of the individual law enforcement officers, and that an allegation that Defendants "were joint tortfeasors who all contributed to Plaintiffs' injuries…" was proper. *Id*. at 12.

> Accepting Defendants' argument that Plaintiffs have failed to state a claim against any of the Defendants because of Plaintiffs' inability to identify specific officers would require the Court to dismiss Plaintiffs' case in its entirety. Such a result is clearly not in the interests of justice, for it would reward Defendants for their uniform method of dress at the FTAA, which makes it virtually impossible for an observer to identify the officers or departments behind each face shield. The undersigned therefore finds that Plaintiffs' inability to identify the specific officers involved in their alleged deprivation of rights does not mandate dismissal of any of the claims under Federal Rule 12(b)(6). *Id*. at 12-13.

The Court correctly allowed the case to proceed discovery so that persons may be identified, which is exactly what Ms. Robles was requesting.

Furthermore, the *Rauen* Court denied dismissal of a claim for *Monell* liability where:

> The TAC clearly alleges that the Municipal Defendants developed, and submitted to, several plans and agreements, the purpose of which was to stifle protest at the FTAA. It is not material that part of this policy or plan was unwritten. Moreover, the TAC asserts that the allegedly unconstitutional acts of the officers were taken in accordance with the unwritten and written plans and agreements.

Indeed, it is impracticable, if not impossible for Ms. Robles to have obtained to definitive evidence of Defendant-Appellee Berkeley's policies and customs at the motion to dismiss stage, before discovery. Any such additional concrete evidence, other than what is already known publically, of these policies and customs would surely come from Berkeley's own internal memoranda and documents, to which Ms. Robles has been unable to access without discovery. Dismissal at this early stage allows Defendant-Appellee Berkeley to escape liability by virtue of the fact that they "hold all the cards." Such an injustice can only be prevented by allowing this case to proceed to discovery.

Apart from the issue of *Monell* liability, the District Court simply states that the First and Fourteenth Amendment claims against Berkeley fail for the same reasons as they do against the Individual Regents Defendants-Appellees. In the interest of judicial economy and to avoid repetition, Ms. Robles now refers the

Court to *supra* section II. However, it does bear emphasizing that the Amended Complaint expressly alleged that Berkeley, in concert with the other Defendants, actively worked together to deprive her of these rights. Specifically, Ms. Robles alleges, "Defendants [including Berkeley]—in concert with each and every named Defendant, jointly and severally—have worked in concert to deny numerous individuals who attended the Milo Yiannopolous event, including Plaintiff Robles, their constitutional right to freedom of speech and freedom of assembly, as guaranteed by the First Amendment to the U.S. Constitution." ECF No. 58 ¶ 15. As part of Berkeley's role in this joint venture, "…BPD chose to withhold their aid to attendees of the Milo Yiannopolous event—in concert with each and every named Defendant, jointly and severally—including Plaintiff Robles, despite the fact that they could see attendees being viciously attacked by 'protestors.'" ECF No. 58 ¶ 28.

## CONCLUSION

Based on the foregoing, Ms. Robles respectfully requests that this Court reverse the District Court's findings and remand this case to another truly independent and neutral judge for further proceedings. It is clear that the lower court not only denied Ms. Robles a right to counsel, but strained, based on her inherent bias, to find any reason under the sun to improperly dismiss the Amended Complaint.

This honorable Court must respectfully reverse the lower court's rulings and order that Ms. Robles have her day in court, that is before an unbiased and neutral judge who furthers rather than makes a concerted and documented effort to subvert justice, based on her own apparent biases and prejudice, for a young gay woman who was brutally attacked because of her sexual preference and political beliefs.

Appellant Ms. Robles respectfully requests oral argument.

Dated: June 3, 2019

Respectfully Submitted,

/s/ *Larry Klayman*________

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 8,577 words.

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Dated: June 3, 2019 /s/ Larry Klayman_______

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties listed below on June 3, 2019

/s/ Larry Klayman_______

**ORAL ARGUMENT REQUESTED**

**CASE NO. 19-15148**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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KIARA ROBLES

Plaintiff-Appellant
v.

ANTIFA, et al

Defendants-Appellees.

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APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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# APPELLANT'S REPLY BRIEF

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**Dated**: October 7, 2019

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## MEMORANDUM OF LAW

### I. THE DISTRICT COURT ERRED BY REVOKING MR. KLAYMAN'S *PRO HAC VICE* ADMISSION

As set forth in Appellant Kiara Robles' ("Ms. Robles") initial brief, the U.S. District Court for the Northern District of California ("District Court") committed a serious error by granting Defendant-Appellee Berkeley's ("Berkeley") motion to revoke Larry Klayman's ("Mr. Klayman") *pro hac vice* admission in its August 31, 2018 order. EOR 040 - 041. Nothing set forth by Appellee Berkeley[1] changes this.

As set forth previously Supreme Court has expressly recognized a strong presumption in favor of granting applications to appear *pro hac vice*. "We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member of the local bar. In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is a practice to be encouraged." *Leis v. Flynt*, 439 U.S. 438, 441-442 (U.S. 1979).

This fundamental principle is so strong that the California Supreme Court has recognized this right in civil cases, such as the one at bar. "Ultimately, disqualification motions involve a conflict between the client's right to counsel of their choice...." *City and County of San Francisco v. Cobra Solutions Inc.*, 38 Cal. 4th 839, 846 (Cal. 2006); See also *Khani v. Ford Motor Co*., 215 Cal.App.4th 916,

[1] Appellee Berkeley's arguments are joined by Appellees Mirabdal and Miller.

920 (Cal. App. 2d Dist. 2013). Federal courts have also adopted this fundamental principle. "The substantial relationship test balances the new client's right to counsel of choice and the former client's right to confidentiality." *N.L.A. v. Cty. of L.A*, 2016 U.S. Dist. LEXIS 134953, at *6 (C.D. Cal. Sep. 29, 2016).

Appellee Berkeley asserts that these cases are inapposite because they involve the issue of when an attorney may be disqualified based on conflicts of interest. However, this does not change the fact that Courts have recognized the existence right to counsel of choice, even in civil cases. The context in which this right was recognized may be different, but the fact remains that this right has been recognized in civil matters.

### A. Berkeley Again Misrepresents the District of Columbia Disciplinary Proceeding

Whether intentionally or not, Appellee Berkeley has completely misconstrued the status of the ongoing District of Columbia Disciplinary proceeding. The simple fact of the matter is that Mr. Klayman has never been suspended from the practice of law for even one day. Appellee Berkeley's assertion that the "D.C. Bar has suspended him from the practice of law for 90 days" is plainly false. There has been no final decision in this matter, as it is currently before the District of Columbia Court of Appeals. It would appear that this false statement is based on the "Report of Recommendation" by the District of Columbia Board on Professional Responsibility dated February 6, 2018 (SER 63 –

83[2]). However, again, this is not a final decision. The final decision will be rendered by the District of Columbia Court of Appeals and it is still currently pending.

Appellee Berkeley also misconstrues a private, civil lawsuit brought by Mr. Klayman as the "appeal" for this pending disciplinary action. *See Klayman v. Fox*, 2019 WL 2396538 * 2 (D.D.C. June 5, 2019). This has absolutely nothing to do with Mr. Klayman's disciplinary proceeding – it is an entirely separate, unrelated matter that was filed in federal court and is currently on appeal at the U.S Court of Appeals for the District of Columbia Circuit, which has nothing to do with attorney discipline in the District of Columbia.

It is clear from these egregious misstatements that Appellee Berkeley has no idea or basic understanding what is happening in the still pending disciplinary case before the District of Columbia Court of Appeals. However, this has not stopped it from making reckless false statements to both the District Court and now the Ninth Circuit. It is easy to see now exactly how the District Court may have been led astray by Appellee Berkeley, as it clearly relied on these false statements regarding the ongoing District of Columbia disciplinary proceeding. Thus, Ms. Robles respectfully requests that this Court thoroughly review the numerous misstatements

[2] Appellee Berkeley cites SER 116 in support of this false proposition, but that is simply a declaration by counsel for Berkeley. It is unclear if this is simply a clerical error, but SER 116 does not support this false proposition in any way.

that the District Court relied on in revoking Mr. Klayman's *pro hac vice* admission, which are set forth in detail in Ms. Robles' opening brief.

### B. Mr. Klayman Was the Only Lawyer That Ms. Robles Could Find to Represent Her

Nothing set forth by Appellee Berkeley changes the fact that Ms. Robles was unable to find counsel to represent her after Mr. Klayman's *pro hac vice* admission was revoked, which directly caused her case to be terminated, severely prejudicing her due process and other constitutional rights. In fact, perhaps most egregiously, the District Court's order revoking Mr. Klayman's *pro hac vice* admission came after Ms. Robles had shown through sworn affidavits submitted by herself and local counsel, Mr. Kolodzi, that this case would not be able to proceed without Mr. Klayman's representation. EOR 074 - 077. These affidavits contained sworn statements from Ms. Robles that:

> Should this Court revoke Mr. Klayman's *pro hac vice* status, I do not believe that I will be able to find another attorney to represent me. Since this case has been filed, I have been threatened by who I believe are members of Defendant ANTIFA. Even before the filing of this case, I had enormous difficulty finding an attorney who would represent me in this matter, especially given the fact that some of the Defendants are members of ANTIFA. Mr. Klayman is the only attorney that I was able to find who was ready, willing, and able to file this case and litigate it. EOR 074 - 075.

Mr. Michael Kolodzi, who was local counsel, further swore under oath that "[s]hould this Court revoke Mr. Klayman's *pro hac vice* status, I will be unable to

continue representation of Plaintiff Kiara Robles on my own, due to a lack of available time and resources." EOR 077.

Yet, despite the clear showing made that there simply would be no counsel other than Mr. Klayman to represent Mr. Robles, the Court still revoked his *pro hac vice* admission, leaving Ms. Robles without any means to oppose the motion to dismiss filed by Defendant-Appellee Mirabdal, or proceed in litigating the case against Defendant-Appellee Miller, thus effectively terminating the proceedings *sua sponte*.

## II. THE DISTRICT COURT ERRED IN DENYING MS. ROBLES' RECUSAL/DISQUALIFICATION MOTION

Ms. Robles' recusal/disqualification motion is based on far more than a mere disagreement with the Honorable Claudia Wilken's ("Judge Wilken") rulings, as argued by Appellees Berkeley, Dirks, and Napolitano.[3] The actual basis for disqualification is the fact that Judge Wilken knowingly and willingly adopted false statements of fact in order to try to find a way to justify her revocation of Mr. Klayman's *pro hac vice*. These include (1) the patently false finding that Ms. Robles had previously moved to disqualify her, when in fact Ms. Robles had only previously filed a voluntary request for recusal the initial case that was subsequently voluntarily dismissed by Ms. Robles and (2) adopting the inoperative preliminary and later Board reversed recommendation of the hearing committee as

[3] These arguments are joined by Appellees Mirabdal and Miller

dispositive law. These issues are briefed in full in Ms. Robles' opening brief. This willful disregard for the facts goes far beyond merely issuing a ruling that Ms. Robles or Mr. Klayman did not agree with. This is evidence of extrajudicial bias and prejudice to sustain Ms. Robles' motion for recusal.

In *Litecky v. United States*, the U.S. Supreme Court held that if the judge succumbs to extrajudicial influence, he is subject to such a motion. Even more, in the absence of an extrajudicial influence, judicial rulings coupled with the requisite "degree of favoritism or antagonism" can serve as the basis for such a motion even "when no extrajudicial source is involved." *Id.* Lastly, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" constitute a basis for such a motion if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* Regrettably, such is the case here.

## III. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST DEFENDANTS-APPELLEES MIRABDAL AND MILLER

As a direct result of the District Court's decision to revoke Mr. Klayman's *pro hac vice* admission, Ms. Robles was precipitously left without counsel, which left her unable to respond to Appellee Mirabdal's Motion to Dismiss the Second Amended Complaint - which stated a claim under the Bane Act - leading to its dismissal. Similarly, once Judge Wilken left Ms. Robles without any counsel, Ms.

Robles was unable to continue to prosecute her claims against Appellee Miller[4], which ultimately led to the Court's *sua sponte* dismissal. Tellingly, the Court was fully aware that her revocation of Mr. Klayman's *pro hac vice* admission would lead to this result, as set forth in the affidavits of both Ms. Robles and Mr. Kolodzi. EOR 074 – 077. Thus, the dismissal of the Bane Act claim against Mirabdal and the claims against Miller were erroneous for the same reason as the revocation of Mr. Klayman's *pro hac vice* admission. Indeed, the District Court dismissed the Amended Complaint while there was still a pending motion to recuse, which shows her haste to simply get rid of this case.

With regard to Ms. Robles' other claims, the Amended Complaint pled:

> Defendants ANTIFA, Mirabdal, Miller, and Does 1-20 ("ANTIFA Defendants") organized, plotted, planned, and executed the violent shutdown of the Milo Yiannopoulos event. Members of ANTIFA, including Defendants Miller and Mirabdal rioted at the Milo Yiannopolous event and viciously attacked attendees, including Plaintiff Robles, because of their political beliefs, sex, and sexual preference, such as Plaintiff Kiara Robles….
>
> Thus, each of the ANTIFA Defendants are equally, jointly, and severally liable for each others' actions, as they were all performed in concert, and as part of their conspiracy to violently shut down the Yiannopolous event using, among other dangerous objects, pepper spray and bear mace, flag poles, signs, and flashlights.
>
> Therefore, the acts of Does 1-20, the Defendants who used pepper spray and bear mace on Plaintiff Robles must be imputed to each and every one of the other ANTIFA Defendants who planned and carried out the violent protest in concert, and as part of one concerted attack, with each of the ANTIFA Defendants having an agreed role in the attack. ECF No. 58 ¶¶ 21-22.

[4] Appellee Miller did not file any substantive brief, only joining in the arguments of his co-Defendants-Appellees.

Mirabdal's only argument regarding Ms. Robles' claim for battery is that the Amended Complaint did not allege that the light of the flashlight caused any physical harm. However, this is not true. The District Court itself held that Ms. Robles had pled that "the combination of the pepper spray, bear mace, and bright light harmed her eyes." EOR 035. Thus, based on the Amended Complaint alone, the allegation that the flashlight physically harmed Ms. Robles' eyes is clearly present. The extent to which the light harmed her eyes is a matter that can only be settled by a medical expert. It was not the District Court's role to discount the likelihood that the shining of a bright light into Ms. Robles eyes caused additional harm and/or been exacerbated, especially since her eyes were already in a damaged state due to pepper spray and bear mace also being sprayed into her eyes. Respectfully, this is not a determination that Judge Wilken, or even this Court, is medically qualified to make.

Furthermore, nothing in Mirabdal's brief changes the fact that "California law allows for joint liability of aiders and abettors to an intentional tort." *Newman v. San Joaquin Delta Cmty. Coll. Dist.*, 2010 U.S. Dist. LEXIS 95794, at *8 (E.D. Cal. Sep. 13, 2010). Under California law:

> [l]iability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the

> person's own conduct, separately considered, constitutes a breach of duty to the third person. *Id*.

It was clearly alleged that Defendant-Appellee Mirabdal, at a minimum, knew that her fellow ANTIFA Defendants would be committing intentional torts at the Yiannopolous event, i.e., spraying attendees with pepper spray and bear mace and beating them with flagpoles, since the Amended Complaint alleges that ANTIFA carefully organized and planned the attack. Indeed, why else someone be carrying bear mace at a speaking event if not to use it for a premeditated attack? The Amended Complaint further alleges that Mirabdal gave "substantial assistance" to her joint tortfeasors by incapacitating her victims, including Ms. Robles, with light so that her fellow ANTIFA tortfeasors could step in and brutally attack them. In fact, the District Court admitted as much, holding that the allegations of the Amended Complaint "show[ed] that Mirabdal intended to help others to cause harmful or offensive contact." EOR 037. Yet, it still refused to consider Ms. Robles' allegations of concerted action.

Mirabdal falsely states in her brief that Ms. Robles theory was that "everyone in the crowd who was opposed to racism and fascism was in opposition to Robles, was acting in concert, and can be held jointly and severally liable for battery, assault, and the Bane Act." No. It is clear that this is not what Ms. Robles is alleging. Everyone, including ANTIFA members, had the unequivocal right to be physically present and <u>peacefully</u> protest Mr. Yiannopolous' speech. However,

there is no right to physically assault and injure others, or to assist others in this criminal act. The Amended Complaint clearly alleged that Ms. Mirabdal was not simply physically present and peacefully protesting. She was actively participating in causing injury to Ms. Robles and others. This is a huge difference which Mirabdal and the District Court have ignored.

## IV. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST THE INDIVIDUAL REGENTS DEFENDANTS-APPELLEES

As pled in the Amended Complaint, "[t]he Individual Regents Defendants, in their individual capacity, in furtherance of their own political and other beliefs, abused their authority under state law to intentionally withhold police protection of the UCPD and BPD for Plaintiff Robles, despite the fact that it was, at a minimum, reasonably foreseeable that the Milo Yiannopolous event would erupt in violence from "protestors." ECF No. 58 ¶ 16. This is an allegation of specific, individual action performed by Appellees Janet Napolitano and Nicholas Dirks. (the "Individual Regents"). Despite Appellees' false assertion to the contrary, this is not a novel argument raised on appeal. It is clearly set forth in the operative Amended Complaint.

### A. The Individual Regents Defendants-Appellees Affirmatively Placed Ms. Robles In Danger With a Culpable Mental State

As conceded by the Individual Regents under the "state created danger exception," a plaintiff may sue and recover from a government official when the

official "affirmatively place[d] [the plaintiff] in danger," and did so with a "culpable mental state." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1137 (9th Cir. 2018). Furthermore, as conceded by the Individual Regents, an "affirmative act" that places a plaintiff "in danger" is conduct by a government official that "le[aves] the person in a situation that was more dangerous than the one in which they found [the person]." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). This is exactly what Ms. Robles set forth in her Amended Complaint.

The Amended Complaint clearly alleges that the Individual Regents Defendants-Appellees took affirmative steps to prevent Plaintiff from exercising her First Amendment rights.

> Thus, each and every Defendant worked in concert, jointly and severally, to organize and cultivate the riots and violent assaults that led to Plaintiff Robles injuries. The Individual Regents Defendants worked in concert with the BPD and UCPD to withhold police support to the attendees of the Milo Yiannopoulos who were brutally attacked by ANTIFA members and violent protestors, including, but not limited to, Miller and Mirabdal, and Does 1-20. ECF No. 58 ¶ 84.

The Individual Regents Defendants-Appellees did not simply sit by while Ms. Robles was deprived of her First Amendment rights. To the contrary, it is alleged that the Individual Regents Defendants-Appellees, acting in their individual capacities, and as part of a conspiracy and in concert with each and every Defendants-Appellees, took affirmative steps to actively ensure that Ms. Robles

would not be able to exercise her First Amendment rights by shutting down the Yiannopoulos event. The withholding of police protection was simply the Individual Regents Defendants-Appellees' role in this conspiracy. Indeed, the Individual Regents make no argument, nor could they, that ordering police not to intervene as Ms. Robles was being brutally beaten and assaulted did not leave her in a more dangerous position than had they not given the order and police been allowed to intervene. This is common sense. Instead, the Individual Regents improperly rely on *Johnson v. City of Seattle*, 474 F.3d 634 (9th Cir. 2007) to argue that the withholding of police protection is not an affirmative act. However, the facts of *Johnson* actually support Ms. Robles' position.

Whereas in *Johnson*, the plaintiffs were injured after the police "abandon[ed] the operational plan for crowd control, adopted on Sunday, February 5, 2005, that called for a large, highly visible police presence and aggressive law enforcement, and, instead, implement[ed] a more passive plan of staying on the perimeter of the crowd…" *id.* at 638, Ms. Robles was injured as a result of complete inaction. The *Johnson* court found that there was no "affirmative action" because "it did not place them in any worse position than they would have been in had the police not come up with any operational plan whatsoever." *Id.* at 641. However, the facts here are akin to the police coming up without "any operational plan whatsoever," since the question is not about the number of police officers

available to assist Ms. Robles, but the complete inaction of police officers. Even more, whereas in *Johnson*, the court only analyzed a shift in police strategy, here, the relevant inquiry is an order withholding police protection issued by non-members of law enforcement. Thus, by definition, it must be through an affirmative act.

Lastly, it is clear that the Amended Complaint alleges that the Individual Regents acted with culpable mind, that is, a "purpose to harm." *Porter v. Osborn*, 546 F.3d 1131, 1139 (9th Cir. 2008). "The Individual Regents Defendants, in their individual capacity, in furtherance of their own political and other beliefs, abused their authority under state law to intentionally withhold police protection of the UCPD and BPD for Plaintiff Robles, despite the fact that it was, at a minimum, reasonably foreseeable that the Milo Yiannopolous event would erupt in violence from "protestors." ECF No. 58 ¶ 16. As set forth in the Amended Complaint, the Individual Regents absolutely knew that there was a very highly likelihood that the Yiannopolous event would be attacked by ANTIFA:

> In fact, two weeks before the UC Berkeley riot, a man was shot outside a University of Washington hall prior to another planned Milo Yiannopoulos speaking engagement. As was true at the UC Berkeley event, masked protestors in Washington threw bricks at police and were armed with weapons, which they used to assault members of the crowd.34 Another planned speaking engagement by Milo Yiannopoulos at UC Berkeley's sister school, UC Davis, was cancelled after school groups and university police determined that it was unsafe to continue the event amidst the chaotic protests that broke out.35 Defendants knew for weeks that Yiannopoulos' appearance

> could prompt violent protests that would threaten the school's long tradition of facilitating free speech. Defendants should have reasonably anticipated a violent response to Milo Yiannopoulos' presence on their campus and acted accordingly by providing effective police protection to those attending the event. ECF No. 58 at 9.

Indeed, there is no other possible conclusion where the Individual Regents clearly knew that ANTIFA would likely attack and then affirmatively withheld protection, that they were acting with a "culpable mind" and an intent to injure Ms. Robles and the other attendees.

### B. Ms. Robles Properly Stated a Claim Under the Fourteenth Amendment

The Amended Complaint pled that Mr. Yiannopoulos and a large number of his supporters, including Ms. Robles, are gay and female. ECF No. 58 ¶ 96. It is well-known that Mr. Yiannopoulos, a public figure, is gay, as he clearly makes no attempt to hide this fact and there is nothing wrong being gay. Indeed, this is why in part persons such as Ms. Robles came out to see and hear Mr. Yiannoppoulos. As a percentage, there are not many prominent conservative gay Americans. Thus it is disingenuous for the District Court to reason that the Individual Regent Defendants-Appellees could not have known that a large number of the individuals who chose to attend the event, including Ms. Robles, would also be gay. At a minimum, whether the Individual Regents knew this should have been a factual matter to be subject to discovery.

### C. Ms. Robles' Bane Act Claim is Based on an Affirmative Act

The Individual Regents attempt to couch Ms. Robles' Bane Act claim as simply based on a failure to provide police protection. However, as set forth above and in Ms. Robles opening brief, the Individual Regents went far beyond merely not providing police protection. They affirmatively ordered that the police not act to protect Ms. Robles and the other attendees.

### D. The Individual Regents Do Not Have Qualified Immunity

Qualified immunity does not shield "the plainly incompetent or those who knowingly violate the law."[5] *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Qualified immunity protects public officials from personal liability only if the alleged misconduct did not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It is similar to a good faith defense, but focuses on objective reasonableness, not subject belief. *Id.* at 818. It balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To determine whether qualified immunity applies, the court looks

[5] If a federal employee commits a tort in his or her personal capacity, then he or she is responsible individually and subject to personal liability. Gregory C. Sisk, Litigation With the Federal Government (ALI-ABA, 4th Ed. 2006) at § 5.06, at 359.

to (1) whether a plaintiff's allegations, taken as true, show that the official's conduct violated a constitutional or statutory right, and (2) whether that right was "clearly established" at the time of the defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001)

The Individual Regents' argument in this regard is that they enjoy qualified immunity because they did not violate Ms. Robles' rights. In doing so, they again attempt to couch their actions as a failure to provide police protection. However, as set forth above and in Ms. Robles opening brief, the Individual Regents went far beyond merely not providing police protection. They affirmatively ordered that the police not act to protect Ms. Robles and the other attendees. This places them within the "state created danger" rule that they clearly should have known. Thus, they do not enjoy qualified immunity for their affirmative actions.

## V. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS AGAINST THE CITY OF BERKELEY

As a municipality, Defendant-Appellee Berkeley's liability must be decided under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) ("*Monell*"). Berkeley adopts the District Court's false asserts that the Amended Complaint failed to allege "1) how many Berkeley officers were at the Yiannopoulos event, (2) whether police faced violence by third parties, (3) whether police did anything to intervene, and (4) what "conservative" means." Br. at 13. The Amended Complaint also set forth that ANTIFA was there to disrupt and end

the Yiannopolous event, which gives a sense of the dangers involved. The Amended Complaint clearly alleged that police protection was wilfully "withheld," which means that in effect, there were zero police officers at the Yiannopoulos event. It also clearly alleged that the police officers "stood idly by" and therefore did nothing to intervene. Lastly, the assertion that the Amended Complaint does not define "conservative" is disingenuous at best. It is a simple exercise of common sense that the term refers to political conservativeness, as set forth thoroughly in the context of the Amended Complaint. A party cannot be reasonable expected to define every word that potentially has more than one meaning. That is what context is for.

Furthermore, *Rauen v. City of Miami*, 2007 U.S. Dist. LEXIS 14931 (S.D. Fla. Mar. 2, 2007) was cited to support the proposition that the Plaintiff did not need to identify any of the individual law enforcement officers, and that an allegation that Defendants "were joint tortfeasors who all contributed to Plaintiffs' injuries…" was proper. *Id*. at 12. That court correctly allowed the case to proceed discovery so that persons may be identified, which is exactly what Ms. Robles was requesting.

Lastly, similar to the argument set forth by the Individual Regents, Berkeley asserts that it did not have a duty to provide a "safe venue" for Ms. Robles to exercise her First Amendment rights. Once again, however, this is not the basis for

Ms. Robles claims. The Amended Complaint expressly alleged that Berkeley, in concert with the other Defendants, actively worked together to deprive her of these rights. Specifically, Ms. Robles alleges, "Defendants [including Berkeley]—in concert with each and every named Defendant, jointly and severally—have worked in concert to deny numerous individuals who attended the Milo Yiannopolous event, including Plaintiff Robles, their constitutional right to freedom of speech and freedom of assembly, as guaranteed by the First Amendment to the U.S. Constitution." ECF No. 58 ¶ 15. As part of Berkeley's role in this joint venture, "…BPD chose to withhold their aid to attendees of the Milo Yiannopolous event—in concert with each and every named Defendant, jointly and severally—including Plaintiff Robles, despite the fact that they could see attendees being viciously attacked by 'protestors.'" ECF No. 58 ¶ 28. This is far different from merely failing to provide a "safe space." Instead, Berkeley affirmatively created an unsafe space.

## CONCLUSION

Based on the foregoing, Ms. Robles respectfully requests that this Court reverse the District Court's findings and remand this case to another truly independent and neutral judge for further proceedings. It is clear that the lower court not only denied Ms. Robles a right to counsel, but strained, based on her inherent bias, to find any reason under the sun to improperly dismiss the Amended

Complaint, thus denying Plaintiff due process and equal protection under the law.

This honorable Court must respectfully reverse the District Court's rulings and order that Ms. Robles have her day in court, that is before an unbiased and neutral judge who furthers rather than makes a concerted and documented effort to deny Plaintiff justice, based on her own apparent bias and prejudice, for a young gay woman who was brutally attacked because of her sexual preference and political beliefs.

Appellant Ms. Robles respectfully requests oral argument.

Dated: October 7, 2019

Respectfully Submitted,

*/s/ Larry Klayman*

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,643 words.

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Dated: October 7, 2019 /s/ Larry Klayman_______

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties listed below on October 7, 2019

/s/ Larry Klayman_______