No.

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* at 411 (emphasis added in part)): "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*, *the judgment* that petitioners violated RICO *must also be reversed*. Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated*." On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 14.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW), is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed. Operation Rescue, a defendant below, is a respondent under S. Ct. Rule 12.6.

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Rule:

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals denying rehearing (App., *infra*, 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (App., *infra*, 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (App., *infra*, 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (App., *infra*, 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (App., *infra*, 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. App., *infra*, 1a, 25a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court's jurisdiction to review the first issue presented is also invoked under 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*., are set forth at App., *infra*, 175a-177a.

STATEMENT

This truly is a case of "déjà vu all over again." More than two years ago, this Court issued its second decision in this long-running litigation involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances brought this case to an end by holding that the

political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts, including violations (and attempted violations) of the Hobbs Act, the Travel Act, and state extortion law. 537 U.S. at 397. The Court explained that its "determination with respect to extortion under the Hobbs Act" "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Ibid.* "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," the Court instructed, "the *judgment* that petitioners violated RICO *must also be reversed*" and the injunction "*must necessarily be vacated*." *Id.* at 411 (emphasis added).

On remand, a panel has ruled that, notwithstanding this Court's directives, "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, the RICO judgment was *not* necessarily reversed, and the injunction issued by the district court might *not* need to be vacated after all. The panel also concluded, for good measure, that the Hobbs Act might well criminalize the protesters' activities. Accordingly, the panel remanded the case to the district court to determine whether four predicate acts that the panel viewed as unaffected by this Court's decision could provide a basis for maintaining a RICO injunction against the protesters. App., *infra*, 7a-8a, 15a-16a, 28a-29a. Further review is warranted to bring the Seventh Circuit into compliance with this Court's mandate as well as to resolve significant conflicts on several of the issues presented.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Respondents the

National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are, respectively, a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

Some 19 years ago, respondents initiated this lawsuit against petitioners and various other individuals and entities.[1] Respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by the unlawful activities of petitioners (represented by NOW). NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged, among other things, violations of RICO and of state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Respondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the

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[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. See also page ii, *supra*. References to "respondents" throughout this brief do not include Operation Rescue.

dismissal of the RICO claims, the court of appeals held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. App., *infra*, 140a. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). App., *infra*, 119a-122a.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of other abortion protesters over a 15-year period. App., *infra*, 33a ("hundreds of acts"). The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion); 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[2]

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[2] The jury instructions defined "property" broadly for purposes of all of the Hobbs Act counts to include "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to

The jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 141a-174a.

4. The Seventh Circuit affirmed. App., *infra*, 30a-61a. In holding that injunctive relief is available to a private litigant suing under RICO, the court openly disagreed with the Ninth Circuit. *Id*. at 35a-43a. The court also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id*. at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id*. at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "property" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would impermissibly extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to re-

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provide medical services free from wrongful threats, violence, coercion, and fear." App., *infra*, 182a. The relevant jury instructions, as well as the special verdict form, are reprinted at App., *infra*, 178a-195a.

strict another's freedom of action." 537 U.S. at 405. New York law had clearly established coercion as a separate and lesser offense from extortion, and the legislative history of the Hobbs Act showed that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover activity that would merely have constituted coercion. *Id.* at 409.[3]

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the court of appeals on remand entered an unpublished order. App., *infra*, 25a-29a. The Seventh Circuit panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in purported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the

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[3] The Court set forth the definition of coercion under New York law at 537 U.S. at 405 n.10. Coercion included the wrongful use of "violence" or "threat[s]" of violence against "any other person" or "his property," if such actions were undertaken "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." New York Penal Law § 530 (1909).

only question the Court accepted for review with respect to the Hobbs Act was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" App., *infra*, 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. App., *infra*, 28a. The panel did not explain how its remand instructions could be reconciled with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. On remand, the panel noted, the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion." App., *infra*, 29a.

2. Petitioners sought panel and en banc rehearing, arguing, among other things, that the order on remand was squarely at odds with this Court's unambiguous mandate in *Scheidler II*, that this Court *did* resolve the legality of the four Hobbs Act predicates, and that, in the alternative, the panel should decide whether the Hobbs Act reaches freestanding acts or threats of violence to property or persons, unconnected to extortion or robbery (an issue that was briefed to the same panel in the prior appeal). But cf. App., *infra*, 6a (suggesting, incorrectly, that petitioners were seeking rehearing on the ground that the panel's remand order had "implicit[ly] resol[ved]" the Hobbs Act issue). No appellate court in the 58 years since the Hobbs Act was enacted, petitioners explained, has interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has categorically rejected this reading as "fatally flawed" and utterly "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999). Petitioners also requested en banc consideration of this issue, noting that, if the panel decided that the Hobbs Act punishes freestanding acts or threats of violence, that would

place it in direct conflict with the Ninth Circuit. Finally, petitioners sought en banc consideration of the panel's prior holding, in conflict with other circuits, that injunctive relief is available to private parties under RICO.

3. On January 28, 2005, panel and en banc rehearing were denied over three dissenting votes. App., *infra*, 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with this Court's remand instructions in *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these four counts because "they were not included in the petitions for *certiorari*." App., *infra*, 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id*. at 7a-8a. Although the panel purported not to resolve that issue conclusively ("for reasons of judicial economy and restraint"), it nonetheless devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (App., *infra*, 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." App., *infra*, 8a. Rejecting petitioners' argument, the panel stated that, "[g]rammatically, the text can be read either way without undue

strain." *Ibid.* Later in its opinion, the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.[4]

Next, the panel observed that "there is no decisional law that sheds light on which of the two readings is to be preferred." App., *infra*, 8a. Yet the panel then quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." App., *infra*, 8a. The panel later acknowledged that "the Sixth and Ninth Circuits have both" squarely held that the Hobbs Act does *not* reach freestanding acts or threats of violence. App., *infra*, 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). But the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998).

Finally, the panel turned to the "legislative history." App., *infra*,15a. The panel acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). Indeed, the Hobbs Act as enacted could hardly have been clearer on this point:

> SEC 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or

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[4] The panel also suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." App., *infra*,14a. The panel brushed aside or ignored petitioners' contrary arguments.

> commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. Although the panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," it went on to suggest that "it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently." App., *infra*,15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel insisted that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (19 years into this litigation) and therefore – "for reasons of judicial economy and restraint" – it "prefer[red] a wait-and-see approach." App., *infra*, 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id*. at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id*. at 7a.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. App., *infra*,17a-24a.[5] In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." App., *infra*,19a. The dissenters pointed out that the panel's conclusion that certain RICO predicates and the injunction might remain tenable was flatly inconsistent with *Scheidler II*'s unambiguous language and with this Court's conclusion that it need not address the availability of private RICO injunctions.

Moreover, even if "the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act." App., *infra*, 21a. "Clearly," the dissenters explained, "under the Hobbs Act, physical violence to any person or property is confined to furthering robbery or extortion. It does not stand alone as a separate violation." *Id.* at 23a-24a. This straightforward reading explains why this Court's conclusion that petitioners had not committed extortion within the meaning of the Hobbs Act ended the case: "the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists." *Id.* at 24a. Finally, the dissenters faulted the panel for purporting not to decide the Hobbs Act issue while simultaneously criticizing petitioners' arguments. *Id*. at 23a.

REASONS FOR GRANTING THE PETITION

As this case returns to the Court, it presents three issues that satisfy the traditional criteria for this Court's review. First, the case involves a lower court's flagrant disregard of this Court's unambiguous mandate in *Scheidler II*. Second, it raises a significant question about the meaning of the Hobbs Act (an issue on which the Seventh Circuit's ruling is irreconcilable with

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[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

decisions of the Sixth and Ninth Circuits). Third, the panel's decision has resuscitated the important and recurring issue of the availability of private injunctive relief under RICO, a question on which this Court previously granted certiorari. Each of these issues provides an independent reason for a grant of certiorari, and the first two warrant summary reversal.

I. Certiorari Or Mandamus Is Warranted Because The Seventh Circuit's Decision Is Contrary To This Court's Clear Mandate

In reversing the Seventh Circuit's decision, this Court unambiguously stated (537 U.S. at 411 (emphasis added in part)):

> Because *all of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed*, *the judgment that petitioners violated RICO must also be reversed*. Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

In direct contradiction, the Seventh Circuit has now decided that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all.

A. This extraordinary conclusion warrants review – and summary reversal – because, as the dissenting judges below observed it "directly conflicts" with this Court's instructions. App., *infra*, 19a (dissenting opinion); *id.* at 17a ("I believe that the Supreme Court meant what it said"). Neither can the panel's decision be reconciled with this Court's description of its holding: "We further *hold* that our determination with respect to extortion under the Hobbs Act *renders insufficient the other bases or predicate acts of racketeering* supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). The Seventh Circuit also disregarded this

Court's decision *not* to address the question concerning the availability of private RICO injunctions on which review had been granted. That decision necessarily rested on a determination that the underlying RICO judgment was no longer valid.

The panel simply was not free to conclude that "the other bases or predicate acts" might be sufficient, after all, to support the injunction (which necessarily rested on the jury's invalidated "conclusion that [petitioners] violated RICO"). See App., *infra*, 17a-19a (dissenting opinion); *id.* at 20a (this Court's "unequivocal holding negates any reasonable inference that those four predicate acts remain an issue"). As this Court long ago explained, a court of appeals

> is bound by the [Supreme Court's] decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal * * * or by a writ of mandamus to execute the mandate of this court.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); see also *Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 784-85 (1929). Because the panel failed to follow this Court's mandate, summary reversal is warranted. See *id.* at 785 ("It is well understood that this court has power to do all that is necessary to give effect [to] its judgments.").[6]

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[6] As *Sanford* and *Baltimore & Ohio R.R.* indicate, when an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 585 (8th ed. 2002). Because the present case was "in the court of appeals," it clearly falls within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). See *Hohn* v.

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion (and there is none), the proper course for respondents would have been "to seek rehearing from the Supreme Court." App., *infra*, 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do – no doubt because they knew what the answer would be.

B. In any event, the reasons the panel gave for refusing to follow this Court's mandate do not withstand scrutiny. According to the panel, the *Scheidler II* "opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." App., *infra*, 7a. Citing this Court's Rule 14.1(a) and its "general refusal to decide issues outside the question presented," the panel declared itself unwilling to "presume that in this case [the Court] went beyond the scope of its grant of certiorari * * * to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction." App., *infra*, 28a.

That reasoning is flawed at every turn. To begin with, as just explained, there is nothing "*sub silentio*" about this Court's

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United States, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Seventh Circuit into compliance with the mandate of *Scheidler II* by granting certiorari and reversing the court of appeals' judgment. See *Perkins* v. *Fourniquet*, 55 U.S. 328, 330 (1852). In an abundance of caution, however, petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. See *United States* v. *Fossatt*, 62 U.S. 445, 446 (1858) ("And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction."); STERN ET AL., SUPREME COURT PRACTICE, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court.").

opinion or the instructions and holding quoted above. To the contrary, the Court was quite explicit in invalidating *all* of the predicate acts, as well as the RICO judgment and the injunction. There is no ambiguity in this Court's statement that "all" – not "some" or "most" – of the RICO predicates had to be reversed. 537 U.S. at 411. And there is neither need nor reason to "presume" that this Court did not mean exactly what it said.

Equally mistaken was the panel's suggestion that the four acts of violence were *not* included in the petitions for certiorari. On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage, with respondents arguing that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15. In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. Thus, petitioners took the position that these four

predicate acts *were* "fairly included" (S. Ct. Rule 14.1(a)) within the Hobbs Act question presented.

This Court granted review of the Hobbs Act question over respondents' objections, see 535 U.S. 1016 (2002). At the merits stage, respondents shifted gears and made a strategic decision to *ignore* these four Hobbs Act predicates. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations not involving extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35; App., *infra*, 21a (dissent). Indeed, respondents went further in order to address the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity. Faced with that problem, respondents argued that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*all* of the acts that supported the jury's finding as to Hobbs Act violations *also* supported its findings as to state law [extortion] violations" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion*.

Respondents' strategy helps explain why the Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See App., *infra*, 21a (dissent) (because respondents at merits stage "did not argue that the four predicate acts of violence * * * independently justified the jury's verdict, * * * the Supreme Court found no need to expressly address that question").

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to rest on a presumption that this Court did not go

"beyond the scope of its grant of certiorari." App., *infra*, 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002) (order limiting grant of certiorari). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

Nor is this surprising. As the panel acknowledged (App., *infra*, 28a), this Court's usual practice of deciding only the issues presented and those issues "fairly included" therein (S. Ct. Rule 14.1(a)) is not a "jurisdictional or absolute" limit on the Court's authority but rather a rule of discretion. See R. STERN ET AL., *supra*, at 422. Beyond that, it is well settled that the Court "may consider additional questions" *not* presented in the petition "if necessary to *properly dispose* of the case." *Id.* at 416 (internal quotations omitted) (emphasis added); see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981). Thus, the Court was perfectly free to decide that it should address the state-law extortion counts, even though they were outside the scope of the questions presented, because doing so would allow this Court properly to dispose of the RICO injunction issue by avoiding a decision on it. The Seventh Circuit should have conformed to what this Court *did*, not operated on presumptions about what this Court did *not* do.

II. The Court Should Decide Whether The Hobbs Act Punishes Acts Or Threats Of Violence To Property Or Persons, Unconnected To Either Extortion Or Robbery

In response to the rehearing petition, the panel has issued a published decision that strongly suggests, in direct conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act makes it a felony punishable by up to 20 years in federal prison for any person to threaten (or commit) physical violence against any "property" (or "person") in a manner that "in any

way or degree * * * affects commerce" – even if such threats or acts of violence are wholly unconnected with robbery or extortion. Although the panel insisted that it was not actually resolving what it acknowledged is an "important question" of federal criminal law (App., *infra*, 6a), it proceeded to criticize virtually all the arguments advanced against this sweeping interpretation. The panel achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the issue.

Worse yet, the effect of the panel's analysis is to give credence to a far-reaching theory of liability broader in certain respects than even the expansive definition previously adopted by the same panel, which this Court rejected as "well beyond" the "outer boundaries" of Hobbs Act liability. *Scheidler II*, 537 U.S. at 402. The panel's decision creates conflicts with decisions of this Court and other courts of appeals, addresses an important and recurring issue, and is wrong.

A. *The Conflicts.* According to the panel, the circuits are in conflict over whether the Hobbs Act reaches freestanding acts or threats of violence against property or people, unconnected to either robbery or extortion. App., *infra*, 11a-12a. And it is true that both the Sixth and Ninth Circuit have rejected that interpretation as inconsistent with plain language of the Hobbs Act. See *id.* at 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). On the other hand, the panel suggested that the Fourth Circuit reached the opposite result in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). App., *infra*,12a; but see pages 24-25, *infra*. The panel expressed basic agreement with the supposed position of the Fourth Circuit, stating that the Sixth and Ninth Circuit approach "threatens to leave * * * an entire clause in the statute" with "no meaningful function to perform" (App., *infra*, 15a) and the Fourth Circuit's supposed reading takes the statutory text "at face value" and is "the result

one reaches looking at the statute as whole." *Id.* at 14a-15. Thus, the panel either created or exacerbated a circuit conflict.[7]

The panel's opinion is also at odds, in at least three respects, with this Court's decisions. *First*, it conflicts with *United States* v. *Enmons*, 410 U.S. 396 (1973), which reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not

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[7] The Hobbs Act question in this case also presents the Court with an opportunity to resolve other conflicts in the lower courts – specifically, conflicts over the meaning of "property" under the Hobbs Act. In *Scheidler II*, this Court, having concluded that there was no "obtaining" (or attempted obtaining), observed that there was no need to delineate precisely the "outer boundaries of extortion liability under the Hobbs Act." 537 U.S. at 402. In particular, the Court explained, it was unnecessary to address whether the term "property" in the Hobbs Act includes the three components mentioned in the jury instructions. See note 2, *supra*. But that avoided issue is clearly present in this case, and necessarily underlies any holding that freestanding acts or threats of violence to "property" are indeed covered. As we explained in our previous petition, the Seventh Circuit's definition of "property" for purposes of the Hobbs Act conflicts with the position taken by other circuits. See 01-1118 Pet. 17-20. Compare *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) and *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) with App., *infra*, 59a (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Thus, if the panel is correct, then the convictions in *Enmons* should have been sustained. Yet this Court, in *Enmons*, noted that in "nearly three decades that have passed since the enactment of the Hobbs Act, no reported case" had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court categorically rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. So, too, here.

Second, the panel's decision is inconsistent with the logic of *Scheidler II*. As the panel acknowledged, the holding of *Scheidler II* rested on a determination that "Congress used the Penal Code of New York as a model for the [Hobbs] Act" and made a deliberate "decision to include extortion as a violation of the Hobbs Act *and omit coercion*." App., *infra*, 9a (emphasis added). See 537 U.S. at 403, 405-06; *id.* at 409 (distinction between coercion and extortion "controls these cases"). Moreover, as the panel also acknowledged (App., *infra*, 9a, 10a), the crime of coercion under New York law included acts or threats of "violence" against "other person[s]" or "property," unconnected to either extortion or robbery. See note 3, *supra*. It follows that freestanding acts or threats of violence – which constitute coercion under New York law – *cannot* be covered by the Hobbs Act without "eliminat[ing] the recognized distinction between extortion and the separate crime of coercion" and violating Congress's intent. 537 U.S. at 405-08. Thus, the panel was wrong to say that this Court's reasoning concerning

Congress's exclusion of coercion "offers at best a subtle indication, and at worst is not helpful at all." App., *infra*, 9a. In fact, *Scheidler II*'s reasoning is dispositive.

There are other inconsistencies with *Scheidler II* as well. The panel's statement that a single sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), which involved a prosecution for extortion, "suggests that the Court saw three distinct types of predicate acts in the statute" (App., *infra*, 9a) ignores this Court's clarification, in *Scheidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce clause element. See 537 U.S. at 408; but see *id*. at 417 (Stevens, J., dissenting). Even before *Scheidler II*, the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074 ("The government's contention that this single statement * * *, taken out of context, should be used * * * to reject the clear and express provisions of the Hobbs Act is without merit.").

Inexplicably, the panel also ignored this Court's teaching, in *Scheidler II*, that the rule of lenity informs the interpretation of the substantive terms of the Hobbs Act. 537 U.S. at 408-09. The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. App., *infra*, 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires courts to choose the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994).

As if that were not enough, the panel's decision is difficult to square with the reasons given by Justices Ginsburg and Breyer for concurring in *Scheidler II*. See 537 U.S. at 411-12 (concurring opinion). As Justice Ginsburg explained, the Court was "rightly reluctant" to "extend * * * further" the "domain" of RICO – a statute that "imposes severe criminal penalties and

hefty civil liability" and that "has already 'evolv[ed] into something quite different from the original conception of its enactors'" – "by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit." *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985)). Yet the panel's endorsement of the "freestanding" reading accomplishes the same undesirable expansion of RICO.

Third, the panel's treatment of "the 1948 revision and codification of Title 18 of the U.S. Code" – which adopted the current language of Section 1951 – is contrary to a long line of this Court's decisions. App., *infra*, 15a. According to the panel, although "these revisions were intended to be formal, stylistic changes," Congress "may have made certain substantive changes, either advertently *or inadvertently*." *Ibid.* (emphasis added). But this Court has long recognized the principle that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). And this Court has repeatedly applied that principle to the 1948 revisions themselves. See, *e.g.*, *Muniz* v. *Hoffman*, 422 U.S. 454, 468-70 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966). This Court's decisions thus establish that no substantive change in the law was brought about by the 1948 revisions – unless the detailed Reviser's Notes clearly indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. And, contrary to the panel's suggestion, this Court's cases do not allow any assumption that Congress made substantive changes "inadvertently." App., *infra*, 15a. Finally, the Reviser's Notes, which are reprinted in the U.S. Code Annotated, show that the changes to Section 1951 were not intended to be substantive at all. See 18 U.S.C. App. (Revisers' Notes), at 2591-92 (1948).[8]

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[8] The settled principles governing the construction of changes in language made by the 1948 revisions were clearly set forth in an article cited by the panel's own opinion (at App., *infra*, 15a). See Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1948-1949) ("There

B. *The Issue Is Important and Recurring*. "Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction * * *." *Evans* v. *United States*, 504 U.S. 255, 290 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Although several federal statutes criminalize extortion, "[p]rosecutors prefer" the Hobbs Act because "it carries a twenty year maximum sentence." Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 816 (1988). The Hobbs Act is also commonly invoked as a predicate act of racketeering in criminal prosecutions and private civil actions brought under RICO.

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. In the past decade, RICO has repeatedly been used against abortion protesters, with mixed success. See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995). There is no reason why, if the Seventh Circuit's latest interpretation of the Hobbs Act is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights. It could also be applied to labor protests if acts or threats of violence (against persons *or* property) occur.[9]

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was no purpose on the part of the Revision staff to effect any change in existing law."); *id*. at 445-48 (discussing special rules governing judicial construction of 1948 Act).

[9] Contrary to the panel's suggestion, the practical impact of its far-reaching construction of the Hobbs Act is not mitigated because of Congress's inclusion of a jurisdictional element that "limits" the Hobbs Act's applicability to acts or threats of violence that "*in any way or degree* * * * affect[] commerce" (18 U.S.C. § 1951(a) (emphasis added)). App., *infra*, 12a (omitting italicized language). As explained above, a restrictive construction of the jurisdictional element of the Hobbs Act is inconsistent with this Court's teachings in both *Stirone* and *Scheidler II*.

C. *The Panel's Decision Is Wrong.* Any suggestion that the Hobbs Act punishes freestanding acts or threats of violence against property or persons is mistaken. By its plain terms, Section 1951 makes it a crime to "commit[] or threaten[] physical violence to any person or property" *only* if such acts or threats are committed "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). In other words, acts or threats of violence are proscribed by the Hobbs Act only if done in furtherance of a plan to commit (or attempt to commit) robbery or extortion.

Any doubt about the text's plain meaning is eliminated if one looks at the text of the Hobbs Act as enacted in 1946. See pages 9-10, *supra*. As even the panel was constrained to admit (App., *infra*, 15a), the text of the 1946 Act "explicitly" and unambiguously requires a connection between the forbidden acts or threats of violence and either robbery or extortion. As explained above, the panel was wrong to impute to the drafters of the 1948 revision an intent to make a substantive change.

The panel made other serious missteps on the merits. Contrary to the panel's suggestion (App., *infra*, 12a), the Fourth Circuit, in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998), did *not* interpret the Hobbs Act as reaching freestanding acts or threats of violence. *Milton* involved a Hobbs Act conviction based on "a violent robbery." *Id*. at *1. Accordingly, the Fourth Circuit had no occasion to address the "freestanding" theory. Moreover, the only issue raised on appeal in *Milton* was whether the government had presented sufficient evidence that the defendant's robbery affected interstate commerce.[10]

See also 18 U.S.C. § 1951(b)(3) (defining "commerce" broadly).

[10] Contrary to the panel's suggestion (App., *infra*, 12a), it is not possible fairly to interpret as an endorsement of the "freestanding" theory the *Milton* court's passing statement (in dictum) that "[t]here are two essential elements" of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence. See *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir.1993) (quoting *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed.2d 252

Equally flawed was the panel's speculation that the snippet of language torn from *Milton* "likely * * * was expressing agreement with the position of the government, though * * * it is impossible to know." App., *infra*, 12a. In fact, the United States' brief in *Milton* in no way mentioned or endorsed the "freestanding" theory. See Br. of Appellee, *United States* v. *Milton*, No. 96-4851 (4th Cir. filed Aug. 19, 1992) (addressing issues of robbery's jurisdictional nexus to interstate commerce and sentencing disparity). That should come as no surprise, because the Hobbs Act conviction in that case involved a robbery.

Nor was the panel correct in stating that "[i]t appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General." App., *infra*, 12a. The Justice Department has *rejected* the "freestanding" reading:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion*.

U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (citing *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975)) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>.

The panel was also wrong to suggest that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a

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(1960))." *Milton*, 1998 WL 468812, at *1. What *Bailey* actually says is that the "two essential elements of the Hobbs Act crime" that were identified in *Stirone* were "interference with commerce, *and extortion*." *Bailey*, 990 F.2d at 125 (emphasis added) (quoting *Stirone*, 361 U.S. at 218). The *Milton* panel's inaccurate paraphrase in an unpublished opinion hardly counts as endorsement of the "freestanding" theory.

court should avoid making one part of statute meaningless." App., *infra*,14a. That analysis is soundly refuted by the language of the 1946 Act, which (as even the panel conceded) required that acts or threats of violence be connected to either robbery or extortion. See pages 9-10, *supra*.

For all of these reasons (and still others more suitable for a merits brief than a petition), and because of its inconsistency with *Scheidler II*, *Enmons*, and this Court's cases interpreting the 1948 revisions to Title 18, the panel's decision is wrong.[11]

III. This Court Should Grant Review Again To Resolve The Circuit Split Over Whether Injunctive Relief Is Available In A Private RICO Action

Almost three years ago, this Court in *Scheidler II* granted certiorari to decide the following question: "Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO], 18 U.S.C. § 1964(c)." 01-1118 Pet. i. In reversing on the merits, this Court concluded that it "need not address" this question "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation" and the liability judgment itself "must be reversed" and the injunction "vacated." 537 U.S. at 411.

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[11] The panel's heavy reliance (App., *infra*, 8a, 13a) on Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994), was misplaced. That article antedates this Court's decision in *Scheidler II*, which establishes that Congress did not intend to punish conduct that would qualify as coercion under New York law. It also suffers from multiple flaws, including: (1) its failure to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading and disproves the article's argument about Congress's intent; (2) its failure to address (much less explain) how the "freestanding" reading can be reconciled with *Enmons*; and (3) its reliance on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title that was never enacted. See Bradley, 1994 SUP. CT. REV. at 143 n.78.

Under the opinion on remand, the issue remains alive after all. And the conflict in the circuits has persisted and spawned additional confusion in the lower courts. See, *e.g.*, *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1282-83 (S.D. Fla. 2003); *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), remanded, 322 F.3d 130 (2d Cir. 2003). As we explained in our prior petition for a writ of certiorari, the issue is both important and recurring. Moreover, the Seventh Circuit's decision is manifestly incorrect (a conclusion endorsed by the Solicitor General's merits brief in *Scheidler II*).

A. As we demonstrated in our previous petition for a writ of certiorari (01-1118 Pet. 6-10), the Seventh Circuit's earlier opinion squarely conflicts with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). Although respondents, in unsuccessfully opposing certiorari, argued that there was no circuit split because *Wollersheim* involved a preliminary injunction (Opp. 7), we explained that this argument was wrong, refuted by the Ninth Circuit's analysis and by subsequent Ninth Circuit cases, inconsistent with the Seventh Circuit's own analysis, and contrary to representations made by respondents' counsel during oral argument in the Seventh Circuit. See 01-1118 Pet. 6-10; 01-1118 Pet. Reply Br. 2-3 & n.5.

B. In becoming the first federal appellate court to uphold the availability of injunctive relief in this setting, the Seventh Circuit in 2001 suggested in multiple ways that the intercircuit conflict it was creating should not raise concerns because judicial opinion about the availability of injunctive relief was divided, and because *Wollersheim* reflected an outmoded method of statutory interpretation, rested on errors, or had been superseded by later decisions of this Court. These efforts to mask the extent of the panel's radical departure from settled law are worth highlighting because of their striking similarity to the panel's most recent decision. In both instances, the panel went to great lengths to reach a particular outcome and characterize it as

supported by the decisions of other circuits and of this Court when in fact exactly the opposite was true.

First, the panel's prior opinion sought to disguise the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta* [and] are split." App., *infra*, 35a. In fact, every other circuit that had discussed the issue of injunctive relief for private parties had agreed with the Ninth Circuit. Contrary to the panel's suggestion (*ibid.*), the Eighth Circuit in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), did not endorse the availability of private injunctions but rather expressly reserved the issue. Neither did the First Circuit reach the issue in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845, 848 (1990). In similar fashion, as explained above, the panel's most recent opinion incorrectly suggests that (1) the Fourth Circuit has interpreted the Hobbs Act as punishing freestanding acts or threats of violence, and (2) the United States government may still be pressing that interpretation today. The panel's previous holding concerning the availability of injunctive relief in private RICO actions – like the reading of the Hobbs Act it now suggests is the most plausible – is, in fact, wholly unprecedented in the appellate courts.

Second, the panel was wrong in 2001 to suggest that *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals may have followed in earlier years." App., *infra*, 38a. That case has no relevance to *Wollersheim* – which may explain why respondents never cited *Steel Co.* in their briefs in the court of appeals or in this Court (and made no effort to defend the panel's reliance on it at either the petition or merits stages).[12]

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[12] *Steel Co.* involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorizes civil penalties and injunctive relief. The statute also contains a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that, because Section

Third, the panel wrongly suggested that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance on legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 35a. In fact, the Ninth Circuit's decision rested principally on the *text and structure* of RICO – as well as on the crucial fact, brushed aside by the panel (*id.* at 42a), that Congress modeled Section 1964(c) on virtually identical provisions in the Sherman and Clayton Acts (provisions that, at the time RICO was enacted, had been authoritatively interpreted by this Court as *not* authorizing injunctive relief). See 796 F.2d at 1081-84, 1087. Moreover, the predecessor provision in the Clayton Act coexists with a separate provision in that statute that expressly authorizes private injunctive relief (a provision that has no equivalent in RICO and that was proposed, but rejected, as a RICO amendment).[13]

Just as the panel's earlier opinion seeks to brush aside this powerful evidence of RICO's meaning by labeling it "legislative history," the panel's most recent opinion refers to the *language of the Hobbs Act as enacted* as "legislative history" evidence. App., *infra*, 15a. It does so by treating the 1948 recodification of the whole of Title 18 as the crucial statute, even while acknowledging that the 1948 "revisions were intended to be formal, stylistic changes." App., *infra*, 15a. The panel then speculated that "it is not beyond the realm of possibility that the revisers

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11046(c) refers to "jurisdiction," it follows that "all of the elements of a cause of action under" Section 11046(a)(1) implicate the court's subject-matter jurisdiction. 523 U.S. at 90.

[13] Contrary to the panel's suggestion, this Court often has looked to legislative history for guidance in interpreting RICO. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 164 (2001); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). Indeed, the Court has "repeatedly" relied on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987).

may have made certain substantive changes, either advertently or inadvertently." *Ibid.* As explained above, that analysis is contrary to a long line of this Court's decisions and it ignores Congress's clear intent that the 1948 recodification *not* result in any substantive changes unless the Revisers' Notes say so specifically (which they not do for the Hobbs Act). And nothing in this Court's decision in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460 (2004) (see App., *infra*, 8a-9a, 14a-15a), remotely supports such an approach to statutory interpretation.

C. The possibility that the district court, on remand, will elect not to uphold the injunction (in the original or modified form) is not a good reason to deny review of this issue. In light of this Court's decision in *Scheidler II,* petitioners should not be required to litigate that issue (in the district court and perhaps in yet another appeal to the Seventh Circuit) in this 19-year-old litigation. Moreover, the issue has already been fully briefed and argued in this Court, and the Court presumably would not have avoided its resolution if it had thought there was a possibility that an injunction could remain intact on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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